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**U.S. Violations of the  
International Covenant on Civil and Political  
Rights**

**A shadow report by the Center for Constitutional Rights,  
the International Federation for Human Rights, and the  
Center for International Human Rights of Northwestern University School of Law  
prepared for the United Nations Human Rights Committee  
on the occasion of its review of**

**The United States of America's Second and Third Periodic Report to the  
UN Committee on Human Rights Concerning the International Covenant  
on Civil and Political Rights**

**June 2006**

## Executive Summary

The Center for Constitutional Rights (CCR), the International Federation for Human Rights (FIDH), and the Center for International Human Rights of Northwestern University School of Law (CIHR) submit this joint memorandum in order to assist the Committee in evaluating the U.S. Report and developing additional issues to discuss with United States government officials attending the Committee's July 2006 session.

Since our last submission in March of this year, the United States has adopted new policies and practices that evince the current Administration's refusal to meet its obligations under the ICCPR. This memo discusses some of these legal developments in brief as well as recent events that make Committee consideration of these issues all the more critical at this juncture.

The arbitrary and indefinite detentions at the U.S. Naval Facility at Guantánamo Bay, Cuba (Guantánamo) violate the Article 9 right to be free from arbitrary arrest and detention. In addition, given the length of these detentions and the extremely harsh circumstances in which the men have been detained, the ongoing indefinite detention in and of itself rises to the level of a violation of Article 7's right to be free of torture and cruel, inhuman and degrading treatment or punishment and Article 10's right, when in detention, to be treated humanely and with respect for human dignity. Articles 7 and 10 are also independently violated by the U.S. government's abusive interrogation and detention practices at Guantánamo. The U.S. government's efforts, by means of its use of the Detainee Treatment Act of 2005, to prevent U.S. courts from exercising their jurisdiction over the Guantánamo detainees' pending habeas petitions violate the Article 9(4) right to a prompt judicial determination of the lawfulness of detention. Likewise, the provisions of that Act which deprive U.S. courts of jurisdiction over other actions arising out of the Guantánamo detentions violate the U.S. government's Article 2 obligation to provide an effective remedy for violations of ICCPR rights. Finally, the use of military commissions that fail to adhere to international fair trial standards violates the United States' obligations under Article 14.

Despite the fact that numerous government documents recently made public indicate that many of the detainees: (i) are not "enemy combatants" within the meaning of the U.S. Supreme Court's definition of that term; (ii) were seized in countries far from any battlefield while engaging in activities having nothing to do with the armed conflict in Afghanistan or the actions of Al Qaeda, or (iii) were sold for large bounties to the U.S. as part of its local citizen enlistment program in Pakistan and Afghanistan, little has been done to move forward the release and resettlement of these wrongly detained men. Instead, the U.S. government continues to assert that the men have no enforceable rights and are therefore consigned to a fate of waiting until the government figures out what to do with them.

While they wait in a prison filled with anguish and hopelessness, the men sink ever lower into despair. On Saturday, June 10, 2006, three men, Ali Abdullah Ahmed, Mani Shaman al-Habardi al-Utaybi, and Yassar Talal Al-Zahrani were found dead in their cells, having apparently committed suicide during the early hours of the morning.

We strongly urge the Committee to inquire of the U.S. government when it plans to close the prison at Guantánamo, release the detainees to freedom or try them in the proper court system, and commence an independent investigation of the policies that led to such inhumane treatment and the officials that created and implemented them.

## Introduction

The Center for Constitutional Rights (CCR), the International Federation for Human Rights (FIDH) (of which CCR is the member organization in the United States), and the Center for International Human Rights of Northwestern University School of Law (CIHR) would like to thank the Committee for its request to U.S. NGOs for additional information regarding United States compliance with the articles of the International Covenant of Civil and Political Rights (ICCPR or Covenant) and their response to the United States' Second and Third Periodic Report (U.S. Report). We are submitting this joint memorandum in order to assist the Committee in evaluating the U.S. Report and developing additional issues to discuss with United States government officials attending the Committee's July 2006 session.

Since our last submission in March of this year, the United States has adopted new policies and practices that evince the current Administration's refusal to meet its obligations under the ICCPR. This memo discusses some of these legal developments in brief as well as recent events that make Committee consideration of these issues all the more critical at this juncture.

### **1. THE ARBITRARY ARREST AND INDEFINITE DETENTION OF THE MEN BEING HELD BY THE U.S. AT GUANTÁNAMO VIOLATES THE UNITED STATES' OBLIGATIONS UNDER ARTICLES 7, 9, AND 10 OF THE ICCPR.**

The arbitrary and indefinite detentions at the U.S. Naval Facility at Guantánamo Bay, Cuba (Guantánamo) violate the Article 9 right to be free from arbitrary arrest and detention. In addition, given the length of these detentions and the extremely harsh circumstances in which the men have been detained, the ongoing indefinite detention in and of itself rises to the level of a violation of Article 7's right to be free of torture and cruel, inhuman and degrading treatment or punishment and Article 10's right, when in detention, to be treated humanely and with respect for human dignity. The U.S. government's efforts, by means of its efforts to use the Detainee Treatment Act of 2005, to prevent U.S. courts from exercising their jurisdiction over the Guantánamo detainees' pending habeas petitions violate the Article 9(4) right to a prompt judicial determination of the lawfulness of detention.

#### **A. The U.S. Government's Unsupportable Claim That No International Humanitarian And Human Rights Obligations Apply With Respect To The Men Detained At Guantánamo Because Of Their "Enemy Combatant" Status.**

Four and a half years after the U.S. first began transferring its "war on terror" detainees to Camp X-Ray in Guantánamo more than 450 men remain imprisoned in the Guantánamo camps, held *incommunicado*, with little hope for justice. The U.S. government insists that holding these men with limited or no access to their families, lawyers, or the courts is permissible because the men are supposedly "enemy combatants," a status that has not been consistently and definitively defined by the U.S. government and has been used to refer to persons seized from a broad range of contexts on the basis of secret, allegedly inculpatory information. This newly coined status, the U.S. government contends, supplants all statuses that might be applicable under international humanitarian law.<sup>1</sup> Thus, although there are men who fought with the Taliban incarcerated at Guantánamo, no battlefield hearings were held to determine their status and no presumption of prisoner of war status was applied as required by Article 5 of the Third Geneva Convention.<sup>2</sup> With the denial of a proper status determination,

<sup>1</sup> See "White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees" (February 7, 2002), available at <http://www.state.gov/s/1/38727.htm>.

<sup>2</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 5, August 12, 1949, 75 U.N.T.S. 135 (hereinafter Geneva Convention III).

also came the deprivation of nearly every meaningful protection afforded military and civilian internees under international humanitarian and human rights law. The United States contends that these “enemy combatants” can be held, pursuant to the President’s powers as Commander-in-Chief and under the laws and usages of war, under any terms and conditions it deems appropriate, until the end of hostilities in the “war on terror.” This is so, the U.S. government states, even if there is no means by which to judge when this “war” has ended.

## **B. The Continued Military Detention of Civilians without Charge or Trial**

Although the U.S. government continues to portray the detainee population of Guantánamo as a homogenous group of terrorists and their associates captured on the battlefield in Afghanistan during the conflict with the United States, the facts uncovered in the past two years have laid bare this spurious and inaccurate claim. From the facts gathered through the independent research efforts of attorneys acting as habeas counsel for the men and from documents released by the courts through years of litigation, we now know that a number of the men held at Guantánamo were seized and detained in places thousands of miles from any battlefield – from countries such as The Gambia, Zambia, Bosnia, and Thailand.<sup>3</sup> These men, as *civilians*, should never have been placed in military custody in the first instance, and certainly should not have been incarcerated without notice of the charges against them, access to counsel, or access to a fair and just civilian court system to assess the legality of their detention.

## **C. The Seizure and Detention of Bounty Victims**

The U.S. military has been holding people in Guantánamo without due process for more than four years based on allegations that the detainees *all* are hardened terrorists with ties to the Taliban or Al Qaeda. Yet as more information has been released, it has become clear that many of those being held – some of whom were seized at ages as young as 7 and as old as 97 – are neither violent terrorists nor any sort of “enemy combatants,” but rather are merely unfortunate individuals who were in the wrong place at the wrong time. Researchers at Seton Hall University recently issued a report based entirely on the U.S. government’s own characterization of the evidence pertaining to the detainees.<sup>4</sup> That report, shockingly, found that even by the U.S. government’s own account, as many as 55% of the detainees have been found to have committed no hostile act against the United States. A scant 8% of detainees were characterized as al Qaeda fighters; 40% had no connection to al Qaeda at all, and 18% had no connection to either al Qaeda or the Taliban.<sup>5</sup>

Of particular significance, only 5% of detainees were actually captured by U.S. forces. Of those whose captors were known to the U.S., 86% were captured in Pakistan or Afghanistan (including by Northern Alliance or Pakistani authorities) and turned over to the United States at a time when the U.S. was actively recruiting local citizens to do so in return for a sizable bounty. One recruiting flier advocating such captures, distributed in Afghanistan, states:

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<sup>3</sup> See *In re Guantánamo Detainee Cases*, Civil Action Nos., 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK) (D. D.C., January 31, 2005) available at <http://news.findlaw.com/wp/docs/gitmo/inregitmo13105opn.pdf>

<sup>4</sup> *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* by Mark Denbeaux, Professor, Seton Hall University School of Law and Counsel to two Guantánamo Detainees *et. al.* (February 8, 2006) available at [http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf). A copy of the Report is included in the appendix to this submission.

<sup>5</sup> *Id.* at 2.

*Get wealth and power beyond your dreams...you can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.*<sup>6</sup>

Despite the fact that numerous government documents recently made public indicate that many of the detainees: (i) are not “enemy combatants” within the meaning of the U.S. Supreme Court’s definition of that term; (ii) were seized in countries far from any battlefield while engaging in activities having nothing to do with the armed conflict in Afghanistan or the actions of Al Qaeda, or (iii) were sold for large bounties to the U.S. as part of its local citizen enlistment program in Pakistan and Afghanistan, little has been done to move forward the release and resettlement of these wrongly detained men. Instead, the U.S. government continues to assert that the men have no enforceable rights and therefore resigned to a fate of waiting until the government figures out what to do with them.

#### **D. The Gross Deficiencies of the Combatant Status Review Tribunals**

Notwithstanding the manner in which most of the detainees were apprehended, the United States maintains that it has provided an adequate method for detainees to challenge the legality of their detention through a mechanism denominated the “Combatant Status Review Tribunal” (CSRT). The government’s plan to conduct CSRTs for at least some portion of the total Guantánamo detainee population was announced on July 7, 2004, more than two and a half years after the first men were transferred to the Guantánamo for imprisonment, in an order issued by Deputy Secretary of Defense Paul Wolfowitz.<sup>7</sup>

The CSRT procedures are wholly inadequate in terms of ensuring that any sort of due process is afforded the detainees. Both the procedures governing the process and the substantive rules applied during the hearings are deeply flawed.<sup>8</sup> First, the CSRTs do not include the participation of an impartial decisionmaker. The government has acknowledged that the purpose of the CSRTs is *not* to provide an impartial determination of whether detainees are “enemy combatants” but rather to *confirm* the government’s longstanding conclusion that the detainees are “enemy combatants.” As the Wolfowitz Order establishing the CSRTs declares: “Each detainee subject to this Order *has been determined* to be an enemy combatant through multiple levels of review by officers of the Department of Defense.”<sup>9</sup> The CSRT procedures appoint low-ranking military officials to the task of confirming the determinations of their

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<sup>6</sup> *Id.* at 25.

<sup>7</sup> See Memorandum from Paul Wolfowitz, Deputy Sec’y of Defense, to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (hereinafter “Wolfowitz Order”).

<sup>8</sup> The U.S. government appears to recognize, correctly, that the constitutional validity of the procedures should be judged by the standard articulated by the U.S. Supreme Court plurality decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In *Hamdi*, a plurality of the Court declared that enemy combatants must be given a “fair opportunity to rebut the government’s factual assertions before a neutral decision maker.” 124 S. Ct. at 2648; *see also, e.g., Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance.’”) (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)). The Court in *Hamdi* also recognized that the petitioner in that case had been accorded “unmonitored” access to his counsel and “unquestionably has the right to access to counsel in connection with the proceedings on remand.” 124 S. Ct. at 2652. The CSRT procedures do not remotely satisfy the standards articulated in *Hamdi* because they do not provide a “neutral decision maker,” do not give the petitioners a “fair opportunity” to rebut the government’s allegations, and do not involve representation by counsel.

<sup>9</sup> Wolfowitz Order, *supra* note 7, ¶ a (emphasis added).

superiors.<sup>10</sup> Because members of the highest echelon of the Defense Department have long maintained that the detainees are “enemy combatants,” review of the detainees’ status by low-ranking officers within that agency cannot conceivably be characterized as an impartial review. Moreover, final review of the decisions of the CSRT process is retained by the Secretary of Defense, who has already prejudged the outcomes.<sup>11</sup>

Second, the CSRTs do not afford detainees a “fair opportunity” to rebut the government’s allegations. In this regard, the deficiencies of the CSRT procedures are both egregious and numerous. They include:

- (i) The CSRT procedures allow the detainees to be confirmed as “enemy combatants” based on secret evidence unknown to them. The Wolfowitz Order provides that detainees may be barred from attending the hearings if, in the unreviewable judgment of military officials, their presence would “compromise national security.”<sup>12</sup> Detainees are only allowed to see and confront information that is unclassified, which may preclude the detainees from knowing information like the identity of their accusers. This rule means that the detainees may be imprisoned indefinitely without any opportunity to confront the witnesses or evidence against them.
- (ii) The CSRT procedures provide little or no opportunity for the detainees to present evidence or call witnesses in their defense. The Wolfowitz Order provides that the detainees are allowed to call witnesses *only* if the government concludes, in its unreviewable discretion, that the witnesses are “reasonably available.”<sup>13</sup> The detainees also cannot call U.S. military personnel if that would, in the unreviewable judgment of the government, “affect combat or support operations.”<sup>14</sup> The Wolfowitz Order provides no mechanism by which the detainees may gather any evidence not provided to them by the government.
- (iii) The CSRT procedures employ an overly expansive definition of the term “enemy combatant.” In *Hamdi*, the United States Supreme Court accepted the government’s proffered definition of “enemy combatant” as “an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”<sup>15</sup> The Wolfowitz Order, in contrast, defines the category expansively to include any person who “was part of or supporting Taliban or al Qaeda forces, or associated forces.”<sup>16</sup> Under the government’s newly-minted category of persons it may detain indefinitely and without due

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<sup>10</sup> *Id.* ¶ e.

<sup>11</sup> *Cf. Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (where a state board “was incompetent by reason of bias to adjudicate the issues before it . . . [the district court] need not defer to the Board”); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (administrative hearings “must be attended, not only with every element of fairness but with the very appearance of complete fairness” and as a result “[t]he test for disqualification . . . is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law in advance of hearing it”).

<sup>12</sup> Wolfowitz Order, *supra* note 7, ¶ (g)(4).

<sup>13</sup> *Id.* ¶ (g)(8).

<sup>14</sup> *Id.*

<sup>15</sup> 124 S. Ct. at 2639.

process, an individual may be an “enemy combatant” without having engaged in combat in any sense. Instead, anyone whom the government declares to have “supported” the Taliban in any fashion (including cooks, secretaries, taxi drivers, school teachers, and nurses) may be indefinitely detained by the United States as an “enemy combatant”, even if they never took up arms against the United States or supported international terrorism, and even if they were coerced against their will into serving the Taliban.

- (iv) The CSRT procedures establish a presumption of guilt. In addition to declaring that the detainees have already been determined to be “enemy combatants”, the CSRT procedures provide that it is the detainees’ obligation to rebut the existing presumption in favor of the government’s evidence.<sup>17</sup> Even if such a presumption were acceptable, the CSRT procedures do not provide the detainees with the ability to confront the evidence against them or to present witnesses and evidence to rebut the presumption against them.
- (v) The CSRT procedures bar participation by detainees’ counsel. The U.S. Supreme Court’s decision in *Hamdi* declares that he “unquestionably has the right to access to counsel in connection with the proceedings on remand,” 124 S. Ct. at 2652, and its decision in *Rasul* makes clear that this ruling applies equally to the Guantánamo detainees, because they, “no less than American citizens, are entitled to invoke the federal court’s authority.”<sup>18</sup> Rather than allowing the detainees to choose counsel to assist them, all counsel are barred from participating in the CSRT process. The CSRT procedures instead establish that the military chooses a “personal representative” to assist each of the detainees. These personal representatives are not lawyers and need not have any training or familiarity with the legal protections accorded to detained persons or knowledge of the law governing who lawfully may be detained during wartime. Moreover, the personal representatives do not establish a confidential relationship with the detainees; instead, they remain free to communicate to the members of the tribunal or any other military officials any information they glean from their conversations with the detainees.

Confirming that the CSRTs are show trials, the government has permitted the press – but not detainees’ counsel – to attend the proceedings.<sup>19</sup> According to published reports, the primary evidence used by the government at the CSRTs to establish the detainees’ status comes from the detainees’ own forced interrogations at Guantánamo. As discussed below, approved interrogation techniques at Guantánamo include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety just short of terror. Such interrogations may involve shackling the detainees to the floor for up to 48 hours, while flashing strobe lights in their faces, and playing music at extremely high volumes. Introduction of evidence derived from such interrogations alone renders the CSRT proceedings beyond the bounds of due process.<sup>20</sup>

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<sup>16</sup> Wolfowitz Order, *supra* note 7, ¶ (a).

<sup>17</sup> *Id.* ¶ (g)(12).

<sup>18</sup> 124 S. Ct. at 2696.

<sup>19</sup> Indeed, in at least one instance, the government has neglected to provide a detainee with a letter from counsel advising him not to participate in the CSRT hearing.

Press reports also indicate that detainees have routinely been precluded from being informed of the evidence against them.<sup>21</sup> For instance, at one hearing, a Saudi prisoner attempted to rebut the government's allegation that he had been at a certain al Qaeda training facility by asking who had made the allegation, but the CSRT panel said the information was classified and could not be shared with him.<sup>22</sup>

Published reports also indicate that the government has concluded that detainees are not entitled to present evidence that their connection with the Taliban was insubstantial or that they were forced to work for the Taliban. For instance, according to an Associated Press report, an Afghani detainee claimed that he was forced to work for the Taliban as a cook, and he sought to call four witnesses to confirm that claim. The presiding CSRT officer denied the request, declaring: "Whether or not the detainee was forced to join the Taliban, or in what role they served in the Taliban, is not relevant."<sup>23</sup> Another witness sought to call witnesses to support his claim that the Taliban "came to my house and took me by force. I joined the Taliban by force, not by my own choice," the detainee said, through an interpreter. "Everybody in Afghanistan knows that if the government asks you, you can't say no." The CSRT panel denied the detainee's request to call witnesses, concluding that how or why a detainee joined the Taliban is irrelevant.<sup>24</sup>

For all of these reasons, the CSRTs in no way alleviate the arbitrary and unlawful nature of the detentions at Guantánamo.

#### **E. The Continued Detention and Unlawful Transfer of Admittedly Innocent Men**

A more recently uncovered category of Guantánamo detainees are those men whom the U.S. Defense Department itself has determined to be "non-enemy combatants" or "no longer enemy combatants." While the Defense Department has offered no explanation of what this new status means or what factors determined the change in status, it has stated that men with this status are eligible for release to freedom.<sup>25</sup> Unfortunately, the Defense Department has not been entirely forthcoming regarding changes in individuals' statuses, and in one important case, two men were held at least four months *after* their exoneration before their attorney was even told of the exoneration.

The detainees in that case are Uighurs, members of a Muslim minority who inhabit the Xingjiang Autonomous Region of far-western China. For years, the Uighurs have suffered under brutal communist rule. In December, 2001, 23 men, while visiting Pakistan, were sold by bounty hunters to United States forces and transported to a military facility at Kandahar,

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<sup>20</sup> See U.N. H.R. Committee *General Comment No. 20: Replaces General Comment No. 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)* (March 10, 1992), ¶ 12 (hereinafter *General Comment No. 20*) (to discourage violations of Article 7's prohibition of torture and cruel, inhuman, or degrading treatment, "the law must prohibit the use or admissibility in judicial proceedings of statements obtained through torture or other prohibited treatment").

<sup>21</sup> See Kathleen T. Rhem, *Reporters Offered Look Inside Combatant Status Review Tribunals*, AMERICAN FORCES PRESS SERVICE (Aug. 29, 2004).

<sup>22</sup> "A Question of Status," N.Y. TIMES, Aug. 29, 2004.

<sup>23</sup> Stevenson Jacobs, *Guantanamo: Prisoner Says Taliban Forced Him to Cook*, ASSOCIATED PRESS (Aug. 12, 2004).

<sup>24</sup> See Kathleen T. Rhem, *Reporters Offered Look Inside Combatant Status Review Tribunals*, AMERICAN FORCES PRESS SERVICE (Aug. 29, 2004).

<sup>25</sup> See Department of Defense News Release of May 5, 2006, "Detainee Release Announced," <http://www.defenselink.mil/releases/2006/nr20060505-12980.html>.

Afghanistan. They were held in prison there until June, 2002.<sup>26</sup> One case involving two of the men, Hakim and Qassim, illustrates well their unlawful and horrifying predicament.

During his imprisonment in the prison at Kandahar, Petitioner Hakim was advised that United States forces knew that he had been taken “by mistake.” Nevertheless, beginning in June, 2002, these Petitioners were held in the prisons at Guantánamo. They were never charged with any wrongdoing nor designated for any military tribunal.

Sometime in late 2004, the Defense Department conducted “Combatant Status Review Tribunal”<sup>27</sup> hearings for each Petitioner to determine whether each man should continue to be held as an “enemy combatant”.<sup>28</sup> It then kept the results secret until July 29, 2005, when the Department conceded that “the CSRTs determined petitioners should no longer be classified as enemy combatants on March 26, 2005.”<sup>29</sup>

In May, 2005, Hakim and Qassim were advised in Guantánamo that they had been determined not to be enemy combatants.<sup>30</sup> But no one told counsel or the federal district court, however, and the two men were unable to contact anyone.<sup>31</sup> On July 13 and 14, 2005, counsel first met Petitioners in separate meetings in small isolation cells at Guantánamo, where Petitioners were chained to the floor. In these meetings, counsel *for the first time* learned of the noncombatant findings.<sup>32</sup> On return from the base, Petitioners’ counsel filed an Emergency Motion demanding the immediate release of the Petitioners, and the federal district court scheduled an August 1, 2005 hearing.<sup>33</sup> In a brief filed on July 29, 2005, the U.S. government for the first time admitted that Petitioners were not enemy combatants.

In mid-August of 2005, the two Petitioners, along with seven other prisoners found to be noncombatants, were hastily moved to “Camp Iguana,” a slightly lower-security prison. Ten or fewer men have been imprisoned there ever since. The government advised the federal district court that the men continued to be held because they could not be returned to Communist China, where they would be subject to torture. The district court was assured, both on the record and in closed chambers that the government was attempting to arrange for resettlement of the two men. In August, 2005, the district court advised the parties that it

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<sup>26</sup> See Petition for Certiorari before Judgment in *Qassim v. Bush* (2005), Pet. App. at 1a.

<sup>27</sup> The inadequacies of the Combatant Status Review Tribunals are discussed *supra* section 1D.

<sup>28</sup> See *Order Establishing Combatant Status Review Tribunals*, written by Deputy Secretary of Defense Paul Wolfowitz (Wolfowitz Order), which established “Combatant Status Review Tribunals” (“CSRTs”), July 7, 2004. The Wolfowitz Order provides: “Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session whether the detainee is properly detained as an enemy combatant.” It continues: *Non-Enemy Combatant Determination*. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee’s country of citizenship or other disposition consistent with the domestic and international obligations and the foreign policy of the United States.”

<sup>29</sup> See Petition for Certiorari before Judgment in *Qassim v. Bush* (2005), Pet. App. (citing CSRT records) .

<sup>30</sup> See Petition for Certiorari before Judgment in *Qassim v. Bush* (2005), Pet. App. at 1a-2a.

<sup>31</sup> *Id.* at Pet. App. 2a.

<sup>32</sup> *Id.* at Pet. App. 2a-3a.

<sup>33</sup> *Id.* at Pet. App. 3a.

would permit the government some time to attempt to resolve the matter diplomatically.<sup>34</sup> However, no resettlement was arranged. In an effort to assist with this process, Petitioners moved for access to representatives of the United Nations High Commission for Human Refugees (UNHCR). The motion was strenuously opposed by the government and ultimately denied in December of 2005.

Petitioners urged the district court to order one of three remedies: (i) release of the men into the civilian population of Guantánamo Bay; (ii) production of the body of each Petitioner in court, for the district court then to order a parole of each Petitioner pursuant to conditions of release pending an ultimate resettlement by the Executive; or (iii) outright release. On December 22, 2005, the district court denied the *habeas* petition, ruling correctly that the government's imprisonment of the Petitioners was unlawful, and holding incorrectly that the judicial branch was powerless to fashion a remedy against the lawless conduct of the government.<sup>35</sup>

From December through May, counsel for the two Petitioners were in discussions with several countries regarding the possibility for resettlement. At the same time, counsel filed an expedited appeal with the federal court of appeals overseeing the district court (the District of Columbia Circuit Court of Appeals) and a special appeal to the United States Supreme Court, seeking to overturn that portion of the district court's ruling that stated that the courts could not functionally address the unlawful detention of the Petitioners. Oral argument was scheduled before the Court of Appeals for Monday, May 8, 2006. On Friday, May 5, at the close of the business day and on the eve of a hearing in front of the Court of Appeals as to why innocent men were still in military custody so many months after they had been cleared of any wrongdoing, the government transported the two Petitioners, Hakim and Qassim, along with three other Uighurs, to Tirana, Albania. The men were placed in a refugee center to await the processing of their (mandatory) asylum applications. Since their transfer there have been several requests for the extradition of the five men to China to face trial for crimes against the state. Statements by Albanian officials have confirmed that they will be very hard pressed to guarantee the safety of the five men should they remain and attempt to make a life in Albania despite the lack of a Uighur community in the country.

#### **F. The U.S. Government's Effort To Use The Detainee Treatment Act To Undermine The Jurisdiction Of U.S. Courts To Hear The Pending Petitions For Habeas Corpus**

On December 30, 2005, President Bush signed into law the Detainee Treatment Act (DTA).<sup>36</sup> This law includes provisions that purport to strip the jurisdiction of the U.S. courts over petitions for habeas corpus brought on behalf of the "aliens" detained at Guantánamo. The issue of whether this jurisdiction-stripping provision of the law applies to cases that were already pending at the time of its enactment remains unresolved as of the date of this report. Because the DTA's restriction on the availability of habeas corpus review was discussed in the Center for Constitutional Rights' March 2006 submission to the Committee, we will not repeat that discussion here, other than to note its importance in assessing the United States' compliance with its Article 9 obligations.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at Pet. App. 1a-12a.

<sup>36</sup> Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739 (2005) (hereinafter Detainee Treatment Act or DTA).

## **G. The Facts Establish Violations Of The United States' Obligations Under Articles 7, 9, And 10 Of The ICCPR**

Article 9 guarantees the right to be free of arbitrary arrest and detention. A key element of this right is the guarantee, under Article 9(4), that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” This Committee has emphasized that this right is not limited to persons detained on criminal charges. Rather, “the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to *all persons* deprived of their liberty by arrest or detention.”<sup>37</sup>

The arbitrary and indefinite detentions at Guantánamo violate the core elements of Article 9. The failure to bring each of the detainees promptly before a court violates the clear obligation of Article 9(4). Had the detainees been captured on a conventional battlefield and promptly been given the protection of an Article 5<sup>38</sup> battlefield hearing before a competent authority to determine whether detaining them as prisoners of war was justified, the need for an individual court hearing would be assessed in a different light. But here, individuals were detained in many places, including places far from any battlefield, and the vast majority were detained not by the U.S. but by others, in the context of a bounty system offering huge (by local standards) amounts of money to people turning in purported terrorists. All of the detainees have been denied their Article 9(4) right to have a court decide “without delay” whether their detention is lawful. Those detainees like the Uighurs, who have been determined by the U.S. *not* to be enemy combatants, have been deprived, as well, of their Article 9(4) right to have a court “order [their] release if the detention is not lawful.”

Under circumstances as egregious as those concerning the Guantánamo detentions, the prolonged arbitrary detention rises, as well, to the level of a violation of Articles 7 and 10. Article 7 proscribes torture and cruel, inhuman and degrading treatment and punishment. Article 10 requires that persons in detention be treated humanely and with respect for human dignity. The United States has violated its obligations under each of these articles by virtue of the utterly arbitrary and indefinitely prolonged detentions at Guantánamo.

### **2. THE UNITED STATES' MISTREATMENT OF GUANTÁNAMO DETAINEES VIOLATES ARTICLE 7'S ABSOLUTE PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.**

Article 7 of the ICCPR absolutely prohibits torture or cruel, inhuman and degrading treatment or punishment. The prohibition admits of no exceptions under any circumstances. Article 7's prohibition is expressly identified in Article 4 as an obligation from which no derogation may be made even in the context of a national emergency so severe as to threaten the life of the nation. This Committee has emphasized that “no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons...”<sup>39</sup> The obligation to avoid, at all times, any use of torture or cruel, inhuman or degrading treatment or punishment “is complemented by the positive requirements of article 10, paragraph 1, of the Covenant,

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<sup>37</sup> U.N. H.R. Committee, *General Comment No. 8: Right to liberty and security of persons (Art. 9)* (June 30, 1982), ¶ 1 (*emphasis added*).

<sup>38</sup> Geneva Convention III, *supra* note 2, art. 5.

<sup>39</sup> *General Comment No. 20, supra* note 20, ¶ 3.

which stipulates that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’<sup>40</sup>

This Committee’s insistence that the ban on torture and cruel, inhuman or degrading treatment or punishment is absolute reflects a broad international consensus. It is reflected in Article 2 of the Convention against Torture, which declares that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be involved as a justification of torture.”<sup>41</sup> It is found also in the jurisprudence of the European Court of Human Rights, which has also unqualifiedly declared that the protection against torture afforded by Article 3<sup>42</sup> of the European Convention on Human Rights is absolute in nature – even in the context of efforts to combat the scourge of international terrorism.<sup>43</sup> Torture and inhumane treatment are also absolutely prohibited in all forms of armed conflicts by customary and conventional rules of international humanitarian law. For example, the Third and Fourth Geneva Conventions mandate that prisoners of war and civilian detainees be treated humanely at all times.<sup>44</sup> Both Conventions also make the killing, torture, or inhuman treatment of protected persons “grave breaches” of the treaties which may be prosecuted as serious war crimes.<sup>45</sup>

There is by now a wide recognition that certain forms of mistreatment rise to the level of torture or cruel, inhuman or degrading treatment or punishment. The European Court of Human Rights and the Inter-American Commission on Human Rights have found the following acts to constitute torture or inhumane treatment in the context of interrogation and detention: prolonged incommunicado detention; keeping detainees hooded and naked in cells; rape; mock executions; beatings; threats of a behavior that would constitute inhumane treatment; exposure to the torture of other victims; and death threats.<sup>46</sup> This Committee has

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<sup>40</sup> *Id.* ¶ 2 (quoting International Covenant on Civil and Political Rights art. 10, Dec. 16, 1966, 999 U.N.T.S. 171) (hereinafter ICCPR).

<sup>41</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, ¶ 2, GA Res. 39/46, (Dec. 10 1984), *reprinted in* 23 ILM 1027 (1984), *as modified*, 24 ILM 535 (1985).

<sup>42</sup> Article 3 states “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>43</sup> In *Chahal v United Kingdom* (1996) 23 EHRR 413, the European Court stated “Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention... Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.”

<sup>44</sup> *See* Geneva Convention III, *supra* note 2, art. 3, ¶ 1, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, ¶ 1, August 12, 1949, 75 U.N.T.S. 287 (hereinafter Geneva Convention IV).

<sup>45</sup> *See* Geneva Convention III, *supra* note 2, art. 130, and Geneva Convention IV, *supra* note 44, art. 147.

<sup>46</sup> Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, Human Rights Brief, at 3. The European Court of Human Rights stated in *Pretty v United Kingdom* (2002) 35 EHRR: “As regards the types of ‘treatment’ which fall within the scope of Article 3 of the Convention, the court's case law refers to ‘ill-treatment’ that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being,

recognized that “prolonged solitary confinement” can violate Article 7.<sup>47</sup> The United Nations Committee Against Torture has stated that the threat of torture, severe sleep deprivation, forcing a person to sleep on the floor handcuffed after interrogation, physically restraining a person in very painful conditions, and hooding can each constitute inhuman treatment as well. The UN Special Rapporteur on Torture has identified certain actions as involving the infliction of suffering severe enough to constitute torture, including, among other things: suspension; exposure to excessive light, noise, or temperature extremes; sexual aggression; prolonged denial of rest or sleep, sufficient hygiene or medical assistance; total isolation and sensory deprivation; and threats to torture or kill relatives.<sup>48</sup>

Many of these proscribed techniques, and others equally severe, have been used at Guantánamo. The experience of a detainee named Mr. Al Dossari is illustrative:

*On one occasion, while in the interrogation room, an MP trained a rifle directly on Mr. Al Dossari at close range, despite the fact that Mr. Al Dossari was shackled to the floor. On another occasion, an interrogator in civilian clothing threatened to send Mr. Al Dossari to a prison with murderers, where he said Mr. Al Dossari would be raped.*

*At a subsequent interrogation, Mr. Al Dossari was told that it was known that he was a low-level al Qaeda soldier and that if he admitted this, he would spend five to ten years in prison. If he did not confess, Mr. Al Dossari was told, he would spend 50 years or perhaps the rest of his life in jail.*

*During another interrogation, a woman Mr. Al Dossari believes was of Egyptian origin banged Mr. Al Dossari’s head on a table. Further, the chain wrapped around Mr. Al Dossari’s waist was so tight that it caused him to vomit.<sup>49</sup>*

Overall, prisoners in Guantánamo allege that, in connection with interrogation, they have been:

Held in solitary confinement for successive periods exceeding a year;

Deprived of sleep for days and weeks;

Deprived of food and water for days;

Exposed to prolonged temperature extremes;

Beaten;

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exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible. *See also*, PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE 48, May 2005, *available at* [http://www.phrusa.org/research/torture/report\\_breakthendown.html](http://www.phrusa.org/research/torture/report_breakthendown.html).

<sup>47</sup> See *General Comment No. 20*, *supra* note 20, ¶ 6.

<sup>48</sup> Goldman, *supra* note 46, at 3.

<sup>49</sup> Guantánamo Bay Detainee Statements: Jum’ah Mohammed Abdullatif Al Dossari, Isa Ali Abdulla Al Murbati, Abdulllah Al Noaimi and Adel Kamel Abdulla Haji 5 (May 2005) (Joshua Colangelo-Bryan) (hereinafter Guantánamo Bay Detainee Statements).

Threatened with transfer to a foreign country for torture;

Tortured in foreign countries or at U.S. military bases abroad before transfer to Guantánamo;

Threatened with life imprisonment at Guantánamo for continuing to seek access to a court;

Sexually harassed and raped or threatened with rape;

Deprived of medical treatment for serious conditions, or allowed treatment only on the condition that they “cooperate” with interrogators;

Subjected to injections of unknown medications; and

Routinely “short-shackled” (wrists and ankles bound together and to floor) for hours and even days during interrogations.

The prisoners report that many live in conditions that are debilitating. Many have serious, untreated medical problems, often caused by living conditions or physical punishment. At least one prisoner nearly died during his interrogation. As has been reported in the mainstream press, prisoners have undertaken several hunger strikes to protest conditions at Guantánamo, and one is ongoing at this writing. Several prisoners are determined to die, and are being intra-nasally force-fed to keep them alive. Such extreme measures are being utilized that at least 17 of the interrogation techniques authorized for use at Guantánamo go beyond those officially permitted by the U.S. Army Field Manual 34-52.<sup>50</sup>

The use of these techniques has been facilitated by an official climate of disrespect for the prohibition of torture and inhumane treatment. Thus, for example, in 2002 U.S. Executive branch officials embarked upon a plan to alter the widely accepted definition of torture and construct legal defenses to acts constituting torture in order to authorize the CIA and the U.S. military to conduct more aggressive interrogations of terrorism suspects. The legal opinion memoranda authorized and justified the use of torture in violation of international and U.S. law.<sup>51</sup>

These developments have been exacerbated by the United States’ failure to investigate and prosecute the high level military and civilian officials responsible for authorizing torture; the predictable result is a climate of impunity in which torture and inhumane treatment occurred, are presently occurring and will likely continue to occur. Official government reports have documented ongoing horrific abuses inflicted on detainees in U.S. custody from Abu Ghraib prison in Iraq to Afghanistan to Guantánamo.<sup>52</sup> Yet despite a number of official investigations

<sup>50</sup> See United States Army Field Manual 34-52, *Intelligence Interrogations*, iv-v, available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/toc.htm> (hereinafter FM 34-52) (“These principles and techniques of interrogation are to be used within the constraints established by the following: . . . Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, . . . Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, . . . Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. . .”); Memorandum from the Secretary of Defense to the Commander, U.S. Southern Command (Apr. 16, 2004), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 360-65 (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

<sup>51</sup> See Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASHINGTON POST, June 8, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.

<sup>52</sup> See ACLU, *Government Documents on Torture: Freedom of Information Act*, <http://www.aclu.org/intlhumanrights/gen/13794res20050429.html>.

– criminal, military and administrative – no independent commission or investigation into the use of torture has yet taken place, and only low level military personnel have been subject to military prosecution.<sup>53</sup>

Because of this climate of impunity, the Detainee Treatment Act’s declaration that no one in U.S. custody or physical control will be subjected to cruel, inhuman or degrading treatment or punishment<sup>54</sup> – while of course welcome – is unlikely to lead to any meaningful change. This is all the more true because of the Detainee Treatment Act’s limiting provision which deprives persons held in Guantánamo of the right to bring any cases – including those alleging torture or inhumane treatment – arising out of their detentions at Guantánamo.<sup>55</sup>

While the United States continues to defend its operations in Guantánamo, international opinion has been harshly – and appropriately – critical of the abusive treatment to which the United States has subjected the Guantánamo detainees. The Parliamentary Assembly of the Council of Europe in its Resolution 1433 (2005), entitled “Lawfulness of detentions by the United States in Guantánamo Bay,”<sup>56</sup> and adopted on April 26, 2005, concluded that “many if not all detainees have been subjected to cruel, inhuman or degrading treatment occurring as a direct result of official policy, authorized at the very highest levels of government” and that “many detainees have been subjected to ill-treatment amounting to torture which has occurred systematically and with the knowledge and complicity of the United States Government.”<sup>57</sup> Further, the Assembly also concluded that the United States has, by practicing “rendition” allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement*.<sup>58</sup>

The treatment of detainees at Guantánamo likewise has been the subject of much judicial comment in the United Kingdom.<sup>59</sup> Further, on May 10, 2006, the Attorney General of the

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<sup>53</sup> See DEBORAH PEARLSTEIN, HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH: INVESTIGATING U.S. ABUSES IN THE “WAR ON TERROR,” available at [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Getting\\_to\\_Ground\\_Truth\\_090804.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf).

<sup>54</sup> Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739 § 1003(a).

<sup>55</sup> This provision of the Detainee Treatment Act is discussed more fully in Section 3 of this report, *infra*.

<sup>56</sup> Eur. Parl. Ass. Deb. 10th Sess. (April 26, 2005), available at <http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> In a judicial review permission application in a case concerning the obligation of the British authorities to make representations on behalf of, and seek the release of, those Guantánamo detainees who are British residents (but not nationals), Mr. Justice Collins, the lead judge in the Administrative Court of the High Court of England and Wales stated “What is said to tip the balance here is the evidence which was not available in *Abbasi* that there is torture being practiced in Guantánamo Bay. That evidence at the moment cannot be discounted as being incredible because it is supported not only by the assertions made by the claimants, but also by the person who has been assigned to assist and to represent them by the American authorities, and it has been confirmed more recently and indeed today by the UN report on what is going on in Guantánamo Bay. **Unfortunately, it appears that the Americans have a somewhat different view as to what constitutes torture to certainly this country and to what is applied by Strasbourg under the European Convention on Human Rights, and I suspect what is applied by the international body in relation to the Convention against Torture.** That being so, a new dimension is added, and there are obligations which may exist as a result of the allegations of torture.” R (on the application of Al-Rawi and 6 others) v. (1) Secretary of State for Foreign and Commonwealth Affairs, (2) Secretary of State for the Home Department [2006] EWHC 458 (Admin) (February 16, 2006) (emphasis added), available at

United Kingdom called for the closure of Guantánamo, stating that “[t]he existence of Guantánamo remains unacceptable. It is time, in my view, that it should close. Not only would it, in my personal opinion, be right to close Guantánamo as a matter of principle, I believe it would also help to remove what has become a symbol to many - right or wrong - of injustice.”<sup>60</sup>

In its report of February 15, 2006, four Special Rapporteurs and the Director of the Working Group on Arbitrary Detention of the UN Commission on Human Rights concluded that the interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount at a minimum to degrading treatment, and on some occasions, torture, in violation of Article 7 of the ICCPR. They found that the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, alone amount to inhuman treatment. They also concluded that the excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces, and in force-feeding of detainees on hunger strike had to be assessed as amounting to torture as defined in article 1 of the Convention Against Torture. Further, the practice of rendition of persons to countries where there is a substantial risk of torture was held to be a violation of the principle of *non-refoulement* and contrary to Article 3 of the Convention Against Torture.<sup>61</sup>

### **3. THE DETAINEE TREATMENT ACT OF 2005 VIOLATES THE UNITED STATES’ OBLIGATION UNDER ARTICLES 2 AND 9(5) TO PROVIDE AN EFFECTIVE REMEDY FOR COVENANT VIOLATIONS, AND THE OBLIGATIONS UNDER ARTICLES 2 AND 26 NOT TO DISCRIMINATE.**

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005<sup>62</sup> (Detainee Treatment Act or DTA). Section 1005(e) of that Act, entitled “Judicial Review of Detention of Enemy Combatants,” applies exclusively to “alien[s] detained by the Department of Defense at Guantánamo Bay, Cuba.”<sup>63</sup> As to such persons, the DTA provides that, with exceedingly limited exceptions,<sup>64</sup> “no court, justice or judge shall have jurisdiction to hear or consider” either (1) an application for a writ of habeas corpus, or (2) “any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba.”<sup>65</sup> The DTA’s restriction on the availability of habeas corpus review was discussed in the Center for Constitutional Rights’ March 2006

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<http://www.bailii.org/ew/cases/EWHC/Admin/2006/458.rtf>.

<sup>60</sup> BBC News, *UK Calls for Guantanamo Closure*, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4759317.stm](http://news.bbc.co.uk/1/hi/uk_politics/4759317.stm). The Attorney General of the United Kingdom further stated that U.K. was “unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offered sufficient guarantees of a fair trial in accordance with international standards.” *Id.* See *infra*, section 4, regarding the deficiencies of the military tribunals.

<sup>61</sup> REPORT OF CHAIRPERSON OF THE WORKING GROUP ON ARBITRARY DETENTION AND SPECIAL RAPPORTEURS, SITUATION OF DETAINEES AT GUANTANAMO BAY (Feb. 15 2006).

<sup>62</sup> Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739.

<sup>63</sup> *Id.* § 1005(e).

<sup>64</sup> Under the only exceptions to the DTA’s jurisdiction-stripping provisions, the Act would allow certain very limited reviews of (a) Department of Defense enemy combatant determinations, and (b) military commission decisions that result in a sentence of either death or at least ten years imprisonment. *Id.* Review of military commission decisions leading to lesser sentences would be available only at the court’s discretion.

<sup>65</sup> *Id.*

submission to the Committee. Here we address first, the United States' violations of the ICCPR engendered by the DTA's removal of U.S. court jurisdiction over "any other action" relating to "any aspect of detention" at Guantánamo, and second, the U.S. government's use of the DTA to undermine the attorney-client relationship between habeas counsel and the detainees they represent.

Article 2 of the ICCPR obliges each State Party "to respect and to ensure" the rights recognized in Covenant and to adopt such laws as may be necessary "to give effect" to these rights. A cardinal aspect of the mandate "to give effect" to Covenant rights is the corollary obligation "[t]o ensure" that there exists an "effective remedy" for any violation of the rights and freedoms enshrined in the Covenant.<sup>66</sup> The obligation to provide an effective remedy extends, explicitly, to those cases where the alleged "violation has been committed by persons acting in an official capacity."<sup>67</sup> Article 9(5) reiterates the obligation to provide an effective remedy in the particular context of unlawful arrests or detentions: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."<sup>68</sup> Finally, an overarching obligation of Article 2 is that the undertaking to ensure an effective remedy must be implemented in a non-discriminatory manner – *i.e.*, "without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>69</sup>

This Committee has previously underscored certain critical attributes of a State Party's obligation to respect and ensure Covenant rights and to provide an effective remedy for any breach of this obligation. First, the obligation is of such a high order that it "constitutes a treaty obligation inherent in the Covenant as a whole," and hence the obligation is non-derogable even in states of emergency.<sup>70</sup> Further, it cannot be made the subject of a reservation, since any such reservation would be incompatible with the object and purpose of the ICCPR.<sup>71</sup>

Second, a State Party's Article 2 obligations extend beyond its own territorial borders: "[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."<sup>72</sup>

Third, in order to meet its Article 2 obligations, a State Party must guarantee and apply ICCPR rights and protections not only to its own citizens but "to all individuals, regardless of nationality or statelessness," who find themselves within the territory or "power or effective control" of the State Party.<sup>73</sup>

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<sup>66</sup> ICCPR, *supra* note 40, art. 2(3)(a).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at art. 9(5).

<sup>69</sup> *Id.* at arts. 2(1), 26.

<sup>70</sup> U.N. H.R. Committee, *General Comment No. 29: States of Emergency (Article 4)*, (Aug. 31, 2001), ¶ 14.

<sup>71</sup> U.N. H.R. Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (Nov. 4, 1994), ¶ 10; *see also* U.N. H.R. Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (May 26, 2004), ¶ 5 (hereinafter *General comment No. 31*).

<sup>72</sup> *General Comment No. 31, supra* note 71, ¶ 10.

Fourth, the obligation to provide an effective remedy for violation of Covenant rights continues with force even in times of war. This Committee has clarified that, although as to certain Covenant rights, “more specific rules of international humanitarian law may be specifically relevant for the purposes of interpretation of Covenant rights,” under the principle of complementarity of human rights and humanitarian law, “the Covenant applies also in situations of armed conflict.”<sup>74</sup> Because the obligation to provide an effective remedy for violations of Covenant rights is non-derogable during a state of emergency that threatens the life of the nation, the existence of a state of armed conflict cannot be a legal basis for derogating from this essential Article 2 obligation.

Within this legal framework, there can be no doubt that the DTA provision depriving U.S. courts of the power to hear any action arising out of the detentions at Guantánamo violates Articles 2 and 9(5). It leaves detainees with no recourse for violations of any of their substantive ICCPR rights, including, *inter alia*, their right to be free of torture and cruel, inhuman or degrading treatment or punishment (Art. 7), their right to liberty and security of person and to be free of arbitrary arrest or detention (Art. 9(1)), and their right while detained to “be treated with humanity and with respect for the inherent dignity of the human person (Art. 10(1)). Moreover, the DTA provision accomplishes these violations in a manner that concomitantly violates the detainees’ Covenant right to non-discrimination given that the jurisdiction-stripping provision applies only to actions brought by “aliens” regarding their Guantánamo detention. For all of these reasons, this provision of the DTA violates the United States’ ICCPR obligations. Where, as here, “there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees.”<sup>75</sup>

A greatly troubling effect of the provision precluding an alien from bringing an action relating to his detention at Guantánamo is that the provision may prevent an individual from bringing a claim to stop any abuse he is suffering during his detention despite the fact that a separate – and admirable – provision of the DTA expressly prohibits the government from subjecting any person in U.S. custody “to cruel, inhuman or degrading treatment or punishment.”<sup>76</sup> But because of the absence of any remedy, the DTA’s prohibition against mistreatment is rendered a nullity because there is no means of enforcement.

Equally disturbing is the fact that, despite the clear language in the DTA that there shall be no “geographical limitation on the applicability of the prohibition against cruel, inhuman or degrading treatment or punishment,”<sup>77</sup> President Bush, at the time he signed the bill into law, stated that he would interpret the ban “in a manner consistent with the constitutional authority of the president” and his powers as Commander-in-Chief, implying that he may authorize acts prohibited by the law.<sup>78</sup> Indeed, in recent testimony before the Parliamentary Assembly of the Council of Europe, John Bellinger, Chief Legal Advisor to the U.S. Department of State,

<sup>73</sup> *Id.*; see also U.N. H.R. Committee, *General Comment No. 15: The position of aliens under the Covenant* (Apr. 11, 1986), ¶ 1.

<sup>74</sup> *General Comment No. 31, supra* note 71, ¶ 11; see also I.C.J. Advisory Op. of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 25.

<sup>75</sup> *General Comment No. 31, supra* note 71, ¶ 13.

<sup>76</sup> Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739 § 1003(a).

<sup>77</sup> *Id.* § 1003(b).

<sup>78</sup> Edward Alden, *Bush Statement Appears to Contradict Anti-torture Pledge*, FINANCIAL TIMES, Jan. 6, 2006, at 6.

made clear that the United States does not view international human rights laws as legally binding on the U.S. government's actions outside of the United States.<sup>79</sup>

In addition to the U.S. government's failure to provide an effective remedy for violation of Covenant rights and its unlawful codification of discrimination by means of a bar to the courts for non-U.S. citizens, it has used the DTA as a justification to deny habeas counsel access to their clients at Guantánamo. Specifically, the government contends that the DTA operates retroactively to deprive the courts of their authority to decide the habeas corpus petitions that have been pending before them for the last two years. If this is so, the government claims—and the Supreme Court has not yet decided this issue—then the Guantánamo detainees will no longer be able to file petitions for a writ of habeas corpus but instead will be relegated to seeking a very limited review in the federal court of appeals of the determinations made by the military-run Combatant Status Review Tribunals. The government contends that this likely change means that the current Protective Order, which governs the conditions under which attorneys may visit their clients at Guantánamo, is no longer operable. For this reason, the government says, it is unwilling to sign the Protective Order in any new cases and therefore unwilling to allow any new attorney to visit his client. This new policy now threatens to undermine the Supreme Court's 2004 decision in *Rasul v. Bush*<sup>80</sup> that the detainees have the right to challenge the legality of their detention, and the following decision in *Al Odah v. United States*,<sup>81</sup> making clear that this right necessarily includes the corollary right to assistance of counsel in litigating all of the related issues. Although recent decisions have been consistent with the position taken by habeas counsel and their clients,<sup>82</sup> the litigation of each set of issues takes months, during which the detainees have no contact with the outside world. Because access to counsel is so critical in order to give practical effect to any remedy, the denial of access to counsel is an additional violation of the obligation under Articles 2 and 9(5) to provide an effective remedy for ICCPR violations.

Finally, representation of the Guantánamo detainees continues to be frustrated by the government's persistent refusal to provide a complete and accurate list of the names, countries of birth, ISNs, and other identifying information for all of the detainees remaining at the base. The documents released in the Associated Press Freedom of Information Act litigation have not yielded accurate lists for the current population at the base. This, too, frustrates the goal of making an effective remedy a practical reality.

#### **4. THE MILITARY COMMISSIONS ESTABLISHED FOR THE TRIAL OF CERTAIN GUANTÁNAMO DETAINEES VIOLATE THE COVENANT'S FAIR TRIAL REQUIREMENTS.**

On November 13, 2001, President Bush issued a Military Order providing for trial by military commission of foreign nationals alleged to be members of Al Qaeda or otherwise involved in international terrorism.<sup>83</sup> Since that time, the Department of Defense has issued a series of Military Commission Orders ("MCO's")<sup>84</sup> and Military Commission Instructions ("MCI's")<sup>85</sup>

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<sup>79</sup> Dick Marty, *Alleged Secret Detentions and Unlawful Inter-state transfers involving Council of Europe Member States*, Parliamentary Assembly, Council of Europe, June 7, 2006, at 60.

<sup>80</sup> 542 U.S. 466 (2004).

<sup>81</sup> 346 F. Supp. 2d 1, 7 (D.D.C. 2004).

<sup>82</sup> See *Said v. Bush*, Case No. 05-CV-2384 (RWR), filed May 23, 2006.

<sup>83</sup> Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FED.REG. 57833 (Nov. 16, 2001) (hereinafter President's Military Order).

governing the establishment and conduct of these military commissions. Certain provisions of the Detainee Treatment Act also bear on the conduct of the military commissions.<sup>86</sup>

There are currently 10 individuals detained at Guantánamo who have been designated for trial by military commission.<sup>87</sup>

These military commissions violate fundamental fair trial standards enshrined in the Covenant. Among these critical standards are the norms guaranteeing that the courts are independent and impartial, that judicial procedures not discriminate against foreign nationals, that accused persons are tried in the presence of their accusers and with access to the evidence against them, and that evidence procured by means of cruel, inhuman or degrading treatment or punishment is excluded from consideration. None of these basic international standards is met by the Guantánamo military commissions.

Before addressing these norms, it is important to emphasize that they remain applicable even in the context of armed conflict. Customary international law, as reflected in the “Fundamental Guarantees” of article 75 of the 1977 Geneva Protocol I (“Protocol I”),<sup>88</sup> imposes fair trial obligations in the context of armed conflict which largely parallel the Covenant’s fair trial safeguards.<sup>89</sup> These fundamental guarantees apply to all persons within the power of a state participant in an armed conflict who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.<sup>90</sup> Thus, even crediting the United States’ argument that the Guantánamo detainees are not entitled to the protections accorded prisoners of war under the Third Geneva Convention, the Guantánamo detainees would nonetheless be protected by these “fundamental guarantees.”

These fundamental guarantees have attained the stature of customary international law and thus bind the United States even though it has not ratified Protocol I. More than 160 states are parties to Protocol I.<sup>91</sup> The United States has taken the initial step of signing the treaty, its stated reasons for not ratifying do not include objections to article 75, and the State Department transmittal letter recognized that certain provisions of Protocol I reflect

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<sup>84</sup> See generally, United States Department of Defense, Military Commission Orders, *available at* [http://www.defenselink.mil/news/Aug2004/commissions\\_orders.html](http://www.defenselink.mil/news/Aug2004/commissions_orders.html), (last visited June 23, 2006).

<sup>85</sup> See generally, United States Department of Defense, Military Commission Instructions, *available at* [http://www.defenselink.mil/news/Aug2004/commissions\\_instructions.html](http://www.defenselink.mil/news/Aug2004/commissions_instructions.html), (last visited June 23, 2006).

<sup>86</sup> Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739 §§ 1005(e)(3), (h)(2).

<sup>87</sup> See Sgt. Sara Wood, *Commission Decides Detention Status for Detainees*, ARMED FORCES INFORMATION SERVICE, April 27, 2006, [http://www.dod.gov/news/Apr2006/20060427\\_4944.html](http://www.dod.gov/news/Apr2006/20060427_4944.html).

<sup>88</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 (1977) (hereinafter Protocol I).

<sup>89</sup> Whereas Covenant article 14 guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” article 75.4 of Protocol I assures the right to trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure....” It then lists essentially the same safeguards as Covenant articles 14.2 and 14.3. Protocol I also states that these “fundamental guarantees” must be provided “without any adverse distinction based upon ... national or social origin...” Art. 75.1.

<sup>90</sup> Protocol I, *supra* note 88, art. 75.1.

<sup>91</sup> See The International Committee of the Red Cross States Parties & Signatories Database, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited Jan. 3, 2006).

customary international law.<sup>92</sup> Government legal experts and military manuals have identified article 75 as among those provisions that reflect customary international law.<sup>93</sup> Leading commentators as well as the American Bar Association agree that article 75 reflects customary international law.<sup>94</sup>

We turn now to an examination of the Covenant fair trial norms violated by the military commissions.

### A. The Military Commissions Are Not Independent and Impartial

Article 14.1 of the Covenant guarantees an accused the right to be tried by a tribunal that is “independent and impartial.” This Committee has characterized this right as “an absolute right that may suffer no exception.”<sup>95</sup>

“Independence” refers to the freedom of tribunal members from external interference with their judicial functions, and to the “objectively justified” appearance of such independence.<sup>96</sup> “Impartiality” refers to the absence of subjective bias on their part, and to the objectively justified appearance of the absence of bias.<sup>97</sup> In assessing independence and impartiality, this Committee has indicated that it looks “in particular ... to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition[s] governing promotion, transfer and cessation of their functions; and the actual independence of the judiciary from the executive branch ...”<sup>98</sup>

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<sup>92</sup> See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, attaching State Dept. transmittal letter, 26 I.L.M. 561, 564 (1987).

<sup>93</sup> See T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989) (citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL PROC. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only)); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM.U.J. INT'L.L. & POL'Y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of State); D. Scheffer, *Remarks*, 96 ASIL PROC. 404, 406 (2002) (Former Ambassador at Large for War Crimes Issues Scheffer stated that “we need to understand fully that article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I).”). Additionally, the 1997 edition of the lawyer’s manual for U.S. Army Judge Advocate Generals stated expressly that the U.S. views article 75 of Protocol I as “customary international law.” OPERATIONAL LAW HANDBOOK 18-2 (Richard M. Whitaker ed., 1997), available at <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>. Although more recent editions do not repeat this statement, neither do they qualify or retract it.

<sup>94</sup> E.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MILITARY L. REV. 40, 81-82 (2002); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates Aug. 9, 2004 (“customary international law, including article 75 of the 1977 Protocol I to the Geneva Conventions”), available at <http://www.abanet.org/humanrights/torture.pdf> (last visited Jan. 3, 2006).

<sup>95</sup> *González del Río v Peru*, U.N. H.R. Committee, Communication No.263/1987 (Oct. 28, 1992), ¶ 5.2.

<sup>96</sup> E.g., *Cooper v. U.K.*, App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), ¶ 104, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Cooper%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionId=3675449&skin=hudoc-en> (last visited Jan. 3, 2006).

<sup>97</sup> *Id.*

By any of these measures, the lack of independence of the Guantánamo military commissions is patent. Broad powers over the commissions are exercised by the “Appointing Authority,” a newly-created executive office whose incumbent is appointed by, and serves at the pleasure of, the Secretary of Defense.<sup>99</sup> The Authority selects the members of each military commission panel and chooses one to be the presiding officer.<sup>100</sup> The only criteria provided for selection are that commission members must be U.S. military officers, “competent to perform the duties involved,”<sup>101</sup> and that the presiding officer must be a U.S. military lawyer.<sup>102</sup> The lack of both criteria for selection and transparency in the selection process raises troublesome questions of potential unseen interference in the independence of the commissions. Nothing precludes the Authority from selecting members in order to favor the prosecution over the defense. This risk is aggravated by the entirely *ad hoc* nature of the appointments. A military officer may be appointed to sit on one commission, and then never be appointed to another, or the officer may be appointed repeatedly. The Authority’s discretion to control the composition of commissions is wide and unchecked.

The same Authority has sole power to decide many critical questions normally ruled on by courts, further undermining any military commission panel claim to independence. The commission panels are not allowed to decide any interlocutory question whose outcome might result in termination of the proceedings; instead, the presiding officer must refer all such questions to the Authority.<sup>103</sup> In addition, the presiding officer can choose to refer any and all interlocutory questions to the Authority. Likewise, a plea agreement between the defense and prosecution is subject to approval, not by the commission panel, but by the Authority.<sup>104</sup>

The Authority may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.<sup>105</sup> The Authority directs the time and place of each commission session,<sup>106</sup> conducts an “administrative review” of the record of trial and may return the case for further proceedings if deemed necessary,<sup>107</sup> and approves or disapproves any

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<sup>98</sup> U.N. H.R. Committee, *General Comment No. 13: Equality before the courts and the right to a fair trial and public hearing by an independent court established by law (Art. 14)* (Apr. 13, 1984), ¶ 3 (hereinafter *General Comment No. 13*); see also U.N. Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 Aug. to 6 Sept. 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, ¶¶ 1-6.

<sup>99</sup> Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, § 2 (Aug. 31, 2005), available at <http://www.dod.mil/news/Sep2005/d20050902order.pdf> (hereinafter MCO No. 1); see also Military Commission Order No. 5, *Designation of Appointing Authority* (Mar. 15, 2004) (revoking designation of initial Appointing Authority and designating new Appointing Authority), available at <http://www.dod.mil/news/Mar2004/d20040317ord5.pdf>.

<sup>100</sup> MCO No. 1, §§ 4(A)(1)-(4).

<sup>101</sup> *Id.* § 4(A)(3).

<sup>102</sup> *Id.* § 4(A)(4).

<sup>103</sup> *Id.* § 4(A)(5)(e).

<sup>104</sup> *Id.* § 6(A)(4).

<sup>105</sup> *Id.* § 6(B)(3).

<sup>106</sup> *Id.* § 6(B)(4).

<sup>107</sup> *Id.* § 6(H)(3).

communications regarding military commissions by prosecutors or defense counsel to the news media.<sup>108</sup> Exercise of these normally judicial powers by an executive officer constitutes direct interference with the independence of the commission panels.

In addition, all members of the military commissions are serving military officers,<sup>109</sup> a factor justifying doubt as to their independence and impartiality.<sup>110</sup> They are subject to military performance evaluations,<sup>111</sup> and most have career aspirations within the military.<sup>112</sup> While the commissions are instructed to act “impartially,”<sup>113</sup> and officers’ performances as commission members are not to be taken into account in their evaluations,<sup>114</sup> under international law these formal undertakings do not suffice to assure impartiality in fact or in appearance.<sup>115</sup>

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<sup>108</sup> Military Commission Instruction No. 3, *Responsibilities of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, § 5(c) (July 15, 2005), available at <http://www.dod.mil/news/Aug2005/d20050811MCI3.pdf>; Military Commission Instruction No. 4, *Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Counsel*, § 5 (c) (Sept. 16, 2005), available at <http://www.dod.mil/news/Oct2005/d20051003MCI4.pdf>.

<sup>109</sup> MCO No. 1, *supra* note 99, § 4(A)(3).

<sup>110</sup> See *Cooper v. U.K.*, App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), ¶ 117 (participation of civilians in key positions on British air force courts-martial found to be “one of the most significant guarantees of the independence of the court-martial proceedings”); *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), ¶ 68 (independence and impartiality of Turkish National Security Courts were negated by fact that one of three members of these courts was a military judge, and such officers are “servicemen who still belong to the army, which in turn takes its orders from the executive.” In addition, security courts’ impartiality was open to doubt because they empowered members of one armed force to sit in judgment on their presumed enemies.); *Ocalan v. Turkey*, App. No. 00046221/99, Eur. Ct. H.R. (March 12, 2003), ¶¶ 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other factors, doubts were objectively justified by “the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities ...”).

<sup>111</sup> Military Commission Instruction No. 6, *Reporting Relationships for Military Commission Personnel*, § 3(A)(8) (Apr. 15, 2004), available at <http://www.dod.mil/news/Apr2004/d20040420ins6.pdf> (hereinafter MCI No. 6). Commission members “continue to report to their parent commands.” *Id.* § 3(B)(10).

<sup>112</sup> MCO No. 1, *supra* note 99, § 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

<sup>113</sup> MCO No. 1, *supra* note 99, § 6(B)(2).

<sup>114</sup> MCI No. 6, *supra* note 111, § 3(B)(10).

<sup>115</sup> *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), ¶¶ 35, 75, 80 (Court expressed doubts as to whether impartiality was objectively justified even though British court-martial members were sworn to act “without partiality”); *Incal v. Turkey*, Eur. Ct. H.R., note 37 *supra*, ¶¶ 27, 67, 73 (Court expressed doubts about impartiality even though Turkish military judges on National Security Courts were constitutionally guaranteed to be independent and to judge “according to their personal conviction, in accordance” with the law); *Grievies v. U.K.*, App. No. 00057067/00, Eur. Ct. H.R. (Dec. 16, 2003), ¶¶ 84, 85, 88, 91 (career aspirations of British navy court-martial members were among the factors objectively justifying doubts about their independence and impartiality; although British government argued that naval Judge Advocate was “not reported on as regards his performance” in courts-martial, the European Court of Human Rights was unimpressed); *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), ¶ 8.8 (Peruvian anti-terrorism tribunals violated a “cardinal aspect of a fair trial... that the tribunal must be, and be seen to be, independent and impartial,” because they could include “serving members of the armed forces”).

These structural defects are aggravated by public statements by the Commander in Chief, characterizing the prisoners at Guantánamo as “bad men,”<sup>116</sup> and by the Secretary of Defense, asserting that “the people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country.”<sup>117</sup> To counter these widely publicized statements would require strong structural guarantees of independence and impartiality. Yet the commissions are burdened by the opposite: strong structural interferences with their independence and impartiality.

The structural defects also mean that the lack of independence and impartiality cannot be cured by the particular composition of a commission or by disqualification of individual members. Doubts about the independence and impartiality of the military commissions are objectively justified by their structural deficiencies. The military commissions thus fail the international tests of independence and impartiality.

### **B. The Military Commissions Impermissibly Discriminate Against Non-U.S. Nationals**

The President’s Military Order authorizes trial by military commission of members of al Qaeda and other alleged international terrorists *only* if they are non-citizens of the U.S.<sup>118</sup> Thus, if a foreign national and an American both join al Qaeda, and both commit the same terrorist bombing, the foreign national can be tried by military commission, but the American cannot. The American would be entitled to trial either by a civil court with full judicial guarantees, or by a court-martial conducted in accordance with a whole panoply of fair trial rights set forth in the United States Uniform Code of Military Justice.<sup>119</sup>

This discrimination contravenes essential Covenant rights to non-discrimination. Article 2.1 requires States Parties to recognize Covenant rights “without distinction of any kind.” Article 26 adds, “All person are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>120</sup>

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<sup>116</sup> E.g., N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, THE GUARDIAN, July 19, 2003, at 8.

<sup>117</sup> Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce re: Prisoners being held at Guantanamo Bay, Miami, Fla., Feb. 13, 2004 available at [www.defenselink.mil/transcripts/2004/tr20040213-0445.html](http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html) (last visited Jan. 3, 2006).

<sup>118</sup> Presidential Military Order, *supra* note 83, § 2(a).

<sup>119</sup> Uniform Code of Military Justice, 10 U.S.C. § 830 et. seq.

<sup>120</sup> Although a few ICCPR rights (such as the rights to residence within a country and to political participation) may be denied to non-citizens, “[t]he general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens.” U.N. H.R. Committee *General Comment No. 15: The position of aliens under the Covenant* (April 11 1986), ¶ 2 (hereinafter *General Comment No. 15*).

Not all differences in treatment are discriminatory. Distinctions may be upheld “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”<sup>121</sup> The President’s Military Order, however, articulates no justification, let alone a “reasonable and objective” basis, to discriminate against foreign nationals. It justifies trial by military commission in order to “protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks,” and because of the “danger to the safety of the United States and the nature of international terrorism.”<sup>122</sup> But it makes no effort to explain why these rationales apply to foreign but not to American international terrorists, and none is apparent. On the contrary, where the subject matter jurisdiction of special courts for alleged terrorists “is not based on objective criteria but on the nationality of the suspected terrorists,” the result is “discrimination based on nationality.”<sup>123</sup>

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<sup>121</sup> U.N. H.R. Committee, *General Comment No. 18: Non-discrimination*, (Nov. 10, 1989), ¶ 13. The United States interprets articles 2.1 and 26 to permit distinctions “when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” 138 CONG. REC. S4781-01 (daily ed., April 2, 1992), Understanding II(1). It is not clear that this test differs from the “reasonable and objective” language used by the Committee. In any event neither the President’s Military Order nor logic explains why trying foreign but not American members of al Qaeda by military commission is “rationally related” to the legitimate objective of countering international terrorism.

<sup>122</sup> Presidential Military Order, *supra* note 83, §§ 1(e) and (f).

<sup>123</sup> U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003), ¶ 67, available at <http://www.ohchr.org/english/issues/detention/annual.htm> (last visited Jan. 3, 2006).

Trial before a civil court with full judicial safeguards is not a right that may be afforded only to citizens. Under Covenant article 14.1, “[a]ll persons shall be equal before the courts and tribunals,” and article 14.3 requires that each of its fair trial provisions must be provided “in full equality.” This Committee has elaborated: “Aliens shall be equal before the courts and tribunals....Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”<sup>124</sup>

A 2004 judgment of Britain’s highest court confirms that the Covenant prohibits discrimination against suspected terrorists who happen to be foreign nationals.<sup>125</sup> The Law Lords considered a British law which permitted prolonged detention without trial of suspected terrorists, but only if they were foreign nationals awaiting deportation, not British citizens.<sup>126</sup> The Lords ruled by an 8-1 vote that the law was “incompatible” with the European Convention on Human Rights (“ECHR”), as both disproportionate and discriminatory.<sup>127</sup> In an opinion endorsed by the clear majority, Lord Bingham ruled that article 14 of the ECHR and article 26 of the ICCPR, which Britain’s Attorney General conceded are “to the same effect,” are “inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency.”<sup>128</sup>

Because the Guantánamo military commissions have been established exclusively for the trial of foreign nationals, they are in violation of the Covenant’s guarantees of non-discrimination.

### **C. The Military Commission Procedures Impermissibly Deny Access to Secret Trial Proceedings and Documents**

The military commission procedures permit the exclusion of the accused from portions of his own trial. While generally the accused may be present at every stage of the trial, his presence must be “consistent with Section 6(B)(3).”<sup>129</sup> That section authorizes the commission’s presiding officer -- or the Appointing Authority -- to close proceedings.<sup>130</sup> Closure may be for such purposes as protecting classified information or intelligence sources, methods or activities, or “other national security interests.”<sup>131</sup> And it “may include a decision to exclude the Accused, [and] Civilian Defense Counsel...”<sup>132</sup>

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<sup>124</sup> *General Comment No. 15, supra* note 120, ¶ 7.

<sup>125</sup> *A(FC) and others (FC) v. Secretary of State, and X (FC) and another (FC) v. Secretary of State*, House of Lords, [2004] UKHL 56 (U.K.) accessible in LEXIS International Law Library, Cases file (last visited Jan. 3, 2006).

<sup>126</sup> *Id.* ¶¶ 2, 3, 12, 14 and 46.

<sup>127</sup> *Id.* 73 (Lord Bingham), 85 (Lord Nicholls), 139 (Lord Hope), 160 (Lord Scott), 190 (Lord Rodger), 234-39 (Baroness Hale), 240 (Lord Carswell). Lord Hoffman joined in the judgment on the separate ground that there was no emergency sufficient to justify Britain’s derogation from the right to liberty. *Id.* at 50-53.

<sup>128</sup> *Id.* ¶ 63; *see also* ¶¶ 73, 76, 136, and 139.

<sup>129</sup> MCO No. 1, *supra* note 99, § 5(K).

<sup>130</sup> MCO No. 1, *supra* note 99, § 6(B)(3).

<sup>131</sup> *Id.* § 6(B)(3).

<sup>132</sup> *Id.*

Such exclusion violates the right of the accused under Covenant article 14(3)(d) “[t]o be tried in his presence, ...”<sup>133</sup> By allowing prosecutors to present and argue secret evidence in the absence of the accused and civilian defense counsel, the military commission procedures breach not only the critical right to be tried in one’s presence, but also the right to assistance of counsel under Covenant art. 14.3 (d). Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military counsel “may not disclose any information presented during a closed session to individuals [such as the accused and civilian defense counsel] excluded from such proceeding.”<sup>134</sup>

The military commission procedures deny the accused and his counsel access to documents containing “protected information” – broadly defined – even if that evidence would be exculpatory.<sup>135</sup> While the prosecution is directed to provide the defense with access to evidence that the prosecution intends to introduce at trial, as well as other evidence known to the prosecution that tends to exculpate the accused, there are caveats to these requirements that substantially undercut them.<sup>136</sup> Such access is only to be granted where it is consistent with subsequent provisions relating to broadly-defined “protected information.”<sup>137</sup>

With respect to evidence the prosecution intends to introduce, the Presiding Officer may direct the deletion of “protected information” from documents before they are made available to the accused and his military and civilian defense counsel, “or” the substitution of either a “portion or summary” of the information or a statement of the facts that the omitted information tends to prove.<sup>138</sup> But even where a deletion is accompanied by a substitution, it is no cure, since neither the accused nor his counsel has any way to know whether the substitute fairly and adequately compensates for the denial of access to the original. The accused and his civilian defense counsel are further excluded from access to protected information. Although military defense counsel must have access to protected information actually admitted into evidence, at least through the kind of substitutes described above, neither the accused nor his civilian counsel are guaranteed even that much.<sup>139</sup>

With respect to exculpatory evidence – evidence the accused could use to demonstrate his innocence – the denial of access is even more severe. So long as the prosecution does not intend to introduce the evidence at trial, the prosecution is not required, and indeed is not allowed, to disclose to the accused or his counsel any protected information, *even if* that information is of an exculpatory character.<sup>140</sup> The defense thus may never learn of the existence of critical exculpatory information.

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<sup>133</sup> ICCPR, *supra* note 40, art. 14.3 (d). *Accord*, Protocol I, *supra* note 88, art. 75.4 (e): “Anyone charged with an offense shall have the right to be tried in his presence.”

<sup>134</sup> MCO No. 1, *supra* note 99, § 6(B)(3). While such disclosures may be made with the presiding judge’s prior consent, *id.*, this is an insufficient substitute for full access to one’s own trial.

<sup>135</sup> MCO No. 1, *supra* note 99, §§ 5E, 6(D)(5)(b).

<sup>136</sup> *Id.* § 5(E).

<sup>137</sup> This includes information which is “classified or classifiable”; or which is protected from disclosure by “law or rule”; or whose disclosure “may” endanger witnesses or participants in commission trials; or which concerns “intelligence and law enforcement sources, methods, or activities”; or which concerns “other national security interests. *Id.* § 6(D)(5)(a). *See also id.* § 9 (no unauthorized disclosure of “state secrets”).

<sup>138</sup> MCO No. 1, *supra* note 99, § 6(D)(5)(b).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* §§ 5(E), 6(D)(5)(b).

Denying the accused the opportunity to see “protected” documents admitted into evidence against him is an additional violation of the article 14(3)(d) guarantee that the accused must be tried in his own presence. More broadly, permitting the denial of “protected” information to the defense violates the Covenant right to “adequate ... facilities for the preparation of his defense”<sup>141</sup> and to equality of arms.

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<sup>141</sup> ICCPR, *supra* note 40, art. 14.3(b). This Committee has explained that the “facilities must include access to documents and other evidence which the accused requires to prepare his case, ...” *General Comment No. 13*, *supra* note 98, ¶ 9. *See also* Geneva Convention III, *supra* note 2, art. 105 (right to “necessary facilities to prepare the defense”); and Protocol I, *supra* note 88, art. 75.4(a) (right to “all necessary rights and means of defense”).

## **RECOMMENDATIONS**

### **Recommendations regarding arbitrary detention:**

1. Close the Guantánamo detention facility. All individuals currently held at Guantánamo should either be promptly charged or be released. Those charged should be transferred to pre-trial detention facilities on U.S. territory and should be promptly tried before civilian courts or, where appropriate under the Third Geneva Convention regarding trials of prisoners of war, before the same courts that would try comparable offenses committed by members of the United States military. In all cases these courts should fully respect all ICCPR fair trial requirements.
2. All persons not charged as well as those acquitted after trial should be returned to their home countries except where there exist substantial grounds for believing that to do so would place the individual in danger of being subjected to torture. In such exceptional cases, it is the responsibility of the United States to see to it that the individual is promptly resettled elsewhere in an appropriate country.

### **Recommendations regarding torture and cruel, inhuman, or degrading treatment or punishment:**

3. Close the Guantánamo detention facility.
4. Ensure that all interrogation rules, instructions, policies and practices are consistent with the absolute prohibition on torture and cruel, inhuman, or degrading treatment or punishment, and affirm that no exceptions to this mandate can be made under any circumstances whatsoever.
5. Ensure that all prisoners and detainees are confined in conditions consistent with their human dignity. No prisoner or detainee should be confined in overcrowded, dangerous, filthy, unbearably noisy, or intolerably hot or cold cells.
6. Ensure that all prisoners and detainees have prompt access to medical care, including psychiatric and psychological care.
7. Grant full access, including private visitation rights, to United Nations independent human right experts, the International Committee of the Red Cross, and other independent human rights monitors, to all prisoners and detainees in the custody of the United States.
8. Grant all prisoners and detainees prompt access to legal counsel, independent doctors, and family members.
9. Prohibit the use of any evidence obtained as a result of torture or cruel, inhuman, or degrading treatment or punishment in any civilian or military proceeding, whether judicial, administrative, or other.
10. Immediately end the practice of rendering individuals to secret detention facilities or to countries where torture is a serious human rights problem. End as well the use of threats of such rendition as an interrogation technique.

11. Ensure effective judicial review of all transfers of detainees between the United States and other countries, and prohibit transfers where there exist “substantial grounds,” as provided in the Convention Against Torture, to believe that a detainee will be in danger of being subjected to torture.
12. End reliance on diplomatic assurances to facilitate the transfer of detainees to a country where there are substantial grounds for believing that such persons will be in danger of being subjected to torture.
13. Establish an independent commission to investigate the policies and practices that have led to the widespread and systemic torture and inhumane treatment of detainees in the custody of the United States in Guantánamo, Afghanistan, and Iraq, as well as in secret detention facilities.
14. Hold accountable all individuals, including government officials, members of the armed forces, intelligence personnel, medical personnel, and private government contractors and interpreters who have authorized, condoned, or committed acts of torture or cruel, inhuman, or degrading treatment or punishment.
15. Prosecute crimes of torture and abuse as aggressively as other criminal actions involving bodily or mental harm.

**Recommendations regarding denial of an effective remedy for violations of ICCPR rights:**

16. Repeal the provisions of the Detainee Treatment Act that would strip U.S. courts of jurisdiction over actions arising out of the detentions at Guantánamo.
17. Ensure the existence of effective judicial remedies for violations of ICCPR rights by the United States and its employees and agents, without regard to where the violation took place and without regard to the nationality of the victim.

**Recommendation regarding the fair trial violations of the Guantánamo military commissions:**

18. End the use of military commissions. Detainees who are charged and tried should be tried before civilian courts or, where appropriate under the Third Geneva Convention regarding trials of prisoners of war, before the same courts that would try comparable offenses committed by members of the United States military. In all cases these courts should fully respect all ICCPR fair trial requirements.

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# ANNEX 1

U.S. Department of Defense  
Office of the Assistant Secretary of Defense (Public Affairs)  
News Release

On the Web:

 <http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2006/nr20060624-13329.html> 


Public contact:

<http://www.dod.mil/faq/comment.html> or +1 (703) 428-0711

Media contact: +1 (703) 697-5131


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 IMMEDIATE RELEASE 

No. 594-06  
June 24, 2006 

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## **Detainee Transfer Announced**




 The Department of Defense announced today that it transferred 14 Saudi detainees from Guantanamo Bay, Cuba, to Saudi Arabia.

This movement included one detainee found to no longer be an enemy combatant by the Combatant Status Review Tribunals. The other thirteen detainees were approved for transfer by an Administrative Review Board (ARB) decision at Guantanamo.

With today's transfer, approximately 120 detainees remain at Guantanamo who the U.S. government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers or releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified.

With this transfer, approximately 310 detainees have departed Guantanamo to other governments, including Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, France, Great Britain, Kuwait, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden and Uganda.

 Approximately 450 detainees remain at Guantanamo.  
 <http://www.defenselink.mil/releases/2006/nr20060624-13329.html> 

## ANNEX 2

### **Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data**

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Seton Hall University - School of Law

[JOSHUA W. DENBEAUX](#)

Denbeaux & Denbeaux

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February 2006

[Seton Hall Public Law Research Paper No. 46](#)

**THE FULL REPORT IS AVAILABLE AT:**

[http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf)



#### **Abstract:**

The media and public fascination with who is detained at Guantanamo and why has been fueled in large measure by the refusal of the Government, on the grounds of national security, to provide much information about the individuals and the charges against them. The information available to date has been anecdotal and erratic, drawn largely from interviews with the few detainees who have been released or from statements or court filings by their attorneys in the pending habeas corpus proceedings that the Government has not declared "classified."

This Report is the first effort to provide a more detailed picture of who the Guantanamo detainees are, how they ended up there, and the purported bases for their enemy combatant designation. The data in this Report is based almost entirely upon the United States Government's own documents. This Report provides a window into the Government's success detaining only those that the President has called "the worst of the worst."

Among the findings of the Report:


1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.
2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.
3. The Government has detained numerous persons based on mere affiliations with a large number of groups that, in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority - 60% - are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For

2% of the prisoners, a nexus to any terrorist group is not identified by the Government.

4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. This 86% of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.


5. Finally, the population of persons deemed not to be enemy combatants - mostly Uighers - are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.



Keywords: Guantanamo, detainee, Al Qaeda, Taliban, terrorist, terrorism, war on terror, Osama bin Laden, enemy combatant, habeas corpus, hostile acts, Uighers, Pakistan, Northern Alliance, Coalition Working Paper Series 

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**THE FULL REPORT IS AVAILABLE AT:**  
[http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf)

## ANNEX 3

### **Estimated Gtmo Detainee Population (Incl. Released & Transferred)**

**From DoD May 2006 List of All Detainees Recorded by DoD Since 2002**

**Total Gtmo Population: 762**

**(By Number)**

**Afghanistan:** 219 (incl. 1 dual citzn)  
**Saudi Arabia:** 138 (incl. 2 dual citzn)  
**Yemen:** 108  
**Pakistan:** 67 (incl. 2 dual citzn)  
**Algeria:** 24  
**China:** 21  
**Morocco:** 15  
**Tajikistan:** 12  
**Tunisia:** 12  
**Kuwait:** 12  
**Sudan:** 12 (incl. 1 dual citzn)  
**Libya:** 11  
**Syria:** 10  
**Russia:** 9  
**United Kingdom:** 8  
**Jordan:** 8  
**Iraq:** 8  
**Uzbekistan:** 7  
**France:** 7  
**Egypt:** 6  
**Bahrain:** 6  
**Turkey:** 5  
**Iran:** 3  
**Kazakhstan:** 3  
**Mauritania:** 3  
**West Bank:** 3  
**Australia:** 2  
**Bangladesh:** 2 (incl. 1 dual citzn)  
**Belgium:** 2  
**Canada:** 2  
**Somalia:** 2  
**United Arab Emirates:** 2  
**Azerbaijan:** 1  
**Chad:** 1  
**Denmark:** 1  
**Ethiopia:** 1  
**Lebanon:** 1  
**Maldives:** 1  
**Qatar:** 1  
**Spain:** 1  
**Sweden:** 1  
**Turkmenistan:** 1  
**Uganda:** 1  
**United States:** 1 (dual citzn)

**(By Country)**

**Afghanistan:** 219 (incl. 1 dual citzn)  
**Algeria:** 24  
**Australia:** 2  
**Azerbaijan:** 1  
**Bahrain:** 6  
**Bangladesh:** 2 (incl. 1 dual citzn)  
**Belgium:** 2  
**Canada:** 2  
**Chad:** 1  
**China:** 21  
**Denmark:** 1  
**Egypt:** 6  
**Ethiopia:** 1  
**France:** 7  
**Iran:** 3  
**Iraq:** 8  
**Jordan:** 8  
**Kazakhstan:** 3  
**Kuwait:** 12  
**Lebanon:** 1  
**Libya:** 11  
**Maldives:** 1  
**Mauritania:** 3  
**Morocco:** 15  
**Pakistan:** 67 (incl. 2 dual citzn)  
**Qatar:** 1  
**Russia:** 9  
**Saudi Arabia:** 138 (incl. 2 dual citzn)  
**Somalia:** 2  
**Spain:** 1  
**Sudan:** 12 (incl. 1 dual citzn)  
**Sweden:** 1  
**Syria:** 10  
**Tajikistan:** 12  
**Tunisia:** 12  
**Turkey:** 5  
**Turkmenistan:** 1  
**Uganda:** 1  
**United Arab Emirates:** 2  
**United Kingdom:** 8  
**United States:** 1 (dual citzn)  
**Uzbekistan:** 7  
**West Bank:** 3  
**Yemen:** 108

**Estimated Current Detainee Count by Country (Minus Transfers)  
Based on DoD News Releases on Transfers**

**Transfer Count—DoD News Releases  
Total # Transferred: 213**

**Pakistan: 36**  
**Afghanistan: 28**  
**Saudi Arabia: 23**  
**Kuwait: 6**  
**France: 5**  
**Great Britain: 5**  
**Morocco: 5**  
**Uighurs: 5**  
**Bahrain: 3**  
**Australia: 2**  
**Belgium: 2**  
**Spain: 1**  
**Denmark: 1**  
**Egypt: 1**  
**Iran: 1**  
**Jordan: 1**  
**Maldives: 1**  
**Sudan: 1**  
**Sweden: 1**  
**Tajikistan: 1**  
**Turkey: 1**  
**Uganda: 1**  
**Yemin: 1**

**Unknown Country Transfers: 81**

**Detainee Count Minus Transfer Count  
Total - Transfers: 457**

**Saudi Arabia: 115**  
**Yemen: 107**  
**Afghanistan: ~94 - 100 left according to  
multiple news sources**  
**Pakistan: 31**  
**Algeria: 24**  
**China: 16**  
**Tunisia: 12**  
**Tajikistan: 11**  
**Libya: 11**  
**Sudan: 11**  
**Morocco: 10**  
**Syria: 10**  
**Russia: 9**  
**Iraq: 8**  
**Jordan: 7**  
**Uzbekistan: 7**  
**Kuwait: 6**  
**Egypt: 5**  
**Turkey: 4**  
**Bahrain: 3**  
**Kazakhstan: 3**  
**Mauritania: 3**  
**United Kingdom: 3**  
**West Bank: 3**  
**Bangladesh: 2**  
**Canada: 2**  
**France: 2**  
**Iran: 2**  
**Somalia: 2**  
**United Arab Emirates: 2**  
**Azerbaijan: 1**  
**Chad: 1**  
**Ethiopia: 1**  
**Lebanon: 1**  
**Qatar: 1**  
**Turkmenistan: 1**  
**United States: 1**  
**Australia: 0**  
**Belgium: 0**  
**Denmark: 0**  
**Maldives: 0**  
**Spain: 0**  
**Sweden: 0**  
**Uganda: 0**