Parliamentary **Assembly**
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Lawfulness of detentions by the United States in Guantánamo Bay

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Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Kevin McNamara, United Kingdom, Socialist Group

Summary

The Committee on Legal Affairs and Human Rights considers that, through its practices surrounding detentions at Guantánamo Bay, the United States Government has betrayed its own highest principles. Guantánamo Bay is not a "legal black hole": international human rights law has at all times been fully applicable to all detainees and for those captured during now-ceased international armed conflict in Afghanistan, protection of certain rights may have been complemented by the provisions of international humanitarian law for the duration of that conflict.

On the basis of an extensive review of legal and factual material from a wide range of reliable sources, the Committee concludes that the circumstances surrounding detentions by the USA at Guantánamo Bay show unlawfulness on grounds including the torture and cruel, inhuman or degrading treatment of detainees and violations of rights relating to prisoner-of-war status, the right to judicial review of the lawfulness of detention and the right to a fair trial. The Committee also finds that the USA has engaged in the unlawful practices of secret detention and "rendition" (i.e. the removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention) and that US proposals to return or transfer detainees to other countries in reliance on "diplomatic assurances" risk violating the principle of *non-refoulement*.

The Committee therefore calls on the US Government to ensure respect for the rule of law and human rights by remedying these situations. It further calls on member states to protect the situation of persons from their countries who are or have been detained at Guantánamo and to ensure that they do not contribute to and are not complicit in such unlawfulness. Finally, the Committee calls on the Committee of Ministers to transmit its concerns to the US Government, reminding it of its obligations as an observer state to the Council of Europe and recommends measures to ensure monitoring of the future implementation of the Committee's proposals.

I. Draft resolution *[Link to the adopted text]*

1. The Parliamentary Assembly recalls and restates its outrage and disgust at the terrorist attacks on the United States of America of 11 September 2001, the horror of which has not been dimmed by the passage of time. It shares the USA's determination to combat international terrorism and fully endorses the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives.

2. Whilst the Assembly therefore offers its full support to the USA in its efforts to fight terrorism, this must be on condition that all measures taken are fully respectful of human rights and the rule of law. Conformity with international human rights and humanitarian law is not a weakness in the fight against terrorism but a weapon, ensuring the widest international support for actions and avoiding situations which could provoke misplaced sympathy for terrorists or their causes.

3. The USA has long been a beacon of democracy and a champion of human rights throughout the world and its positive influence on European development in this respect since World War II is greatly appreciated. Nevertheless, the Assembly considers that the US Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror". These errors have perhaps been most manifest in relation to Guantánamo Bay.

4. At no time have detentions at Guantánamo Bay been within a "legal black hole". International human rights law has at all times been fully applicable to all detainees. For those captured during international armed conflict in Afghanistan, protection of certain rights may have been complemented by the provisions of international humanitarian law (IHL) for the duration of that conflict. Since that international armed conflict ceased, however, international human rights standards have applied in the normal fashion.

5. The Assembly applauds and supports the work of the International Committee of the Red Cross (ICRC) and the various United Nations human rights protection mechanisms, along with that of non-governmental organisations including Human Rights First, the Center for Constitutional Rights and Amnesty International, in striving to improve detention conditions at Guantánamo Bay and ensure that detainees' rights are respected. It also thanks the European Commission for Democracy through Law for its Opinion on the possible need for further development of the Geneva Conventions, produced in response to a request from the Assembly's Committee on Legal Affairs and Human Rights.

6. The Assembly recalls the evidence provided by Mr Jamal Al Harith, former detainee, along with lawyers representing current and former detainees and other international experts, at the hearing held by its Committee on Legal Affairs and Human Rights in Paris on 17 December 2004.

7. On the basis of an extensive review of legal and factual material from these and other reliable sources, the Assembly concludes that the circumstances surrounding detentions by the USA at Guantánamo Bay show unlawfulness and inconsistency with the rule of law, on the following grounds:

i. many if not all detainees have been subjected to cruel, inhuman or degrading treatment occurring as a direct result of official policy, authorised at the very highest levels of government;

ii. many detainees have been subjected to ill-treatment amounting to torture which has occurred systematically and with the knowledge and complicity of the US Government;

iii. the rights of those detained in connection with the international armed conflict previously conducted by the USA in Afghanistan to be presumptively recognised as prisoners-of-war (POWs) and to have their status independently determined by a competent tribunal were not respected;

iv. there have been numerous violations of various aspects of all detainees' rights to liberty and security of the person, making their detention arbitrary;

v. there have been numerous violations of various aspects of all detainees' rights to fair trial, amounting to a flagrant denial of justice;

vi. the USA has engaged in the unlawful practice of secret detention;

vii. the USA has, by practicing "rendition" (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the principle of *non-refoulement*;

viii. US proposals to return or transfer detainees to other countries, even where reliant on "diplomatic assurances" concerning the detainees' subsequent treatment, risk violating the principle of *non-refoulement*.

8. The Assembly therefore calls on the US Government to ensure respect for the rule of law and human rights by remedying these situations and in particular:

i. to cease immediately all ill-treatment of Guantánamo detainees;

ii. to investigate, prosecute and punish all instances of unlawful mistreatment of detainees, no matter what the status or office of the person responsible;

iii. to allow all detainees to challenge the lawfulness of their detention before a regularly constituted court competent to order their release if detention is not lawful;

iv. to release immediately all those detainees against whom there is not sufficient evidence to justify laying criminal charges;

v. to charge those suspected of criminal offences and bring them for trial before a competent, independent and impartial tribunal guaranteeing all the procedural safeguards required by international law, without delay, whilst excluding imposition of the death penalty against them;

vi. to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made;

vii. to cease immediately the practice of secret detentions and to ensure full respect for the rights of any detainees currently held in secret, in particular the prohibition on torture and cruel, inhuman or degrading treatment and the rights to have relatives informed of the fact of detention, to recognition as a person before the law, to judicial review of the lawfulness of detention and to release or trial without delay;

viii. to allow access to all detainees by family members, legal representatives, consular representatives and officials of international humanitarian and human rights organisations;

ix. to cease the practice of “rendition” in violation of the prohibition on *non-refoulement*;

x. not to return or transfer detainees in reliance on “diplomatic assurances” from countries known to engage in the systematic practice of torture and in all cases unless the absence of a risk of ill-treatment is firmly established;

xi. to comply fully and promptly with the recommendations of the ICRC and to avoid any actions that might have the effect of undermining its activities, reputation or standing.

9. Furthermore, the Assembly also calls on the US Government to ensure that the “war on terror” is conducted in all respects in accordance with international law, particularly international human rights and humanitarian law.

10. In addition, the Assembly calls on member states of the Council of Europe:

i. to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo, whether legally obliged to do so or not;

ii. with respect to any of their citizens, nationals or former residents who have been returned or transferred from detention at Guantánamo:

a. to treat such persons according to the usual provisions of criminal law, respecting the presumption in favour of immediate liberty on arrival;

b. to provide such persons with all necessary support and assistance, in particular legal aid to bring cases relating to detention at Guantánamo;

c. to protect such persons from prejudice or discrimination and to ensure their mental and physical well-being during the process of reintegration;

d. to ensure that such persons do not suffer detriment to their rights or interests as a result of being held in unlawful detention at Guantánamo Bay, especially in relation to immigration status;

iii. not to permit their authorities to participate or assist in the interrogation of Guantánamo detainees;

iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made;

v. to refuse to comply with US requests for extradition of terrorist suspects liable to detention at Guantánamo;

vi. to refuse to comply with US requests for mutual legal assistance in relation to Guantánamo detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court;

vii. to ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law;

viii. to respect the *erga omnes* nature of human rights by taking all possible measures to persuade the US authorities to respect fully the rights under international law of all Guantánamo detainees.

II. Draft recommendation *[Link to the adopted text]*

1. The Parliamentary Assembly refers to its Resolution … (2005) on the lawfulness of detention by the United States in Guantánamo Bay.

2. The Assembly recommends that the Committee of Ministers:

i. transmit Resolution … (2005) to the Government of the United States of America, reminding it of its obligations, as an observer state to the Council of Europe, to respect human rights and the rule of law, in accordance with Committee of Ministers' Statutory Resolution (93) 26;

ii. request the Government of the USA to provide information on its response to and measures taken to ensure compliance with Assembly Resolutions 1340 (2003) and … (2005);

iii. co-ordinate the efforts of member states' governments in relation to detentions at Guantánamo Bay, in particular by developing a common, united and determined front aimed at achieving the immediate unconditional release or prompt fair trial of all detainees, in particular their citizens, nationals and former residents;

iv. report to the Assembly, within six months of receipt, on efforts and progress made further to this recommendation.

III. Explanatory memorandum

By the Rapporteur, Mr McNamara

A. Introduction

1. On 21 June 2004 the Bureau referred the motion contained in Doc 10178 to the Committee on Legal Affairs and Human Rights for report (Reference No 2973). The present Rapporteur was appointed by the Committee on 24 June 2004. This report follows Assembly Resolution 1340 (2003) on the rights of persons detained by the United States in Afghanistan or Guantánamo Bay.

2. The Assembly's interest in this question is two-fold: first, because a significant number of citizens or residents of member States remain in detention at Guantánamo (although that number has decreased since adoption of Resolution 1340, at a rate vastly disproportionate to the overall decrease in the number of detainees); and second, because the USA is an Observer state of the Council of Europe.

3. Since the Assembly's previous report there have been encouraging developments on the legal front, unfortunately unaccompanied by any real change in the actual situation faced by the majority of prisoners. Consistent with the basic conclusions of Resolution 1340, international legal opinion – notably in the form of UN human rights protection mechanisms, the Inter-American Commission on Human Rights, the International Committee of the Red Cross and the European Commission for Democracy through Law – has concluded that US policy and actions in relation to Guantánamo are unlawful. Furthermore, a growing number of US court decisions, including important judgments of the Supreme Court, have also gone against the US administration. Despite this, however, the releases of prisoners that have occurred have not been in direct response to court judgments, but rather been motivated by apparently political or, at best, operational considerations: for instance, most European detainees have now been released.

4. The Rapporteur shares the USA's determination to combat terrorism and fully agrees with the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives. In the Rapporteur's view, however, the challenge presented by what the USA terms the "global war on terror" is not to the applicability of current international law, but rather to its application; in other words, the problem is not whether existing law is appropriate to the context of the international fight against terrorism, but how to apply it appropriately in that context.

5. In the course of preparation of this report, the Committee on Legal Affairs and Human Rights held a hearing in Paris on 17 December 2004, and a questionnaire was sent to the heads of national delegations to the Parliamentary Assembly (for details of both, see the annexes).[1] In addition, on 22 February 2005 the Rapporteur met senior officials at the headquarters of the International Commission of the Red Cross and the Office of the UN High Commissioner for Human Rights in Geneva.[2] He also referred to the Opinion of the European Commission for Democracy through Law on the possible need for further development of the Geneva Conventions,[3] produced in response to a request from the Assembly's Committee on Legal Affairs and Human Rights. The Rapporteur would like to thank all those concerned for their invaluable contributions and assistance.

B. Background

6. The appalling terrorist attacks on the USA of 11 September 2001 were soon ascertained to have been committed by individuals associated with the international terrorist network Al Qaeda, most of whose leaders and physical infrastructure were at the time based in Afghanistan under the protection of the Taliban regime.

7. On 12 and 28 September 2001 respectively, the UN Security Council passed Resolutions 1368 and 1373, both of which reaffirmed states' inherent right of individual and collective self-defence, as recognised in Article 51 of the Charter of the United Nations. On 12 September, NATO's North Atlantic Council invoked Article 5 of the organisation's statute, stating that the attacks were to be considered as attacks against them all, permitting exercise of their rights under Article 51 of the UN Charter.

8. On 14 September 2001, President Bush declared that a national emergency had existed since 11 September 2001 by reason of certain terrorist attacks.[4] On 18 September 2001 the US Congress passed a Joint Resolution on the Authorisation for Use of Military Force (AUMF).[5] This authorised the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

9. On 20 September 2001, President Bush made a series of demands of the Taliban regime, including to deliver Al Qaeda leaders to the US authorities, close terrorist training camps and hand over terrorists to appropriate authorities, and give the USA full access to terrorist training

camps. Whilst these demands were separate from the USA's "war on terror", to be conducted against Al Qaeda and associated groups, failure to comply would lead the Taliban to "share in the fate" of Al Qaeda.[6]

10. When these demands were not met, on 7 October 2001 the US and its allies launched "Operation Enduring Freedom" against Afghanistan. President Bush explained that the operation was designed both to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime, and described it as "part of our campaign against terrorism, another front in a war which has already been joined through diplomacy, intelligence, the freezing of financial assets and the arrests of known terrorists by law enforcement agencies."[7] Secretary of Defense Rumsfeld stated that "the campaign against terrorism will be broad, sustained and … will use every element of American influence and power. Today, the president has turned to direct overt military force to complement the economic, humanitarian, financial and diplomatic activities".[8]

11. On 13 June 2002, following the overthrow of the Taliban regime, an Afghan Grand Assembly or *Loya Jirga* elected Hamid Karzai, previously interim head of state following the collapse of the Taliban regime, as president of an interim government. In January 2004 another Loya Jirga adopted the new constitution.

12. On 13 November 2001, President Bush issued a Military Order on the detention, treatment, and trial of certain non-citizens in the war against terrorism. This document set out the categories of persons who could be detained, the conditions of their detention, and the status and basic procedural rules of the military commissions before which they would be tried.

13. The first detainees arrived at Guantánamo on 11 January 2002, most having previously been held in Afghanistan. Subsequent arrivals included individuals arrested outside Afghanistan in circumstances having no direct connection to the conflict there. Detainees were initially held in Camp X-Ray, a temporary facility originally constructed in 1994 for Haitian refugees. By the summer of 2002, all detainees had been transferred to a permanent facility, Camp Delta, which in turn consists of a number of separate units for various purposes and applying differing regimes.

14. On 7 February 2002, President Bush issued a memorandum on the humane treatment of Taliban and Al Qaeda Detainees. In this document (read alongside advice given by the Department of Justice), the President determined that:

i. The 1949 3rd Geneva Convention relative to the treatment of prisoners of war (GC III) applied only to conflicts between High Contracting Parties and assumed the existence of "regular" armed forces fighting on behalf of states. The "war against terrorism", however, "ushers in a new paradigm" which "requires new thinking in the law of war".

ii. On this basis, "none of the provisions of [GC III] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party".

iii. Although the conduct of the Taliban regime justified the President in suspending GC III as between the USA and Afghanistan, he declined to exercise his authority in this respect.

iv. Common Article 3, which applied only to "armed conflict of a non-international character", did not apply, as the relevant conflicts were international in scope.

v. Taliban detainees were "unlawful combatants and, therefore, do not qualify as" prisoners-of-war (POWs) under GC III, on account of their failure to respect the laws and customs of war.

vi. Al Qaeda detainees did not qualify as POWs because GC III did not apply to the USA's conflict with Al Qaeda.

15. Detainees at Guantánamo are held for three essential purposes: internment, in other words to prevent their resuming activities hostile to the USA and its allies (whether in Afghanistan or in connection with international terrorism); interrogation; and pre-trial detention. They can be broadly categorised into three groups:

i. Taliban fighters captured in connection with the conflict in Afghanistan;

ii. those suspected of association with Al Qaeda who were captured in connection with the conflict in Afghanistan;

iii. those suspected of association with Al Qaeda who were captured in circumstances having no direct connection to the conflict in Afghanistan.

Preliminary conclusions

16. Against this background information, the Rapporteur draws the following conclusions:

i. the US-led invasion of Afghanistan was a legitimate act of collective self-defence undertaken to prevent further terrorist attacks following those of 11 September 2001;

ii. the consequent hostilities amounted to an international armed conflict within the meaning of international humanitarian law (IHL), thus engaging the Geneva Conventions;

iii. this international armed conflict came to an end in June 2002, since when there has been a legitimate national government in Afghanistan with which the USA is not in conflict. Instead, although forces from other countries, including the USA, are engaged with the agreement of the Afghan government in support of its military forces, any conflict – assuming it reaches the necessary threshold of violence – is now internal and therefore non-international;

iv. those detained outside the context of hostilities in Afghanistan fall within the category "arrests of known terrorists by law enforcement agencies" undertaken as a non-military part of the "campaign against terrorism".[9]

C. The applicable legal framework

1. Relevance of armed conflict or state of public emergency

17. The USA is a party to the 1966 International Covenant on Civil and Political Rights (ICCPR). As the UN Human Rights Committee has stated in General Comment No. 29 on states of emergency, the ICCPR applies even in war time.[10] The ICCPR does, however, make provision for derogations from certain rights in time of national emergency threatening the life of the nation.[11] As the International Court of Justice has stated, "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation".[12] Some rights, however, are explicitly non-derogable.[13] Furthermore, all derogations must not be inconsistent with states' other obligations under international law, including international criminal law and IHL.[14] In order to derogate, a series of conditions must be satisfied, including that the Secretary General of the UN be informed of the provisions being derogated from and the reasons for the derogation.[15]

18. IHL is *lex specialis* which applies in time of armed conflict. It is thus non-derogable, as it is intended to be applied in times of national emergency. It does not, however, displace international human rights law: as noted above, in the absence of a proper derogation, human rights norms continue to apply even during armed conflict. "During armed conflict, whether international or non-international, rules of [IHL] become applicable and help, in addition to article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers."[16] During armed conflict, IHL complements human rights norms and establishes a minimum level of protection for basic rights should derogation from those norms be necessary.[17] IHL allows belligerent states certain 'privileges', including to kill enemy combatants and to apply specific standards regarding detention and fair trial for POWs. The USA is a party to the 1949 Geneva Conventions, but not to the 1977 Additional Protocols.

19. The question of whether the wider "global war on terror" as a whole amounts to an armed conflict was in part addressed by a US District Court in the case of *Jose Padilla v. Hanft*. This involved a US citizen arrested as a terrorist suspect at Chicago airport, initially held in criminal custody, but later transferred to military custody as an "enemy combatant", purportedly on the basis of Presidential authority granted under the AUMF. Referring to the AUMF, the Court stated that "whilst it may be a necessary and appropriate use of force to detain a US citizen who

is captured on the battlefield, this Court cannot find… that the same is true when a US citizen is arrested in a civilian setting such as an US airport… Simply stated, this is a law enforcement matter, not a military matter." [18]

2. Jurisdiction

20. In General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State part, even if not situated within the territory of the State party, … regardless of the circumstances in which such power or effective control was obtained." [19] Clearly, it is also the case that IHL binds states outside their territory, since the armed conflicts in which they become involved may not always take place within their own countries.

21. The position of the US administration was that US courts did not have jurisdiction over Guantánamo as it was outside US sovereign territory, and therefore detainees could not apply to US courts for *habeas corpus*. This argument was rejected by the US Supreme Court in *Rasul v. Bush*, on the basis that the detainees were "imprisoned in territory over which the US exercises exclusive jurisdiction and control", and the courts had jurisdiction over their custodians. [20]

22. This would not mean that every act committed by the USA outside its borders, whether during armed conflict or otherwise, brings those affected within US jurisdiction. Whilst the USA is not a party to the ECHR, the issue is illuminated by the caselaw of the European Court of Human Rights, which also uses the concept of 'control'.

i. In the case of *Loizidou v. Turkey*, the Court stated that "the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory." [21] In this case, the Turkish military occupation of northern Cyprus and the reliance of the authorities there on Turkish armed support were sufficient to establish such control.

ii. In *Ocalan v. Turkey*, jurisdiction was due to the fact that "the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention." [22]

iii. In *Bankovic & others v. Belgium & others*, however, the Court rejected the applicants' argument that "the positive obligation under Article 1 ECHR extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation", a 'cause-and-effect' notion of liability implying that "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State". [23] Thus the respondent states' bombing of Belgrade did not extend their jurisdiction to the persons affected.

23. Since *Rasul*, many of the detainees have filed suit. In response, the US administration has argued that, whilst *Rasul* gives the right to take these cases to court, the applicants have no substantive rights by which to argue for release. Two District Court cases have produced conflicting conclusions:

i. District Judge Green, *In re Guantanamo Detainee cases*, found against the respondents, noting that the "special nature of Guantanamo Bay" justified it being treated "as the equivalent of sovereign US territory where fundamental constitutional rights exist… Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected 'enemy combatants' at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees." [24]

ii. In *Khalid v. Bush*, District Judge Leon found a "lack [of] any viable theory… under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo… Similarly, petitioners have offered no viable theory regarding any treaty that could serve as the basis for the issuance of a writ." In doing so, he accorded enormous deference to the executive: "[H]aving concluded that Congress, through the AUMF, has conferred authority on the President to detain the petitioners, it would be impermissible… under our constitutional system of separation of powers for the judiciary to engage in a substantive

evaluation of the conditions of their detention… In the final analysis, the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed."[25]

24. As to Judge Leon's deference to the executive, the Supreme Court in *Hamdi* had rejected the Government's argument – put in strikingly similar terms – that "separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." "Whatever power the US Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." The Rapporteur too cannot accept that the executive may properly be given discretion to violate basic human rights outside effective judicial supervision; in light of *Hamdi*, it is to be hoped that such an approach will not be maintained by the higher courts.

25. Finally, the Rapporteur notes Article VI of the US Constitution states that all treaties "shall be the supreme law of the land". Furthermore, many provisions relating to torture and cruel, inhuman or degrading treatment or punishment, arbitrary detention and fair trial are now also norms of customary international law: in *Filartiga v. Pena-Irala* (630 F.2d 876), the US Court of Appeals found that the Alien Tort Statute created an implied right of action for violations of customary international law.

Preliminary conclusions

26. Given the absence of due notice of derogation (and so regardless of satisfaction of the other conditions), along with its exclusive control over the Guantánamo Bay naval base, the Rapporteur considers that the USA is obliged to respect fully the rights under the ICCPR of all detainees held there. The role of IHL can thus be no more than to complement practical protection of certain rights during armed conflict, including provisions on arbitrary detention and fair trial, without justifying restrictions which would otherwise require derogation. In any case, there is no longer international armed conflict in Afghanistan, and so provisions of IHL no longer apply to those who were captured there. Furthermore, it has never applied to those captured elsewhere, as "war on terror" is no more than a rhetorical expression encompassing US anti-terrorism policy.[26] Instead, all detainees are now entitled to the normal protections of international human rights law and their situation should be addressed according to criminal, not military considerations. For the sake of argument, however, what follows will take account of alternative legal frameworks.

D. Respect by the USA of its obligations under international law

1. Right to independent determination of POW status

27. As mentioned above, the US President has decreed that no Taliban or Al Qaeda detainees qualify as POWs. This is clearly contrary to the provisions of Article 5 GC III, which states that should any doubt arise, persons who have committed a belligerent act and fallen into the hands of the enemy are to be considered as POWs and enjoy the protection of GC III, unless and until their status has been determined otherwise by a competent tribunal. This question is relevant *inter alia* to the way in which the rights to liberty and security of the person and fair trial would be protected under IHL (see below).

28. The US administration's approach is wrong on several grounds:

i. GC III allows no role for the executive in determining the question of status, instead requiring this to be done by a "competent tribunal."

ii. Determination should be conducted on an individual basis and not on a general level by reference to characteristics not necessarily shared by all detainees: for example, it cannot be right to disqualify an entire armed force from POW status on the basis that isolated individuals contravened the law and customs of war; such an approach would make POW status almost impossible to attain.

iii. The Presidential Memorandum imposes the requirements for members of militias and volunteer corps to qualify as POWs (having a fixed, distinctive sign and conducting their operations in accordance with the laws and customs of war) on Taliban fighters, who instead

come within the category of “armed forces of a party to the conflict”.[27] Even failure by Taliban fighters to satisfy these requirements, therefore, is irrelevant to their POW status, although, for example, breaches of the laws of war could still give rise to criminal prosecution.

29. By contrast, US Army Regulation 190-8 states that “A competent tribunal shall determine the status of any person *not appearing to be entitled to prisoner of war status* who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and *who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists*.”[28] Furthermore, “Persons in the custody of the U.S. Armed Forces who have not been classified as [a POW, retained personnel or a civilian internee], shall be treated as [POWs] until a legal status is ascertained by competent authority.”[29]

30. In the case of *Hamdi v. Rumsfeld*, the US Supreme Court found that Congress, in conformity with international law, had authorised the government to detain enemy combatants for the duration of hostilities between the USA and the forces to which those detainees belonged. In the absence of some form of due process to challenge categorisation as “enemy combatant”, however, the government’s treatment of alleged Al Qaeda and Taliban detainees (particularly their indefinite detention) violated Article 5 GC III and exceeded the authority given by Congress. Furthermore, reliance on unsubstantiated and unchallenged hearsay evidence along with the President’s memorandum of 7 February 2004 to settle doubts concerning their status under GC III did not satisfy due process requirements and was apparently at odds with Regulation 190-8.[30]

31. Only by establishing “competent tribunals” within the meaning of Article 5 GC III can the USA fulfil its obligations to respect this right. On 7 July 2004, following the Supreme Court decision in *Hamdi* (see above), the administration announced the establishment of Combatant Status Review Tribunals (CSRT) intended to allow detainees to challenge their designation as an “enemy combatant”, i.e. as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the US or its coalition partners”. In addition, it was announced that all detainees would be subject to periodic review by “administrative boards” to determine the necessity of further detention on the basis of whether or not they continued to represent a threat to the security of the USA. Members of these boards would be officers of the US armed forces and thus lack independence when reviewing previous Defense Department decisions that detainees were in fact “enemy combatants”. Detainees would have no right to legal assistance or representation and no access to evidence or allegations against them, other than a summary prepared by an officer. The boards do not apply international law, not even IHL.

32. On 8 November 2004, the District of Columbia District Court ruled in the case of *Hamdan v. Rumsfeld*. In relation to a preliminary issue, the Court stated that “the CSRT was not established to address detainees’ status under the Geneva Conventions. It was established to comply with the Supreme Court’s mandate in *Hamdi* to decide ‘whether the detainee is properly detained as an enemy combatant’ for the purposes of continued detention… The government must convene a competent tribunal and seek a specific determination as to Hamdan’s status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protection of a prisoner-of-war.” [31] In the case of *In re Guantanamo detainee cases* (see above), the same court found that “the CSRT’s extensive reliance on classified information…, the detainee’s inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases of their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights.”

Preliminary conclusions

33. The Rapporteur agrees with the judgment in *Hamdan*, insofar as it relates to the period during which the USA was at war with Afghanistan. The USA acted unlawfully in refusing to acknowledge detainees’ status as POWs and in failing to convene ‘competent tribunals’ for determination of the issue.[32] More generally, the Rapporteur also concurs with the *In re Guantanamo detainee cases* ruling that the CSRT fail to provide minimum guarantees of due process, and considers that the Administative Review Boards are even more deficient in this respect.

2. The absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment

34. The prohibition on torture and cruel, inhuman or degrading treatment is *jus cogens* and is codified in Article 7 ICCPR; Article 10 ICCPR states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Numerous relevant provisions are to be found in the Geneva Conventions.[33]

35. "Cruel, inhuman or degrading treatment or punishment" is not defined in the ICCPR. The Rapporteur considers that these terms should be interpreted primarily in accordance with their ordinary meaning, as required by Article 31 of the 1969 Vienna Convention on the Law of Treaties. The UN Human Rights Committee, in General Comment No. 20 on the prohibition on torture and cruel treatment or punishment, has given additional guidance, stating that Article 7 "relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim." (It also stated that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited under Article 7".) In relation to Article 3 of the ECHR, the European Court of Human Rights has ruled that, in order to constitute a violation, mistreatment "must attain a minimum degree of severity", assessed by reference to "all the circumstances of the case, and in particular the nature and context, and the duration of the treatment, its physical or mental effects and, sometimes, the sex, age and state of health of the person concerned."[34]

36. Torture is defined in international law by Article 1 of the UN Convention Against Torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

37. On 16 April 2003, Secretary of Defense Rumsfeld approved a list of "counter-resistance techniques" for use during interrogations at Guantánamo. The latter document made clear the administration's appreciation of the fact that certain of the techniques could contravene the Geneva Conventions. The approved techniques, which could be applied simultaneously and cumulatively, included the following: significantly increasing the fear level in a detainee (using unspecified means);[35] dietary manipulation (i.e. partial deprivation of food and water); environmental manipulation, e.g. adjusting temperature or introducing an unpleasant smell; sleep "adjustment", i.e. reversing sleep cycles from night to day (not sleep deprivation); isolation, with clear approval of periods up to 30 days and implicit approval of longer periods; and convincing detainees that interrogators were from another country than the USA. The final sentence stated that "Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees."[36]

38. A Justice Department memorandum of 1 August 2002 stated the following conclusions:

i. "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

ii. "For purely mental pain or suffering to amount to torture…, it must result in significant psychological harm of significant duration."

iii. "[E]ven if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."

iv. Prosecutions for acts of torture committed in relation to the "global war on terror" were barred as representing unconstitutional infringements of the President's authority to conduct war.[37]

39. In the Rapporteur's view, this analysis is profoundly flawed on several grounds, which may be illuminated by comparison with European jurisprudence.

i. It requires far too high a level of pain and suffering. The European Court of Human Rights requires "very serious and cruel suffering".[38]

ii. It sets an inappropriate test for the intention of the person responsible for the ill-treatment. The Court instead requires "deliberate inhuman treatment".[39]

iii. Further to this, it follows that 'severity' is assessed by reference to the victim and thus is relative: "it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[40]

iv. The decision of the UK House of Lords in the *Pinochet* case suggested that the immunity against prosecution enjoyed even by serving heads of state may not extend to international crimes such as torture.[41] In any case, any immunity arises because of President Bush's personal status as head of state, and thus cannot extend to other officials even if acting on the President's direct orders.[42]

40. A second Justice Department memorandum of 30 December 2004, however, superseded that of August 2002. Implicitly acknowledging the inaccuracy of the earlier advice, the second memorandum differed in several crucial respects:

i. With respect to the meaning of "severe pain or suffering", it referred to torture as "extreme, deliberate and unusually cruel practices", and stated that "we do not believe Congress intended to reach only conduct involving 'excruciating and agonising' pain or suffering." It also concluded that "[t]he critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting or heinous the agony, the more likely it is to be torture." Furthermore, "under some circumstances 'severe physical suffering' may constitute torture even if it does not involve 'severe physical pain'." Clearly, this is a lesser test than that set out in the earlier memorandum (see above).

ii. For the purposes of US domestic law, "prolonged mental pain or suffering" meant some mental damage or injury caused by or resulting from one of the acts prescribed in the statute and continuing for a prolonged period of time. Use of the word "some" instead of "significant" again makes clear a lesser test (see above).

iii. "Specific intent must be distinguished from motive. There is no exception… permitting torture to be used for a 'good reason'. Thus, a defendant's motive (to protect national security, for example) is not relevant… [S]pecific intent to take a given action can be found even if the defendant will take the action only conditionally… Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture…"

iv. The December 2004 memorandum, in superseding that of August 2002 "in its entirety" whilst omitting any reconsideration of the issue of the President's powers as Commander-in-Chief and potential defences to liability, effectively withdrew those parts of the earlier memorandum, on the basis that "Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that US personnel not engage in torture".[43]

41. In a retrograde step, however, US Attorney General Albert R. Gonzales (who had approved the August 2002 memorandum on torture – see above), during his confirmation hearing before the Senate Judiciary Committee, stated that "there is no legal prohibition under the Convention Against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas." Furthermore, he concluded that extreme techniques such as simulated drowning, mock executions, the use of threatening dogs, hooding, forced nudity, forced injection of mind-altering drugs and the threat of being sent to another country to be tortured "might be permissible in certain circumstances."[44]

42. It is thus clear that official guidance taken as a whole contained confusing ambiguities, inconsistencies and omissions.[45] It was primarily intended not to prevent internationally prohibited mistreatment but to permit and even encourage lesser forms of abuse. Only as a secondary aim did it seek to prevent such abuse becoming excessive. It clearly failed to provide effective safeguards against detention conditions and interrogation techniques amounting to torture or to cruel, inhuman or degrading treatment or punishment. Indeed to a non-lawyer, the wording of official documents might appear to give implicit authorisation or even instruction to employ conditions and techniques which in law would amount to such mistreatment. Nevertheless, further evidence is required to show that such practices actually occurred. What

follows is selected material relating to the more extreme forms of ill-treatment, suggesting circumstances amounting to torture within the definition of the Convention Against Torture: in the Rapporteur's view, these circumstances should be taken together and not treated as a set of separate or isolated incidents.[46]

i. Jamal Al Harith has described 15 hour interrogation sessions during which he would be confined in "long shackles" which forced him to either squat or kneel and which were so tight as to cause bleeding. During interrogation threats were made against his family. He was also on occasion subjected to "short shackling" in uncomfortable "stress positions" for long periods of time. Unmuzzled dogs were brought to the cage in which he was held and encouraged to bark threateningly. He was exposed to alternating extremes of heat and cold and prevented from sleeping by powerful spotlights and loud noise. He was provided with inadequate food and water. He was twice placed in solitary confinement, where conditions were even more extreme, including pitch darkness and deprivation of basic necessities such as sanitary material and the Koran. On one occasion, when he refused to be given an unidentified injection, he was severely beaten by the "Extreme Reaction Force" (ERF). During all the period of his detention, he had no access to his family, to legal representation or to a court to challenge the lawfulness of his detention.[47]

ii. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed have produced a "Composite Statement" describing their treatment. Rhuhel Ahmed and Shafiq Rasul both describe being severely beaten on arrival. Asif Iqbal and Shafiq Rasul both describe being forced, on arrival, to sit for hours in the heat of the sun without sufficient water, as a result of which Asif Iqbal suffered a convulsive fit. For the first few weeks, Asif Iqbal and Shafiq Rasul were confined in cages of two metres by two metres with no opportunities for exercise and one brief shower a week. They were exposed to direct sunlight during the day and were illuminated by powerful floodlights at night. Against this background, interrogations also took place in extreme conditions, to which detainees were taken in shackles: if they fell, they were kicked and punched. In the more permanent facilities of Camp Delta detainees continued to be exposed to sun and rain. There was a constant atmosphere of fear and stress, with no remedies for ill-treatment and constant exposure to the ill-treatment of others. All three repeated Jamal Al Harith's account of being beaten by the ERF for refusing an unidentified injection. During one cycle of interrogation, Shafiq Rasul was detained in a filthy isolation cell which was extremely hot during the day and freezing cold at night. On one occasion during this period he was put in a room for six or seven hours in a short-shackling stress position, after which he was unable to walk and suffered severe back pain. During other periods of short-shackling, deafeningly loud heavy metal music was played. He was told that if he did not admit the allegations made against him, he would be kept in isolation for 12 months until he "broke". Asif Iqbal was isolated in a cell which he was told had previously been occupied by a detainee with mental health problems, who had smeared excrement everywhere, as a result of which it stank. During his interrogation cycles, he was subjected to loud music and strobe lighting, kept in short-shackling stress positions and threatened with being beaten. Rhuhel Ahmed describes similar treatment. All three mention suicide attempts by numerous detainees and the fact that at least 50 detainees suffered very serious mental health problems, yet continued to be interrogated. As a result of their ill-treatment, Shafiq Iqbal suffers pain in his knees and back, and Rhuhel Ahmed has suffered irreversible damage to his eyesight, through being denied simple treatment for a pre-existing condition.[48]

iii. Tarek Dergoul confirms the allegations of ill-treatment on arrival and that detainees were exposed to extremes of heat and cold. He adds that interrogators threatened to send him to Morocco or Egypt, where he would be tortured. On one occasion, having refused to submit to a search of his cell, the ERF came and assaulted him, spraying pepper spray and poking their fingers into his eyes, banging his head on the floor, kicking and punching him and forcing his head into a toilet. On another occasion, whilst in isolation, he was beaten to unconsciousness. He now suffers from nightmares and flashbacks, depression, memory loss and migraines.[49]

iv. Moazzem Begg has described being physically abused and degradingly stripped by force. During interrogation he was subjected to torture and threats of torture and death, against a general background of "generated fear, resonant with terrifying screams of fellow detainees facing similar methods… This culminated, in my opinion, with the deaths of two fellow detainees, at the hands of US military personnel, to which I myself was partially witness."[50]

v. Martin Mubanga has also spoken of being shackled for so long that he wet himself and was then forced to clean up his own urine. During interrogation he was threatened and an interrogator stood on his hair, and he was subjected to extreme temperatures.[51]

vi. Mamdouh Habib has mentioned physical abuse including having his head struck against the floor, as well as sexual humiliation and emotional abuse such as being shown photographs which apparently depicted his wife naked with Osama bin Laden.[52]

vii. Lawyers for Omar Khadr, now 18 but 15 at the time he was captured in Afghanistan, claim that he was regularly shackled in solitary confinement for long periods; if he urinated himself, guards would pour pine-scented cleaning fluid on him.[53]

viii. A British detainee has told his lawyer of being tortured by being suspended from a bar with handcuffs for long periods, until the handcuffs cut into his wrists, a technique known in South America as the "strappado".[54]

ix. The lawyer for 11 Kuwaiti detainees has recounted their descriptions of being hung by the wrists or ankles and beaten, sometimes with chains, sodomized and subjected to electric shocks.[55]

x. An edited FBI memorandum, apparently dated 22/5/02, contains a translated interview with a detainee who stated that "he had been beaten unconscious three of four times when he was still at Camp Delta. A … number of guards entered his cell, unprovoked, and started spitting and cursing at him. The guards called him a "son of a bitch" and a "bastard," then told him he was crazy. [He] rolled onto his stomach to protect himself… [A] soldier jumped on his back and started beating him in the face… choked him until he passed out… stated that he was beating him because [he] is a Muslim, and [the soldier?] is Christian. [He] indicated that there was a female guard… who was also beating him and grabbed his head and beat it onto the cell floor."[56]

43. The US Federal Bureau of Investigation (FBI) has on numerous occasions expressed its concerns in relation to interrogation techniques employed at Guantánamo.[57]

i. In a memorandum dated 5/12/03, an FBI agent complained of "torture techniques" being used by Department of Defense (DOD) interrogators impersonating FBI agents. On 12 July 2004, an FBI agent confirmed observing "treatment that was not only very aggressive, but personally very upsetting."

ii. Documents dated 30/6/04, 13/7/04 and 14/7/04 and an undated memorandum variously refer to the use of loud music, bright/strobe lights and intimidating dogs.

iii. The 30/6/04 memorandum describes how an FBI agent saw a detainee "sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing."

iv. The letter of 14/7/04 mentioned "highly aggressive" interrogations, such as a female interrogator grabbing a detainee's genitals and bending back his thumbs, and "extreme psychological trauma" caused by isolation for three months in a cell flooded with light.[58]

v. In a memorandum dated 2/8/04, an FBI agent stated that "On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a foetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on, I was told that the interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasions, the [air conditioning] had been turned off, making the temperature in the unventilated room probably well over 100 degrees [Fahrenheit, equal to 38 degrees Celsius]. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out during the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor."

44. A New York Times article, prepared on the basis of interviews with military guards, intelligence agents and other Guantánamo personnel, described that "one regular procedure… was making uncooperative prisoners strip to their underwear, having them sit in a chair while

shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air-conditioning was turned up to maximum levels… intended to make the detainees uncomfortable, as they were accustomed to high temperatures… Such sessions could last up to 14 hours with breaks… 'It fried them,' the official said… Another person familiar with the procedure said "They were very wobbly. They came back to their cells and were just completely out of it.'"[59]

45. The International Committee of the Red Cross (ICRC), which usually works through confidential reports to governments, has exceptionally made public its concerns over the treatment of detainees at Guantánamo. In October 2003, following an inspection visit, the leader of the team stated that "One cannot keep these detainees in this pattern, this situation, indefinitely… The open-endedness of the situation and its impact on the mental health of the population has become a major problem."[60] In January 2004, the organisation noted "a worrying deterioration in the psychological health of a large number of [the detainees]."[61] A press release of 30 November 2004 stated that "the ICRC remains concerned that significant problems regarding conditions and treatment at Guantanamo Bay have not yet been adequately addressed."[62]

46. In late November 2004, numerous media bodies reported on a leaked US government memorandum concerning a confidential ICRC report. According to the memorandum, the ICRC had stated that treatment of detainees at Guantánamo was "tantamount to torture", and an earlier confidential ICRC report had suggested that detainees were subjected to "psychological torture". The underlying ICRC report had apparently concluded that the system in Guantánamo was intended to make detainees wholly dependant on their interrogators through "humiliating acts, solitary confinement, temperature extremes [and] use of forced positions… The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."[63]

47. At its hearing on 17 December 2004, the Committee heard from Dr James MacKeith, an eminent forensic psychologist and member of the UK Criminal Cases Review Commission, who had been closely involved in a detailed report on terrorist suspects subjected to potentially indefinite detention in the UK. Dr MacKeith firmly concluded that those who underwent the experience of detention in Guantánamo would be even more likely to suffer from significant mental illness than the UK detainees, most of whom had been gravely injured by the experience; the damage done and illnesses caused would most likely last some time, perhaps indefinitely.[64] Six human rights experts of the UN Commission on Human Rights have stated that "The conditions of detention, especially of those in solitary confinement, place the detainees at significant risk of psychiatric deterioration, possibly including the development of irreversible psychiatric problems."[65] In January 2004, it was reported that the official number of suicide attempts as of September 2003 had been 32. Whilst the rate had since declined, this was due to many attempts being recategorised as "manipulative self-injurious behaviour", with 40 such incidents in six months. The Guantánamo Chief Surgeon had indicated that depression was the most common ailment amongst detainees, with more than one fifth on antidepressants, and a professor of forensic psychiatry who had spent a week at Guantánamo at the invitation of the Pentagon had stated that "it would be hard to imagine a more highly stressed group of people."[66]

Preliminary conclusions

48. The Rapporteur concludes that there can be no doubt that most, if not all detainees are subjected to cruel, inhuman and degrading treatment and punishment, and that such mistreatment is systematic and, indeed, a result of official policy. Furthermore, given the duration and severity of the ill-treatment and its deliberate connection with the purpose of obtaining information, in many cases it amounts to torture, as defined under international law. The frequency of incidents amounting to torture indicates that it is systematic and suggests strongly that knowledge of and responsibility for torture extends far up the chain of command, and may result directly from policy decisions taken at the highest level.[67]

3. The right to liberty and security of the person

49. Article 9 ICCPR, which prohibits arbitrary detention, states *inter alia* that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be immediately informed of the reasons for his arrest and of any charges against him. Criminal detainees shall be brought promptly before a

judge or other judicial officer and shall be entitled to trial within a reasonable time or to release. Detainees shall be entitled to take proceedings so that a court may decide without delay on the lawfulness of the detention and order release if it is not lawful.

50. Specific provisions of IHL apply to those captured during international armed conflict:

i. Prisoners of war, as defined in Article 4 GC III,[68] may be interned but must be released and repatriated without delay after the cessation of hostilities.[69]

ii. Civilians may be detained only if the security of the detaining power makes this absolutely necessary, but this detention must be reviewed as soon as possible by an appropriate court or administrative board and, if detention is maintained, at least twice yearly, with a view to favourable amendment of the initial decision, if circumstances permit.[70] A civilian detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the occupying power, may, in cases where absolute military security so requires, be regarded as having forfeited rights of communication.[71]

iii. Article 75 Protocol I, setting out customary international law, requires that all persons detained for actions related to the armed conflict shall be informed promptly, in a language they understand, of the reasons for their detention. Except in cases of arrest or detention for penal offences (for which basic fair trial provisions must be respected – see below), such persons shall be released as soon as possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

51. District Judge Green, *In re Guantanamo Detainee cases* (see above), stated that"There would be nothing impracticable and anomalous in recognizing that the detainees … have the fundamental right to due process of law. Recognizing the existence of that right at the Naval Base would not cause the US government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States…"

52. Despite the Supreme Court ruling in *Rasul* that the detainees had the right to challenge their detention before US courts, the administration is still arguing – with mixed success (see above) – that US courts have no authority to order the release of detainees. Thus in part due to the US administration's legal position, no detainee has yet been released as a result of a US court decision, although some have been detained for over three years. From the available evidence, none of the detainees were provided with cogent reasons for their arrests, nor informed of any charges against them.[72] Despite the US administration's repeated allegations that the detainees are criminals, [73] none have been properly brought to trial.

53. Even assuming that the USA was entitled to detain those captured in connection with the conflict in Afghanistan, that conflict has now ended. Since all such detainees are entitled to be presumed to be POWs, they should have been charged or released and repatriated as of June 2002. Furthermore, the findings set out in paragraph 52 above are relevant also to the situation under customary international law, as set out in Article 75 Protocol I.

54. The UN Working Group on arbitrary detention has stated that "the deprivation of liberty of [four named Guantánamo detainees] is arbitrary, being in contravention… of article 9 of the ICCPR."[74]

Preliminary conclusions

55. There have been various and numerous breaches of the detainees' rights to liberty and security of the person whether under international human rights law, IHL and customary international law.

4. Right to fair trial

56. This is protected under Article 14 ICCPR, which states that all persons are equal before the law and that in criminal trials, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, and defendants are presumed innocent until proven guilty according to law. It also establishes a series of procedural safeguards, including *inter alia* the following: provision of full and prompt information

concerning the charge in a language which the accused understands; adequate time and facilities for preparing the defence and to communicate with counsel of choice; trial without undue delay; trial in the presence of the accused; to defend oneself in person or through legal assistance of choice; to examine, or have examined, prosecution witnesses and to obtain the attendance and examination of defence witnesses under the same conditions; free interpretation, if needed; and not to be compelled to give self-incriminating evidence or to confess guilt. Furthermore, everyone convicted of a crime shall have the right to have conviction and sentence reviewed by a higher tribunal according to law, with Article 14.6 implying that appeal should be possible on grounds including new or newly discovered fact.

57. The UN has elaborated further on several issues relating to fair trials:

i. The "Basic Principles on the Independence of the Judiciary" state, *inter alia*, that the judiciary shall have jurisdiction over all issues of a judicial nature; judicial decisions by the courts [shall not] be subject to revision; tribunals using exceptional procedures shall not displace the jurisdiction of ordinary courts; persons selected for judicial office shall have appropriate legal training or qualifications; and the assignment of judges within a court is an internal matter of judicial administration.[75]

ii. The "Guidelines on the Role of Prosecutors" state, *inter alia*, that the office of prosecutors shall be strictly separated from judicial functions.[76]

iii. The "Basic Principles on the Role of Lawyers" state, *inter alia*, that governments must ensure that all detainees have prompt access to a lawyer and 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: consultations may be within the sight, but not the hearing, of guards; governments must ensure that lawyers are able to perform all their professional functions without hindrance or improper interference and must be able to travel and consult freely with their clients, including abroad; and the competent authorities must ensure that lawyers have access to appropriate information, files and documents in possession or control of the authorities in sufficient time to be able to provide effective legal assistance.[77]

iv. In General Comment No. 13 on administration of justice, the UN Human Rights Committee has stated that the use of military courts to try civilians could present serious problems in relation to the provision of fair trials. "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." "[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."

58. The situation under IHL is as follows:

i. Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[78]

ii. Article 75 Protocol I contains a similar statement of principle, and in addition sets out specific safeguards similar to those listed in paragraph 54 above.

iii. Pre-trial investigations relating to POWs must be conducted as rapidly as circumstances permit, so that trial shall take place as soon as possible; in no circumstances may pre-trial detention exceed three months.[79]

iv. GC III also provides for the assistance of comrades, defence by qualified counsel of choice (or failing such choice, provision of counsel by the detaining power) and the services of a qualified interpreter. Defence counsel shall be entitled to reasonable time and facilities for preparing the defence, including rights to visit freely and consult privately with the accused and to confer with defence witnesses, including other POWs. POWs shall be entitled to appeal against conviction or sentence in the same manner as members of the armed forces of the detaining power.[80]

v. Articles 71-73 of the 1949 4th Geneva Convention relative to the protection of civilian persons in time of war (GC IV) guarantee similar basic rights to civilians accused of criminal offences (including unprivileged belligerents).

59. The now-adjourned trials before Military Commissions are, from the perspective of international human rights, deficient on several grounds.[81]

i. No defendant has been tried without undue delay: indeed, proceedings have yet to be completed against any of the few detainees charged with criminal offences.

ii. Military Commissions try only non-citizens and thus institute inequality before the law.

iii. Commissions exist solely on the basis of executive orders and instructions.[82] The executive appoints their members, only one of whom (the Presiding Officer, who must be a judge advocate) need be legally trained, but all of whom must be commissioned officers of the US armed forces. Legal motions whose disposition could determine the outcome of proceedings must be referred to the executive, as must plea bargains. [83] The government has stated that only "Commission law", written by the executive for the purposes of Commission trials, is applicable; neither US domestic law nor international law applies. The Commissions thus fail to provide a "competent, independent and impartial tribunal established by law".

iv. Defence lawyers are impeded in their ability to prepare and there is inequality of arms between prosecution and defence. The Chief Defense Counsel, appointed from the armed forces by the executive, supervises all defence activities, including the efforts of both Detailed Defense Counsel and civilian defence lawyers (if any). Lawyer-client communications are not privileged and confidential, but may be monitored by government officials. Defendants may not represent themselves, despite the lack of confidentiality in lawyer-client relations. For those who can afford it, the right to choose civilian defence counsel is limited by various procedural considerations, and civilian defence lawyers may be denied access to "protected information" (see further below). Defence lawyers in different cases may not coordinate their defences in the interests of their clients, even to the extent of discussing tactics or sharing exculpatory evidence. Only the prosecution may subpoena individuals to testify or produce evidence. In these circumstances, the Commissions do not provide a fair hearing.

v. Commission trial procedures permit the use of secret evidence ("protected information") which is never shown to the accused and on which defence lawyers are prohibited from taking instructions, thus failing to ensure that defence lawyers are able to perform their professional functions and denying the defendant a fair hearing.

vi. The only test for the admissibility of evidence is whether it would "have probative value to a reasonable person." Usual grounds for exclusion, such as assertions of legal privilege, hearsay or coercion, are not mentioned. This permits for defendants to be compelled to give self-incriminating evidence. [84]

vii. The post-trial Review Panels consist of three military officers, "qualified by virtue of their experience, impartiality, and judicial temperament" (no mention is made of legal qualification or judicial experience), who are appointed by the executive. The defence has no right to make submissions and may present oral argument only if the Review Panel so chooses. Unless a majority has formed a "definite and firm conviction that a material error of law occurred" (in which event the executive must either dismiss the charges or refer the case back to the Commission for further proceedings, as appropriate), the Panel merely submits an opinion to the executive, which then has discretion as to determination of verdict and sentence. This does not amount to review by a "higher tribunal according to law".

viii. Independent observers attending Military Commission proceedings strongly criticised the quality of interpretation, and indeed the Commissions themselves found it necessary to replace incompetent interpreters.[85]

ix. The material jurisdiction of the Commissions includes offences which are normally within the jurisdiction of civilian courts, including terrorist offences, hijacking, murder and destruction of property by an unprivileged belligerent,[86] and aiding the enemy and spying. Charges before the Commissions must relate to offences which have occurred "in the context of and associated with armed conflict", with two consequences: first, this implies all terrorist attacks of sufficient magnitude or severity being defined as "armed attacks" or "acts of war"; and second, it requires

categorisation of the “global war on terror” as an armed conflict. Both of these are legally questionable, to say the least.

60. Given the similar safeguards guaranteed under IHL, one can conclude that the Military Commissions would also be unacceptable were that legal regime applicable. Furthermore, in the ruling in *Hamdan* (see above), District Judge Robertson found that the applicant was presumptively entitled to POW status, and that POWs were entitled to trial by courts martial or by tribunals operating under their normal procedures.[87] Since the Military Commission procedures did not conform to those of the Uniform Code of Military Justice – notably with respect to “the structure of the reviewing authority after trial [and] the power of the appointing authority of presiding officer to exclude the accused from hearings and deny him access to evidence presented against him” – they were incompetent for trying detainees, whether their entitlement to POW status was presumptive or judicially determined. (Following Judge Robertson’s ruling, all proceedings before Military Commissions were adjourned indefinitely.)

61. Even US military lawyers appointed to represent defendants have condemned the Military Commissions. Lieutenant Commander Charles Swift and Major Mark Bridges were reported as stating that the tribunals were incapable of producing a fair and just result and describing them as “fundamentally flawed”.[88] Major Michael Mori has stated that “The system is not set up to provide even the appearance of a fair trial… The commission process has been created and controlled by those with a vested interest only in convictions.”[89] “This Military Commission system is designed to allow evidence that could have been obtained under torture to be used.”[90] Lieutenant Colonel Sharon Shaffer had expressed her “great concerns about whether [her client] could receive a fair trial with rules that are written that are twisted against the defence”.[91]

Preliminary conclusions

62. The Rapporteur considers that on numerous and various grounds, whether under international human rights law, IHL or customary international law, the Military Commissions are incompetent to provide a fair trial. Should the correct position be that the detainees are still held in connection with an ongoing armed conflict, the Rapporteur would agree with Judge Robertson’s conclusion that it would be unlawful to try any of them before the Military Commissions. Furthermore, whatever the legal context, the Military Commissions fail to satisfy the minimum standards of international customary law.

5. Secret detention

63. Secret or unacknowledged detention amounts to a form of enforced disappearance. It directly violates various human rights provisions, including the right to liberty and security of the person and the right to recognition as a person before the law.[92] Furthermore, it facilitates violation of other provisions, in particular the right to life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment. As noted by the UN Human Rights Committee, “The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.”[93] This position has been confirmed by the UN General Assembly, which condemned enforced disappearances as “a grave and flagrant denial of human rights and fundamental freedoms” and their systematic practice as being “of the nature of a crime against humanity”.[94] IHL requires the prompt registration of detainees (whether POWs or civilians) and gives them rights of communication with the exterior.[95]

64. There have been consistent allegations of unacknowledged, ‘secret’ detainees being held in Guantánamo. The ICRC has been “especially concerned about the fact that the US detains an unknown number of people outside any legal framework… According to public statements by official US sources, a number of detainees are… being held incommunicado at undisclosed locations.”[96] More specifically, six human rights experts of the UN Commission for Human Rights have stated that “The exact number and the names of the persons detained at Guantánamo continue to be unknown. This situation is extremely disconcerting and is conducive to the unacknowledged transfer of inmates to other, often secret detention facilities…”[97] The US NGO Human Rights First has noted that “there is still no or only conflicting information about how many individuals are held [at Guantánamo and Bagram Air Base in Afghanistan, and] troubling information about inadequate provision of notice to families about the fact of detainees’ capture and condition… [T]he numbers provided by the Administration raise concerns

that the information regarding the number of detainees provided by the U.S. Government does not reveal the whole picture."[98]

65. The Washington Post has reported on a separate CIA detention facility at Guantánamo, where detainees "are held under separate rules and far greater secrecy. Under a presidential directive and authorities approved by administration lawyers, the CIA is allowed to capture and hold certain classes of suspects without accounting for them in any public way and without revealing the rules for their treatment… Current and former US intelligence officials say the [CIA] holds the most valuable Al Qaeda leaders… The CIA is believed to be holding about three dozen Al Qaeda leaders in undisclosed locations, US national security officials say."[99]

66. There is an immediate link between secret detentions and the risk of ill-treatment in these circumstances: Attorney General Gonzales, during his confirmation hearing, stated that CIA and other non-military personnel were not covered by the 2002 presidential memorandum on humane treatment of detainees (see above).[100]

Preliminary conclusions

67. The Rapporteur considers that there is sufficient evidence to suggest that the USA is engaging in secret detentions, including at Guantánamo and of detainees previously held at Guantánamo, although because of the nature of the problem, concrete details of specific cases are not available.

6. "Rendition," non-refoulement and "diplomatic assurances"

68. "Extraordinary rendition" describes the US administration's practice of sending terrorist suspects to foreign countries for purposes such as interrogation and prosecution. Removal of persons to countries in which they would be subjected to torture or to cruel, inhuman or degrading treatment or punishment amounts to *non-refoulement* in violation of customary international law, as codified in various international instruments.[101] The UN Human Rights Committee has stated that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[102]

69. According to credible reports, the policy had been used occasionally by the CIA since the mid-1990s but escalated dramatically following the 11 September 2001 terrorist attacks, with the emphasis changing from transferring detainees to the custody of other states, to maintaining them in US custody within the territory of other states. These reports also mention numerous cases in which detainees have been subjected to torture and cruel, inhuman and degrading treatment in the countries to which they have been sent. Indeed, detainees are often sent to countries with particularly bad records of human rights abuses.[103] These countries include in particular Egypt, of which the US government's own State Department has reported that "torture and abuse of detainees by police, security personnel, and prison guards remained common and persistent".[104] One US official involved in the practice has been quoted as saying "We don't kick the shit out of them. We send them to other countries so *they* can kick the shit out of them."[105]

70. Mamdouh Habib has stated that he was transferred from Afghanistan to Guantánamo via Egypt, where he had been tortured daily for six months, including being kicked so hard "it nearly killed me", having cigarettes put out on his chest, electric shocks, and being beaten whilst hung from the ceiling in handcuffs.[106] The Composite Statement alleges that Moazzem Begg (British detainee) and Saad Al Madini had also been tortured in Egypt before arriving at Guantánamo. Amnesty International has issued an "Urgent Action" concerning the fear of forcible return of Guantánamo detainees to torture or ill-treatment.[107]

71. A further point relates to reliance on "diplomatic assurances" given by the authorities of a receiving state that those transferred to their custody will not be subject to mistreatment. In his 2004 interim report to the General Assembly, the UN Special Rapporteur on torture stated that "In circumstances where [the] definition of 'systematic practice of torture' applies, the Special Rapporteur believes that the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to…" and was "compelled to state that he is reticent with regard to the practice of resorting to diplomatic assurances, in particular if that practice becomes a substitute for the principle of non-refoulement." In his opinion, it was essential that "such assurances contain an unequivocal guarantee that the person concerned will

not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of that person has been put into place."[108]

72. On 19 March 2005, Judge Collyer of the District Court for the District of Columbia granted a temporary restraining order preventing the US government from removing 13 Yemeni detainees from Guantánamo. This order was granted on the basis that removal of the detainees would take them outside US jurisdiction and into potentially indefinite detention elsewhere, thus depriving US courts of the possibility of reviewing the lawfulness of their detention. Furthermore, the court was concerned to ensure that the detainees were not sent back to a risk of being tortured.[109]

73. On 16 March 2005, the US Congress passed, by 420 votes in favour to two against and three abstentions, an amendment offered by Representative Edward J. Markey. Entitled the "Torture Outsourcing Prevention Act", this would prohibit the transfer of persons to countries where there were substantial grounds for believing that torture or cruel, inhuman or degrading treatment is commonly used during detention or interrogation. This prohibition could be waived only in cases of certification that the country in question had ended such practices and where a mechanism for verifying the returned individual's well-being was in place, including, at a minimum, immediate, unfettered and continuing access by an independent humanitarian organisation. "Diplomatic assurances" would be insufficient to justify a waiver. The Rapporteur strongly welcomes and encourages this development.

Preliminary conclusions

74. The Rapporteur finds that there is credible evidence that the USA has "rendered" detainees, including those en route to Guantánamo, in violation of the prohibition on *non-refoulement*. Against this background, he fears that the US administration intends to return or transfer detainees without taking proper account of the subsequent risk of torture or other prohibited mistreatment.

E. Conclusions and recommendations

75. The Rapporteur wholeheartedly agrees with the following dicta of US District Courts on the need to respect human rights and the rule of law:

i. "Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years."[110]

ii. "If the law in its current state is found by the President to be insufficient to protect this country from terrorist plots…, then the President should prevail upon Congress to remedy the problem."[111]

76. All right-minded people felt disgust and outrage in the aftermath of the terrorist attacks of 11 September 2001 and extended their unflinching support to the USA's determination to punish those responsible and prevent further attacks. Since then, however, the US administration has strayed into unlawful actions in its zeal to pursue a world-wide campaign against terrorism, exceeding both the authority granted to it by Congress and the bounds imposed on its conduct by international law.

77. The Rapporteur wishes to make clear that international law should not be considered as a hindrance on the USA in its efforts to combat terrorism. Respect for international human rights law and IHL in particular would work to the administration's advantage, in ensuring the widest international support for its activities and avoiding situations which could provoke misplaced sympathy for terrorists or their causes. In particular, no branch of international law would prevent the arrest, detention, interrogation, prosecution and punishment of terrorists; nor the investigation and prevention of terrorist offences; nor cooperation in these matters with foreign governments.

78. The Rapporteur therefore proposes making a series of recommendations: first, to the US government, calling on it to cease all unlawful practices and respect fully the rights of all detainees; second, to the governments of member States, calling on them to take effective

action in support and defence of any of their citizens, nationals or former residents who are or have been detained at Guantánamo and to avoid being implicated in unlawful US actions; and finally, to the Committee of Ministers, to bring the Assembly's concerns to the attention of the USA as an Observer state of the Council of Europe and to take steps to monitor and report back on the USA's response to and compliance with the Assembly's requests.

APPENDIX I
Programme of the Hearing

10 h 00 *Opening of the Hearing* by Mr Christos Pourgourides, Chairperson of the Sub-Committee on Human Rights

10 h 05 *Introduction* by the Rapporteur, Mr Kevin McNamara

10 h 15 *Theme I*:

The experiences of the detainees and their legal representatives: the factual basis of possible unlawfulness

Mr Jamal al-Harith, *British ex-detainee*

Mr Robert Lizar, *solicitor, legal representative of Mr al-Harith*

Mr Bernhard Docke, *legal representative of Mr Kurnaz, detainee with Turkish nationality and German residency*

Dr James MacKeith,*forensic psychiatrist*

11 h 00 *Questions and discussion*

[11 h 45 Break]

12 h 00 *Theme II:*

International human rights and humanitarian law: the legal standards relevant to lawfulness

Professor Georg Nolte, *Member of the Venice Commission*

Mr Edward J. Flynn, *Office of the UN High Commissioner for Human Rights*

Mr Rob Freer, *Amnesty International*

12 h 45 *Questions and discussion*

13 h 15 *Closing of the hearing* by the Rapporteur, Mr Kevin McNamara

APPENDIX II
Questionnaire addressed to national delegations[1]

Explanatory note

In this questionnaire:

i. "Detainee" means a person who is or has been detained by the United States at Guantánamo Bay.

ii. "From your country" refers to a person having citizenship or nationality of your country or whose former habitual residence was in your country.

Section I - general

1. Are there any persons from your country who are or have been detained by the US at Guantanámo Bay?
(If the answer to this question is "no", the remaining questions are not applicable.)

2. How many detainees from your country have there been, and what are their names?

Section II – consular, family and other access to detainees

3. Have the US authorities been approached to allow consular/ family/ legal representatives' / other access to detainees from your country?
(if the answer to this question is "no", please continue to the next section.)

4. What was the response of the US authorities to such approaches?

5. If the US authorities allowed it, please give details (dates, participants, findings) of any such access.

Section III – diplomatic efforts on the behalf of detainees

6. Please describe any involvement by your country's diplomatic services on the behalf of detainees from your country, and the response of the US authorities to these efforts.

Section IV – allegations of mistreatment

7. Have your country's authorities received any allegations of mistreatment of detainees occurring whilst in detention?

Section V – treatment of released detainees

8. Have any of the detainees from your country been released or returned by the US?
(If the answer to this question is "no", there are no further questions.)

9. When were they released or returned?

10. Were any of them transferred to continuing detention in your country or elsewhere (if elsewhere, please specify)?

11. For those transferred to continuing detention:

i. have they subsequently been released;

ii. if not, have they been charged with any criminal offence (please give details)?

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[1] Approved by the Committee at its meeting on 27 January 2005.

APPENDIX III
Replies from the national delegations to the questionnaire

1. A total of 30 replies were received to the questionnaire. Of these, seven stated that citizens, nationals or former residents of the country were or had been detained.

2. Belgium had two detainees (names withheld), both of whom were still in detention.[112] Consular, legal and family visits had been requested, but the US had refused. There had been four visits, three in 2002 and one in 2003, by Belgian judicial investigators and police officers in connection with an investigation in Belgium. Several interventions had been made on behalf of detainees by the Embassy in Washington and to the US Ambassador in Brussels. No allegations of mistreatment had been received.

3. Bosnia & Herzegovina had six detainees, four citizens and two former residents. In June 2003, the Council of Ministers of Bosnia and Herzegovina assigned a vice-consul to visit the detainees, but the US authorities refused permission. In July 2004, the same representative, this time on behalf of the Ministry of Justice, was permitted to visit. Following this, the Chairman of the Council of Ministers wrote to the US Embassy in Sarajevo asking for release of the four citizens; no response had yet been received. All detainees had complained to the vice-consul about the way they had been treated by Guantánamo staff and about general detention conditions. A US attorney involved in their cases had reported to the Ministry of Justice that one

of the detainees had complained of having one of his fingers broken during questioning at Guantánamo.

4. The case of these six is particularly disturbing as in January 2002, prior to their removal to Guantánamo, Bosnia and Herzegovina federal police had arrested and then transferred them to the custody of US forces in contravention of court orders from both the Supreme Court and the Human Rights Chamber. In October 2002 and April 2003, the Human Rights Chamber found that the men's rights to liberty and security of the person and not to be arbitrarily expelled had been violated, and ordered all possible diplomatic efforts to be made to protect their basic rights in detention, including to retain and pay for lawyers whilst they were in detention and during any trial, and compensation to be paid. In the case of Mustafa Ait Idir, the authorities were ordered to take all possible steps to obtain his release.[113] In the Rapporteur's view, the information received in response to the questionnaire does not suggest that "all possible efforts" have been made as required.

5. Denmark has had one detainee, released on 19 February 2004 and not subsequently detained.[114] Danish delegations visited him on five occasions in 2002-2003, conversed with him and were able to ascertain his detention conditions. During his detention, the Danish government was in continuous diplomatic dialogue with the US authorities, emphasising that his indefinite detention was unacceptable and seeking to safeguard his interests. He made no allegations of mistreatment to the visiting delegations.

6. France had had seven detainees, four released in July 2004 and the final three in March 2005.[115] The Ministry of Foreign Affairs conducted three "identification and information visits" in January 2002, March 2002 and April 2004. Since the outset, there had been high-level contacts with the US authorities regarding the question of the status of the detainees and future legal proceedings. France had requested that all detainees (whatever status or nationality) be treated in accordance with international law, and demanded that any French detainees against whom there were grounds for prosecution by tried in France. Since 2002, France had engaged in judicial and penal cooperation with the USA; in November 2002, the Parquet de Paris had opened a case, on the basis of which all but one of the detainees had been detained since their return on suspicion of "criminal association in connection with a terrorist organisation". No allegations of mistreatment had been received.[116]

7. Germany had one detainee, Murat Kurnaz, a "former resident" and Turkish national. "It is not known, but cannot be excluded, if there are other detainees… who had their former habitual residence in Germany."[117] The German government had not approached the US authorities, "as Turkey is responsible and able to grant diplomatic protection to Mr Kurnaz."[118] No information had been received on allegations of mistreatment.[119] He is still detained.

8. Russia had eight detainees.[120] Following Russian acceptance of a US proposal that diplomatic notes be exchanged subjecting Russia to certain engagements, the US agreed to hand over seven detainees, not including Mr R. Mingazov who remained under investigation. (No other questions were answered.)[121]

9. Spain's consular authorities were aware of one detainee, Hamid Abderrahman Imed, born in Ceuta. The consular authorities had approached the US authorities for access; the Spanish reply contained no information on the US response or on any visits, and no information was given as to any diplomatic efforts. Mr Imed's lawyers produced a written complaint of mistreatment.[122] In 2004, Mr Imed was returned to Spain to face trial on terrorism charges; he was initially subject to preventive detention but had since been provisionally released.

10. Sweden had one detainee, Mehdi Ghezali, now released.[123] The Swedish government had approached the US authorities for consular etc. access, but "The US authorities regard this as an intelligence matter, and have hence declared that no [such] visits are to be allowed." There were numerous contacts made on his behalf at ministerial and diplomatic levels, between 2002 and 2004. The government was aware of media reports alleging mistreatment.[124] He was neither detained nor charged on return.

11. The United Kingdom had had nine persons detained, five of whom were released in March 2004 and the remaining four in January 2005.[125] Nine "consular welfare visits" had taken place, between January 2002 and October 2004, and the US had granted access to the detainee's legal advisors. The government held discussions with the US authorities during 2003, and then requested the return of all British detainees. Foreign Office Ministers had also held a

number of meetings with detainees' families, lawyers and members of parliament. Further contacts, involving the UK Prime Minister and the US President, as well as the UK Foreign Minister and the US Secretary of State, led to the US agreeing to return the remaining detainees in January 2005, following discussions to address US security concerns. "Throughout the period of detention…, the government has sought to balance the need to safeguard the interests of Britons overseas with our duty to meet the threat from international terrorism."[126] The UK authorities had received allegations of mistreatment during detention (no details were given, but see the Explanatory Memorandum). None of the released detainees had been detained further following their return.[127]

12. The Rapporteur is concerned at the failure to reply of Turkey, which has been reported to have as many as thirteen detainees (including Murat Kurnaz – see above).[128] At least one has alleged that he was psychologically and physically tortured.[129]

13. The following countries' replies suggested that they had no detainees: Austria (more specifically, no "Austrians"), Cyprus (no persons having "any connection whatsoever"), Czech Republic (no "citizens"), Estonia ("no Estonian"), Finland (no-one "from Finland"), Greece (no "persons having a connection"), Hungary (no "citizens"), Iceland ("none of the questions apply"), Ireland, Italy (no "Italian citizens or persons having their residence"), Latvia (no-one "from our country"), Lithuania, Luxembourg, Malta ("no nationals"), the Netherlands, Norway, Poland, Romania (no "citizens"), Slovenia (no "citizens") and Switzerland ("no Swiss"). Georgia replied that it had no detainees, although UPI had reported that there were two Georgians.

14. The Rapporteur would make the following comments:

i. there is clearly continuing uncertainty about the numbers, names and nationalities of detainees, adding to concern over secret detentions;

ii. several countries do not seem to have taken any or sufficient consular steps to ensure the safety and well-being of their detainees: apparent ignorance of reported allegations of ill-treatment implies a failure to have intervened;

iii. equally, not all countries have made adequate diplomatic efforts to protect the rights or secure the release of their detainees;

iv. the USA refused to allow consular and other access in some cases but not others, with no obvious, justifiable distinction between the two;

v. given the Explanatory Memorandum's findings on torture and ill-treatment, arbitrariness of detention and lack of fair trial amounting to a flagrant denial of justice, member States' human rights obligations prohibit assistance or participation in interrogations at Guantánamo, or compliance with US requests for extradition or mutual legal assistance in relation to individuals liable to detention at Guantánamo, unless and until such violations cease;

vi. Bosnia-Herzegovina can be singled out for particular criticism for having acted unlawfully and in direct contravention of court orders in assisting in the transfer of persons to Guantánamo.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10178, Reference 2973 of 21 June 2004

Draft resolution and draft recommendation unanimously adopted by the Committee on 6 April 2005

Bartumeu Cassany, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Sali Berisha, Mr Rudolf **Bindig**, Mr Malcolm **Bruce**, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mr Boriss Cilevics, Mr András Csáky, Mr Marcello Dell'Utri, Mr Mehdi **Eker**, Mr Martin Engeset, Mrs Lydie **Err**, Mr Václav **Exner**, Mr Valeriy Fedorov, Mr Robert Fico, Mr György **Frunda**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Ms Gultakin Hajiyeva (alternate: Mr Ali **Huseynov**), Mrs Karin Hakl, Mr Michel **Hunault**, Mr Sergei Ivanov, Mr Tomáš Jirsa, Mr Neven Jurica, Mr Antti Kaikkonen, Mr Hans Kaufmann, Mr Ulrich Kelber, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre **Kucheida**, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Andrea Manzella, Mr Alberto Martins, Mr Dick **Marty** (alternate: Mr Andreas **Gross**), Mr Tito Masi, Mr Kevin **McNamara**, Mr Philippe Monfils (alternate: Mr Luc **Van den Brande**), Mr Philippe Nachbar, Mr Tomislav Nikolic, Ms Ann **Ormonde**, Ms Agnieszka **Pasternak**, Mr Ivan **Pavlov**, Mr Johan Pehrson, Mr Piero Pellicini, Mrs Sólveig Pétursdóttir, Mr Rino Piscitello (alternate: Mr Milos **Budin**), Mr Petro Poroshenko, Mrs Maria Postoico, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine (alternate: Mr Michel **Dreyfus-Schmidt**), Mr Armen Rustamyan, Mr Adrian **Severin**, Mr Michael Spindelegger (alternate: Mr Hans **Ager**), Mrs Rodica Mihaela **Stanoiu**, Mr Petro Symonenko, Mr Egidijus **Vareikis**, Mr Miltiadis **Varvitsiotis**, Mr John Wilkinson, Mrs Renate Wohlwend, Mr Vladimir Zhirinovsky, Mr Zoran Žižic

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Clamer, Mr Milner

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[1] The USA was invited to send a representative to participate in the hearing, but declined to do so, nor did it send an observer.

[2] Namely Mr François Stamm, Head of Operations for Northern America, Western, Northern and Southern Europe, Mr Gabor Rona, Legal Advisor and Mr Vincent Cassard, head of the Guantánamo inspection team, at the ICRC and Ms Mona Rishwami, Legal Advisor and Head of the Rule of Law Unit and Mr Edward J. Flynn, Coordinator, Human Rights and Counter-terrorism at the Office of the UN High Commissioner for Human Rights.

[3] Doc. CDL-AD (2003) 18.

[4] Proc. 7463.

[5] Public Law 107-41, 115 Stat. 224.

[6] Speech to Joint Session of Congress, 20 September 2001.

[7] Statement, 7 October 2001.

[8] Press conference, 7 October 2001.

[9] See statements of President Bush and Secretary of Defense Rumsfeld, 7 October 2001, para 10 above.

[10] General Comment No. 29, paragraph 3.

[11] ICCPR article 4.

[12] *Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory*, 9/7/04, para 106; see also *Advisory Opinion on the legality of the threat of use of nuclear weapons*, 8/7/96, para 25.

[13] The Human Rights Committee has further stated that certain procedural rights become non-derogable in circumstances where derogation would impinge on effective protection of non-derogable rights: General Comment No. 29, paragraph 15.

[14] See General Comment No. 29, in particular paragraphs 9, 12, 13 and 16.

[15] ICCPR article 4.

[16] General Comment No. 29, paragraph 3.

[17] In its decisions on the adoption of precautionary measures in relation to detentions at Guantánamo, the Inter-American Commission on Human Rights noted that "the interrelationship between international human rights and humanitarian law in situations of armed conflict is variable. In some respects the protections may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In other respects, the test for evaluating the observance of a particular right in a situation of armed conflict may be distinct from that applicable in time of peace" (see note to the US Government, 23/7/02).

[18] Civil Action No. 2:04-2221-26AJ, judgment of 28/2/05.

[19] General Comment No. 31, paragraph 10. See also ICJ, *Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory*, 9/7/04, para 109: "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory."

[20] Case no. 03-334, judgment of 28/6/04.

[21] Judgment of 23/3/95, para 62.

[22] Judgment of 12/3/03, para 93.

[23] Grand Chamber judgment of 19/12/01, para 75.

[24] Judgment of 31 January 2005, pp. 34-37.

[25] Judgment of 19 January 2005.

[26] A policy involving possible use of armed force against a diffuse enemy with no territorial base or aspirations, which has no defined starting point and no definable conclusion, and which may be pursued at any time in any country in the world, regardless of its government's policies, cannot amount to an "armed conflict" within the meaning of IHL.

[27] See Article 4A paragraphs 1 and 2 of GC III.

[28] Chapter 1 paragraph 6, Army Regulation 190-8 on "Enemy prisoners of war, retained personnel, civilian internees and other detainees", 1/10/97 (emphasis added).

[29] Regulation 190-8, Glossary, Section II: "retained personnel" are defined to include medical personnel, chaplains and officials of the Red Cross and similar organisations, and "civilian internee" is defined as "A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power." See also "Determination of Eligibility for Enemy Prisoner of War Status", Directive No. 45-2, HQ, US European Command, and *Law of War Workshop Deskbook*, Judge Advocate General's School, US Army.

[30] The Rapporteur disagrees, however, with the Supreme Court's conclusion that since "active combat operations against Taliban fighters apparently are ongoing", the "relevant conflict" persists. This is a misunderstanding of the meaning of "international armed conflict" applicable to IHL.

[31] Civil Action No. 04-1519, pp 18-19.

[32]. Since the international armed conflict in Afghanistan has now ceased, all detainees are now entitled to the normal protections of international human rights law, regardless of what their status under IHL may previously have been.

[33]. See Common Article 3; Articles 13, 14, 17, 20, 46 & 87 GC III; Articles 27, 32, 37 & 127 GC IV; Articles 10 and 75 of the First Additional Protocol of 1949 (Protocol I); and Articles 4, 5 & 7 of the Second Additional Protocol of 1949 (Protocol II). Article 75 Protocol I is broadly accepted to represent customary international law (see Matheson, Michael J., "The US position on the relation of customary international law to the 1977 Protocols", 2 Am. U. J. Int'l L. & Pol'y 415).

[34]. *B. v. France*, judgment of 25/3/92.

[35]. An earlier instruction has authorised the use of dogs to induce fear (see below).

[36]. This replaced an earlier instruction of 2 December 2002 which had approved a different list of techniques including: use of stress positions for a maximum of four hours (Rumsfeld questioned this time limit, saying that he himself stood for 8-10 hours a day); deprivation of light and auditory stimuli; hooding; 20-hour interrogations; removal of all comfort items (including religious items); removal of clothing; forced shaving; using individual phobias (e.g. fear of dogs) to induce stress; and use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing. Whilst declining to authorise "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, exposure to cold weather or water…, [and] use of a wet towel or dripping water to induce the misperception of suffocation", it was stated that such techniques "may be legally available".

[37]. "Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. ss.2340-2340A", 1/8/02: 18 U.S.C. ss.2340-2340A contains the US domestic legal provisions against torture.

[38]. *Ireland v. UK*, judgment of 18/1/78, para 167.

[39]. ibid.

[40]. *Selmouni v. France*, judgment of 28/7/99, paras 100-101.

[41]. *R. v. Bow Street Metropolitan Stipendiary, ex p. Pinochet Ugarte (Amnesty International Intervening) (No. 3)*, [1999] 2 WLR 827, HL. See also Article 27, Rome Statute of the International Criminal Court.

[42]. See Articles 2 and 4, Convention Against Torture and Article 33, Rome Statute.

[43]. E.g. President's Statement on the UN International Day in Support of Victims of Torture, 26 June 2004: "We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all US laws, including the Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of detainees."

[44]. "A degrading policy", *Washington Post*, 26/1/05.

[45]. See the Rumsfeld memoranda on "counter-resistance techniques" and the Justice Department's memorandum of 1/8/02 on "standards of conduct for interrogation", above.

[46]. As a preliminary matter, it should be recalled that the overriding purpose of detention at Guantánamo is interrogation, with the regime *as a whole* designed to facilitate the obtaining of information.

[47]. British detainee; see doc. AS/Jur (2005) 01, Minutes of the hearing held by the Committee in Paris on 17/12/04.

[48] “Composite Statement” of British detainees Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, 26/7/04; see http://www.cageprisoners.com/dn_files/200408041051220.pdf .

[49] Witness Statement of Tarek Dergoul, British detainee, in the case of *R. (on the application of Feroz Abbasi and Martin Mubanga) v. Secretary of State for the Foreign Office & Secretary of State for the Home Department*

[50] Letter of 12 July 2004; British detainee.

[51] *The Guardian*, “Guantánamo torture and humiliation still going on, says shackled Briton”, 11/12/04; British detainee.

[52] *New York Times*, “Detainee says he was tortured in US custody”, 13/2/05; Australian detainee. On the widespread use of sexual humiliation as an interrogation technique, see *Associated Press*, “Sex used to break detainees: report”, 28/1/05.

[53] *New York Times*, “Canadian was abused at Guantánamo, lawyers say”, 10/2/05; Canadian detainee.

[54] *The Observer*, “Guantanamo Briton ‘in handcuff torture’”, 2/1/05; British detainee (name not disclosed due to restrictions placed on his lawyer).

[55] *New York Times*, “Lawyer says US forces abused Kuwaiti prisoners”, 8/2/05. The US administration rejected these claims, stating that “It is important to note that Al Qaeda training manuals emphasize the tactic of making false allegations.”

[56] Memorandum obtained by the American Civil Liberties Union (ACLU) (see below).

[57] Unless indicated otherwise, see ACLU, “FBI E-mail refers to Presidential Order authorizing inhumane interrogation techniques”, 20/12/04.

[58] CNN, “FBI reports Guantanamo ‘abuse’”, 8/12/04.

[59] *New York Times*, “Broad use of harsh tactics is described at Cuba base”, 17/10/04.

[60] *New York Times*, “Red Cross criticizes indefinite detention in Guantánamo Bay”, 10/10/03.

[61] ICRC, “Guantanamo Bay: Overview of the ICRC’s work fro detainees”, Operational Update, 30/01/04.

[62] ICRC, “The ICRC’s work at Guantánamo Bay”, Press Release, 30/11/04.

[63] *New York Times*, “Red Cross finds detainee abuse in Guantánamo”, 30/11/04.

[64] See doc. AS/Jur (2005) 01.

[65] “UN Human Rights Experts express Continued Concern about Situation of Guantánamo Bay detainees”, Press Release, 4/2/05.

[66] “Operation Take Away My Freedom: inside Guantanamo Bay on trial”, *Vanity Fair*, January 2004.

[67] The Rapporteur notes also the findings of the UN Special Rapporteur on torture: see e.g. docs E/CN.4/2003/68/Add.1, 27/2/03 and E/CN.4/2004/56/Add.1, 23/3/04.

[68] Including *inter alia* members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces; members of militias, volunteer corps or organised resistance movements, providing they are commanded by a responsible officer, bear a fixed distinctive sign recognisable at a distance, carry arms openly and conduct their operations in accordance with the laws and customs of war; authorised civilians

accompanying the armed forces; and inhabitants of a non-occupied territory who spontaneously take up arms in resistance, providing they carry arms openly and respect the laws and customs of war.

[69] Articles 21 & 118 GC III.

[70] Articles 42 and 43 GC IV.

[71] Article 5 GC IV; "rights of communication" are otherwise protected under Article 104 GC IV.

[72] See e.g. Jamal Al Harith: "[I was] never given any reason or explanation for my detention", doc. AS/Jur (2005) 1.

[73] President Bush has stated that "the only thing I know for certain is that these are bad people": and that "the ones in Guantánamo Bay are killers", and Secretary Rumsfeld has described the detainees as "hardcore, well-trained terrorists" who are "among the most dangerous, best-trained vicious killers on the face of the earth".

[74] Opinion No. 5/2003 (USA), doc. E/CN.4/2004/3/Add.1, adopted 8/5/03.

[75] Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26/8-6/9/85; endorsed by the General Assembly in Resolutions 40/32, 29/11/85 and 40/146, 13/12/85.

[76] Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27/8-7/9/90.

[77] Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders.

[78] Whilst on its face applying only to non-international armed conflicts, Common Article 3 has been recognised by the International Court of Justice as constituting, "in the event of international armed conflicts", a "minimum yardstick" reflecting the "elementary considerations of humanity": *Nicaragua v. USA*, judgment of 27/6/86.

[79] Article 103 GC III.

[80] Articles 105 & 106 GC III.

[81] Six human rights experts of the UN Commission on Human Rights have expressed their doubts about the independence of the Commissions and the fairness of proceedings before them. "UN Human Rights Experts express…", 4/2/05; see also "UN Rights Expert 'alarmed' over US Implementation of Military Order". 7/7/03.

[82] For Military Commission Order No. 1 and the Military Commission Orders, see www.dtic.mil .

[83] Human Rights First has observed that "Officials all in the same chain of command create the rules governing the military commissions, define the crimes to be tried by them, and staff the panels sitting in judgment (including review panels)." See "Trials Under Military Order", 10/04.

[84] It is also a clear violation of Article 15 of the Convention Against Torture, which requires states to "*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" (emphasis added). Indeed, during court proceedings in the case of *Khalid v. Bush* (see above), the US government admitted that CSRTs could rely on evidence obtained as a result of torture.

[85] See Human Rights First, "Military Commission Trial Observation", 30/8/04, and Amnesty International, "Amnesty International observer's notes, No. 3", 9/11/04.

[86] For other purposes, the US administration considers “unlawful combatants” to fall outside IHL.

[87] Article 102 GC III.

[88] *New York Times*, “Military defenders for detainees put tribunals on trial”, 4/5/04.

[89] *Sydney Morning Herald*, “Military lawyer brands Hicks trial process unfair”, 22/1/04.

[90] *ABC Online*, “US allows use of evidence gained by torture”, 4/12/04.

[91] *New York Times*, 4/5/04.

[92] See Articles 9, 16, 6 and 7 ICCPR, respectively.

[93] See General Comment No. 29, paragraph 13(b).

[94] Declaration on the protection of all persons from enforced disappearance, A/RES/47/133, 18/12/92.

[95] See Articles 69-72 GC III and Articles 43 and 105-108 GC IV.

[96] ICRC, “Operational update on US detention related to the events of 11 September 2001 and its aftermath”, 5/11/04.

[97] “UN Human Rights Experts express…”, 4/2/05.

[98] Human Rights First, “Ending Secret Detentions”, June 2004. See also “Outsourcing torture”, *The New Yorker*, 14/2/05.

[99] “At Guantanamo, a prison within a prison”, 17/12/04.

[100] “Gonzales says ’02 policy on detainees doesn’t bind CIA”, New York Times, 19/1/05.

[101] See Article 3 CAT; also Article 33, International Convention relating to the status of refugees, and the Executive Committee’s statement, in General Conclusion on International Protection No. 25 (XXXIII) 1982, that “the principle of non-refoulement … was progressively acquiring the character of a peremptory rule of international law” (i.e. *jus cogens*).

[102] General Comment No. 20 on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, paragraph 9. The similar situation under the ECHR is set out in cases such as *Soering v. UK*, judgment of 7/7/89 and *Chahal v. UK*, judgment of 15/11/96.

[103] See in particular “Outsourcing torture”, *The New Yorker*, 14/2/05.

[104] US State Department, Country Reports on Human Rights Practices 2004: Egypt, Section 1.c.

[105] “US decries abuse but defends interrogations”, *Washington Post*, 26/12/02.

[106] *New York Times*, “Detainee says he was tortured whilst in US custody”, 13/2/05.

[107] See doc. AMR 51/058/2005, 17/3/05.

[108] A/59/234, 1/9/04. The Special Rapporteur referred to the statement of the Council of Europe Commissioner for Human Rights that “The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the absolute nature of the

prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains" (CommDH(2004)13, para 19).

[109] See *New York Times*, "US judge bars transfer of 13 Guantanamo detainees", 13/3/05 and *Washington Post*, "Judge blocks transfer from Cuba of 13 Yemeni detainees", 14/3/05.

[110] *In re Guantanamo Detainee cases* (see above), p.37.

[111] *Padilla v. Hanft* (see above), p.23.

[112] Both UPI and the Washington Post mention only one Belgian.

[113] See Amnesty International, "Unlawful detention of 6 men from B-H in Guantánamo Bay", EUR 63/013/2003, 30/5/03.

[114] Although the Danish reply does not name him, this detainee is presumably Sulayman Hajj Abdur-Rahman. Cageprisoners.com mentions that another detainee, Hasan Ma'Mum, may be Danish.

[115] cageprisoners.com names 11 French detainees: Mourad Benchellali, Imad Kanouni, Nizar Sassi, Ibrahim Yadel (the first four to be released), Khalid bin Mustafa, Ridouane Khalid, Mustaq Ali Patel (the three released later), and Abdul-Wahab, Jean Christian Marie Joseph Basar Olivier, Jean-Baptiste Mihoud and Mustafa Abd-al-Rahman al-Huwari. Since the French reply named only the three recently released, it is difficult to check this discrepancy.

[116] There have, in fact, been extensive media reports of mistreatment: see "Frenchmen say Guantanamo detention was like hell", Reuters, 31/7/04; "French Guantanamo detainees say sexually abused", Islamonline (quoting Libération), 4/8/04; "French prisoners were experimented on at Gitmo", granmo.cu (quoting Le Nouvel Observateur), 25/12/04; see also UN Special Rapporteur on torture, doc. E/CN.4/2004/56/Add.1, 23/3/04.

[117] This corresponds with the figure given by UPI.

[118] "[The] German Foreign Minister wrote to the Kurnaz family saying that there was no possibility of making diplomatic representations on his behalf… [T]he Turkish government viewed Murat Kurnaz as 'German-Turkish', and only after intense lobbying by [his mother] has the Turkish government come to view him as their responsibility. Despite this recognition, the Turkish government has shown little interest in pressuring the US government over [his] case." Amnesty International, "Who are the Guantanamo detainees? Case sheet 6", AMR 51/151/2004, 1/11/04.

[119] Since the German reply, press articles on Mr Kurnaz have mentioned the following: "head forced under water… electric shocks through his feet… pointed a rifle at his head to force him to confess… kept without food for six days." Associated Press, "Lawyers: detained Turk tortured at Gitmo", 9/3/05.

[120] UPI mentions 8 Russians plus two "Chechens"; the Washington Post also mentions 8 Russians, but cageprisoners.com mentions 9: Timur Ishmuradov, Shamil Khazhiyev, Rustam Akhmerov, Ruslan Odigov, Ravil Mingazov, Ravil Gumarov, Airat Vakhitov, Rasul Kudayev and Taloot.

[121] An Associated Press article, "Russian sue US for Guantanamo torture" (5/1/05), cites the claims of one ex-detainee referring to "scars on my back… beat[en] during interrogations… lost 66 pounds… deprived of sleep", mentioning reports in the Russian newspaper Izvestia.

[122] See "Freed detainee calls Guantanamo 'hell'", Washington Times, 28/2/04; "Springsteen used against detainees", The Australian, 29/2/04; "Former Spanish detainee accuses US of torture", Khaleej Times (citing "Spanish media"), 16/7/04; "Spain's former Gitmo detainee to sue Bush", The Australian, 28/7/04.

[123] This corresponds with the figures given by UPI and the Washington Post.

[124] See e.g. “Prisoner of Guantanamo Bay to sue Rumsfeld”, The Local [Sweden], 17/3/05: “sexual harassment at the hands of a female guard, being exposed to extreme heat and cold and long periods of sleep deprivation… chained for up to 14 hours a day in a cold interrogation room… ‘my body started shaking uncontrollably’”; see also “Swede reignites Guantanamo Bay torture fears”, ABC Online, 14/7/04 and “Freed Swede says he was tortured at Guantanamo”, Reuters, 14/7/04.

[125] This corresponds with figures given by United Press International, the Washington Post and cageprisoners.com.

[126] See Foreign Secretary, Statement to the House of Commons, 11/1/05.

[127] More accurately, subsequent detention was limited to a brief period of police questioning prior to release. Furthermore, the Home Secretary has since exercised executive powers to deny passports to the four released in 2005; their lawyers believe that this decision may be based on information obtained from them at Guantánamo under duress (see “Passport ban for two more Britons”, BBC News, 16/2/05).

[128] Ten of these (Nuri Mert, Lutfi Bayrikan, Abdullah Celik, Yuksel Celikgogus, Mustafa Eksi, Ibrahim Sen, Mesut Sen, Salih Uyar and Turgut Uzel, along with Murat Kurnaz) are mentioned by both UPI and cageprisoners.com; the other three (Arif Ulsam, Ibrahim Habbak, Ibrahim Jan) by cageprisoners.com alone.

[129] “Nobody is talking”, The Guardian, 18/2/05.