
amnesty international

UNITED STATES OF AMERICA

Beyond the Law

Update to Amnesty International's April Memorandum to the US Government on the rights of detainees held in US custody in Guantánamo Bay and other locations

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More than 600 people are held in United States (US) military custody at the US naval base at Guantánamo Bay, Cuba, and elsewhere without charge or trial or access to the courts, lawyers or relatives. Most of the detainees – who are believed to be nationals of more than 40 countries – have been held in US custody for many months with no indication of when or if they will be released.

The US government has maintained that it is entitled to hold people in the above circumstances as “enemy combatants” under the “laws of war” in connection with the war in Afghanistan and the continuing threat to US national security posed by *al-Qa’ida*. The designation of such status has been used to justify detention without any recourse to the courts, on the decision of the executive, for an apparently indefinite period. However, international law does not permit people to be detained at the unfettered discretion of the executive, even in time of war or national emergency.

Amnesty International set out its concerns in a detailed memorandum to the US government in April 2002, to which the organization has received no response.¹ This document renews and updates these concerns. In addition to the legal situation of the detainees, Amnesty International remains disturbed by the physical conditions under which prisoners in Guantánamo Bay are detained which, together with the indefinite nature of the confinement, may cause severe mental and physical distress. The incommunicado detention of other detainees in unknown locations is also cause for concern, as is the situation of two US nationals held in military custody in the USA.

Amnesty International’s concerns are as follows:

¹ *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, 15 April 2002 (April Memorandum, AI Index: AMR 51/053/2002)

1. Protection from arbitrary detention

It is a basic principle of international law that no-one may be arbitrarily deprived of their liberty. Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), to which the USA is a party, provides that “Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention”. As a safeguard against arbitrary detention, Article 9 (4) of the ICCPR states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order his release if the detention is unlawful.” This is a right which cannot be derogated from in even in time of national emergency.²

Most of the Guantánamo detainees were taken into custody during the international armed conflict in Afghanistan - many reportedly turned over to the US by the Northern Alliance after they were captured on the battlefield. Under Article 4 of the Third Geneva Convention members of the armed forces of a party to an international armed conflict, as well as members of militias or volunteer corps forming part of such armed forces, are entitled to be granted prisoner of war status. Under Article 5 of the Third Geneva Convention, any dispute about the status of those taken into custody during such armed conflict must be determined on a case by case basis by a “competent tribunal”, operating through due process.³

Amnesty International noted in its April Memorandum that those captured and held by the USA during the conflict in Afghanistan, whether they belong to the Taliban or *al-Qa’ida*, must be presumed to be prisoners of war and afforded the protections of the Geneva Convention unless their status is determined otherwise by a competent tribunal. This would not preclude such persons being charged with crimes, in which case they would also be entitled to the full rights accorded to criminal suspects under international law, including access to lawyers. These rights would also extend to those who are treated as potential criminal suspects before charge: Amnesty International is concerned that detainees in US custody have been denied access to lawyers, in violation of their right to counsel recognized in Article 14(3)(b) and (d) of the ICCPR, despite reportedly being subjected to intensive interrogation for both intelligence and possible prosecutorial purposes.

The International Committee of the Red Cross Commentary to Article 4 of the Fourth Geneva Convention states that: “Every person in enemy hands must have some status under international law; he is either a prisoner of war... covered by the Third Convention, a civilian covered by the Fourth Convention, or...a member of the medical personnel of the armed forces covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law* (emphasis added).”

The USA, however, has refused to recognize any of those in its custody as prisoners of war; nor has it allowed their status to be determined by a “competent tribunal”. At the same time, it has refused to afford them the protections to which detainees are entitled under international human rights law, such as those set out under the relevant provisions of the ICCPR, and under international humanitarian law, specifically Article 75 of Protocol I

² As Amnesty International points out in its Memorandum of April 2002, the ICCPR applies to all persons subject to the jurisdiction of a state party, including non-nationals held in places outside the territory of a state party under its control (p 5).

³ Article 5 of the Third Geneva Convention states: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”.

Additional to the Geneva Conventions, which the USA has recognized reflects customary international law. The detainees at present have effectively been placed beyond the reach of the courts in what a UK court has recently referred to as a “legal black hole”.⁴ This is an untenable position under international law.

The US Government’s obligation to adhere to international standards in its treatment of all those detained during the course of the conflict in Afghanistan was emphasized by the UN High Commissioner for Human Rights in a statement on 16 January 2002. She stated that all such persons are “entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Convention of 1949.” The statement went on to say that “The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Geneva Convention.”

In March 2001, the Inter-American Commission on Human Rights (IACHR) wrote to the US government, citing US obligations under international law (including Article 5 of the Geneva Conventions and Article XIII of the American Declaration on the Rights and Duties of Man) and requesting that the USA: “Take urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent Tribunal”. In a further letter of 23 July 2002, the IACHR requested urgent precautionary measures, stating that “it is not sufficient for a detaining power to simply assert its view of the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status”. The Commission went on to state that “doubts continue to exist concerning the legal status of the detainees” and that “... the nature and extent of rights afforded to the detainees remain entirely at the discretion of the US government ... as indicated by the Commission in its initial request, this is not sufficient to comply with the United States’ international obligations”.

It is also worth drawing attention to observations made in a recent Court of Appeal judgment in the case of a British national detained in Guantánamo Bay. While the judgment rejected the plaintiff’s claim that the UK Government had jurisdiction over the matter, the judges were nevertheless strongly critical of the lawfulness of the detention, commenting that:

“... we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a ‘legal black hole’ ...

What 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.”

The urgency of the situation is compounded by the fact that not all those in custody in Guantánamo were arrested on the battlefield. There remains substantial doubt about the status of some detainees and whether there is ground for their lawful detention. Although the USA has designated all of them as “enemy combatants”, media reports about several recently released detainees suggest that people who are not likely to have been fighters (including men aged over 70) have been detained in Guantánamo, and one of those released said that he and others were forced to fight for the Taleban. Others, it is claimed, were in Afghanistan for purposes unconnected with *al-Qa’ida* or the Taleban. They include around a dozen Kuwaitis

⁴ Judgment given by Lord Phillips, Master of the Rolls, Court of Appeal England and Wales, on 6 November 2002 in the case of *Abbasi and another v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, Case No: C/2002/0617A; 0617B.

whose families insist they were not members of *al-Qa'ida* or the Taleban but relief workers who were assisting refugees when they were caught up in the conflict.

Several people have been transferred to Guantánamo from other countries, including six Algerians seized in Bosnia-Herzegovina in January 2002 whose removal has been found to violate international law.⁵ The doubts about the legal status of these and other detainees make it even more disturbing that the US has failed to offer any opportunity for cases to be reviewed by an appropriate tribunal.

2. Release or trial of detainees following the end of the international armed conflict in Afghanistan.

Under the Geneva Conventions, state parties to an international armed conflict are entitled to hold combatants as prisoners of war until the “cessation of active hostilities”, after which those detained must be repatriated.⁶ Although the US government has not granted any of the detainees captured during this conflict POW status it has nevertheless said it would treat the prisoners in a manner which was “reasonably consistent” with the Geneva Conventions. As the international armed conflict in Afghanistan ended with the defeat of the Taleban and the installation of an interim government allied to the USA, those detainees who would have been entitled to POW status are now entitled to repatriation unless they are to be charged with a recognizably criminal offence or face serious human rights abuses if returned to their own countries.

Amnesty International is concerned that the US Government has raised the prospect of holding detainees indefinitely without charge or trial on the ground that the threat from *al-Qa'ida* extending across state boundaries is continuing. However, there is no basis for this contention in international humanitarian law, which applies to the situations of armed conflict specified in the Geneva Conventions and their Protocols. State action against those operating outside the arena of armed conflict is a matter for law enforcement and should be carried out with full respect for international human rights law and standards.

Amnesty International urges the US Government to take immediate steps to ensure the voluntary repatriation of all those detained as combatants during the international armed conflict in Afghanistan, unless they are to be charged with a recognizably criminal offence or face serious human rights abuses if returned. Anyone not involved in the hostilities and against whom there are no pending criminal charges should be immediately released. Under international law, anyone found to have been unlawfully detained is entitled to receive reparations.

⁵ On 11 October 2002 the Human Rights Chamber of Bosnia and Herzegovina concluded that the treatment of four of the Algerians violated several of their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the right to liberty and security of the person and the right not to be arbitrarily expelled in the absence of a fair procedure. In January 2002, the representative in Bosnia-Herzegovina of the UN High Commissioner for Human Rights described the case of the Algerians as one of “extrajudicial removal from sovereign territory” (see April Memorandum, page 12).

⁶ Under the Geneva Conventions prisoners of war (POWs) cannot be tried for the mere fact of having been involved in military actions but can be tried for war crimes and crimes against humanity as well as other crimes. The Geneva Conventions provide that, when tried, a POW is entitled to the same procedural rights as a member of the detaining state’s military would receive in the same circumstances. Such procedural rights are only a minimum and international law recognizes a broader framework of procedural guarantees applicable to all persons.

Any detainee who is suspected of having committed serious human rights abuses should be brought to justice, whether in the USA, their country of origin or other countries, in proceedings that afford these suspects their rights under international law and standards, including the presumption of innocence; prompt access to legal counsel; communication with family; opportunity to challenge the basis for the detention in an impartial procedure and other fair trial guarantees, and no resort to the death penalty.

Detainees in Guantánamo and elsewhere who would face serious human rights abuses (including unfair trial) if they were repatriated or handed over to another country must be protected against such an eventuality (principle of non-refoulement). Any detainee has the right to seek asylum and to have claims for protection assessed in a fair and satisfactory procedure. Anyone excluded from asylum under the exclusionary clauses of the 1951 Refugee Convention must still have their individual claims for protection assessed in a fair and impartial procedure and the principle of non-refoulement still applies.

3. Military commissions

As Amnesty International has stated in its previous communications with the US government, the military commissions, executive bodies established under the Military Order signed by President Bush in November 2001 would not meet international standards for a fair trial.⁷ They are not independent and impartial courts; they curtail the right of appeal; and they allow a lower standard of evidence than ordinary civilian courts in the USA. It is not even clear what law they would apply. By providing a lower standard of justice for foreign nationals than similarly placed US nationals, they would also be in violation of international law prohibiting discriminatory treatment. Amnesty International is further concerned that, despite their procedural shortcomings, the commissions would have the power to impose death sentences. Amnesty International would oppose any trials before such bodies and again urges President Bush not to name anyone to appear before the military commissions, and to rescind the military order.

4. Conditions of detention in Guantánamo Bay

The US government has stressed that the detainees at Guantánamo Bay are being treated humanely and are provided with adequate food and medical care and are able to practice their religion. However, Amnesty International remains concerned by reports that the detainees are confined for virtually 24 hours a day to small, solitary cells with no more than 30 minutes exercise a week, taken alone and in shackles. The lack of exercise directly contravenes the UN Standard Minimum Rules for the Treatment of Prisoners which has long been the international standard. The Rules require that all prisoners should receive a minimum of one hour a day of outdoor exercise. The need for adequate exercise becomes even more important in cases where detainees or prisoners are confined to cells. The conditions inside the cells are reportedly made worse by stifling heat. Although it has been reported that detainees can communicate with one another to some extent through the mesh at the front of the cells, any interaction with guards is allegedly discouraged and detainees are frequently moved to prevent them from establishing contacts. Some prisoners have reportedly been kept in enclosed isolation cells.

The above conditions, particularly when imposed long-term or indefinitely, can cause significant physical and mental health problems and may amount to cruel, inhuman or degrading treatment in violation of international treaties to which the US is a state party. The

⁷ AI Memorandum, pages 44-58.

detainees' very limited contact with the outside world,⁸ together with lack of any information as to when they might be released, is liable to exacerbate any suffering inherent in the conditions of confinement. A number of detainees are reported to have attempted suicide in recent months.

Several recently released detainees have said they were interrogated repeatedly, for hours, while in shackles during their detention. In its April Memorandum, Amnesty International expressed its deep concern about the continuing interrogations of detainees, without their having access to lawyers and with a view to possible prosecution. The organization remains concerned about this issue, especially as trials by military commissions, which may have the power to admit hearsay evidence and coerced testimony, remain a possibility. Amnesty International is further concerned by allegations that detainees have been subjected to sleep deprivation and have been woken up during the night to be taken for questioning.

In its Memorandum, Amnesty International also expressed concern about the conditions under which detainees have been transported during the 22-hour flight to Guantánamo. Recently published photographs purport to show detainees in US custody sitting on the floor of a military aircraft hooded, chained at the feet with their wrists shackled behind their backs and their bodies supported only by lengths of tape running along the width of the aircraft. International standards provide that restraints may be used as a precaution against escape, damage or injury but must be applied for no longer than strictly necessary and in a manner consistent with international law which prohibits cruel, inhuman or degrading treatment. The manner in which the detainees have apparently been made to sit on aircraft while in restraints would appear to cause unnecessary physical hardship, inconsistent with these standards.

Amnesty International urges that all those held in US custody are provided with adequate standards of humane treatment at all stages of their detention. Detainees who continue to be held at Guantánamo Bay should immediately be provided with adequate exercise. No detainee should be held long-term in small cells for 23 or 24 hours a day.

5. Prisoners in US custody in undisclosed locations

Amnesty International is also concerned that a number of people have been publicly reported to have been taken into US custody but are apparently not in Guantánamo and their whereabouts remain unknown. It is feared that such individuals may not have access to any outside representatives, including the ICRC. Incommunicado detention in an undisclosed location is in clear violation of international law and standards.⁹ Amnesty International urges the US government to provide clarification on the whereabouts and legal status of the following individuals if still detained.

Abu Zubaydah, Saudi national, arrested in Pakistan on 28 March 2002;

Umar al-Faruq, arrested in Indonesia on 5 June 2002;

⁸ Although detainees have been able to write to and receive letters from their families, long delays have been reported in some cases. An Afghan man released in October said he had spent 11 months at Guantánamo completely cut off from the outside world; he received a letter from his family (date-stamped June 2002) only three days before his release.

⁹ These include standards providing that all detained persons should be notified of their rights, including the right to inform family members of the detention and place of confinement; and the right of foreign nationals to contact their embassy or an international organization. Other rights include prompt access to and assistance of a lawyer; the right to be informed of the reasons for the arrest or detention and other protections against arbitrary detention set out under Article 9 of the ICCPR.

Ramzi bin al-Shibh (or bin al-Shiba), Yemeni national, arrested in Pakistan on 11 September 2002;

Sayf al-Islam al-Masri, arrested early October 2002 in Georgia;

Ibn al-Shaykh al-Libi, Libyan national taken into US military custody in Afghanistan in January 2002;

Muhammad Mansur Jabara, dual national of Kuwait and Canada, arrested in Oman in March 2002 and reportedly transferred to the USA, possibly via Canada.

Amnesty International urges that all those detained be immediately afforded safeguards under international law, including the right to inform family members of their place of detention; to be visited by counsel of their own choice; to humane treatment in custody; and to other protections guaranteed to detained persons.

In its April Memorandum, Amnesty International raised concern about reports that one of the above, Abu Zubaydah, who was arrested in Pakistan in March 2002 and handed over to US custody, may have been transferred to a third country where torture could be used during interrogation. Although the Secretary of Defense denied such reports, he refused to exclude the possibility that Abu Zubaydah could be in a country other than Afghanistan, Pakistan or the USA. Amnesty International recalls the US government's legal obligation not to send detainees to another country to be interrogated if there are substantial grounds for believing that the person would be at risk of torture or other cruel, inhuman or degrading treatment or punishment.

6. Yaser Esam Hamdi and Jose Padilla

Amnesty International is also concerned by the incommunicado detention without charge or trial of Yaser Esam Hamdi and Jose Padilla, two US citizens held in military custody aboard navy brigs on the US mainland. Yaser Esam Hamdi reportedly surrendered to the Northern Alliance during fighting in Afghanistan and was transferred to Virginia from Guantánamo Bay in April 2002. He has had no access to a lawyer since his capture. Jose Padilla (aka Abdullah Al Mujahir) was arrested at Chicago airport in May 2002 and was originally held on a material witness warrant on suspicion of involvement in an alleged conspiracy to detonate a radioactive "dirty bomb" against a US target. On 9 June, without notice to his court-appointed attorney, he was transferred to US military custody and has not had access to his lawyers since that date. On 4 December a federal district judge issued a ruling stating that Jose Padilla could have access to his attorney, under conditions which Amnesty International understands have yet to be finalized.¹⁰

The US government has asserted its right to hold both men as "enemy combatants" on the same basis as the detainees in Guantánamo Bay and elsewhere, despite the fact that Jose Padilla was arrested far from any battlefield and was originally held as an ordinary criminal suspect. Amnesty International is particularly concerned that the USA has attempted to circumvent the criminal justice system in this case and deny him the due process protections afforded other criminal suspects in the USA. Amnesty International believes that it is contrary to the right to equality of treatment, recognized in Article 14(1) of the ICCPR, to deny either man the protections afforded to all detained persons under international and US law and to seek to hold them indefinitely under such circumstances.

Although the US courts are currently reviewing these detentions, Amnesty International is concerned that the lawyers arguing their cases have thus far had no access to

¹⁰ Amnesty International understands this is currently under negotiation between Mr Padilla's attorney.

their clients during these proceedings. Although Jose Padilla has now been granted access under certain conditions, Yaser Esam Hamdi continues to be denied access to a lawyer. International law and standards provide that all detainees should have access to counsel, whether or not they are charged with a criminal offence, and expressly recognize that assistance of counsel is a basic component of the right to challenge the lawfulness of a detention.¹¹ Denial of access to lawyers during such proceedings may undermine the ability of detainees or their counsel to challenge effectively the legality of the detention as required under international law and standards.

Amnesty International urges the US government to provide both men with immediate, confidential and continuing access to lawyers and permit them to receive visits from family while their cases are being reviewed by the courts. Amnesty International further urges that they be charged with a recognizable offence within a reasonable period or released. If charged, they should have full protection of human rights and US law.

Incommunicado detention generally has been condemned by human rights bodies, including the UN Special Rapporteur on torture, as a human rights violation which can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Access to a lawyer is an important safeguard to ensure that detainees' rights are protected, not only with regard to criminal or other proceedings, but also with regard to conditions of detention and the detainees' physical and mental health.

In raising these concerns, Amnesty International fully recognizes the US government's obligations to take effective security measures when dealing with cases affecting the safety of the public. However, the government also has an obligation to ensure that any such measures do not compromise fundamental human rights safeguards under international law and standards. Amnesty International is concerned that the detainees held in US custody in Guantánamo and elsewhere as "enemy combatants" could be detained indefinitely in circumstances which amount to arbitrary detention. The organization urges that the US government take the necessary steps to ensure that basic safeguards are met with regard to all those in its custody, including the measures recommended above.

¹¹ Principle 11 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or be assisted by counsel as prescribed by law."

George W. Bush
President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500, USA

13 December 2002

Dear Mr President,

I am writing again to express Amnesty International's deep concern at the continuing detention of more than 600 people held in United States (US) military custody in Guantánamo Bay and elsewhere without charge or trial or access to the courts, lawyers or relatives.

Amnesty International set out its concerns in a detailed Memorandum to you last April to which we have received no response. This letter and the attached document renew and update our concerns. In addition to the legal situation of the detainees, we remain extremely disturbed by the physical conditions under which prisoners in Guantánamo Bay are detained which, together with the indefinite nature of the confinement, may cause severe mental and physical distress. The incommunicado detention of other detainees in unknown locations is also cause for concern, as is the situation of two US nationals held in military custody in the USA.

Amnesty International has made several requests to the US government to visit the detention facility at Guantánamo Bay, to which we have also received no response. We believe it is fundamental to the protection of human rights that detainees are not held in prolonged isolation in conditions shielded from public scrutiny. This letter renews our request for permission to visit Guantánamo Bay. If, as the government maintains, the detainees are being treated humanely, we would welcome an opportunity to view the conditions first-hand and to discuss any queries with the relevant authorities.

I am sending a copy of this letter and the attachment to Secretary of Defense Donald Rumsfeld, Secretary of State Colin Powell and Assistant Secretary of State Lorne Craner.

Yours sincerely

Irene Khan
Secretary General