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UNITED STATES OF AMERICA

Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay

“The United States cannot expect to reap the benefits of internationally recognized human rights – in the form of greater worldwide stability and respect for people – without being willing to adhere to them itself.” US Senior District Judge, New York, January 2002¹

Introduction - All detainees and prisoners have rights

More than 3,000 people lost their lives in the United States of America (USA) on 11 September 2001 as a result of the deliberate crashing of four hijacked commercial airliners in New York City, Washington DC, and Pennsylvania. In a televised address from the White House that evening, President Bush said: “I have directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice.” Military action began on 7 October 2001 with the first air strikes in Afghanistan that, with the use of ground forces, continued into March 2002.

Amnesty International has condemned the atrocities of 11 September and has consistently urged that the search for justice be conducted in strict compliance with international human rights and humanitarian law. It is concerned that the USA has failed to meet this obligation. On several occasions, the organization has raised its concern that international law and standards have been violated or are under threat of violation, including in the context of the more than one thousand foreign nationals arrested and detained in the USA in post-11 September sweeps,² and the situation of people taken into US custody in Afghanistan and elsewhere outside the USA, some 300 of whom had been transferred to the US naval base at Guantánamo Bay in Cuba at the time of writing.³ It is these detentions in Afghanistan and Guantánamo that are the focus of this memorandum – which seeks to remind the US Government of its stated commitment to international law and standards, and provides detail on the ways in which its actions are failing to match this rhetoric. The memorandum concludes

¹ *Beharry v Reno*. Amended memorandum and judgment. US District Court, Eastern District of New York, 22 January 2002.

² See *Memorandum to the US Attorney General – Amnesty International’s concerns relating to the post 11 September investigations*, AMR 51/170/2001, 1 November 2001; and *Amnesty International’s concerns regarding the post September 11 detentions in the USA*, AMR 51/044/2002, March 2002.

³ A 1903 lease agreement between the two countries provides that the USA shall lease Guantánamo Bay from Cuba for use as a coaling or naval station. The lease states that while the USA recognizes Cuba’s “ultimate sovereignty” over Guantánamo Bay, Cuba “consents that during the period of occupation” by the USA, the latter “shall exercise complete jurisdiction and control over” the area in question. Under a 1934 treaty, the 1903 lease shall “continue in effect” until the two countries agree to modify or revoke it.

with Amnesty International's recommendations. The organization is separately requesting information from the authorities on cases raised in this paper.

All persons under any form of detention or imprisonment, including prisoners of war and other persons arrested, detained or interned for reasons related to an armed conflict, have numerous fundamental rights recognized under international human rights and humanitarian law.⁴ Indeed, these rights are recognized even with respect to persons suspected of the worst possible crimes: genocide, crimes against humanity and war crimes. This law includes treaties ratified by the USA, as well as customary international law recognized by the USA. Furthermore, international humanitarian law recognizes that certain groups of people taken into custody, such as persons detained in an international or non-international armed conflict, have similar or additional rights. In particular, Amnesty International believes that those captured and held by the USA in the armed conflict in Afghanistan must be presumed to be prisoners of war. Under the Third Geneva Convention, any dispute about their status must be determined by a "competent tribunal" (which necessarily must fully respect the right to a fair trial). Despite claiming to fully support the Geneva Conventions, the US Government has refused to grant prisoner of war status to any of the people in its custody in Afghanistan or Guantánamo Bay, or submit the question of each person's status to a competent tribunal to resolve the doubts about their status that plainly exist.

As this memorandum details, the USA has denied or threatens to deny internationally recognized rights of people taken into its custody in Afghanistan and elsewhere, including those transferred to Camp X-Ray in Guantánamo Bay. Among other things, Amnesty International is concerned that the US Government has:

- transferred and held people in conditions that may amount to cruel, inhuman or degrading treatment, and that violate other minimum standards relating to detention;
- refused to inform people in its custody of all their rights;

⁴ These rights include: the right to be informed of one's rights; the right to be informed of the reason for arrest and detention; the right to prompt and confidential access to counsel of one's choice and to free legal assistance if one cannot afford counsel; the right not to be questioned if suspected of a crime without one's lawyer being present; the right to be presumed innocent unless and until convicted by an independent and impartial court, established by law, under proceedings which meet international standards of fairness; the right to take proceedings before a court in order that a court may decide without delay on the lawfulness of the detention and to order release if that detention is unlawful; if charged, the right to a public trial before an independent and impartial tribunal within a reasonable time, or release; the right to appeal to a higher tribunal according to law; the right to be treated with humanity and dignity; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right to equality before the law and to freedom from discrimination.

- refused to grant people in its custody access to legal counsel, including during questioning by US and other authorities;
- refused to grant people in its custody access to the courts to challenge the lawfulness of their detention;
- undermined the presumption of innocence through a pattern of public commentary on the presumed guilt of the people in its custody in Guantánamo Bay;
- failed to facilitate promptly communications with or grant access to family members;
- undermined due process and extradition protections in cases of people taken into custody outside Afghanistan and transferred to Guantánamo Bay;
- threatened to select foreign nationals for trial before military commissions – executive bodies lacking clear independence from the executive and with the power to hand down death sentences, and without the right of appeal to an independent and impartial court;
- raised the prospect of indefinite detention without charge or trial, or continued detention after acquittal, or repatriation that may threaten the principle of *non-refoulement*;
- failed to show that it has conducted an impartial and thorough investigation into allegations of human rights violations against Afghan villagers detained by US soldiers.

In his State of the Union address of 29 January 2002, President Bush asserted that “America will always stand firm for the non-negotiable demands of human dignity”. Among these non-negotiable issues, the President listed “equal justice”. Two months earlier, on 13 November 2001, he had signed a Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (“Military Order”). Its provisions are applicable only to foreign nationals. Any person placed under the Military Order would be denied fair trial rights that the US authorities would recognize for similarly placed US citizens, in violation of international law guaranteeing equality before the law and prohibiting discrimination, including on the basis of nationality.

Although none of the Guantánamo detainees had at the time of writing been named by the President for detention or trial under the Military Order, all are nonetheless foreign nationals.

The government’s position is that they are being held not under the Military Order, but “under the President’s authority as Commander in Chief and under the laws and usages of war”,⁵ and “of course, are aliens with no connection to the United States, being held outside sovereign United States territory”.⁶ That the authorities do not intend to hold any US nationals at Guantánamo was made clear on 5 April 2002, when Yasser Esam Hamdi was flown out of the

⁵ *Shafiq Rasul v George Walker Bush*. US District Court, District of Columbia. Respondents’ motion to dismiss petitioners’ first amended petition for writ of *habeas corpus*. 18 March 2002. The Petition for Writ of *Habeas Corpus* in this case had stated that the US Government had advised the Australian Government that Australian national David Hicks was being held at Camp X-Ray under the Military Order.

⁶ *USA v Lindh*, US District Court, Eastern District of Virginia. Government’s opposition to defendant’s motion to compel production of discovery. 29 March 2002.

base to military custody in Virginia after the authorities found a birth certificate supporting his claim to have been born in Louisiana to Saudi parents. The haste with which the authorities removed him from Guantánamo – the day after the corroborating evidence was made public – suggested official concern that his could have become a test case for challenging the detention of all prisoners there. Announcing his transfer, the Pentagon said: “Given the likelihood that Hamdi is an American citizen, it was deemed appropriate to move him to the United States”.⁷

Until then, Yasser Esam Hamdi, aged 22, had been held as a foreign national along with 299 others, facing continuing interrogation without access to legal counsel and, among other things, the possibility of trial by military commission or indefinite detention at the naval base. This treatment contrasts to that of another detainee, taken into custody in Afghanistan around the same time and place as Yasser Esam Hamdi, whose US nationality was known from the outset. John Walker Lindh was returned from Afghanistan to face an ordinary civilian trial in the United States on charges of conspiring with the Taliban and *al-Qa’ida* to kill US citizens.

At the same time, however, serious allegations have been made relating to John Walker Lindh’s treatment after he was taken into US custody in Afghanistan on 1 December 2001. Among other things, his lawyers have alleged that during his initial interrogations at a location near Mazar-e Sharif in Afghanistan – in a room with the only window blocked, “making it difficult to discern whether it was night or day” – John Walker Lindh asked for a lawyer but was told he would be provided with one later. The lawyers allege that during his transfer by plane a week later to the US military base at Camp Rhino, south of Kandahar, “he was blindfolded and bound with plastic cuffs so tight they cut off the circulation to his hands. Soldiers transporting him threatened him with death and torture”. It is further alleged that he was held at the base “blindfolded and restrained in a metal shipping container without heat or light, immobilized by shackles and bound naked to a stretcher”, for the next two to three days.

This latter period, the defence team has asserted, “is crucial because the government, in its allegations for this case, relies largely on statements allegedly made by Mr Lindh to an FBI agent interrogator” at this time. They allege that John Walker Lindh had again asked for a lawyer, but “was told that there were no lawyers there”. The interrogation continued despite the fact that from 3 December, a lawyer retained by John Walker Lindh’s family following news of his arrest had requested the US authorities to stop any further interrogation, “[e]specially if there is any intent to use it in any subsequent legal proceedings”. Moreover, communications to Lindh from his family that they had retained the lawyer were allegedly not relayed to him. The defence team assert that Lindh “believed that the only way to escape the torture of his current circumstance was to do whatever the FBI wanted. Only at this point did Mr Lindh allegedly

⁷ Department of Defense news release, 5 April 2002.

waive his rights and answer the agent's questions".⁸ The prosecution has denied that John Walker Lindh's treatment amounted to torture, or that he was ill-treated or threatened during transfer to Camp Rhino, or that he was illegally denied access to defence counsel.

While the defence allegations are a matter of serious concern in and of themselves, they also serve to heighten concern for the foreign nationals who have been detained in Afghanistan or elsewhere, and emphasise the importance of ensuring that their rights be fully recognized. John Walker Lindh now has lawyers working to defend him. However, at the time of writing, with interrogations continuing with a view to possible prosecutions, none of the foreign nationals in US custody in Afghanistan or Guantánamo had been granted access to legal counsel.⁹ In the words of a Pentagon spokesperson, "as we've shown with John Walker, the US citizenship does make it a different case and a different kind of treatment".¹⁰

By detaining people at the Guantánamo Bay naval base, the US Government appears to have effectively removed them from the reach of the US courts because US jurisprudence has restricted the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals.¹¹ However, international law, including the provisions of the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, applies to persons subject to the jurisdiction of a state party even abroad. Article 2(1) of the ICCPR states: "Each State Party to the present Covenant undertakes 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. The Human Rights Committee, the body of experts established by the ICCPR to monitor that treaty's implementation, has stated: "The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to *all individuals under their*

⁸ *USA v Lindh*. Supplemental memorandum of points and authorities in support of motion to compel production of discovery in response to government's March 15, 2002, notice of documents filed *in camera*. US District Court, Eastern District of Virginia, CR No. 02-37-A. 22 March 2002.

⁹ Principle 2 of the UN Basic Principles on the Role of Lawyers states: "Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin...national or social origin...".

¹⁰ Victoria Clarke. Department of Defense news briefing, 4 April 2002.

¹¹ For example, see US Supreme Court decisions *Johnson v Eisentrager*, 339 US 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

jurisdiction.”¹² (emphasis added). The Human Rights Committee has made it clear that the ICCPR applies to places outside the territory of a state party under its control.¹³

On 21 February 2002, a US District Judge dismissed a petition for writ of *habeas corpus* brought by a Coalition of Clergy, Lawyers and Professors on behalf of the Guantánamo detainees. Judge Howard Matz said that the coalition lacked the legal standing to file the petition and that his court lacked jurisdiction over the prisoners. He further ruled that under US Supreme Court precedent, no Federal District Court has jurisdiction over them because, although the USA has jurisdiction over the naval base, under the lease agreement with Cuba, “sovereignty over Guantánamo Bay remains with Cuba”.¹⁴

Although this judicial opinion would suggest that the government has placed those held in Guantánamo Bay beyond the protection of *habeas corpus*, Judge Matz’s concluding remarks are noteworthy: “The Court understands that many concerned citizens, here and abroad, believe this case presents the question of whether the Guantánamo detainees have *any* rights at all that the United States is bound, or willing, to recognize. That question is *not* before this Court and nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever.”

All those in US custody have the right to legal protections under international law and standards which the US Government must uphold in the interests of justice, respect for the rule of law and human rights. For example, Article 9(4) of the ICCPR states: “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.” The Human Rights Committee has stressed that this “important guarantee... applies to all persons deprived of their liberty by arrest or detention”.¹⁵ Indeed, it has stated that this right is non-derogable, even in states of emergency.¹⁶ When the USA ratified the ICCPR in 1992, it declared that: “it is the view of the United States that States

¹² Human Rights Committee, General Comment 3, para 1. 29 July 1981.

¹³ See, for example, Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add. 93, 18 August 1998, para 10.

¹⁴ *Coalition of Clergy v George Walker Bush*. Order dismissing petition for writ of *habeas corpus* and first amended petition for writ of *habeas corpus*. US District Court, Central District of California.

¹⁵ Human Rights Committee. CCPR General comment 8. 30 June 1982.

¹⁶ “The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. 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 by a State party’s decision to derogate from the Covenant”. General Comment no 29. Paragraphs 11 and 16. CCPR/C/21/Rev.1/Add.11. 31 August 2001.

Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the terms of the Covenant”.

The international law and standards which the USA must respect also include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷, the International Convention on the Elimination of All Forms of Racial Discrimination¹⁸, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁹, the Standard Minimum Rules for the Treatment of Prisoners²⁰, the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty²¹, the Third Geneva Convention of 12 August 1949,²² and customary international law.

The USA’s stated commitment to international law and standards

“Over the past few months, I have heard the worry that the war on terrorism will sideline America’s interest in human rights. This is far from true. In fact, the protection of human rights is even more important now than ever. The US Government is deeply committed to the promotion of universal human rights...”. Lorne Craner, Assistant Secretary, Democracy, Human Rights and Labor, 4 March 2002²³

The USA played a leading role in the drafting of the Universal Declaration of Human Rights, which was adopted on 10 December 1948. On the eve of the Declaration’s 53rd anniversary, President George W. Bush issued a proclamation: “The terrible tragedies of September 11 served as a grievous reminder that the enemies of freedom do not respect or value individual human rights. Their brutal attacks were an attack on these very rights.” The President called on “the people of the United States to honour the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our nation and throughout the world as we move into the 21st century”.²⁴ In similar vein, in his State of the Union address

¹⁷ Ratified by the USA in 1994.

¹⁸ Ratified by the USA in 1994.

¹⁹ Adopted by consensus by the UN General Assembly in 1988.

²⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955. Approved by the UN Economic and Social Council in 1957 and 1977. In 1971, the UN General Assembly called on all states to implement these rules and to incorporate them into national legislation.

²¹ Approved by the UN Economic and Social Council resolution 1984/50 of 25 May 1984.

²² Ratified by the USA in 1955.

²³ Release of the Country Reports on Human Rights Practices for 2001. US State Department, Washington, DC. 4 March 2002.

²⁴ *President Proclaims Human Rights Day & Bill of Rights Week*, 9 December 2001.

of 29 January 2002, President Bush said: “America will lead by defending liberty and justice because they are right and true and unchanging for people everywhere... America will always stand firm for the non-negotiable demands of human dignity... We choose freedom and the dignity of every life.”

Secretary of State Colin Powell, launching the State Department’s Country Reports on Human Rights Practices on 4 March 2002, said: “The attacks of September 11, in which some 3,000 men, women and children from 80 countries died, reminded us all of our common humanity. Today, as America stands firm against terrorism with countries all around the world, we also reaffirm what our nation has stood for since its earliest days: for human rights, for democracy and for the rule of law. The worldwide promotion of human rights is in keeping with America’s most deeply held values... The Bush administration is working in cooperation with governments, intergovernmental organizations, non-governmental groups and individuals to help bring human rights performance into compliance with international norms....[W]e will not relax our commitment to advancing the cause of human rights”.

In a speech on 20 February 2002, the US Ambassador at large for war crimes issues, Pierre-Richard Prosper, nominated by President Bush and confirmed by the Senate on 12 July 2001, said of the alleged Taleban and *al-Qa’ida* detainees in US custody: “In bringing these abusers to justice the United States will continue to honour and uphold the rule of law and work within the norms of the global community in answering the challenge that faces us all. In doing so we will continue to uphold relevant legal standards of treatment with respect to the detainees in our custody”.²⁵ The military authorities at Guantánamo Bay echoed this on 28 February 2002: “The detainees will continue to be treated fairly but firmly in accordance with international conventions”.²⁶

Also in February 2002, the Chairman of the House Committee on the Judiciary sought to allay the “great deal of concern and misinformation about the treatment of Arab detainees in Guantánamo Bay in Cuba”. Speaking in Kuwait, and explaining why he had visited Camp X-Ray, the Congressman said: “I am responsible for ensuring that the United States sustains its longstanding tradition of human rights and equality before the law”.²⁷

At a hearing after President Bush signed the Military Order providing for trials by military commissions, the Chairperson of the US Senate Committee on Armed Services, Senator Carl Levin, asserted that if the commissions “not only dispense prompt results, but just results”,

²⁵ Speech at Chatham House, London, United Kingdom. 20 February 2002.

²⁶ American Forces Information Service. 28 February 2002.

²⁷ Visit of Congressman Jim Sensenbrenner, Chairman of the House Committee on the Judiciary, February 20, 2002, Kuwait. Embassy of the United States of America.

this would “enhance the status of the United States as the standard-bearer for democracy, respect for human rights and human liberty.” Deputy Secretary of Defense Paul Wolfowitz responded: “We are confident that we will develop a process that Americans will have confidence in and which is fully consistent with the principles of justice and fairness our country is known for throughout the world.”²⁸

Stephan M. Minikes, the US Ambassador to the Organization for Security and Cooperation in Europe (OSCE) spoke to the OSCE Permanent Council in Vienna, Austria, on 31 January 2002. Addressing concerns raised about the situation of the detainees in Guantánamo Bay, the Ambassador stated: “We believe our actions and our plans are consistent with the United States Government’s commitment to respect and safeguard international law”. His address concluded with the promise: “You have the assurance of the United States that we have not and will not abandon our commitment to human rights”.

The international system of human rights protection built up over more than 50 years is based on the understanding not only that human rights are universal, but that they transcend the sovereignty of individual states. Despite the USA’s leading role in establishing this system, and frequent claims from US government officials that their country is the global champion of human rights, the United States has all too often shown itself to be reluctant to adhere to international human rights law and standards.²⁹

The USA’s reluctance to support and respect international human rights protection mechanisms has extended to the inter-American system. Despite having long been a leading member of the Organization of American States (OAS), the United States has not ratified the American Convention on Human Rights³⁰ and has on several occasions claimed that the 1948 American Declaration on the Rights and Duties of Man is not binding on the USA, even though the Inter-American Court on Human Rights and the Inter-American Commission on Human

²⁸ Testimony before the Senate Armed Services Committee. Washington DC, 13 December 2001.

²⁹ Two examples are that the USA is the only country apart from Iran not to have respected a ruling of the International Court of Justice (*Nicaragua v USA*, 1986), and it leads a tiny handful of countries that flout the international legal prohibition on the use of the death penalty for the crimes of children. It has shown a marked reluctance to ratifying human rights treaties (eg, it is the only country apart from Somalia not to have ratified the Convention on the Rights of the Child), and a tendency to ratify them with crippling “reservations”, such as its reservations to the ICCPR and Convention against Torture. The USA also remains opposed to the Rome Statute of the International Criminal Court, at the same time as a steady stream of other countries proceed to ratify it.

³⁰ However, the USA signed the Convention in 1977, thereby binding itself under international law not to do anything that defeats the object and purpose of the treaty, pending a decision on whether to ratify it.

Rights have considered the Declaration part of customary law binding on all member states of the OAS.³¹

On 12 March 2002, the Inter-American Commission on Human Rights presented the USA with an opportunity to demonstrate its stated commitment to international human rights law and standards. The Commission wrote to the US Government on the issue of the Guantánamo detainees.³² It called on the government “to take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal”. It noted that:

“the information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State... [P]recautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights”.

On 11 September 2001, the day of the attacks on New York and Washington, the OAS adopted by consensus the Inter-American Democratic Charter. The Charter notes that “the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy”. It reaffirms that “the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society” and recognizes “the importance of the continuous development and strengthening of the inter-American human rights system”.

³¹ Inter-American Court of Human Rights, Advisory Opinion OC 10/89, 14 July 1989. In 2001, for example, the Inter-American Commission on Human Rights concluded that the USA had violated Articles I, XVIII and XXVI of the American Declaration in condemning federal defendant Juan Raul Garza to death after an unfair sentencing hearing and that it would “perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration should it proceed with Mr Garza’s execution based upon the criminal proceedings under consideration.” Case No. 12.243, 9 April 2001. Despite this, Juan Raul Garza was executed by the US Government on 19 June 2001.

³² This was in response to a petition filed on 25 February 2002 by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law alleging violations of the USA’s obligations under the American Declaration on the Rights and Duties of Man in relation to the Guantánamo detainees.

At the special session of the OAS General Assembly to adopt the Inter-American Charter, Secretary of State Colin Powell stated in unequivocal terms the USA's support for "this groundbreaking document": "We have resolved that...the rule of law must defend individual liberty. That human rights are to be enjoyed by all... And we have resolve to work together to put these principles into practice."³³ After the news of the attacks on the USA came through, Secretary of State Powell asked that the resolution to adopt the Charter be brought forward so that "I can be a part of the consensus." He said that this was "the most important thing I can do before departing to go back to Washington, DC."³⁴

The USA should put its stated commitment to the Inter-American system into practice and comply with the precautionary measures issued by the Inter-American Commission on Human Rights in relation to the Guantánamo detainees. At the time of writing, as far as Amnesty International was aware, the US Government had not responded to the Commission's call.

On 22 January 2002, US Senior District Judge Jack B. Weinstein, in the Eastern District of New York, wrote in an unrelated case: "This nation's credibility would be weakened by non-compliance with treaty obligations or with international norms. The United States seeks to impose international law norms – including, notably, those on terrorism – upon other nations... The United States cannot expect to reap the benefits of internationally recognized human rights – in the form of greater worldwide stability and respect for people – without being willing to adhere to them itself." Judge Weinstein quoted what a former Chief Judge of the US Court of Appeals for the Second Circuit said in 1996: "[Y]ou can't simply say that we're going to have treaties for the rest of them, but, of course, they won't apply to us".³⁵

It is time for the USA fully to respect international law and standards, as it is obliged to do, and as it has promised it will.

Human rights safeguards circumvented - the urgent need for *habeas corpus*

"To circumvent the rule of law and to ignore human rights considerations places us at great risk for future democracy and freedoms". Representative of the UN High Commissioner for Human Rights, Sarajevo, 22 January 2002³⁶

³³ Remarks at the Special General Assembly of the Organization of American States, Lima, Peru.

³⁴ Statement at the Special General Assembly of the Organization of American States.

³⁵ *Beharry v Reno*. US District Court, Eastern District of New York. *op.cit.*

³⁶ NATO/SFOR joint press conference, 22 January 2002, Sarajevo.

At the time of writing there were more than 500 people in US custody in Afghanistan and Guantánamo Bay. There is very little information about the circumstances under which they were taken into custody and where this occurred, whether in Afghanistan, Pakistan or elsewhere. This lack of clarity about the circumstances of many of the detentions heightens the need for full recognition of the detainees' right to be able to challenge the lawfulness of their detention in a court of law.

The US authorities are perpetuating the inaccuracy that all of the detainees were captured in combat. For example, the Pentagon's General Counsel recently said: "The people that we are detaining, for example, in Guantánamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm US soldiers or allies".³⁷ In rejecting a petition for *habeas corpus* brought in federal court in California on behalf of the Guantánamo detainees, US District Judge Howard Matz noted, among other things, that the detainees "were captured in combat".³⁸ The US Government, in seeking to have a similar petition for *habeas corpus* dismissed in US District Court in the District of Columbia, have quoted Judge Matz's finding.³⁹

Nevertheless, at least six of the detainees in Guantánamo Bay, and possibly numerous others, were detained outside Afghanistan. The six – Bansayah Belkacem, Lahmar Saber, Mustafa Ait Idir, Hadz Boudella, Lakhdar Boumediene and Mohamed Nechle – are Algerian nationals who were seized by US officials in Bosnia-Herzegovina on 18 January 2002 in violation of an order by the Human Rights Chamber for Bosnia and Herzegovina. The Chamber, which makes up part of the Bosnian Human Rights Commission, had ordered that four of the men should not be removed by force from Bosnia pending its final decision on the case. Their detention by the USA appears to have taken place outside both Bosnian and international law.

Under the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the Human Rights Chamber is vested with the authority to issue decisions binding upon both entities as well as the state authorities of Bosnia-Herzegovina. The decision by the Bosnian authorities to hand the men over to US custody ignores the Human Rights Chamber's order and undermines respect for this institution as well as adherence to international human rights law as prescribed by the Dayton Agreement. Amnesty International considers that the blatant flouting of an order by the Chamber in this case sets a dangerous precedent which may have far-reaching consequences for future adherence to applicable national and

³⁷ Department of Defence news briefing, 21 March 2002.

³⁸ *Coalition of Clergy v George Walker Bush*. US District Court, Central District of California, 21 February 2002, *op.cit.*

³⁹ *Shafiq Rasul v George Walker Bush*. US District Court for the District of Columbia. Respondents' motion to dismiss petitioners' first amended petition for writ of *habeas corpus*. 18 March 2002.

international law and implementation of the Chamber's decisions. The organization deeply regrets the involvement of the US authorities in such a potentially destructive step.⁴⁰

At a press conference in Sarajevo on 22 January 2002, Madeleine Rees, representative in Bosnia-Herzegovina of the United Nations High Commissioner for Human Rights, described the case of the Algerians as one of "extrajudicial removal from sovereign territory". She said: "In brief, our concern is that the rule of law was clearly circumvented in this process. There was no legal basis upon which the Ministry of the Interior could have taken these individuals from the prison. Consequently, it would appear that this was an arbitrary arrest and detention. The same charge, therefore, would apply to those who received them from the Bosnian authorities...".

The representative continued: "I must reiterate, on behalf of the High Commissioner, that the need to combat terrorism in all its forms is necessary and legitimate. It must not, however, be done in such a manner that everything is held hostage to that necessity. To circumvent the rule of law and to ignore human rights considerations places us at great risk for future democracy and freedoms".⁴¹ Despite this, President Bush referred to the detention of the six Algerians in uncritical fashion in his State of the Union address on 29 January 2002, and displayed a disturbing lack of respect for the presumption of innocence (see further below): "Our soldiers...seized terrorists who were plotting to bomb our embassy".

In a report published in November 2001, Amnesty International drew attention to the USA's past record of undermining the rule of law by subverting or circumventing extradition protections.⁴² The report recalled US Supreme Court Justice William Brennan's 1990 warning: "[A]s our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere.... When we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same."⁴³ The Constitutional Court of South Africa echoed this warning last year when it ruled in the case of a man suspected of involvement in the 1998 bombing of the US Embassy in Tanzania and unlawfully handed over to US custody: "[W]e may be tempted to use questionable measures in

⁴⁰ See *Bosnia-Herzegovina: Letter to the US Ambassador regarding six Algerian men*, 18 January 2002, EUR 63/003/2002; *Bosnia-Herzegovina: Transfer of six Algerians to US custody puts them at risk*, EUR 63/001/2002, 17 January 2002.

⁴¹ NATO/SFOR joint press conference, 22 January 2002, Sarajevo.

⁴² *No return to execution - The US death penalty as a barrier to extradition*, AMR 51/171/2001, November 2001, pages 16-24.

⁴³ *US v Verdugo-Urquidez*, 494 US 259 (1990).

the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully.”⁴⁴ Amnesty International believes that the US Government must reflect and act upon these warnings in the current context.

In this regard, Amnesty International was disturbed by allegations in March 2002 that the US authorities had transferred “dozens of people” to countries where they may be subjected to interrogation tactics – including torture – against which there would be more stringent safeguards in the USA. In some cases, it is alleged that US intelligence agents remained closely involved in the interrogation.⁴⁵ It was further reported in April 2002, that “Egyptian and Jordanian jails recently received scores of Arab prisoners affiliated with the *al-Qa’ida* organization after the United States had decided to transfer them from Afghanistan”.⁴⁶ Such individuals sent to Egypt, for example, would be at risk of torture and ill-treatment, in particular when held in incommunicado detention, and possibly other human rights violations. This issue was also raised after an alleged leading member of *al-Qa’ida*, Abu Zubaydah, was arrested in Pakistan on 28 March 2002 and taken into US custody. Media reports suggested that he might be transferred to a third country where torture could be used during interrogation. The Secretary of Defence said that such reports were “irresponsible and wrong”. Nevertheless, pressed by a journalist as to whether he was excluding the possibility that Abu Zubaydah, “even if he’s under the control of the US”, could be interrogated in a country other than Afghanistan, Pakistan or the USA, he replied “I am not going to systematically rule out this, this, this and this”.⁴⁷ Amnesty International is concerned at his unwillingness to issue a categorical denial.

In a memorandum to Attorney General Ashcroft in November 2001⁴⁸, Amnesty International stated: “Just as the US Government may not send detainees to another country to be interrogated if there are substantial grounds for believing that the person would be at risk of torture or other cruel, inhuman or degrading treatment or punishment, it has an obligation also to oppose the use of such treatment against any of the detainees arrested at its behest in other countries.”⁴⁹ The organization once again reminds the US Government of this obligation.

⁴⁴ *Mohamed and another v. President of Republic of South Africa and others*. CCT 17/01 (2001).

⁴⁵ *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.

⁴⁶ *Scores of al-Qa’ida Arab prisoners reportedly flown to Egypt, Jordan*. BBC, citing text of a report carried in Jordanian weekly, *Al-Majd* on 1 April 2002.

⁴⁷ Department of Defense news briefing, 3 April 2002.

⁴⁸ *Memorandum to the US Attorney General - Amnesty International’s concerns relating to the post-11 September investigations*, AMR 51/170/2001, November 2001.

⁴⁹ An example cited by the Washington Post alleges that the US Central Intelligence Agency informed the Indonesian authorities that Muhammad Saad Iqbal Madni, an Egyptian national, was a member of *al-Qa’ida*.

In the memorandum to the Attorney General, Amnesty International asked for information about Yemeni national Jamil Qasim Saeed Mohammed. Wanted in connection with the bombing of the *USS Cole* in Yemen in October 2000 in which 17 US servicemen were killed, Jamil Qasim Saeed Mohammed was reportedly handed over in secret to US agents by Pakistani agents on 26 October 2001 and flown out of Karachi International Airport. It has subsequently been reported that he has been taken to Jordan, but Amnesty International has not been able to confirm this.⁵⁰ The organization has had no reply to its request for information from the US authorities, and is once again seeking information on Jamil Qasim Saeed Mohammed's current legal status and whereabouts.

Other cases of people reportedly detained outside the military conflict zone in Afghanistan heighten concerns about the potential for arbitrary detentions or circumvention of the rule of law by the detaining authorities.

Moazzam Begg, aged 35, who holds UK and Pakistan passports, was reported to be teaching in Afghanistan until the US bombing began in October 2001, after which he fled Kabul and rented a flat in Islamabad in Pakistan. It is alleged that he was arrested in early 2002 by two Pakistani agents and two US agents who came to his flat and took him away in the boot of a car.⁵¹ His family filed a writ of *habeas corpus* in court in Pakistan. Following a ruling that the Pakistan authorities should produce Moazzam Begg in court, it is alleged that he was instead handed over to US custody on 8 February 2002, and that he was transferred to the US base in Kandahar in Afghanistan. Moazzam Begg's whereabouts remained unknown until his father received a letter from his son in early April, via the International Committee of the Red Cross, that he was being held in US custody in Kandahar. Earlier attempts by relatives in the UK and

He was allegedly arrested by Indonesian intelligence agents in early January 2002 after Egypt requested his extradition. Without any court hearing or access to a lawyer, he was allegedly put aboard a US-registered jet at a military airport in Jakarta and flown to Egypt. *US behind secret transfer of terror suspects. Op cit.* Deputy Secretary of Defence Paul Wolfowitz was apparently referring to this case when he said: "And we've had, by the way, in at least one significant case that I know of, great cooperation from the Indonesian authorities in locating and arresting and rendering one particularly dangerous person to his home country." Interview with New York Times, 21 March 2002.

⁵⁰ In 2001, members of the US Federal Bureau of Investigation travelled to Yemen to take part in the investigations into the bombing of the *USS Cole*, but Amnesty International does not know whether they were involved in the interrogation of around 100 people who were detained for questioning. Most were released, but Amnesty International remains concerned that some may remain in incommunicado detention in Yemen.

⁵¹ This would appear to be similar to the case of Mir Aimal Kasi who was seized from his hotel room in 1997 in Pakistan by FBI Agents, and taken off in handcuffs, shackled, hooded and gagged. Within 48 hours he was on a plane to the USA with the FBI. Mir Aimal Kasi is currently on death row in Virginia. See *No return to execution: The US death penalty as a barrier to extradition*, AMR 51/171/2002, November 2001.

a lawyer in Pakistan to obtain confirmation from the US embassies in London and Pakistan that Moazzam Begg was in US custody had been unsuccessful.

It is alleged that over 150 people, mainly non-Pakistan nationals, were detained in Kohat, Pakistan, between October and December 2001, apparently under a preventive detention law. Amnesty International does not know by which agency, under whose orders, or under what circumstances these people were arrested. A *habeas corpus* petition was filed in the Peshawar High Court on behalf of 57 of them, including nationals of Yemen (17), Saudi Arabia (15), Morocco (6), Kuwait (4), Algeria (2), France (2), Afghanistan (2), Spain (1), Pakistan (1), Bangladesh (1), Bahrain (1), Egypt (1), Sudan (1) and Iraq (1). While the petition was still pending, it is alleged that a number of the detainees in Kohat were transferred to Peshawar Central Jail and handed over to the USA, and that US forces transferred a number of the detainees to Islamabad, where they were placed on military aircraft and flown to the US base at Kandahar in Afghanistan. Five Kuwaiti nationals who had been among this group were later transferred from Kandahar to Guantánamo Bay. It is not known how many others from this ex-Kohat group, or of what nationalities, may have also been transferred to Camp X-Ray.

Under Pakistan's Extradition Act of 1972, any country seeking extradition must supply sufficient evidence for its request. This evidence must be scrutinized by a magistrate, who decides whether it is sufficient to warrant the extradition. It appears that this safeguard was bypassed in the above cases, as well as the fact that the transfers took place while a *habeas corpus* petition was pending for some of the detainees.

The lack of information surrounding the circumstances of the various detentions, and the apparent bypassing of human rights safeguards during their transfer to US custody, highlights the urgent need for the detainees to have their right to challenge the lawfulness of their detention on a case-by-case basis fully respected.

US responsibilities relating to detainees in Afghan and Pakistani custody

"In the end, the United States cannot wash its hands of responsibility for prisoners whose fate from the start it has been in a position to influence or determine". Physicians for Human Rights⁵²

As of 8 April 2002, there were 242 people in US custody in Afghanistan. This situation has been in constant flux, as the US, Afghan and Pakistan authorities transfer prisoners between each other.

⁵² A report on conditions at Shebarghan Prison, northern Afghanistan. 28 January 2002.

Overall there are thousands of prisoners in Afghanistan who have been detained in the context of the armed conflict. On 28 January 2002, Rear Admiral John Stufflebeem said: “There are detainees throughout the country...north, south, east and west. I mean, there are over 300 being detained in Herat. There still are hundreds that are still being detained up in Shibarghan in the North, and so there are initial interrogations that are going on while they’re in custody of the Afghans. The Afghans are recommending those to the US whom they think we would be interested in. And so when we have the opportunity to get our forces moved around, we’ll go and do the interrogations of those, and then we continue the screening process until it becomes obvious that these are individuals whom we do want to continue to interrogate or to hold.”⁵³ On 30 January, Secretary of Defence Rumsfeld said: “there’s thousands of these people that are being held by the Afghans, they’re being held by the Pakistanis, they’re being held by us. And as we go through and look at them, we’re giving a great – large number back to the Afghans as people that were foot soldiers in the Taleban, and a lot back to the Pakistanis that were foot soldiers in the Taleban, and trying to sort out the *al-Qa’ida* and the more senior Taleban.”⁵⁴ On 26 February, he said: “We still have a lot of people we’ve not looked at completely that the Afghans and the Pakistanis have. And we keep getting more. I mean, some people are turning themselves in. Other people are being captured. We keep doing sweeps around the country.”⁵⁵ On 5 April, General Tommy Franks of US Central Command said that “the vast majority of those being detained in Afghanistan have been screened by our people, but there probably are a hundred, 200, that we believe need additional screening... We’ll make determinations whether they’re of interest to us, and if they are, then, of course, we’ll ask the Afghans to release them to us and we’ll also place them in detention”.⁵⁶

Under international law, the United States has continuing responsibilities for the welfare of any person who was in US custody before being handed over to another party.⁵⁷ Furthermore, it is clear from the above comments that US government personnel have significant access to prisoners in the custody of the Afghan and Pakistan authorities. Amnesty International believes that they must denounce any torture or other cruel, inhuman or degrading treatment of which they become aware during such access to detention facilities, and that the US authorities must do everything in their power and influence to stop any such human rights violations.⁵⁸

⁵³ Department of Defense News Briefing, 28 January 2002.

⁵⁴ Department of Defense News Briefing, 30 January 2002.

⁵⁵ Department of Defense News Briefing, 26 February 2002.

⁵⁶ Defense Department operational update briefing, 5 April 2002.

⁵⁷ Generally, under the principle of *non-refoulement*, and in the case of prisoners of war, Article 12 of the Third Geneva Convention.

⁵⁸ For example, Faiz al-Kandari, a Kuwaiti national of about 27 years of age, was detained in Jalalabad before being transferred to a detention centre in Kabul. In a letter to the Kuwaiti ambassador in Pakistan,

On 26 February 2002, Physicians for Human Rights (PHR) wrote to Secretary of Defence Rumsfeld about conditions in Shibarghan prison in Afghanistan. The organization stated that it had learned that the Department of Defence was “disclaiming any responsibility and will not take measures to assure adequate sanitation, nutrition, medical care and shelter” for the Shibarghan prisoners. PHR had visited the prison in January 2002, and reported on the poor conditions it found there. It reported that the US military had controlled access to the prison until shortly before the organization visited it. Rear Admiral John Stufflebeem’s comment cited above indicates that the US authorities were still aiming to interrogate prisoners in Shibarghan in late January, after the PHR visit. Two months later, the New York Times reported that the conditions in the prison remained poor, but that “few people of consequence appear to have time for the prisoners now. The Americans were here in the beginning, photographing and tagging the inmates, trying to select the worst ones. They took about 100 to Guantánamo, the American base in Cuba, Afghan officials here said....The remaining prisoners, all of them Afghan or Pakistani, appear to have been largely forgotten.”⁵⁹

The investigation into killings and alleged ill-treatment of detainees by US soldiers

“By refusing to...conduct a serious investigation that would insist on accountability, Mr Rumsfeld and General Franks send the message that the loss of innocent Afghan lives at US hands is not a matter of importance; that Afghan allegations of US misconduct are not to be taken seriously, even when they are numerous and repeated; and that nothing need be learned or corrected following such tragic mistakes.”⁶⁰

Any allegations of human rights violations committed by US personnel must be subject to proper investigation. In this regard, Amnesty International is unpersuaded that the investigation into the killing and alleged torture or ill-treatment of Afghan villagers in the course and aftermath of a raid by US Special Forces in Uruzgan province on the night of 23/24 January 2002 met

published by *al Rai al-A'am* newspaper on 31 December 2001, Faiz al-Kandari wrote from Jalalabad: “I came to Afghanistan to help with charitable projects. I helped to build wells, renovated a mosque, distributed financial aid to the poor. I fled to Jalalabad following the capture of Kabul.... and I was eventually detained. I was questioned by an American... He then told me that there is no evidence against me and that they have nothing on me.... The problem we are now facing, is that the current Afghan government is treating us like animals. I have injuries all over my body, and was kept in handcuffs for days. They also stole my belongings. We are threatened with torture and murder...” (translation). As far as Amnesty International was aware, Faiz al-Kandari remained in detention at the time of writing.

⁵⁹ *Marooned Taliban tick off grim hours in an Afghan jail.* New York Times, 14 March 2002.

⁶⁰ *Mistakes were made.* Washington Post, 27 February 2002. The editorial was referring to the US investigation into the Uruzgan allegations. It stated that “the Pentagon has made no effort to reconcile the accounts of US forces – which not surprisingly maintain there was no wrongdoing – with those of Afghans on the ground, which offer disturbing descriptions of US misbehavior...”.

international standards of impartiality or thoroughness. The organization is further concerned at indications that the authorities have ruled out any investigation into similar allegations of ill-treatment against Afghans in Kandahar province in March 2002.

The US military authorities revealed that the targets of the Uruzgan raid had subsequently turned out to be compounds under the control of “friendly Afghans”, and admitted that US Special Forces had killed 16 villagers who were members of neither the Taliban nor *al-Qa’ida*. In the two-page “unclassified executive summary” of the investigation⁶¹, US Central Command stated that the US soldiers were acting in self-defence after being fired upon by people in the compounds. It had been alleged that some of those killed were found with their hands bound behind their backs with plastic handcuffs. The executive summary states: “None of the Afghani personnel at the compounds were bound and then killed by US forces. As US forces proceeded to secure a building, all personnel encountered are bound by large plastic zip ties. This is a security measure that is also applied to personnel that are wounded and those that are not obviously dead. Once the area is fully secure, medics will check on the personnel, provide care to the wounded and remove the cuffs from those that have died. It is possible that some restraints were not recovered.”

The US military’s findings are reported to have been rejected by local Afghan officials and relatives of those killed. They allege that the US forces fired first, and that at least eight of the 21 dead villagers⁶² were discovered with their hands tied behind their backs with the plastic ties used by the US Special Forces. One villager has alleged that he saw his cousin fall as he tried to escape. The next morning the villager said that he had found his cousin in the plastic handcuffs and that he appeared to have been shot in the back.⁶³

During the Uruzgan raid, US Special Forces also took 27 villagers into custody. Amnesty International is concerned by allegations that they were ill-treated by US soldiers in the initial stages of their detention. All 27 people were released on 6 February after two weeks in detention after it was determined that they were villagers mistakenly identified by US forces as Taliban or *al-Qa’ida* members. It is alleged that at the scene of the raid they had their hands and feet tied, were blindfolded and hooded, and flown to the US base at Kandahar. According to the allegations, having arrived at the base the prisoners were beaten, kicked and punched by soldiers, made to lie on their stomachs with their hands tied behind their backs and their legs chained, whereupon soldiers walked across their backs. Two men were said to have lost consciousness during the beatings, and others to have suffered broken ribs and loosened

⁶¹ The executive summary is undated, but a spokesperson at US Central Command told Amnesty International that it was publicly available from 21 February 2002.

⁶² Local accounts allege that 21 villagers were killed by the Special Forces, not 16 as stated by the US.

⁶³ *Afghan witnesses say G.I.’s were duped in raid on allies*. New York Times, 27 February 2002.

teeth. Reporters stated that they saw evidence of physical injuries allegedly sustained two weeks earlier.⁶⁴

Allah Noor, 40, was quoted as saying “They were beating us on the head and back and ribs. They were punching us with fists, kicking me with their feet. They said: “You are a terrorist! You are *al-Qa’ida!* You are Taleban!””. Abdul Rauf, aged between 60 and 65, reportedly said: “I was down on my knees, bent over, and they kicked me in the chest. I heard my ribs crack. Then I was lying on my side and they kicked me in the back, in the kidneys and I fainted.” Seventeen-year-old Akhtar Mohammed states that he was kept in solitary confinement in a shipping container for eight days.⁶⁵

Central Command’s executive summary of the investigation states: “None of the detainees were mistreated or unnecessarily abused. As a force moves through a building, personnel encountered may be treated roughly during the process of ensuring they are properly secured and no longer represent a threat to US forces. To the extent they resist, they may receive injuries in the process. However, once secured, and if cooperative, detainees were handled only as necessary to move them safely toward the waiting helicopters, secure them for the flight and transport them to Kandahar.”

Amnesty International is troubled by Secretary of Defence Rumsfeld’s assertion that “investigation” was not the right term to describe what was being conducted into the Uruzgan raid: “What we try to do after an incident that comes to our attention is to ask ourselves what kinds of lessons might be learned from this. And the word ‘investigation’ sometimes has the implication of more formality or a disciplinary action, which is not the case in the overwhelming number of incidents when we have to go out and determine and have a review of what took place...”.⁶⁶ Moreover, Amnesty International is concerned by statements from other senior military officials which seemed to prejudge the findings of the investigation. On 11 February 2002, despite stating that it was official policy not to comment on ongoing investigations, Rear Admiral John Stufflebeem said there was “no information” that would support the allegations of beatings. This was at least 10 days before the executive summary of the investigation was released - the Rear Admiral himself noted that the investigating officer was still “in the midst” of his investigation.⁶⁷ The following day, General Richard Myers, Chairman of the Joint Chiefs

⁶⁴ This conflicts with a statement by General Richard Myers who said on 12 February that all the detainees were medically screened upon arrival at the Kandahar base and that “there were no issues of beating or kicking or anything of that sort”. *Myers: Doesn’t believe Afghan detainees were beaten*. American Forces Information Service. 12 February 2002.

⁶⁵ *Villagers released by American troops say they were beaten, kept in ‘cage’*. Washington Post, 11 February 2002. *Released Afghans tell of beatings*. New York Times, 11 February 2002.

⁶⁶ Department of Defense news briefing, 21 February 2002.

⁶⁷ Department of Defense news briefing, 11 February 2002.

of Staff, stated that the investigation “was progressing”, but that he did not believe “that any of the detainees – this was the 27 that were detained – were subject to beatings or rough treatment after they were taken into custody.”⁶⁸

At the 21 February Pentagon news briefing, asked to clarify whether he meant that there would be no disciplinary action against any military personnel involved in the raid and its aftermath, the Secretary of Defence replied: “Why would there be? I can’t imagine why there would be any.” This was despite stating that he did not know if the Central Command investigation had been completed. On 25 February, General Tommy Franks, Commander, US Central Command, said that he did “not anticipate any disciplinary action being taken against anybody involved in that raid”. He said, “I think that the incident is unfortunate. I think it has been accurately reported. I think it has been adequately investigated. I have been through the results of the investigation and I am satisfied that while - that while unfortunate, that I will not characterize it as a failure of any type”.⁶⁹ Central Command’s executive summary of the investigation concluded: “The nature of the war on terrorism makes distinguishing friend from foe very difficult”.

According to Central Command, “this incident is closed”.⁷⁰ However, Amnesty International remains concerned that the military investigation into the allegations of possible torture or ill-treatment and killings may not have complied with the USA’s obligations under the Convention against Torture⁷¹ or in accordance with the UN Principles on the Effective

⁶⁸ Department of Defense news briefing, 12 February 2002.

⁶⁹ US CENTCOM press briefing, 25 February 2002.

⁷⁰ Status of investigations during Operation Enduring Freedom. US Central Command. 29 March 2002.

⁷¹ Article 2(2): “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 12: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Article 13: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”

Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁷² It is seeking further information from the authorities about the investigation.

Amnesty International is also concerned by recent reports of the alleged ill-treatment of Afghan villagers by US soldiers in the context of a raid on a compound near Kandahar on 17 March 2002. The US authorities stated that they detained 31 people in the compound.⁷³ The detainees were released after it was established that they were members of neither the Taliban nor *al-Qa'ida*.

The detainees have alleged that they were ill-treated by US soldiers. Those interviewed by journalists said that they surrendered and tried to explain that they were allies, but were either misunderstood or ignored. According to reports, “the men said that their feet were bound, their hands tied behind their backs and black hoods placed over their heads while US soldiers punched and kicked them. Many of the 18 men who gathered to describe what happened showed a variety of cuts and bruises they said they had received during the beatings. In all, they said, 34 men at the outpost were taken into custody...”.⁷⁴ The men said that they were driven to the Kandahar base, where they were made to lie on their stomachs on rocky ground and kicked in the back. It is alleged that the detainees had their beards and heads shaved by the military.⁷⁵ For the next four days, the men were allegedly held in 10 by five metre cages, each holding between 10 and 18 people, with buckets as toilets.

⁷² Principle 1: “Exceptional circumstances including a state of war or threat of war...may not be invoked as a justification of such executions”. Principle 9 states: “There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern and practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses...”. Principle 17: “A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection.” Principle 18: “Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice...”. Principle 20: “The families and dependents of victims of extra-legal, summary or arbitrary executions shall be entitled to fair and adequate compensation within a reasonable period of time.”

⁷³ Department of Defence news briefing, 18 March 2002.

⁷⁴ *Afghans falsely held by US tried to explain*. Washington Post, 26 March 2002.

⁷⁵ *Afghans say US troops abused them*. Associated Press, 23 March 2002.

According to the reports, a military spokesperson at the Kandahar base said that all detainees are treated humanely there, and that the above allegations of ill-treatment were not under investigation. Another reportedly stated that if any of the detainees were injured, it may have been as a result of their resisting arrest. A Pentagon spokesperson went so far as to suggest that the people taken into custody were never actually detainees, despite having been held for about four days. He said: “We went to the compound – no shots were fired – found out who these folks were, temporarily detained them. We never processed them and they never became detainees”.⁷⁶

On 29 March 2002, General Tommy Franks said that since the US military action in Afghanistan began, “there have been a number of incidents which we have reviewed in order to apply lessons learned to our ongoing and future operations.” The allegations relating to the 17 March raid on the compound near Kandahar were not listed by Central Command as being one of the incidents under review.⁷⁷

Amnesty International is seeking further information from the authorities about the alleged ill-treatment of these detainees.

Concerns over identification of detainees, and their access to family

“They’re concerned about their future, their families, how to communicate with them, and things like that.” Camp X-Ray Muslim cleric⁷⁸

As of 8 April 2002, there were 242 prisoners in US custody in Afghanistan and a further 299 in Guantánamo Bay. On 20 March, General Tommy Franks said that the detainees in the two locations comprised about 35 nationalities.⁷⁹ At the time of writing, the full range of nationalities and the numbers of detainees of each nationality had not been made public by the US authorities.

The names of some of the detainees have appeared in the public domain, but the identities of the majority of those held in US custody in either Afghanistan or Guantánamo Bay remained unknown at the time of writing.⁸⁰ On 20 February 2002, the US Ambassador at large for war crimes issues said that there were nationals “from approximately 31 countries” held in

⁷⁶ Department of Defence news briefing, 20 March 2002.

⁷⁷ Status of investigations during Operation Enduring Freedom. 29 March 2002.

⁷⁸ *Cuba prisoners worry about families*. Associated Press. 27 January 2002.

⁷⁹ Interview with General Tommy Franks, Operating Enduring Freedom Commander, at US Embassy, Moscow. 20 March 2002.

⁸⁰ The US authorities themselves report that they have been unable to establish the identities of some of the nationals held in Guantánamo Bay.

Guantánamo Bay⁸¹. It has been reported that these include nationals of Afghanistan, Algeria, Australia, Azerbaijan, Bahrain, Belgium, China, Denmark, Egypt, France, Iran, Kuwait, Qatar, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Turkey, United Kingdom, Uzbekistan and Yemen. Amnesty International is seeking further information from the US authorities about the identities and nationalities of the detainees.⁸²

Concern over the lack of information about the detainees in Afghanistan and Guantánamo Bay is illustrated by the case of Egyptian national Ahmad Abdul Rahman.⁸³ The repeated efforts of his family to obtain information from the US authorities about his whereabouts and status have been unsuccessful. On 30 November 2001, following media reports that Ahmed Abdul Rahman had been taken into custody in Afghanistan by members of the Northern Alliance, lawyers acting for the family wrote by fax and courier to Attorney General John Ashcroft and Secretary of Defence Donald Rumsfeld. The letter asked for immediate notification in the event that Ahmed Abdul Rahman was transferred to US custody, and requested that no interrogation take place without at least one of the lawyers present.

⁸¹ Speech at Chatham House, London, United Kingdom. 20 February 2002.

⁸² On 18 January 2002, four delegates of the International Committee of the Red Cross began visiting the Guantánamo detainees with a view to registering the prisoners, and documenting the conditions of their arrest, transfer and detention. ICRC policy is not to make public their findings, but to make recommendations to the detaining authority.

⁸³ Ahmed Abdul Rahman is one of the sons of Sheik Omar Abdul Rahman, who is serving a life sentence in the USA. He was convicted in 1995 on charges of conspiracy to bomb various New York landmarks.

In December it was reported that Ahmed Abdul Rahman had been transferred to US custody. On 28 January 2002, the US Department of Justice replied to the lawyers' communication of 30 November. The entire text of the letter consisted of: "Your letter of November 30, 2001, to the Attorney General advising that you have been retained by the family of Ahmed Abdul Rahman to represent him has been referred to the Criminal Division for response. Receipt of your letter, and your request concerning any potential interrogation of Ahmed Abdul Rahman by agencies of the United States in the event he is taken into custody in Afghanistan, is herewith acknowledged".⁸⁴

As of 3 April 2002, three months after Ahmed Abdul Rahman's reported transfer into US custody, the above was the total information provided by the US Government. The whereabouts of Ahmed Abdul Rahman remained unconfirmed, including whether he is in Guantánamo Bay or Afghanistan.⁸⁵

Anyone who is arrested, detained or imprisoned has the right under international standards to inform, or have the authorities notify, their family or friends of the fact of their arrest or detention and the place where they are being kept in custody. International standards also require that detainees be allowed to tell their family or others of the

I am fine, the only thing missing is the sight of you and the children. I miss you all. I am held by the Americans, who have now believed that I only went to Afghanistan to assist with relief work. Send my love to my father, mother, brothers and sisters, and the children. I see you all in my dreams...

~~~~~
Please pray for my speedy return to Kuwait. Hopefully I shall see you once the investigations are complete and my innocence is established.

~~~~~
I want you to know that I am fine. Hopefully I shall soon return, once the Americans are sure that I only went to Afghanistan to help with the relief efforts and not to fight. However they might keep me here if they are not convinced of that... Take care of the children and teach the Quran.

~~~~~
Extracts from letters to relatives from Mohammad Finaitel al-Deyhani, Fawzi Khaled al-'Awdah, and Mansour Abdullah Kamil bin 'Abdullah Kamil al-Kandiri, three of seven Kuwaiti nationals held in US custody in Guantánamo Bay (translated from Arabic). The letters are believed to have been sent when they were being held at the US base in Kandahar.

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A Bahraini national held in Guantánamo wrote to his family that he was being held for questioning, but that he did not know why. He said that the US authorities had told him that he would be repatriated once their investigations were complete. *Akhbar al Khaleej* newspaper (Bahrain), 14 March 2002.

⁸⁴ Letter to legal team from James S. Reynolds, Chief, Terrorism and Violent Crime Section, Criminal Division, US Department of Justice, Washington, DC. 28 January 2002.

⁸⁵ A Washington Post journalist cited the continued detention of Ahmed Abdul Rahman in an article in mid-March. He told Amnesty International that he had been unable to establish if the prisoner was being held in Afghanistan or Guantánamo Bay. *From veil of secrecy, portraits of US prisoners emerge*. Washington Post, 15 March 2002.

place of detention, *promptly* after any transfer from one place to another.⁸⁶ As information about the attempts of families to get information about their detained relatives emerges, it would appear that the US authorities have failed to fully and promptly facilitate communications between the prisoners and their families.

In letters seen by Amnesty International from Kuwaiti nationals who had allegedly been transferred from a detention facility in Kohat, Pakistan, to the US base in Kandahar (see above) between October and December 2001 and subsequently flown to Guantánamo Bay, there was nothing in the letters to indicate that the detainees knew where they were, and indeed none had stated his place of detention on the line provided for that purpose (it was widely believed among their families that the letters were sent from Kandahar). In the case of people transferred to Guantánamo Bay, at least until 1 February even the detainees themselves were apparently not being told where they were, according to the Pentagon.⁸⁷ This would appear to be confirmed in a letter to a family member on 30 January 2002, in which one of the UK nationals wrote: "Don't know where we are and they are not telling us where we are". Keeping prisoners in the dark about their location would obviously restrict their ability to notify their families, as international standards require.

Some families have been left for prolonged periods without knowing the whereabouts of their relative. Essa Khan, a Pakistan national who was in Afghanistan when the US bombing began in October 2001, is reported to be in Guantánamo Bay. His father told an Amnesty International delegation in Pakistan in late March 2002 that he waited for five months without knowing where his son was. On 8 March 2002 he received a letter from Essa Khan indicating that he was in US custody in Camp X-Ray. Saudi national Abdul Hakeem Bukhari reportedly telephoned his family from detention in Kandahar in late December 2001. The family did not hear anything from him for the next three months, until on 16 March 2002 they received two letters from him in Guantánamo Bay. His brother was quoted as saying: "Although the letter was very short and did not give much detail about our brother, it nevertheless made us very happy. At least now we know that he is still alive".⁸⁸ Other relatives have learned of the

⁸⁶ Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states: "Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

⁸⁷ "Although the detainees aren't told where they are, Inouye believes those who can read English 'certainly saw the license plates' of the vehicles that go in and out of the compound. 'So, I must assume that all of them know that they're in this place in Cuba called Guantanamo,' he said." *Inouye About X-Ray: "I'd Rather be There Than Kabul"*. American Forces Information Service, 1 February 2002. (Daniel Inouye is a US Senator, one of a number of Members of US Congress who have visited Camp X-Ray.)

⁸⁸ *Carpet trader ends up in Guantanamo*. Arab News, 17 March 2002.

detention of their family member in the press. The families of French nationals Mourad Benchellali and Nizar Sassi, for example, only later learned of their arrests in the media and since then have hardly been able to discover any more information on their relatives' conditions of detention and legal status.⁸⁹ Mourad Benchellali and Nizar Sassi are believed to have been held in Camp X-Ray since early January and mid-February respectively.

Asked whether there would ever be any future provision for relatives to visit the Guantánamo detainees – some of whom could be detained there indefinitely – the Secretary of Defence replied: “Oh, I would doubt it... No, I would think that would be highly unlikely”.⁹⁰ Yet, as various international standards indicate⁹¹, the international community has recognized the importance of facilitating detainee/family communications and visits. The denial of access and information to families who are left in the dark about the legal status and other conditions pertaining to their relatives' detention, none of whom have yet been charged with any offence, causes the families needless suffering and impedes their ability to ensure access to legal counsel.

In addition, under international law binding upon the United States, all foreign nationals taken into custody have the right to be informed, *promptly* upon arrest, of their right to contact their consulate if they so wish. Amnesty International does not know whether and when the detainees were informed of this right, as guaranteed under the Vienna Convention on Consular Relations. The organization has previously raised the US Government's failure to meet its international legal obligation on this issue, including in relation to capital defendants.⁹² If detainees take up this option, prisoners must be allowed “reasonable facilities to communicate with the diplomatic and consular representatives”.⁹³

⁸⁹ *Les Minguettes contre Guantánamo*, Libération, 23/24 March 2002.

⁹⁰ Interview with The Sunday Times (UK), 21 March 2002.

⁹¹ Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states: “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.” Rule 37 of the Standard Minimum Rules for the Treatment of Prisoners states that: “Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence - and by receiving visits.” Rule 92 of the Standard Minimum Rule states that an “untried prisoner shall be allowed to inform *immediately* his family of his detention and shall be given all reasonable facilities for communicating with this family and friends, and for receiving visits from them, subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.” [emphasis added].

⁹² See, for example, *USA: A time for action: Protecting the consular rights of foreign nationals facing the death penalty* (AMR 51/106/2001, August 2001).

⁹³ Standard Minimum Rules for the Treatment of Prisoners, Rule 38(1).

On 22 January 2002, Amnesty International asked for access to the Guantánamo detainees. At the time of writing, it had not received a reply to its request, which it was renewing.

The interrogation of detainees and denial of access to counsel

“We are 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 from an intelligence standpoint, but what they’ve done from a law enforcement standpoint. That process is underway.” US Secretary of Defence, 27 February 2002.⁹⁴

Everyone – even a person suspected of the worst possible crimes – has the right not to be questioned without his or her counsel being present and before being informed of his or her rights in a language which he or she understands. At the time of writing, none of the detainees, either in Afghanistan or Guantánamo Bay, had been granted access to legal counsel despite the fact that interrogations by US agents, and in some cases by agents of other governments⁹⁵, had been continuing for over two months in both locations.

Camp X-Ray interrogation sessions began on 23 January 2002 and are reported to have lasted up to four hours at a time, with some individuals reportedly questioned on numerous occasions. Interrogations can reportedly take place at any time of day or night. On 27 February, the US Secretary of Defence said that all the detainees, “except for one or two” had been “questioned and interrogated” for intelligence gathering purposes. He said that the US was now beginning the process of interrogating with a view to possible prosecution. In the same vein, the Pentagon’s General Counsel, William J. Haynes, said on 21 March: “It might be that as we investigate – and that’s what we’re doing now – that they will be appropriately charged with crimes”.⁹⁶

Evidence gleaned during these interrogations – whether characterized as being conducted for intelligence or prosecutorial purposes – could eventually be used in trials before the military commissions envisioned in the Military Order signed by President Bush on 13 November 2001. As the government itself has stated: “The United States military and other authorities are gathering and evaluating information concerning whether individuals should be

⁹⁴ Interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002.

⁹⁵ “I think we’ve already had three or four of five countries send their own people down to Guantánamo to help to interview their own citizens”. Deputy Secretary of Defence Paul Wolfowitz, interview with Jim Lehrer, News Hour, PBS TV, 21 March 2002.

⁹⁶ Department of Defense News Briefing on military commissions, 21 March 2002.

made subject to the Order.”⁹⁷ The military commissions, which may be able to admit hearsay evidence and coerced testimony, will have the power to hand down death sentences.

Attempts by lawyers retained by relatives to gain access to the detainees have been rebuffed by the authorities. For example, in an affidavit on 13 February 2002, the lawyer retained by the family of Shafiq Rasul, a UK national in Guantánamo Bay, stated that her request for access to Shafiq Rasul had been denied by the US Government, which had stated that access was limited to consular officials and the International Committee of the Red Cross. The affidavit also asserted that “Shafiq has tried to send [his mother] a number of other messages, including one in which he requested legal representation, but the Red Cross told her that the US authorities have not permitted these messages to be passed on.”⁹⁸ As of 5 April 2002, seven weeks later, access to legal counsel had still not been granted.⁹⁹

According to Article 17 of the Third Geneva Convention, prisoners of war (see below) are required to give only name, rank, date of birth and number, or equivalent information. That article does not prohibit the detaining power from questioning them and seeking their cooperation in providing intelligence. However, once any individual has been identified as a suspect in a crime – the Guantánamo detainees have repeatedly been labelled as “killers” and “terrorists” by, among others, President Bush and Secretary of Defence Rumsfeld (see below) – that person has the right to be informed that he or she is a suspect, to be informed of his or her rights – including the right to remain silent without such silence being a consideration in the determination of guilt or innocence, to have counsel of one’s own choice and to have free legal assistance if unable to pay for it, and not to be questioned in the absence of one’s counsel. As the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Rome Statute of the International Criminal Court (ICC) make clear, these rights apply even to persons suspected of the worst crimes in the world: genocide, crimes against humanity and war crimes.¹⁰⁰

⁹⁷ *Shafiq Rasul v George Walker Bush*. US District Court for the District of Columbia. Respondents’ motion to dismiss petitioners’ first amended petition for writ of *habeas corpus*. 18 March 2002.

⁹⁸ *Shafiq Rasul v George Walker Bush*. Affidavit of Gareth Peirce, 13 February 2002.

⁹⁹ US national John Walker Lindh’s lawyers have asked for access to Guantánamo detainees. At the time of writing it was not clear whether this request would be granted. The prosecution noted that it is a matter for the military and that “the military has not yet definitively resolved whether and under what circumstances (if any) defense counsel can be permitted access to Guantánamo Bay detainees”. *USA v Lindh*. Government’s opposition to defendant’s motion to compel production of discovery. US District Court, Eastern District of Virginia. 29 March 2002.

¹⁰⁰ (1) ICTY: Rules of Procedure and Evidence. Section 1. Rule 42. (2) ICTR: Rules of Procedure and Evidence. Part 4, Section 1, Rule 42. And Part 5, Section 1, Rule 63. (3) Rome Statute of the ICC: Part 5. Article 55 (2) states that any suspect has the right: “(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent,

Principle 17(1) of the 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. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”¹⁰¹ Principle 1 of the Basic Principles on the Role of Lawyers makes clear that all persons have the right to legal assistance at all stages of criminal proceedings, including interrogations.¹⁰² Principle 7 states: “Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest and detention.”¹⁰³ The Human Rights Committee, interpreting the International Covenant on Civil and Political Rights (ICCPR), has stated that “all persons arrested must have immediate access to counsel”.¹⁰⁴ The Inter-American Commission for Human Rights has concluded that the right to counsel set out in Article 8(2) of the American Convention on Human Rights applied on the first interrogation.¹⁰⁵

Amnesty International is also concerned about whether the medical and psychological condition of the detainees has been fully considered in relation to the interrogations. Several of the detainees were suffering from serious injuries on arrival at the naval base, and some required surgery (for example one detainee reportedly had lost both his legs to a landmine explosion before capture). Reports indicate that at least one detainee has received medication for post-traumatic stress disorder, and another for bipolar disorder.¹⁰⁶ Minimum fair trial guarantees

without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person’s choosing.; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

¹⁰¹ Principle 23 of the Body of Principles requires the authorities to keep records of any interrogation of a detainee. The records are to contain the duration of each interrogation, the intervals between interrogations, and the identities of the officials conducting the interrogation and other persons present. These records should be accessible to the detainee or their counsel. The Rules of Evidence and Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda require video and audio recordings of interrogations of persons suspected of genocide, crimes against humanity and war crimes.

¹⁰² “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings”. The Principles were adopted by at the UN in 1990.

¹⁰³ Principle 8 states: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

¹⁰⁴ UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

¹⁰⁵ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin. OEA Ser.L./V.62, do.10, rev.3, 1983.

¹⁰⁶ *Media given a tour of tent hospital*. Washington Post, 4 February 2002.

include the right, recognized in Article 14(3)(g) of the ICCPR, “[n]ot to be compelled to testify against [oneself] or to confess guilt”. A person with serious mental or physical health problems may not only be vulnerable to making unreliable statements, but to being unduly pressured into making self-incriminating statements, contrary to this principle. The fact that the military commissions would admit hearsay evidence, and appear not to exclude the admission of statements extracted under torture or other coercive methods, heightens concern on this issue (see below).

The conditions of detention in Guantánamo Bay – confinement to small cells for up to 24 hours a day, isolation from family, denial of access to legal counsel and possible indefinite detention in such circumstances or trial by military commission – may in themselves amount to cruel, inhuman and degrading treatment and be coercive. Principle 21 of the Body of Principles states: “It shall be prohibited to take 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”. This Principle also prohibits the subjection of detainees to any methods of interrogation which impair the detainee’s capacity of decision or judgment.

Article 75(4)(a) of Additional Protocol I to the Geneva Conventions, recognized by the USA as reflecting customary international humanitarian law, requires that “the procedure...shall afford the accused before and during his trial all necessary rights and means of defence”.

The status of detainees captured in connection to the conflict in Afghanistan

“There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.” International Committee of the Red Cross (ICRC), 9 February 2002

As the first prisoners arrived at the Guantánamo Bay naval base, Secretary of State Rumsfeld made it clear that the US Government was adopting, at best, a selective approach to international humanitarian law: “We have indicated that we do plan to, *for the most part*, treat [the prisoners] in a manner that is *reasonably consistent* with the Geneva Conventions, *to the extent they are appropriate*, and that is exactly what we have been doing.” [emphasis added].¹⁰⁷ A week later, in a decision reportedly reached in secret and without announcement on the advice of the Justice Department and the White House Counsel, President Bush decided to reject the Geneva Conventions in relation to any of the detainees in US custody in, or transferred from, Afghanistan.¹⁰⁸ Following concern within the administration and

¹⁰⁷ Department of Defense news briefing, 11 January 2002.

¹⁰⁸ *Behind-the-Scenes clash led Bush to reverse himself on applying Geneva Conventions.* New York Times, 22 February 2002.

internationally, a partial reversal in this position was announced on 7 February 2002: the President had determined that the Geneva Conventions applied to detainees who were alleged members of the Taleban, but not to those of *al-Qa'ida*.¹⁰⁹ However, at the same time it was made clear that none from either group would be granted prisoner of war status. Amnesty International condemns this pick and choose approach to the Geneva Conventions.

Amnesty International believes that those captured and held by the USA during the conflict in Afghanistan must be presumed to be prisoners of war, whether they belong to the Taleban or *al-Qa'ida*. The Taleban were effectively the armed forces of Afghanistan when the US military operations began in October 2001, and *al-Qa'ida* fighters appear to have been an integral part of such forces, thus fulfilling the requirements of Article 4(1) of the Third Geneva Convention. In line with Article 5, any dispute about their status must be determined by a competent (in this case, US) tribunal, operating through due process.

Amnesty International recalls a statement issued by the United Nations High Commissioner for Human Rights on 16 January 2002 in which she said that:

- All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.*
- The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.*
- All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.*
- Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.*

The International Commission on Jurists, an international non-governmental organization consisting of judges and lawyers from all regions and legal systems in the world working to uphold the rule of law and the legal protection of human rights, stated that the 7 February 2002 decision by President Bush to apply the Third Geneva Convention to the conflict in Afghanistan

¹⁰⁹ Fact Sheet. Status of detainees at Guantanamo. White House, 7 February 2002.

but deny prisoner of war status to Guantánamo Bay detainees was “incorrect in law”.¹¹⁰ In a letter to Secretary of State Colin Powell, dated 7 February, the organization wrote: “The refusal by the United States to grant these persons prisoner-of-war status, as well as the reasons given for this decision, are not consistent with United States’ legal obligations under international humanitarian law and human rights law. We are particularly disturbed by the degree of legally inaccurate debate on the issue that is occurring within the United States, which is not being corrected by the US Government.”

On 21 February 2002, the Crimes of War Project released the findings of a survey it had conducted of leading world experts in international humanitarian law:

Most of the experts surveyed by the Crimes of War Project believe that the Taliban should be granted POW status, citing Article 4 of the Third Geneva Convention, which defines prisoners of war as ‘members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces’. Although there was disagreement about the legal status of Al Qaeda who have been captured, most agreed that the Administration had not taken necessary steps under international law to determine their status...”¹¹¹.

The presidential announcement of 7 February 2002 that the Geneva Conventions do apply to the conflict in Afghanistan was made, at least in part, out of concern that any other determination would put future captured US soldiers at risk of having their rights under these conventions denied.¹¹² The President, however, has not gone far enough to minimize this risk. The US administration’s selective approach to the provisions of the Geneva Convention threatens to undermine the effectiveness of international humanitarian law protections for any US or other combatants captured in the future.

The US Ambassador at large for war crimes issues, Pierre-Richard Prosper, has asserted that there is no need for resort to the “competent tribunal” envisaged in the Third Geneva Convention to determine the status of any of the Guantánamo detainees. He claimed that such a tribunal only becomes necessary when the detaining power has any doubt about the status of the detainees. In this case, Ambassador Prosper has stated, the US administration has

¹¹⁰ *Bush decision on prisoner of war status is incorrect in law.* News release, 8 February 2002.

¹¹¹ See the Project’s website for more information. www.crimesofwar.org.

¹¹² Secretary of Defence Rumsfeld put it thus: “The United States, as I have said, strongly supports the Geneva Convention. Indeed, because of the importance of the safety and security of our forces, and because our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the US Government take care in determining the status of Taleban and *al-Qa’ida* detainees in this conflict.” Department of Defence news briefing, 8 February 2002.

no doubt.¹¹³ However, there is nothing in the wording of Article 5 of the Third Geneva Convention¹¹⁴, or the official International Committee of the Red Cross (ICRC) commentary on this article, which suggests that the doubt is limited to a doubt entertained by the detaining power.

The commentary of the ICRC repeatedly makes clear that the Conventions are to be given a broad reading, including this article. Indeed, following the presidential announcement of 7 February 2002, the ICRC, the most authoritative body on the provisions of the Geneva Conventions, stated that there were “divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status. The United States and the ICRC will pursue their dialogue on this issue. The ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime.”¹¹⁵

Substantial doubt about the status of the detainees plainly exists, in the form of opinion from bodies other than the US administration – including the ICRC, the UN High Commissioner for Human Rights, the international humanitarian law experts surveyed by the War Crimes Project, and the International Commission of Jurists. The US Government should respect this expert opinion and demonstrate that it does indeed “strongly support” the Geneva Conventions, as its officials have stated. It should ask a competent, independent and impartial court, affording all the necessary guarantees for a fair trial recognized in Article 14 of the International Covenant on Civil and Political Rights, Article 75 of the First Additional Protocol and other international law and standards, to make individual determinations of the status of each detainee.

The conditions of transfer to, and detention in, Guantánamo Bay

“Consider yourself being locked up 24 hours a day; getting out once in a while – very, very little getting out. Not knowing what’s going to happen, probably not even knowing why you’re here. I think it would frighten anybody”. Deputy commander, Camp X-Ray, March 2002

Transfers of detainees from Afghanistan to the Camp X-Ray facility at the US naval base in Guantánamo Bay in Cuba began on 10 January 2002. As of 6 April, there were 299 people, all non-US nationals, held in Camp X-Ray. While Secretary of Defence Donald Rumsfeld and others have raised the prospect of some of the Guantánamo detainees being sent to their countries of origin, more transfers to the naval base of detainees held in Afghanistan or taken

¹¹³ For example, speaking on *Today*, BBC Radio 4, 21 February 2002.

¹¹⁴ Article 5 of the Third Geneva Convention states: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

¹¹⁵ ICRC press release, 9 February 2002.

into custody elsewhere in the world are expected. A permanent detention centre to replace Camp X-Ray was under construction at the naval base at the time of writing and was due to begin housing prisoners in April 2002.

Amnesty International recognizes the right of law enforcement officials to take legitimate security measures when transporting and holding prisoners, but emphasizes that such measures should be proportionate to the risk and used for the minimum time possible, and must be consistent with international standards which prohibit the use of cruel, inhuman or degrading treatment at all times. In addition, Rule 45 of the Standard Minimum Rules for the Treatment of Prisoners require that: "The transport of prisoner in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited." Amnesty International remains concerned that these principles were not respected in relation to the transfer of people from Afghanistan to the Guantánamo Bay naval base, and that excessive use of restraint and other measures, amounting to cruel, inhuman and degrading treatment may have occurred. During the 25-hour flights, prisoners have been handcuffed, shackled, and made to wear mittens, surgical masks, and ear muffs, and were effectively blindfolded by the use of taped-over ski goggles. They also had their beards and heads shaved.¹¹⁶ At least two prisoners were sedated.

I am being held by the Americans while they do their investigations. Don't know where we are and they are not telling us where we are... Tell mom not to worry, tell her I'm okay and everything is going to be alright. It is very hot here. I can't take the heat. The food they give us is terrible, I have lost 3 stone in weight since I left home [about a quarter of his reported usual bodyweight]... PS. Make sure mom ain't worrying tell her everything is okay....

~~~~~  
*How is everyone at home. Is mum and dad okay. Tell them not to worry... I've got a Quran and a hat from RED CROSS. I'm getting three meals a day and have to SHIT IN A Bucket in my cell... How is MAN UTD doing in football....*

~~~~~  
Extract of two letters to relatives from UK nationals held at Guantánamo Bay.

Shortly after the transfers of prisoners to Guantánamo Bay had begun, Secretary of Defence Rumsfeld was asked whether "hooding..., shaving, chaining, perhaps even tranquilizing some of these people is violating their civil rights". He replied: "It simply isn't... all one has to do is look at television any day of the week, and you can see that when prisoners are being moved between locations, they're frequently restrained in some way with handcuffs or some

¹¹⁶ The Muslim chaplain at Camp X-Ray reportedly persuaded the authorities not to repeat the forcible shaving in the camp. *As trust develops, guards still maintain full alert.* New York Times, 4 February 2002.

sort of restraints”.¹¹⁷ On 15 January 2002, reacting to criticisms of the treatment of the detainees, he said: “They are being treated vastly better than they treated anybody else over the last several years... It’s not going to be a country club, but it will be humane”.¹¹⁸ On 8 February 2002, he said: “Notwithstanding the isolated pockets of international hyperventilation, we do not treat detainees in any manner other than a manner that is humane.”¹¹⁹ A few days later, President Bush said that the Guantánamo detainees were being treated “incredibly humanely”. The President added that the USA “is mindful of the need to respect people’s rights.”¹²⁰

Amnesty International notes such assurances, but emphasizes that the US authorities must ensure that all measures, including prisoner transportation, comply with international minimum standards relating to detention, not just US or other countries’ standards. As the organization has pointed out on many occasions, the treatment of prisoners in the USA has frequently fallen below international standards, including by resort to excessive use of instruments of restraint¹²¹ and by allowing prison conditions in certain facilities, such as super-maximum security units, that amount to cruel, inhuman and degrading treatment.¹²²

Amnesty International remains concerned at the conditions of detention at the Camp X-Ray facility, including the small size of the cells and the fact that the cells leave the detainees exposed to the elements. Amnesty International is also concerned by the possible effects on the detainees of the powerful arc lighting that lights up the wire-mesh cells throughout the night. Constant illumination through fluorescent lighting in cells has been a complaint among prisoners held in 23-hour cellular confinement in some super-maximum security prisons in the USA. This

¹¹⁷ Department of Defence news briefing, 11 January 2002.

¹¹⁸ Secretary Rumsfeld round table with radio media, 15 January 2002.

¹¹⁹ Department of Defense news briefing, 8 February 2002.

¹²⁰ *US-Pakistan Affirm Commitment Against Terrorism*. White House news release, 13 February 2002. A Fact Sheet issued by the White House on 7 February 2002 clarified that the Guantánamo detainees were being provided: “three meals a day that meet Muslim dietary laws; water; medical care; clothing and shoes; shelter; showers; soap and toilet articles; foam sleeping pads and blankets; towels and washcloths; the opportunity to worship; correspondence materials, and the means to send mail; the ability to receive packages of food and clothing, subject to security screening”. The Fact Sheet further stated that the detainees “will not be subjected to physical or mental abuse or cruel treatment”.

¹²¹ It is common practice in the USA to shackle prisoners and detainees during transportation, with handcuffs attached to metal waist chains and, in many cases, the legs or ankles chained together. Rule 33 of the Standard Minimum Rules for the Treatment of Prisoners states that: “Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as punishment. Furthermore, chains or irons shall not be used as restraints.” Rules 33 and 34 further provide that restraints may only be used when other methods are ineffective and only for so long as is “strictly necessary”. (Rules 33 and 34).

¹²² See, *Violations in prisons and jails: needless brutality*. Chapter 4, USA: Rights for All. AMR 51/35/98, October 1998, and *USA: A briefing for the UN Committee against Torture*, AMR 51/56/00, May 2000.

has been cited as contributing to conditions which, in their totality, violate the US constitutional prohibition on cruel and unusual punishment.¹²³

Amnesty International is also concerned that the prisoners are made to wear shackles whenever they are out of their cells.¹²⁴ It has not been able to confirm if this includes during any periods allocated for exercise.¹²⁵ Initially, the detainees had to walk from the cells to the interrogation buildings, but for reasons of speed and because the shackles were causing injury, they are reportedly now taken for interrogation either by two-wheeled stretcher or by motorized cart (while shackled).¹²⁶ It is reported that the prisoners are also shackled during medical treatment, including when unconscious during surgery, and when in recovery, unless that interferes with medical care.¹²⁷ The organization is also concerned by information it has received that the prisoners only receive, on average, two to three 15-minute periods of out-of-cell exercise time per week, an allocation which would fall well below international standards.¹²⁸

A permanent detention facility, Camp Delta, is being built in the Radio Range area of Guantánamo Bay to replace Camp X-Ray, and at the time of writing was due to begin housing prisoners in April 2002. The initial contract is for the building of a 408-cell prison. Each cell will have a steel bed, a toilet, sink, and a steel-mesh window. Rule 10 of the Standard Minimum Rules for the Treatment of Prisoners states: “All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor

¹²³ For example, prisoners have complained that such lighting has caused “excruciating eye aches, headaches and sleeplessness”. *Johnson v Berge*, US District Court for the Western District of Wisconsin, Opinion and Order 00-C-421-C, 25 September 2000. On 8 March 2002, in this case of a Wisconsin supermax prison, US District Judge Barbara Crabb approved a settlement providing for the reduction by at least 60 per cent of the nocturnal lighting. The US Court of Appeals for the Ninth Circuit has stated: “[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional”. *Keenan v Hall*, CV-93-00051-REJ (1996).

¹²⁴ “Any time a detainee leaves that unit [cell], they are shackled and they are escorted by two guards”. Officer at Camp X-Ray. *Today*. BBC, Radio 4. 7 March 2002.

¹²⁵ It was reported soon after the transfers to Guantánamo began that detainees were to be shackled and accompanied by two military officers during their out of cell “recreation time”. *At Guantánamo Bay, a peaceful night*. Washington Post, 13 January 2002. However, Amnesty International has been unable to confirm if this remains the case.

¹²⁶ *Gurneys are used to transport all prisoners at Guantánamo*. Miami Herald, 7 February 2002. *An uneasy routine at Cuba prison camp*. New York Times, 16 March 2002.

¹²⁷ *Guantanamo interrogations begin*. Miami Herald, 24 January 2002.

¹²⁸ Rule 21(1) of the Standard Minimum Rules for the Treatment of Prisoners states: “Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.”

space, lighting, heating and ventilation”. Amnesty International is particularly disturbed to learn that the cells in the new unit will be smaller than those in which the detainees are currently held – six feet eight inches by eight feet (2.03 metres by 2.44 metres) compared to the eight feet by eight feet of the wire-mesh cells of Camp X-Ray.¹²⁹ In the USA, the professional standard-setting body, the American Correctional Association, sets standards for prisoners in segregation which specify a minimum of 80 square feet for each inmate when confinement exceeds 10 hours a day. The small size of the cells under construction at Radio Range is of particular concern given that, if the current regime is maintained, prisoners may be confined to these cells for up to 24 hours a day indefinitely.

Amnesty International believes that the confinement to small cells for virtually 24 hours a day with minimal opportunity for exercise – conditions to which some of the detainees had been subjected for three months at the time of writing – may amount to cruel, inhuman or degrading treatment in violation of international law. Their situation is made worse by the limited contact with the outside world and the uncertainty about their futures.

As already stated, at least until 1 February 2002 the detainees were apparently not being told by the military authorities where they were.¹³⁰ Such denial of information would likely have exacerbated any disorientation of the prisoners caused by the sensory-depriving conditions under which they had been transferred from Afghanistan, and their limited contact with the outside world. Human contact within the facility is minimal. Although they can communicate with inmates in adjoining cells, guards do not respond to attempts by detainees to engage them in conversation, and the prisoners are punished if they “talk back” to guards.¹³¹

At the end of February 2002, almost 200 of the Guantánamo detainees participated in a hunger-strike. The military authorities said that a reason behind the protest was an incident in which a Muslim prisoner, during prayer, allegedly refused to remove a head-dress he had fashioned from a towel or sheet and as a result had had it forcibly removed by guards. The protest led to the Camp X-Ray authorities relenting on their ban on the prisoners wearing such makeshift headgear during prayer, subject to possible security searches. Despite this move, a number of prisoners continued to refuse meals, and some were still doing so in intermittent

¹²⁹ US Department of Defense, Contracts. 26 February 2002. Brown & Root Services, a division of Kellogg Brown & Root, of Arlington, Virginia, was awarded the US\$16 million contract to build the 408-cell facility. Congressional funding for a further 400 cells is reportedly expected, and a possible long-term inmate capacity of around 2,000 has been envisaged.

¹³⁰ *Inouye About X-Ray: “I’d Rather be There Than Kabul”*. American Forces Information Service, 1 February 2002. Op cit.

¹³¹ Commander, Joint Task Force-160, Camp X-Ray. *Today*. BBC Radio 4, 9 March 2002. Rule 27 of the Standard Minimum Rules for the Treatment of Prisoners states: “Discipline and order shall be maintained with firmness, but with no more restriction that is necessary for safe custody and well-ordered community life.”

protests at the time of writing. As a result of the high temperatures, a number of prisoners were taken to the infirmary for intravenous rehydration. Most of the rehydrations were reported to be voluntary.¹³² On 31 March 2002, the authorities began the forcible feeding via stomach tubes of two Guantánamo detainees who had been on hunger-strike since 1 March.

The authorities acknowledged that a more general reason behind the protest was “the detainees’ displeasure over the uncertainty of their future”.¹³³ One senior official said: “This doesn’t surprise us... Many of them, the first group, got there seven weeks ago, so they are going through the shock and amazement of being some place that they’re not familiar with... I think the real issue is, what’s their fate?”¹³⁴ The deputy commander of Camp X-Ray said: “Consider yourself being locked up 24 hours a day; getting out once in a while – very, very little getting out. Not knowing what’s going to happen, probably not even knowing why you’re here. I think it would frighten anybody”.¹³⁵ On 11 March 2002, one of the detainees shouted to US and foreign journalists who were outside the perimeter of the camp: “We need the world to know about us. We have no legal rights, nothing. So can somebody know about us? Can you tell the world about us?”¹³⁶

As much as the actual conditions in which the Guantánamo detainees were transferred and are held is a cause for concern, it is this legal limbo – denial of prisoner of war status, interrogation without access to counsel, denial of *habeas corpus*, limited communications with families, potential trial by military commission with the power to pass death sentences, and the prospect of indefinite detention without charge or trial – which has caused widespread international disquiet.

Undermining the presumption of innocence

¹³² *Fewer detainees joining hunger strike*. Miami Herald, 7 March 2002.

¹³³ *Some Al Qaeda, Taliban Detainees Refuse Food*. American Forces Information Service, 28 February 2002.

¹³⁴ Brigadier General John W. Rosa Jr, deputy director for operations, Joint Chiefs of Staff. Department of Defense news briefing, 1 March 2002.

¹³⁵ *Today*. BBC, Radio 4. 7 March 2002. As a result of the hunger-strike, Brigadier General Michael Lehnert, commander of Joint Task Force-160 at Guantánamo Bay, agreed to provide the detainees with a weekly update on the status of their cases. The first such update took place on 8 March, in which he told them that they were being held because they were “suspected of being high-ranking Taleban or *al-Qa’ida*”, and that their prospects for possible eventual return to their families would be improved if they cooperated with the US authorities. The commander told reporters that if the detainees “continue to lie, they will be here for a very long time”. *Today*. BBC, Radio 4. 9 March 2002. On 22 March 2002, the commander told the detainee for the first time that some of them could be brought for trial before military commissions. *Guantánamo prisoners told about tribunals*. Miami Herald, 23 March 2002.

¹³⁶ For example: *Guantanamo inmate: ‘Nobody cares’*. Associated Press, 12 March 2002.

“These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established.” Rear Admiral John Stufflebeem on Guantánamo detainees

A fundamental component of the right to fair trial under international human rights law is the right of everyone to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. This right is guaranteed even to those facing charges of the worst possible crimes in the world: genocide, crimes against humanity and war crimes, under the Statutes of the Yugoslavia and Rwanda Tribunals and the Rome Statute of the International Criminal Court.¹³⁷ This right applies at all stages of proceedings, from arrest or detention until judgment.

This right is recognized under customary and conventional international humanitarian law as well, and may not be derogated from under any circumstances. In both international and non-international armed conflicts, the presumption of innocence must be respected. Under customary and conventional international humanitarian law, any person arrested, detained or interned for actions related to the armed conflict is entitled to be presumed innocent until proved guilty according to law.¹³⁸

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also means that public authorities should not make statements relating to the guilt or innocence of any individual before the outcome of a trial. As the Human Rights Committee has stated in its authoritative interpretation of the right to the presumption of innocence guaranteed under the ICCPR: “It is...a duty for all public authorities to refrain from prejudging the outcome of a trial.”¹³⁹

¹³⁷ ICTY: Article 21.3. ICTR: Article 20.3. Rome Statute of the ICC: Article 66 states: “1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.”

¹³⁸ Article 75(3)(d) of the First Additional Protocol to the Geneva Conventions, which the USA has recognized reflects customary international law, expressly provides that “[a]nyone charged with an offence is presumed innocent until proved guilty according to law”. Article 6(2)(d) of the Second Additional Protocol to provides with respect to the prosecution and punishment of criminal offences related to a non-international armed conflict, “[a]nyone charged with an offence is presumed innocent until proved guilty according to law”.

¹³⁹ General Comment 13. Paragraph 7.

The Pentagon's procedures for trials by military commission, issued on 21 March 2002, include the presumption of innocence. However, this guarantee has been undermined by a pattern of public commentary on the presumed guilt of the Guantánamo detainees, including by the very same officials who have overall control over the military commissions, namely President Bush and Secretary of Defence Rumsfeld (see further below).¹⁴⁰

On 28 January 2002, for example, the President referred to the Guantánamo detainees as "these killers -- these are killers", and, explaining that he would not grant them prisoner of war status, added: "These are killers. These are terrorists".¹⁴¹ Similarly in the State of the Union address of 29 January 2002, he stated: "Terrorists who once occupied Afghanistan now occupy cells at Guantánamo Bay". On 20 March 2002, discussing his proposed military commissions, President Bush said: "Remember, these are -- the ones in Guantánamo Bay are killers. They don't share the same values we share."¹⁴²

On 20 January 2002, Secretary of Defence Rumsfeld described the Guantánamo detainees as "hard-core, well-trained terrorists",¹⁴³ and again on 27 January as "among the most dangerous, best-trained, vicious killers on the face of the earth."¹⁴⁴ On 8 February he said that the treatment of all those held in Camp X-Ray would be "consistent with the principles of fairness, freedom and justice that our nation was founded on, the principles that they obviously abhor and which they sought to attack and destroy."¹⁴⁵ On 23 February, discussing the prospect for returning them to their countries of origin, Secretary Rumsfeld said: "[W]e prefer to only give them back to countries that have an interest in prosecuting people that ought to be prosecuted, rather than simply turning them loose, putting them back on the street, and having them go get into more airplanes and fly into the Pentagon and the World Trade Center".¹⁴⁶

¹⁴⁰ On 27 February, Secretary Rumsfeld acknowledged the possibility that some held in Camp X-Ray could be innocent. This was the first time, as far as AI is aware, that he or any other administration official had said as much. He said: "If we find that someone's an innocent and shouldn't have been brought there, why, they would be released." Interview with Cale Ramaker, KSDK-NBC, St Paul, Minnesota, 27 February 2002. The deputy commander of Camp X-Ray has reportedly said that some of the detainees are "victims of circumstance" and probably innocent. *An uneasy routine at Cuba prison camp*. New York Times, 16 March 2002.

¹⁴¹ White House. President Meets with Afghan Interim Authority Chairman. Remarks by the President and Chairman of the Afghan Interim Authority Hamid Karzai. 28 January 2002.

¹⁴² Remarks by the President to the travel pool. 20 March 2002.

¹⁴³ Secretary Rumsfeld media stakeout at NBC. 20 January 2002.

¹⁴⁴ *Rumsfeld visits, thanks US troops at Camp X-Ray in Cuba*. American Forces Information Service.

¹⁴⁵ Department of Defense news briefing, 8 February 2002.

¹⁴⁶ Interview with *The Telegraph*, 23 February 2002.

Other officials in the US administration have also adopted a less than rigorous public approach to the presumption of innocence, with the detainees collectively labelled as “terrorists” and explicitly linked to the attacks of 11 September. For example, on 20 January 2002, Attorney General John Ashcroft, asked about the Guantánamo Bay detainees, said: “These people are terrorists... This is part of the conspiracy where innocent women and children, innocent Americans, were destroyed not as an act of conventional war, but in the context of what I consider to be war criminality.” Defending the treatment of the Camp X-Ray detainees, he stated: “They are terrorists. They are uniquely dangerous”.¹⁴⁷ These statements are inconsistent with the Attorney General’s duties under the UN Guidelines on the Role of Prosecutors.¹⁴⁸ Prosecutors from the Justice Department, which Attorney General Ashcroft heads, may be used in trials by military commission.¹⁴⁹

Officials outside of the US administration have sent out the same message. For example, US Senator James Inhofe, after visiting Guantánamo Bay in January, commented to the media afterwards that the conditions of detention were “better than they deserve. We’re dealing with terrorists here”. Another Congressman, Representative John Mica, displayed similar sentiment when he said he thought conditions were “too good for the bastards”.¹⁵⁰ Senior Pentagon officials, too, have publicly commented on the presumed guilt of the detainees. For example, Rear Admiral John Stufflebeem, has said: “These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established.”¹⁵¹

Concern about ensuring strict respect for the right to the presumption of innocence of the Guantánamo detainees is heightened because of the political and public climate in which they have been detained; the fact that they are being interrogated without access to legal counsel; the prospect that some of them may face military commissions that lack independence from the

¹⁴⁷ CNN Late Edition, 20 January 2002.

¹⁴⁸ Guideline 12 requires that “[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”. Guideline 13 provides that “[i]n the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) Protect the public interest, act with objectivity, take proper account of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect....”.

¹⁴⁹ “Prosecutors and Assistant Prosecutors [at the military commissions] shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States”. Department of Defense, Military Commission Order No. 1, 4(B)(2).

¹⁵⁰ *Congressional visitors say prison is fine*. Miami Herald, 26 January 2002.

¹⁵¹ Department of Defense News Briefing, 28 January 2002.

executive; and the fact that they may not be tried at all by the USA, but detained indefinitely or repatriated for possible prosecution elsewhere having been labelled as “terrorists” by the US authorities.

The principle of *non-refoulement* and the right to seek asylum

“We prefer to only give them back to countries that have an interest in prosecuting people that ought to be prosecuted.” US Secretary of Defence, 23 February 2002.

The US authorities have raised the prospect of the repatriation of some of the people held at Guantánamo Bay, with a possible condition that they will only be returned to countries willing to prosecute them. For example, a Pentagon spokesperson explained that in the case of “those countries that we feel would handle them appropriately, depending on the person and depending on the circumstances, [repatriation] probably will happen... But we want to make sure these people are not back out on the streets, back out on the roads doing what they have done.”¹⁵² Similarly, Under Secretary of Defense Douglas Feith has explained that “if we find we’re holding somebody who is not of intelligence interest to us, is not of law enforcement interest to us, is not a threat, in our view, to Americans, to the United States, to our interests, to our, you know, allies or friends as a terrorist, if we don’t have any interest in holding the person, we’ll let them go... We are talking with various countries about the possibility of transferring people that we are holding after we are no longer interested in holding them to other countries that might be interested in prosecuting them”.¹⁵³ On 8 April 2002, Secretary of Defence Rumsfeld suggested that Yasser Esam Hamdi, a possible US/Saudi dual national (see introduction) transferred to Virginia from Guantánamo on 5 April, might be sent to Saudi Arabia if he had no intelligence or prosecutorial value to the US authorities.¹⁵⁴

Some government officials from the detainees’ countries of origin have suggested that their nationals should be returned. For example, France’s Minister of Justice has reportedly said that it would be “preferable” to have the French nationals in Guantánamo Bay returned to France “in part because our system guarantees a full and fair process”¹⁵⁵. Russian prosecutors are reportedly preparing to prosecute three Russian nationals being held in Guantánamo Bay. The country’s Justice Minister reportedly said that Russia would likely seek extradition of the three men.¹⁵⁶ The Yemeni authorities have asked for their nationals held in Guantánamo,

¹⁵² Department of Defense News Briefing, 28 January 2002.

¹⁵³ Department of Defense news briefing on military commissions, 21 March 2002.

¹⁵⁴ Department of Defense news briefing, 8 April 2002.

¹⁵⁵ “...d’une part parce que notre système garantit un vrai procès contradictoire”. *La justice s’invite à Guantanamo*. Libération, 11 March 2002.

¹⁵⁶ *Russia to prosecute US captives*. Associated Press, 2 April 2002.

reportedly numbering around 50, to be returned to Yemen.¹⁵⁷ On 28 January 2002, the Interior Minister of Saudi Arabia stated that around 100 of the 158 detainees held in Guantánamo Bay at that time were Saudi nationals, and that they should be returned to Saudi Arabia for interrogation and possible prosecution. President Bush stated that the US authorities would “make a decision on a case-by-case basis as to whether they go back to Saudi Arabia or not”.¹⁵⁸

The US authorities must respect scrupulously the principle of *non-refoulement*, generally regarded as a norm of customary international law, and not send any of the detainees to countries where they would be at risk of serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment and unfair trials, or to countries where they would be at risk of the death penalty.¹⁵⁹ If the extradition of any of the detainees is requested by other countries, the decision on whether to extradite or not should be determined in a fair individual procedure. If there are substantial grounds for believing the individuals are at risk of serious human rights abuse, the United States should refuse the request.

As a state party to the 1967 Protocol to the 1951 Convention relating to the Status of Refugees, the United States must ensure that the detainees will be able to exercise their right to seek and enjoy asylum in a fair and satisfactory procedure if they so wish. In the event that individuals were determined, pursuant to a fair procedure, to be excludable from international refugee protection, the principle of *non-refoulement* (in its broadest sense) should still be respected.

The prospect of indefinite detention without trial or after acquittal

Interviewer: “*Is it possible, then, that we're going to have a kind of prisoner of war camp, not in the legal sense, at Guantánamo Bay for an indefinite period of time?*” Deputy Secretary of Defence Paul Wolfowitz: “*I think that's probably a good way to think about it.*”¹⁶⁰

¹⁵⁷ Yemen Observer, 23 March 2002.

¹⁵⁸ President Meets with Afghan Interim Authority Chairman. White House. 28 January 2002.

¹⁵⁹ For example, in 1999 Amnesty International sent urgent appeals to the USA not to deport Hani al-Sayegh to Saudi Arabia because he would be at risk of torture, unfair trial and execution. Detained in connection with the 1996 bombing of a US military complex at al-Khobar, he was nevertheless forcibly returned to Saudi Arabia in October 1999. The US Government stated that it had received (undisclosed) assurances that he would not be tortured. Today, he remains in virtual incommunicado detention in Saudi Arabia, his legal status unknown. AI fears that he remains at risk of torture, and that if he comes to trial in connection with the bombing, may face execution after secret proceedings. On 21 June 2001, Hani al-Sayegh and 13 others were indicted on capital charges in the USA, along with 13 others, in connection to the al-Khobar bombing.

¹⁶⁰ Interview with Fox News Sunday, 17 February 2002.

Closely tied to the presumption of innocence is the right to be tried within a reasonable time or to release from detention. The US Government is contemplating the indefinite detention without trial of an unknown number of people in Guantánamo Bay. The Military Order signed by President Bush on 13 November 2001 allows for detention without trial.¹⁶¹ Separately, the government has stated that “the ultimate course of action remains to be determined with respect to each of the detainees at Guantánamo, and may include any of a number of different possible options, including, *inter alia*, detention and trial pursuant to the Military Order, trial by other means such as a civilian court, repatriation, release, or *continued detention under legal authority other than the Order*.” [emphasis added].¹⁶² As noted above, a permanent 408-cell facility is due to open in April 2002 at Guantánamo Bay to replace the temporary Camp X-Ray and may ultimately be expanded to be able to house some 2,000 prisoners.

Under international law, including Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR), and under the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, criminal proceedings must be started and completed within a reasonable time. While there is no precise time under international law of what constitutes “a reasonable time”, indefinite detention without charge or trial would be a clear violation of international law.

The Pentagon’s General Counsel said on 21 March 2002 that some of the detainees could be held “for the duration of the conflict. And the conflict is still going and we don’t see an end in sight right now.” He also stated that even if a detainee was tried by military commission and acquitted, that detainee “may not necessarily automatically be released”.¹⁶³ The Secretary of Defence has sought to clarify the government’s position on this issue: “Even in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over. Detaining enemy combatants for the duration of a conflict is universally recognized as responsible and lawful. This is fully consistent with the Geneva Conventions and other war authorities.. The detainees include dangerous terrorists who committed brutal acts and are sworn to go back to do it again”.¹⁶⁴

¹⁶¹ “It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, *if the individual is to be tried*, that such individual is tried only in accordance with section 4.” [emphasis added]. Section 2(b) of the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.

¹⁶² *Shafiq Rasul v George Walker Bush*. Respondents’ motion to dismiss petitioners’ first amended petition for writ of *habeas corpus*. 18 March 2002.

¹⁶³ Department of Defense news briefing on military commissions, 21 March 2002.

¹⁶⁴ Department of Defense news briefing, 28 March 2002.

The above statement raises troubling issues. The Secretary of Defence, who as detailed below has been given a very substantial role in the operations of the proposed military commissions, once again displayed a less than stringent respect for the presumption of innocence. Secondly, while it is correct that the Third Geneva Convention allows a party to an armed conflict to hold prisoners of war until the “cessation of active hostilities” (in this case the military conflict in Afghanistan), the USA has refused to grant prisoner of war status to the detainees or to bring any of them before a competent tribunal to resolve cases of disputed status. The Secretary of Defence’s reliance upon the Geneva Conventions to justify indefinite detention would appear to be another example of the US Government’s pick and choose attitude to international law. In any event, the USA is proposing that its own “war on terrorism” – a conflict which has been projected to last far into the future – rather than the military conflict in Afghanistan, should be the controlling factor in determining release dates of selected detainees. Secretary Rumsfeld said: “I think that the way I would characterize the end of the conflict is when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities”.¹⁶⁵

International law and standards, recognizing the need to safeguard the right to liberty and freedom from arbitrary arrest or detention, and to prevent violations of fundamental human rights, require that all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority. Article 9(4) of the International Covenant on Civil and Political Rights states: “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 that detention is not lawful.”¹⁶⁶ As stated in the introduction to this memorandum, the Human Rights Committee has said that this principle applies to all prisoners and detainees, and is non-derogable even in times of emergency.

In 1998, the Human Rights Committee expressed its continuing concern that the use of administrative detention on security grounds in Israel allowed people to be held “for long and apparently indefinite periods of time in custody without trial”. The Committee also expressed its concern that “Palestinians detained by Israeli military order in the occupied territories do not have the same rights to judicial review as persons detained in Israel under ordinary law... The Committee considers the present application of administrative detention to be incompatible with

¹⁶⁵ Department of Defense news briefing, 28 March 2002.

¹⁶⁶ Principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority”. Principle 11 (1) of the Body of Principles states: “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.”

articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency”. The Committee stressed that “a State party may not depart from the requirement of effective judicial review of detention” as guaranteed under Article 9(4) of the ICCPR.¹⁶⁷

The possibility of indefinite detention without trial has not been raised in relation to US nationals taken into custody in Afghanistan and elsewhere outside the USA, only in the case of similarly placed foreign nationals. Amnesty International reiterates that “effective judicial review” of their detention is urgently required.

The threat of trials by military commission

*“The actions of the United States provides authoritarian regimes throughout the world with the excuse they crave for their treatment of (real or supposed) opponents.”*¹⁶⁸

In its initial report to the Human Rights Committee, the expert body set up by the International Covenant on Civil and Political Rights (ICCPR) to monitor that treaty’s implementation, the US Government said that the USA provided trials to “both citizens and nationals of other countries” that recognized “the fair trial rights embodied in article 14 of the Covenant”. It continued: “While not perfect, the American court systems do not remain static but constantly adapt to evolving notions of fairness and due process”.¹⁶⁹

On 13 November 2001, President Bush signed a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (“Military Order”). The Military Order is both sweeping and open-ended.¹⁷⁰ As noted above, it provides for the

¹⁶⁷ UN Doc. CCPR/C/79/Add.93. 18 August 1998. Article 7 of the ICCPR prohibits torture or other cruel, inhuman or degrading treatment or punishment; Article 16 states that “[E]veryone shall have the right to recognition everywhere as a person before the law.”

¹⁶⁸ Letter to the Editor. Douwe Korff. Guardian (UK) 18 January 2002. “Last year at the request of the Organisation for Security and Cooperation in Europe, I acted as the main expert in a number of training sessions for judges, prosecutors and lawyers in Uzbekistan, teaching them international standards.... I tried to show them that under these international standards all...persons suspected of criminal offences are entitled to a fair trial... and that the death penalty may not be imposed by special military tribunals. How can I be expected to convince these legal practitioners of the validity and universal acceptance of these standards if one of the main members of the OSCE, bound by treaties and agreements and which prides itself on being the leader of the world’s democracies, violates these fundamental principles in its ‘war against terrorism’?”

¹⁶⁹ UN Doc. CCPR/C/81/Add.4, 24 August 1994. Para. 362-363.

¹⁷⁰ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Section 3(a). The Order covers anyone, who is not a US citizen, who “(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 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

indefinite detention without trial of foreign nationals named by the President. It also provides for their trial by military commissions – executive bodies, not civilian courts. Amnesty International has called for the Military Order to be revoked because its provisions threaten to violate international principles of justice, including the separation of powers, freedom from non-discrimination, the right to appeal, and the right to defence counsel of one’s choosing.¹⁷¹

At the time of writing, no one had been named by President Bush for trial by the military commissions, although Abu Zubaydah, a 30-year-old Saudi-born Palestinian arrested in Pakistan on 28 March 2002, was reportedly being raised within the administration as a likely candidate.¹⁷² The whereabouts of Abu Zubaydah, an alleged leading member of *al-Qa’ida*, were unknown at the time of writing because the US authorities were keeping his location secret “as a matter of security”.¹⁷³

On 21 March 2002, the Department of Defence released the operating procedures for trials by the military commissions.¹⁷⁴ Although the Pentagon procedures addressed some of the criticisms made after the Military Order became public in November 2001, they were unable to overcome the fundamental flaws of the proposed commissions. Amnesty International repeated its call for revocation of the Military Order and for no one to be named to appear before the commissions.¹⁷⁵ It should also be noted that the Pentagon’s procedures themselves contain the caveat: “In the event of any inconsistency between the President’s Military Order and this Order... the provisions of the President’s Military Order shall govern”.

! The Military Order provides for a lower standard of justice for foreign nationals than similarly placed US nationals, in violation of international law prohibiting discriminatory treatment, including on the basis of nationality.

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)...”. Asked whether the option of military commissions could remain in place indefinitely, the Pentagon’s General Counsel stated that the procedures “do not have a sunset provision in them... I’d only observe that the war, we think, will last for a while”. Department of Defense news briefing on military commissions, 21 March 2002.

¹⁷¹ *Presidential order on military tribunals threatens fundamental principles of justice*. 15 November 2001, AMR 51/165/2001.

¹⁷² *US says a key detainee had planned more attacks*. New York Times, 3 April 2002. *FBI chief says al Qaeda aide’s arrest will help prevent attacks by terrorists*. Washington Post, 4 April 2002.

¹⁷³ Secretary of Defence, Department of Defence news briefing, 3 April 2002.

¹⁷⁴ Department of Defense. Military Commission Order No. 1. 21 March 2002.

¹⁷⁵ *Military commissions: Second-class justice*. 22 March 2002, AMR 51/049/2002.

Only foreign nationals will be subject to the military commissions, even if accused of lesser crimes than US nationals tried in ordinary civilian courts. As a result, any foreign nationals selected for trial by the commissions will receive a lower standard of justice than their US counterparts. Questioned about the commissions by US journalists, members of the administration have repeatedly reaffirmed – to an extent that could be interpreted as tacit acknowledgement of this proposed second-class justice – that US nationals will be exempt from such trials. For example, asked about how people would be selected for trial by the commissions, Secretary of Defence Rumsfeld stated: “[W]e know the first cut is that no one who’s an American would come to a commission. That’s part of the way the Military Order’s written. So that’s an easy cut. If there’s an American involved, he’s not going to go to the commission.”¹⁷⁶ The Deputy Secretary of Defence has said: “The only thing that I can tell you for sure is no US citizens will go before these commissions”.¹⁷⁷ At a news conference to explain the guidelines for the military commissions, the Pentagon’s General Counsel repeated to journalists that anyone made subject to the Military Order ‘may not be a United States citizen.’¹⁷⁸

On 4 April 2002, explaining that one of the Guantánamo detainees, Yasser Esam Hamdi, appeared to be a US national (see introduction), Pentagon spokesperson Victoria Clarke said: “The one thing we can say, American citizen – he would not be considered a candidate for the military commission.”¹⁷⁹ Earlier, presidential spokesperson Ari Fleischer, commenting on the case of John Walker Lindh, a US national taken into custody in Afghanistan, said that “there’s no consideration of a military tribunal. The military tribunals are exclusively for non-citizens of this country; Mr. Walker is a citizen.”¹⁸⁰ John Walker Lindh is set to receive a trial in ordinary civilian Federal District Court, with ordinary rules of evidence and full rights of appeal in the event he is convicted. In contrast, Section 1(f) of the Military Order, to which only foreign nationals are subject, states that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”. Furthermore, there will be no right of appeal to an independent tribunal for those convicted by military commission.

To the extent that trials conducted under the provisions of the Military Order fall short of those afforded to US citizens accused of similar offences, and that this different treatment is inexplicable by any reasonable and objective criteria, the commissions will be

¹⁷⁶ Department of Defense news briefing, 26 February 2002.

¹⁷⁷ Interview with Wolf Blitzer, CNN, 21 March 2002.

¹⁷⁸ Department of Defense news briefing on military commissions, 21 March 2002.

¹⁷⁹ Department of Defence news briefing, 4 April 2002.

¹⁸⁰ Press briefing, 17 December 2001.

discriminatory.¹⁸¹ Such discriminatory treatment would violate the principle that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” as recognized in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits any discrimination, including on the basis of national origin. Indeed, it deprives persons tried before such executive bodies of their right, recognized in Article 14(1) of the ICCPR, to “be equal before the courts and tribunals”. The Human Rights Committee, in its authoritative interpretation of the ICCPR, has stated: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.¹⁸² In its comments on the US Government’s initial report on US compliance with the ICCPR, the Human Rights Committee welcomed the government’s assurance that the “understanding” it made upon ratification in relation to the principle of non-discrimination “is construed by the Government as not permitting distinctions that would not be legitimate under the Covenant”.¹⁸³

In its report to the Human Rights Committee, the US Government stated that it was “committed to the international principle of equal protection and is actively moving toward ratification of the International Convention on the Elimination of All Forms of Racial Discrimination”.¹⁸⁴ The Convention, which the USA subsequently ratified in 1994, requires that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”, including the “right to equal treatment before the tribunals and all other organs administering justice”.¹⁸⁵

Principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 6(1) of the Standard Minimum Rules for the Treatment

¹⁸¹ The Human Rights Committee has observed 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 Covenant.” General Comment 18, 1989.

¹⁸² General Comment 18. 1989.

¹⁸³ UN Doc. CCPR/C/79/Add.50. 7 April 1995. When it ratified the ICCPR, the US Government filed several “understandings”, “declarations” and “reservations”. This included: “The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status...to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective...”.

¹⁸⁴ UN Doc. CCPR/C/81/Add.4, 24 August 1994. Para. 362-363.

¹⁸⁵ Article 5. In the Convention, the term “racial discrimination” means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms...”. (Article 1). The Human Rights Committee adopted this definition in relation to the ICCPR. General Comment 18, 1989.

of Prisoners, both prohibit discriminatory treatment, including on the basis of nationality. In addition, Article 75(1) of the First Additional Protocol to the 1949 Geneva Conventions, which is applicable to all people captured in connection with an armed conflict, regardless of whether they are granted prisoner of war status, and which the USA recognizes reflects customary international law,¹⁸⁶ states that: “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour... national or social origin...”.

! The commissions would allow a lower standard of evidence than ordinary civilian courts in the USA. Concern on this issue is heightened by the fact that the commissions will have the power to hand down death sentences.

The Pentagon’s guidelines confirm that commissions would allow a lower standard of evidence than is admissible in the ordinary courts, including hearsay evidence. Such evidence, and the possible use of secret evidence and anonymous witnesses, is particularly troubling given that the commissions will have the power to hand down death sentences. There is an ever-growing body of evidence of the error-prone, discriminatory and arbitrary nature of the death penalty system in the ordinary US civilian courts (see below). The potential for irrevocable miscarriages of justice in the case of death sentences handed down by military commissions admitting lower standards of evidence and lacking the right of appeal, can only be even greater.

US national John Walker Lindh is facing a maximum sentence of life imprisonment without the possibility of parole on charges that he conspired with the Taleban and *al-Qa’ida* to kill US nationals.¹⁸⁷ If he were a foreign national facing trial by military commission on similar charges, he would apparently be eligible for the death penalty under the Military Order.

¹⁸⁶ Remarks by M. Matheson (Deputy Legal Adviser, US Department of State) in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int’l L. & Pol. 415, 426 (1987), cited in Theodor Meron, *Human rights and humanitarian norms as customary law*, Clarendon Press, page 65; Jeanne M. Meyer & Brian J. Bill, eds, *Operational Law Handbook* (Charlottesville, Virginia: International and Operational Law Department, Judge Advocate General’s School 2002), Chapter 2, page 1; Brian J. Bill, ed., *Law of War Workshop Deskbook*, (Charlottesville, Virginia: International and Operational Law Department, Judge Advocate General’s School 2002), Chapter 3, pages 8-9.

¹⁸⁷ John Lindh was indicted in the US District Court for the Eastern District of Virginia on 5 February 2002 on 10 charges. He has pleaded not guilty. He would have been eligible for the death penalty if charged with treason.

The Military Order expressly states that anyone named for trial under it will not be able to “seek any remedy” in any court in the USA or anywhere else in the world, thereby ruling out access to judicial redress for any human rights violations that may have occurred during arrest, detention or prosecution. Disturbingly, the Pentagon’s guidelines do not expressly exclude statements extracted under torture or other coercive methods. Under international law, any statement made as a result of torture is inadmissible in evidence, except in proceedings against the alleged perpetrator of the torture.¹⁸⁸ Other international standards exclude not only any statements extracted under torture, but also those elicited as a result of other cruel, inhuman or degrading treatment or punishment.¹⁸⁹ The Human Rights Committee, in its interpretation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the “law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.¹⁹⁰ These statements apply not only to statements made by the accused, but also to statements made by any witness. Guideline 16 of the UN Guidelines on the Role of Prosecutors requires that prosecutors refuse to use any evidence that they have reasonable grounds to believe was obtained under such methods.¹⁹¹

The Pentagon’s procedures for the military commissions state that a defendant “shall not be required to testify during trial”, but also state that this “shall not preclude admission of evidence of prior statements or conduct of the Accused”.¹⁹² Article 14(3)(g) of the ICCPR states that anyone charged with a criminal offence shall “[n]ot be compelled to testify against himself or to confess guilt”. The Human Rights Committee has stated that “[i]n considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which

¹⁸⁸ Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: “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”.

¹⁸⁹ Article 12, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 69(7) of the Rome Statute of the International Criminal Court; Principle 27, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

¹⁹⁰ CCPR General comment 20, para. 12, 10 March 1992.

¹⁹¹ “When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.” UN Guidelines on the Role of Prosecutors, adopted 1990.

¹⁹² Military Commission Order No. 1, 5(F).

violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.”¹⁹³

John Walker Lindh’s lawyers have claimed that coercive methods were used in allegedly obtaining incriminating statements from their US client, allegations that have heightened concerns in the case of the hundreds of detained foreign nationals who have been denied access to legal counsel during interrogations in Afghanistan and Guantánamo Bay, and possibly in third countries, and who may yet face trial by military commission. The alleged ill-treatment of Afghan villagers by US soldiers in January and March 2002 outlined earlier in this memorandum also serve to deepen concern in this area.

! The military commissions would lack independence from the executive.

Principle 1 of the UN Basic Principles on the Independence of the Judiciary states: “The independence of the judiciary shall be guaranteed by the State... It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” The Military Order gives unfettered and unchallengeable discretionary power to the executive to decide whom will be prosecuted and under what rules, as well as to review convictions and sentences. This is inconsistent with the principle of the separation of the executive and the judiciary. Between them, the President and the Secretary of Defence (or his designee) will have the power under the Military Order to:

- name who will be tried by the military commissions;
- appoint military officers to be members of the commissions, and to remove them;
- determine how large the “jury” of commissioners will be in any particular trial;¹⁹⁴
- designate which member will serve as “judge” to preside over the proceedings;¹⁹⁵
- appoint the Chief Prosecutor, a judge advocate (lawyer) of the US armed forces;
- appoint the Chief Defense Counsel, a judge advocate of the US armed forces;
- revoke the eligibility of any official to appear before the commissions;

¹⁹³ CCPR General comment 13, para. 14, 13 April 1984. Article 7 of the ICCPR prohibits torture or other cruel, inhuman or degrading treatment or punishment. Article 10(1) requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

¹⁹⁴ “Each Commission shall consist of at least three but no more than seven members, the number being appointed by the Appointing Authority.” Military Commission Order No. 1, 4(A)(2). The Appointing Authority is the Secretary of Defence or a designee. A conviction, on the standard of beyond a reasonable doubt, is by two thirds vote. Sentencing is also by two thirds vote, except a death sentence which can only be passed by a unanimous vote of seven commissioners.

¹⁹⁵ “From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.” Military Commission Order No. 1, 4(A)(4).

- approve the charges prepared by the prosecution;
- approve plea agreements;
- vet the level of investigative or other resources to be made available to the defence;¹⁹⁶
- decide which parts of the proceedings should be held *in camera*,¹⁹⁷ and decide whether open proceedings may include attendance by the public and accredited media;
- pick the panel of three military officers (or civilians temporarily appointed as military officers) who would review the trial record;
- make the final decision in any case, including in death penalty cases whether a condemned defendant will live or die;
- amend the operating procedures of the commissions at any time, within the scope of the Military Order of 13 November 2001.

Article 14(1) of the ICCPR requires that all trials be conducted by a “competent, independent and impartial tribunal established according to law”. The Human Rights Committee, the expert body set up by the International Covenant on Civil and Political Rights to monitor that treaty’s implementation, has stated that the right to trial by a competent, independent and impartial tribunal is “an absolute right that may suffer no exception”.¹⁹⁸ The military commissions will not be independent. As executive officials, the impartiality of its members could not be guaranteed. None of the commission members would have the same security of tenure as civilian judges. In fact, any of them, including the Presiding Officer, could be removed by the Secretary of Defence “for good cause”.¹⁹⁹ Indeed, a military commission would not be a court “established according to law”, as required by Article 14, but an executive body set up by presidential order.

In 1994, for example, the Inter-American Commission on Human Rights stated that the Special Military Court in Peru was not “a competent, independent, and impartial tribunal” since it came under the Ministry of Defence, “making it a special court subordinated to an organ of

¹⁹⁶ “The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary to a full and fair trial”. Military Commission Order No. 1, 5(H).

¹⁹⁷ “The Commission shall...[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer”. Military Commission Order No. 1, 6(B)(3).

¹⁹⁸ *González del Rio v. Peru* (263/1987), 28 October 1992; Report of the HRC, vol. II, (A/48/40), 1993, at 20.

¹⁹⁹ Military Commission Order No. 1, 4(A)(3). Principle 11 of the UN Basic Principles on the Independence of the Judiciary states: “The term of office of judges, their independence, their security... shall be adequately secured by law”. Principle 12 states: “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

the Executive Branch”.²⁰⁰ US legislators criticized the 1996 trial of Lori Berenson, a US national charged with the “terrorism-related” offence of “treason”, before such a court in Peru. The USA’s resort to military commissions would puncture the credibility of any such criticism by US government officials in the future.

The Human Rights Committee, in its authoritative interpretation of the ICCPR, has stated: “The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”²⁰¹

The Human Rights Committee has also stated that the jurisdiction of special courts should be strictly defined by law. In its concluding observations on Iraq in 1997, for example, the Committee “expressed concern that in addition to the list of offences which were triable in special courts in Iraq, the Minister of the Interior and the Office of the President had discretionary authority to refer any other cases to these courts.”²⁰² As already stated, President Bush’s Military Order provides for sweeping military jurisdiction over a potentially wide-range of individuals, and is open-ended. Furthermore, the offences over which it has jurisdiction are not clearly spelled out in the Pentagon guidelines: “Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission”.²⁰³

Prisoners of war are, like other detainees, entitled to a fair trial, as recognized by various articles of the Third Geneva Convention, to which the USA is a State Party. Article 84 states: “In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized”. Indeed, Article 130 provides that “wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention” is a grave breach of that Convention – that is, it is a war crime. Article 75 of Additional Protocol 1, recognized by the USA as

²⁰⁰ Inter-American Commission on Human Rights. Annual Report 1994. 17 February 1995. Reports on individual cases, Report No. 27/94, case 11.084, Peru. November 30, 1994.

²⁰¹ General Comment 13, para. 4.

²⁰² UN Doc. CCPR/C/79/Add.84, 19 November 1997.

²⁰³ Department of Defense, Military Commission Order No. 1, 3(B).

reflecting customary international law, states: “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”.

! In violation of international law, there will be no right of appeal to an independent and impartial court.

Section 7(2) of the Military Order of 13 November 2001 states that any individual tried by the commissions “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”.

Instead, any defendant convicted by military commission will have his or her conviction and sentence reviewed by a three-member panel of military officers appointed by the Secretary of Defence,²⁰⁴ the official who approved the charges. This panel would review the record of the trial and make a recommendation. The Secretary of Defence would then review the record of the trial and the review body’s recommendation. The final decision on the case would reside with the President, the official who selected the suspect for trial by military commission, or the Secretary of Defence, if so designated by the President.²⁰⁵

Article 14(5) of the International Covenant on Civil and Political Rights expressly guarantees that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. As noted above, the Human Rights Committee has stated: “The provisions of article 14 apply to all courts and tribunals” and that proceedings must “genuinely afford the full guarantees stipulated in article 14.”

! The right to legal assistance of the defendant’s own choosing is not fully guaranteed under the Military Order.

Article 14(3)(d) of the International Covenant on Civil and Political Rights requires that anyone facing a criminal trial be able to “to defend himself in person or through legal assistance of his own choosing”. The Pentagon’s procedures issued on 21 March 2002 give a nod in the direction of this right, but stop short of guaranteeing it.

²⁰⁴ Department of Defense, Military Commission Order No. 1, 6(H)(4).

²⁰⁵ Department of Defense, Military Commission Order No. 1, 6(H)(6).

Under the procedures, the Chief Defense Counsel, appointed by the Secretary of Defence or designee, appoints a military officer, who is a judge advocate (military lawyer) of the US armed forces, to act as defence lawyer. However, the defendant may select another such US military officer to replace the appointed one. An indigent defendant would have no choice but to be represented by a military lawyer. A defendant may, at his or her own expense, retain a civilian lawyer, providing the latter is a US citizen with the necessary security clearance. Even then, the civilian lawyer would not have access to certain classified information used at the trial, which only the military co-counsel would be granted. If the defendant chooses and is able to retain such a civilian lawyer, he or she will still be represented by the US military lawyer, even if that goes against the defendant's wishes. This violates Article 14 of the ICCPR. The Human Rights Committee found that this right was violated in Uruguay when a defendant was forced to accept military counsel, although a civilian attorney was willing to represent him.²⁰⁶

Article 14(3)(b) of the ICCPR guarantees the right of defendants to communicate with counsel of their choosing. The Human Rights Committee has explained that this requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications."²⁰⁷ The Pentagon's procedures state that a defendant to be tried by military commission "must be represented at all relevant times" by the military counsel.²⁰⁸ This could be interpreted to mean that for defendants who have retained civilian lawyers, and who have been forced to retain military co-counsel against their wishes, confidential communications with their attorney of choice would be prevented.

- The USA has previously tried or is due to try individuals accused of serious organized crimes, cases that bring with them particular security issues. The creation of a system of special executive bodies to try similar crimes is unnecessary, contrary to international standards, and will undermine the international reputation and credibility of the United States.

²⁰⁶ CCPR/C/21/D/110/1981. 29 March 1984. *Acosta v Uruguay*. Under the USA's Uniform Code of Military Justice, if a US soldier facing a court martial decides to retain a civilian lawyer, he or she can dismiss the military lawyer. As with US civilians, US soldiers could not be tried by the military commissions. In the case of all crimes other than purely military offences (such as desertion, absence without leave, and disrespect towards superiors), they could be tried in an ordinary civilian Federal or State court for a crime violating Federal or State law, a foreign court, for crimes committed abroad, or a general court-martial. Decisions whether to try soldiers in an ordinary civilian court are made on a case by case basis and abroad based on the terms of any Status of Forces agreement with the host state where the crime occurred. See "Military Jurisdiction" - Military Justice Fact Sheets, National Institute of Military Justice, www.nimj.org.

²⁰⁷ General Comment 13, para 9. Principle 22 of the UN Basic Principles on the Role of Lawyers states: "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential".

²⁰⁸ Department of Defense, Military Commission Order No. 1, 4(C)(4).

Zacarias Moussaoui, a French national arrested in the USA prior to the attacks of 11 September 2001, had reportedly been discussed within the US administration as the possible first candidate for the military commissions. Nevertheless, in a development welcomed by Amnesty International, on 11 December 2001 it was announced that he would be tried in ordinary Federal District Court on charges that he conspired to carry out the 11 September attacks.²⁰⁹ Despite the seriousness of these charges, which would place Zacarias Moussaoui squarely within the reach of the Military Order, the US authorities evidently believe that the ordinary criminal justice system is able to try him, as they have believed previously, for example, in the case of people accused and convicted of involvement in the bombing of the US embassies in Tanzania and Kenya in 1998.

The creation of a separate system of trials before executive bodies for those who may yet face criminal charges in connection with the crimes of 11 September or other serious human rights abuses is contrary to international standards. Principle 5 of the UN Basic Principles on the Independence of the Judiciary, states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. 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.”

The United Nations Working Group on Arbitrary Detention has said: “One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has none the less found by experience that virtually none of them respects the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant.”²¹⁰

The Human Rights Committee has stated that “arbitrariness” is not to be equated simply with “against the law”, but must be interpreted more broadly to include elements of

²⁰⁹ In testimony before the Senate Armed Services Committee on 13 December 2001, Deputy Secretary of Defense Paul Wolfowitz, stated that the Department of Defense was not consulted before the decision was made to try Zacarias Moussaoui in Federal District Court. Amnesty International deeply regrets the US Attorney General’s decision, announced on 28 March 2002, to authorize federal prosecutors to seek the death penalty against Zacarias Moussaoui. At a press briefing on 19 March 2002, presidential spokesperson Ari Fleischer said: “I can share with you that when the President made the determination that Mr. Moussaoui would not be tried in a military tribunal, that he would indeed be tried in a civilian court, he was aware of the possibility that one of the charges could be brought included a death penalty. But this was a decision made by the professionals at the Attorney General’s office. The President is not involved in that process.”

²¹⁰ UN Doc. E/CN.4/1996/40, at 26.

inappropriateness, injustice and lack of predictability.²¹¹ Zacarias Moussaoui is charged with conspiracy to commit the very crime that led President Bush to sign the Military Order in the first place. The welcome decision to try Zacarias Moussaoui in an ordinary civilian court rather than before a military commission could render a decision to try anyone else in front of military commissions as arbitrary, in violation of international law.

The Military Order has generated widespread national and international concern. For example, in an urgent appeal to the US Government on 16 November 2001, the United Nations Special Rapporteur on the independence of judges and lawyers expressed his deep concern about the Order and “the wrong signals it sent, not only in the United States, but around the world.” He wrote: “The very fact that such powers are available to the Executive strikes at the core of the principles of the rule of law, equality before the law and the principles of a fair trial.” He stressed his belief that he was “not convinced that such repressive measures curtailing the core values of the rule of law and a fair trial are necessary”.²¹²

On 1 March 2002, the President of the Parliamentary Assembly of the Council of Europe said of the proposed military commissions: “The special courts set up by the US administration to try suspected international terrorists, without many of the legal safeguards provided by the US legal system and international law, do not represent a viable alternative”.²¹³

The International Commission of Jurists expressed its “alarm” at the Military Order: “The envisaged system of military commissions skewers the ordinary checks and balances and separation of powers essential to state institutions functioning under the rule of law. Verdicts reached by such bodies will not only carry adverse implications for the rights of defendants, but will also raise doubts domestically and internationally as to the legitimacy of the verdicts themselves. This consequence cannot but ultimately hinder the battle against terrorist activities. There is no reasonable basis upon which to conclude that ordinary civilian courts of law would in any way be deficient to meet the challenges of trying accused terrorists. On the contrary, such courts have previously proved optimally effective in achieving fair trials with just verdicts.”²¹⁴

A former US Assistant Secretary of State for Democracy, Human Rights, and Labor has written: “No country with a well functioning judicial system should hide its justice behind

²¹¹ UN Doc. CCPR/C/39/D/305/1988. 15 August 1990.

²¹² *UN expert on independence of judiciary concerned by military order signed by United States President*. United Nations press release, 16 November 2001.

²¹³ *Parliamentary Assembly: President’s statement on International Criminal Tribunals*. Council of Europe, 1 March 2002.

²¹⁴ *US military commissions should not try accused terrorists*. International Commission of Jurists, News Release, 21 November 2001.

military commissions”.²¹⁵ More than 300 law professors from around the country asserted that special military commissions would be “legally deficient, unnecessary and unwise”.²¹⁶ A Harvard law professor has written separately: “No matter how tempting or expedient, trials by military commission will prove disastrous - to the war against terrorism, to the Constitution and to the rule of law... Imagine how this looks to the rest of the world: Timothy McVeigh killed 168 of his fellow citizens. Yet he was entitled to all the constitutional protections of a federal criminal trial – held in the United States in public. Now, when the defendants are foreigners, most likely Muslims, the administration of justice is left to an ad hoc military commission...”²¹⁷

Following the release on 21 March 2002 of the Pentagon’s procedures for the military commissions, the New York Times stated in an editorial that “there is still no practical or legal justification for having the tribunals... [T]he tribunals would still constitute a separate, inferior system of justice, shielded from independent judicial review.”²¹⁸ In the same newspaper, a former White House official wrote: “Federal prosecutors recently decided not to use terrorist tribunals in trying the “20th hijacker” or the “shoe bomber”. Let’s hope that means last year’s notion of circumventing the civil courts, even as refined today, will quietly be shelved.”²¹⁹

At a hearing after President Bush signed the Military Order providing for military commissions, the Chairperson of the US Senate Committee on Armed Services, Senator Carl Levin, asserted: “If the rules adopted by the Secretary of Defense provide for a fundamental level of due process, it will be recognized as such by the civilized nations of the world. These military commissions will not only dispense prompt results, but just results, which, in turn, will enhance the status of the United States as the standard-bearer for democracy, respect for human rights and human liberty.”²²⁰

²¹⁵ *We have the right courts for Bin Laden*. By Harold Hongju Koh. New York Times, 23 November 2001.

²¹⁶ *In letter, 300 law professors oppose tribunals plan*. New York Times, 8 December 2001.

²¹⁷ *Al Qaeda should be tried before the world*. By Anne-Marie Slaughter, New York Times, 17 November 2001. Timothy McVeigh, convicted in the 1995 Oklahoma City bombing, was executed in 2001 after waiving his appeals.

²¹⁸ *Refining military tribunals*. New York Times, 22 March 2002.

²¹⁹ *Military tribunals modified*. William Safire. New York Times, 21 March 2002. The “20th hijacker” refers to Zacarias Moussaoui, accused of conspiracy to commit the 11 September crimes, and the “shoe bomber” is a reference to Richard Reid, a UK national facing trial in federal court in Boston for allegedly attempting to detonate explosives concealed in his shoes during a transatlantic flight in December 2001.

²²⁰ Testimony before the Senate Armed Services Committee on military commissions. Washington DC, 13 December 2001.

Amnesty International does not share Senator Levin's confidence. The proposed trials by military commission threaten fundamental human rights standards. They have already caused immense damage to the international reputation of the USA, and apparently compromised the USA's willingness to criticize unfair trials in other countries. After reviewing the State Department's 2001 Country Reports on Human Rights Practices, released in March 2002, the Lawyers Committee for Human Rights cited the entry on Egypt:

"The United States has scaled back its criticism of the use of military courts to try civilians accused of terrorism. In last year's report on Egypt, the State Department roundly condemned this practice, concluding that "military courts do not ensure civilian defendants due process before an independent tribunal." This year, that sentence is missing from the report. Likewise, last year's report said of military judges, "they are neither as independent nor as qualified as civilian judges in applying the civilian penal code". This year's report did not mention the issue. Ordinarily, each year's reports are an update of the previous year's language, and language is changed either to credit the government with making progress on human rights performance, or to cite a deterioration in rights protection. That is what makes these omissions in the Egypt report so significant. Far from making improvements, the situation on the ground in Egypt has actually worsened over the past year. For example, during 2000, no new cases of civilians were referred for trial by military courts, but in 2001 numerous civilians were sent before such tribunals.²²¹

It is clear that the presidential Military Order has put the USA's credibility on the line. No-one has yet been named to appear before its proposed commissions, however. Justice would best be served by revocation of the Order, or at the very least a presidential decision not to refer any individual to be tried by military commission. Asked why the military commissions were necessary, the Pentagon's General Counsel, replied: "It's necessary – well, and it is also not new. It is consistent with American history; I mean the use of military commissions historically has been an option for the president".²²²

The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States – a period which has seen the

²²¹ *Language condemning use of military tribunals in Egypt missing this year from 2001 State Department Country Reports on Human Rights.* Lawyers Committee for Human Rights, 4 March 2002. Amnesty International has repeatedly condemned unfair trials before military courts in Egypt (for example, see Amnesty International reports 1999, 2000, 2001, and forthcoming 2002). During 2001 in Egypt, hundreds of people were tried or referred to military courts which violate international standards for fair trial, including the right to a full review before a higher tribunal.

²²² Department of Defense news briefing on military commissions, 21 March 2002.

reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems.

The death penalty

“America will always stand firm for the non-negotiable demands of human dignity... We choose freedom and the dignity of every life.” President Bush, State of the Union, 29 January 2002

Asked whether anyone tried by military commission could receive a death sentence, Secretary of Defense Rumsfeld replied: “Sure”.²²³ In a sadly predictable announcement a month later, on 28 March 2002 Attorney General Ashcroft said that he had authorized federal prosecutors to seek the death penalty against French national Zacarias Moussaoui, arrested in August 2001 and charged in ordinary civilian court with conspiracy to commit the crimes of 11 September 2001. To many US officials, the death penalty remains an accepted and normal part of criminal justice. Their position on this cruel, inhuman and degrading punishment daily undermines their country’s claims to be a progressive force for human rights.

Amnesty International opposes the death penalty under all circumstances and has repeatedly called on the USA to join the clear majority of countries which have abolished capital punishment in law or practice.²²⁴ The international community has ruled out the death penalty as a sentencing option in international courts for even the worst crimes – genocide, war crimes and crimes against humanity. Amnesty International remains deeply concerned that the military commissions will have the power to hand down death sentences. The prospect of the USA carrying out executions after unfair trials by these executive bodies threatens to deepen the divide between the USA and the international community on this fundamental human rights issue.

There is an ever-growing body of evidence of the arbitrary, discriminatory and error-prone nature of the USA’s ordinary death penalty system, with many death sentences overturned on appeal on the basis of issues such as inadequate legal representation and prosecutorial misconduct. Since 1976, more than 90 prisoners have been released from death rows around the country after evidence of their actual innocence emerged. Indeed, the Governor of Illinois was so troubled by the errors being made under his state’s capital justice system that in January 2000 he instituted a moratorium on executions, which is still in effect. The potential for irrevocable miscarriages of justice in the case of death sentences handed down

²²³ Interview with *The Telegraph*, 23 February 2002.

²²⁴ See, for example, *USA: Arbitrary, discriminatory, and cruel: An aide-mémoire to 25 years of judicial killing*, AMR 51/003/2002, 17 January 2002, sent to federal and state governments.

by military commissions admitting lower standards of evidence and lacking genuine independence from the executive or right of appeal, can only be even greater.

The USA's continuing resort to the death penalty, and now its insistence on trying selected foreign nationals by military commission, will undermine international law enforcement cooperation and deter many countries from extraditing suspects to the United States.

Conclusion and recommendations

“There is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.” Kofi Annan, United Nations Secretary-General, January 2002²²⁵

Despite repeated statements that it is committed to international law and standards, the US Government is failing to meet its obligation to apply such law and standards to those it has in its custody in Afghanistan and Guantánamo Bay. In so doing, it has not only violated the rights of those individuals, but threatens to undermine the rule of law everywhere.

Amnesty International urges the USA to give serious consideration to the concerns raised in this memorandum, and to ensure that all its actions are in full compliance with international human rights and humanitarian law. The organization is separately requesting particular information from the US authorities, including on individual cases raised in this paper.

Amnesty International calls upon the US Government to:

- assess all its actions in relation to those in its custody in Afghanistan and Guantánamo Bay, to ensure that they comply not only with US law, but also with international human rights and humanitarian law;
- ensure that the special Justice Department team under the Solicitor General set up to counter legal challenges to the government's policy relating to the detainees held at Guantánamo Bay makes it a priority to ensure that the USA fully respects its legally binding obligations under international human rights law;
- do all in its power and influence to ensure that prisoners in Afghanistan are being treated in accordance with international human rights and humanitarian law, and publicly

²²⁵ Statement at Security Council meeting on counter-terrorism, 18 January 2002.

to denounce any torture or other cruel, inhuman or degrading treatment of which US personnel become aware;

- ensure that anyone taken into custody by the USA during the military conflict in Afghanistan who is handed over to the Afghan or Pakistan authorities is treated in accordance with international human rights and humanitarian law, and to seek to ensure that any officials who violate the rights of such detainees are brought to justice;
- ensure that any allegations of extrajudicial executions or torture and ill-treatment by US personnel in Afghanistan are promptly, thoroughly, independently and impartially investigated – not simply reviewed to see what “lessons might be learned”. The findings of all such investigations should be made public, and anyone found to have carried out human rights violations must be brought to justice;
- presume that all detainees in US custody captured during the military conflict in Afghanistan are prisoners of war and treat them accordingly. Any individual whose status is disputed should be promptly brought before a competent US tribunal for the matter to be resolved;
- ensure that all people taken into US custody are promptly informed of their rights under international law and standards;
- grant all detainees immediate access to legal counsel, and conduct no further interrogation of any detainee until this right is recognized;
- recognize the right of all detainees to challenge the lawfulness of their detention in a court of law and to be released if such detention is unlawful;
- ensure that all government officials are instructed to adhere strictly to their obligation to respect the presumption of innocence of all the detainees;
- facilitate fully communications and visits between detainees and family members;
- assess the new detention facility at Radio Range, Guantánamo Bay, to ensure that any detentions there comply with minimum international standards, paying particular attention to the relationship between the very small size of the cells and the time that will be spent in them by inmates;
- ensure that all detainees have adequate resort to exercise time out of their cells, free from shackles, in line with international minimum standards on the treatment of prisoners;

- revoke the Military Order of 13 November 2001, and ensure that no person is tried by the military commissions envisioned in it;
- not seek or carry out the death penalty against any of the people taken into custody in or outside the USA, including those currently held in Guantánamo Bay;
- not undermine the rule of law by promoting or participating in “renditions” of suspects abroad to the USA that circumvent or ignore extradition and human rights protections;
- not transfer anyone who is in US custody for interrogation in a country where there is a risk of abuses such as unfair trial, torture, the death penalty, or other cruel, inhuman or degrading punishment;
- denounce any torture or ill-treatment of detainees of which the USA becomes aware in other countries, including in the case of detainees to whom US agents have access and who were arrested or extradited at the USA’s behest or using US intelligence;
- respect scrupulously the principle of *non-refoulement*, and not send any detainee to countries where he or she would be at risk of serious human rights abuses, including unfair trial, torture, the death penalty or other cruel, inhuman or degrading punishment. If the extradition of any of the detainees is requested by other countries, the decision on whether to extradite or not should be determined in a fair individual procedure. If there are substantial grounds for believing the individuals are at risk of serious human rights abuses, the United States should refuse the request.
- ensure that the detainees will be able to exercise their right to seek and enjoy asylum in a fair and satisfactory procedure. In the event that any individual is determined, pursuant to a fair procedure, to be excludable from international refugee protection, the principle of *non-refoulement* must still be respected.