ATTACKS ON JUSTICE – UNITED STATES OF AMERICA

Highlights

The 9/11 2001 attacks on the Pentagon and the World Trade Center have led to wars in Afghanistan (2001) and Iraq (2003) and the detention of thousands of individuals in detention centres in various countries including the Guantánamo Bay Naval Reserve in Cuba. Most of the detainees have been held for over two years without charges or access to a lawyer. The detainees were not recognized by the US government as prisoners of war nor were they allowed to have their legal status determined by a competent tribunal as required by the Geneva Conventions. The detention centres have become therefore a "legal black hole" where detainees have no legal status or legal rights. This situation led to a number of *habeas corpus* petitions being filed in 2002 on behalf of the detainees. These cases culminated in two very significant decisions of the Supreme Court in 2004, *Rasul v Bush* and *Hamdi v Rumsfeld,* establishing the jurisdiction of the federal courts over the *habeas* petitions as well as the due process rights of the detainees. The American Bar Association (ABA) approved in August 2003 the recommendations of the Commission on the 21st Century Judiciary concerning the appointment procedure of state court judges: the preferred system of state court judicial selection should be a commission-based appointive system to guarantee an effective and unbiased judicial independence. In addition, a segregated and independent budget is recommended for the judiciary as well as the establishment of independent commissions to fix judicial salaries.

BACKGROUND

On **11 September 2001**, the **al-Qaida** terrorist network used several hijacked commercial airliners to attack the World Trade Center buildings in New York City and the Pentagon in Washington, DC. Approximately 3,000 people died as a result of these attacks. On **18 September 2001** Congress authorized President George W. Bush, re-elected for a second term in 2004, to use all "necessary and appropriate force against those nations, organizations, and persons he [President Bush] determines" planned and executed these attacks ("*Authorization For Use of Military Force, 115 Stat. 224*"). In **October 2001** the President ordered US forces to Afghanistan to subdue al-Qaida and to defeat the Taliban government that supported it.

On 25 March 2003, US forces attacked **Iraq**, ostensibly precipitated by US claims that Iraq possessed weapons of mass destruction. Notwithstanding the ongoing UN weapons inspection programme and the inability of the US to obtain UN Security Council authorization to use force against Iraq, US-led forces invaded the country, rapidly defeated the Iraq army and overthrew the regime of Saddam Hussein.

The wars in Afghanistan and Iraq initiated a whole series of events that have led to numerous issues involving the independence of the judiciary and access to justice

through US courts. Thousands of detainees have been held in detention camps in Cuba, Iraq and Afghanistan. Access to justice and fair trial rights have been denied to the detainees by the authorities.

JUDICIARY

The USA has a tradition of an independent judiciary. Federal judges have life tenure and state judges are appointed or elected for long terms. However, certain reforms are needed in the method by which state judges are selected to assure a fully independent judiciary.

The procedure for appointing state judges varies significantly within the US. In some states judges are appointed by the governor with the consent of the state senate. In other states, potential candidates are selected by independent, non-partisan nominating bodies established by law and then appointed by the governor or general assembly. Finally, in many states, judges are chosen in popular elections. Such popular elections can involve either partisan or non-partisan ballots. Contested elections encourage the perception that judges are less than independent, and that justice is more available to the wealthy and the powerful, or those with partisan influence.

American Bar Association (ABA) President Alfred P. Carlton convened the **Commission on the 21st Century Judiciary** to study these problems and make recommendations to ensure the independence, impartiality and accountability of state judiciaries. During **2003** the commission, including both practising lawyers and members of the judiciary, held four public hearings in various cities in the United States. The hearings focused on developments in the states that have politicized the judiciary. In **July 2003**, the commission delivered its report "Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century to the American Bar Association" (http://www.abavideonews.org/ABA263/ExecSummary.htm). The recommendations of the commission were approved by the **ABA House of Delegates** in **August 2003**. As a private organization, ABA resolutions cannot directly affect the election of judges, although they may be considered by state legislatures considering changes in the selection process for judges.

The commission found that a number of factors have led to the excessive politicization of state courts. The number of controversial cases before state courts has grown in recent years. This trend has been exacerbated by the trend to use state constitutions as a basis for litigating constitutional rights and responsibilities. The interposition of intermediate appellate courts between the trial courts and courts of last resort has also meant that the highest appellate courts in many jurisdictions are deciding more high-profile cases. One of the results of these trends is that state judicial campaigns are focusing on highly political issues. The public tends to believe that judges are very influenced by their campaign contributors. In addition, the commission found that the lack of racial and other types of diversity among judges further undercuts public confidence in the judiciary. All these trends have had, according to the commission, a very adverse effect on the public's perceptions regarding the independence of the state judiciary.

The commission developed a list of key recommendations that would respond to some of the problems identified in their report (http://www.abavideonews.org/ABA263/ExecSummary.htm). Most importantly, the commission recommended that the preferred system of state court judicial selection should be a **commission-based appointive system**. In such a system the state governor would appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a non-partisan and neutral commission. The commission further recommended that the **judiciary's budget** should be segregated from that of the political branches, and that states should create **independent commissions** to establish judicial salaries.

Some of the observations and conclusions of the Commission on the 21st Century Judiciary find support in other commentators on the state judicial systems. In this sense, **Judith Kaye**, the Chief Judge of New York, proposed in her annual message on the state of the judiciary (**2004**) a number of reforms in the conduct of elections of judges in New York, such as creating judicial campaign conduct committees throughout the state to reduce negative campaigning and monitor the fairness of campaign statements. Judge Kaye also advocated exploring the possibility of public financing of judicial campaigns (http://www.courts.state.ny.us/admin/stateofjudiciary/soj2003.pdf).

Cases

Impartiality

Justice Scalia's refusal to recuse himself from the Supreme Court's decision in *In Re Richard B. Cheney*, 124 S. Ct. 2576 (2004), raised significant concerns with respect to his impartiality in light of his relationship with Vice President Dick Cheney. **On 5 January 2004**, Justice Scalia met **Vice President Cheney** for a three-day hunting trip in a Louisiana camp. It has been reported that he and Justice Scalia arrived in a government-owned plane. The trip took place three weeks after the Supreme Court decided to hear Mr Cheney's appeal against an order requiring him to disclose information concerning an energy task force he led. Justice Scalia is reported to have met the Vice President at least once before. In **November 2003**, when the Supreme Court was still considering whether to accept Mr Cheney's appeal, the two had a private diner with **Defence Secretary Rumsfeld**.

Impartiality requires judges to be unbiased through the existence of actual impartiality as well as the appearance of impartiality as seen through the eyes of a reasonable observer. The right to a fair trial by an independent and impartial tribunal is a fundamental human right. Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), to which the US is a party, states: "In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be determined to a fair and public hearing by a competent, independent and impartial tribunal established by law." Principle 2 of the *United Nations Principles on the Role of Lawyers*, adopted by the UN General Assembly in 1990, also states: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

The socializing that took place between the Vice President and Justice Scalia over a period of several days could be seen as compromising the justice's impartiality. Even if the justice and the Vice President did not discuss Mr Cheney's case during their three-day trip together at the camp, Justice Scalia's appearance of impartiality could reasonably be questioned.

The **Centre for the Independence of Judges and Lawyers** (CIJL/ICJ) expressed its concern in **February 2004** and requested the Chief Justice of the Supreme Court to ensure that international standards on the impartiality of judges are given effect by the Supreme Court (http://www.icj.org/news.php3?id_article=3241&lang=en).

Attacks on judges

In early **March 2005,** the husband and mother of US District Judge **Joan Humphrey Lefko** were murdered in Chicago at the judge's home. While followers of a white supremacist were initially suspected of being responsible for these attacks, the murderer appears to have been a very troubled individual who was bitter about the dismissal in 2004 of a malpractice case by Judge Lefko. A second incident involved the murder of a state judge, a court reporter and several law enforcement officers in Atlanta, Georgia also in **March 2005**. This series of killings was initiated when a man on trial for rape seized a deputy sheriff's gun in the courthouse. A "New York Times" editorial noted that such incidents are a serious threat to the rule of law, and that a searching review on the state and federal levels of judges' security inside and outside the courtroom was needed (See "New York Times": "Electrician Says in Suicide Note That He Killed Judge's Family", **11 March 2005**; "Suspect Kills 3, Including Judge in Atlanta Court", **12 March 2005**; "Protecting Judges" and "The Bench Under Siege", **14 March 2005**, all at http://www.nytimes.com/).

While these attacks are serious, they were isolated incidents by defendants adversely affected by litigation and do not represent a pattern of intimidation. Such incidents, while calling for careful scrutiny, are not new in the nation's history and probably constitute an ongoing and inevitable set of risks in the operation of a legal system.

Executive interference

The refusal by **Attorney-General John Ashcroft** to comply with a federal judge's order to make a witness available in the trial of suspected terrorist **Zacarias Moussaoui** was inconsistent with respect for the independence of the judiciary. Mr Mossaoui was arrested in **December 2001** in connection with the September 11 terrorist attacks and was charged with six conspiracy counts. In **September 2002**, Mr Moussaoui indicated that one aspect of his defence would be access to Mr **Ramzi Bin al-Shibh**, who had been arrested in Pakistan. On **31 January 2003**, US District Judge **Leonie Brinkema** ordered the government to allow Mr Moussaoui to conduct a videotaped deposition of Mr Bin-Shibh. The Government appealed against the ruling to the US Court of Appeals, arguing that producing Mr Bin al-Shibh would result in disclosure of classified information. In **July 2003** the court dismissed the appeal as interlocutory (*United States v Moussaoui,* 333 F.3rd 509 (4th Cir. 2003)). On **14 July 2003 Attorney-General Ashcroft**, in defiance of the court order, filed an affidavit refusing to produce Mr Bin al-Shibh for the deposition. This refusal to comply with the Court's order constituted an unjustifiable interference with the independence of the judiciary. The **Centre for the Independence of Judges and Lawyers** (CIJL/ICJ) condemned Attorney-General Ashcroft's refusal to respect federal court rulings under

the pretext of "threats to the national security" (http://www.icj.org/news.php3?id_article=2991&lang=en).

In **late 2003**, US District Judge **Leonie Brinkema** imposed sanctions on the Government, including holding that the Government could not seek the death penalty in the case, and rejected the Government's proposed substitutions for the witnesses' testimony. The Government appealed against this order. On **13 September 2004** the **Court of Appeals** rejected the **District Court's** position that all proposed substitutions for the witnesses' depositions were inadequate and held witness summaries could be submitted to the jury in lieu of the witnesses' deposition testimony (*United States v Moussaoui, 382 F3d. 453 (4th Cir. 2004)*). A petition for *certiorari*, to allow for the revision of the case, filed by the defendant, was denied on **21 March 2005** by the **US Supreme Court**.

Sentencing guidelines

On **28 July 2003**, Attorney-General **John Ashcroft** sent a directive to federal prosecutors to report to the Department of Justice all "downward departure" sentencing decisions – i.e. decisions departing from US sentencing guidelines that meet certain criteria. The Attorney-General's directive to federal prosecutors to compile for the Justice Department, in effect, a "blacklist" constitutes a serious infringement on the independence of the judiciary and the rule of law. Despite the stated purpose of sentencing guidelines, to reduce crime and generate more uniformity in judicial sentencing, guidelines, if strictly interpreted, do not take into account mitigating factors. Therefore sentencing should, to a large degree, remain within the discretion of judges who take into account the totality of the circumstances before issuing a ruling. When judges are dissuaded from issuing sentences based upon a consideration of the facts and the law before them and are instead pressured by the executive into giving sentences they deem excessive, their independence has been compromised.

The Centre for the Independence of Judges and Lawyers (CIJL/ICJ) urged the Attorney-General to revoke the directive for prosecutors to report judges who fall afoul of the guidelines and not apply the guidelines in a manner that would compromise judicial independence. In our opinion, imposing minimum sentencing guidelines on judges without allowing them a modicum of discretion and creating a list of those who depart from the said minimum guidelines constitutes a grave infringement upon the independence of the judiciary and jeopardizes the rule of law. (http://www.icj.org//news.php3?id_article=3023&lang=en).

LEGAL PROFESSION

Executive Order 13304, 68 Fed. Reg. 32315 (2003), issued on **28 May 2003,** prohibited the provision of goods, services and funds to more than 200 individuals and organizations in the former Yugoslavia. One of the **prohibited services** was the **provision of legal defence** to any individual or company enumerated in the list, unless exempted from the rule. The names of all suspects in the proceedings before the International Criminal Tribunal for the Former Yugoslavia (ICTY) were included in the list of individuals for whom the provision of legal defence was prohibited. At the time this order was issued, there were about 20 lawyers defending suspects at the international tribunal.

While the **Bush Administration** subsequently rescinded a portion of this order on **9 July 2003**, it required that lawyers representing defendants who were receiving fees directly from defendants, rather than from the tribunal, apply for a specific licence authorizing such payments and keep records of the receipt of such fees. Section 588.507 (a) of the *Office of Foreign Asset Control's (OFAC) regulations* contains a general licence authorizing the provision of legal services, but only to the extent that such services relate to US enforcement actions or property subject to US law: 31 CFR §588.507(a) (available at http://www.access.gpo.gov/nara/cfr/cfr-table-search.html, page1). While this regulation does not authorize representation before the **ICTY**, **OFAC** has issued a general licence authorizing the representation of person before the ICTY if the lawyer's fees are received from the ICTY (*Western Balkans Stabilization Regulations, General License No. 1*, available at http://www.treas.gov/offices/enforcement/ofac/programs/balkans/gls/balkans_gl1.pdf) . If an attorney is receiving fees directly from the client or other sources, such payment must be specifically licensed and records of receipt of such payments must be maintained and available for inspection ("No Legal Representation Without Governmental Interposition", 17 "Geo. J. Legal Ethics" 597 (2004), online at http://findarticles.com/p/articles/mi_qa3975/is_200407/ai_n9454348).

Such restrictions on the defence of suspects before the International Tribunal represent an interference with the independence of the legal profession and the capacity of the attorneys involved to represent their clients.

Cases

A recent conviction in the Federal Court has raised serious concerns that US lawyers may suffer reprisals for defending politically unpopular clients. This case involved **Lynne Stewart**, an attorney in New York City. Ms Stewart has built a career representing terrorists and others seen as threats to national security by the US government. Stewart was indicted in **2002** under the **1996 Antiterrorism Act** and charged with four counts of aiding and abetting a terrorist organization ("Lawyer Is Guilty of Aiding Terror", "New York Times", 11 Feb. 2005).The indictment indicated that Stewart's communications with her client **Sheik Omar Abdel Rahman** had been the subject of government wiretaps for more than two years. In **February 2005**, Stewart was convicted of providing material aid to terrorism and of lying to the government when she pledged to obey federal rules that barred her client, **Sheik Omar Abdel Rahman**, from communicating with his followers. The indictment had its source in Stewart's work over a decade defending Mr Rahman, who is serving a life sentence for inspiring a 1993 plot to bomb the United Nations, the Lincoln and Holland Tunnels and other New York landmarks.

The case has provoked a strong debate. Some lawyers who take politically unpopular cases argued after the verdict that the case was a warning that they could be indicted also. Other lawyers contended that the evidence indicated that Stewart had violated prison rules and passed messages on behalf of her client. Beyond the merits of the case, however, there was a concern among some lawyers who have represented politically unpopular clients that the conviction might deter lawyers from taking similar cases. An additional concern stemming from the case was the fact that the **Department of Justice** had placed cameras and recording devices in the area of the prison where Ms Stewart visited her client, which may be seen as jeopardizing the

confidentiality of Ms Stewart's communications with her client. ("Defendants of the Unpopular Feel a little Less Popular," "New York Times", **11 Feb. 2005**).

ACCESS TO JUSTICE

In response to the September 11 attacks and the subsequent wars in Afghanistan and Iraq, the United States has detained over the last three years thousands of people in Afghanistan, Pakistan, Iran, Zambia or Cuba as "enemy combatants", denying them since **February 2002** both prisoner-of-war status under the **Third Geneva Convention** and the protection of international human rights law. Most of these detainees have been held indefinitely, without charges and without any known legal status, incommunicado and without access to a lawyer or to their families. In addition, many of these detainees have been subjected to interrogation techniques that are inhumane and violate international standards.

As of **March 2005** there were, according to the **US Department of Defense**, approximately 540 detainees from about 40 countries held in **Guantánamo Bay**, the US Naval Base in Cuba, mostly captured during the armed conflict in Afghanistan. According to the **Pentagon**, 214 other detainees had "departed" the base, of whom 146 were released and 65 "transferred to the control of other governments" (29 to Pakistan, five to Morocco, seven to France, seven to Russia, four to Saudi Arabia, one each to Spain, Sweden, Kuwait and Australia and nine to the UK). The remaining detainees have been given no indication of when they will be released. In addition to the detainees at Guantánamo Bay, thousands of detainees have been held at other detention centres in Iraq and other countries. This situation has led to a number of extremely significant cases involving the rights of such detainees. Particularly important are *Rasul v Bush,* 124 S. Ct. 2686 (2004), and *Hamdi v Rumsfeld,* 124 S. Ct. 2633 (2004), two cases decided by the **US Supreme Court** on **28 June 2004**.

"Enemy combatants": lack of access to justice and fair trial rights

The refusal by the US to grant the detainees prisoner-of-war status is not consistent with its legal obligations under the *Geneva Conventions*. Article 4 of the *Third Geneva Convention* establishes the categories of persons who must be considered prisoners of war. As members of the armed forces, captured Taliban fighters are entitled to prisoner-of-war status. If captured al-Qaida members are acting under the same command as the Taliban armed forces, they are also entitled to prisoner-of-war status. In addition, al-Qaida members would have prisoner of war status if they fulfil four conditions: 1) they are commanded by a person responsible for his subordinates; 2) they wear a fixed emblem; 3) they carry arms openly; and 4) they conduct their operations in accordance with the laws and customs of war. If there are doubts as to whether any detainees are entitled to prisoner-of-war status, the *Third Geneva Convention* requires a determination by a "competent tribunal" (Article 5). Since the detainees were neither recognized as prisoners of war nor allowed to have their status determined by a competent tribunal, the detention centres became a "legal black hole" where the detainees had no legal status and no legal rights. As described below, this situation led to a number of *habeas corpus* petitions being filed on behalf of the detainees (http://www.icj.org/news.php3?id_article=3523&lang=en; http://www.icj.org/news.php3?id_article=3405&lang=en; http://www.icj.org/news.php3?id_article=2718&lang=en;

http://www.icj.org/news.php3?id_article=2700&lang=en;
http://www.icj.org/news.php3?id_article=2620&lang=en;
http://www.icj.org/news.php3?id_article=2621&lang=en;
http://www.icj.org/news.php3?id_article=2619&lang=en;
http://www.icj.org/news.php3?id_article=2612&lang=en;
http://www.icj.org/news.php3?id_article=2609&lang=en).

Rasul v Bush and *Hamdi v Rumsfeld*

The *Rasul* and *Hamdi* cases established the basic rights of both aliens and American citizens to access US courts to challenge their status as "enemy combatants". **Between 19 February and 1 May 2002** a number of *habeas corpus* petitions were filed with the **US District Court for the District of Columbia** on behalf of two Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban to challenge the legality of their detention at Guantánamo Bay. All petitioners alleged that none had been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. The relief sought included requests for their release, an order permitting counsel to meet with detainees, as well as access to the courts or some other impartial tribunal to exonerate the detainees from wrongdoing.

On **30 July 2002** the District Court dismissed the cases based on a finding that *Johnson v Eisentrager* (339 U.S. 763 (1950)) barred claims of an alien seeking to enforce the US Constitution in a *habeas* proceeding unless the alien is in custody in sovereign United States territory. On **11 March 2003** the US Court of Appeals affirmed the District Court's decision (*Al Odah v United States,* 321 F.3d 1134 (DC Cir. 2003). On **10 November 2003**, the US Supreme Court granted *certiorari* to allow for the revision of the case, (http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states;
http://supreme.lp.findlaw.com/supreme_court/orders/2003/111003pzor.html). **On 28 June 2004** (*Rasul v Bush,* 124 S. Ct. 2686 (2004); http://supct.law.cornell.edu/supct/html/03-334.ZO.html) the **Supreme Court** considered whether the *habeas* statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty", and reversed the DC Circuit's decision, remanding for the District Court to consider in the first instance the merits of petitioners' claims

The majority opinion found that several facts distinguished the **Guantánamo Bay petitioners** from the petitioners in *Eisentrager*. The Court noted that the Guantánamo Bay petitioners were not nationals of countries at war with the United States and that they denied that they had engaged in acts of aggression against the United States. The Court further indicated that petitioners had never been afforded access to any tribunal and that for more than two years they had been imprisoned in territory over which the United States exercises exclusive jurisdiction. In addition, the Court ruled that post-*Eisentrager* precedent required the recognition of statutory *habeas* jurisdiction even over cases brought by petitioners outside the territorial jurisdiction of any federal district court. The Court held that "aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority" under the *habeas* statute. The **International Commission of Jurists** filed an amicus brief in this proceeding (http://www.icj.org/news.php3?id_article=3223&lang=en.)

On the same day the **Supreme Court** considered in *Hamdi v Rumsfeld* an American citizen's due process challenge to his designation as an "enemy combatant" by the military (*Hamdi v Rumsfeld*, 124 S. Ct. 2633 (2004); http://supct.law.cornell.edu/supct/pdf/03-6696P.ZS).The Government classified **Hamdi**, who was captured during the war in Afghanistan and detained in a naval brig in Charleston, NC, as an "enemy combatant" for allegedly taking up arms with the Taliban. Hamdi's father filed a *habeas corpus* petition. The Government produced a Defense Department declaration that Hamdi was affiliated with a Taliban unit during the time when the Taliban was at war with the United States. The **US Court of Appeals** held that no factual inquiry or evidentiary hearing was necessary to rebut the Government's assertions and dismissed the *habeas* petition. The **Supreme Court** reversed the judgement. The Court found that resolution of a due process challenge such as Hamdi's required the balancing of Hamdi's private interest, the risk of erroneous deprivation of that interest, and the competing interests of the Government. Emphasizing the importance of maintaining due process safeguards during periods when the national security is threatened, the Court held "that a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker" (*Id*. at 2647-2648).

Combatant Status Review Tribunals

As a response to the *Rasul* and *Hamdi* **June 2004** Supreme Court decisions (http://supct.law.cornell.edu/supct/html/03-334.ZO.html ; http://supct.law.cornell.edu/supct/pdf/03-6696P.ZS), the US government established the **Combatant Status Review Tribunal (CSRT)**, panels of three military officers whose sole aim is to confirm or reject each detainee's status as a so-called "enemy combatant" (see above).

This is neither a court of law nor the "competent tribunal" required by the *Third Geneva Convention*. Unlike the latter, which presumes a detainee to be a prisoner of war until proved otherwise, the **CSRT** process places the burden on the detainee to disprove his "enemy combatant" status. The detainee does not have access to legal counsel or to secret evidence. Many have boycotted the CSRT process, and to date only two have been released as a result of it, while 230 have been confirmed as "enemy combatants".

Each detainee confirmed as an "enemy combatant" will also have an annual review of his case by an **Administrative Review Board (ARB)** to assess whether he "continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention". In **December 2004** the Pentagon announced that it had conducted its first ARB. Again, detainees have no access to lawyers or to secret evidence for this administrative review. Evidence extracted under torture or other coercion could be admitted by either body.

Post *Rasul* and *Hamdi* litigation

CSRT procedures and constitutional rights of detainees

The US District Court in Washington, DC recently issued several opinions concerning the **CSRT** procedures as well as the *habeas* proceedings that had been remanded to the Court by the Supreme Court. As of the end of **July 2004**, 13 cases involving more

than 60 detainees were pending before eight judges in the District Court. The Government moved to dismiss all 13 cases.

On **31 January 2005**, **US District Judge Green** issued an opinion denying the motion to dismiss a number of the *habeas* dockets (*In Re Guantanamo Bay Detainee Cases,* Docket Nos. 02-CV-0299, et al., US District Court for the District of Columbia, **Jan. 31, 2005**; https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0299-156; and https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0299-157). Judge Green initially addressed the effect of the ***Rasul*** decision on the *habeas* proceedings. The Government contended that the *Rasul* decision stood only for the proposition that the District Court had jurisdiction to consider the *habeas* petitions, and was silent on whether the detainees possess any rights under the US Constitution. Judge Green rejected this argument and interpreted the *Rasul* decision, together with other precedent, to "require the recognition that the detainees at Guantánamo Bay possess enforceable constitutional rights". Fundamental constitutional rights (including the right to due process), according to Judge Green, cannot be denied in territories under the control of the US, even where the US is not technically "sovereign" and even where the claimant is not a US citizen. Judge Green further found that the *Rasul* decision supports the conclusion that Guantánamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply. Judge Green emphasized that the majority opinion in *Rasul* found significant the territorial nature of Guantánamo Bay and dismissed the **DC Circuit**'s characterization of Guantánamo Bay as nothing more than a foreign military prison. It was at least implicit in the reasoning of *Rasul*, according to Judge Green, that the Court considered the petitioners to be within a territory in which constitutional rights are guaranteed. Therefore Judge Green treated the naval reserve as the equivalent of sovereign US territory where fundamental constitutional rights exist. Judge Green also concluded that "the CSRT procedures are unconstitutional for failing to comport with the requirements of due process": no detainee is permitted access to any classified information nor is any detainee permitted to have counsel review and challenge the classified information on his behalf. Therefore the CSRT "fail[s] to provide the detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an 'enemy combatant'". Second, the CSRT procedures are constitutionally defective in some cases because the CSRT relied on statements allegedly obtained by torture. The **Supreme Court** has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment.

On **19 January 2005 US District Court Judge Richard J. Leon** issued a separate order involving one of the *habeas* cases, in which he disagreed with almost all of the conclusions reached by Judge Green. Dismissing the *habeas* application before him, Judge Leon found that non-resident aliens captured and detained outside the US have no cognizable constitutional rights. Judge Leon noted that this was the holding of ***Johnson v Eisentrager*** and that nothing in the ***Rasul*** opinion was inconsistent with the holding of *Eisentrager*. According to Judge Leon, the Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantánamo have a right to judicial review of the legality of their detention under the *habeas* statute and, therefore, did not concern itself with whether the petitioners has any independent constitutional rights (*Memorandum Opinion and Order, Docket No.*

1:04-1142 (RJL) and 1:04-1166 (RJL), US District Court for the District of Columbia (**19 January 2005**), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1142-70). The inconsistent orders of Judge Green and Judge Leon will be resolved by the **US Court of Appeals** and, ultimately, by the **Supreme Court**.

Transfer of detainees

Following Judge Green's decision (see above), lawyers who had been filing petitions for the detainees sought a judicial order preventing the government from transferring them out of Guantánamo without giving 30 days' notice. The lawyers were concerned that the government might seek to avoid further adverse court rulings by transferring out of the base the detainees whose cases were before the courts. There was due to be a hearing on the issue on **24 March 2005**. The "New York Times" had previously reported **on 10 March 2005** that the Pentagon was seeking to transfer hundreds of Guantánamo detainees to prisons in Saudi Arabia, Afghanistan and Yemen in a bid to halve the number of prisoners at the Cuba base. As a result, lawyers have begun filing for temporary restraining orders preventing transfers of detainees, concerned that they may face torture or ill-treatment in the country to which they are transferred.

On **12 March 2005**, US **District Judge Rosemary Collyer** for the District of Columbia issued the temporary injunction after lawyers for 13 Yemeni detainees filed an emergency petition to stop what they perceived as an imminent transfer of their clients, and until a hearing is held on their lawyers' request for at least 30 days' notice if their clients are to be transferred (http://www.swissinfo.org/sen/swissinfo.html?siteSect=143&sid=5598837). In the judge's opinion, "While the Supreme Court has granted [Guantánamo prisoners] a right of access to our court system, such a transfer would terminate that right... because US courts would no longer have control over their warden. … The [Yemeni] petitioners ... raise serious arguments that require more deliberative consideration concerning whether removing them from the [US] court's jurisdiction while insisting on continued detention is within the province of the executive."

On **29 March 2005**, US District **Judge Henry H. Kennedy, Jr**. granted in ***Abdah v Bush*** (https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1254-146; https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1254-147; http://www.washingtonpost.com/ac2/wp-dyn/A10997-2005Mar29?language=printer) a preliminary injunction prohibiting the US government from transferring the 13 Yemeni detainees to foreign countries. The detainees seek a preliminary injunction requiring the government to provide their lawyers with 30 days' advance notice of "any intended removal of Petitioners from Guantanamo Bay Naval Base", to enable them to contest the removal if they deem it advisable to do so. Judge Kennedy noted that according to Judge Green's ruling the defendants "have the fundamental right to due process of law under the Fifth Amendment". In his opinion, the fact that "Petitioners' enemy combatant status was recently confirmed in Combatant Status Review Tribunals' ignores Judge Green's ruling that the CSRTs as so far implemented are constitutionally deficient. Instead, this factor tilts in Petitioners' favour, because the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process." Petitioners contend that "Respondents have contemplated or are contemplating removal of some or all Petitioners from Guantánamo to foreign territories for torture or indefinite

imprisonment without due process of law", fearing that any such transfer would "also circumvent Petitioners' right to adjudicate the legality of their detention". He noted that the defendants' *habeas corpus* applications are on appeal from Judge Green's decision and that such removal would effectively deprive the Court of jurisdiction over the cases.

Allegations of Torture

Ever since the first photographs appeared **during 2004** of US military personnel mistreating detainees at the **Abu Ghraib prison** in Iraq, there have been repeated and widespread allegations of torture of detainees in US custody. While the US government has sought to portray the abuse as the work of a few "bad apples", many organizations have alleged that the pattern of abuse did not result from the acts of a few individual soldiers, but resulted from deliberate policy decisions made by the Bush administration.

These charges lie at the heart of a lawsuit filed in late **February 2005** in the **US District Court in the Northern District of Illinois**, captioned ***Ali et al. v Rumsfeld***, on behalf of eight released detainees who allege that they were subject to torture and abuse at the hands of US forces under the command of Secretary Rumsfeld. The parties seek a court order declaring that Secretary Rumsfeld's actions violated the US Constitution, federal statutes and international law. As of **April 2005**, no responsive pleading has been filed by the Government. The case raises serious concerns about the degree of access to justice which plaintiffs will be able to obtain because the acts of mistreatment alleged in the complaint generally occurred in detention centres in Iraq or Afghanistan. The extraterritorial nature of the allegations raises issues concerning the applicability of US statutes and the US Constitution to acts committed outside US territory.

Military Commissions

President Bush signed a ***Military Order*** on **13 November 2001**, authorizing the establishment of **Military Commissions to try suspected international terrorists** ("*Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*", 66 Fed. Reg. 57, 833 (16 November 2001, hereinafter "MO"). The Pentagon released the procedures for military commissions on **21 March 2002** (*Military Commission Order No. 1* (M.C.O. No. 1), 32 C.F.R. §9.1, et seq.), and, on **30 April 2003**, released eight **"*Military Commission Instructions*"** (*MCI Nos. 1–8*) to elaborate on these procedural rules (http://www.defenselink.mil/news/commissions.html). The *Military Commission Instructions* set forth the elements of the crimes to be tried, establish guidelines for civilian attorneys, and provide other administrative guidance.

The *MO* provided for non-US nationals suspected of involvement in "international terrorism" to be held indefinitely without trial or to be tried by military commissions. Military Commissions have the power to hand down death sentences with no right of appeal to any court. The prospect of trials before these executive bodies rather than independent and impartial courts has caused international concern. Indeed, the **US administration** has exempted its own nationals from the scope of the Military Order.

In **July 2003,** President Bush determined that 15 of the detainees at the US Naval Station in Guantánamo Bay were subject to the *MO* and may be charged and tried

before military commissions. In **November 2004**, pre-trial hearings for the first four detainees charged in preparation for trial by commission took place.

The **proceedings** were suspended the same month since **Judge James Robertson**, the US District Judge presiding over **Hamdan**'s *habeas corpus* appeal in federal court in Washington DC, issued an order stating that Hamdan could not be tried by a military commission as charged (*Hamdan v Rumsfeld,* 344 F. Supp.2d 152 (2004); http://www.defenselink.mil/news/Jan2006/d20060104Qosistay8Nov04.pdf). Judge Robertson ordered that unless and until a "competent tribunal", as required under Article 5 of the *Third Geneva Convention*, determined that Hamdan is not entitled to prisoner-of-war status, he may only be tried by court martial under the USA's *Uniform Code of Military Justice* (UCMJ). "Until or unless such a tribunal decides otherwise," Judge Robertson wrote, "Hamdan has, and must be accorded, the full protections of a prisoner-of-war." The judge found the *Third Geneva Convention* to be a "self-executing" treaty.

Judge Robertson dealt a blow to a central tenet of the US administration's "war on terror" detention policy – i.e. President Bush's determination that the *Geneva Conventions* did not apply to alleged al-Qaida suspects captured during the war in Afghanistan and that neither they nor Taliban suspects were entitled to prisoner-of-war status. This presidential decision was widely criticized, including by the **International Committee of the Red Cross**, the most authoritative body on the provisions of the Geneva Conventions. Judge Robertson concluded that "[n]otwithstanding the President's view … the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there". He noted that "[t]he President is not a tribunal", and also pointed out that the **CSRT**s set up by the administration in June 2004 (see Combatant Status Review Tribunals above) did not constitute the "competent tribunals" required by the *Third Geneva Convention* (after a hearing on **3 October 2004**, a CSRT found that Hamdan was a so-called "enemy combatant").

The government has appealed to a higher court, arguing that the judge's ruling "constitutes an extraordinary intrusion into the Executive's power to conduct military operations". The government also argues that the district court should not have interfered in the military commission prior to completion, that Hamdan is not entitled to protection from the *Geneva Conventions* and that the President has inherent authority to establish military commissions, which need not conform to statutes regulating military courts martial.

In addition to this, the rules established by the **Department of Defense** raise many due process concerns. Amongst the most troubling features of the procedural rules are restrictions on access to evidence by civilian defence counsel and defendants. Under the regulations, the Military Commission must hold open hearings except where otherwise decided by the Appointing Authority or the Presiding Officer (32 C.F.R. §§ 9.6(b) (3), (d)(5)). However, the accused himself may be excused from the proceedings, and evidence may be received that he will never see (because his lawyer will be forbidden to show it to him). Judge Robertson found such a procedural rule inarguably inconsistent with due process standards by stating that "the right to trial 'in one's presence' is established as a matter of international humanitarian and human rights law".

Under the **Defense Department rules**, the military commissions will deprive defendants of independent judicial oversight by a civilian court; improperly subject criminal suspects to military trials; place review of important interlocutory questions with the charging authority; fail to guarantee that evidence obtained via torture or ill-treatment shall not be used; allow wide latitude to close proceedings and impose a "gag order" on defence counsel; deprive military defence counsel of normal protections afforded military lawyers from improper "command influence"; restrict the defendant's right to choose legal counsel; and provide lower due process standards for non-citizens than for US citizens (http://hrw.org/backgrounder/usa/military-commissions.htm; "The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice", Congressional Research Service Report for Congress, Jenifer Elsea, updated **4 August 2005**, http://www.fas.org/irp/crs/RL31600.pdf).

The **International Commission of Jurists** (ICJ) has repeatedly expressed its concern over the lack of rule of law surrounding Guantánamo Bay detainees (http://www.icj.org/news.php3?id_article=2609&lang=en ; http://www.icj.org/news.php3?id_article=3523&lang=en; http://www.icj.org/news.php3?id_article=3405&lang=en; http://www.icj.org/news.php3?id_article=2718&lang=en; http://www.icj.org/news.php3?id_article=2700&lang=en; http://www.icj.org/news.php3?id_article=2620&lang=en; http://www.icj.org/news.php3?id_article=2621&lang=en; http://www.icj.org/news.php3?id_article=2619&lang=en; http://www.icj.org/news.php3?id_article=2612&lang=en).

The International Criminal Court (ICC)

The US in recent years has proceeded to make a number of efforts to systematically undermine the **International Criminal Court** and reduce or eliminate its availability as a forum for providing redress for international crimes. On **2 April 2002**, the **International Commission of Jurists** (ICJ) sent a letter to President Bush urging that the US desist from efforts to undermine the *ICC treaty*, including withdrawal of its signature (http://www.icj.org//news.php3?id_article=2626&lang=en).

In **May 2002** the US removed its signature from the *Rome Statute for an International Criminal Court*. In **July 2002** the US indicated that unless its personnel were granted immunity from the jurisdiction of the **ICC**, it would veto extension of the UN peacekeeping mission to Bosnia. This action appeared to reflect fears that US peacekeepers would face politically motivated prosecutions even though the ICC can only exercise its jurisdiction once remedies in national courts are exhausted. As the ICJ noted in a press release, this action appeared to be another attempt to threaten the integrity of the *Rome Statute* and the effectiveness of the ICC (http://www.icj.org//news.php3?id_article=2637&lang=en). By seeking immunity for its personnel, the US undermined the principle that there can be no immunity for anyone for horrific crimes such as genocide, war crimes and crimes against humanity. The US subsequently continued this strategy by attempting to convince other countries to grant immunity for US nationals from the ICC by threatening to withdraw military aid. The US approached officials around the world to sign special agreements

(so-called “Article 98 agreements” after a provision in the ICC treaty), allowing immunity for US military personnel and peacekeepers from the jurisdiction of the ICC. The US announced that countries supporting the Court without creating an exemption for US nationals could face a withdrawal of US support for military education and training, as well as financing for military weapons and equipment (http://www.icj.org//news.php3?id_article=2644&lang=en). The threat to cut off military aid appears to be part of a multi-pronged effort by the US Government to undermine the International Criminal Court.