House of Commons

Foreign Affairs Committee

Visit to Guantánamo Bay

Second Report of Session 2006–07

Report, together with formal minutes and written evidence

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Foreign Affairs Committee

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1. We conclude that the Government was right to ensure that persons detained by UK Armed Forces in Afghanistan and transferred to the Afghan authorities cannot be further transferred to the authority of another state, or detained in another country, without the prior written agreement of the United Kingdom. We recommend that the Government in its response to this Report state whether the requirement for such prior written agreement would apply to the transfer to Guantánamo Bay of any person originally detained by UK Armed Forces in Afghanistan including any who may be transferred directly or indirectly to US Forces or agencies. We further recommend that the FCO also set out in its response what steps it is taking to ensure that those detained by UK Armed Forces in other countries cannot be transferred to Guantánamo Bay without the prior written agreement of the United Kingdom. (Paragraph 5)

2. We conclude that, having visited both Guantánamo and Belmarsh, the facilities at Guantánamo are broadly comparable with those at the United Kingdom's only maximum security detention facility, but the conditions are not. Guantánamo scores highly on diet and on health provision; but it fails to achieve minimum United Kingdom standards on access to exercise and recreation, to lawyers, and to the outside world through educational facilities and the media. (Paragraph 46)

3. We conclude that publication of the US Army Field Manual for Human Intelligence Collector Operations is a very positive development. We recommend that the Government work both bilaterally and through international fora to press the US Administration to ensure that its interrogation practices do not contravene international law. (Paragraph 55)

4. We conclude that abuse of detainees at Guantánamo Bay has almost certainly taken place in the past, but we believe it is unlikely to be taking place now. Although violence and low-level abuse are endemic in any high-security prison situation, it is the duty of the detaining authority to strive to its utmost to minimise them. We recommend that the Government continue to raise with the United States authorities human rights concerns about the treatment of detainees. (Paragraph 70)

5. We conclude that, in choosing unilaterally to interpret terms and provisions of the Geneva Conventions, the United States risks undermining this important body of international law. (Paragraph 83)

6. We conclude that, by its own test, the Government should recognise that the Geneva Conventions are failing to provide necessary protection because they lack clarity and are out of date. We recommend that the Government work with other signatories to the Geneva Conventions and with the International Committee of the Red Cross to update the Conventions in a way that deals more satisfactorily with asymmetric warfare, with international terrorism, with the status of irregular combatants, and with the treatment of detainees. (Paragraph 85)

7. We conclude that the Government is right to stick to its established policy of not accepting consular responsibility for non-British nationals. We recommend that the Government maintain its current position with respect to the return to the United Kingdom of the former British residents presently detained at Guantánamo Bay. (Paragraph 92)

8. We conclude that, although some aspects of the Military Commissions Act are welcome, others give cause for concern. We welcome the Government's undertaking to study the procedures proposed by the Act. We recommend that the Government carry out that study without delay and that it share the full findings of the study with this Committee. If the Government's study finds that the procedures proposed in the Military Commissions Act or in any subsequent elaboration are inconsistent with international law or human rights norms, it should make strong representations to the United States Administration. (Paragraph 103)

9. We conclude, in line with our previous Reports, that those detained at Guantánamo must be dealt with transparently and in full conformity with all applicable national and international law. But we recognise too, as we have before, that many of those detained present a real threat to public safety and that all states are under an obligation to protect their citizens and those of other countries from that threat. At present, that obligation is being discharged by the United States alone, in ways that have attracted strong criticism, but we conclude that the international community as a whole needs to shoulder its responsibility in finding a longer-term solution. We recommend that the Government engage actively with the US Administration and with the international community to assist the process of closing Guantánamo as soon as may be consistent with the overriding need to protect the public from terrorist threats. (Paragraph 116)

1 Introduction

1. The Foreign Affairs Committee first commented on the United States detention centre at Guantánamo Bay, Cuba, in its June 2002 Report on Foreign Policy Aspects of the War against Terrorism.[1] At that time, the camp had been in use for a matter of months. Over the following four years, the Committee has continued to take a close interest, commenting in nine further Reports and culminating in a visit to Guantánamo by a group of seven Members in September 2006. Extracts from the previous Reports, and from the relevant government responses, are appended to this Report.[2]

2. The purpose of this Report is to place on the record a summary of what the group who visited Guantánamo saw and heard and to make a further contribution to the debate on a number of issues relating to the US authorities' continued detention at that base of men classed by it as 'unlawful enemy combatants.' In reaching our conclusions and recommendations, we have drawn on the first-hand experience of those of us who visited Guantánamo and on the extensive body of documentation available on US government web sites. We have also made use of our back catalogue, and have received further evidence from Amnesty International, Human Rights Watch and the Foreign and Commonwealth Office (FCO).

3. This Report does not deal with the detention or interrogation of terrorist suspects in the field, or by the Central Intelligence Agency (CIA); nor does it consider the practice of extraordinary rendition.

4. A number of us visited Afghanistan in November 2006 and were given a copy of the Memorandum of Understanding between the Government of the United Kingdom and the Government of Afghanistan on the transfer of detainees which was signed on 30 September 2006. The Memorandum is published with this Report.[3] It contains some important safeguards, including that in paragraph 3.2 whereby: "The Afghan authorities will ensure that any detainee transferred to them by the UKAF [United Kingdom Armed Forces in Afghanistan] will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the UK."

5. **We conclude that the Government was right to ensure that persons detained by UK Armed Forces in Afghanistan and transferred to the Afghan authorities cannot be further transferred to the authority of another state, or detained in another country, without the prior written agreement of the United Kingdom. We recommend that the Government in its response to this Report state whether the requirement for such prior written agreement would apply to the transfer to Guantánamo Bay of any person originally detained by UK Armed Forces in Afghanistan including any who may be transferred directly or indirectly to US Forces or agencies. We further recommend that the FCO also set out in its response what steps it is taking to ensure that those detained**

1 Foreign Affairs Committee, Seventh Report of Session 2001–02, *Foreign Policy Aspects of the War Against Terrorism*, HC 573, paras 137 to 145

2 Appendix 2

3 Appendix 3

by UK Armed Forces in other countries cannot be transferred to Guantánamo Bay without the prior written agreement of the United Kingdom.

6. Shortly before our visit to Guantánamo, President Bush acknowledged for the first time that a small number of suspected terrorists had been detained, held and questioned outside the United States in a separate programme operated by the CIA.[4] He announced that 14 CIA-held detainees had been transferred to Guantánamo, but their whereabouts or treatment before then are not known to us and—although a matter of great concern—lie outside the scope of this Report. Extraordinary rendition, as distinct from rendition, involves the removal of suspects to countries where they may be subject to interrogation techniques not approved for use by US personnel. Again, this is a matter of great and legitimate concern, on which we have previously commented and into which the Intelligence and Security Committee is currently inquiring,[5] but it lies outside the scope of this Report.

7. We may return to all these issues in our next Report on Human Rights, due in early 2007.

4 See "President Discusses Creation of Military Commissions to Try Suspected Terrorists", www.whitehouse.gov

5 Cabinet Office, *Intelligence and Security Committee Annual report 2005–06*, Cm 6864, para 104

2 Summary of the visit

Background

8. Reports of the Foreign Affairs Committee are based on evidence heard in Westminster, on written evidence and on public source material. In addition, they are almost invariably informed by discussions held during a visit or visits to a relevant country or region. The off-the-record exchanges we are able to have on these visits are not referred to directly in our Reports, but they are of great assistance to us in analysing the evidence and in forming our conclusions.

9. We discussed Guantánamo with senior officials in the State Department when we visited Washington DC in March 2006. In the course of that discussion, we raised the possibility of a visit to Guantánamo, so that we might see conditions there for ourselves. We later pursued this request with a senior State Department official when he was in London, and then in correspondence with senior figures in the Department of Defense. Our request was granted and a maximum of seven of us were permitted to visit Guantánamo in September 2006. Those seven were the first members of a national parliament other than the United States Congress to visit the base. We are grateful to the State Department and Department of Defense for facilitating the visit, and to the British Embassy in Washington DC both for setting up the visit and for accompanying us on it.

Itinerary

10. The seven members who visited Guantánamo were Mike Gapes (Chairman, Lab), Fabian Hamilton (Lab), Paul Keetch (Lib Dem), Eric Illsley (Lab), John Maples (Con), Greg Pope (Lab) and Sir John Stanley (Con). They were accompanied by the Clerk of the Committee. The visit to Guantánamo took place on 20 September and was both preceded and followed by meetings in Washington DC.

11. In Washington, the group met senior State Department officials, senior Department of Defense officials, Senators Richard Lugar and Lindsey Graham, the International Committee of the Red Cross, and the British Ambassador. A full itinerary is appended to this Report.[6]

12. The group spent a full day at Guantánamo. It was accompanied on the flight from Andrews Air Force base by Rear Admiral Harry B Harris Jr, Commander of the Joint Task Force (JTF) Guantánamo. Members received a full briefing from JTF officials and then toured the facility. In outline, the itinerary was as follows:

- briefing at JTF Headquarters
- lunch with JTF personnel; view display of detainee rations
- Camp Delta:
    - Camp I (medium security);

- Camp IV (low security);
- Camp V (high security), including interrogation wing;
- Camp VI (high security) (not then open) ;
- medical facilities

- view of former Camp X-Ray (closed)

13. Apart from US Joint Task Force personnel, the only people who are permitted to meet detainees are their lawyers and the Red Cross. Having consulted the International Committee of the Red Cross before the visit, we accepted their advice that it would be contrary to the provisions of Common Article 3 of the Geneva Conventions for us to meet detainees. We recognise that we did not, therefore, hear at first hand the complaints of the detainees about the conditions in which they are held. However, a number of former detainees have written in detail about their experiences, and non-governmental organisations such as Amnesty International have collated and presented such information, also in detail. It is also the case that the only alternative to visiting Guantánamo without access to detainees would have been not to visit Guantánamo, and thus not to have been able to make this Report to the House.

Description of Guantánamo Bay detention centre

History of Guantánamo Bay naval base

14. The US Naval Base at Guantánamo Bay is the oldest outside the continental United States, and the only one in a country with which the United States does not have full relations.[7] In 1903, the United States leased 45 square miles of land and water at Guantánamo Bay for use as a coaling station for its fleet. A 1934 treaty reaffirming the lease granted Cuba and her trading partners free access through the bay, modified the lease payment from $2,000 in gold coins per year to the 1934 equivalent value of $4,085, and added a requirement that termination of the lease requires the consent of both the US and Cuban governments, or the abandonment of the base by the US. We were informed that the annual payment is still made to the Cuban government, although the account into which it is paid has remained untouched for many years.

15. US relations with Cuba remained stable through the two world wars and the periods between and did not significantly change until the revolution of the late 1950s. Cuban territory outside the base was declared off limits to US servicemen and civilians on 1 January 1959. When the US severed diplomatic relations with Cuba two years later, several thousand Cubans sought refuge on the base. In September 2006, 56 Cubans still lived and worked on the base permanently, and we were told that three elderly Cuban men who had worked there since before the revolution still crossed from Cuban territory into the base each day. Current US policy is to return any Cuban who enters the base illegally.

16. The base is located on both sides of an estuary, with no land or bridge link between the two parts. The airstrip is on the West side; most of the other facilities are to the East.

7 See www.nsgtmo.navy.mil/htmpgs/gtmohistory.htm

Transit between the two is by ferry. Cuban vessels also use the estuarial waters, although they do so only in small numbers—roughly six to eight vessels monthly. On land, a fence delineates the base boundary. There is a crossing-point to the North-East.

17. In February 1964, Cuban authorities cut off water and access to the base in retaliation for several incidents in which Cuban fishermen were fined by the US government for fishing in Florida waters. Since then, the base has been totally self-sufficient, with its own power and water sources. We were told that there are regular, monthly meetings between US Naval and Cuban military authorities to resolve any issues that arise regarding the base; these are the only acknowledged official contacts between the two governments.

18. In 1991, the naval base's mission was expanded when 34,000 Haitian refugees transited through Guantánamo Bay. Some were granted asylum in the US; others were returned to Haiti. A special detention facility—Camp Bulkeley—was constructed to house several hundred Haitians who were HIV-positive. Some remained there for up to eighteen months, until a US court declared their detention to be unconstitutional and the camp was closed in June 1993. In late August and early September 1994, the refugee population climbed to more than 45,000 and the Pentagon began preparing to house up to 60,000 migrants on the base. This was the period when Camp X-Ray was originally constructed, as one of several temporary holding facilities for Cuban and Haitian migrants.

19. The last Haitian migrants departed the base in late 1995, and the last Cuban migrants left in early 1996. After then, the base was used to hold illegal Chinese migrants being smuggled into the United States, who had been intercepted at sea. However, the naval role of the base declined when the US Navy Fleet Training Group relocated to Mayport, Florida, in July 1995 and the shore maintenance facilities were closed down. Now, the main roles of the naval base are support of counter-narcotics operations in the Caribbean, and provision of hurricane warnings.

20. The base took on a new role in 2002, when Camp X-Ray—by then the only remaining detention facility on the base—was reopened to receive 'enemy combatants' detained in Afghanistan. Since then, the Joint Task Force Guantánamo has become the most important operation at the base. There are approximately 1,000 military and 300 civilian JTF personnel at the base, comprising just part of up to 9,500 US personnel at Guantánamo, many with their families. The resident population includes 2,300 foreign workers, as well as the detainees. We were told at the time of our visit that the number of detainees was approximately 455, of whom the US was prepared either to release or to transfer about 130. In December 2006, following several transfers of detainees to their countries of origin, the latest official figures given by the Department of Defense were 395 detainees remaining in custody, of whom 85 were eligible for release or transfer.[8]

21. As noted above, the group who visited the base had a full tour of the different camps and other facilities. We summarise below what the group saw.

8 "Detainee Transfer Announced", Department of Defense news release 1287–06, 17 December 2006

The Committee's visit

22. Having had a full day of very detailed discussions in Washington DC, the group arrived at Guantánamo Bay at about 09.30 on 20 September and departed at about 16.30. Members were briefed on the role of the US Naval Base *en route* from the airstrip to the Joint Task Force Headquarters. At the Headquarters, Admiral Harris and other JTF personnel gave the group a presentation and answered questions. The issues we discussed are considered in detail later in this Report. Those of us who went on the visit were impressed by the openness of Admiral Harris and his team, and by their willingness both to answer our questions and to engage in frank discussion of the issues.

23. Before lunch, we viewed what we were told was a typical day's rations for a detainee. Several times during the visit, we were informed that all detainees are offered 4,200 calories of *Halal* food daily and that most have put on weight since arriving at Guantánamo. We were told that some are clinically obese.[9] All the camps have exercise facilities, although these vary greatly in size, according to the category of prisoner. Individual cells are too small to provide detainees with much scope for vigorous exercise.

24. The group then visited Camp Delta. Although all detainees in Camps I to III in Camp Delta are classified to varying degrees as 'non-compliant', some have been granted certain privileges. Fully non-compliant detainees are issued with orange clothing and a minimum of other items; these include sandals, basic bedding, a prayer cap, a prayer mat and a copy of the Quran. The group also saw 'suicide smocks', which are made of material which breaks when pressure is applied and are used, we were told, to prevent detainees from harming themselves. Detainees may by compliant behaviour earn privileges; these include being issued with beige clothing, more bedding, a traditional Islamic prayer rug, ear plugs and personal sanitary items. The detainees are under constant surveillance and electric lighting is on permanently.

25. The Camp is split into six sub-camps, numbered I to VI. Camps I to III date from 2002 and hold high-security prisoners. We went into Camp I, which was closed at the time of the visit for repairs. We were told that detainees had discovered they could remove part of the plumbing system in each cell to fashion weapons and that these had been used to attack guards; the plumbing was therefore being replaced.

26. Camps I to III are of predominantly wire cage construction, but with concrete floors, hard roofs and protection from the elements. Each block houses up to 48 detainees, in two rows of 24 cells. At the end of each block are showering and basic exercise facilities. The cells are small, about 2 metres by 1.5 metres. They are equipped with a fixed bunk and basic sanitation. An arrow set into each bunk points to Mecca.

27. At the end of the block visited by the group was a recreation area, with four shower cubicles and a number of exercise yards, some containing basic gym machinery. Each yard is enclosed by wire. In several places, camouflage netting has been arranged to provide a little shade. Two further wire fences, to one of which heavy-duty fabric has been attached to block any view, mark the perimeter of the camp. Watch towers stand in the strip between the two fences.

9 See "A Growing Threat at Guantanamo? Detainees Fatten Up", *ABC News*, 3 October 2006

28. The group next visited Camp IV, which is classed as medium-security and houses 'compliant' detainees. The camp is a series of single-storey blocks arranged around an exercise area. Detainees are accommodated in dormitories with up to ten conventional beds and mattresses; lights are dimmed at night. They eat and pray communally and are permitted to wear white clothing. Among the additional items they are issued with are board games; they also have access to more extensive physical recreation areas, including soccer, volleyball and basketball pitches, as well as table tennis and gym equipment; television is sometimes available. There are several outdoor association areas in this camp; these have shade, benches and tables. At the time of our visit, detainees appeared to have free access to these areas and the dormitories appeared to be unlocked. However, fewer than one in ten detainees were accommodated in Camp IV at the time of our visit.

29. Camp V is a maximum-security block of more conventional construction, being based on the 'Indiana model' prison. It was opened in 2004. About 100 prisoners are housed in four, two-storey wings. Cells are slightly larger than those in Camps I to III and the sanitation is less basic. All walls, floors and doors are of solid construction, which greatly reduces the scope for detainees to converse without being overheard. Guards look into each cell every few minutes, and also monitor them using cameras. Prisoners may summon a guard by using a microphone built into each cell, which communicates directly with the control room. Some cells are equipped for disabled detainees; a large number of those held at Guantánamo have disabilities, mostly as a result of losing a limb in an explosion or in combat.

30. This camp also houses the interrogation facilities. The group witnessed by closed-circuit television an interrogation being conducted. The detainee, wearing a beige uniform which indicated he was compliant to a degree, was seated on an upholstered chair. His hands were free, but one ankle was secured to a metal ring set into the floor and he was wearing a heavy belt, which is used to restrain detainees when they are moved between their cells and other rooms. A soft drink was next to him. We were told that the detainee was free to ask for food and drink to be sent in and that he was also free to end the interview at any time.

31. The group visited an interrogation room. The furniture was plusher than the type depicted in photographs available on the internet.[10] The room was also equipped with a table, two ceiling-mounted video cameras, a television set and a DVD player. There is a panic button to summon help if the interviewer feels threatened.

32. Outside Camp V, there are individual recreation pens, each measuring ten by eighteen feet. Prisoners held in Camp V are not allowed to associate and at the time of our visit they were conducting shouted conversations from their cells.

33. Camp VI, which we were told cost $37 million to build, opened at the end of 2006. Like Camp V, it is based on a US penitentiary, in this case the 'Michigan model'; however, unlike Camp V, it was designed as a medium-security facility. It has since been reconfigured for use as a maximum-security block and it was clear when we visited that this has required substantial additional work. The camp has eight two-storey wings or 'pods' accommodating about 22 prisoners each, opening onto full-height association areas.

10 See, eg, http://cryptome.org/gitmo5/gitmo-052205.htm

A high-tech central monitoring and control room makes use of the many remote-control cameras to supervise the pods using minimum numbers of guards. The intention is to close Camps I to III once Camp VI is fully open, and after more of those eligible for release or transfer have left.

34. Many contemporary articles about Guantánamo continue to refer mistakenly to the entire existing facility as 'Camp X-Ray'. Photographs and film of detainees at Camp X-Ray are also regularly used in media coverage of stories about Guantánamo Bay. However, as we saw for ourselves, Camp X-Ray is no longer used for housing detainees and has not been so used since 2002. Detainees are now housed in much more modern facilities.

35. The group visited the detention hospital at Camp Delta. Most of the 100 medical staff are drawn from US Naval units and their average tour of duty is six months. Their mission was described to us as "to provide the best possible care for our detainees." Initially, medical staff dealt with many battlefield injuries as the detainees arrived from Afghanistan. Now, chronic conditions prevail over the acute. Typical complaints presented by detainees are gastro-enteric, muscular-skeletal or ear, nose and throat. Much dental work is carried out. There is also a clinic, in a separate building, which receives about 300 visits monthly.

36. The hospital has two wards, each with nine beds, and two single-bed rooms for infectious cases. About 100 x-ray examinations are made each month, mostly for routine reasons such as screening for tuberculosis. The operating theatre has carried out 150 procedures.

37. Next, the group visited the Behavioural Health Unit (BHU). This provides in- and out-patient services for psychiatric patients. The percentage of detainees in Guantánamo exhibiting psychiatric problems is comparable to that in the US prison population as a whole. About one fifth of the detainees have had a diagnosis of one or more of a variety of psychiatric conditions, but not all require treatment. Four percent of detainees receive medication for a psychiatric condition.

38. The Unit also assesses hunger strikers to discover their motivation. However, there are 'firewalls' between the Unit and the rest of the Joint Task Force. For example, patient confidentiality can be broken only in the case of overriding need, to prevent loss of life. A separate team of psychiatrists—the behavioural science consultation team, referred to by the acronym 'biscit'—monitors interrogations at Camp V. We were told that it would not be appropriate for the BHU staff to confuse their patient care role by becoming involved in the interrogation process.

39. In our view, the full day spent at Guantánamo by seven of us was an invaluable opportunity to witness at first hand the conditions which prevail there, and to ask questions of some of those directly involved in the detention, interrogation or care of the prisoners. The JTF personnel whom we met were very open and gave full answers to our many questions. We do not suppose that we were able to see everything, but we are satisfied with the access that we were given, which we were told was equal to that given to members of the United States Congress.

3 Treatment of detainees

Conditions of detention

40. The image of Guantánamo that prevails is of inmates kneeling in the dirt, shackled and hooded at Camp X-Ray in 2002. Although such images are still used to illustrate articles about Guantánamo in the press, on the evidence of our visit they are no longer an accurate picture. Detainees in Camps V and VI are housed in accommodation which is comparable to that at modern high-security prisons in the USA. The accommodation in Camp IV is reminiscent of a basic military barracks from national service days, with a series of single-storey dormitory huts surrounding a recreation area. The accommodation at Camps I to III, which we describe at paragraphs 23 to 25 above, has no real equivalent in other modern institutions. However, the facilities, as distinct from the physical fabric, are no worse than those in Camp V.

41. Food, sanitation, medical care and psychiatric care all appeared to us to be of a high standard. Facilities for worship are provided, including in each cell and in each exercise area an arrow pointing to Mecca, for every detainee a copy of the Quran and other religious items, and for compliant detainees a traditional Islamic prayer rug.[11] The call to prayer is broadcast at the appropriate five times daily, although we were told the prisoners prefer to be called by their own mullahs, and that they make a point of responding to the mullahs' calls and not to those provided by the camp authorities.

42. Amnesty International told us that, in their view, the conditions in which detainees are held at Guantánamo breach international law.

> While some detainees have been transferred to a section where they have more out-of-cell time and contact with other detainees, most continue to be confined to small cells with little contact with other inmates and minimal opportunities for exercise. Some detainees are held in extreme isolation in Camp V: a segregation block apparently modelled on 'supermaximum' security prisons in the USA. The Committee against Torture is concerned about the 'extremely harsh regime imposed in detainees in 'supermaximum prisons". Inmates in Camp V are reportedly held for up to 24 hours a day in solitary confinement in small concrete cells. They are allowed out of their cells three times a week for a shower and exercise, although reportedly this is often reduced to once a week. Such conditions fall short of UN minimum standards which provide that prisoners should receive at least one hour of exercise daily. Prisoners in Camp V are reportedly subjected to 24 hour lighting, which US courts have held to be 'cruel and unusual' in US mainland segregation units.[12]

43. In fact in one respect the situation is worse than described by Amnesty. As noted above, 24-hour lighting applies throughout Camp Delta, not just in Camp V, although it is dimmed at night in Camp IV. When we raised this, we were told that it was to allow guards to verify at all times of the day that a prisoner is alive, and thus to prevent suicides. In other

11 See "Joint Task Force Respects Detainees' Religious Practices", *American Forces Press Service*, 29 June 2005. The Committee was told that only one detainee professes not to be a Muslim.

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respects, however, our impression is more favourable than Amnesty's. We would not describe Camp V as holding prisoners in "extreme isolation." When we visited Camp V, detainees were conversing loudly and constantly. They were separated, but not isolated. We were assured—although we could not verify this—that all prisoners at Guantánamo are given opportunities to exercise for at least two hours daily, and we noted that every cell has its own washing facilities.

44. In order to provide ourselves with a reference point in relation to the conditions at Guantánamo, we visited Belmarsh maximum security prison in London in November 2006. Belmarsh provides the closest comparison in the United Kingdom to Guantánamo, as it was used between late 2001 and early 2005 to house up to twelve detainees, who like those held at Guantánamo were imprisoned without trial. The prison has a High Security Unit, which usually holds 35 category 'A' prisoners who have been assessed as presenting a heightened risk of escape.

45. The Prison Service told us that:

> After a short spell in the High Security Unit, the detainees were located at Belmarsh on Houseblock 4. They were subject to the same regime applicable to all prisoners on the Houseblock. This regime permitted daily exercise (with others) in the open air subject to weather conditions permitting, association, attendance at education, attendance at religious worship, attendance at the library etc. On average the detainees were out of their cell for around seven hours per day.[13]

Prisoners at Belmarsh also had access to the print and broadcast media, although not to the internet. It is the case, therefore, that although the physical conditions in which detainees were held in Belmarsh were broadly similar to those in which detainees are held in Camp V at Guantánamo Bay, the detainees at Belmarsh enjoyed substantially more time and space for exercise, greater opportunities for association, and greater access to education, library and news facilities.

46. **We conclude that, having visited both Guantánamo and Belmarsh, the facilities at Guantánamo are broadly comparable with those at the United Kingdom's only maximum security detention facility, but the conditions are not. Guantánamo scores highly on diet and on health provision; but it fails to achieve minimum United Kingdom standards on access to exercise and recreation, to lawyers, and to the outside world through educational facilities and the media.**

Interrogation of detainees

47. We spent considerable time during our visit discussing the US forces' use of interrogation techniques. Interrogations at Guantánamo may be carried out by personnel from a range of US agencies and have allegedly been carried out by members of other countries' agencies too.[14]

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14 See the 'Tipton 3' dossier at www.ccr-ny.org

48. On 6 September 2006, the US Department of Defense published Army Field Manual FM2-22.3, on Human Intelligence Collector Operations.[15] The manual is a very detailed document, which runs to 384 pages. Chapter 8 describes the interrogation techniques that may be used by US Army personnel. We were assured that interrogations by the Joint Task Force at Guantánamo are currently conducted in full accordance with the manual.

49. The manual does not, however, apply to interrogations carried out by the Central Intelligence Agency, which we were told practises additional techniques. These techniques have not been published, but their existence has been referred to in court documents deposited by the Administration.[16] The CIA's previous 'High Value Terrorist Detainee Program' has been acknowledged by President Bush[17] and by intelligence chief John Negroponte,[18]—both of whom noted the vital intelligence thereby gained—and the right of the CIA to run such a programme in future has been given statutory effect by Congress in passing the Military Commissions Act 2006.[19] Senior members of Congress were briefed on the past use by the CIA of techniques other than those in the field manual, and we were told that they will continue to be briefed on any future use of such techniques.

50. The Army Field Manual sets out eighteen permitted interrogation techniques, which it refers to as "approach techniques." We summarise these techniques below, using only the terms in which they are described in the manual.

- DIRECT APPROACH: In using the direct approach, the HUMINT [human intelligence] collector asks direct questions … a HUMINT collector might offer the source coffee or cigarettes to reward his cooperation.

- INCENTIVE APPROACH: The incentive approach is trading something that the source wants for information. … On one extreme, the exchange may be a formal cash payment for information during some contact operations while on the other extreme it may be as subtle as offering the source a cigarette.

- EMOTIONAL APPROACHES: The HUMINT collector employs verbal and emotional ruses in applying pressure to the source's dominant emotions. He then links the satisfaction of these emotions to the source's cooperation. … The following are types of emotional approaches.

    - ***Emotional Love Approach***: The HUMINT collector focuses on the anxiety felt by the source about the circumstances in which he finds himself, his isolation from those he loves, and his feelings of helplessness.

    - ***Emotional Hate Approach***: The HUMINT collector must clearly identify the object of the source's hate and, if necessary, build on those feelings so the emotion overrides the source's rational side.

15 The full text of the manual is available at www.fas.org/irp/doddir/army/fm2-22-3.pdf

16 "US Seeks Silence on CIA Prisons", *Washington Post*, 4 November 2006

17 In his speech of 6 September 2006; see www.whitehouse.gov/news/releases/2006/09/20060906-3.html

18 See www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf

19 See "President Bush Signs Military Commissions Act of 2006", www.whitehouse.gov/news/releases/2006/10/20061017-1.html, 17 October 2006

- ***Emotional Fear-Up Approach***: In the fear-up approach, the HUMINT collector identifies a preexisting fear or creates a fear within the source. He then links the elimination or reduction of the fear to cooperation on the part of the source. The HUMINT collector must be extremely careful that he does not threaten or coerce a source. Conveying a threat may be a violation of the UCMJ [Uniform Code of Military Justice]. … It is often very effective to use the detainee's own imagination against him. The detainee can often visualize exactly what he is afraid of better than the HUMINT collector can express it. … The 'fear-up' approach is frequently used in conjunction with the emotional love or hate approaches.

- ***Emotional Fear-Down Approach***: In the fear-down approach the HUMINT collector mitigates existing fear in exchange for cooperation on the part of the source.

- ***Emotional-Pride and Ego-Up Approach***: In this technique, the source is flattered into providing certain information in order to gain credit and build his ego.

- ***Emotional-Pride and Ego-Down Approach***: The HUMINT collector accuses the source of weakness or implies he is unable to do a certain thing. … The objective is for the HUMINT collector to use the source's sense of pride by attacking his loyalty, intelligence, abilities, leadership qualities, slovenly appearance, or any other perceived weakness.

- ***Emotional-Futility***: In the emotional-futility approach, the HUMINT collector convinces the source that resistance to questioning is futile. This engenders a feeling of hopelessness and helplessness on the part of the source.

- OTHER APPROACHES: There are numerous other approaches but most require considerable time and resources. Most are more appropriate for use with sources who are detainees, but some, such as change of scenery, may have application for elicitation or MSO [military source operations].

  - ***We Know All***: In the 'we know all' approach technique, the HUMINT collector subtly convinces the source that his questioning of the source is perfunctory because any information that the source has is already known.

  - ***File and Dossier***: The file and dossier approach is a variation of the 'we know all' approach. The HUMINT collector prepares a dossier containing all available information concerning the source or his organization. The information is carefully arranged within a file to give the illusion that it contains more data than actually there.

  - ***Establish Your Identity***: In using this approach, the HUMINT collector insists the detained source has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and he is not the person he purports to be. In an effort to clear himself of this allegation, the source makes a genuine and detailed effort to establish or substantiate his true identity. In so doing, he may provide the HUMINT collector with information and leads for further development.

- ***Repetition***: The repetition approach is used to induce cooperation from a hostile source. In one variation of this approach, the HUMINT collector listens carefully to a source's answer to a question, and then repeats the question and answer several times. He does this with each succeeding question until the source becomes so thoroughly bored with the procedure, he answers questions fully and candidly to satisfy the HUMINT collector and gain relief from the monotony of this method.

- ***Rapid Fire***: The rapid-fire approach is based upon the principles that everyone likes to be heard when he speaks [and that] it is confusing to be interrupted in mid-sentence with an unrelated question. This approach may be used by one, two, or more HUMINT collectors to question the source. In employing this technique, the HUMINT collectors ask a series of questions in such a manner that the source does not have time to answer a question completely before the next one is asked. This confuses the source, and he will tend to contradict himself as he has little time to formulate his answers.

- ***Silent***: The silent approach may be successful when used against either a nervous or confident source. When employing this technique, the HUMINT collector says nothing to the source, but looks him squarely in the eye, preferably with a slight smile on his face. It is important not to look away from the source but force him to break eye contact first. The source may become nervous, begin to shift in his chair, cross and re-cross his legs, and look away. He may ask questions, but the HUMINT collector should not answer until he is ready to break the silence.

- ***Change of Scenery***: The change of scenery approach may be used in any type of MSO to remove the source from an intimidating atmosphere such as an 'interrogation' room type of setting and to place him in a setting where he feels more comfortable speaking.

- ***Mutt and Jeff***: The goal of this technique is to make the source identify with one of the interrogators and thereby establish rapport and cooperation. This technique involves a psychological ploy that takes advantage of the natural uncertainty and guilt that a source has as a result of being detained and questioned. Use of this technique requires two experienced HUMINT collectors who are convincing actors. The two HUMINT collectors will display opposing personalities and attitudes toward the source. … The Mutt and Jeff approach may be effective when orchestrated with Pride and Ego Up and Down, Fear Up and Down, Futility, or Emotional Love or Hate.

- ***False Flag***: The goal of this technique is to convince the detainee that individuals from a country other than the United States are interrogating him, and trick the detainee into cooperating with US forces. For example, using an interrogator who speaks with a particular accent, making the detainee believe that he is actually talking to representatives from a different country, such as a country that is friendly to the detainee's country or organization. The False Flag approach may be effectively orchestrated with the Fear Down approach and the Pride and Ego Up.

51. An additional, nineteenth technique—Separation—is also permitted, but requires special authority as its use contravenes the Geneva Conventions:

- ***Separation***: As part of the Army's efforts to gain actionable intelligence in the war on terrorism, HUMINT collectors may be authorized, in accordance with this appendix [Appendix M], to employ the separation interrogation technique, by exception, to meet unique and critical operational requirements. The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee's resistance to interrogation. Separation, further described in paragraphs M-2 and M-28, is the only restricted interrogation technique that may be authorized for use.

52. We were told that for at least the last sixteen months only the 'rapport-building approach' interrogation technique has been used at Guantánamo Bay. We were assured that this technique is fully compliant with the new Army Field Manual. It is a matter of record that other techniques were used previously.[20] It is also a matter of record that, in 2002, the then JTF Commander asked for and on 2 December was given permission by the then Defense Secretary, Donald Rumsfeld, to use techniques which would not normally be permitted.[21] We were told that the additional techniques were not used. Mr Rumsfeld rescinded his decision on 15 January 2003.[22]

53. Interrogating officers are required to draw up a plan for each interrogation, which has to be approved before the interrogation may take place. Most interrogations last for between two and four hours, although the detainee being interrogated is permitted to end the interrogation at any time. No interrogations are permitted between the hours of midnight and 6a.m.. At the time of our visit, about one third of detainees were subject to interrogation. We were told that the remainder were not interrogated, either because they refused to cooperate or because they had nothing of value to say.

54. The publication by the Department of Defense of its Army Field Manual for Human Intelligence Collector Operations is a welcome step, placing on the record as it does the interrogation techniques that US military personnel—including those at Guantánamo—are permitted to use. We fully recognise that human intelligence gathering can play a valuable role in counter-terrorist operations. Interrogation techniques should be permitted if they do not contravene the United Nations Convention against Torture or the Geneva Conventions. We find it significant that, so far as we are aware, the International Committee of the Red Cross has not disputed the legality of the techniques listed in the US Army Field Manual. We were also reassured by the very clear statements to us by Admiral Harris, JTF Commander, that interrogation methods used at Guantánamo Bay are fully consistent with the manual. However, we remain concerned that:

- failure by individual interrogators to adhere to the safeguards set out in the manual, or the use of techniques in combination, could result in abuse of detainees, particularly in the field;

20 See "Alleged Guantánamo Abuse Did Not Rise to Level of 'Inhumane'", US Department of Defense News article, 13 July 2005

21 See "DoD Provides Details on Interrogation Process ", US Department of Defense news release 596–04, 22 June 2004; see also Ev 6.

22 See "DoD Provides Details on Interrogation Process ", US Department of Defense news release 596–04, 22 June 2004

- the US Administration is still working to definitions of torture and of cruel, inhuman and degrading treatment which differ from those used by the United Kingdom and by other responsible countries;

- the CIA may be permitted to resume the use of interrogation techniques which have not been published and which may contravene international law.

55. **We conclude that publication of the US Army Field Manual for Human Intelligence Collector Operations is a very positive development. We recommend that the Government work both bilaterally and through international fora to press the US Administration to ensure that its interrogation practices do not contravene international law.**

Allegations of ill treatment and the US response

56. Common Article 3 of the Geneva Conventions applies in circumstances of an armed conflict not of an international character to, *inter alia*, "those placed 'hors de combat' by … detention."[23] The US Supreme Court has ruled that it applies to US detainees held at Guantánamo Bay and elsewhere. In particular, Common Article 3 explicitly prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment." The British Government considers that these are "the minimum legal standard that should be applied to those detained by the US."[24]

57. There is considerable debate about what constitutes an outrage upon personal dignity. We were told that the US military would prefer to have a checklist of acts which fall within the definition, but this would of course be difficult as an act which might outrage one person, such as the desecration of a religious item, might have no effect at all on another. Nonetheless, if a guard at Guantánamo were deliberately to treat a detainee's copy of the Quran with disrespect—which a US military inquiry in 2005 found had happened on five occasions[25]—that would clearly and understandably outrage the detainee and it is not unreasonable to expect any guard to know that such an act would have such an effect.

58. Such breaches of Common Article 3 are not yet explicitly recognised in United States law. The Military Commissions Act 2006 equates "grave breaches" of Common Article 3 with "cruel, inhuman, or degrading treatment or punishment" as already defined in US law.[26] It does not define, nor does it provide for prosecutions in relation to, lesser breaches of Common Article 3. Under the Act, the President may interpret the provisions of the Geneva Conventions in secondary legislation.[27] Until such regulations are made by the President, then, as Human Rights Watch told us, the Act effectively,

23 Full text available at www.icrc.org/ihl.nsf/WebART/375-590006

24 Ev 11, para 5

25 Enclosure 1 to US Southern Command news release dated 3 June 2005, available at www.globalsecurity.org/security/library/report/2005/pr050603a.pdf

26 Military Commissions Act 2006, section 6

27 "Prepared Remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund", 25 October 2006, available at www.usdoj.gov/ag/speeches/2006/ag_speech_061025.html

> … narrows the scope of the offences for which interrogators and other officials could be prosecuted under the War Crimes Act, most notably by decriminalizing humiliating and degrading treatment that does not rise to the level of cruel and inhuman treatment.[28]

59. As for more serious abuses, the Committee has set out in some of its previous Reports a number of allegations of mistreatment and even torture of detainees at Guantánamo Bay.[29] The British former detainees have been particularly vocal in their claims to have been tortured, and fresh allegations continue to be made. Three of the released British detainees, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed—the 'Tipton Three'—released a dossier in which they claimed that at various times while held at Guantánamo they were abused or suffered from neglect.[30] The allegations include beatings, disrespect for their religion, lack of food, prolonged exposure to loud noise or to extreme temperatures, and aggressive interrogations. In their dossier they name several US personnel, whom they accuse of this abusive behaviour. They also allege that abusive interrogations were witnessed by FCO and MI5 personnel, although this has never been accepted by the Government.

60. Both Amnesty International and Human Rights Watch have previously told us that they regard mistreatment of the type described by the Tipton Three as amounting to torture.[31] In a report published jointly with the Center for Global Rights and Justice and Human Rights First in April 2006, Human Rights Watch referred to at least 50 cases of abuse at Guantánamo.[32]

61. The US authorities refer frequently to the 'Manchester document.'[33] This document was found on a computer when police raided a house in Manchester in May 2000. It is a comprehensive terrorist manual, parts of which have been translated and released by the US Department of Justice. In a section on how to behave when brought before a court, the manual advises 'brothers' to claim they have been tortured and mistreated while in prison.[34] Chapter seventeen, which has not been published, is said to contain advice on how to resist interrogation.[35]

62. We have discussed in previous Reports the differing interpretations placed by the United States and other countries, including the United Kingdom, on the term 'torture.'[36] This is a question we raised with those whom we met during our visit. We were left with the strong impression that the US authorities are very aware of the potential advantages to them of aligning their definitions of torture and of cruel, inhuman and degrading treatment with those used by other countries. We are less certain that all parts of the US

28 Ev 1, section 2

29 Appendix 2

30 The dossier is available at www.ccr-ny.org/v2/legal/september_11th/docs/Guantánamo_composite_statement_FINAL.pdf

31 Foreign Affairs Committee, Fourth Report of Session 2005–06, *Foreign Policy Aspects of the War against Terrorism*, HC 573, para 34

32 *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, April 2006, available at www.hrw.org

33 See http://fas.org/irp/world/para/manualpart1.html

34 See www.fas.org/irp/world/para/manualpart1_4.pdf

35 "Al Qaeda Manual Drives Detainee Behavior at Guantánamo Bay", *American Forces Press Service*, 29 June 2005

36 Appendix 2

Administration accept that combinations of what one might term low-grade abusive treatment, such as exposure to loud music, bright light, extreme temperatures, deprivation of food, water, exercise or company, could cumulatively amount to inhumane treatment or have an effect similar to torture.

63. We questioned senior State Department and Pentagon officials, as well as personnel at Guantánamo, about allegations of abuse. They confirmed that a number of guards had been disciplined for abusing detainees. We were also provided with a copy of an investigation into allegations made by FBI personnel who had been stationed at Guantánamo and who claimed to have witnessed abuse by military personnel in the course of interrogations.[37] The senior US Army officers who conducted that investigation found that three out of 24,000 interrogations had violated authorised techniques; that the then Commander of the Joint Task Force had failed to monitor the interrogation of one high value detainee in late 2002; that the interrogation of this same high value detainee resulted in degrading and abusive (but not inhumane) treatment; and that the communication of a threat to another high value detainee was in violation of official guidance.

64. Among the interrogation techniques the inquiry found to be acceptable were "playing loud music, manipulating the air conditioning to make a detainee uncomfortable during interrogation, and carefully controlled acts of sexual humiliations."[38] The investigating team found no evidence of torture or of inhumane treatment at Guantánamo. Further allegations that guards at the camp bragged about mistreating detainees were raised by a US Marine Sergeant, Heather Cerveny, in September. These allegations, too, have been investigated and, according to the US media, the Army Colonel appointed to inquire into the allegations has submitted his report.[39]

65. Another senior US military figure, retired General Barry R McCaffrey, visited the detention centre just three months before we did. In a report for the US Military Academy, General McCaffrey concluded that:

> During the first 18 months of the war on terror there were widespread, systematic abuses of detainees under US control in Iraq, Afghanistan, and Guantánamo. Some were murdered and hundreds tortured or abused. This caused enormous damage to US military operations and created significant and enduring damage to US international standing. We have been routinely condemned by the international community. … Although some low level officers, NCOs, and soldiers have been administratively punished or prosecuted—the public denial of wrong-doing by DOD [Department of Defense] has created a widespread belief in the world community that the US has unilaterally walked away from Federal and international treaty restrictions on torture.[40]

66. The various investigations by the US authorities into allegations of abuse—which we welcome as evidence of the determination of the US to apply rigorously the standards it has

37 The report is also available on the internet, at www.defenselink.mil/news/jul2005/d20050714report.pdf

38 "Alleged Guantánamo Abuse Did Not Rise to Level of 'Inhumane'", US Department of Defence News article, 13 July 2005

39 "Col. submits Guantanamo investigation", *Associated Press*, 10 December 2006

40 The full report is available at www.fas.org/man/eprint/mccaffrey.pdf

set—have not satisfied public opinion. Neither, as General McCaffrey observes, has the "public denial of wrong-doing" by the US Administration convinced the rest of the world that no wrong has been done. Guantánamo Bay has become what the Foreign Secretary recently called a "discrediting influence."[41] Whether torture as well as lesser forms of abuse has occurred at Guantánamo—and we are no more able to be certain on this point than are others who have not been directly involved—the damage to the reputation of the US has been done, and is severe.

67. The evidence on how the US authorities deal with allegations of mistreatment is contradictory. On the one hand, we were repeatedly told by the authorities in Washington and in Guantánamo that all credible allegations are thoroughly investigated and that where US personnel have been found guilty of abuse, they have been punished. On the other hand, although we were told that the allegations made in the dossier produced by the Tipton Three had been investigated and found to be groundless, there is no published record of that investigation; nor have the punishments of those who have been found guilty of committing other abuses at Guantánamo been published.[42] What does seem clear is that those allegations that have been most thoroughly investigated have been raised by US personnel who claim to have witnessed their colleagues engaging in acts of abuse, whereas there is little evidence that uncorroborated allegations made by detainees who claim to have been victims of abuse, or to have witnessed it, have been taken as seriously.

68. The frequent references by US officials to the Manchester Document and in particular to the advice contained in that document for detained terrorists to make false claims of abuse and mistreatment have not led us to conclude that all such claims must therefore be bogus, although some surely are. It is for those investigating claims of abuse to determine if they are well-founded. In the case of Guantánamo, of course, those who investigate allegations of abuse wear the same uniform as those accused and, fairly or unfairly, this reduces confidence in the outcomes. We have no doubt that some of the claims of ill treatment at Guantánamo are unfounded or exaggerated; we are no less certain that abuse of some detainees has taken place.

69. However, it appears that many if not most of the allegations of torture or severe abuse at Guantánamo relate to the first two years of the facility's operation, from 2002 to 2004. While this does not make the allegations any less serious—nor does it reduce the need to inquire into them properly—it does suggest that conditions there may have improved over time. Certainly, those of us who visited in September 2006 felt that the present leadership both in the Joint Task Force and in the Pentagon's Office for Detainee Affairs is serious about preventing abuse. No doubt individual officers will from time to time fail to adhere to official policy—as will happen in any prison—but the systematic cruelty alleged to have been practised on detainees in the first two years, and which has still not been satisfactorily investigated, is in our view probably absent from Guantánamo today.

70. **We conclude that abuse of detainees at Guantánamo Bay has almost certainly taken place in the past, but we believe it is unlikely to be taking place now. Although violence**

41 Foreign Secretary's speech on publication of the Human Rights Report 2006, available at www.fco.gov.uk

42 In June 2005, the House of Representatives Armed Services Committee was told that ten US uniformed personnel had been disciplined for "inappropriate" acts; see www.defenselink.mil/news/Jun2005/20050629_1909.html

and low-level abuse are endemic in any high-security prison situation, it is the duty of the detaining authority to strive to its utmost to minimise them. We recommend that the Government continue to raise with the United States authorities human rights concerns about the treatment of detainees.

Forced feeding of hunger strikers

71. In its written evidence, Amnesty International drew our attention to the treatment of hunger strikers at Guantánamo:

> … there have been serious allegations of ill-treatment of hunger strikers during force-feeding. Although Amnesty International has no position on force-feeding per se, it considers that if forcible feeding is done in such a way as deliberately to cause suffering this would constitute torture or other ill-treatment. Detainees have alleged having nasal tubes roughly inserted into their noses without anaesthetic or gel, causing choking and bleeding. Some of the hunger strikers have alleged being placed in punitive restraints during force-feeding and being subjected to verbal and physical abuse by guards.

72. We raised the question of forcible feeding with the Pentagon and with the Camp Delta authorities. They told us that, although at one stage more than 30 detainees were being forcibly fed, at the time of our visit (September 2006) just two detainees who had been on long-term hunger strike were being fed using a tube inserted through the nose (enteral feeding). This procedure has to be authorised by the Commander personally. Such authorisation is generally given only when a striker's weight goes down to 85 percent of ideal body weight, or food has been refused at 21 consecutive mealtimes. We saw the equipment used for feeding hunger strikers, which is the same as that used in US federal prisons. Restraining chairs are used if necessary.

73. The US authorities apply the same forcible feeding policy to hunger strikers in their mainland prisons, regarding it as their duty to preserve life. The Red Cross, however, regards forcible feeding as breaching the World Medical Association's Malta Declaration of 1991 (reaffirmed at its annual meeting in October 2006), which states:

> Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment.[43]

We were told that the two prisoners being artificially fed in September 2006 were co-operating with the procedure.

Violence by detainees

74. Those of us who visited Guantánamo were shown a number of weapons fashioned by inmates from items available to them even in the tightly-controlled environment in which they are detained. These included stabbing weapons fashioned from metal, plastic or glass, and rope garrottes. JTF personnel have been attacked using such weapons and we were

43 "World Medical Association Declaration on Hunger Strikers", WMA, available at www.wma.net/e/policy/h31.htm

told they are routinely spat at or struck. We were also told that some have had 'cocktails' of urine, blood and semen, or faeces, thrown over them. We do not doubt the veracity of these statements.

75. Detainees have also carried out violent assaults on each other, and some have committed suicide. The need to prevent suicides—which on the most recent occasion were portrayed by the base Commander as "not an act of desperation, but an act of asymmetric warfare against us"[44]—is cited as one reason for constant surveillance of detainees, necessitating 24-hour lighting, and as a reason for restricting the items they may have in their cells.

44 "Three Detainees Commit Suicide at Guantanamo", *Washington Post*, 11 June 2006

4 Legal status of detainees

76. The United States clearly believes that it is at war with al Qaeda. Al Qaeda also asserts it is at war with the United States. When countries are at war, prisoners are normally released at the end of hostilities. However, the 'war on terror' is not a conflict between states, but between a state and an ideology. This colours US perceptions of those enemy combatants who fall into its hands.

77. The US authorities say that the great majority of those held at Guantánamo were "picked up on the battlefield," mostly in Afghanistan, although some have been detained in other settings. In US terminology, those detained are 'unlawful enemy combatants.' The Pentagon's view of the legal basis for detaining them was set out in a document handed to us during our visit.[45] It was elaborated on in evidence to the Senate Armed Services Committee in 2005 by Daniel J Dell'Orto, Principal Deputy General Counsel for the Department of Defense:

> Lawful combatants include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power. They are entitled to prisoner of war status upon capture, and are entitled to 'combatant immunity' for their lawful pre-capture warlike acts. They may be prosecuted, however, for violations of the law of war. If so prosecuted, they still retain their status as prisoners of war.
>
> Unlawful combatants, or unprivileged belligerents, may include spies, saboteurs, or civilians who are participating in hostilities, or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor.[46]

78. However, the US Supreme Court ruled in June 2006 that all detainees were entitled to the protection of Common Article 3 of the Geneva Conventions and the new Army Field manual published in September 2006 contains the following, updated definition of unlawful enemy combatants:

> Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For the purposes of the war on terrorism, the term 'unlawful enemy combatant' is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda

45 "The Legal Basis for Detaining Al Qaida and Taliban Combatants", available at www.defenselink.mil

46 Full statement available at http://armed-services.senate.gov

> forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.[47]

79. In the Military Commissions Act 2006, which was under discussion in Congress while a number of us were in Washington DC in September, the definition of an unlawful enemy combatant is somewhat different, as follows:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[48]

Under the Act, an unlawful enemy combatant is subject to trial by a US military commission.[49]

80. Human Rights Watch criticised the Act for including,

> … an overly broad definition of 'unlawful combatant' that could subject civilians who purposefully provide virtually any form of support to an armed group (even far from the battlefield) to military detention and trial.[50]

Amnesty International disputes the use by the US of the term 'unlawful enemy combatant', pointing out that such a status is not recognised under international law and that the international armed conflict in Afghanistan ended with the convening of a *loya jirga* in June 2002.[51]

81. The view of the International Committee of the Red Cross, as we understand it, is that in circumstances of armed conflict the Geneva Conventions provide only a minimum level of protection. In other circumstances, full rights under national and international law should apply. The US Administration appears to have determined that the 'war on terror' is an "armed conflict not of an international character" within the meaning of Common Article 3. As noted above, both the United States and, to a lesser extent, its co-belligerents on the one hand, and al Qaeda, Islamic Jihad, the Taliban and other armed groups on the other hand, make frequent reference to being at 'war', but neither side extends to those whom it captures the status of 'prisoner of war.'

82. There are clear implications of the decision by Congress to define the term 'unlawful enemy combatant' in statute law. The most obvious is that other states might decide to interpret the term in ways which suit them, possibly applying it to armed forces personnel

47 Preface to Army Field Manual FM2-22.3

48 Military Commissions Act 2006, section 2, available at www.access.gpo.gov/index.html

49 See paras 98 to 103, below

50 Ev 1, section 2

51 Ev 4

of the United States who are captured abroad in an armed conflict not of an international character. Such is arguably the situation now pertaining in both Afghanistan and Iraq. To take one possible scenario: if Iran were to detain some US personnel who strayed across the international boundary with Iraq—as has happened before—it might deem them 'unlawful enemy combatants' and arraign them as war criminals before a military commission, perhaps one composed of revolutionary guards. It would be difficult, in such a case, for the United States to have resort to the Geneva Conventions.

83. **We conclude that, in choosing unilaterally to interpret terms and provisions of the Geneva Conventions, the United States risks undermining this important body of international law.**

84. We were told time and again in Washington DC that the Geneva Conventions cannot be applied satisfactorily to modern, asymmetric forms of warfare. This was also a question raised by the Foreign Affairs Committee in June 2002, when our predecessors invited the Government to "consider whether the Geneva Conventions remain wholly appropriate in the modern conduct of warfare."[52] The Government replied:

> The Geneva Conventions of 1949 were updated and expanded in the two Protocols of 1977. The Conventions and their Protocols form the cornerstone of international humanitarian law. This crucial body of law is applicable to all kinds of armed conflict; the challenge for all governments is to see that it is faithfully applied. The Government remains determined that the United Kingdom will continue to play a leading role in securing the application and implementation of international humanitarian law worldwide. The Government will keep under review the need to update the law, in consultation as appropriate with the International Committee of the Red Cross and the international community more generally. Our aim is to ensure that it affords the maximum protection to those vulnerable to the effects of armed conflict, that it restricts the means and methods of conflict, and that it delivers justice to all.[53]

85. **We conclude that, by its own test, the Government should recognise that the Geneva Conventions are failing to provide necessary protection because they lack clarity and are out of date. We recommend that the Government work with other signatories to the Geneva Conventions and with the International Committee of the Red Cross to update the Conventions in a way that deals more satisfactorily with asymmetric warfare, with international terrorism, with the status of irregular combatants, and with the treatment of detainees.**

Why Guantánamo?

86. The US Naval base at Guantánamo was chosen as the location for the detention centre because (a) it is relatively close to the US, but is not in the US and (b) it is secure and easily defended. We were told that it would not be feasible to locate such a facility on US

52 Foreign Affairs Committee, Seventh Report of Session 2001–02, *Foreign Policy Aspects of the War against Terrorism*, para 145

53 Foreign and Commonwealth Office, *Seventh Report from the Foreign Affairs Committee, Foreign Policy Aspects of the War Against Terrorism, Response of the Secretary of State for Foreign and Commonwealth Affairs*, Cm 5589, p9

territory, as this would mean that various rights would accrue to detainees, such as the right to apply for asylum or to pursue a legal action against guards. The fact that US federal law does not apply in Guantánamo is the single most important reason why foreign detainees continue to be held there, and not in the United States. This is an important consideration in any discussion of the future of Guantánamo, an issue to which we turn later in this Report.[54]

Former British residents

87. There are no British citizens held in Guantánamo. The nine British citizens who were held there were released in March 2004 and January 2005. However, nine former British residents are still held at the camp. They are nationals of Algeria, Ethiopia, Iraq, Jordan, Libya, Morocco and Saudi Arabia, but all had either been given refugee status in the United Kingdom or had otherwise been granted leave to remain.

88. The Government has adhered to the principle that the former British residents are not entitled to consular or diplomatic support. They have received no visits from FCO staff; nor have their interests been represented in the way that those of the British citizens held at the camp were. This refusal by the Government to act on behalf of the detainees was subject to judicial review and, in October 2006, to appeal. The courts ruled that the Government was under no obligation to act.[55]

89. The Government has in fact made what it calls "informal representations on humanitarian grounds" in respect of the former residents and a FCO Minister has met their families.[56] In recent months, there has apparently been contact between the British and US governments about possible repatriation of the men. According to *The Guardian* newspaper of 3 October 2006, David Richmond, Director General of Defence and Intelligence at the FCO, wrote that:

> The British embassy in Washington was told in mid-June 2006 that, during an internal meeting between US officials, the possibility had been floated of asking the UK government to consider taking back all the detainees at Guantánamo who had formerly been resident in the UK. Information about what had occurred at this meeting had been fed back informally to the embassy, and the UK government wished to clarify the significance of this idea.[57]

According to the *Guardian*, on 27 June British officials met US officials to discuss the situation of the former residents. Mr Richmond wrote of that meeting:

> The US administration would only be willing to engage with the UK government if it sought the release and return of all the detainees who had formally resided in the UK (ie, regardless of the quality of their links with the UK), rather than just a subset of the detainees falling in that category.

54 See paras 93 to 103, below

55 Ev 8, p 11

56 HC Deb, 22 May 2006, col 1302

57 "Britain to US: we don't want Guantánamo nine back", *The Guardian*, 3 October 2006

90. The FCO told us that "Contrary to media speculation, the US Government has not offered to return the 'British residents' to the UK."[58] The FCO did, however, confirm that the former Foreign Secretary wrote to Condoleezza Rice, requesting the return to the United Kingdom of one of the former residents, Bisher Al-Rawi, "having considered his fact-specific claim and on the basis of shared counter-terrorism objectives." According to the *Guardian*, Mr Al-Rawi had once worked on behalf of MI5.[59] The Government has refused to release Mr Straw's letter.[60]

91. A senior Home Office official is quoted in the same newspaper article as expressing the view that it would not be possible to subject the other former residents to control orders, and that keeping them under surveillance would require the diversion of resources from other counter-terrorist operations. The FCO told us only that "Discussions between the British and US Governments about Mr Al Rawi's release and return to the UK are continuing."[61] There is no suggestion that the Government is also discussing the possible return of the other former residents.

92. The Court of Appeal has concluded that the Government is within its rights not to accept consular responsibility for non-British nationals, or to make diplomatic representations on their behalf. On 8 January, FCO Minister of State Ian McCartney informed the House that the cases of the former British residents (other than Mr al-Rawi) will be heard on appeal in the House of Lords.[62] He declined to comment further, apparently on the basis that these cases were therefore *sub judice* under the terms of the Resolution of the House of Commons on *matters sub judice*.[63] We have considered this point and have taken advice. We are clear that the waiver set out in the Resolution in respect of issues where a ministerial decision is in question applies in this case. We are therefore free to comment on those ministerial decisions. **We conclude that the Government is right to stick to its established policy of not accepting consular responsibility for non-British nationals. We recommend that the Government maintain its current position with respect to the return to the United Kingdom of the former British residents presently detained at Guantánamo Bay.**

58 Ev 12, para 11

59 "Guantánamo Briton claims he spied for MI5", *The Guardian*, 22 March 2005

60 HC Deb, 6 June 2006, col 676W

61 Ev 12, para 11

62 HC Deb, 8 January 2007, cols 121 and 122

63 Resolution of 15th November 2001, see http://pubs1.tso.parliament.uk/pa/cm200506/cmstords/416/41606.htm#a184

5 Judicial process

Combatant Status Review Tribunals and Administrative Review Boards

93. All detainees at Guantánamo are subject to two procedures: Combatant Status Review; and Administrative Review. The Department of Defense defines these as follows:

> Combatant Status Review is a formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant. (Enemy combatant is defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.)
>
> Administrative Review is an annual review to determine the need to continue the detention of an enemy combatant. The review includes an assessment of whether the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against terrorist [groups] such as al Qaeda and its affiliates and supporters and whether there are other factors bearing on the need for continued detention (e.g., intelligence value). Based on that assessment, a review board will recommend whether an individual should be released, transferred or continue to be detained. This process will help ensure no one is detained any longer than is warranted, and that no one is released who remains a threat to our nation's security.[64]

Detainees who are found to have committed an act which "violates the laws of war" may be tried by a Military Commission.

94. We were told that in the period July 2004 to January 2005, 558 Combatant Status Review Tribunals (CSRTs) were held. These classified 520 detainees as enemy combatants; the other 38 were released or transferred. At the time of our visit, the fourteen former CIA detainees, then recently arrived at Guantánamo, had yet to go through the CSRT process. In the period 14 December 2004 to 23 December 2005, the Administrative Review Board (ARB) released a further fourteen detainees, approved the transfer of 119, and renewed the detention of 330. Since then, 249 'phase two' ARB reviews have been completed, producing another 33 recommendations for transfer and 58 for renewed detention (decisions on the remainder were pending at the time of our visit). The Deputy Secretary for Defense, Gordon England, has the final say on the ARB's recommendations.

95. As the US Department of Defense points out, the CSRTs are an opportunity for detainees to contest their detention, by demonstrating they do not deserve 'enemy combatant' status.[65] The tribunals are intended to satisfy the requirement under the Geneva Conventions for "competent tribunals" to determine the status of those detained in

64 Taken from "Guantánamo Detainee Processes", US Department of Defense, October 2006

65 "Combatant Status Review Tribunal Order Issued", US Department of Defense news release 651–04, July 2004

a conflict situation, such as the present conflict in Afghanistan. The need for such tribunals was established by the US Supreme Court in its judgment of June 2004; they were given effect initially by administrative order, and the Detainee Treatment Act 2005 gave them statutory force. CSRTs are composed of three military officers, none of whom has had any previous involvement with the detainee. One serves as a judge advocate, and the senior ranking officer chairs the Tribunal. The Tribunal's proceedings are on the record, but it deliberates in closed session. Detainees are provided with: personal representation; interpretation if necessary; copies of the unclassified evidence against them; the opportunity to question any witnesses testifying against them; and the opportunity to call witnesses in their defence (in the unlikely eventuality that any are available to be called).[66] Detainees are not represented before the Administrative Review Board.

96. Amnesty International told us that "the CSRTs and subsequent annual Administrative Review Boards (ARBs) are inadequate and in no way a lawful or appropriate substitute for judicial review."[67] Amnesty cited a case where a detainee was informed by the Tribunal hearing his case that an alias allegedly used by him had been found on a computer hard drive associated with an alleged senior al Qaeda member. Neither his own alias, nor the name of the senior al Qaeda member, nor the location where the computer hard drive was found were revealed to him. He was thus unable to rebut the charge.

97. The Military Commissions Act 2006 has been criticised for failing to reform the CSRT process. It is, however, the military commission process itself which has been the subject of most disquiet.

Military Commissions

98. The US established military commissions at Guantánamo in 2004, for the purpose of trying enemy combatants accused of war crimes. However, following a legal challenge by one detainee, the commissions were effectively ruled unlawful by the Supreme Court in July 2006.[68] It was necessary, therefore, for the Administration either to abandon the commissions or to regularise their status. President Bush chose the latter option. The Military Commissions Bill was going through Congress at the time a group of us were in Washington, in September 2006. We were able to discuss its provisions with Senator Lindsey Graham, one of the three prominent Republican Senators who were in negotiation with the Administration about aspects of the Bill which they felt undermined civil liberties.

99. In summary, the Act as passed by Congress and as signed into law by the President:

- Provides for military commissions composed of at least five and up to twelve US armed forces officers to hear cases against enemy combatants;
- Requires at least two-thirds of the commission members to support a conviction;

66 Memorandum by the Deputy Secretary of Defense, 14 July 2006, www.defenselink.mil/news/Combatant_Tribunals.html

67 Ev 5

68 *Hamdan v Rumsfeld*, for full judgment see www.supremecourtus.gov/opinions/05pdf/05-184.pdf

- Stipulates that for a sentence of death, which may only be sought if the defendant's actions resulted in fatalities, all twelve commission members have to agree, and gives the final decision on carrying out the sentence to the President;
- Provides the accused with the presumption of innocence and requires proof of guilt to be established beyond reasonable doubt;
- Protects the accused from being forced to testify against himself and allows him to be represented by both a military lawyer and a civilian one (although such lawyers will require high security clearance);
- Allows the accused will be able to be present for the proceedings unless he is ruled disruptive, to present evidence and witnesses in his defence and to cross-examine any witnesses against him;
- Provides for commissions to sit in public unless that jeopardises the safety of individuals or intelligence (but they will sit in Guantánamo Bay);
- At the discretion of the commission, allows hearsay or evidence obtained by coercion (but not evidence obtained by torture);
- Does not allow the accused to challenge the basis of classified information relied upon by the prosecution;
- Allows a convicted person to appeal to the United States Court of Appeal;
- Bars US courts from hearing applications for a writ of *habeas corpus* made by detainees who have been classified as enemy combatants;
- Prohibits any person from invoking the Geneva Conventions or their protocols as a source of rights in any action in any US court.

It is also important to note that acquittal by a military commission does not mean release. A person acquitted by a commission will remain an enemy combatant and thus will remain subject to detention. Also, after a sentence has been served, the convicted enemy combatant will be liable to be returned to detention.

100. In Washington DC, we were told that military commissions established under the new Act will commence work in 2007. It was suggested that they will hear between 25 and 50 cases of detainees who are believed to have committed war crimes, although in one conversation the potential number was put as high as 80. Up to four commissions are expected to sit at any one time, but the process will clearly take some years.

101. In some ways, the Military Commissions Act is welcome: it sets out the rights of detainees, and it includes important safeguards, such as a right of appeal. In other respects, the Act is quite troubling. It provides for the continued use of aggressive interrogation techniques, limits defendants' rights to challenge evidence, prevents actions for *habeas corpus*, and creates a revolving door in which detainees may be trapped, whether convicted or acquitted.

102. The Government appears to share some of our apprehension. In its evidence, the FCO states that,

> The Government will study the details of the procedures proposed by the Military Commissions Act, any subsequent elaborations and the implications for those who might not be subject to trial.[69]

103. **We conclude that, although some aspects of the Military Commissions Act are welcome, others give cause for concern. We welcome the Government's undertaking to study the procedures proposed by the Act. We recommend that the Government carry out that study without delay and that it share the full findings of the study with this Committee. If the Government's study finds that the procedures proposed in the Military Commissions Act or in any subsequent elaboration are inconsistent with international law or human rights norms, it should make strong representations to the United States Administration.**

69 Ev 11, para 6

6 The future of Guantánamo

104. At the time of our visit in September 2006, 319 detainees had been released or transferred from Guantánamo and a further 130 had been approved for release or transfer. Although more than forty detainees have been transferred or released since then, the high number approved for release or transfer but still detained is a matter of concern, not least for the US authorities. The reasons given to us why the men cannot be released or transferred from Guantánamo fell broadly into three groups, which in some cases may overlap: some of the men are still considered to be dangerous and the US has been unable to secure sufficient guarantees from other countries that they will be controlled or monitored; others are not considered to be dangerous but their countries of origin refuse to take them back; others are at risk from torture or other mistreatment, including death, if they return to their own countries. Among those in the first category are apparently the nine former British residents, as well as large numbers of Afghans. In the last category are included fifteen Chinese Uighurs, and Arabs of various nationalities. Most of the remaining detainees hold Afghan, Saudi or Yemeni nationality.[70]

105. A point made repeatedly by those whom we met in Washington and at Guantánamo was that the majority of those who remain in detention are dangerous men, who if released will return to the terrorist campaign they are alleged to have been part of. Various figures ranging to as high as 20 were quoted to us of detainees who had been released, only to have been encountered again on the battlefield. One example given to us was that of Abdullah Mehsud, who was picked up in Afghanistan but was released after claiming to be a non-combatant, low-level figure. He was later involved in terrorist acts in Afghanistan and was killed in action by Pakistani forces in March 2006.

106. The FCO wrote to us that intelligence gathering at Guantánamo "has provided information of importance to the UK's national security."[71] When we visited, we were told that some of those detained continue to yield intelligence of high value, notwithstanding the fact that the great majority of detainees have been in US custody for over four years. However, we were told that some of them were close contemporaries, at training camps and elsewhere, of the current generation of al Qaeda and Taliban leaders. The US also believes that it will need to continue to detain the remaining 330 detainees for as long as the 'war on terror' continues, or until they no longer present a severe threat. The military commissions will be held in Guantánamo. This, together with the significant financial investment in building new, state-of-the-art prisons at Guantánamo and the absence of any obvious alternative place of detention that could meet the US authorities' perceived need, suggests the camp will not be closing in the near future.

107. None of this has prevented widespread calls for the immediate closure of the detention centre at Guantánamo Bay. In 2002, our predecessor Committee expressed concern about the failure of the US authorities to provide detainees with due judicial process, and later it called for the detention of terrorist suspects to be regularised in

70 Ev 11, para 3

71 Ev 11, para 2

accordance with international law.[72] Concern in Parliament and elsewhere grew over the following four years and in 2006, a succession of senior government ministers called for the closure of the camp. Launching the FCO's Annual Report on Human Rights on 12 October 2006, Foreign Secretary Margaret Beckett made the clearest statement yet, declaring that "The continuing detention without fair trial of prisoners is unacceptable in terms of human rights."[73]

108. To this, the US Administration replies that, if Guantánamo were to be closed, something would have to take its place. In an interview with the BBC, the State Department's senior legal adviser, John Bellinger, said that:

> No one's comfortable with the situation in Guantánamo. But if we really want to reduce the numbers to send people back, progress cannot be made by just simply saying Guantánamo should be closed. We have to have practical suggestions, practical ways to move forward.[74]

President Bush himself has said, in his landmark speech of 6 September 2006, that the US will "move toward" closing Guantánamo:

> America has no interest in being the world's jailer. … We will continue working to transfer individuals held at Guantánamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantánamo Bay.[75]

109. Privately, US officials are quick to request from all those who demand closure of Guantánamo, what proposals they have for dealing with the dangerous men who are presently held there. However, many outside the United States regard Guantánamo as a dilemma of the Bush Administration's own making, and are not inclined to 'rescue' that Administration.

110. It is indeed possible to see this dilemma as one purely for the United States. However, the obvious retort to President Bush's complaint that "America has no interest in being the world's jailer"—'stop locking people up'—is too simplistic. For our part, we accept that many of the men presently held at Guantánamo represent a threat to the United Kingdom and its allies. Just as their treatment is a shared interest based on universal values of human rights, so their fate is a shared responsibility, not a matter for the US alone. We therefore agree that it is incumbent on those who call for its closure to suggest what, if anything, should replace the detention centre, what should happen to those who are currently held there, and how the public are to be protected from those who have a professed commitment to engage in acts of terrorism.

111. Proposals for how to close Guantánamo in an orderly way have been thin on the ground, but there are some. Amnesty International sent us a paper in which they set out a

72 Appendix 2

73 "Launch of the 2006 Annual Report on Human Rights", FCO News release, 12 October 2006

74 "US call over Guantánamo detainees", *BBC News online*, 20 October 2006

75 "President Discusses Creation of Military Commissions to Try Suspected Terrorists", White House news release, 6 September 2006

proposed "framework for closing Guantánamo."[76] This framework envisages fair trials for those against whom there is admissible evidence; no forced repatriations; granting of asylum in the US to those former detainees who have a well-founded fear of persecution if returned to their country of origin, or exceptional leave to remain in the US, or transfer to a third country willing to receive them; and a system of reparations for those unlawfully detained. Amnesty further suggests allowing the UN's experts on 'arbitrary detention' to visit the camp with full access, in the interests of transparency.

112. We congratulate Amnesty on developing this proposal. Unlike some others who call for the closure of Guantánamo, Amnesty has recognised there is a problem that requires a solution which will protect the public from terrorist threats. We do not suppose it stands any realistic chance of being accepted in full by the US Administration. Nonetheless, it does establish some basic principles which should guide any attempt to resolve the dilemma of how to deal with Guantánamo and the people in it.

113. Another, quite different series of recommendations has been made by retired General Barry McCaffrey of the US Military Academy. In the report of his June 2006 visit to Guantánamo, General McCaffrey sets out a "way ahead" for the Administration.[77] In terms which are very frank, and which may strike more of a chord in Washington than the ideas of groups such as Amnesty, the General concludes that "We need a political-military decisive move to break the deadlock." He then considers, only to reject, the solution floated by many in the United States (but by few outside it) of handing over the running of Guantánamo to an international body: "We would provide and pay for the detention vehicle—the international legal system would accept jurisdiction. Not likely."

114. Here in full is General McCaffrey's "way ahead":

> We need to rapidly weed out as many detainees as possible and return them to their host nation with an evidence package as complete as we can produce. We can probably dump 2/3 of the detainees in the next 24 months. Many we will encounter again armed with an AK47 on the battlefields of Iraq and Afghanistan. They will join the 120,000 + fighters we now contend with in those places of combat. It may be cheaper and cleaner to kill them in combat [than] sit on them for the next 15 years.
>
> We need to pick out the most dangerous of the international terrorists (possibly the top 25) and have them tried in US Federal Court with a possible use of international law as the basis of criminal conviction. Tough. It worked with Noriega—why not al-Qaeda?
>
> As a general rule, we probably need a new Federal Law that allows for civil indefinite detention of foreign terrorists when convicted by a US Military Court-Martial. The civil detainees could have the right of appeal to the Federal Court system. This requires the active involvement of the Congress to pass any required new legislation.
>
> Finally, we need to work creatively to support foreign legal jurisdiction over their nationals who violate international law and conduct terrorist actions. Better these

76 Ev 9–11

77 The full report is available at www.fas.org/man/eprint/mccaffrey.pdf

> foreign governments try these dangerous terrorists by their own legal system where possible.

General McCaffrey then adds one further point, which would probably gain wider support than his other proposals:

> We need to be completely transparent with the international legal and media communities about the operations of our detention procedures wherever they are located. Arrogance, secrecy, and bad judgment have mired us in a mess in Guantánamo from which we are having great difficulty in extricating ourselves.

We heard similar voices from within the US Administration when we visited Washington DC, though they were less forcibly expressed.

115. Aspects of General McCaffrey's scheme for the closure of the Guantánamo Bay detention centre—such as 'dumping' detainees in their countries of origin regardless of the fate that awaits them—are clearly unacceptable on human rights grounds, but as the basis for a consensus on the way forward it has the great benefits of coming from inside the US military establishment, and of being grounded in realism. Stripped to its essentials, his proposal to close Guantánamo contains the following elements:

- Subject those detainees against whom there is strong evidence to due legal process
- Release or transfer the other detainees
- Devise a better, transparent procedure for dealing with future detainees

The debate on such proposals has to take place primarily in the United States. However, as the US has been asking for ideas, it should be prepared to listen to and to work with its allies. For their part, those allies need to stand ready to help.

116. **We conclude, in line with our previous Reports, that those detained at Guantánamo must be dealt with transparently and in full conformity with all applicable national and international law. But we recognise too, as we have before, that many of those detained present a real threat to public safety and that all states are under an obligation to protect their citizens and those of other countries from that threat. At present, that obligation is being discharged by the United States alone, in ways that have attracted strong criticism, but we conclude that the international community as a whole needs to shoulder its responsibility in finding a longer-term solution. We recommend that the Government engage actively with the US Administration and with the international community to assist the process of closing Guantánamo as soon as may be consistent with the overriding need to protect the public from terrorist threats.**

Appendix 1: Itinerary of the visit to Guantánamo Bay

Monday 18 September 2006

Washington DC

British Embassy

Alan Charlton, Deputy Head of Mission

Tuesday 19 September

Washington DC

State Department

John Bellinger III, Legal Adviser

Colleen P Graffy, Deputy Assistant Secretary of State for Public Diplomacy (Europe)

Kurt Volker, Principal Deputy Assistant Secretary of State

Department of Defense

Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs

Colonel Barry Cable, USAF

Bryan Del Monte, Deputy Director for policy development and international issues

Frank Sweigart, Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC)

Gordon England, Deputy Secretary of Defense (Public Affairs)

Wednesday 20 September

Guantánamo Bay, Cuba

Guantánamo Bay Naval base

Commander Jeff Hayhurst, USN, Executive Officer

Guantánamo Bay detention centre

Rear Admiral Harry B Harris, USN, Commander, Joint Task Force Guantánamo

Tour of Guantánamo

Thursday 21 September

Washington DC

International Committee of the Red Cross (ICRC)

Geoff Loane, Head of regional delegation for the United States and Canada

British Embassy

HM Ambassador Sir David Manning

US Senate

Senator Lindsey Graham

Senator Richard Lugar, Chairman of the Senate Foreign Relations Committee

Appendix 2: Extracts from previous FAC Reports and Government Responses

2002

June 2002 : Seventh Report : Foreign Policy Aspects of the War Against Terrorism

THE DETAINEES AT GUANTÁNAMO BAY

137. A further legal question relates to the treatment of persons detained by the US in Afghanistan and transported for questioning to the US military base in Guantánamo Bay, Cuba. More than 300 "unlawful combatants" remain in captivity, from 31 countries. Five of these are British citizens.

138. The US has refused to grant these "detainees" prisoner of war (POW) status, and the Administration contends that the Geneva Conventions do not apply to the detainees. In the words of the US Embassy in London: "The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such its members are not entitled to POW status. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs. Therefore, neither the Taliban nor al-Qaida detainees are entitled to POW status [although] they are being provided many POW privileges as a matter of policy."

139. Speaking before the camp at Guantánamo Bay was set up, the Foreign Secretary told us that "We have to ensure that terrorist prisoners of war are treated in accordance with international law." However, since the camp was established, government Ministers and spokesmen have no longer referred to terrorist detainees as "prisoners of war."

140. We understand that the US authorities have made "no decisions... on the disposition of the detainees currently being held. The fate of the detainees will be determined on a case-by-case basis." We heard during our visit to Washington in March 2002 that if, after review, the US decides that a detainee does not pose a significant security threat, he will be repatriated. However, the US claims "every right" to detain certain individuals "for the duration of the conflict," even if they are acquitted of specific crimes. Victory in the war against terrorism is difficult to foresee. This leads us to question how long the US intends to keep these individuals in custody.

141. The US President made an executive order on 13 November 2001, to establish special military commissions to try the "unlawful combatants." The announcement of these special commissions provoked considerable controversy in the US and elsewhere. On 21 March 2002, the Department of Defense presented additional procedural guidelines for these commissions. They are designed to try non-US citizens selected by the US President, to include al Qaeda members, people involved in acts of terrorism against the United States, and people who knowingly harboured such terrorists. The procedural guidelines released on 21 March allay some of the fears initially voiced about the commissions: for example, the Department of Defence made clear that suspected terrorists would be granted

the presumption of innocence, the right to choose counsel and to see the prosecution's evidence, and to trial in public—though classified information would be kept secret. Those arraigned would also be granted the right to remain silent.

142. However, there is no jury. An appeal procedure is only to a panel of judges appointed by the military: non-US citizens cannot appeal to US federal courts. Detention is indefinite. For these reasons, the military commissions continue to prompt considerable criticism, both inside and outside the United States. The lawyer and academic Ronald Dworkin, assessing the clarified rules for the commissions, described the Administration's decision to prevent appeals to civilian courts as "indefensible. The new procedures permit a prisoner to be tried in secret and sentenced to death on evidence that neither he nor anyone else outside the military—no-one, that is, not under the Pentagon's direct command—has even heard." Dworkin concluded that "we have no right to roam the world arresting foreigners we think might be dangerous and keeping them in our jails when we cannot show them to have committed any crime."

143. The international coalition needs to be seen to treat prisoners justly. 'Winning hearts and minds' in the Islamic world is tremendously important for the long term success of the war against terrorism, and prisoners taken in Afghanistan have not been universally perceived to have been treated humanely and with justice. As Rosemary Hollis also pointed out to us "once you abandon attention to the means" in the war against terrorism, "you influence the ends."

144. We conclude in relation to the detention of Taliban and al Qaeda suspects, as we do in relation to other matters, that the Government must strive to uphold standards of international law, and, to the greatest extent possible, to ensure that prisoners are tried in full accordance with internationally accepted norms of justice.

145. We recommend that the Government consider whether the Geneva Conventions remain wholly appropriate in the modern conduct of warfare. If they do not, there may be a need to work towards a new international consensus to amend the Conventions, to ensure that the protection that they provide to civilians and combatants is maintained.

August 2002 : FCO Response Cm 5589

The United Kingdom Government has been in close contact with the United States Government about the treatment of the British detainees being held by the US at the Naval Base in Guantanamo Bay. It is for the US, as the detaining power, to decide whether, and if so how, they will prosecute the detainees. However, we have made our view clear to the US, and will continue to do so, that if any of the detainees are prosecuted they should receive a fair trial in accordance with international law.

The Geneva Conventions of 1949 were updated and expanded in the two Protocols of 1977. The Conventions and their Protocols form the cornerstone of international humanitarian law. This crucial body of law is applicable to all kinds of armed conflict; the challenge for all governments is to see that it is faithfully applied. The Government remains determined that the United Kingdom will continue to play a leading role in securing the application and implementation of international humanitarian law worldwide. The Government will keep under review the need to update the law, in consultation as

appropriate with the International Committee of the Red Cross and the international community more generally. Our aim is to ensure that it affords the maximum protection to those vulnerable to the effects of armed conflict, that it restricts the means and methods of conflict, and that it delivers justice to all.

December 2002 : Second Report : Foreign Policy Aspects of the War Against Terrorism

Prisoners Detained at Guantánamo Bay, Cuba

228. Since the terrorist attacks of September 11th, 2001 and the subsequent military operations in Afghanistan, over six hundred individuals, including seven British nationals, have been detained by the United States government in Guantánamo Bay, Cuba and classified as "unlawful combatants". We discussed the treatment and status of these detainees in our Seventh Report.

229. Before agreeing the Seventh Report, we asked the United States government to clarify how it intended to deal with the detainees. The US response was that the relevant authorities have made "no decisions... on the disposition of the detainees currently being held. The fate of the detainees will be determined on a case-by-case basis." In March 2002, when we visited Washington, we were reassured to hear that if, after review, the US decides that a detainee does not pose a significant security threat, he will be repatriated.

230. We questioned in the Seventh Report for how long the US intended to detain the prisoners it holds at Guantánamo Bay. The US Secretary of State for Defense, Donald Rumsfeld, had stated that the US claims "every right" to detain certain individuals "for the duration of the conflict," even if they are acquitted of specific crimes. This poses the question of whether the 'war against terrorism', unlike a conventional conflict, can ever have an end. The only detainees released from Guantánamo so far are a mentally ill inmate who was returned to Afghanistan on May 1, 2002, and four detainees (two of whom were over 80 years old) who were returned to Afghanistan and Pakistan on October 28, 2002.

231. The President of the New York-based Center for Constitutional Rights, Michael Ratner, wrote to us that the prisoners at Guantánamo Bay "have not been charged, tried or given access to lawyers." Citing US Department of Defense press transcripts, Mr Ratner, reminds us that "The United States has itself acknowledged that at least 'some [of the detainees] were 'victims of circumstance' and probably innocent.'" Nonetheless, "Since gaining control of the detainees, the United States military has held them virtually incommunicado. They have been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, though they have not been charged with an offense, nor have they been notified of any pending or contemplated charges. They have made no appearance before either a military or civilian tribunal of any sort, nor have they been provided with counsel or the means to contact counsel."

232. In a Written Statement on 11 December 2002, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, Mr Mike O'Brien, wrote: "British officials paid a fourth visit to Guantánamo Bay between 11-15 November... The official passed to the camp authorities some personal letters for some of the detainees and was able to give oral messages to others. We have passed on to the families oral messages which were

received and have briefed them on details of the detainees' circumstances. For reasons of privacy these details are not disclosed in this statement. Detainees continue to be able to send and receive letters through the camp authorities and through the ICRC, although there is some concern about delays."

233. Citing the cases of Messrs. Rasul and Iqbal, two of the British citizens detained at Guantánamo, Mr Ratner informs us that the detainees' "ability to contact their families has been severely restricted ... Attempts by their Members of Parliament to secure greater access to them by their families have failed." The Center for Constitutional Rights, having examined the cases, has concluded that: "(i) the detentions are unlawful, arbitrary and indefinite contrary to the Fifth and Fourteenth Amendments of the United States Constitution and customary international law, specifically Articles 9 and 14 of the International Covenant on Civil and Political Rights, and Articles 18, 25 and 26 of the American Declaration on the Rights and Duties of Man; and (ii) that the detainees' rights as persons seized in times of armed conflict, as established under, inter alia, the regulations of the United States Military, Articles 4 and 5 of Geneva Convention III, Geneva Convention IV, and customary international law have been violated. We also believe that the ancient writ of habeas corpus should be available to the detainees to challenge their detention."

234. We further note with interest the Abbasi case, which was "an attempt by judicial review proceedings to pressure the Foreign Secretary to intervene more forcefully on behalf of [Mr Abbasi, A British citizen held at Guantánamo Bay] and the other detainees ... on the basis that the Foreign Office was not reacting appropriately to the fact that [a British citizen was] being arbitrarily detained in violation of his fundamental human rights."

235. In the Abbasi case, the Court of Appeal "made a clear finding that 'in apparent contradiction of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present detained in a 'legal black hole' and [w]hat appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal'. This was a matter of "deep concern" to the Court, which it appeared to hope would be conveyed to the appellate courts of the United States. However, the Court felt it could not order the Foreign Secretary to do more than consider Mr Abbasi representations for assistance, which had been done."

236. The US government maintains that the detainees at Guantánamo Bay are being treated humanely. Delegates of the International Committee of the Red Cross (ICRC) have visited the detainees, at the invitation of the US Government. The American Red Cross explains that the US government issued this invitation to the ICRC, because "Along with 188 other nations across the globe, the United States is committed to meeting the standards of humanitarian treatment described in the Geneva Conventions." During our visits to Washington in March and October this year, US officials have also made it clear to us that some of the Guantánamo detainees have provided the administration with valuable intelligence, which may help to prevent further civilian casualties in the 'war against terrorism.'

237. In the Seventh Report, we concluded that "in relation to the detention of Taliban and al Qaeda suspects, as we do in relation to other matters, that the Government must strive to uphold standards of international law, and, to the greatest extent possible, to ensure that prisoners are tried in full accordance with internationally accepted norms of justice." In August, the Government replied to this conclusion that "It is for the US, as the detaining power, to decide whether, and if so how, they will prosecute the detainees. However, we have made our view clear to the US, and will continue to do so, that if any of the detainees are prosecuted they should receive a fair trial in accordance with international law." We are pleased that the Foreign Secretary was able to raise the cases with the US Secretary of State, Colin Powell, at the Prague NATO summit on 20 November 2002.

238. While we understand that the US government has obtained valuable intelligence from prisoners detained at Guantánamo Bay, Cuba, we are nonetheless concerned that the US government continues to detain many of these prisoners without trial. We recommend that the Government continue to press the US government to move rapidly towards the trial of these alleged terrorists, in accordance with international law.

239. We recommend that the Government supply us with further information about the seven British citizens currently being held, including details about when and how they can expect to be tried, and whether, if found guilty, they will be liable to the death penalty.

February 2003 : FCO Response Cm 5739

The Foreign Secretary has raised the question of detainees in Guantánamo Bay with the US Secretary of State on a number of occasions, most recently on 23 January. UK and US officials are in regular contact on the matter. We are pressing the US to move forward on deciding what to do with the detainees.

We are pressing the US to decide what to do with the detainees. It is for the US, as the detaining power, to decide whether they are going to prosecute them. We have made clear our view that, if prosecuted, the detainees should receive a fair trial. The US is well aware of the UK's opposition to the death penalty under all circumstances.

2003

March 2003 : Fourth Report : Human Rights Annual Report 2002

Guantánamo Bay

19. The first chapter of the latest Annual Report also included a box containing details on the situation of the detainees at Guantánamo Bay, Cuba. There are, at present, nine British nationals detained at the naval base there by the US authorities, following the events of 11 September 2001 and the overthrow of the Taliban regime in Afghanistan. The Annual Report stated that: "The question of the detainees' status, access to them and the legal procedure to which they might be subject are complex. The UK has discussed these issues with the US and will continue to do so."

20. We have inquired into the status of these detainees as part of our on-going inquiry into the foreign policy aspects of the war against terrorism. In our latest Report on this subject we stated that:

> "While we understand that the US government has obtained valuable information intelligence from prisoners detained at Guantánamo Bay, Cuba, we are nonetheless concerned that the US government continues to detain many of these prisoners without trial. We recommend that the Government continues to press the US government to move rapidly towards the trial of these alleged terrorist, in accordance with international law."

21. In that Report, we also noted the 'Abbasi case', in which the family of Mr Feroz Ali Abbasi, one of the detainees at Guantánamo Bay, had sought by judicial review to compel the FCO to intervene more forcefully with the US Administration on his behalf. In November the Court of Appeal concluded that, "Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'", in what was a "clear breach" of his "fundamental human rights". The judgement also recorded the Court's view that: "[w]hat appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal." However, the Court felt unable to order the Foreign Secretary to do more than consider Mr Abbasi's representations for assistance.

22. Human Rights Watch, in its written evidence, stated bluntly that, "the holding of these detainees is in contravention of international humanitarian law," and Amnesty International expressed similar concern at the legal position of the detainees. Amnesty also complained about the description of the situation in the Annual Report, which it felt to be "at best, oblique" and failed to answer some of the fundamental questions about the United Kingdom's stance on this issue.

23. We conclude that the ambiguous status of the detainees at Guantánamo Bay, Cuba, risks undermining the United Kingdom's ability to speak out on human rights issues. We reiterate our concern that the Government continue to press the US Government on the conditions in which the detainees are held and on the need for them to be brought to trial as soon as possible.

May 2003 : FCO Response Cm 5820

As the Prime Minister said to the House on 26 February 2003, this is a highly unusual and difficult situation which we would certainly want to try to bring to an end as swiftly as possible. The Annual Report on Human Rights 2002 set out in some detail the conditions in which the detainees are held. UK officials have now visited a total of five times. The Government has throughout sought to ensure the detainees' wellbeing and will continue press the US Government on this. The International Committee of the Red Cross has a presence on Guantanamo Bay. It has access on demand to the detainees. The status of each detainee under humanitarian law has to be considered in the light of the facts of the individual case. Whatever their status, the detainees are entitled to humane treatment, and if prosecuted, a fair trial. The Government continues to urge the US to resolve the detainees' situation as quickly as possible.

July 2003 : Tenth Report : Foreign Policy Aspects of the War against Terrorism

244. A further area of difference between the US administration and the Government is the continued detention of prisoners—including nine Britons—at Guantánamo Bay, Cuba. We have discussed the detention of these prisoners in our previous two Reports in the Inquiry; in our December 2002 Report, we expressed concern "that the US government continues to detain many of these prisoners without trial", and recommended "that the Government continue to press the US government to move rapidly towards the trial of these alleged terrorists, in accordance with international law." Seven months have passed since we made this recommendation. We reiterate our concerns, raised in December 2002, that British citizens are being held without trial at Guantánamo Bay, and recommend again that the Government press the US towards trial of all the detainees in accordance with international law.

245. On 7 July, 2003, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, Chris Mullin, told the House that "the United States designated six detainees including two British nationals held at Guantánamo Bay, as eligible for trial under a military commission." The Government has "strong reservations about the military commission", which it has "raised, and will continue to raise … energetically with the US … So far, neither of the detainees has been charged. However, we have made it clear to the US that we expect the US to fulfil internationally accepted standards of a fair trial." Chris Mullin stated that "If there is any suggestion that the death penalty might be sought in these cases, we would raise the strongest possible objections." He also made it clear that "frankly, we disagree" with the United States' view that the Geneva Conventions do not apply to the prisoners held at Guantánamo Bay. However, the Government believes that "it is probably not to the advantage of these defendants—or to that of any others—that we engage in megaphone diplomacy with the United States. This is a delicate and sensitive issue that has to be pursued in a delicate and sensitive way".

246. In our December 2003 Report, we stated that we "understand that the US government has obtained valuable intelligence from prisoners detained at Guantánamo Bay". However, it is the Government's responsibility to do all it can to ensure that the rights of British citizens are upheld. We also agree with the Government's view, expressed by Chris Mullin on 7 July, that "it is strongly in the interests of the United States that these trials be conducted in a credible and transparent fashion, because that obviously will affect the respect in which the United States is held throughout the world." We recommend that the Government press the US to ensure that the forthcoming trials of the two British citizens detained at Guantánamo are conducted according to internationally recognised judicial standards and that, if sanctioned by the Crown Prosecution Service, those trials should take place in the United Kingdom.

247. Judging the extent of the United Kingdom's influence over the US is, of course, very difficult. It seems clear that, in the wake of the Iraq war, the United Kingdom has emerged from the Iraq war as America's closest ally. We conclude that in a number of areas—including ensuring the fair trial of prisoners detained at Guantánamo Bay—the Government must ensure that its close relationship with the US administration brings substantive benefits to the United Kingdom and its citizens.

September 2003 : FCO Response Cm 5968

The Government has consistently pressed the US Administration in London and Washington to come to a decision on how to resolve quickly the position of the Guantanamo Bay detainees. On 3 July the US designated six detainees, including two British nationals held at Guantanamo Bay, as eligible for trial by a Military Commission. This is a clear indication that the US is now ready to put some of the detainees through judicial process. However, we have made clear to the US that we have strong reservations about the Military Commissions.

The Government has made clear to the US our view that any trial procedure that the British detainees may face must be fair and meet generally recognised principles. Following the Prime Minister's visit to Washington in July, the US announced that all legal proceedings against British nationals held at Guantanamo Bay would be suspended pending further discussions.

The Attorney General visited Washington from 21–22 July for talks with the US Administration. His objective was to ensure that the British detainees in Guantanamo Bay, if prosecuted, are assured of fair trials that meet generally recognised principles, wherever those trials take place, and to make clear our opposition to the death penalty. We are discussing a number of options with the US Government, including the possible repatriation of the UK detainees. The talks were constructive and the Attorney General received a number of assurances from the US Administration, including agreement that the prosecution would not seek the death penalty in the cases of Mr Begg and Mr Abbasi. Other concessions included agreement that Mr Begg and Mr Abbasi would be able to be represented by an appropriately qualified US civilian lawyer of their own choosing, subject to security clearance, and that a UK lawyer would be able to serve as a consultant on the defence team. It was also agreed that subject to any necessary security restrictions, the trials of Mr Begg and Mr Abbasi would be open and the media present. Proceedings against Mr Begg and Mr Abbasi remain suspended and the Attorney General is continuing his discussions with the US Administration.

The Attorney General has met the US Administration twice since then, most recently on 12 August. Productive discussions have continued on the Military Commissions process and on the review of other potential options for a resolution of the cases of the British detainees held in Guantanamo Bay. The US is considering what further assurances they can give as regards the process. At the time of going to print, further discussions were planned for late September. The Government will continue to press the US Government urgently to resolve the position of all the detainees held in Guantanamo Bay.

2004

February 2004 : Second Report : Foreign Policy Aspects of the War against Terrorism

Guantánamo Bay

320. In our previous Reports we have discussed the detention of prisoners at Guantánamo Bay and expressed concern that the US government continues to detain many of these prisoners without trial. We have also recommended that the Government continue to press

the US government to move rapidly towards the trial of these alleged terrorists, in accordance with international law. In addition, we concluded that in a number of areas—including ensuring the fair trial of prisoners detained at Guantánamo Bay—the Government must ensure that its close relationship with the US administration brings clear, substantive benefits to the United Kingdom and its citizens.

321. In his press conference with President George W Bush on 20 November 2003, the Prime Minister said that the issue of British detainees at Guantánamo Bay "will be resolved at some point or other." The Prime Minister also highlighted the fact that the UK will "make sure that justice is done for people." On 2 December the Foreign Secretary told us that

> we are reaching, or near, a conclusion on this. If we are not able to achieve a satisfactory outcome in terms of the conditions which we would find acceptable, then we will ask for the UK detainees to be returned to the United Kingdom. That is where we are. I want it to be resolved as soon as possible. It is not satisfactory.

322. More recently, on 8 January 2003, Pierre-Richard Prosper, the US Ambassador for war crimes issues, told a briefing that United Kingdom detainees could be repatriated if the United Kingdom "managed" them. However, neither the FCO nor the US State Department have clarified Mr Prosper's comments.

323. We remain concerned at the Government's lack of progress in ensuring the fair trial of British citizens currently detained at Guantánamo Bay. We note that the current situation of uncertainty surrounding the fate of the United Kingdom detainees is unsatisfactory. We recommend that the Government continue to press the US towards trial of all the detainees in accordance with international law.

March 2004 : FCO Response Cm 6162

As the Foreign Secretary foreshadowed on 19 February and in the House on 24 February, 5 of the 9 British detainees were released and returned to the UK on 9 March as a result of discussions between the British and US Governments. The detainees were questioned by the British police and subsequently released without charge. Discussions between the British and US Governments on the remaining 4 British detainees in Guantanamo Bay continue. The UK's position remains that they should either be tried in accordance with international standards or returned to the UK. The Government will continue to work to resolve their position.

May 2004 : Fourth Report : Human Rights Annual Report 2003

Guantánamo Bay

52. The United States currently holds about 660 people at its naval base in Guantánamo Bay in Cuba. These detainees are terrorist suspects, many of whom were captured during the US campaign in Afghanistan in the winter of 2001, subsequent to the terrorist attacks of 11 September 2001. Three of these detainees were British residents, and six were British nationals. On 19 February 2004 the Foreign Secretary made a statement to the House of Commons in which he made clear that the United Kingdom's requests for the repatriation

of five of its nationals were successful. He said that the men would face police investigations on their arrival but that any further action would depend on the outcome of those investigations. Subsequently, the USA released the five men, Rhuhel Ahmed, Tareq Dergoul, Jamal Udeen, Asif Iqbal amd Shafiq Rasul, on 10 March 2004. Four remain in Guantánamo Bay. They are Feroz Abbasi, Moazzam Begg, Richard Belmar and Martin Mubanga.

53. The FCO Annual Report contains a section on Guantánamo Bay, describing in some detail the situation of the detainees and including the Prime Minister's comments to US President Bush on 17 July 2003 and the work done by the Attorney General to ensure that the prisoners do not face the death penalty and to facilitate their trials. The Report also mentions the Government's concern that the detainees were and are held outside any recognised legal system.

54. The Government also expressed its concerns on other matters such as the American plans to try a number of the detainees by Military Commission, including the four remaining British men. Human rights organisations have also criticised these plans. The Foreign Secretary told the House of Commons on 24 February 2004:

> In July 2003, two of the detainees were designated by the United States authorities as eligible to stand trial by United States Military Commissions established to prosecute the detainees. The Government made it clear straightaway that we had concerns about the Military Commission process.

55. However, the legal vacuum surrounding the detainees presents a dilemma for states such as the United Kingdom that espouse the rule of law. Many of the detainees have been held for over two years "without charge, without access to their families, and overwhelmingly without access to legal counsel," according to Amnesty International. Human Rights Watch said in its submission: "Despite some tinkering at the edges, the detentions at Guantánamo, and the preparations for the military commissions, have trampled the most basic provisions of international law. A US federal appeal court has also been highly critical of the administration's attempt to create a legal black hole," and the US Supreme Court agreed to hear evidence about the detentions on 18 April 2004. These criticisms remain relevant even after the USA agreed to release some detainees to Spain and the United Kingdom. It was the view of Amnesty International that: "Failure to strongly criticise the situation in Guantánamo Bay, which in any sense constitutes an affront to human rights, makes the UK appear selective in its concerns."

56. The Government has defended its position on Guantánamo Bay. Mr Rammell told us:

> We are in a very extraordinary situation. We are into new territory in terms of the threat we face. …[The Foreign Secretary] did make the point that detaining people in this way is not unique; it happened in this country at the outbreak of the Second World War. Nevertheless, our aim throughout has been to try and bring the process to a conclusion, either by having the people tried in the US or them being returned to the UK. We have achieved that on an individual basis in five out of the nine cases.

57. He went on: "From the beginning of this process … we have pressed the US either to bring the matter to a conclusion as quickly as possible and to try the people within Guantánamo consistent with international norms or to have them returned." The Foreign

Secretary also made clear to the House of Commons that the remaining men would not face the death penalty. The Committee was able to discuss the problem with Ambassador Prosper, the US official responsible, on our recent visit to Washington DC.

58. We conclude that the release without charge of the five detainees by the British police raises major concerns about the due process of law and the detentions at Guantánamo Bay, given their incarceration for over two years without access to lawyers or any due process of law. We recommend that the Government explain why the process of repatriation took so long. We also recommend that the Government redouble its efforts to achieve due process of law for those at Guantánamo Bay for whom the British Government has accepted responsibility and do its utmost to encourage the United States to regularise the detentions according to internationally accepted standards of legal process.

July 2004 : FCO Response Cm 6275

The Government has consistently sought to resolve the position of the British detainees. No government has worked harder in respect of its nationals held at Guantanamo Bay. British officials have visited the British detainees to check on their welfare seven times, more often than any other government has visited its nationals. We have held more and higher level talks with the US Government than any other. As has been made clear in public statements and to Parliament on a number of occasions, the Government's position has been that the British detainees should either be tried fairly in accordance with international standards or returned to the United Kingdom.

Following discussions between the Government and US Government, we came to the view that the US military commission process would not provide sufficient guarantees of a fair trial. The Government then made an unequivocal request that all nine British detainees be returned to the UK. As a result of that request, the US agreed to release five of the British detainees. They returned to the UK in March. However despite the Government's request, the US Government has so far declined to return to the UK the remaining four British detainees. We agreed with the US Government that discussions would continue on the future of the remaining four and made clear that our position remained unchanged – the detainees should either be tried fairly in accordance with international standards or be returned to the UK. As yet we have been unable to reach a conclusion with the US Administration on this matter.

During a visit by British officials to Washington towards the end of May to discuss the future of the four men, the UK position was reiterated to representatives of the US Government. The Government will continue to seek to resolve the position of the four British detainees.

Discussions between the British and US Governments about the British detainees' continued detention have included complex legal and security issues which arose from an unprecedented event - the attacks on 11 September 2001, the most appalling terrorist atrocity ever in which more than 3,000 died on the US mainland. Following the attacks, thousands of individuals believed to be Al Qa'ida or Taliban fighters, or their supporters, were detained. The vast majority were released in Afghanistan. But those whom the US deemed to pose a substantial risk were sent by the US to Guantanamo for detention and questioning about their knowledge of Al Qa'ida. These events have had a significant

influence on the US position in discussions on the possible release of detainees from Guantanamo, including on the nature and length of those discussions.

2005

April 2005 : Sixth Report : Foreign Policy Aspects of the War against Terrorism

Guantánamo Bay

53. We have previously commented on the camps at Guantánamo Bay in our Report on the Annual Human Rights Report 2003 and in our series of Reports on Foreign Policy Aspects of the War against Terrorism. The United States continues to hold over 500 people in the camp of 42 different nationalities, although the last British detainees were returned to this country in January, to be released without charge by police. Administration officials told the Washington Post at the beginning of January that plans were being developed to hold detainees without trial over the long term and possibly for life.

54. Over recent months further concerns have emerged regarding the treatment of detainees. In December 2004, a leaked report from the International Committee of the Red Cross was reported to have described US interrogation methods at the camp as "tantamount to torture" and in January, under the American Freedom of Information Act, hundreds of internal documents and memos were released, which indicate systematic abuse of detainees. An anonymous FBI agent wrote in one of the papers released:

> On a couple of occasions I entered interview rooms to find a detainee chained hand and foot in a foetal position to the floor, with no chair, food or water…Most times they had urinated or defecated on themselves, and had been left there for 18 to 24 hours or more.

55. The FCO's Annual Report on human rights registers the "concern in civil society, Parliament, the media and the legal profession" in the United Kingdom over the continued detentions although expressing concerns of the Government in cautious language. The FCO focuses on the position of the British detainees, of whom four remained in the camp when it was published. The Report criticises the proposed military commissions by which detainees are to be tried, stating that they "would not provide sufficient guarantees of a fair trial according to international standards", and states that the welfare of the British detainees has been a priority for the Government "from the outset". There were more welfare visits to the camp from British officials than from any other government, and the detention conditions were improved following the raising of welfare concerns by the Government at various levels.

56. In its recent Report, the Intelligence and Security Committee noted that the FCO received assurances in March 2002 from the US State Department that detainees were being treated humanely, and that "the Foreign Secretary was … satisfied with the US authorities' assurances". British intelligence personnel made several visits to the camp and after the last visit, in February 2004, the Security Service reported that the mental health of detainees was deteriorating due to the conditions under which they were being kept. These concerns were raised at a senior level with the US, by the Foreign Secretary, Home Secretary and Sir Nigel Sheinwald, the Prime Minister's Foreign Policy Adviser.

57. Amnesty and Human Rights Watch made strong criticisms of the Government and of the Annual Report for its approach to the issues of Guantánamo Bay. Amnesty called the detentions a "shocking outrage" which amounted to "cruel, inhuman or degrading treatment" and Human Rights Watch referred to the "severe trampling of process" by the US. Both groups questioned what Human Rights Watch called the "quite extraordinary", and seemingly exclusive, focus of the Government on the position of British nationals detained in the camp, regardless of the more general concern for all detainees. Human Rights Watch called this an "absolutely fundamental misunderstanding" of the issues raised by the entire regime at Guantánamo Bay, and said that for the Government to fail to understand this was "enormously worrying". Both groups expressed regret that the Government has not seen fit to make stronger criticism of the US administration over the camps. In our view, such criticism fails to take due account of the fact that the Government had particular consular responsibilities towards British citizens and that it was right to focus at first on their welfare.

58. Amnesty also raised the question of the detainees who are British residents but not British nationals, saying that the Government's diplomatic efforts had not been extended to those detainees. In November 2004, in answer to a Parliamentary Question in the House of Lords, FCO Minister of State Baroness Symons said that:

> The British Government are not in a position to provide consular or diplomatic assistance to those detainees in Guantanamo Bay who are not British nationals, including those who hold refugee status and are, or were, resident in the United Kingdom.

In December, FCO Minister Chris Mullin stated that "We are aware of five former British residents also in detention [in Guantánamo Bay] but the Government is not in a position to provide consular or diplomatic assistance to them and I therefore cannot comment on their situation". This refusal by Ministers even to comment on the situation of former residents of the United Kingdom detained in Cuba has been the subject of considerable criticism.

59. Bill Rammell, Minister for Human Rights, did not accept these criticisms when we pressed him in evidence to our inquiry into the Human Rights Annual Report. He referred to the horrific events of 11 September 2001, saying that "the United States has been absolutely right to take the greatest of care with terrorist suspects" and that information obtained from detainees had "helped to protect all of us from potential further terrorist attack". Nonetheless, he stated that the Government's position had always been that the detainees should be tried according to international standards or released; he was "genuinely not aware" of any plans the US government might have to hold detainees long-term, as reported in the press. The Government had, he told us, concentrated on the position of the British detainees in its lobbying of the US Administration as it was there that the greatest pressure could be brought to bear.

60. We find that the Government's position on the detentions at Guantánamo Bay does not sit easily with its pledge in the Human Rights Annual Report to "respect, and urge others to respect, those human rights laid down in the International Covenant on Civil and Political Rights that can never be compromised, even in states of emergency". Nor is it in line with the Annual Report's statements that "there is no excuse for the deliberate mistreatment or

neglect of prisoners" and that "a government itself is bound by law and that the arbitrary exercise of power not based on law is without authority". Finally, the approach appears to conflict with the Government's striking claim in the introduction to the Annual Report to "speak loudly and clearly on the international stage" against abuses.

61. We conclude that, now that the British nationals have been released from detention at Guantánamo Bay, the Government need no longer keep its diplomacy quiet in the interests of increasing leverage over individual cases. We recommend that the Government make strong public representations to the US administration about the lack of due process and oppressive conditions in Guantánamo Bay and other detention facilities controlled by the US in foreign countries, such as Iraq and Afghanistan. We further recommend that, during the United Kingdom Presidency of the EU, the Government raise the situation at these facilities in the UN Commission for Human Rights.

June 2005 : FCO Response Cm 6590

The US Government and international community are well aware of the British Government's views on Guantanamo Bay, including on the question of due process and the detention conditions there. Notwithstanding the release of the British nationals detained at Guantanamo, the Government will continue to discuss questions relating to the detention of suspected terrorists with the US Government. The US Government announced at the recent Commission on Human Rights that it is discussing possible visits to Guantanamo with the UN Special Rapporteurs on torture, independence of judiciary and arbitrary detention. The US Government has made clear its intention of facilitating such visits. The Government fully supports this dialogue.

2006

February 2006 : First Report : Human Rights Annual Report 2005

Guantánamo Bay

35. Amnesty International has attacked the system of detentions at Guantánamo Bay, saying:

> The detention camp at the US Naval Base in Guantánamo Bay in Cuba has become a symbol of the US administration's refusal to put human rights and the rule of law at the heart of its response to the atrocities of 11 September 2001. Hundreds of people of around 35 different nationalities remain held in effect in a legal black hole, many without access to any court, legal counsel or family visits. As evidence of torture and widespread cruel, inhuman and degrading treatment mounts, it is more urgent than ever that the US Government bring the Guantánamo Bay detention camp and any other facilities it is operating outside the USA into full compliance with international law and standards. The only alternative is to close them down.

According to Human Rights Watch, detainees in Guantánamo are subjected to sleep deprivation, loud music, dietary manipulation, isolation, 'hooding', sensory deprivation, exposure to extremes of temperature, and 'water boarding', which involves the simulation of drowning. However, the US government has issued strong denials of mistreatment at

the facility. The USA has also made clear that it will continue to hold detainees at Guantánamo Bay, and the US Supreme Court ruled in June 2004 that detainees had a right to appeal their detention, but that they can also be held without charge or trial. The House of Representatives Armed Services Committee has also heard evidence on the Guantánamo Bay complex, but has not opposed the prison complex's existence. In its Report last year, the Committee called on the Government to make strong representations about the abuses committed at Guantánamo Bay. The Government responded both by saying that the US authorities were familiar with the UK position and by expressing support for the negotiations between the UN Rapporteurs on Torture and the US government.

36. However, Human Rights Watch contend that "the UK government chooses to praise the US government even while it remains in blatant defiance of international law. As far as we area aware, the British government has not expressed its concerns about the US failure to provide the conditions in which rapporteurs can do their work. Instead, it has publicly 'welcomed' the alleged 'engagement', which has so far proved worthless."

37. Kate Allen of Amnesty International told the Committee, in relation to the Annual Report: "I think we have moved from commenting in that report on Guantánamo to an attempt to offer an explanation as to why Guantánamo might be necessary." She added that Amnesty International saw the Government's record on Guantánamo as "lamentable and not improving". Amnesty International also brought forward their concerns about the 210 men on hunger strike in Guantánamo Bay, and said that if diplomatic routes are not working, then the United Kingdom should take a more publicly critical stance against the detention facility.

38. The Minister for Human Rights was quick to reject these suggestions. He told us: "We made clear to the US authorities on many occasion and at every level that we regard the circumstances under which detainees are held in Guantánamo Bay as unacceptable, and the US Government knows our view on this."

39. We conclude that the continued use of Guantánamo Bay as a detention centre outside all legal regimes diminishes the USA's moral authority and is a hindrance to the effective pursuit of the war against terrorism. We recommend that the Government make loud and public its objections to the existence of such a prison regime.

May 2006 : FCO Response Cm 6774

The Government has made clear publicly that it regards the circumstances under which detainees continue to be held in Guantanamo as unacceptable. The United States Government knows our views. As the Prime Minister said on 16 March 2006, it would be better if Guantanamo were closed. We will continue to raise our concerns about Guantanamo Bay and work with the US authorities to resolve outstanding issues.

July 2006 : Fourth Report : Foreign Policy Aspects of the War against Terrorism

GUANTÁNAMO BAY

32. The US government has claimed that the detention camp at Guantánamo Bay, which has been used to hold suspected al Qaeda terrorists since shortly after the attacks of 11 September 2001, plays a key role in the 'war against terrorism'. However, its existence has been extremely controversial, especially among human rights groups, many of which have condemned what they believe are extralegal detentions at the camp. Current criticism centres on the continuing detention of about 500 people, including nine individuals previously resident in the United Kingdom and one Australian citizen currently seeking British citizenship, and allegations of abuses committed at the Guantánamo Bay prison complex. The USA has made moves recently to release 140 of the detainees; in April 2006, the Pentagon announced that 141 detainees could no longer be classified as enemy combatants and would be freed. Positively, it has also now released the names of all those held at the camp.

33. Amnesty International has attacked the system of detentions, saying:

> The detention camp at the US Naval Base in Guantánamo Bay in Cuba has become a symbol of the US administration's refusal to put human rights and the rule of law at the heart of its response to the atrocities of 11 September 2001. Hundreds of people of around 35 different nationalities remain held in effect in a legal black hole, many without access to any court, legal counsel or family visits. As evidence of torture and widespread cruel, inhuman and degrading treatment mounts, it is more urgent than ever that the US Government bring the Guantánamo Bay detention camp and any other facilities it is operating outside the USA into full compliance with international law and standards. The only alternative is to close them down.

34. We asked Amnesty International and Human Rights Watch for evidence that torture is being used at Guantánamo Bay. Kate Allen, Director of Amnesty International UK, told us: "I think we have very strong accounts, particularly from young men from Tipton, who documented on their return to the UK what had happened to them, of being kept awake, of loud music, of threats being made to them, of being held and interrogated endlessly day after day… I think that amounts to torture." Ms Allen went on to say: "I think if you hold people incommunicado and you interrogate them endlessly day upon day, that you have extremes of temperature that are used, that you do not allow them any contact with their families, that you have loud noise playing continuously, that you threaten people in terms of their lives and their well-being, I think that adds up to torture." Steve Crawshaw, London Director at Human Rights Watch gave his perspective:

> I think it is important to remember that torture is not just applying electrodes to the testicles… to put it this way, a number of the techniques that have been used have led to both self-incriminating evidence which was completely false—in other words the pressures were great enough that they confessed to things which they had not done and provably had not done—you know, having been together with Osama bin Laden at a particular time when demonstrably, and as, indeed, the British authorities later confirmed, they had actually been somewhere else. Those kinds of pressures are

> banned for the same reasons… [N]ot everybody has been tortured at Guantánamo. That is not the suggestion. Some people have got off relatively lightly and others have not.

35. In April 2006, Professor Philippe Sands QC told us his views on Guantánamo Bay:

> I think Guantánamo should be closed down tomorrow. Guantánamo is terribly undermining of a legitimate effort to protect against a serious threat and it is being used mainly as an indication of the values that our societies purport to hold dear not being followed when their vital interests are at stake, and I think it has been terribly undermining in that sense. I recall here a statement made by the great American diplomat, George Kennan, who wrote a famous telex in 1947 from Moscow, where he was posted for the State Department, on the emergent Soviet threat, and he ended that telex by saying, "The greatest threat that can befall us as a nation is to become like those who seek to destroy us."

The recent suicide of three detainees at Guantánamo Bay has reinvigorated calls for the camp to be closed down.

36. Professor Sands told us that in his view there were only two categories into which those detained at Guantánamo might fall and that they should either be treated as Prisoners of War or as Criminals. He said that there is no third category of Illegal Combatants as the US asserts. The US view is that they are not Prisoners of War and they cannot all be treated as criminals and prosecuted with due process for practical as well as legal reasons. The USA therefore argues that there is a third category of Illegal Combatants into which those detained at Guantánamo fall and that they are entitled to detain them.

37. The USA denies allegations that it is mistreating detainees and argues that Guantánamo Bay is an important tool in the 'war against terrorism'. Speaking at Chatham House in February 2006, John Bellinger, Legal Adviser to the US Department of State, outlined the US position:

> [W]e believe we have been and still are engaged in an international armed conflict with al Qaida. They have attacked our embassies, our military vessels and military bases, our capital city, and our financial center. On September 11, they killed nearly three thousand people, including 67 British nationals. The UN Security Council has reaffirmed our right of self-defense in relation to their attacks, which were planned and launched from abroad, in resolution 1373. In the context of this conflict, we believe that the appropriate legal framework for the detention and transfer of al Qaeda is the international law of war. While domestic criminal law has been used in the past to deal with terrorism, we believe that traditional systems of criminal justice, which were designed for different needs, do not adequately address the threat posed by this enemy, which continues to plan and launch attacks of a magnitude and sophistication previously achievable only by organized states.

Mr Bellinger went on to set out the USA's position on torture:

> "In its activities relating to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. We have made clear our position on torture: U.S. criminal law and treaty obligations prohibit torture, and United States

> policy is not to engage or condone torture anywhere… Where there have been cases of unlawful treatment of detainees, the U.S. has vigorously investigated and, where the facts have warranted it, prosecuted and punished those responsible."

38. During her visit to Blackburn on 1 April 2006, US Secretary of State Condoleezza Rice spelled out the difficulties that the USA faces over what to do with suspects captured in Afghanistan and elsewhere. She also reiterated the point that Guantánamo Bay is a US response to the very real threat posed by international terrorism:

> [W]e have to recognize that Guantanamo is there for a reason. It's there because we captured people on battlefields, particularly in Afghanistan but sometimes, frankly, on the battlefields of our own democratic societies, who were either plotting or planning or actively engaged in terrorist activities. And we have released hundreds of people from Guantanamo. It is not as if everybody who was in Guantanamo on October 1st, 2001 or January 1st, 2002 is still in Guantanamo. We have gone out of our way to try to release people. We've released British citizens back to Great Britain. We've done that with many different countries. But there are some people who cannot either be safely be released to their countries or certainly safely released, and there are people for whom the value of the information that they have is still relevant to the fight against terror.

39. The British Government has been criticised for its reticence to criticise loudly the Guantánamo Bay camp. In evidence to this Committee, Human Rights Watch said: "the UK government chooses to praise the US government even while it remains in blatant defiance of international law. As far as we are aware, the British government has not expressed its concerns about the US failure to provide the conditions in which rapporteurs can do their work. Instead, it has publicly 'welcomed' the alleged 'engagement', which has so far proved worthless." For its part, Amnesty International has described the United Kingdom's role on Guantánamo as "lamentable and not improving" since "we have moved from commenting…on Guantánamo to an attempt to offer an explanation as to why Guantánamo might be necessary."

40. The last Report in this inquiry called on the Government to make strong representations about the complex. The Government responded by saying that the US authorities were familiar with the British position. In a previous Human Rights Report, we noted the oppressive conditions and mistreatment at Guantánamo Bay and the USA's strong denial of mistreatment at the facility as well as its determination to continue to hold detainees there. The Report also noted criticisms of the Government's failure to engage seriously with the USA on these points as well as calls by international human rights groups for the Government to take a more publicly critical stance. Ian Pearson, the then Minister for Human Rights, was quick to reject these suggestions, telling the Committee: "We made clear to the US authorities on many occasions and at every level that we regard the circumstances under which detainees are held in Guantánamo Bay as unacceptable, and the US Government knows our view on this." Notwithstanding the Minister's comments, we concluded that the continued use of Guantánamo Bay as a detention centre outside all legal regimes diminishes the USA's moral authority and is a hindrance to the effective pursuit of the 'war against terrorism'. We recommended that the Government make "loud and public" its objections to such a prison regime.

41. The Committee's concerns were echoed by a UN report released in February 2006, which called for the closure of Guantánamo Bay as soon as possible. Among its conclusions, the Report says:

> Terrorism suspects should be detained in accordance with criminal procedure that respects the safeguards enshrined in relevant international law. Accordingly, the United States Government should either expeditiously bring all Guantánamo Bay detainees to trial, in compliance with articles 9(3) and 14 of ICCPR, or release them without further delay. Consideration should also be given to trying suspected terrorists before a competent international tribunal.

The White House dismissed the report as "a discredit to the UN", because investigators did not travel to the camp. "[The Unedited Report] selectively includes only those factual assertions needed to support those conclusions and ignores other facts that would undermine those conclusions. As a result we categorically object to most of the Unedited Report's content and conclusions as largely without merit and not based clearly in the facts." In response, the investigators said they rejected an offer to go to the prison complex because they would not have been allowed to meet the prisoners.

42. Recently, the British Government has edged towards a more critical public stance on Guantánamo Bay. In the wake of the UN report, Northern Ireland Secretary Peter Hain said that he would prefer to see the camp closed. The Prime Minister, who had previously referred to the prison complex as an "anomaly" that should be dealt with "sooner or later", went further when he said on 17 March 2006 that it would be better if it were closed. We asked the former Foreign Secretary Jack Straw about Guantánamo Bay just two days before this, and he told us:

> On Guantánamo Bay…it is an anomaly which, as the Prime Minister said, will come to an end and should come to an end sooner or later, we all hope sooner. The American Government is aware of that and it is working on it, but again I simply, at the risk of repetition, say that they have practical problems. On the issue of damage to the United States' reputation, I think views vary but it is just worth bearing in mind that the September 11 terrorist atrocities actually happened and they were not caused by the CIA or Mossad but by al Qaeda.

43. He went on to explain that the USA's attempts to close Guantánamo Bay had slowed because:

> [T]he problem they face is what to do with these individuals, which countries they go back to. In the case of British citizens, it would be straightforward, we would have them back here. I was able to negotiate that, and that has been true for citizens of a number of other countries, but their concern is that quite a number of these are Afghans. Do they go back to Afghanistan? Some are Pakistanis. Do they go back to other countries? In what circumstances can they transfer them? There is a process taking place.

Notwithstanding the practical difficulties of closing the camp, the right to a free and fair trial is enshrined in international instruments to which the USA and United Kingdom are party, such as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

44. We also asked Mr Straw why the Government had not made loud and public its opposition to the prison regime, and he said:

> I talk about the issue quite regularly to my American counterparts. They are also well aware of opinion around the world and in the United States on it, but they have just got practical problems they have got to deal with, and if we were in that situation we would have a practical problem, too. I do just say that if September 11 had happened in this country rather than the United States, it would have changed our politics and security parameters just as it has changed the Americans. It just would have done.

In its response to our annual Report on Human Rights, the FCO went further than in previous exchanges with the Committee when it stated that the Government:

> has made clear publicly that it regards the circumstances under which detainees continue to be held in Guantanamo as unacceptable. The United States Government knows our views. As the Prime Minister said on 16 March 2006, it would be better if Guantanamo were closed. We will continue to raise our concerns about Guantanamo Bay and work with the US authorities to resolve outstanding issues.

45. We note that in a speech to the Royal United Services Institute the Attorney-General described not just the circumstances but the very existence of the camp at Guantánamo as "unacceptable", although he was careful to say that this was his personal opinion. He called for the camp to be closed down:

> Not only would it, in my personal opinion, be right to close Guantanamo 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. The historic tradition of the United States as a beacon of freedom, liberty and of justice deserves the removal of this symbol.

On 15 June 2006, during a debate on the Committee's Report on Human Rights, Minister for Trade and Human Rights Ian McCartney told the House:

> We have long made it clear that we regard the circumstances under which detainees continue to be held at Guantánamo Bay as unacceptable. The US Government know our views, which we have reiterated to them. As the Prime Minister has said, it would be better if Guantánamo were closed. We have also heard the public remarks of the Attorney-General and the Lord Chancellor. We raise those concerns in our regular discussions on detainee-related issues with the US Government. I give my hon. Friends the commitment that we will continue to do so.

Pressed by the Chairman on whether Guantánamo Bay is unacceptable and should be closed, the Minister added: "Yes, that is what has been said. Furthermore, that is what I believe." On 19 May 2006, the UN Committee against Torture added its voice to those calling for the closure of the camp.

46. We acknowledge that there is a problem of what to do with some of the detainees at Guantánamo and that those detained include some very dangerous terrorists. We also conclude that the continuing existence of Guantánamo diminishes US moral authority and adds to the list of grievances against the US. We further conclude that detentions without either national or international authority work against British as well as US interests and

hinder the effective pursuit of the 'war against terrorism'. We conclude that those who can be reasonably safely released should be released, those who can be prosecuted as criminals should be prosecuted and that as many others as possible should be returned to their countries of citizenship. We commend the British Government for its policy of urging the US government to move towards closing Guantánamo.

September 2006 : FCO Response Cm 6905

10. The Government welcomes the US Administration's public indications of its desire to see the number of detainees at Guantánamo Bay reduced or the detention facilities at Guantánamo Bay closed down altogether. But the Government agrees that careful consideration needs to be given to how the detention facility at Guantánamo Bay should be closed so that international security is maintained and the human rights of detainees are respected if returned to their countries of citizenship. On 29 June the US Supreme Court gave judgment in the case of Salim Hamdan v. Donald Rumsfeld et al. The Court held that the Military Commissions, which had been established to try certain detainees at Guantánamo Bay, did not comply with either US or relevant international humanitarian law. The US Administration I still considering how to respond to the Hamdan decision although it has promised to respect the Court's decision and produce new legislation aimed at bringing the military commission process more into line with US and international law. We expect the new legislation to be presented to Congress by the Autumn.

11. The Government continues to discuss detainee related issues, including Guantánamo Bay, regularly with the US Administration and seeks to ensure that the handling of detainees is consistent with the British Government's other objectives. These objectives include preventing further terrorist attacks, undermining the work of those who recruit terrorists, and upholding respect for human rights and the rule of law.

Appendix 3

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

AND

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF

AFGHANISTAN

CONCERNING

TRANSFER BY THE UNITED KINGDOM ARMED FORCES TO AFGHAN AUTHORITIES OF PERSONS DETAINED IN AFGHANISTAN.

CONTENTS

INTRODUCTION

This Memorandum of Understanding records the arrangement reached between the Government of the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") and the Government of the Islamic Republic of Afghanistan ("Afghanistan"), hereinafter referred to jointly as the Participants, in the event of a transfer by the United Kingdom Armed Forces to Afghan authorities of persons detained in Afghanistan.

HAVING REGARD to the need to respect basic standards of international human rights law such as the right to life, and the prohibition against torture and cruel, inhumane and degrading treatment:

HAVING ACCEPTED the MOU for UK Forces deployed in Afghanistan dated 30 September 2005:

HAVE REACHED the following understandings:

PARAGRAPH 1 – DEFINITIONS

1.1 For the purposes of this Memorandum the following definitions apply:

a. "United Kingdom Armed Forces" (UK AF) means the Armed Forces of the United Kingdom of Great Britain and Northern Ireland when deployed to the territory of the Islamic Republic of Afghanistan. The term includes all military personnel together with their ships, aircraft, vehicles, stores, equipment, communications, ammunitions, weapons and provisions together with the civilian components of such forces, as well as all air, sea and surface movement resources, together with their supporting services, required to deploy the forces mentioned above;

b. "Area of Operations" means the sovereign territory of the lslamic Republic of Afghanistan including its airspace;

c. "Detention" refers to the right of UK forces operating under ISAF to arrest and detain persons where necessary for force protection, self-defence, and accomplishment of mission so far as is authorised by the relevant UNSCRs.

PARA 2 – PURPOSE AND SCOPE

2.1 The purpose of this Memorandum is to:

- Establish the responsibihties, principles and procedures in the event of the transfer by the UK AF to Afghan authorities of persons detained in Afghanistan.

- Ensure that Participants will observe the basic principles of international human rights law such as the right to life and the prohibition on torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK AF to Afghan authorities and their treatment.

PARA 3 – RESPONSIBILITIES OF PARTICIPANTS

3.1 The UK AF will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK AF in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility.

3.2 The Afghan authorities will accept the transfer of persons arrested and detained by the UK AF for investigation and possible criminal proceedings. The Afghan authorities will

be responsible for treating such individuals in accordance with Afghanistan's international human rights obligations including prohibiting torture and cruel, inhumane and degrading treatment, protection against torture and using only such force as is reasonable to guard against escape. The Afghan authorities will ensure that any detainee transferred to them by the UK AF will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the UK.

PARA 4 – ACCESS TO DETAINEES

4.1 Representatives of the Afghan Independent Human Rights Commission, and UK personnel including representatives of the British Embassy, members of the UK AF and others as accepted between the Participants, will have full access to any persons transferred by the UK AF to Afghan authorities whilst such persons are in custody. The International Committee of the Red Cross and Red Crescent (ICRC) and relevant human rights institutions with the UN system will be allowed to visit such persons.

4.2 UK personnel, including members of the UK AF will have full access to question any persons they transfer to the Afghan authorities whilst such persons are in custody.

PARA 5 – RECORD KEEPING AND NOTIFICATION OF CHANGE

5.1 The UK AF will notify the ICRC and the Afghan Independent Human Rights Commission, normally within 24 hours, and if not, as soon as possible after of when a person has been transferred to Afghan authorities. The Afghan authorities will be responsible for keeping an accurate account of all persons transferred to them by the UK AF, including, but not limited to; a record of any seized property, the detainee's physical condition following initial detention, record of transfer to an alternative holding facility and record of any prosecution status. Records should be available upon request.

5.2 The United Kingdom will be notified prior to the initiation of criminal proceedings involving persons transferred by the UK AF and prior to the release of a detainee. The United Kingdom will also be notified of any material change of circumstance regarding the detainee including any instance of alleged improper treatment.

PARA 6 – USE OF THE DEATH PENALTY

6.1 No person transferred by the UK AF to Afghan authorities will be subject to the execution of the death penalty.

PARA 7 – DURATION AND TERMINATION

7.1 This Memorandum will have effect upon the date of the later signature by the relevant authorities and will remain in effect unless terminated by mutual consent or by either Participant giving not less than six months' notice in writing to the other Participant.

7.2 In the event that this Memorandum is terminated, the relevant provisions will continue to be applied in respect of any matters not resolved at the time of termination.

7.3 Any dispute concerning the interpretation or application of this Memorandum of Understanding will be resolved exclusively by negotiations between the Participants.

The foregoing record represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan upon the matters referred to therein.

Signed in Kabul on 23 April 2005, in duplicate in English and Dari languages. For the purposes of interpretation the English version is authoritative.[78]

For the Secretary of State for Defence for the Government of the United Kingdom of Great Britain and Northern Ireland

For the Minister of Defence for the Government of the Islamic Republic of Afghanistan

78 The Memorandum was actually signed on 30 September 2006; see HC Deb, 8 January 2006, col 77W

Formal minutes

Wednesday 10 January 2007

Members present:

Mike Gapes, in the Chair

Mr Fabian Hamilton	Sandra Osborne
Mr David Heathcoat-Amory	Mr Greg Pope
Mr John Horam	Mr Ken Purchase
Mr Eric Illsley	Sir John Stanley
Andrew Mackinlay	Gisela Stuart
Mr Malcolm Moss	Richard Younger-Ross

The Committee deliberated.

Draft Report (Visit to Guantánamo Bay), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 and 2 read and agreed to.

Paragraph 3 read, amended and agreed to (now paragraphs 3 to 5).

Paragraphs 4 to 12 (now paragraphs 8 to 14) read and agreed to.

Paragraph 13 (now paragraph 15) read, amended and agreed to.

Paragraphs 14 to 21 (now paragraphs 16 to 23) read and agreed to.

Paragraph 22 (now paragraph 24) read, amended and agreed to.

Paragraphs 23 to 64 (now paragraphs 25 to 66) read and agreed to.

Paragraph 67 (now paragraph 68) read, amended and agreed to.

Paragraphs 68 to 89 (now paragraphs 70 to 91) read and agreed to.

Paragraph 90 (now paragraph 92) read, amended and agreed to.

Paragraphs 91 to 114 (now paragraphs 93 to 116) read and agreed to.

Appendices agreed to.

Resolved, That the Report, as amended, be the Second Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No. 134 (Select Committees (reports)) be applied to the Report.

Several Papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.—(The Chairman).

The Committee further deliberated.

[Adjourned till Thursday 11 January at 3.00pm

List of written evidence

Written evidence

Written evidence submitted by Human Rights Watch

Human Rights Watch thanks the Foreign Affairs Committee for the opportunity to present evidence on the treatment of detainees at the US military facility at Guantánamo Bay, where the continued detention of several hundred men in defiance of international human rights and humanitarian law has become a serious embarrassment for the United States and its allies.

1. Abuse of Detainees

Human Rights Watch has documented a disturbing pattern of abuse not only at Guantánamo Bay but also in US detention facilities in Iraq and Afghanistan. In a report published jointly with the Center for Global Rights and Justice and Human Rights First in April 2006,[1] Human Rights Watch documented over 330 cases in which US military and civilian personnel are credibly alleged to have killed or abused detainees in Iraq, Afghanistan and Guantánamo. The cases involved more than 460 detainees and more than 600 US personnel. Of these cases the majority have been in Iraq. But at least fifty cases have been documented at Guantánamo Bay. The research undertaken for the report also indicated that US authorities have failed to investigate adequately numerous cases of abuse, including torture. As of October 2006 only an estimated 55 military personnel (a fraction of the 600 US personnel involved in abuses) had been convicted. The Pentagon says there have been more convictions of US personnel but has not provided further information, despite repeated requests from Human Rights Watch.

Of those convicted for whom information is available, only ten received more than a year of custodial sentence. Most received no prison terms at all. Almost all those convicted have been enlisted men. No military intelligence personnel have been convicted (even though it is established that military intelligence has been involved in detainee abuse). No US military officers have been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility. It is worth noting that all the convictions for detainee abuse documented by Human Rights Watch relate to cases in Iraq and Afghanistan. As far as Human Rights Watch has been able to ascertain there have been no convictions for detainee abuse at Guantánamo Bay.

Mohammed al-Qahtani, one of the dozens of Guantánamo detainees who have alleged mistreatment, says that he was subjected to weeks of sleep deprivation, isolation and sexual humiliation in late 2002 and early 2003. Human Rights Watch obtained an unredacted copy of al-Qahtani's interrogation log, and believes that the techniques used during al-Qahtani's interrogation were so abusive that they amounted to torture.

The findings of Human Rights Watch were reinforced by a May 2006 report by the UN Committee against Torture which raised concerns about US treatment of detainees and lack of accountability for torture and abuse. At the very least the evidence gathered by Human Rights Watch points to a systemic failure by the US administration to prevent illegal and abusive treatment by US personnel of detainees in the "war on terror", including those held at Guantánamo Bay.

2. Military Commissions Act of 2006

The most important recent development with regard to the legal status of the Guantánamo detainees (and other terrorist suspects) and their access to due legal process is the enactment by Congress of the Military Commissions Act (MCA) in September 2006. Human Rights Watch finds the MCA very troubling on several counts.[2]

First it bars detainees from challenging the legality of their detention via *habeas corpus* and from raising claims of torture and other abuses even after they have been released. Second it includes an overly broad definition of "unlawful combatant" that could subject civilians who purposefully provide virtually any form of support to an armed group (even far from the battlefield) to military detention and trial. Third it establishes military commissions to try detainees which violate fair trial rights of detainees, most notably by permitting the use of evidence obtained through coercion and abusive interrogation practices. Fourth, although both torture and cruel and inhuman treatment remain criminalized as war crimes, the MCA narrows the scope of the offences for which interrogators and other officials could be prosecuted under the War Crimes Act, most notably by decriminalizing humiliating and degrading treatment that does not rise to the level of cruel and inhuman treatment.

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[1] Human Rights Watch, et al., *By the Numbers: Findings of the Detainee Abuse and Accountability Project,* April 2006, http://hrw.org/reports/2006/ct0406/

[2] For a fuller analysis see *Q and A: Military Commissions Act of 2006* http://hrw.org/backgrounder/usa/qna1006/

3. Obstacles to Releasing or Transferring Detainees

Human Rights Watch recognises serious obstacles to the release of detainees at Guantánamo Bay and has called on the EU to work with the United States to find solutions. Many of the detainees cannot be sent to their countries of origin either because they would not be accepted or because they are at risk of being tortured. For example there are eleven Chinese Uighurs at Guantánamo who have been cleared for release but cannot be sent to China because of the risk of mistreatment. As the United States seeks to release further detainees from Guantánamo, more are likely to fall into this category.

However it is important to underline that although President George W. Bush has said he would like to see the detention facilities at Guantánamo Bay closed down, the US is building a new long-term facility at Guantánamo and asserts that even detainees acquitted by military commissions can still be held indefinitely as an "enemy combatants". Detainees who have neither been convicted nor cleared for release will also remain at Guantánamo. And there is no reason to conclude that new persons declared to be "enemy combatants" will not be locked up there in the future.

4. Conclusion

The well documented abuses at Guantánamo Bay and at other US military detention facilities are a stain on the honour of the United States and serve as a recruiting tool for Islamist militants around the world. Furthermore the abuses of detainees in US custody may be used to justify the repressive methods of states in the Middle East and elsewhere which routinely practice torture and where years of state repression and human rights violations have proved fertile sources for armed groups engaged in terrorism. The UN Special Rapporteur on Torture Manfred Nowak has complained that governments around the world now seek to rebut criticism of how they handle detainees by claiming they are only following the US example in the "war on terror".[3]

The United Kingdom and its EU partners have called (unsuccessfully) for the closure of Guantánamo. But the British government, a key ally of the United States in Afghanistan and Iraq and a vocal supporter of the broad thrust of US strategy in the "war on terror" has been at best muted in its criticism of detainee abuse by the US authorities whether at Guantánamo or elsewhere. It has also failed to speak out against the practice of "extraordinary rendition" whereby terrorist suspects in US custody have been delivered by US government agents to states like Syria and Egypt where torture is routinely used for purposes of interrogation.

The British government, which claims to be a leading champion of human rights in general and of the worldwide ban on torture in particular, should publicly speak out not just for the closure of Guantánamo Bay, but against the systemic pattern of abuses that have been committed there and in US detention facilities in Iraq and Afghanistan. It should also, along with its EU partners and the United States, devise humane solutions to the dilemma of what to do with the detainees in Guantánamo who should be released but who have nowhere safe to go, such as by offering asylum for such persons within the EU, including in the United Kingdom.

3 November 2006

Written evidence submitted by Amnesty International UK

Amnesty International

Amnesty International is a worldwide membership movement. Our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights. We promote all human rights and undertake research and action focussed on preventing grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination.

Amnesty International welcomes the Foreign Affairs Committee's interest in Guantánamo Bay. Amnesty International further welcomes the opportunity to contribute to the work of the Committee in its scrutiny of the FCO's human rights policy. The Committee plays an invaluable role in the examination of this policy; the recommendations that it makes are clearly taken seriously by the Secretary of State and the FCO. It is vital to the continued accountability of government policy that the Committee continue to undertake this critical work.

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[3] NEED Title of article, Associated Press, 24 October 2006.

Security and Human Rights

Amnesty International fully recognises the serious nature of today's threats to public safety and the obligation on all states to act to protect their citizens. The duty of the USA to bring to justice anyone responsible for crimes, including the crime against humanity that was committed on 11 September 2001, is undisputed. However, unless governments across the world respond to this security threat in a manner that is fully grounded in respect for human rights and the rule of law, they risk undermining the values they seek to protect and defend.

Guantánamo Bay

In November 2001, President Bush signed a Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism. Anyone held under the Military Order can be detained indefinitely without charge or trial. The Military Order also provided for trial by military commission—executive bodies, not independent or impartial courts—whose verdicts, including death sentences, could not be appealed in any court. In May 2006, the US administration told the UN Committee against Torture that all those held in US custody in Guantánamo were held under the Military Order.

In June 2006, the US Supreme Court, in *Hamdan v Rumsfeld*, concluded that the military commissions as established under the Order violated US and international law. The US government responded to the Hamdan ruling by passing the Military Commissions Act of 2006. While the commissions that can be established by the President under the Act would be an improvement on their fundamentally flawed predecessors under the Military Order, Amnesty International remains deeply concerned that any trials convened under the Act are unlikely to meet international fair trial standards.

This submission outlines some of Amnesty International's concerns regarding the legal status of detainees at Guantánamo, their access to due legal process, the conditions under which they are detained, interrogation techniques and options for the closure of the camp.

Legal Status of Detainees

All persons have the right to liberty. A person's liberty may only be restricted for reasons and in accordance with procedures set out in national and international law. In its authoritative commentary on the provisions of the Fourth Geneva Convention, the International Committee of the Red Cross (ICRC) stresses that:

> "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law."

However, in the context of what it conceptualises as a global and armed "war on terror", the USA has created an intermediate and loosely-defined status outside the law termed "enemy combatant". International law does not recognise such a category of detainee.

International humanitarian law and international human rights law contain rules for the categorisation of detainees. The international armed conflict in Afghanistan ended in June 2002.[4] When that armed conflict ended, those who were captured by the USA during hostilities[5]—and who the USA was obliged to treat as prisoners of war in the absence of a determination "by a competent tribunal" that they were not[6]—were required to be released, unless charged with criminal offences.[7]

Civilians detained in that conflict were entitled to have their detention ("internment") reviewed "as soon as possible" by a "court or administrative board".[8] They too were required, when that conflict ended, to be released, unless charged with recognised criminal offences.[9]

Those detained later in Afghanistan, for reasons related to the subsequent non-international armed conflict there[10] and transferred to Guantánamo were required, as a minimum, to have their detention promptly, and thereafter periodically, reviewed.[11]

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[4] The conflict is deemed to have ended with the conclusion of the Emergency Loya Jirga and the establishment of a Transitional Authority on 19 June 2002.

[5] Geneva Convention III, Art 4 uses the term "persons [belonging to certain categories] . . . who have fallen into the power of the enemy".

[6] Geneva Convention III, Art 5.

[7] Geneva Convention III, Part III, Part IV Section II.

[8] Geneva Convention IV, Art 43.

[9] Geneva Convention IV, Art 133.

[10] The current conflict in Afghanistan is a non-international armed conflict, to which an international legal framework applies that is different from an international one, mainly Article 3 Common to the Geneva Conventions, rules of customary international law and international human rights law.

[11] Under rules of customary international law applicable to non-international armed conflict, comprising also of relevant rules of international law human rights law. See, for instance, The International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds), Customary International Humanitarian Law, Vol 1: Rules (Cambridge: Cambridge University Press, 2005), pp 347–352.

Those detained in countries outside of the zones of armed conflict and transferred to Guantánamo should always have been treated as criminal suspects, therefore subject to international human rights law, including the right to a prompt judicial review of the lawfulness of their detention and to release if that detention is deemed unlawful, and if prosecuted to be tried in proceedings which meet international standards of fairness.[12]

The USA has applied none of these provisions of international humanitarian law and international human rights law in determining the status of the Guantánamo detainees:

- it has not treated those captured during the international armed conflict in Afghanistan initially as prisoners of war, pending determination of their status by a court;
- it has not convened a court to determine whether or not persons captured during the international armed conflict in Afghanistan are entitled to prisoner of war status;
- it has not reviewed promptly the detention of those captured during the subsequent non-international armed conflict in Afghanistan;
- it has not brought the detention of civilians promptly under judicial review, tried or released them;
- it did not, at the close of international hostilities, release the detainees captured during hostilities, with the exception of those against whom criminal procedures had been initiated—in fact, the USA initiated no such procedures.

In view of the above, Amnesty International believes that all those currently held in Guantánamo are arbitrarily and unlawfully detained.

Access to Due Legal Process

Amnesty International takes no position on the guilt or innocence of detainees prior to trial; that is precisely what a fair trial by an independent and impartial tribunal is supposed to determine. However, the vast majority of those held by the USA in the "war on terror" are unlikely ever to face US trials and the US authorities continue to oppose and resist full judicial review of the detentions. By the time of the Hamdan ruling in June 2006, two years after the US Supreme Court ruled in *Rasul v Bush* that the US federal courts had jurisdiction to consider *habeas corpus* appeals from detainees held at Guantánamo, not a single detainee then held at the base had had the lawfulness of his detention judicially reviewed on its merits. Only 10 detainees held in Guantánamo had been charged for trial by military commission by 29 June 2006, when the Supreme Court ruled in *Hamdan v Rumsfeld* that military commissions as constituted under the Military Order of November 2001 were unlawful.

As outlined below, the Military Commissions Act of 2006 provides for the US courts to be stripped of the jurisdiction to consider challenges from non-US citizens held as "enemy combatants" in US custody in Guantánamo or elsewhere against the lawfulness or conditions of their detention in *habeas corpus* appeals.

Status review

Judicial review of the lawfulness of detention is a fundamental principle of international human rights law which now covers all those held in Guantánamo. Judicial review is an integral component of the prohibition against arbitrary detention and a fundamental protection against torture or other cruel, inhuman or degrading treatment.

For more than two years, the USA detained hundreds of individuals in a legal black hole with no process of review. Then in June 2004, the US Supreme Court ruled in *Rasul v Bush* that the federal courts had jurisdiction to hear appeals from foreign nationals detained at Guantánamo. In response to this decision, the US administration devised the Combatant Status Review Tribunals (CSRTs).

The CSRT is an inadequate administrative procedure consisting of panels of three military officers allowed to rely on classified and/or coerced evidence (in violation of the Geneva Conventions) against a detainee denied legal representation and presumed to be an "enemy combatant", as broadly defined, unless he shows otherwise. To take the example of a Kuwaiti detainee held without charge or trial in Guantánamo:

> "One of the primary pieces of evidence upon which the CSRT designated Abdullah Al Kandari to be an enemy combatant is that, more than a year after he was brought to Guantánamo . . . , his 'alias' allegedly was found on a list of names on a document saved on a computer hard drive allegedly 'associated with a senior al Qaida member'. Mr Al Kandari stated that he is not known by any aliases and asked what name appeared on the list, but the CSRT told him that the information was classified. The name of the 'senior al Qaida member' was likewise classified, as was the place where the hard drive was found. Mr Al Kandari was thus left to defend himself

[12] See for instance International Covenant on Civil and Political Rights, Articles 9(3) and 9(4).

against the accusation that an unknown alias of his appeared on a list on a computer found somewhere in the world associated with someone. It is impossible to rebut such a charge, and Mr Al Kandari said so: 'The problem is the secret information, I can't defend myself'."[13]

Amnesty International believes that the CSRTs and subsequent annual Administrative Review Boards (ARBs) are inadequate and in no way a lawful or appropriate substitute for judicial review. A federal judge has characterised the CSRT has having "fundamental deficiencies", including its reliance on classified evidence and the lack of legal counsel for the detainee to compensate for this deficiency.[14] Neither the CSRT nor the ARB satisfy the requirements for a judicial review of the legality of the Guantánamo detentions under articles 9(3) and 9(4) of the International Covenant on Civil and Political Rights. The CSRT also fails to constitute the "competent tribunals" required by the Third Geneva Convention.

Military commissions

Any trials, whatever the status of the person being tried, must be carried out in proceedings that meet international standards of fairness. Amnesty International has some specific concerns about the system of military commissions. On 29 June 2006, the US Supreme Court ruled in *Hamdan v Rumsfeld* that military commissions as constituted under a Military Order signed by President Bush in November 2001, were unlawful as they had not been expressly authorised by Congress, and violated international law and US military law. Amnesty International welcomed this ruling and called on the USA to use it as a springboard for real change in detention policies and practices. However, the US administration responded to the ruling with a firm defence of its policies and Congress passed legislation entrenching them.

On 17 October 2006, President Bush signed into law the Military Commissions Act. The Act facilitates human rights violations and impunity for them, frustrates detainees' access to remedies, and threatens to lead to unfair trials by:

- Stripping the US courts of jurisdiction to hear or consider *habeas corpus* appeals challenging the lawfulness or conditions of detention of any non-US citizen held in US custody as an "enemy combatant". *Habeas corpus* is a fundamental safeguard against enforced disappearance, arbitrary detention and torture or other cruel, inhuman or degrading treatment.
- Prohibiting any person from invoking the Geneva Conventions or their protocols as a source of rights in any action in any US court.
- Permitting the executive to convene military commissions to try "alien unlawful enemy combatants", as determined by the executive under a dangerously broad definition, in trials that threaten to provide foreign nationals so labelled with a lower standard of justice than US citizens accused of the same crimes. This would violate the prohibition on the discriminatory application of fair trial rights.
- Permitting civilians captured far from any battlefield to be tried by military commission rather than civilian courts, contradicting international standards and case law.
- Establishing military commissions whose impartiality, independence and competence would be in doubt due to the overarching role that the executive would play in their procedures.
- Permitting, in violation of international law, the use of evidence extracted under cruel, inhuman or degrading treatment or punishment, or as a result of "outrages upon personal dignity, particularly humiliating or degrading treatment", as defined under international law.
- Permitting the use of classified evidence against a defendant, without the defendant necessarily being able effectively to challenge the "sources, methods or activities" by which the government acquired the evidence.
- Giving the military commissions the power to hand down death sentences, in likely contravention of international standards which only permit capital punishment after trials affording "all possible safeguards to ensure a fair trial".
- Limiting the right of charged detainees to be represented by counsel of their choosing.
- Failing to provide any guarantee that trials will be conducted within a reasonable time.

Amnesty International is campaigning for the repeal of the Act.

[13] Al Odah *et al* v USA *et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005. Abdullah al-Kandari was transferred from Guantánamo to Kuwait on 14 September 2006 nearly five years after he had been taken into custody.

[14] In re Guantanamo detainee cases, Memorandum Opinion Declining in Part and Granting in Part Respondents' Motion to Dismiss or Grant for Judgment as a Matter of Law in the US District Court for the District of Columbia, 31 January 2005, http://www.dcd.uscourts.gov/opinions/2005/Green/2002 CV-299-8:57:59-3-2-2005-a.pdf

Conditions in Which Detainees are Held and Treatment by the Detaining Authority

Indefinite detention in Guantánamo Bay is in and of itself a human rights violation, continuing to cause distress to detainees, their relatives and their communities. In its May 2006 report, the UN Committee against Torture said that "detaining persons indefinitely without charge constitutes per se a violation of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]."[15]

Amnesty International also considers the conditions of confinement at Guantánamo Bay to breach the Convention against Torture. While some detainees have been transferred to a section where they have more out-of-cell time and contact with other detainees, most continue to be confined to small cells with little contact with other inmates and minimal opportunities for exercise. Some detainees are held in extreme isolation in Camp V: a segregation block apparently modelled on "supermaximum" security prisons in the USA. The Committee against Torture is concerned about the "extremely harsh regime imposed in detainees in "supermaximum prisons".[16] Inmates in Camp V are reportedly held for up to 24 hours a day in solitary confinement in small concrete cells. They are allowed out of their cells three times a week for a shower and exercise, although reportedly this is often reduced to once a week. Such conditions fall short of UN minimum standards which provide that prisoners should receive at least one hour of exercise daily. Prisoners in Camp V are reportedly subjected to 24 hour lighting, which US courts have held to be "cruel and unusual" in US mainland segregation units.

Well into 2006, an unknown number of detainees remained on hunger strike; there have been serious allegations of ill-treatment of hunger strikers during force-feeding. Although Amnesty International has no position on force-feeding *per se*, it considers that if forcible feeding is done in such a way as deliberately to cause suffering this would constitute torture or other ill-treatment. Detainees have alleged having nasal tubes roughly inserted into their noses without anaesthetic or gel, causing choking and bleeding. Some of the hunger strikers have alleged being placed in punitive restraints during force-feeding and being subjected to verbal and physical abuse by guards.

The conditions and uncertainty about detainees' fate have reportedly contributed to severe mental and emotional stress and there have been numerous suicide attempts. As of May 2006, The US Department of Defense had reported over thirty attempts, but has reclassified others as "manipulative self-injurious behaviour", indicating a disregard for detainees' welfare as well as the circumstances underlying such incidents. On 10 June 2006, three detainees were found dead in their cells, apparently having hanged themselves. All three had previously participated in hunger-strikes and been subjected to force-feeding. All were held in a maximum security section of the camp. One was reportedly just 17 when he was taken into custody. Amnesty International is disturbed by descriptions of these suicides by US officials as "asymmetric warfare" and "a good PR move".

Interrogation Techniques

The USA's protections against torture or other cruel, inhuman or degrading treatment are less than adequate. Among other things, the USA's treaty reservations mean that the USA considers itself, including under the Detainee Treatment Act, bound by the prohibition on cruel, inhuman or degrading treatment or punishment only to the extent that it matches existing US law. Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience". Justice Department lawyers reportedly view this as allowing consideration of the context in which abuse of detainees occurs.

Thus the USA adheres to a less than absolute ban on torture and other ill-treatment. Indeed, on 6 September 2006, President Bush justified the secret CIA detention and interrogation programme for use against certain "high-value" detainees on the grounds of necessity. He said that "it has been necessary to move these individuals to an environment where they can be held secretly [and] questioned by experts" using unspecified "alternative" techniques to extract information from detainees allegedly resistant to interrogation. "Military necessity" has also been used to justify torture or ill-treatment at Guantánamo under at least one of two "special interrogation plans" authorised by Secretary of Defence Rumsfeld.

In 2002 information was obtained through litigation under the Freedom of Information Act and through leaks of an interrogation log detailing various interrogation techniques used at Guantánamo Bay. Interrogators asked for and received authorisation from Secretary Donald Rumsfeld to use additional interrogation techniques against certain detainees who were allegedly proving resistant to "standard" interrogation procedures. In memos dated December 2002 and April 2003, Secretary Rumsfeld approved, "as a matter of policy", a number of techniques including stress positions, sensory deprivation, isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, "dietary manipulation", "environmental manipulation" and "using detainees' individual phobias (such as fear of dogs) to induce stress".

[15] "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture", UN Committee against Torture, 36th session 1–19 May 2006, CAT/C/USA/CO/2, 25 July 2006.

[16] Ibid.

Many of the techniques listed above, even if applied in isolation or for limited period, would in Amnesty International's view violate the prohibition of cruel, inhuman or degrading treatment or punishment. Such techniques have reportedly been used against detainees in combination and for prolonged periods, causing severe pain and suffering (physical, mental or both) and, being inflicted intentionally by officials for the purpose of obtaining information, thereby amount to torture.

Amnesty International has raised with the US government the cases of Mohamed al-Qahtani and another detainee, believed to be Mohamedou Ould Slahi, for whom special interrogation plans were requested.

Mohamedou Slahi

On 4 August 2002, Mauritanian national Mohamedou Slahi was transferred to Guantánamo. In his 2004 CSRT hearing, Mohamedou Slahi said that he was "not willing" to answer questions about whether he had been abused. However, in his ARB hearing a year later, he made allegations about his treatment. At this point, the government's transcript states that "the recording equipment began to malfunction". Therefore, the ARB report only summarises the Board's recollection of what Mohamedou Slahi alleged. The report states: "The detainee discussed how he was tortured while here at GTMO by several individuals." Mohamedou Slahi alleged that he had been sexually harassed by a female interrogator. Mohamedou Slahi went on to detail a beating he alleged he had received at the hands of two masked interrogators.

According to the 2005 "Schmidt/Furlow" military investigation into FBI allegations of abuse at Guantánamo, from July to October 2003, Mohamedou Slahi was subjected to "environmental manipulation" (extremes of hot and cold using air-conditioning). The investigation concluded that no disciplinary action was required as "environmental manipulation" was an interrogation technique that had been approved by the Secretary of Defense, and there was "no evidence in the medical records of the [detainee] being treated for hypothermia or any other condition related to extreme exposure." The investigation concluded that it was unable to corroborate Mohamedou Slahi's allegations that he had been beaten, or that he had been subjected to sexual humiliation by female interrogators (although it acknowledged that "female interrogators used their status as females to distract the [detainee]"). Not in the published report was the statement given to the investigators by a former psychiatrist with the Behavioural Science Consultation Team at Guantánamo who stated that "sexual tension" was one of many authorised interrogation techniques. This could incorporate "shocking behaviour [that] would be culturally taboo, disrespectful, humiliating . . .".[17]

The investigation did find that Mohamedou Slahi had been threatened with death and "disappearance" by military interrogators. The detainee had also been told that his family was in US custody, and that he should cooperate in order to help them.

Mohamed al-Qahtani

A FBI memorandum of 14 July states: "In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours)."

Mohamed al-Qahtani was subjected to intense isolation for three months in late 2002 and early 2003. He was variously forced to wear a woman's bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number dog tricks; was forced to dance with a male interrogator while forced to wear a towel on his head "like a burka"; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, culturally inappropriate use of female interrogators, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of "swimsuit models" hung round his neck; was subjected to hooding, loud music, white noise, and to extremes of heat and cold through manipulation of air conditioning.

Other forms of humiliation included being forced to urinate in his clothing when interrogators refused to allow him to go to the toilet. Mohamed al-Qahtani was interrogated for 18–20 hours per day for 48 out of 54 consecutive days. According to a military investigator, in the four hours that he was not under interrogation, "he was taken to a white room . . . with all the lights and stuff going on and everything . . ." During the period of his interrogation, al-Qahtani was allegedly subjected to a fake rendition, during which he was injected with tranquilisers, made to wear blackened goggles, and taken out of Guantánamo in a plane.

[17] Summarized witness statement, 28 February 2005, page 3771 of http://www.aclu.org/torturefoia/legaldocuments/july_docs/(M)%20SCHMIDT-FURLOW%20DEFERRED.pdf

These cases illustrate the inadequacy of investigations, the lack of accountability for torture or ill-treatment including at high-levels of government, and how the USA's notion of humane treatment does not meet international standards. No one has been brought to account for the torture and ill-treatment of either of these detainees, despite findings by military investigators that they were ill-treated in Guantánamo, including under techniques authorised by Secretary of Defense Donald Rumsfeld. The ill-treatment of the detainee believed to be Mohamedou Slahi took place when the ICRC was denied access to him for more than a year.

Amnesty International is concerned that if the administration weighs abuse against national security or similar notions, the end result may be less than an absolute ban. Thus, if a detainee is believed to have information considered by the government to be important to national security, the "shocks the conscience" test could be interpreted by the government as allowing detention conditions and interrogation techniques that would otherwise be unlawful. In addition, Amnesty International urges President Bush to withdraw his signing statement to the Detainee Treatment Act, which carries the risk of being used to undermine the protections against cruel, inhuman or degrading treatment contained in that legislation. Finally, Amnesty International reiterates its call for the USA to ratify the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Options for the Future of the Detention Facility, Including Consequences of Closure and Difficulties in Releasing or Transferring Detainees

Amnesty International was one of the first international organisations to call for the closure of the Guantánamo detention camp. The organisation believes that the detainees must be charged without further delay and brought to trial within a reasonable time in full accordance with international fair trial standards, or else released. In addition, no detainee upon release should be forcibly returned to any country where they risk serious human rights violations. Amnesty International's 12-point framework for closing Guantánamo is appended to this submission.

Role of the UK Government

Recent comments by the Prime Minister, Foreign Secretary, Lord Chancellor and Attorney General not withstanding, Amnesty International believes that the UK Government has failed to publicly oppose the human rights scandal that is Guantánamo with any vigour. We urge the UK Government, and all other governments, to take a clear and public position; they should demand that the USA close the facility.

At least eight former UK residents remain detained at Guantánamo. These include men who had been residents in the UK for a long time and who have family members who are UK nationals; others had been granted refugee status in the UK. To date, the UK Government has agreed to petition its US counterpart to seek the release and return to the UK only of Bisher Al-Rawi.

Amnesty International considers that the UK Government has failed to take adequate measures aimed at safeguarding the rights and ensuring the return of all UK residents detained at Guantánamo. The organisation noted the recent judgment by the Court of Appeal of England and Wales in the case of *Al Rawi & Others v The Secretary of State for Foreign and Commonwealth Affairs & Anor*, according to which the UK Government is not obliged to intervene on behalf of the UK residents. In the immediate aftermath of the judgment, Amnesty International expressed its disappointment at the ruling, which the organisation considers to be legally flawed.

Amnesty International considers that the UK Government is obliged under domestic and international law to make representations on behalf of all UK residents still held at Guantánamo Bay to ensure that their human rights are upheld. Furthermore, in the knowledge that the human rights of all of those held at Guantánamo Bay have been violated, and continue to be violated, Amnesty International believes that there exists an additional obligation that the UK authorities demand that all UK residents held at the camp are returned to the UK unless they are charged, without delay, with a recognizably criminal offence and tried by a competent, independent and impartial court in proceedings which meet international standards of fairness and exclude the possibility of the imposition of the death penalty.

Amnesty International is also dismayed at the attitude of the UK authorities to the case of David Hicks. In December 2005, a UK court ruled that David Hicks, an Australian national detained at Guantánamo Bay, was entitled to be registered as a UK citizen and therefore to receive assistance by the UK authorities. (His mother was born in the UK). This ruling was upheld by the Court of Appeal in April 2006, and the UK government was refused leave to appeal against it. However, the UK Government introduced an amendment to legislation to enable the Home Secretary to strip David Hicks of his UK nationality as soon as it was granted. Thus, on 7 July 2006, David Hicks was granted UK citizenship, and stripped of it some hours later. He is appealing against the Secretary of State's decision to deprive him of his UK nationality.

In addition, Amnesty International is concerned that the UK authorities have failed to undertake a full independent and impartial investigation into the UK's involvement in the cases of Bisher Al-Rawi, a UK resident, and Jamil El-Banna, another UK resident held at Guantánamo Bay who had been granted status in the UK. It has been alleged that the UK was involved in the arrest of both men in Gambia and their

eventual rendition to US custody. The investigation must establish whether UK security services were complicit, whether wittingly or unwittingly, in their detention and subsequent human rights violations; anyone who is suspected of being responsible for abuses against them should be brought to justice.

Amnesty International has also called for an independent and impartial investigation into reports that UK intelligence agents were involved in the treatment of Benyam Mohammed al-Habashi, another former UK resident held at Guantánamo Bay.

Conclusions

Nearly five years after it first opened, more than 400 people of around 35 different nationalities remain in detention without charge or trial at Guantánamo Bay. The detention centre has become a symbol of injustice and abuse in the US government's "war on terror". The selective disregard for international law by the USA in the context of the "war on terror" has enormous influence over the rest of the world. When the USA commits serious human rights violations it sends a signal to abusive governments that these practices are permissible. This is why Guantánamo Bay is so important: it tells other governments that they too can commit human rights violations in the name of counter-terrorism.

Amnesty International takes no position on the guilt or innocence of the detainees at Guantánamo Bay. However, Amnesty International does insist that their human rights be respected, including the right of any detainee to be able to challenge the lawfulness of their detention in a court of law, the right to an effective remedy for any violations of their rights, and the right, if charged with a recognizably criminal offence, to a trial within a reasonable time in procedures that fully accord with international law. Amnesty International reiterates its absolute and unconditional opposition to the death penalty. Every person also has a right to be free from torture and other ill-treatment at all times and under all circumstances. To date, the US administration has failed to afford these basic rights to those held in Guantánamo.

Amnesty International also believes that the UK has failed to publicly oppose the human rights scandal that is Guantánamo with any vigour or to take adequate measures with regard to the UK residents still detained at Guantánamo.

For all our concerns over the detention camp at Guantánamo Bay, it represents the visible face of US detention. On 6 September 2006, President Bush for the first time publicly admitted the existence of secret US detention facilities. He said that with the transfer of 14 "high-value" detainees to Guantánamo, there was no-one still held in secret US detention. However, he did not rule out the possibility of further secret detentions in the future.

When people are held in secret detention and the authorities refuse to disclose their fate or whereabouts, they have "disappeared". This practice, known as enforced disappearance, is expressly prohibited under international law; international law requires that any person deprived of their liberty be held in an officially recognised place of detention. All such facilities must be opened to independent scrutiny. All detainees should have access to the courts and should be treated humanely. These are basic principles that cannot be overridden even in time of war or national emergency. Amnesty International urges the USA to open all such facilities to independent scrutiny. All detainees should have access to the courts and should be treated humanely. These are basic principles that cannot be overridden even in time of war or national emergency.

7 November 2006

A Framework for Closing Guantánamo[18]

Amnesty International

General

1. Any detention facility which is used to hold persons beyond the protection of international human rights and humanitarian law should be closed. The detention camp at Guantánamo Bay Naval Base falls into this category, and in more than four years of detention operations there, the US administration has failed to bring the facility into compliance with international law and standards. Secret facilities operated by the CIA should also be immediately closed down and its secret detention program ended permanently.

2. Closing Guantánamo or other facilities must not result in the transfer of the human rights violations elsewhere. All detainees in US custody must be treated in accordance with international human rights standards, and, where relevant, international humanitarian law. All US detention centres must be open to appropriate external scrutiny, in particular that of the International Committee of the Red Cross (ICRC).

3. The responsibility for finding a solution for the detainees held in Guantánamo rests first and foremost with the USA. The US administration created the system of detention Guantánamo in which detainees—many of whom were transferred to the facility unlawfully—have been held without charge or trial, outside

[18] This proposed framework was first sent to President George W Bush in June 2006.

the framework of international law and without the possibility of full recourse to US courts. It is therefore the US administration's responsibility to redress this situation in full compliance with international human rights standards.

4. All US officials in the administration should desist from further undermining the presumption of innocence in relation to the Guantánamo detainees. The continued commentary on their presumed guilt applies a dangerous label to them—dangerous to the prospect for a fair trial and dangerous to the safety of any detainee who is released. This can only make the USA's task of resolving the Guantánamo issue more difficult.

5. President George W. Bush should rescind his 13 November 2001 Military Order establishing military commissions (blocked by the *Hamdan v Rumsfeld* ruling) and authorizing detention without charge or trial.

6. Those currently held in Guantánamo should be released unless they are to be charged and tried in accordance with international standards of fair trial.

7. No detainees who are released should be forcibly sent to their country of origin or other countries where they may face serious human rights abuses.

Fair Trials

8. Those to be charged and tried must be charged with a recognizable crime under law and tried before an independent and impartial tribunal, such as a US federal court, in full accordance with international standards of fair trial. There should be no recourse to the death penalty.

9. Any evidence obtained under torture or other cruel, inhuman or degrading treatment or punishment should not be admissible. In light of the years of legal, physical and mental abuse to which detainees held in Guantánamo have been subjected, any trials must scrupulously respect international standards of fairness and any sentencing take into account the length and conditions of detention in Guantánamo or elsewhere prior to be transported to Guantánamo.

Solutions for those to be Released

10. There must be a fair and transparent process to assess the cases of each of the detainees who is to be released, in order to establish whether they can return safely to their country of origin or whether another solution ought to be found. In all cases detainees must be individually assessed, be properly represented by their lawyers and given a full opportunity to express their views. Relevant international agencies, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), could be invited to assist in this task, in line with their respective mandates. The options before the US Administration to deal in a manner which fully respects the rights of detainees who are not to be tried and who therefore ought to be released without further delay include the following:

(a) Return. The US authorities should return released detainees to their country of origin or habitual residence unless they are at risk of grave human rights violations, including prolonged arbitrary detention, enforced disappearances, unfair trial, torture or other ill-treatment, extrajudicial executions, or the death penalty. Among those to be returned are all those who according to the laws of war (Geneva Conventions and their Additional Protocols) should have been recognized after their capture as prisoners of war, and then released at the end of the international armed conflict in Afghanistan, unless they are to be tried for war crimes or other serious human rights abuses.

(b) Asylum in the USA. The US authorities should provide released detainees with the opportunity to apply for asylum in the USA if they so wish, and recognize them as refugees if they meet the requirements of the 1951 UN Convention on Refugees (well-founded fear of persecution on certain grounds if returned to their country of origin). The US authorities must ensure that any asylum applicants have access to proper legal advice and to fair and effective procedures that are in compliance with international refugee law and standards, including the opportunity to contact UNHCR. Asylum applicants should not be detained except in the most exceptional circumstances.

(c) Other forms of protection in the USA. Persons who do not meet the criteria of the 1951 UN Convention on Refugees, but are at risk of grave human rights abuses in the prospective country of return and wish to remain in the USA must receive other forms of protection and should be allowed to stay in the USA. They should not be detained, unless it is established that their detention is lawful, necessary and proportionate to the objective to be achieved, in accordance with international human rights law and standards.

(d) Transfer to third countries. The US authorities may seek durable solutions in third countries for those who cannot be returned to their countries of origin or habitual residence, because they would be at risk of grave human rights abuses, and who do not wish to remain in the USA. Any such solution should address the protection needs of the individuals, respect their human rights and take into account their views. All transfers to third countries should be with the informed consent of the individuals concerned. UNHCR should be allowed to assist in such a process, in accordance with its mandate and policies. Released detainees should not be subjected to any pressures and

restrictions that may compel them to choose to resettle in a third country. Other countries should consider accepting released detainees voluntarily seeking resettlement there, especially countries of former habitual residence or countries where released detainees had close family or other ties.

Reparations

11. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, rehabilitation and fair and adequate financial compensation to released detainees for the period spent unlawfully detained and other violations that they may have suffered, such as torture or other ill-treatment.[19] The right of victims to seek reparations in the US courts must not be limited.

Transparency Pending Closure

12. The US authorities should invite the five UN experts—four Special Rapporteurs and the Chairperson of the Working Group on Arbitrary Detention—to visit Guantánamo without the restrictions that led them to turn down the USA's previous invitation. There should be no restrictions on the experts' ability to talk privately with detainees.

Written evidence submitted by the Foreign and Commonwealth Office

1. In response to a request from the Committee this memorandum sets out the Government's position in respect of the US detention facility at Guantánamo Bay.

General Remarks

2. The Government recognised the unprecedented circumstances which led to the creation of the detention facility at Guantánamo Bay. It has provided information of importance to the UK's national security. The Government has long said publicly, however, that it thinks that the facility should be closed. This position was expressed most recently by the Foreign Secretary in her speech at the launch of the FCO's 2006 Human Rights Annual Report on 12 October. The Foreign Secretary also pointed out that some now argued that the existence of the camp is as much a radicalising and discrediting influence as it is a safeguard to security.

3. The Government has therefore welcomed the US President's public commitment to close Guantánamo Bay as soon as practicable. The Government recognises that this is a complicated task. The Government believes that careful consideration needs to be given to how the camp is closed so that international security is maintained and the human rights of the detainees are respected, especially if they are to be transferred back to their home countries. The Government understands that most of the remaining detainees are from Afghanistan, Saudi Arabia and Yemen.

4. The Government has also welcomed other recent steps by the US Government relevant to Guantánamo Bay. In particular, President Bush announced on 6 September the intention to treat all detainees in accordance with the provisions of the Geneva Conventions, to grant access for the International Committee of the Red Cross (ICRC) to 14 detained previously held by the CIA elsewhere and to try them. After considerable discussion in Congress, the Military Commissions Act passed on 29 September has now enshrined the relevant aspects of the President's announcement into US law.

5. On the treatment of detainees, the Government considers, along with the rest of the international community, that Common Article 3 of the Geneva Conventions is the minimum legal standard that should be applied to those detained by the US. The Government notes the Committee's own observations on the conditions at Guantánamo Bay following its recent visit. The Government's concern about conditions at the camp, like the ICRC's, has long focussed on the indefinite nature of detention there. The Government understands that the ICRC has now had access to the 14 detainees recently transferred to Guantánamo from CIA detention facilities elsewhere.

6. On prosecution, the Government's view is that terrorist suspects should be brought to justice wherever possible. We therefore welcome President Bush's stated intention to prosecute detainees, not least to the many victims of international terrorism, and their families. The Government will study the details of the procedures proposed by the Military Commissions Act, any subsequent elaborations and the implications for those who might not be subject to trial.

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[19] Article 14 of the UN Convention against Torture states: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." Those who have been subjected to arbitrary arrest also have a right to compensation. Article 9.5 of the International Covenant on Civil and Political Rights, which the USA ratified in 1992, states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

7. The Committee will recall that the US President and Government have made clear their views on torture, cruel, inhuman and degrading treatment of terrorist suspects. In December 2005 for example, at the time of high profile allegations about US detention and rendition operations, the US Secretary of State, Condoleezza Rice, stated publicly that the US does not authorise and condone torture of detainees. The US Detainee Treatment Act of 30 December 2005 requires that no individual in the custody or under the physical control of the US Government, shall be subject to cruel, inhuman or degrading treatment. The Act made established US policy a matter of statute.

8. The Government continues to discuss detainee related issues, including Guantánamo Bay, regularly with the US Administration and to seek to ensure that the handling of detainees at Guantánamo Bay is consistent with the British Government's counter-terrorism objectives. These include preventing further terrorist attacks, addressing circumstances which might generate terrorism and upholding respect for human rights and the rule of law.

UK Nationals

9. No British citizens are detained in Guantánamo Bay. The Committee is aware of the extensive efforts made by the Government to safeguard the welfare of nine British nationals while they were detained at the camp and to secure their return to the UK in 2004 and 2005.

"British Residents"

10. The Government welcomed the October decision of the Court of Appeal in *Al Rawi and others v Secretary of State for Foreign and Commonwealth Affairs* that there is no duty on the Foreign Secretary in domestic or international law to provide consular or diplomatic assistance to British residents overseas, including those in Guantánamo Bay, and consequently no duty on the Foreign Secretary to request the return of former "British residents" from Guantánamo. The Court of Appeal confirms the similar judgement by the High Court in May.

11. The Foreign Secretary agreed at an earlier stage of the legal proceedings to make representations to the US for the release and return to the United Kingdom of one claimant, Mr Bisher Al Rawi. The Foreign Secretary decided to make such representations to the US Government having considered his fact-specific claim and on the basis of shared counter-terrorism objectives. Discussions between the British and US Governments about Mr Al Rawi's release and return to the UK are continuing. Contrary to media speculation, the US Government has not offered to return the "British residents" to the UK.

12. David Hicks, an Australian citizen detained in Guantánamo Bay who had claimed an entitlement to be registered as a British citizen, has brought an appeal against the Home Secretary's decision to deprive him of British citizenship. Mr Hicks remains an Australian citizen. The British Government is not in a position to provide Mr Hicks (a foreign national) with consular or diplomatic assistance in Guantánamo Bay. Mr Hick's appeal is expected to be heard in 2007.

Closing Remarks

13. The Government will continue to follow developments at Guantánamo Bay closely and discuss conditions there, as well as wider detainee issues, with the US Government.

References

14. Additional material on the Government's counter-terrorism and human rights policies, including on Guantánamo Bay, can be found on the FCO's website at www.fco.gov.uk. The website includes the texts of the FCO's 2006 Annual Human Rights Report and the Foreign Secretary's speech at the launch of the Report on 12 October.

Counter Terrorism Policy Department
Foreign and Commonwealth Office

November 2006

Briefing for visit to Belmarsh prison on 21 November 2006 from Her Majesty's Prison Service

General

Between December 2001 and 2004 a number of persons were detained and held in prison custody under Part IV of the Anti-Terrorism Crime and Security Act 2001. The majority were placed at Belmarsh prison although a few were located to Woodhill prison mainly due to family connections being more northern.

2. As the reason given for the detention was that they presented a national security risk, that were classified for prison purposes as Category A "standard" escape risk prisoners a few days after their arrival. Any person coming into prison custody, whether on remand or on conviction, is allocated a security category. For those convicted this will range from A to D, with Category A requiring placement in a high security prison and Category D generally being allocated to an open prison. For those on remand they are treated as either unallocated or provisional Category A. Given the history of their detention Category A conditions were considered appropriate.

3. Due to the need for this group to attend court hearings (Special Immigration Appeals Commission—SIAC) or at least to be able to consult regularly with their legal advisers, they remained at these two prisons until released on control orders or, in the case of some, transferred to a special hospital.

4. The Security Category was occasionally reviewed to ensure it remained appropriate. Throughout their time in prison custody, the detainees were subject to the application of Prison Rules.

Belmarsh Prison

Access to legal advisers

5. With the exception of initial arrival day at Belmarsh of those detained, all had access to their legal advisers while at the prison. The problems encountered on the day of arrival were quickly rectified so that the issue never arose again.

6. The detainees were able to contact their legal adviser in confidence under Rule 39 of the Prison Rules. Under this rule a letter to or from a detainee to their legal adviser would not be stopped or opened by a member of the prison staff unless there were suspicions about it eg containing an unauthorised item. If a letter was to be opened, then such opening would be undertaken by the Governor in the presence of the prisoner. Even then the letter should not be read. A person is also able to telephone their solicitor. Again such calls are in confidence and the content not subject to any form of monitoring.

7. The detainees were able to have frequent visits with their legal advisers. Legal visits at Belmarsh take place every weekday. The only restriction is availability of space, taking into account the need for other prisoners to have access to their legal advisers. For this reason advance bookings are required.

Access to family/friends

8. All prisoners (including the detainees) were able to speak to members of their family/friends by telephone (incoming calls not permitted) or can write and receive letters. Such contacts were liable to monitoring.

9. Prisoners (including detainees) were able to receive regular visits from family and friends. The only restriction is that for those classified Category A, the proposed visitor first has to become an Approved Visitor. This is a simple procedure but one necessary for reasons of security. All those detained received visits.

Location in prison

10. After a short spell in the High Security Unit, the detainees were located at Belmarsh on Houseblock 4. They were subject to the same regime applicable to all prisoners on the Houseblock. This regime permitted daily exercise (with others) in the open air subject to weather conditions permitting, association, attendance at education, attendance at religious worship, attendance at the library etc. On average the detainees were out of their cell for around seven hours per day.

Meals

11. In common with all other prisons, Belmarsh produced a variety of meals to meet the religious, dietary or medical needs of individual prisoners. Prisoners (including detainees) were provided with a pre-select menu sheet for the following week, from which they could select their choice of food. Menu sheets highlighted appropriate meals such as those containing halal meat. In addition prisoners (including detainees) were able to purchase additional food items from their own funds, via the prison canteen. They also had access to a kitchen area so as to cook their own food should they wish to do so.

Clothing

12. Prisoners (including detainees) were entitled to wear their own clothing. They were also able to purchase additional items via the prison canteen. The only restriction would be where any clothing conflicted with security requirements such as in colour or design, or the quantity was greater than could be permitted in the cell.

Cellular accommodation

13. Due to their security category the detainees were accommodated in single cells, as are all Category A prisoners. Each cell has a toilet and washbasin. It contains a bed, cupboard, table and chair. Prisoners are able to store personal property in the cell subject to an overall maximum size limit. They are also able to have a radio/CD and hire from the prison a television (£1 per week). Prisoners could make arrangements to obtain daily newspapers, magazines, and books suitable within a prison environment.

Education

14. The detainees were able to undertake a wide range of educational courses, studying for various qualifications as well as undertaking recreational activities. While the detainees were at Belmarsh a number undertook pottery courses although those classes had to be stopped for operational reasons. A number of the detainees did painting and cookery, while other studied English and computers.

Medical facilities

15. Belmarsh has a health care centre staffed by qualified doctors and nurses which is operational 24-hours a day. It has an in-patient unit and close contact with the local hospitals. In the event a prisoner develops a medical problem that cannot be dealt with at the prison, arrangements would be made for that person to be treated at the nearest hospital under NHS arrangements.

16. Prisoners have access to psychiatric and psychological services, physiotherapist services and dentistry services. In the case of one particular detainee who had substantial disability problems, Belmarsh obtained an agency Health Care Assistant to assist with his activities of daily living such as washing, toileting, dressing and eating.

17. Where the prisoner and/or his legal adviser wishes to have an independent medical examination payable by themselves, Belmarsh will make the necessary arrangements to facilitate this.

Religion

18. The need of prisoners to engage in religious worship is recognised. Arrangements are made so that prisoners are able to comply with requirements of their religion eg Ramadan. For Muslim prisoners Friday prayers are arranged by the prison Imam. Subject to any security issues all Muslim prisoners (including detainees) were allowed to attend Friday prayers. Where this was not possible, the Imam would make appropriate alternative arrangements.

Her Majesty's Prison Service

November 2006

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