

GUANTANAMO: IMPLICATIONS FOR U.S. HUMAN RIGHTS LEADERSHIP

HEARING BEFORE THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

JUNE 21, 2007

Printed for the use of the
Commission on Security and Cooperation in Europe

[CSCE 110-1-2]



Available via <http://www.csce.gov>

U.S. GOVERNMENT PRINTING OFFICE

38-491 PDF

WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMISSION ON SECURITY AND COOPERATION IN EUROPE

LEGISLATIVE BRANCH COMMISSIONERS

HOUSE

ALCEE L. HASTINGS, Florida,
Chairman
LOUISE McINTOSH SLAUGHTER,
New York
MIKE McINTYRE, North Carolina
HILDA L. SOLIS, California
G.K. BUTTERFIELD, North Carolina
CHRISTOPHER H. SMITH, New Jersey
ROBERT B. ADERHOLT, Alabama
JOSEPH R. PITTS, Pennsylvania
MIKE PENCE, Indiana

SENATE

BENJAMIN L. CARDIN, Maryland,
Co-Chairman
RUSSELL D. FEINGOLD, Wisconsin
CHRISTOPHER J. DODD, Connecticut
HILLARY RODHAM CLINTON, New York
JOHN F. KERRY, Massachusetts
SAM BROWNBACK, Kansas
GORDON SMITH, Oregon
SAXBY CHAMBLISS, Georgia
RICHARD BURR, North Carolina

EXECUTIVE BRANCH COMMISSIONERS

VACANT, Department of State
VACANT, Department of Defense
VACANT, Department of Commerce

GUANTANAMO: IMPLICATIONS FOR U.S. HUMAN RIGHTS LEADERSHIP

JUNE 21, 2007

COMMISSIONERS

	Page
Hon. Alcee L. Hastings, Chairman, Commission on Security and Cooperation in Europe	1
Hon. Benjamin L. Cardin, Co-Chairman, Commission on Security and Cooperation in Europe	16

MEMBERS

Hon. Steny H. Hoyer, Majority Leader, U.S. House of Representatives	8
---	---

WITNESSES

John B. Bellinger III, Legal Adviser, Department of State	3
Anne-Marie Lizin, President of the Belgian Senate and the OSCE Parliamentary Assembly, Special Representative on Guantanamo	11
Tom Malinowski, Advocacy Director, Human Rights Watch ...	26
Gabor Rona, International Legal Director, Human Rights First	30

APPENDICES

Prepared statement of Hon. Alcee L. Hastings	37
Prepared statement of Hon. Benjamin L. Cardin	39
Prepared statement of Hon. Christopher J. Dodd, Commissioner, Commission on Security and Cooperation in Europe	41
Prepared statement of Hon. Hilda L. Solis, Commissioner, Commission on Security and Cooperation in Europe	42
Prepared statement of Hon. Steny H. Hoyer	43
Prepared statement of John B. Bellinger III	45

IV

	Page
Prepared statement of Tom Malinowski	49
Prepared statement of Gabor Rona	55
Prepared statement submitted for the record by the International Helsinki Federation for Human Rights	71

GUANTANAMO: IMPLICATIONS FOR U.S. HUMAN RIGHTS LEADERSHIP

June 21, 2007

COMMISSION ON SECURITY AND COOPERATION IN EUROPE
WASHINGTON, DC

The hearing was held at 10 a.m. in room 2325 Rayburn House Office Building, Washington, DC, Hon. Alcee L. Hastings, Chairman, Commission on Security and Cooperation in Europe, presiding.

Commissioners present: Hon. Alcee L. Hastings, Chairman, Commission on Security and Cooperation in Europe; Hon. Benjamin L. Cardin, Co-Chairman, Commission on Security and Cooperation in Europe; and Hon. Mike McIntyre, Commissioner, Commission on Security and Cooperation in Europe.

Members present: Steny H. Hoyer, Majority Leader, U.S. House of Representatives.

Witnesses present: John B. Bellinger III, Legal Adviser, Department of State; Anne-Marie Lizin, President of the Belgian Senate and the OSCE Parliamentary Assembly, Special Representative on Guantanamo; Tom Malinowski, Advocacy Director, Human Rights Watch; and Gabor Rona, International Legal Director, Human Rights First.

HON. ALCEE L. HASTINGS, CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. HASTINGS. Well, that gets us right on time.

Mr. Bellinger, thank you very much.

Ladies and gentlemen, I'd like to call this hearing to order. Pretty obviously, it's an extremely busy day, and my colleagues on the Commission will drift in and out as we progress.

But in the interest of everyone's time, I'd like for us to begin. I'd like to start by welcoming you, Mr. Bellinger.

I expect the Majority Leader, Steny Hoyer, will be here at some point. I'd hoped that he would be able to kick us off, but we'll listen to him when he gets here under the circumstances.

This is the Helsinki Commission's first hearing in some time examining an issue of domestic compliance, an area which will receive warranted attention during my chairmanship.

As many people here know, in executing the Helsinki Commission's mandate, members of this Commission are engaged in a continual dialogue with representatives of other countries, including parliamentarians, on issues of concern, with a particular focus on human rights.

This is, of course, a two-way street. Just as we raise issues of concern with representatives of other countries, our colleagues in other countries raise issues with us.

And no issue has been raised with us more vigorously in recent times, and vocally, than questions relating to the status and treatment of detainees, particularly those at the Guantanamo Bay detention facility.

Those concerns have been raised for several years at meetings of the OSCE Parliamentary Assembly. They have been raised at meetings of the OSCE Permanent Council in Vienna. And they have been raised at the human dimension meetings of the OSCE.

I believe very strongly that our colleagues who have raised concerns with us deserve our considered response and engagement.

The fact is for all the 56 OSCE participating States and not just the United States, the issue of how to safeguard human rights while effectively countering terrorism may be one of the most critical issues our countries will face for the foreseeable future.

In organizing this hearing, it's painfully difficult to unpack a whole set of issues related to our counterterrorism efforts: The off-shore detention center at Guantanamo; the treatment of detainees in custody and the interrogation practices to which they may be subjected; the legal procedures for holding, trying and potentially convicting detainees of crimes; and the issue of extraordinary rendition, to name a few.

Frankly, in my opinion, the United States has not covered itself with glory when it comes to most of these issues. I'm, of course, mindful of the fact that many other committees of both the House and Senate are actively engaged in oversight on many aspects of this subject.

It's not our intention to duplicate those efforts. Rather, we hope to address the specific implications of Guantanamo for U.S. human rights leadership.

In no small understatement, this year's State Department Country Report on Human Rights notes, and I quote, "We recognize that we are writing this report at a time when our record and actions we have taken to respond to the terrorist attacks against us have been questioned." Indeed, they have been.

Most importantly, we've got to figure out where we go from here. Pretty much everybody and his brother, including the Secretary of Defense and the Secretary of State, have said that Guantanamo ought to be closed down, either because they believe it never should have been opened to begin with, or because they've concluded that the stigma associated with Guantanamo is so great that the entire operation serves to undermine our alliances and strengthen the propaganda machinery of our enemies rather than make us safer.

But the question is where do we go from here. I'm hoping our hearing today will, in part, help us answer some of those questions.

We have before us today, ladies and gentlemen, a panel of experts whom I believe can really engage in a constructive discussion on these issues. Their biographies have been circulated here, so I'm not going to re-read them.

Unfortunately, although we sent a letter to Secretary Gates on May 15 inviting the Department of Defense to send a witness to

this hearing, the Department has declined the opportunity to have its views heard.

Quite frankly, I'm disappointed by the message this sends. I know some tough questions may come up today, but it seems to me that there is nothing to be gained by avoiding tough questions.

I'd like, in any case, to warmly welcome to America our colleague and friend Senator Anne-Marie Lizin, the President of the Belgian Senate.

When I served as President of the OSCE Parliamentary Assembly, I appointed Senator Lizin—people are looking around.

Raise your hand, Anne-Marie, so they'll see where you are over there.

I appointed Senator Lizin to serve as Special Representative on the issue of Guantanamo. And I did so because of the extraordinary concern voiced in that body by her and numerous of our colleagues, she being one especially, regarding the status and treatment of detainees there.

Senator Lizin has shown remarkable dedication and initiative in addressing the issues within her mandate. And I'm delighted that she's with us today as we prepare for the Assembly's annual session to be held early next month in Kyiv, Ukraine.

Before calling on my colleagues who are here for any opening statement, let me just note the order in which we will receive testimony this morning.

Our first witness will be the Department of State's legal advisor, Mr. John Bellinger, followed by Senator Lizin, and we will then hear from an additional panel of representatives, Mr. Tom Malinowski from Human Rights Watch, and Mr. Gabor Rona from Human Rights First.

And we are prepared at this time to go forward, and, Mr. Bellinger, as I indicated, your handsome and awesome biography has already been passed out. I personally am grateful that you would come as the legal advisor to the State Department, having held such a position for sometime.

I'm deeply grateful to you for being here, and I invite you to go forward with your testimony. I will enter into the record your full statement and which you may summarize if you see fit in any way that you would like. Thank you. Mr. Bellinger?

**JOHN B. BELLINGER III, LEGAL ADVISER,
DEPARTMENT OF STATE**

Mr. BELLINGER. Thank you very much, Mr. Chairman, and for those kind remarks. I do personally welcome the opportunity to be here to talk about what are, in fact, difficult issues.

I do have a prepared statement for the record, and I'll just make a few general comments up front and then look forward to entering into a conversation with you.

I will just say up front that the issue of Guantanamo, the situation in Guantanamo, is a source of frustration for this administration.

On the one hand, it serves a very important purpose, to hold and detain individuals who are extremely dangerous, people like Khalid Sheikh Mohammed, Abu Zubaydah, people who have been planners

of 9/11, others who were captured on the battlefield in Afghanistan and who personally killed U.S. soldiers.

Everyone will agree that these individuals need to be detained somewhere, and the question is where. The administration has concluded that Guantanamo was the most secure and appropriate place to hold them.

On the other hand, we fully and acutely recognize that Guantanamo has become a lightning rod for criticism around the world, and this is something of deep concern to this administration and to Secretary Rice in particular.

I'm not going to go into detail about the legal basis for detention other than to say that we are not holding them as criminals. We are holding them because we consider them to be combatants.

Most of them were, in fact, captured on or near the battlefield during an international armed conflict in Afghanistan by our soldiers.

Mr. HASTINGS. Mr. Bellinger, let me ask you to suspend.

Ladies and gentlemen, those of you in the audience, this matter evokes rather extraordinary emotions from a wide swath of people in the world, but in an effort to conduct a fair and objective hearing, I'm going to request of you, please, to refrain from any comments.

I want to make it very clear that I consider that personally to be rude and unnecessary. Everyone will have an opportunity to have their views expressed.

And for those of you that are here that are concerned about Guantanamo, the chair of this particular committee probably has done as much as you have about this particular facility and the need for it to be addressed, and that's why we're having this hearing.

So I insist on quiet and respect for the witnesses.

Mr. Bellinger?

Mr. BELLINGER. Thank you, Mr. Chairman. So at this point, I'm not going to go into the legal basis for our detention other than, as I say, to emphasize that they are being held as combatants in an armed conflict.

I think there's really not much dispute about the fact that there was an international armed conflict going on in Afghanistan, and these individuals were picked up largely by our soldiers or by coalition forces. I'd be happy to take your questions about that.

What I'd like to focus my short remarks on this morning are the particular interests of this Commission, which are how we address the international concerns that have been raised about Guantanamo and our efforts to address those concerns.

I want to draw your attention to a lesser-known recommendation of the 9/11 Commission from 2004 which noted that the legal framework for holding terror suspects captured outside the United States is unclear because they don't fit neatly into the Geneva Conventions.

The 9/11 Commission recommended, therefore, that we work with our friends around the world to try to develop an appropriate framework for the detention and treatment of such individuals.

That's exactly what we have been trying to do for the last 30 months. This was one of Secretary Rice's top priorities when she became Secretary of State—was to address these concerns.

We had perhaps not done as good a job as we should have in talking with our allies around the world, explaining ourselves, addressing our concerns, and we have tried to do that very hard over the last 30 months. And I'd just like to talk about a couple of those things.

First, last year, coincidentally, our reports under the Convention Against Torture and the International Covenant on Civil and Political Rights were both due in one year.

We fielded large delegations to go to Geneva. I personally headed our delegation to the Convention Against Torture. Both of these reports ended up focusing in large part on Guantanamo.

We took those questions and the concerns that were raised, as the questions raised by the Helsinki Commission, very, very seriously.

Second, over the last 2 years, I have personally visited a dozen countries or more in Europe, OSCE countries, and some of them many times, to try to talk with governments, address their concerns not only about Guantanamo but about our laws, policies, the Military Commissions Act, the military commissions, and to address their questions.

We have entered into for the last 2 years a formal dialogue with the EU, and we have just finished the seventh round of discussions in Brussels with the legal advisers of all the EU countries to discuss the application of the Geneva Conventions and our criminal law framework.

We've done numerous press briefings in an effort to reach a larger audience in Europe to address their concerns and to really explain the legal framework for our holding people, what rights they have and what changes have been made in our laws and policies.

In addition, we have facilitated at the State Department and working with the Defense Department travel by numerous groups to Guantanamo. Chief amongst them is, in fact, the rapporteur of the OSCE, Madam Lizin.

I've gotten to know Madam Lizin quite well over the last 2 years, and it's a relationship that we really welcome because she and her team, all of whom are here today, have really dug into these issues in a serious way and have gone beyond some of the hysteria that we have seen, to delve into the difficult issues.

And they have not shrunk from criticizing us, but at the same time, they have recognized some of the difficulties.

I would also call your attention to the U.K. House of Commons' foreign affairs committee. You may have met some of them. They also went down to Guantanamo and issued a similar report to Madam Lizin's report on behalf of the OSCE.

We have worked with the Council of Europe and with members of the European Parliament.

As a result of these outreach efforts over the last couple of years, I think there is—and this is important—a growing international recognition, at least amongst legal experts and officials, of the legal complexities of how one deals with the threat of international terrorism, for people who we find outside our country.

It's easier when we find people inside our country and we can deal with them in the criminal law framework, like Mr. Moussaoui here in the United States or others in Europe.

But it's much more difficult when one deals with suspects from Al Qaida or the Taliban who are captured 3,000 miles away by one's soldiers.

I think there is now a growing recognition that you see reflected in Madam Lizin's report, in the U.K.'s House of Commons' report and in basically all the legal experts that I have talked to in Europe that the criminal laws don't fit this situation very well.

In fact, most of the individuals held in Guantanamo could not be prosecuted in our criminal courts. I hear repeatedly, "Why don't you act like a traditional country and simply prosecute them in your criminal courts?"

The answer is a large number of these individuals who traveled from countries like Yemen or Saudi Arabia to train in camps in Afghanistan may not have violated U.S. criminal laws by their actions because we did not have extraterritorial jurisdiction at the time.

We have subsequently amended our laws. This is even before you get to the practical difficulties of prosecuting someone captured by your soldiers 3,000 miles away.

But nor do the Geneva Conventions fit them very well because those are designed for individuals who are part of standing national armies.

So there is a growing recognition that we are dealing in areas that are hazy and are not well suited to deal with this threat.

That doesn't make people more comfortable about Guantanamo. I fully understand that, Mr. Chairman. But it is a recognition that, in fact, where people thought that there were perhaps easy answers, easy solutions, that the United States had somehow avoided, that these are much more complicated issues than people thought.

My last couple of points are as follows. In addition to our outreach efforts to address these concerns, we have also been working to move to the day that Guantanamo could be closed.

As you know, the President has said that he would ultimately like to be able to close Guantanamo.

Over the last four years, we have transferred out of Guantanamo more than 400 individuals, a significant percentage of whom have gone right back to fighting us again, but we have tried to move those individuals back out to their countries.

But closing Guantanamo, as I think you alluded to, is not easy. For those who have suggested around the world that Guantanamo must be closed immediately—and I hear this regularly in my travels—no one has really suggested to us how that might be done.

And I ask them regularly, because we are open to dialogue, "How would you close Guantanamo immediately? Where would these people go?" There are very few countries in the world that are willing to help us. Countries are willing to criticize and complain about Guantanamo, but few have been willing to help to close it.

Many countries are not willing to take their nationals back. Some countries that are willing to take their nationals back have human rights concerns, and we have to work very hard either to find appropriate human rights assurances before individuals can be

returned or to send them to other countries, as we did with the Uighurs of Chinese nationality.

So again, closing Guantanamo is easier said than done. And again, we have to be mindful that there are many people there who are quite dangerous who need to be detained somewhere.

I want to just end by quoting something from the U.K. House of Commons report which I thought did take this all quite seriously.

They said, "We recognize 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."

That's something that I think that Madam Lizin has recognized on behalf of the OSCE. She has been working very hard.

She has leveled criticism, but at the same time she has pushed other countries around the world to recognize that there are individuals in Guantanamo who pose a threat, but that we also need the help of the international community to help to close it, if that is what they would like to do.

So in closing—and I see Mr. Hoyer has joined us. In closing, I would say that the United States is held to a high standard around the world. We are a city on the hill and always have been when it comes to respect for human rights and for rule of law.

We recognize that other countries look to us. We also recognize that Guantanamo is seen by many as inconsistent with that commitment to human rights by the United States. The administration is acutely aware of that.

We are working to address those concerns in a way that both balances our need to protect the security of Americans but in a way that also respects human rights and our ideals and respect for rule of law.

So with that, thank you very much. I'm happy to take your questions.

Mr. HASTINGS. Thank you very much, Mr. Bellinger.

I'll note that we've been joined by the distinguished Majority Leader in the House of Representatives.

Before turning to him—and I would appreciate it if you don't mind that we have an opportunity to have him make his opening statement. He has extraordinary floor responsibilities and a fluid calendar today that I'm fully familiar with.

But I do want to point you in the direction of the testimony that was in the prep book that I read last night from Gabor Rona, who I'm sure you are familiar with, at Human Rights First and will be a witness later.

I really encourage that you read that testimony, and anybody else here for Mr. Rona's testimony who's outside. I thought that it was as clear as anything with regard to what to do about the facility and where we go from here, the question I continue to raise. But I'll get back to questions with you.

But right now, with your permission, ladies and gentlemen, let me introduce to you the distinguished Majority Leader of the

House of Representatives, my good friend Steny Hoyer, who has an extraordinary history in the Helsinki Commission, having chaired it for a number of years, and has been active in the Organization for Security and Cooperation in Europe and all of those countries, and has a longstanding record in the human rights arena, and specifically an interest in this particular project.

Steny, you have the floor.

HON. STENY H. HOYER, MAJORITY LEADER, U.S. HOUSE OF REPRESENTATIVES

Mr. HOYER. Thank you very much, Mr. Chairman and Mr. President.

Our Alcee Hastings had the honor of being elected twice as president of the Organization on Security and Cooperation in Europe's Parliamentary Assembly.

Mr. Chairman, I've had the honor of serving on the Commission from 1985 to 2002, when I became the minority whip and left the Commission. But I remain intensely interested in the work of this Commission.

In 1975, in Helsinki, 35 nations came together and signed on to an extraordinary document. Many in this country said that document would not have much effect and was simply an imprimatur to the Soviets for their actions in Central Europe, and that we had, in effect, sold out the captive nations.

Some 20-plus years later, I heard Vaclav Havel give a speech on the floor of the House of Representatives in which he said the Helsinki Final Act was one of the most compelling documents for the emergence of freedom in Central Europe and the freeing of the captive nations.

The Helsinki Final Act adopted a premise which was a radical premise—that the rest of the world had the right to look at how individual countries treated citizens within its own ambit of responsibility.

Toward that end, I have urged this Commission to have this hearing for the last 4 years on Guantanamo, because I believe it is the responsibility of this Commission to look at not only what failures we perceive to be in other nations in meeting their Helsinki Final Act commitments but also looking at this Nation's performance.

I want to welcome Senator Anne-Marie Lizin, who is a very close friend of mine and with whom I have served in the OSCE for some years. And she has been an extraordinary leader.

She is, of course, President of the Belgian Senate and a distinguished leader from an allied nation and from the mother continent of this Nation.

And so, Anne-Marie, we thank you for your leadership in this process of OSCE.

I also want to thank, Mr. Chairman, you. As I said, I've been asking for this hearing for some period of time, and when you became the chairman, I said that we ought to move ahead on this, and you are doing so.

This is an important hearing on the detention of enemy combatants at the U.S. naval base at Guantanamo Bay. As you may know, I've urged the Commission, as I've said, through multiple letters to

examine U.S. policy and conduct concerning those deemed to be enemies in the global war on terror.

This hearing is an important step in addressing a situation that has been mishandled from the outset and which carries serious implications for our nation's reputation throughout the world.

In fact, it has already had a very deleterious impact on the image and the moral standing of the United States of America. Our former secretary of state, Colin Powell, has made that observation himself.

As the former Chairman and Co-Chairman of the Helsinki Commission and throughout my 18 years as a member of this Commission, I always believed that the Commission's responsibility was to oversee the implementation of the Helsinki Final Act abroad and to ensure that its key principles were applied in this country as well.

Human rights champion Andrei Sakharov has observed that the Helsinki Final Act has meaning only if it is observed fully by all parties. As Sakharov has stated, and I quote, "No country should evade a discussion of its own domestic problems, nor should a country ignore violations in other participating States."

The whole point of the Helsinki accords, Mr. Chairman, as you well know, is mutual monitoring, not mutual evasion of difficult problems.

Indeed, Guantanamo, along with several other American detention facilities abroad, is not only a problem but an international disgrace that every day continues to sully this great nation's good reputation.

Today the United States has been holding some detainees at Guantanamo for more than 5 years without bringing them to trial. Many detainees have reported physical and mental abuse.

Four detainees have committed suicide in the past year, acts that one State Department official coldly described as a good P.R. move.

The situation has provoked former Secretary of State Colin Powell to observe, "If it were up to me, I would close Guantanamo not tomorrow but this afternoon."

Essentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and failing to observe the principles that this country has promoted for itself and for all the world.

I could not agree with former Secretary of State Powell more. The system of justice at Guantanamo, if it can be called that, is not only inconsistent with our values and inspiring outrage internationally, but also, ironically, ineffective as well.

Of the hundreds of detainees cycling through and currently held at Guantanamo, only three have faced charges to date, and only one has been convicted. Today, less than 1 year after his conviction, he is serving a severely reduced 9-month sentence in an Australian prison.

As for the other two, Canadian Omar Khadr and Yemeni Salim Ahmed Hamdan, their charges were dismissed recently after an appellate court found that the U.S. government failed to establish jurisdiction.

Mr. Chairman, I believe that one of the most egregious sections in the legislation Congress passed last fall is the provision that dis-

missed all pending habeas corpus suits by current detainees. We must restore this fundamental right for those who have been detained by the government.

Currently I'm working closely with key leaders in Congress, as I know you are as well, Mr. Chairman—Chairman Skelton, Chairman Conyers, and Subcommittee Chairman Nadler—to do so.

Let me be clear: Our respect for and adherence to the rule of law is not a sign of weakness, as some would assert. It is a source of our greatest strength.

No less a figure than Thomas Jefferson observed more than 200 years ago that the right of habeas corpus is, and I quote, “one of the essential principles of our government.”

It was, after all, the American Revolution's premise that it was the arbitrary and capricious and unchecked actions of government that required the revolution and required the constitutional provisions that we know as the Bill of Rights.

Simply stated, the elimination of habeas corpus rights fails to comport with our American values and our long legal tradition.

Let me conclude, Mr. Chairman, by stressing that there is no doubt that our eyes were opened by the horrific acts of September 11, 2001. We will and we must prevail, not just as the United States of America but as a civilized international community, in the war on terror.

However, in the pursuit of those who seek to harm us, we must not sacrifice the very ideals that distinguish us from those who preach death and destruction.

Members of the Commission, the time has come to close the detention center at Guantanamo Bay and to identify a reasoned method to process the detainees held there in a manner that is consistent with our values, our laws and our history.

This does not mean that we will coddle those who are accused of participating in or planning terrorist acts, as some assert.

When Saddam Hussein was taken out of a hole and captured, we afforded him his legal rights to hear the evidence against him, to contest that evidence and to be represented by counsel.

When Slobodan Milosevic was brought to justice after murdering tens of thousands and sanctioning the ethnic cleansing of more than two million people, he was afforded his legal rights.

And even the Butchers of Berlin who committed genocide, murdering millions of innocents, were afforded their legal rights at Nuremberg.

This was not coddling those who committed atrocities. It was recognizing that if civilization is to be what we want it to be, it will be because it follows the rule of law and not the rule of the jungle.

We are in a fight against the brutal extremists who will stop at nothing, obviously, to inflict pain and destruction.

However, we must also be cognizant of the fact that we are in a battle for the hearts and minds of millions of people who must know that the most powerful nation on earth is also the most powerful in its commitment to fairness and justice and due process.

Our current treatment of detainees in the war on terror is not helping us on either front. We must change course.

I look forward, Mr. Chairman, to working with you and the Commission and other Members of the Congress of the United States—and our international partners, Senator—to do precisely that.

And I thank you for giving me this opportunity, and I thank you again for your leadership in calling this hearing.

And I want to thank Senator Lizin and Mr. Bellinger and Mr. Malinowski and Mr. Rona for their participation in this hearing. Thank you very much.

Mr. HASTINGS. Thank you very much, Mr. Majority Leader. [Applause.]

It would be my hope, Mr. Majority Leader, if you did not bring your remarks in prepared form for handout, if you would have your staff—you did? All right. Good. I just wanted to make sure that it's available to those who are in our audience.

Mr. Bellinger, I do not mean to impinge on your time, and I do have some questions that I want to put to you, but I think you would benefit if you had an opportunity to hear Senator Lizin's testimony rather than read it cold.

And if you have the time, I would ask her to come forward and offer her testimony, and then I'll put questions to both of you.

And if Mr. Hoyer has to leave, it's certainly understood. It's hopeful that other members of the Commission will be coming on board. There's one right now. All right.

Senator Lizin, why don't you come forward and join Mr. Bellinger?

You don't have to leave, Mr. Bellinger. There's another microphone.

And we'll hear the Senator's testimony and then go to questions.

As I've indicated earlier, Anne-Marie Lizin is the president of the Belgian senate, and when I was president of the Parliamentary Assembly of the Organization for Security and Cooperation in Europe, I appointed her as special envoy and rapporteur with reference to Guantanamo.

I might add, as I've indicated, she has been extremely diligent and persistent and made reports to the Parliamentary Assembly regarding this matter, probably has few peers in Europe that have spent as much time studying the problem.

And, Mr. Bellinger, to the State Department's credit and the Department of Defense, they did expedite the opportunity for Ms. Lizin and her team to be able to visit Guantanamo. Although there have been some others that were turned down, she did go.

And now you have the floor, Senator.

**ANNE-MARIE LIZIN, PRESIDENT OF THE BELGIAN SENATE
AND THE OSCE PARLIAMENTARY ASSEMBLY, SPECIAL
REPRESENTATIVE ON GUANTANAMO**

Ms. LIZIN. Thank you, Chair. And thank you also for everything very positive you have said about our work as Parliamentary Assembly of the OSCE, and I also especially thank also Mr. Hoyer to have said that, because I was saying also to my team that we feel that we have in front of you Members of the Congress here who are really knowing the situation of what we are speaking about today.

And the report—I have maybe to make some common remarks at the beginning and to introduce you to also Gustavo Pallares. He's a Spanish member of the team coming from Copenhagen.

And as maybe not everybody in the room knows, OSCE, as the followup of the Helsinki Act, is an organization with an executive body based in Vienna, and the Parliamentary Assembly is based in Copenhagen.

So it's for the purpose of making a report for this assembly that I was going to Guantanamo for the second time with my team.

I also would like the audience to excuse the fact that it is such an important internal topic for the United States that sometimes we have difficulties coming from abroad, and say, "Look, this is what you should do or shouldn't."

So I will try to avoid these kinds of advice, to try to stay on the facts and the result of the visit. Our conclusion, and the final recommendation will come for the Kyiv meeting.

And I don't know if you should be present, but it will be clearly also very important if we can have, with all members of assemblies of the OSCE Parliamentary Assembly, a real debate on this matter and part of what Mr. Bellinger has said, which is the international responsibility around also.

So this being said I want to share with you some thoughts and debate about it.

I have presented last year a report that you could find and that most of you maybe have taken the time to read which said in one year and half, it's possible—must be possible to come to a closure. However, after 1 year, we're not at the closure.

The situation has evolved significantly. The report will mention the political arena in U.S. declaration of the highest level in this state. On May 7, 2007 President Bush was saying he wanted the camp to be closed.

The Military Commissions Act in September 2006: the law was designed to allow the trial of the most dangerous detainees. He said he wishes to transfer the detainees, in a speedy manner to their original countries or to another country.

In fact, numerous countries refused to take back their nationals or didn't offer the necessary human rights guarantees.

The insurance that those detainees could not be involved again in terrorist activities is a different guarantee to bring, but it's a very important one for everybody, not only for the U.S. territory, but also for any part of the world where terrorism could harm.

The Secretary of Defense called in March 2007 for the closure of the camp and the transfers.

More recently, the former Secretary of State, Colin Powell, called for the closure of the detention facilities as soon as possible, stating—and this is also another part that's very important—stating that it has become a major problem for America in the eyes of the world.

Numerous political figures have stated similar opinion and voiced suggestions in order to find a solution.

In fact, I consider, like many European political personalities, that Guantanamo remains one of the bases for anti-Americanism fixation in the world and contributes to the image of the United

States abroad, including in friendly countries. They must, therefore, as such, be closed.

Following up on that previous report, I note that the number of detainees now has now significantly decreased.

During the conversation in this city with State Department and DOD, both of those administrations have confirmed that they wish to transfer the majority of the detainees as soon as possible.

And for those who are interested in very, very up-to-date information, we have received a really important briefing yesterday in Guantanamo with all the present numbers of detainees. Twenty-five are ready to be released completely, but no country takes the responsibility of saying, "Yes, we can."

And 80 are no longer in enemy combatant status. So it means that this is part of what we could also recommend in a quite short future: to try to find a transfer country.

And I will put the fact that we focus on this aspect to try to find the solution for these transfers as a recommendation at the OSCE conference.

The 25 detainees immediately transferable means that if it is not done, it's because of a lot of different reason, and we have to take each of them case by case, detainee by detainee, and see why we don't come to a solution and try also to put responsibility on some government that could be more open to the demands of the administration.

In order to accelerate the detainees' transfer to third countries, notably OSCE participating States—and there are lots of them who can be concerned by transfers, not only with nationals, because "national" is a concept that in a globalized world is something that is also diminishing.

You can, have some people of a given nationality but who have been refugees who are working in another one, wanting to go to a third one, so why not to try also to put this sort of chain of responsibility of countries?

I have then addressed to all these countries some letters, very clear ones, and I could let also to your Commission the results, the letters and the result of them, asking if they were ready to do something.

Very few answers, and they were not very positive. Some said that such transfers were not compatible with their legislations. Unfortunately, those countries don't seem to show much willingness to welcome the U.S. request positively.

But we continue, and I personally continue, to explore potential possibilities in order to find solutions that could be acceptable for the parties.

In this case, it may be positive to involve some international organization in the process. I'm careful on that, because one of the conditions is a security condition, which means no ability for the detainee to be able to go back to fight, to return to the fight.

Such condition cannot be ensured, guaranteed, in a very precise manner by any international organization. I'm thinking about the IC of the Red Cross or the IOM.

But then, in any case, it will, from the U.S. side, also be fully based on asking for a security ensuring that there will be no return to fight.

If you look at the answers of the letters, you will see that Europeans are very, very, very cautious. In some precise cases, detainees have lived in different areas.

The most positive ones were from the Muslim world—Emirates, even Algeria. But also, the discussion must be done very carefully with all the countries.

And we mention very often the experience of Albania. Even if we heard in Albania itself, the five detainees who are now free in Albania find the situation in Albania not so good.

Return of non-nationals detainees could create another trouble. If the return of detainees in that case is not going well for the government, this is giving a wrong signal.

Maybe Albania could be positive in the future again. It was answering positively to the letters but if, in the end, people there are creating troubles, and then it will also be part of the difficulties.

In any way, I think that continuous negotiation, case by case, is the most constructive way to come to the solution.

During yesterday's visit to Guantanamo, what feeling can we have from this second visit? We need to make efforts to explain more. Well, this is the most important.

Real efforts to show what the jail is. I can say here, in front of you, that they have answered there, from the highest level to the lowest, all the people in charge of the base, to all questions we have put.

More efforts were made—also has happened there—to bring the different detention regimes in line with the standards of the U.S. prisons.

My experience now in the OSCE Parliamentary Assembly means that I have seen a lot of detention facilities all over the world, the OSCE world. And I can say—I will not mention any country, but I can say that U.S. standards for jail are high ones.

This jail, as jail, is one of the highest quality ones. So this is also part of what they do there, implementing the quality.

Camp 5 and Camp 6 have been visited. Maybe we can, go into details in Camp 6. Something could be maybe done in a better way there, especially for external lights.

We can continue the debate, on the way examinations are followed by a staff that is following the way the interrogatory is done, and the training for doing that respectively to U.S. law is, in my view, the closest thing you can do. You don't have such control in some other countries of OSCE.

Mr. HOYER. Senator, may I interrupt you just 1 second?

Mr. Chairman, I'm going to have to leave because I have to be at a meeting at 10 o'clock in the Capitol.

Mr. HASTINGS. All right.

Mr. HOYER. But, Senator, I thank you very much for the work that you have done, for the statement that you have made.

Mr. Bellinger, I apologize for having to leave, but I thank you for your being here as well.

And I think, Senator, your statement reflects the thought that you put into all of the work that you do, and I think your analysis will be very helpful to us. Thank you very much.

Mr. HASTINGS. Thanks, Steny.

Ms. LIZIN. Thank you. And as you know, Mr.—thank you, Steny. I hope we see you in Kyiv. Yes.

So I could also say to the audience here that going to a jail in some of the country of OSCE is just impossible. And it's a huge difference.

One of the questions we had was the interest in terms of intelligence. Do you have any intelligence interest or any intelligence coming from those detainees who are there for so long now? And the answer is yes.

In the file, you will see that they quote 115 detainees to be able to give, again, information or intelligence—notably, also, information of ongoing military operation of the U.S. Army.

Is there a radicalization phenomenon of the detainees? I have mentioned it in my first report, being quite [inaudible]. And I must say that for me, this is still going on. It is a process that you can see in the leader's determination in groups.

Most detainees still claim to be jihadist, and those who are speaking to them in terms of being Muslim confidant or Muslim advisor have the same feeling.

So this supposes—maybe that's not the reality but it suppose a very, very strong collective control on the behavior between detainees.

And knowing what it means to be members of a community like that, it could be part of the difficulties also.

So the responsible for the guard has also made a priority on the training of the guards, because they are under pressure now to react in a way aligned with the U.S. laws when you are attacked in different ways and just to be aware all the time that you are looked by the whole world.

This is something different from a lot of other situations for guards. So they have a special training for that, and I think it is very important.

We have insisted on a special control that I know from experience: when it comes to difficult situation about human beings being detained, then you can have people who are volunteers to go, and for bad reasons—personal (inaudible) violence or a link to violence. We have to avoid that.

I'm very conscious that the answer I received shows that the people responsible were aware of this risk. So this is part of the question that has been taken into account.

Conclusion: The recent transfer to Guantanamo of particularly dangerous individuals among which a 9/11 attacks' likely brain, Khalid bin Sheikh Mohammed, from secret prisons reflects the administration's obvious will to gather there terrorists who were responsible for the most spectacular attacks against the U.S. security who were captured on various fields of operation.

I notice that the average level of danger has progressively being modified. And it means higher.

As less important detainees in terms of dangerousness are transferred out of Guantanamo—and this is part of what I will recommend in the report to do more and more, quicker and quicker—and as dangerous profiles are being transferred now from other jails to Guantanamo—this conveys the idea there might be an un-

derlying political will to convince of the necessity of maintaining a detention center of that type.

The political will is to make it appearing clearly. I will not come into the U.S. debate, but this means an international humanitarian law—important debate to be opened.

We have to look for the possibility of, maybe not a fifth Geneva Convention, but something more specific in international laws to take into account the situation, and the international jihad.

Where there is a detention because there is a war, there must be legal procedure and fair trial and fair standards. But in between, where do you put these fighters?

And I, as European, can see a lot of European countries' or armies' hypocrisy of saying, "What are you doing?" If you do, prisoners, what are you doing with them in Afghanistan?

The answer of all ministers—I have taken officially the answer—is "we give them to local authorities." They give them to the Karzai's government

There is a real negative hole in international humanitarian law. We have to try to adapt this international humanitarian law to the 21st century's realities of war especially terrorist jihad.

And this is not done. How to do it? In my view, it can be done with NATO's help because lots of armies concerned are NATO's, so normally, the political side of NATO could be a part of it. Maybe.

I see so many European countries not willing to be concerned at all, exception of being free to be critical. My hope is that we will be able to convince in Kyiv, send European delegation to do some work and to move positively on this question.

I thank you, President, for the time you gave to me. I know I'm a little up on the schedule, but I think it was important to make it.

Mr. HASTINGS. Thank you very much, Senator.

I've been joined by two distinguished members of the Commission, and I'd be terribly remiss if I didn't give them an opportunity to make comments.

First to arrive was my colleague from North Carolina, and I'd ask Mike McIntyre if he wishes to make any statement at this time.

Mr. MCINTYRE. Thank you, Mr. Chairman. I'm glad to be with you and appreciate the opportunity for this hearing.

I will have a couple of questions for the senator, but I'll defer to our Co-Chairman of the Commission if he would like to make an opening statement first

Mr. HASTINGS. We've been joined—Anne-Marie, I know you know our colleague who used to be a House Member but now serves in the other body, and I get to see him periodically.

But he is the Co-Chair of this Commission, and I'm very pleased that the Senator could find time to be with us.

Ben, you have the floor.

HON. BENJAMIN L. CARDIN, CO-CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. CARDIN. Well, Chairman Hastings, thank you very much for holding this hearing. It's been a long time in coming.

I had requested a hearing in the prior Congress and I regret that we were not able to accommodate that, because I think we should have had more public hearings.

And, Senator, I thank you particularly for joining us today. And your leadership within not just the OSCE Parliamentary Assembly but your leadership internationally on these issues is well recognized.

And I think we need your help, and I very much appreciate the time that you have spent in trying to understand what's happening at Guantanamo Bay, to try to understand the concerns of our war and concerns about terrorists and what is the appropriate way for a country to respond to those threats, recognizing the responsibilities of human rights.

And let me start off by saying—and I'll ask, Mr. Chairman, my entire statement be put into the record.

Mr. HASTINGS. Without objection.

Mr. CARDIN. But let me just say we not only have a right in the United States, we have a responsibility to protect the security of the people of this country.

And in our war against terrorism, we are fighting unconventional warfare. And the individuals who were picked up had intelligence information that was important for the United States to find out what they do in order to protect the safety of the people of this country.

I visited Guantanamo Bay several years ago with the Helsinki Commission here to see firsthand how the detainees were being treated, the methods being used by our military and to learn more about what was happening at Guantanamo Bay.

I came back with respect for our military operation there but puzzled as to why the United States was so secretive about what was happening at Guantanamo Bay, and why we did not seek the understanding, cooperation and, I think, joint efforts of the international community to establish the right procedures for determining who is appropriate to be at Guantanamo Bay, status, so there'd be due process and status as to individuals who were determined to be appropriate for Guantanamo Bay and international standards for the manner of their treatment.

And for reasons that I do not understand to this day, the United States refused to go along with that advice.

We're now many years into the operation, and it's very difficult to understand what potential value the people detained at Guantanamo Bay could possibly have to help deal with the safety of the people of this country or our allies. So it's hard to understand why this Guantanamo Bay continues today.

I must tell you, Mr. Secretary, that there is concern by some of us that we just don't know what to do with these people, and therefore we just keep them in this indefinite status rather than confronting the issue of either trying or releasing them or sending them back to their host countries, which we should have done many years ago.

So I welcome this hearing because I think it's important for us, the Helsinki Commission, to live up to our international obligations. We invite the scrutiny of our member states and the inter-

national community. And I think we can improve from that type of input.

Mr. Chairman, when it's appropriate, I do have some questions that I do want to pose based upon the testimony that I now have had a chance to read of both of our witnesses.

And I look forward to talking—particularly asking some questions to the legal advisor of the Department of State.

Mr. HASTINGS. With that in mind, I will now go to questions. And I'll start with Mr. McIntyre.

If, Mr. Bellinger and Senator Lizin and our other witnesses—if we do not get to all of the questions, it's because of time constraints, but I will submit questions to you in writing that I would appreciate a follow up on, and I will try to make them available on the Web site of the Helsinki Commission for those interested in the audience.

Congressman McIntyre?

Mr. MCINTYRE. Thank you so much, Chairman Hastings. And it is good to be with Co-Chairman Cardin. And we look forward to being in Kyiv.

Thank you all for coming today.

Senator, I have a couple of questions for you. In your 2006 report, you stated that the allegations of ill treatment and torture of the detainees of the American prisons, including Guantanamo Bay, are recurrent and are helping to propagate a negative view of the United States in the world.

Now, in light of that statement, I want to ask you two things to answer, if you can, directly.

Do you think that this negative view of the United States has impeded American efforts to promote a respect of human rights in other countries, which, of course, is one of the concerns of this Commission particularly, as you know, but also a concern of our country in general?

And if so, if you do think that what has happened at Guantanamo has impeded our efforts to promote the respect of human rights in other countries, can you provide a concrete example where it has impeded those efforts?

Ms. LIZIN. [Off-mike.]

Mr. MCINTYRE. OK. Yes, go ahead.

Ms. LIZIN. Now, I was thinking—I'm sure it has. But it is something that maybe in this audience it's difficult to give you a personal example.

But let's think about a Muslim country, say—I will not give the name of the country, but it should—maybe has happened.

Mr. MCINTYRE. Well, OK.

Ms. LIZIN. You see?

Mr. MCINTYRE. Yes. I now understand. But you're saying in general. I didn't know if you had maybe some specific examples.

But I understand the general impression is not a good one, and we're all concerned about that. But I didn't know if you just had a list or—

Ms. LIZIN. The problem is most of the countries from where those people are coming are not very linked to high-quality of human rights for their citizens.

Mr. MCINTYRE. Right.

Ms. LIZIN. And so it means that—look. You try to have an effort in one direction with this country. Maybe Mr. Bellinger could have in mind very concrete way or so.

And you come and you say, “Look, I need to transfer 22 person to you, but we need that you respect their human rights.” And then the people are just laughing and thinking, “More than for our prisoners?” So that’s what happened, you know.

Mr. MCINTYRE. OK.

Ms. LIZIN. And this is the way it makes it difficult.

Mr. MCINTYRE. All right.

Did you want to respond to that, Mr. Bellinger? Do you have any specific examples you can cite?

Mr. BELLINGER. I don’t think I can give you specific examples. As I said in my opening statement, we are certainly aware of the concerns that have been raised around the world. We are acutely aware, from the President to the Secretary of State to myself.

That’s one of the reasons that we have tried to engage much more actively in talking to our friends and allies around the world and to those who are critical, to explain to them what it is that we are doing; that, in fact, there are not as easy answers as people would think; and to address what those concerns are.

There are clearly—it clearly is having an impact upon the United States. That does not mean that there has been an easy answer as to what to do about it, and I will later on address the questions of whether Guantanamo can just sort of be closed with the snap of a finger. But we are working very hard to address those perceptions.

As the chairman said, it’s one of the reasons why we were candid about it in our human rights report. It was not simply to be critical of others, but to acknowledge that people raised those concerns about us, and we are working hard to address those concerns.

But there’s not a magic answer in which we can make all of those perceptions go away by simply closing Guantanamo.

Mr. MCINTYRE. All right.

And can I just follow up with him, and I’ll be—

Mr. HASTINGS. Sure.

Mr. MCINTYRE. Thank you.

Mr. Bellinger, if we decide we cannot return someone to a country due to security or humane treatment concerns, either one, the United States has said it would look for other nations to accept third country national detainees for resettlement.

If we are not able to accept these folks into our own country, do you think we can credibly expect other countries to take them? And if you do, do you—have you been talking to any other countries about that possibility?

Mr. BELLINGER. Well, we have been very active in talking to other countries. I think Madam Lizin, in fact, explained in detail some of the difficulties in resettling people.

Again, the premise to the suggestion that Guantanamo be closed immediately is that we could do that, and that the people would have places to go. And that’s really why I welcome the dialogue with you so that you can understand the difficulty for the administration.

If we were really to close Guantanamo, as Secretary Powell said, this afternoon, people have to go somewhere.

Mr. MCINTYRE. Right. Right.

Mr. BELLINGER. We've been trying very hard to send them back to their home countries. Countries, as Madam Lizin said, don't want—either don't want them back or there are the human rights concerns about sending them back.

We could move them all into the United States. I think you, as elected representatives, can understand the concerns about moving a large number of suspected terrorists to someplace in the United States.

But that just moves the ball down the road a little bit. Then there will be pressure to say, "Well, all right, you've moved them to the United States, but then what?"

We still would want to send some of them home, and we will still have the difficulties of countries that won't take them back or won't give us the human rights assurances.

Will the pressure then be to let suspected terrorists simply go into our own communities? So that is the—those are the conundrums for us.

With respect to your point, which is a fair one, and which other countries have raised with us, you've asked for—say a European country, who we have pressed—and we have pressed dozens and dozens and dozens of countries.

The best example, perhaps, is the tragic case of the Uighurs, these individuals of Chinese ethnicity who, in fact, had been training in training camps in Afghanistan.

We think it was appropriate to have picked them up, because they were training in training camps. We shouldn't have just left them there. We learned rapidly, though, that they didn't pose a threat to us. They were training against the Chinese.

We've now been, for 3 years or 4 years, trying to send them somewhere. But the only place that wants them is China, and we're not going to send them back to China. But no other country—and we've approached hundreds—is willing to take them, other than Albania, which was willing to take a small number.

On the other hand—and this gets to your question—we can't simply let them go in the United States because our immigration laws prohibit us from resettling any individuals who have engaged in training in terrorism.

So our laws would have to be changed for individuals to be resettled in the United States.

Mr. MCINTYRE. OK. Thank you.

Thank you, Mr. Chairman.

Ms. LIZIN. [Off-mike.]

Mr. HASTINGS. Yes, Madam Lizin?

Ms. LIZIN [continuing]. Could be from interest of the members of the Commission. Now, I have here the list of the answers so far, but we are trying to get more before the meeting of Kyiv.

So if you look, the—well, it's a sort of analysis you can do from it. But Denmark is not answering negatively for non-national, but they say officially in the letter they sent to me that so far it's not excluding.

Some countries excluded it definitely—Finland, Cyprus, Kyrgyzstan, Estonia. Georgia say it's not program. Germany and Austria were, OK, reluctant, but exceptionally could be, so it means OK, we can go maybe on some very specific cases.

Italy—so far, they have negative advice from their justice ministry, but maybe. So this is the sort of debate that Mr. Bellinger has to do. And their answer—we get Sweden. I take it just as an example.

Sweden answered that [inaudible] the opinion of the Swedish security service is also requested and provided the recommendation not to accept the demand within the Swedish (inaudible).

And then if you look at the other side, not in OSCE but Arabic country, Muslim country—Kuwait, very positive. China—it's in French, so I will give it to you, but it's completely negative.

Bahrain, positive. Even if they still have the—taken their detainees, at least four of them, back, they want to continue the discussion. So Bahrain is very positive.

And then Great Britain. So I will not make any difficulties in the relation between the two countries, so let you know.

So this is part of the real difficulty that we have. And maybe OSCE is a good area to try to go further on that.

May I answer to the question of Mr. Cardin?

Mr. HASTINGS. [Off-mike.]

Ms. LIZIN. On interrogation operation. Is this really something? I must say my staff, on this special question of intelligence [inaudible] of this operation, is also doubtful.

But when we go there, the answer is positive. One hundred and fifteen detainees are focused on interrogation, which doesn't mean always intelligence, and—but they're responsible for the joint intelligence group and so positively saying, "Yes, we got it."

So maybe you can go further on that, because he mentioned especially ongoing operation in Afghanistan in area where some of the detainees are coming from.

Mr. HASTINGS. Two things before I turn to Senator Cardin.

I guess it's the lawyer in me, Mr. Bellinger, that cuts to the core of what I perceive to be the problems. In a previous conversation with Senator Lizin, I commented that "close Guantanamo" is a concept.

The facility at Guantanamo has other uses strategically for the United States than holding our prisoners. And therefore, in its closure, what I'm talking about when I say closed—I'm talking about the persons who are imprisoned there, what now appears to be indefinitely.

And my framework, my personal framework, is Franz Kafka's "The Trial". And when I look at Kafkaesque situations around the world, I find myself believing that it is abhorrent to hold a person, not tell them what they're being held for, try them and not give them the judicial process that exists in this country, and then, if they were to be determined to be guilty, likely held indefinitely or executed, and if they're determined to be not guilty, likely to be held indefinitely.

Something is tragically wrong with that. So there are two things that I think we should do. One, repeal the Military Commissions Act. That's a start.

Second, I think what we should do is take every prisoner out of Guantanamo, no matter his or her status, and move them to a Federal prison in the United States of America, and that will give it structure that will allow that they will either be tried as the criminals that they are in a wider jurisdiction than they would have been under the Military Commissions Act, and then go forward to either release persons who are not charged, or charge them, try them and confine them in an appropriate federal prison.

I cannot believe that the American Federal prison system cannot try 380 people. It would then force a different structure. That's my solution to it. And I will introduce legislation to repeal the Military Commissions Act.

Senator Cardin?

[Applause.]

Mr. HASTINGS. Please. Please.

Mr. CARDIN. Mr. Bellinger, first I want to thank you very much for being here and just acknowledge that I believe you've been in your current post for about 2 years, is that right?

So a lot of my comments predate your service at the Department of State, so I just really first want to thank you for being here and express my extreme disappointment that a representative from the Department of Defense was not prepared or willing to come forward to testify in oversight hearings at the Helsinki Commission.

I think that speaks volumes about the continued attitude within the Department of Defense and the administration on having open discussions that are so necessary, as pointed out by your own testimony.

The detainees—many were picked up as early as 2001, 2002. In 2003, I visited Guantanamo Bay with other Members of the U.S. Congress.

As a result of that visit, we asked to see the field and command instructions for how individuals were determined to be selected for Guantanamo Bay. We even agreed to review that information in a classified setting. We were denied that opportunity. It was not made available to us.

The administration has been pursuing its policies in Guantanamo Bay without respect to the Congress and, I would dare say, without concern for court decisions, although it was rebuked by court decisions because of the independence of our judiciary.

You point out in your testimony with pride that the detainees at Guantanamo have received combatant status review tribunals.

Now, if I'm correct, I believe that was established as a result of a Supreme Court decision and not because the administration thought it was a good idea to have it.

So I am somewhat surprised by the attitude of your testimony, which is very conciliatory and very much seeking international input, including an acknowledgment that we face, quote—well, you're quoting the chancellor from Austria, that we face "legal gray areas."

I can't tell you how many times I have had conversations with members of the—with representatives of the administration where they said the law is clear, that it is without any dispute that we can do these things.

So maybe we're seeing a change in attitude now, which is good. I don't want to discourage that.

But excuse me for being somewhat skeptical, knowing the history that the Congress has had—as a member of Congress, I have had—with this administration on trying to get information concerning Guantanamo Bay and the attitude that the administration has taken as to its legal standing and its failure to engage the international community.

You now state in your testimony, “at the Secretary’s instructions I have undertaken an extensive bilateral and multilateral effort to discuss common approaches,” it goes on to say, with other countries. That’s what should have been done in 2001, in 2002.

And now we’re doing it knowing full well that we’re beyond the rainbow on this one.

The 380 people that are at Guantanamo Bay have no useful information that warrants a special facility for interrogation, which is what Guantanamo Bay was originally set up as its primary focus, secondary to try individuals for criminal activities.

If Guantanamo Bay is needed today, it’s needed as a penal facility. And as the chairman pointed out, we have penal facilities. To keep a penal facility at such expense makes very little sense to the taxpayers of this country.

So again, I acknowledge that you were not part of the State Department during the times in which many of these decisions were made, but tell me why I should feel comfort in your testimony today.

Has there really been a conversion in the administration on this issue? Do they now respect the rights and the international scrutinies that should have been done so many years ago?

What has changed that you believe I should have confidence in your testimony today?

Mr. BELLINGER. Well, thank you for those questions. I’d like to address a couple of points in them.

On the aspect of what we are doing today—and I think it has changed—is we are making an enormous effort to reach out to our friends and allies to address the concerns that they have, to explain why we’re holding people in Guantanamo, the sort of people that were there, the difficulties that we have in returning them to different countries, the Military Commissions Act, military commissions.

And I agree, this is something that we should have started earlier. We were, in fact, fighting a war and were designing the system. But we should have started earlier.

Mr. CARDIN. Maybe I could—you point with pride to combat status review tribunals in your testimony. Why did it take the Supreme Court to get that? Why didn’t you just have it from the beginning?

Mr. BELLINGER. Article 5 of the third Geneva Convention says that in cases where there is a doubt whether someone is a prisoner of war, there shall be an Article 5 tribunal to determine whether the person qualifies as a prisoner of war.

Since members of Al Qaida could not possibly qualify as prisoners of war, because Al Qaida is not a party to the Geneva Conventions, the determination was made in the administration that

having an Article 5 tribunal to review their status would have been essentially a null set. They could not have possibly determined. Now—

Mr. CARDIN. Do you disagree with the Supreme Court?

Mr. BELLINGER. No. The Supreme Court concluded that there needed to be some review process, not as a matter of interpreting the Geneva Conventions, but there needed to be some review process.

Mr. CARDIN. And the administration did not think there should be a review process?

Mr. BELLINGER. Well, frankly, sir, we were moving in that direction to begin with.

Mr. CARDIN. That's 3 years after the first detainees?

Mr. BELLINGER. We were moving that way to begin with. Let me say—and this gets to one of your other questions. Why are we holding people in Guantanamo to begin with? It's not because they have intelligence value or that we wanted to try them.

We are holding the people in Guantanamo because they were individuals who were fighting us. And as in any traditional conflict, you may hold enemy combatants who are fighting you.

And, Mr. Chairman, in a traditional conflict—and I will concede rapidly this is not a traditional conflict—

Mr. CARDIN. Well, here you and I are going to part company, because—unless you can differentiate yourself from the President here, because the President says that we're in a conflict and a war against terror, and it's unlikely to be resolved during his administration or perhaps his lifetime.

So therefore, under that logic, you're saying these individuals, without any legal rights, can be detained for the rest of their lives?

Mr. BELLINGER. This is why this is—it is a difficult situation. In a traditional conflict, World War II, you do hold enemy combatants. You don't give them lawyers. You don't charge them with something.

Mr. CARDIN. I'm familiar with that. I want to find out what you are recommending in regards to these 380.

Are you recommending that the United States detain these individuals till the war on terror is over without the right of counsel and without being charged with any criminal offense?

Mr. BELLINGER. All of the people in Guantanamo now have had or will be given access to lawyers. They can all, after they have had a combatant status review tribunal, appeal their cases in to our federal courts.

What I'm explaining, though, is that we are holding these people because they have been combatants and that they pose a threat to us. We have tried—

Mr. CARDIN. I would suggest to you that's not why we're detaining them, because there's a lot of people who are combatants who are not at Guantanamo Bay.

There was a selection process to who should go to Guantanamo Bay. The selection process had to do with the risk of these individuals, with particular reference to their intelligence value because of the sophisticated methods that we had in Guantanamo Bay to get information.

So I think when you're saying that these are soldiers in an unconventional war that are prisoners of war without that status that can be detained until the end of the war is just disingenuous.

I must tell you that, because these are individuals who are—we perceive to be very dangerous, that have information that we believe is useful in our war against terror and protecting the safety of our people. That's what we believed they were.

Now, if that's their status, then you can't take both positions. You can't say we're detaining them because of the intelligence value, but they're prisoners of war in an unconventional war. That just doesn't add up.

Mr. BELLINGER. Sir, we're detaining them because they were fighting us. That may also mean that they may have intelligence.

Let me give you an example, because I think it's helpful, of someone who has been in the news in just the last couple of weeks, Omar Khadr, who is one of the individuals—Canadian, member of Al Qaida, whose military tribunal was thrown out for lack of jurisdiction initially.

He was found fighting us in Afghanistan, caught in a firefight with U.S. soldiers, threw a hand grenade that killed a U.S. soldier and blinded another one. That individual is being held because he was fighting us.

Now, he might also have intelligence, but the—we can hold under traditional rules of war someone who's is fighting us in combat, and they do not have to be tried.

On the other hand, we think he actually did commit a war crime by throwing a hand grenade that killed a soldier, so we would like to try him for a war crime.

But as a matter of international law, someone who was captured fighting us on the battlefield, fighting our soldiers, does not have to be tried or released. And that is one example of the complexity of this situation.

Mr. CARDIN. You're talking as an attorney right now, trying to make a case that won't win. It just won't win. But I appreciate your efforts and your skills as a lawyer.

It won't win because the United States, the principles we stand for and our allies around the world recognize that you can't detain people without giving them the ability to defend a criminal charge, if you believe there's a criminal charge.

It's 4 years. It's time to indict or release. They no longer have intelligence information. And you can't hid behind the war against terror to say that these are prisoners of war without the status of being prisoners of war.

Mr. HASTINGS. Very briefly, less than a minute, Anne-Marie.

Ms. LIZIN. A suggestion, because I will not interfere in the way it must be a fair trial, but in all international—it must be a fair trial, and it is mentioned as a reasonable delay, a reasonable timetable.

So we are at the end of a reasonable timetable. This also is part of an argument that Mr. [inaudible] could also use—is that—and maybe I will suggest Mr. Bellinger also to think about that, because it is part of why it has come to such a high topic in the political life, is because reasonable timetable was coming to an end.

Mr. HASTINGS. I appreciate that, Senator Lizin, but I would also urge our colleagues in the OSCE sphere to understand the term burden-sharing. They have an awful lot of criticism, but they don't have very much in the way of what to do.

And I might add that some of these persons who are terrorists were also directing their energies toward those in the OSCE sphere as well as they were against America. So America is wearing the mantle—and I'm not an apologist. I believe Guantanamo ought to be closed, period, over and out. And I've said that.

But at the same time, where do you put these people, obviously some of them being extremely dangerous? And if Europe isn't prepared—and I'm talking our Western allies in Europe. If they're not prepared to stand up and take their share, then I think they ought to start muting some of their criticism. That's just one point of view.

That said, I appreciate both of you so very much. We have other witnesses. I invite you, please, to listen to them, particularly Mr. Malinowski, and I only say that for the reason that I had his testimony, and Mr. Rona. But I invite them now to come forward.

And, Senator Lizin and Mr. Bellinger, thank you so very much today.

If we could change now and have Tom Malinowski and Gabor Rona.

And I misspoke just then when I said the testimony of Mr. Malinowski. I didn't have his. I had Mr. Rona's, that I continue to rest on, because I think it's the clearest statement on these issues.

Thank you, all.

Since I've doted so heavily on Mr. Rona, I think we ought to hear from Mr. Malinowski first.

And thank you very much.

As I indicated earlier, ladies and gentlemen, the testimony of both witnesses is available, their biographies as well, and I won't go into that in the interest of time.

Mr. Malinowski, you have the floor.

**TOM MALINOWSKI, ADVOCACY DIRECTOR,
HUMAN RIGHTS WATCH**

Mr. MALINOWSKI. Thank you so much, Mr. Chairman, for starting us off and holding this hearing. As others have said, it's long overdue and extremely important.

I want to start by focusing on what it is about Guantanamo that's created such a huge problem for the United States around the world.

With all respect to my good friend John Bellinger, with whom I've been having this conversation now for years, most of the people in Guantanamo are not Khalid Sheikh Mohammed. They are not 9/11 planners.

And they weren't fighting us. And that's not my opinion. That's the opinion of the U.S. military if you read the transcripts of what they're actually accused of in these review tribunals that they've had.

Most of them weren't captured by our forces. Most of them weren't even captured in Afghanistan. They were captured in Paki-

stan by the Pakistani Government and intelligence services, well after the war in Afghanistan ended.

What these guys basically are is just a very small subset of the tens of thousands of young Muslim men from around the world who had flown into Afghanistan during the years of the Taliban and who ran for the exits when the war began.

And they're mostly the guys who didn't have the cash or the connections with the Pakistanis to get their way out of detention. Most of them were sold to our forces for bounties, as many of you know.

It's a very, very sad and fairly pathetic story, and perhaps one reason why you weren't given those documents about the initial selection process. It's not a story to be proud of.

Mr. Bellinger is absolutely right that in a traditional war, we do have a right under Geneva to hold combatants who are captured fighting us on the battlefield.

As an aside, we have a right to do something else to those people who are combatants. We have a right to kill them. That's what you can do to combatants.

And that's why it's so important to maintain this distinction between who is a civilian and who is a combatant in war. And the problem of Guantanamo is that the administration has blurred this distinction with extraordinarily, I think, dangerous consequences.

The basic message that Guantanamo sends to the world is that a government, a president, can designate anybody he wants as a combatant on the basis of some suspicion of threat and, on that basis, whether they were captured on a battlefield or not, hold that person indefinitely without charge.

In addition to that, of course, we've also sent the message that people like that can be subjected to interrogation techniques that we as a country have long condemned as torture. Such people can be seized anywhere in the world without judicial order, held in secret facilities, not just Guantanamo.

It's a very, very dangerous message, one that has huge implications for all of these values that we've been promoting as a country in the world.

Let me, to illustrate that, ask you all to imagine something that I wish the administration had asked itself before it set on this path.

Imagine if another government—let's say, for the sake of argument, the Government of Iran—set up a prison camp on some island to which it claimed its domestic laws did not apply and held there, without charge or trial, several hundred men of multiple nationalities captured outside of Iran who it accused, based on classified evidence, of supporting groups it claimed were hostile to Iran.

Imagine if some of those prisoners were Americans, not soldiers, even, but, say, contractors or diplomats or aide workers who had been seized not on a battlefield but by a private militia off the streets of an Iraqi city and then sold for bounties to the Iranian intelligence service.

Imagine if those Americans weren't even brought before a court but simply before an Iranian military tribunal. Imagine if they made claims that they were tortured but those claims were suppressed to protect Iranian national security.

What would we be talking about here today? Would any Member of Congress or the administration stand up and say, “Well, gosh, Iran’s got a right to do those things?”

Imagine, just for the sake of argument, that the President of Russia declared that his country was engaged in a global war on terror and that anyone with any connection to any group that supported separatist elements in a place like Chechnya was a combatant in that war and could be detained, or shot or poisoned wherever he was found, in Moscow, in Berlin, or, just for the sake of argument, say, in London.

Clearly, we live in a world where such things are possible. But do we want to live in a world where such things are considered legitimate?

That’s what’s at stake in this debate, whether we will preserve the moral and legal rules that we as a country have struggled to develop over generations to limit what governments—and here I mean not just the U.S. government, but any government—can do and can’t do to people in its power, and whether the United States will have the credibility to remain the world’s preeminent champion of those rules.

Now, nothing the administration has done in Guantanamo compares to what the world’s worst dictatorships do every year, every day, in their prisons. But that’s not the point.

The point is we are the standard-setter. And when Saddam Hussein tortures 1,000 people in some dark dungeon, or Kim Jong-Il throws 100,000 people into a prison camp, no one around the world says, “Well, gosh, if those dictators can do it, so can we.”

When the United States does that to one person and tries to justify it, all bets are off. The whole framework we’ve been trying to defend and develop for 50 years begins to fall apart.

Now, as you know, there is a terrible backlash right now being led by authoritarian governments around the world against democracy defenders, human rights activists, opposition parties.

When we call out such governments for violating a universal standard, their stock answer today is, “Guantanamo is the standard. It’s the new standard. The United States does what it has to do. So do we.”

A couple of years ago, my organization, Human Rights Watch, was meeting with the Prime Minister of Egypt.

You asked, Mr. McIntyre, if there were specific examples. Here’s one. We raised a case with him in which hundreds of prisoners the Egyptian Government had rounded up after a terrorist bombing were tortured by their security forces, and he didn’t deny it. What he said was, “Hey, we’re just doing what the Americans do.”

We’ve had Guantanamo and the administration’s interrogation policies thrown back in our face by officials from many other countries—Saudi Arabia, Jordan, Pakistan, Lebanon.

U.S. diplomats have told us they face the same problem. We were told recently by the U.S. Ambassador to a leading Middle Eastern country that he can’t raise the issue of torture in that country anymore because of this reason.

And you know the administration has heard this from Hugo Chavez. They’ve heard it most recently from the Egyptian parliament,

responding to the President's very eloquent speech in Prague on democracy and human rights.

The world champion of this tactic is probably Vladimir Putin of Russia. Just before the recent G-8 summit, he was asked by some reporters about the deteriorating human rights conditions in Russia, and he immediately said, "Hey, let's see what's happening in North America, just horrible torture, Guantanamo, detentions without normal court proceedings."

Now, don't get me wrong. Men like Putin don't need Guantanamo as an excuse to persecute their critics. Guantanamo isn't the reason why Egypt tortures people or detains prisoners without charge.

But these policies are still a gift to dictators everywhere in the world. They use Guantanamo to say to their own people and the rest of the world, "We are just the same as everybody else."

Leaders like Putin understand the extraordinary power America's example has had for the cause of freedom around the world. And they use Guantanamo to tear that example to shreds.

They use it to tell their people, "All this American-inspired talk about human rights and democracy is just hypocritical rubbish. Even America," they say, "tortures prisoners and locks them up without trial. Even America throws away all these legal niceties when push comes to shove. They use that human rights record to beat up on their critics, but they do what they have to do. They are just the same as us."

These are cynical men. Guantanamo helps them to spread their cynicism. We've given them that gift. We need to take it away.

Now, you've asked what to do about the place. I acknowledge and I agree with John Bellinger that it isn't as easy as it sounds.

But I do think that if the administration were to make a commitment to close the camp, it would open the door to the kind of diplomatic cooperation we would need from our allies to find arrangements to send most of these people home, and those who can't be sent home, to find them places of asylum.

And I do believe that those who have committed crimes, terrorist crimes, ought to be prosecuted. They ought to be prosecuted before civilian courts. I'm tired of hearing that people who say we should be using our civilian institutions to deal with these people are somehow weak or showing a pre-9/11 mentality.

Since 9/11, the Bush administration's own Justice Department has successfully prosecuted dozens of international terror suspects in the civilian courts, putting many away for life in maximum security prisons.

Since then, the system at Guantanamo has succeeded in prosecuting one Australian kangaroo trapper to a sentence of nine months, which he's serving back home in Australia.

The terrorists who were prosecuted by our civilian institutions are, to use one of President Bush's favorite phrases, no longer a problem for the United States of America.

Every last one of the prisoners in Guantanamo is a continuing problem for the United States of America. GITMO is a miserable, embarrassing and complete failure, not just in moral terms but in national security terms.

It's hurt America far more than it's hurt its enemies. The answer isn't to perpetuate the failure. It's to end it. Thank you.

Mr. HASTINGS. Thank you very much, Mr. Malinowski.

We did invite folks to submit written testimony without appearing, and I would like to acknowledge the International Helsinki Federation for Human Rights that did, in fact, submit written testimony, and I would encourage those interested in this particular hearing to pick that up.

I found it to be poignant and very much on point with what we are dealing with.

Equally, I found, as I've indicated now five times, Gabor Rona's testimony that was given to me in advance to be very good night reading.

And I often am mindful that everything you read you can't believe, but it is that Mr. Rona said everything in his written remarks that were my sentiments, and I thought the manner of their expression, the directness and the legal framework was outstanding.

So with those compliments, I now invite you to summarize those things that I read, Mr. Rona.

And both your full statements will be accepted into the record.

**GABOR RONA, INTERNATIONAL LEGAL DIRECTOR,
HUMAN RIGHTS FIRST**

Mr. RONA. Thank you, Chairman Hastings. Maybe with that kind introduction, I should just go home instead.

But I do very much appreciate the opportunity to share the views of Human Rights First on these issues with the Commission. And I also thank Co-Chairman Cardin and Mr. McIntyre for the opportunity to address you today.

My name is Gabor Rona. I'm the international legal director of Human Rights First, an organization that has worked in the United States for over a quarter of a century to create a secure and humane world in advancing justice, human dignity and respect for the rule of law.

We support human rights activists who fight for basic freedoms and peaceful change at a local level. We protect refugees in flight from persecution. We help build a strong international system of justice and accountability. And we work to ensure that human rights laws and principles are enforced in the United States and abroad.

You have asked me to lay out the international law applicable to Guantanamo detainees and others detained in the so-called war against terror.

I will do so, and I will make some recommendations necessary to bring U.S. policies and practices back into the fold of that international legal order that the United States shares with its OSCE partner states.

The debate about Guantanamo is, of course, part of a larger debate about the meaning of the words "war on terror".

And this debate between "it is war" advocates and "it is law enforcement" advocates reminds me of H.L. Mencken's admonition that to every complicated problem there is an answer that is simple, clear and wrong.

A simple and clear either/or answer here is wrong. The correct answer is this: When terrorist acts and counterterrorism responses

amount to armed conflict, they are governed primarily, but not exclusively, by international humanitarian law, the law of armed conflict.

But when they do not amount to armed conflict, they are governed by other domestic and international law, including international human rights law. This is not a question of which legal framework one prefers, but, rather, which one or ones are triggered by the facts on the ground.

Consequently, while legal frameworks are complementary, there is no logic to treating the legal frameworks like a Chinese restaurant menu, allowing you to choose one from Column A, another rule from Column B, in order to suit perceived policy interests. To do so renders the legal frameworks themselves meaningless chaos.

The Geneva Conventions do make it absolutely clear that when one state uses armed force against another—the very definition of international armed conflict—detained members of the opposing armed forces get POW status and protection, and those of enemy nationality who are not POWs get civilian status and protections. And that's true even for civilians who have engaged in hostilities without a privilege to do so.

Now, detainees in non-international armed conflict—that is, armed conflict that is not between two or more states. The law of non-international armed conflict, does not have provisions for PoW status for combatans and civilian status for civilians.

But this is not an omission of the law of armed conflict. Because non-international armed conflict fighters don't have a privilege to engage in hostilities that members of armed forces do, because such fighters are, in fact, violating the very domestic criminal laws that apply when they take up arms, they remain subject to those laws. They remain subject to the laws that apply equally in peacetime. That is, domestic criminal law and international human rights law.

And the Geneva Conventions also make clear, and the U.S. Supreme Court has agreed in the *Hamdan* case, that when a state is engaged in armed conflict with a non-state organized group—the very definition of non-international armed conflict—although detainees are not entitled to prisoner of war status, the conventions still require that they be treated humanely and given fair trials if they are to be prosecuted.

This is not a get-out-of-jail-free card. It is merely a means of putting the decision to detain ultimately in the hands of an independent judicial body in cases of non-international armed conflict.

And of course, those who commit war crimes, including acts of terrorism that target civilians, may and should and must be prosecuted and sentenced whether they are civilians or lawful combatants.

So the war on terror is not, in and of itself, entirely a real war, since terror cannot be a party to an armed conflict. Parties are essential to bear the rights and responsibilities that the laws of war create.

One commentator, wryly noted that proper nouns like Germany and Japan—those are good enemies, because they can surrender and promise not to do it again. You'll never get that out of a common noun like terror.

But what of the war against Al Qaida? Is it a real war? Probably so. But since Al Qaida fighters are not privileged belligerents, they should not be afforded the mantle of combatant, even though it may be permissible under the laws of war to target them.

If detained, they should be treated like the criminals they are when they engage in attacks against civilians.

This should lay to rest another straw man argument. One need not choose between, on the one hand, affording terrorists the protections of prisoner-of-war status, to which only privileged belligerents are entitled, or, on the other hand, holding them in a law-free black hole.

They can be targeted while directly participating in hostilities. And if captured, they can be interrogated, they can be detained, but in accordance with international and domestic law.

And so the U.S.-invented status of enemy combatant, unlawful combatant, is wrong. It is wrong, first of all, because as applied through the Military Commissions Act of last year, it fails to respect the obligations of the United States to accord proper status and rights to either combatants or civilians detained, in international armed conflict.

Second, it is wrong because it triggers procedures for judicial challenge that fall far short of international standards of due process applicable in non-international armed conflict.

Third it is wrong because it fails to apply the requirements for fair trial in accordance with international standards of due process for people charged with crimes in either international or non-international armed conflict.

But the most pernicious consequence of enemy combatant is its vague and over-broad definition by which the United States claims extraordinary powers of wartime without geographic or temporal limitation and beyond the bounds of that which is truly armed conflict, all the while denying people the rights they are entitled to under law.

One further point of departure between the United States and much of the rest of the world that has gotten short shrift but deserves much attention concerns the scope of application of international human rights law.

The United States clings to two short-sighted positions: One, that human rights treaty obligations do not follow the flag—in other words, that they impose no limits on U.S. conduct beyond the borders of the United States; and two, that human rights law does not apply in armed conflict.

Mr. Bellinger, who has worked hard to negotiate a middle ground between the U.S. administration and its detractors, unfortunately clings to the position that human rights law does not apply in situations of armed conflict beyond the borders of the United States.

The vast majority of international treaties, treaty monitoring bodies, international jurisprudence, national jurisprudence and legal scholars, however, believe the opposite and affirm the extraterritorial application of human rights in armed conflict.

The United States would better serve its own interests to follow suit. It should stop clinging to arguments that deny human rights in order to support illegal and counterproductive practices such as secret detention, which is a rank violation of the International Cov-

enant on Civil and Political Rights, as well as of the Geneva Conventions; such as interrogation methods that amount to torture and cruel and inhuman and degrading treatment in violation of the Convention against Torture, as well as the Geneva Conventions and the ICCPR; and such as extraordinary rendition to countries that practice torture, which also violates the Torture Convention, as well as the Geneva Conventions and the ICCPR.

And yet I submit that the concept of Americans being from Venus and Europeans being from Mars when it comes to defining the war on terror is an overstatement and an oversimplification.

Europe, which has had more war and more acts of terrorism on its soil than America, does not deny the application of laws of war when the war on terror manifests itself in armed conflict.

U.S. allies, particularly the Europeans who have called most loudly for Guantanamo to be closed, however, need to do much more to help.

But the United States works against its own interest in resettling Guantanamo detainees by clinging to rhetoric that is out of touch.

This government's own statistics say that 55 percent of the detainees were not found to have committed hostile acts. Only 8 percent were characterized as Al Qaida fighters, and 60 percent are detained merely because of alleged association with terrorists or terrorist groups.

So, Mr. Cardin, in response to your statement and question about who's at Guantanamo and the difference between combatants and civilians, I would suggest there's a category of persons that are being held in Guantanamo as a consequence of offers from the United States to people along the Afghani and Pakistani border, represented by this flyer that was distributed in large, large quantities, saying, "You can receive millions of dollars for helping the anti-Taliban force catch Al Qaida and Taliban murderers."

Let me suggest that this is a good indication that the vast majority of the population in Guantanamo is there as a result of the U.S. strategy of offering bounties for bodies.

In contrast to these facts, White House spokesperson Tony Snow recently responded to questions about Guantanamo with the assertion that prisoners are extraordinarily dangerous killers who have waged active warfare against democracy, plucked off the battlefields trying to kill Americans.

It is true that there are some really bad actors at Guantanamo. But I would submit that this flyer is more indicative of the general population there than are the words of Mr. Snow.

So it is no wonder that the United States is having difficulty outplacating Guantanamo detainees.

Our recommendations are to close Guantanamo, to release detainees that are not charged with crimes and bring the rest to the United States for trial, to amend the definition of enemy combatant to comport with the laws of war, and to repeal the MCA.

Human rights advocates normally chafe at the idea of U.S. exceptionalism, but the United States has been exceptional in one regard in the post-World War II era, and that is in the way it has positively influenced the human rights agenda of the world.

But now there is the corollary. The Economist, for example, has called Guantanamo and counterterrorism practices hugely counter-productive.

So the big question is how to effectively promote national security and lead a united global effort to combat terrorism at the same time.

We suggest that a starting point is to get away from the concept that rights and security are in conflict. We see little evidence that this is true and quite a bit of evidence to the contrary.

Mr. HASTINGS. Mr. Rona, let me ask you to wrap it up so that Senator Cardin—

Mr. RONA. Yes.

Mr. CARDIN. If I might just, at this moment, since the chairman interrupted you, just to—we have a vote on in the U.S. Senate, and I want to compliment both of you for your testimonies. I think the legal analysis is particularly helpful.

But as both of you emphasize, this is a matter of U.S. leadership. We are jeopardizing our ability to maintain world focus on the obligations contained in the Helsinki Final Act, the human rights commitments.

The United States has been a champion in advancing those rights internationally. And we are very much compromised by the way that we handled Guantanamo Bay.

So I particularly appreciated both of your testimonies, and I didn't want you to feel that my leaving had anything to do with what you said, because I agree with your testimonies. Thanks.

Mr. HASTINGS. Thanks, Senator.

Mr. RONA. I would like to conclude with a question: what exactly is it that those who say the existing legal framework is somehow insufficient or that there are gaps in the Geneva Conventions are referring to.

The fact is that in armed conflict, it is, as Mr. Malinowski said, completely permissible to shoot combatants and persons who engage in hostilities on sight.

What else do you want to do? Do you want to detain people without trial? That also can be done in situations, as Mr. Bellinger said, in international armed conflict.

But in non-international armed conflict, people who commit hostile acts are not combatants, they are criminals and they need to be held accountable in ways that accord them their rights under human rights laws such as the International Covenant, and that is at the very least the right of habeas corpus.

It is not only a question of obeying constitution and the United States international legal obligations. It is a deeper recognition of the fact that we cannot achieve security through abandonment of respect for human rights—that the fight against terrorism must apply the very same values of fairness and justice that that fight seeks to defend. Thank you.

Mr. HASTINGS. Mr. McIntyre?

Mr. MCINTYRE. Thank you very much.

I want to just—you've done an excellent outline in your remarks, and Mr. Malinowski as well. Thank you both.

Tell me, in regard to your solution, can you succinctly state for us, as I was trying to rapidly read through your more detailed re-

marks, what you would recommend in terms of the detainees who would be brought to federal courts?

Are you saying to go ahead and have those trials set up here right away for the ones that are not accepted by our European allies or others? And how would their attorneys be paid for or provided?

Mr. RONA. I'm not sure how attorneys would be paid for. There certainly are a number of detainees who are able to afford private counsel or organizations that would come to their assistance.

And as we have seen, heroic efforts from private law firms have been made to provide pro bono counsel to many detainees. So I don't think the ability to procure representation would be difficult.

As far as the process itself is concerned, even though Mr. Bellinger is correct that people—combatants in armed conflict may be detained for the duration of the conflict, that is a fact that applies to wars between states, State A and State B.

Mr. MCINTYRE. Right. Right.

Mr. RONA. And in this situation, it would not only be particularly appropriate but also necessary, especially after so many years of, frankly, the mess that has been made in relationship to Guantanamo detainees, that they, in fact, be brought to the United States, charged with crimes.

I respectfully disagree with Mr. Bellinger's assertion that we do not have crimes on our books capable of reaching extraterritorial conduct.

And I think, therefore, it is entirely appropriate and well within the realm of what the United States can and should do to charge people with crimes when it thinks it can prove crimes, have trials.

For those individuals who are convicted of terrorism offenses, detain them in accordance with law, sentences.

And for those individuals who are found not guilty or for those individuals who cannot be tried—and a lot of the reason why individuals cannot be tried is not only because we—is not because we don't have laws on the books to deal with illegal conduct, but rather, so many of them have done nothing wrong.

Others who have done something wrong can and should be prosecuted. Our federal courts are supremely equipped to take on that challenge.

We've had large numbers of very serious terrorism cases tried in U.S. courts well before 9/11. And there is no doubt in my mind that our courts are capable of handling those prosecutions.

So I think a solution can be found and that is to bring the detainees to the United States, charge them with crimes or release them.

Mr. MCINTYRE. Did you want to add a comment?

Thank you.

Did you want to add a comment to that?

Mr. MALINOWSKI. Sure. I think a good example, just to illustrate this, is the case of Richard Reed. Remember the famous shoe bomber?

Mr. MCINTYRE. Right.

Mr. MALINOWSKI. Which illustrates, number one, the Bush administration has been bringing such people before federal courts.

It's been a fairly random process, who goes to GTMO, who goes to federal court.

And in his trial, Mr. Reed did what every terrorist in history has done. He begged to be seen as a soldier, as a combatant. All terrorists want to be seen as combatants, because that status justifies in their minds what they do, killing their enemies.

And when he was sentenced and put away for the rest of his life, the judge, the Federal judge in that case, delivered, I think, an eloquent speech that I think should be quoted again and again and again.

He said, "Mr. Reed, I don't care what you think. I don't care what the Government thinks. You are not a combatant. You are not a soldier in any war. You are the lowest form of criminal." That's what we should be saying to these people.

You know, I mean, setting aside the moral issues and the legal issues, which are profoundly important, if all we care about is defeating this enemy, it's just profoundly unwise to use this model of military courts and military detention.

It gives them a status that they use in their propaganda and that they use to inflate their own sense of what they're doing and who they are.

Mr. MCINTYRE. Thank you.

Thank you, Mr. Chairman.

Mr. HASTINGS. Thank you very much. I recognize you have to leave as well, Mr. McIntyre.

And we've pretty much got it on the button. We're due to vacate the room at noon and it's shortly thereafter, so I won't be running over.

I do thank you, and I would urge that in keeping with the practice that I'm trying to maintain that your written testimony, unless you have specific objections, would be posted on our Web site referencing this particular hearing, as well as the testimony of the Majority Leader, Hoyer.

And I will have just a few questions that I would send to you subsequently and ask if you would be kind enough to answer them, and then I would post it as well.

But I thank you all so very much.

And I appreciate the attentiveness of the audience here today as well. I think it has been helpful to our dialogue and discussion regarding this matter. And let's go forward.

Thank you all so very much.

[Whereupon, at 12:04 p.m., the hearing was adjourned.]

APPENDICES

PREPARED STATEMENT OF HON. ALCEE L HASTINGS, CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Good morning ladies and gentlemen. I'd like to call this hearing to order. Before we get started, I would like to acknowledge that the issues we're addressing today are subjects about which many people feel passionately. Nevertheless, it is my intention to conduct this hearing in an orderly fashion, with due respect for all the witnesses present. Persons who disrupt the hearing may find themselves removed from this room, so I encourage everyone to be attentive and orderly throughout the morning.

I also want to start by welcoming to the dais the Majority Leader, my good friend Congressman Hoyer, who served as Chairman and Co-Chairman of the Helsinki Commission from 1985 through 1994. Steny's leadership on human rights issues is well-known and well respected, and I am honored to have him here with us today.

This is the Helsinki Commission's first hearing in sometime examining an issue of domestic compliance, an area which will receive warranted attention during my Chairmanship. As many people here know, in executing the Helsinki Commission's mandate, Members of this Commission are engaged in a continual dialogue with representatives of other countries—including parliamentarians—on issues of concern, with a particular focus on human rights. This is, of course, a two-way street. Just as we raise issues of concern with representatives of other countries, our colleagues raise issues with us. And no issue has been raised with us more vigorously and vocally than questions relating to the status and treatment of detainees, particularly those at the Guantánamo Bay detention facility. These concerns have been raised for several years at meetings of the OSCE Parliamentary Assembly, they have been raised at meetings of the OSCE permanent Council in Vienna, and they have been raised at the human dimension meetings of the OSCE.

I believe very strongly that our colleagues who have raised concerns with us deserve our considered response and engagement. The fact is, for all the 56 OSCE participating States—and not just the United States—the issue of how to safeguard human rights while effectively countering terrorism may be one of the most critical issues our countries will face for the foreseeable future.

In organizing this hearing, it is painfully difficult to un-package a whole set of issues related to our counterterrorism efforts: the off-shore detention center at Guantánamo; the treatment of detainees in custody and the interrogation practices to which they may be subjected; the legal procedures for holding, trying and (potentially) convicting detainees of crimes; and the issue of extraordinary rendition to name a few. Frankly, the United States has not covered itself with glory when it comes to any of these issues.

I am, of course, mindful of the fact that many other committees of both the House and the Senate are actively engaged in oversight on many aspects of this subject. It is not our intention to duplicate

those efforts. Rather, we hope to address the specific implications of Guantánamo for U.S. human rights leadership. In no small understatement, this year's State Department Country Report on Human Rights notes: "We recognize that we are writing this report at a time when our own record, and actions we have taken to respond to the terrorist attacks against us, have been questioned." Indeed.

Most importantly, we've got to figure out where we go from here. Pretty much everybody and his brother, including the Secretary of Defense and the Secretary of State, have said that Guantanamo ought to be closed down—either because they believe it never should have been opened to begin with, or because they've concluded that the stigma associated with Guantanamo is so great that the entire operation serves to undermine our alliances and strengthen the propaganda machinery of our enemies, rather than make us safer.

But the question is, where do we go from here? I am hoping our hearing today will help us answer that question.

We have before us today a panel of experts whom, I believe, can really engage in a constructive discussion on these issues. Their biographies have been circulated here, so I'm not going to re-read them now. Unfortunately, although we sent a letter to Secretary Gates on May 15 inviting the Department of Defense to send a witness to this hearing, the Department has declined the opportunity to have its views heard. I am frankly quite disappointed by the message this sends. I know some tough questions may come up today, but it seems to me that there is nothing to be gained by ducking them.

I would like, in any case, to warmly welcome Senator Anne-Marie Lizin, the President of the Belgian Senate. When I served as President of the OSCE Parliamentary Assembly, I appointed Senator Lizin to serve a Special Representative on the issue of Guantanamo, and I did so because of the extraordinary concern voiced in that body regarding the status and treatment of detainees there. Senator Lizin has shown remarkable dedication and initiative in addressing the issues within her mandate, and I am delighted that she is with us today as we prepare for the Assembly's Annual Session to be held in Kyiv early next month.

Before calling on my colleagues for their opening statements, let me just note the order in which we will receive testimony this morning. Our first witness will be the Department of State's Legal Advisor, Mr. John Bellinger, followed by Senator Lizin. We will then hear from an additional panel of representatives: Mr. Tom Malinowsky from Human Rights Watch and Mr. Gabor Rona from Human Rights First.

**PREPARED STATEMENT OF HON. BENJAMIN L. CARDIN,
CO-CHAIRMAN, COMMISSION ON SECURITY AND
COOPERATION IN EUROPE**

Mr. Chairman, I commend you for convening this important hearing. As you have rightly noted, the credibility of the United States demands that we answer our critics when they raise human right issues with us, just as we hope representatives of other countries will respond seriously and substantively when we raise concerns with them.

The fact is, in all the years that I have served as a member of the Helsinki Commission, there is no other concern that has been raised with the United States by our colleagues in Europe as often—and in earnest—as the situation in Guantánamo. As a member of the U.S. Delegation to meetings of the OSCE Parliamentary Assembly, this has been a subject of constant debate.

Of course, when Belarus introduces resolutions at the United Nations bashing the United States for Guantanamo and a litany of other alleged human rights violations, we can dismiss this as a classic piece of self-serving, Soviet-style propaganda. But we cannot be so cavalier when Switzerland, a guardian of humanitarian law, expresses concern at the OSCE Permanent Council regarding U.S. practices and policies. And when Vladimir Putin can get crowds cheering by bemoaning the lack of proper trials at GTMO, there is something terribly wrong with this picture.

The damage done to the United States goes beyond undermining our status as a global leader on human rights. Our policies and practices regarding Guantanamo and other aspects of our detainee policies have undermined our authority to engage in the effective counter-terrorism measures that are necessary for the very security of this country. As Gijs de Vries of the Netherlands, who stepped down in March from his position as the EU's first counter-terrorism coordinator, recently observed: "The United States used to be known as a country of the rule of law and of liberty. Today, it's associated with Abu Ghraib, with Guantanamo, and with CIA renditions to secret prisons in blatant violation of international law. That is sapping support for the United States, and indirectly also for Europe worldwide."

This view was echoed by former National Security Advisor Brent Scowcroft, who stated "that the international community no longer trusts our motives is a new phenomenon, and I see it as one of many warning signs of a possible lasting realignment of global power. [. . .] I don't think were there yet, but it's certainly possible that we've created such a menace, and alienated so much of the world that we can never go back to where we were at the end of the Cold War. At that time, the United States was considered the indispensable ingredient in any attempt to make the world better." Or, as Phillip Zelikow, a former Bush administration official recently argued, "Sliding into habits of growing non-cooperation and alienation is not just a problem of world opinion. It will eventually interfere—and interfere very concretely—with the conduct of worldwide operations." This is not just a sad or even tragic commentary on how fast and how far we've fallen in the eyes of the world, it is dangerous for our citizens if we cannot build and maintain effective global alliances.

To be clear, I do not mean to suggest that America should hold its finger to the wind of international opinion and make policy accordingly. The fact is, sometimes being a global leader means bearing the burden of persuasion, the burden of bringing other countries around to our position. In fact, there have been many times when the United States has been almost a lone voice on critical human rights issues. When our policies are just ones, then that is a burden we should be prepared to carry. But I think the question here is: are our underlying policies upholding the rule of law or attempting to circumvent it? Are our positions really defensible at home and abroad?

Mr. Chairman, I welcome the testimony we will receive today on the implications that our practices and policies in Guantanamo have for U.S. human rights leadership.

**PREPARED STATEMENT OF HON. CHRISTOPHER J. DODD,
COMMISSIONER, COMMISSION ON SECURITY AND
COOPERATION IN EUROPE**

I want to thank Senator Cardin and Congressman Hasting, co-chairs of the U.S. Helsinki Commission, for holding today's critically important hearing. As we all know, several hundred individuals are still being held as enemy combatants by the United States government at Guantanamo Bay, Cuba. According to a Red Cross report, prisoners in Guantanamo Bay have been subjected to "cruel, inhumane and degrading" treatment that is "tantamount to torture." Among the abuses cited in the report are beatings, extended periods of isolation, sexual humiliation, and prolonged use of "stress positions."

Guantanamo Bay and the grotesque abuses that have occurred there are not simply a moral stain on our country. More than that, the existence of this prison, which was purposely designed to circumvent public and legal scrutiny into the treatment and trying of detainees, significantly hampers the credibility of our nation as we battle against extremists around the world. It also significantly undermines US human rights leadership, and it provides excuses for even the most grotesque violators of human rights.

I firmly believe that we must make every effort to protect our country from potential threats to our national security. At the same time, we must make sure that we uphold our democratic ideals. It is simply a false choice to choose between security and morality, between safety and legality.

That is why I introduced the Restoring the Constitution Act of 2007, which, among other things, would have restored the right of Habeas Corpus to all those held by the United States government, and would have also restored the Geneva Conventions, both of which were stripped from the Military Commissions Act which was shamefully enacted into law this past fall.

But more than just restoring these key rights, we need to close the detention facility at Guantanamo Bay as soon as possible. I commend Senators Feinstein and Harkin who have both introduced separate legislation that would mandate the closure of Guantanamo Bay. These two bills, both of which I have cosponsored, would provide for the transfer of those who are deemed to be dangerous to other legally credible and established facilities for prosecution.

This Administration made an egregious mistake in opening this facility, and compounded that mistake by purposely eschewing long held national law and international treaty obligations to protect the human rights of all individuals. The time has long passed for this facility to be closed and for us to restore the rule of law, and the moral and political credibility of US human rights leadership around the world.

I thank our two co-chairs again for holding this important hearing and I look forward to hearing the views of our distinguished panel of witnesses today.

**PREPARED STATEMENT OF HON. HILDA L. SOLIS,
COMMISSIONER, COMMISSION ON SECURITY AND
COOPERATION IN EUROPE**

Thank you Chairman Hastings and Co-Chairman Cardin for holding this timely and important hearing. The continued operation of the detention facility for enemy combatants at the U.S. Naval Bases at Guantanamo Bay, Cuba, has contributed to a sharp decline in the United States' credibility on human rights issues around the world. To hold 385 individuals without charge for an indefinite period of time is contrary to the values that our country was founded upon. The detainees at the Guantanamo detention facility should be processed in the American legal system with the rights that all human beings—guilty or innocent—are entitled.

It is telling that significant numbers of high-ranking Bush Administration officials have announced their opposition to the continued operation of the Guantanamo detention facility. Former Secretary of State Colin Powell recently called for its closure. Secretary of Defense Robert Gates and Secretary of State Condoleezza Rice are reportedly in favor of closing the facility. As two of the primary stewards of America's foreign policy, I am pleased that Secretaries Rice and Gate are being responsive to the strong opposition to continuing operations at the detention facility. I urge the Bush Administration to acknowledge the overwhelming opposition to the Guantanamo detention facility and to take action to ensure that detainees are guaranteed rights under the law.

I am concerned about the problems the United States has encountered with returning some of the combatants to their home countries. Apparently, U.S. officials have had difficulty in finding countries that would accept some 75 combatants that could be released from Guantanamo. This situation is further evidence that the United States' foreign policy during the Bush Administration, from the opening of the Guantanamo detention facility to the ongoing conflict in Iraq, has brought us to one of our lowest points as a nation in our relations with our world partners. The United States and its next president will have years of work ahead of them to restore the United States' reputation as a fair and honest partner on human rights.

I want to thank our witnesses for their testimony, and look forward to our continued work together to promote human rights in the United States, throughout the OSCE Member states, and around the world.

**PREPARED STATEMENT OF HON. STENY H. HOYER, MAJORITY
LEADER, U.S. HOUSE OF REPRESENTATIVES**

Chairman Hastings, Co-Chairman Cardin, and Members of the Commission:

I first want to thank you for—at long last—holding this important hearing on the detention of enemy combatants at the U.S. Naval Base at Guantanamo Bay.

As you may know, I have urged the Commission—through multiple letters—to examine U.S. policy and conduct concerning those deemed to be enemies in the Global War on Terror. This hearing is an important step in addressing a situation that has been mishandled from the outset and which carries serious implications for our nation’s reputation throughout the world.

As the former Chairman and Co-Chairman of the Helsinki Commission, and throughout my 18 years as a Member of this body, I always believed that the Commission’s responsibility was to oversee the implementation of the Helsinki Final Act abroad and to ensure that its key principles were applied in this country as well.

Human rights champion Andrei Sakharov has observed that the Helsinki Final Act has meaning only if it is observed fully by all parties.

As Sakharov has stated: “No country should evade a discussion on its own domestic problems, nor should a country ignore violations in other participating states . . . the whole point of the Helsinki Accords is mutual monitoring, not mutual evasion of difficult problems.”

Indeed, Guantanamo—along with several other American detention facilities abroad—is not only a problem, but an international disgrace that every day continues to sully this great nation’s good reputation.

Today, the United States has been holding some detainees at Guantanamo for more than five years without bringing them to trial.

Many detainees have reported physical and mental abuse. Four detainees have committed suicide in the past year—acts that one State Department official coldly described as “a good PR move.”

The situation has provoked former Secretary of State Colin Powell to observe: “If it were up to me, I would close Guantanamo not tomorrow, but this afternoon . . . essentially, we have shaken the belief the world had in America’s justice system by keeping a place like Guantanamo open.”

I could not agree more.

The system of justice at Guantanamo—if it can be called that—is not only inconsistent with our values and inspiring outrage internationally, but also ineffective.

Of the hundreds of detainees cycling through and currently held at Guantanamo, only three have faced charges to date and only one has been convicted.

Today, less than one year after his conviction, he is serving a severely reduced nine-month sentence in an Australian prison.

As for the other two—Canadian Omar Khadr and Yemeni Salim Ahmed Hamdan—their charges were dismissed recently after an appellate court found that the U.S. government failed to establish jurisdiction.

I believe that one of the most egregious sections in the legislation Congress passed last fall is the provision that dismissed all pending habeas corpus suits by current detainees.

We must restore this fundamental right for those who have been detained.

Currently, I am working closely with key leaders in Congress—such as Chairmen Skelton and Conyers and Subcommittee Chairman Nadler—to do so.

Let me be clear: Our respect and adherence to the rule of law is not a sign of weakness. It is a source of strength.

No less a figure than Thomas Jefferson observed more than 200 years ago that the right of habeas corpus is “one of the essential principles of our government.”

Simply stated, the elimination of habeas corpus rights fails to comport with our American values and our long legal tradition.

Let me conclude by stressing that there is no doubt that our eyes were opened by the horrific attacks on September 11, 2001.

We will—and we must—prevail in the war on terror.

However, in the pursuit of those who seek to harm us, we must not sacrifice the very ideals that distinguish us from those who preach death and destruction.

Members of the Commission, the time has come to close the detention center at Guantanamo Bay and to identify a reasoned method to process the detainees held there in a manner that is consistent with our values, our laws and our history.

This does not mean that we will coddle those who are accused of participating in or planning terrorist acts.

When Saddam Hussein was taken out of a hole and captured, we afforded him his legal right to hear the evidence against him, to contest that evidence, and to be represented by counsel.

When Slobodan Milosevic was brought to justice after murdering tens of thousands and sanctioning the ethnic cleansing of more than 2 million people, he was afforded his legal rights.

And even the butchers of Berlin—who committed genocide, murdering millions of innocents—were afforded their legal rights at Nuremburg.

We are in a fight against brutal extremists who will stop at nothing to inflict pain and destruction. However, we also must be cognizant of the fact that we are in a battle for the hearts and minds of millions of people who must know that the most powerful nation on earth is committed to fairness and justice.

Our current treatment of detainees in the war on terror is not helping us win on either front.

We must change course.

I look forward to working with you and our international partners to do precisely that.

Thank you.

**PREPARED STATEMENT OF JOHN B. BELLINGER III, LEGAL
ADVISER, DEPARTMENT OF STATE**

Thank you very much for the opportunity to discuss with the Commission today the Administration's views on the issues raised by our continued detention of enemy combatants at the Department of Defense facility at Guantanamo Bay, and specifically, the Department of State's efforts with the international community on these matters. Currently, there are approximately 375 members of al Qaida and the Taliban detained at Guantanamo, including senior al Qaida planners like Khalid Sheikh Mohammed and al Qaida fighters who have personally attacked Americans. The Administration is acutely aware of concerns that have been raised both at home and abroad about long-term detentions of individuals at Guantanamo. Our challenge has been to explain to the world that the United States and other democracies around the world share a common problem in dealing with dangerous terrorists intent on harming our civilian populations, while at the same time being mindful of the need to operate lawfully and in a manner that preserves our commitment to principles of human rights and international humanitarian law. As Legal Adviser to the Department of State, I would like to explain to you today the international legal background for our detention of enemy combatants at Guantanamo, as well as the significant efforts the Department has undertaken to address the concerns raised by our friends and allies.

Let me begin by emphasizing that the majority of detainees in Guantanamo were detained by U.S. and coalition forces in or near Afghanistan during the armed conflict between the United States and Afghanistan in 2001 and 2002. Our military forces were acting in self-defense in response to the attacks by al Qaida against our country on September 11. The Taliban had refused the request of the United States to turn over those responsible for those vicious attacks to face justice in the United States, choosing instead to harbor al Qaida. This inherent right to act in self-defense was recognized by the international community, including the U.N. Security Council and NATO.

Because the United States was and is in an armed conflict with al Qaida, the Taliban its affiliates and supporters, it was proper and continues to be lawful and appropriate for the United States and its allies to detain individuals who are fighting us in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities. It is not consistent with international law to argue that the United States and its allies had the right to use force in self-defense but did not have the right to detain individuals incident to that use of force unless we planned to charge them with a criminal offense. The Supreme Court has confirmed this authority in the Hamdi and Hamdan decisions.

The legal authority to detain enemy combatants dovetails with a practical reality: many of the people we have captured in this conflict are extremely dangerous individuals who by their past actions have proven their ruthlessness, destructive intent, and flagrant disregard for universally accepted norms of armed conflict. These include the architects of 9/11, the Bali bombings, the attacks on the U.S.S. Cole, and the Embassy bombings in Africa. It is not reason-

able or responsible to suggest that these individuals should simply be released to rejoin the fight, where they could further harm our nation or our allies.

Despite this general recognition that the United States acted lawfully in detaining the Taliban and al Qaida combatants incident to the armed conflict in Afghanistan, and is justified in continued detention of dangerous terrorists like Khalid Sheikh Mohammed and Abu Zubaydah, the Administration understands fully that the detention facility at Guantanamo Bay has been a lightning rod for international and domestic criticisms. Many of these criticisms stem from misperceptions about the conditions at Guantanamo Bay. While critics continue to imagine orange-jump suited detainees in cages, visitors to Guantanamo, such as Madame Lizin who will speak after me, have recognized that the true conditions there mirror, and in some respects improve upon, those of high security prisons in Europe and the United States. And the horrifying images of detainee abuse at Abu Ghraib caused many to conclude that widespread detainee abuse takes place at Guantanamo, when in fact U.S. and international groups have found no evidence of ongoing detainee abuse there. The Detainee Treatment Act, the Department of Defense Detainee Directive, and the revised Army Field Manual on interrogation collectively provide detainees at Guantanamo a robust set of treatment protections that are fully consistent with, and in some respects exceed, our international obligations, including Common Article 3 of the Geneva Conventions.

Other criticisms stem from a sense that detainees at Guantanamo are in a "legal black hole," because they are not being prosecuted domestically. It is simply incorrect to suggest that the detainees have no legal protections absent criminal prosecution. All detainees at Guantanamo have received Combatant Status Review Tribunals confirming that they are properly detained as enemy combatants, and under the Detainee Treatment Act detainees have the opportunity to challenge that determination in the U.S. Court of Appeals for the D.C. Circuit. To our knowledge, these procedural protections are more extensive than those used by any other nation to determine a combatant's status.

And the Administration remains committed to trying by military commission those who have violated the laws of war or committed other serious offences under the MCA. After the Supreme Court in Hamdan set aside the original system of military commissions, we worked with the Congress to create a new set of military commission procedures that are fully consistent with U.S. law and Common Article 3 of the Geneva Conventions. While the Department of Defense can describe to you the latest developments regarding military commissions, it remains important as a matter of international law that we hold those responsible for serious war crimes to account.

Although we may disagree with many of the charges leveled against U.S. detention policies, the Administration recognizes the need to address the concerns that we have heard. As the President said on September 6th of last year, "we will work with the international community to construct a common foundation to defend our nation and protect our freedoms." Secretary Rice has made dialogue with our allies on these difficult issues a priority. We dem-

onstrated continued American commitment to international human rights instruments by leading large interagency delegations presenting reports on U.S. compliance with the Convention Against Torture and International Covenant on Civil and Political Rights last year in Geneva, and we are currently working on a one-year follow up report to both treaty bodies on our actions in response to their recommendations.

At the Secretary's instruction, I have undertaken extensive bilateral and multilateral efforts to discuss a common approach to counterterrorism policies. I have traveled to a dozen countries to speak with government officials, legal scholars and academics, and the media to answer questions they have about U.S. detention laws and policies and to emphasize the importance the United States attaches to complying with our international legal obligations. I have also engaged in seven rounds of discussions with the legal advisers of the 27 EU countries, and held additional discussions with the legal advisers of the member states of the Council of Europe, with the intention of moving towards a common approach to the international legal issues posed by the conflict with al Qaida.

Together with Under Secretary Hughes and the Office for War Crimes Issues, which has the State Department lead on Guantanamo transfer issues, my office also regularly conducts press briefings and appears in the international media in order to answer questions about Guantanamo, the Military Commissions Act, and other U.S. detention laws and policies. The Department has been the lead on U.S. Government public diplomacy efforts on this issue, and consistent with that role we have engaged in outreach to schools and universities, and to the international bar association. We have also facilitated visits to Guantanamo by international groups including the OSCE, led by the Special Rapporteur for Guantanamo, Anne Marie Lizin, the U.K. Foreign Affairs Committee of the House of Commons, and a group of EU parliamentarians, as well as members of the international media. These visits have led to positive contributions to the international dialogue, and we will continue to work with the Department of Defense to facilitate future visits.

Although differences remain, I believe there is a growing international recognition that the threat posed by al Qaida does not neatly fit within existing legal frameworks. Madame Lizin's report from last July recognized that "there is incontestably some legal haziness" regarding the legal status of members of international terrorist organizations. Indeed, she recommended the formation of an international commission of legal experts to examine the question. Likewise, at last year's U.S.-E.U. summit, then-Austrian Chancellor Wolfgang Schussel acknowledged that we face "legal gray areas" regarding detention of terrorists. Most recently the Foreign Affairs Committee of the U.K. House of Commons wrote that the Geneva Conventions dealt inadequately with the problems posed by international terrorism, and called on the U.K. government, in connection with state parties to the Geneva Conventions and the International Committee of the Red Cross to work on updating these Conventions for modern problems. Although we do not—and will not—always see eye to eye with our European allies, I am encouraged that we have reached some degree of common

ground, and that there is a growing acknowledgment that international terrorist organizations like al Qaida do not fit neatly into the existing international legal system.

Progress on this front aside, the President has stated that he would like to move towards the day when we can eventually close the detention facility at Guantanamo Bay. The Ambassador for War Crimes Issues Clint Williamson and I have worked hard with the Department of Defense to reduce the population of Guantanamo. While the Department of Defense can provide you more information on the current population at Guantanamo, it is critical to note that more than half of the original population of the facility has now been transferred or released. As of today, approximately 375 detainees remain, and of those, we have approved approximately 75 for transfer or release. Although our critics abroad and at home have called for Guantanamo to be shut immediately, they have not offered any credible alternatives for dealing with the dangerous individuals that are detained there. Our experience has shown that transferring or releasing a detainee from Guantanamo is quite difficult. It is our policy that we do not transfer detainees from Guantanamo to countries where it is more likely than not that they will be tortured, and as news reports have made clear, this has resulted in our inability to transfer or release groups of detainees such as the ethnic-Uighur, Chinese-national detainees to their home countries. In other instances, countries refuse or are unable to take responsibility for mitigating the threat posed by their nationals, meaning that we cannot repatriate them while protecting our nation and our allies. Moving forward, it is critical that the international community recognize, as the UK Foreign Affairs Committee recently did, that many of the detainees at Guantanamo pose a threat not just to the United States but to its allies, and that the longer-term solution to Guantanamo, including resettlement of detainees who cannot be repatriated, is a responsibility shared between the United States and those allies.

Commission members, the United States has long been a beacon of hope and opportunity for people across the world, and we must continue to serve as a leader in protecting human rights. Our history and our values result in the United States being held to a high standard on human rights issues, and we embrace that responsibility. We recognize that many people around the world view Guantanamo as inconsistent with U.S. values. We have worked hard to address those concerns, both through dialogue and changes to our policies. We will continue to work hard to take the steps necessary to protect Americans and the international community, while at the same time respecting our commitment to the rule of law. I look forward to answering any questions that you might have.

**PREPARED STATEMENT OF TOM MALINOWSKI, ADVOCACY
DIRECTOR, HUMAN RIGHTS WATCH**

Mr. Chairman, members of the Commission, thank you for inviting me to testify today.

I believe that the answer to the question this hearing poses is painfully clear. Guantanamo, and the Bush administration's broader detainee policies, have done profound damage to the moral and legal standards the United States has long championed in the world, and to America's ability to promote those standards. They have diminished America's moral authority, alienated its friends, encouraged its enemies, and, ironically, undermined its ability to wage an effective struggle against terror. The only way for the United States to regain the moral high ground—and the initiative in that struggle—is to close Guantanamo and to change the policies for which the prison has come to stand.

What is it about Guantanamo in particular that has hurt America's standing? Is it fair that the United States has taken so many hits from its friends over the camp and the policies surrounding it? After all, as the administration often reminds us, the Geneva Conventions allow the detention without charge of combatants in wartime for the duration of the conflict in which they were caught fighting. The United States has held such people as prisoners of war in every past conflict, without giving them access to lawyers or courts. Why is this case different?

For one thing, most of the prisoners in Guantanamo were not captured on anything resembling a traditional battlefield, in a traditional war, in which it is easy to tell who is a combatant and who is not. Most were not even captured by the United States, but by Pakistan and by various Afghan militias, who picked a tiny handful of the tens of thousands of foreign men who were fleeing Afghanistan after the fall of the Taliban regime, and sold them for bounties to U.S. forces, even as other, more important al Qaeda and Taliban leaders managed to escape. Still others were detained as far afield as Bosnia and Thailand and the Gambia. The U.S. government hasn't even claimed that most of these men were fighting the United States; many are accused of little more than living in a house or working for a charity linked to the Taliban. They are part of a broad, amorphous universe of people who are suspected to have had some association with international terrorism. The administration has prosecuted some people in this category in civilian courts; it has released others outright; for reasons that often appear entirely random, it has chosen to hold some in Guantanamo without charge.

The laws of war do indeed allow the United States to detain without charge for the duration of an armed conflict combatants captured on a battlefield. They also, by the way, allow the United States to kill combatants on the battlefield without warning or hesitation. In other words, they allow governments engaged in armed conflict to do things to combatants that they would never be allowed to do to civilians. That's why maintaining a crystal clear distinction between combatants and civilians is so important.

What the Bush administration has done in Guantanamo is to blur that distinction—to apply the highly permissible rules governing a military battlefield to anyone anywhere in the world who

is suspected of having any association with terrorism. It is treating the laws of war as a license to kill or detain without charge anyone who the President determines to be a threat to the national security of the United States. And if the President of the United States can do this, then by definition, the leader of any other country can, too. And the United States loses its ability to complain when other governments do the same thing—whether to their own citizens or to Americans—for their own narrow ends.

Here, in a nutshell, are the arguments the administration has made to the world through its detainee policies: First, the whole world is a battlefield in an open-ended war on terror. Anyone the chief executive of a country believes to be associated with terrorism is a combatant in that war, and can therefore be killed or held without charge. Second, such people can be seized anywhere, at any time, without judicial authorization, and if the leader of a country considers them especially dangerous, he can hold them in secret for as long as he likes. Governments can also subject such prisoners to “enhanced” interrogation procedures, including techniques such as water boarding, extended sleep deprivation, and excruciating stress positions, even though such practices have been prosecuted as torture by the United States for over a hundred years.

To demonstrate how dangerous this is, I’d like to ask you something I wish the administration had asked itself before it embarked on these policies.

Imagine if another government—let’s say, for the sake of argument, the government of Iran—set up a prison camp on some island to which it claimed its domestic laws did not apply, and that it held there, without charge or trial, several hundred men of multiple nationalities, captured outside of Iran, who it accused, based on classified evidence, of supporting groups it claimed were hostile to Iran.

Imagine if some of these prisoners were Americans—not soldiers, but contractors, or diplomats, or aid workers—seized not on a battlefield, but by a private militia off the streets of an Iraqi city, and then sold for bounties to the Iranian intelligence service. Imagine if those Americans were ultimately given a hearing—not before a court, but before a panel of Iranian military officers—to confirm the legality of their indefinite detention. Imagine if those Americans tried to say that they had been tortured by their interrogators, but that the Iranian tribunal kept this testimony secret because it didn’t want Iran’s enemies to learn how it interrogates prisoners.

What would be talking about here today if this was happening? Would any member of Congress or official of the Bush administration defend Iran’s right to do such things?

Now, imagine if the intelligence service of the United Kingdom suspected a lawful U.S. resident of sending money to the IRA in Northern Ireland, or the secret police in China or Burma accused an American of supporting rebels in their country, and on that basis, kidnapped that American off the streets of Baltimore or Miami, bundled him on a plane, and held him for years in a secret facility, hidden even from the International Committee of the Red Cross. How would the U.S. government react? Would the president

say “sure, no problem, I guess that guy was considered an enemy combatant over there in Burma or China so I can’t really complain?” If it happened to one of your constituents, Mr. Chairman, would it matter to you if some official in the U.S. intelligence community had given Burma or China permission to whisk that American away?

Or, just for the sake of argument, imagine if the president of Russia declared that his country was engaged in a global war on terror, and that anyone with any connection to any group that supported separatist elements in places like Chechnya was a combatant in that war who could be detained or shot or poisoned wherever he was found, whether in Moscow, or Berlin, or, just for the sake of argument, London.

Clearly, we live in a world in which such things are possible. But do we want to live in a world where they are considered legitimate? That is what is at stake here. Whether we will preserve the legal and moral rules we have struggled to develop over generations to limit what governments—and here I mean not just the United States but all governments—can and can’t do to people in their power. And whether the United States will have the credibility to remain the world’s preeminent champion of those rules.

Now, it is important to note that nothing the administration has done in Guantanamo or anywhere else is remotely as horrible as what happens every day to the victims of cruel dictatorship around the world. The United States is not Sudan or Cuba or North Korea. The United States is an open, democratic country with strong institutions—its Congress, its courts, its professional military leadership—which are striving to undo these mistakes and uphold the rule of law. There is no question that before long we will look back on these last few years as a sad, but brief, departure from American traditions of justice.

But in the meantime, we need to remember that the United States is the most influential country on the face of the earth. The United States is a standard setter in everything it does, for better or for worse.

When Saddam Hussein tortures a thousand people in a dark dungeon, when Kim Jong Il throws a hundred thousand people in a prison camp without any judicial process, no one says: “Hey, if those dictators can do that, it’s legitimate, and therefore so can we. But when the United States bends the rules to torture or unlawfully detain even one person, when the country that professes to be the world’s leading protector of human rights begins to do—and to justify—such things, then all bets are off. The entire framework upon which we depend to protect human rights—from the Helsinki Final Act to the Geneva Conventions and treaties against torture—begins to fall apart.

The United States still can promote human rights, and it does. President Bush can still champion democracy and stand with courageous dissidents from around the world, as he did earlier this month in Prague. And whenever he does, we should applaud him. But it has become almost impossible for the U.S. government to criticize certain kinds of human rights violations around the world, especially torture, indefinite detention, and disappearances. And it is simply an undeniable, objective fact that when President Bush

talks about his freedom agenda today, most people around the world do not conjure images of women voting in Afghanistan, or of Ukrainians and Georgians marching for democracy, or of American aid dollars helping activists in Egypt or Morocco fight for reform. Even America's closest friends now turn their minds to Guantanamo, to unlawful renditions, to secret prisons and to the administration's tortured justifications for torture.

These policies have not only discredited President Bush as a messenger of freedom, they also risk discrediting the message itself. Because the whole idea of promoting democracy and human rights is so associated with the United States, America's fall from grace has emboldened authoritarian governments to challenge the idea as never before. As the United States loses its moral leadership, the vacuum is filled by forces profoundly hostile to the cause of human rights.

Around the world, including in the OSCE region, authoritarian governments are leading a backlash against human rights defenders, democracy promoters, and civil society groups. When we call these governments out for violating a universal standard, they now have a stock reply: "Guantanamo is the new universal standard. The United States does what it has to do, and so do we."

A couple of years ago, Human Rights Watch was meeting with the Prime Minister of Egypt, and we raised a case in which hundreds of prisoners rounded up after a terrorist bombing were tortured by Egyptian security forces. The Prime Minister didn't deny the charge. He answered, "We're just doing what the United States does." We've had Guantanamo and the administration's interrogation policies thrown back in our face in meetings with officials from many other countries, including Saudi Arabia, Jordan, Pakistan and Lebanon. U.S. diplomats have told us they face the same problem. A U.S. ambassador to a leading Middle Eastern country, for example, has told us that he can no longer raise the issue of torture in that country as a result.

After President Bush chided Egypt in his recent speech on democracy in Prague, the Egyptian parliament's foreign relations committee issued a statement that Bush should have talked about Guantanamo prisoners, "deprived of the simplest legal defense guaranteed by all human rights conventions." When Secretary of State Rice recently, and rightly, criticized Hugo Chavez's government in Venezuela for violating human rights, Venezuela's Foreign Minister shot back: "How many prisoners do they have in Guantanamo?"

The master of the tactic is Russia's president Vladimir Putin, who uses it preemptively to ward off criticism of Russia's slide back to authoritarianism. Just before the recent G-8 summit, a reporter asked Putin about his human rights record, and he immediately shifted the subject: "Let's see what's happening in North America," he said. "Just horrible torture . . . Guantanamo. Detentions without normal court proceedings."

Now, don't get me wrong: Putin doesn't need Guantanamo as an excuse to persecute his critics in Russia. Guantanamo is not the reason why Egypt or any other country tortures and detains prisoners without charge. Still, America's detention policies are a gift to dictators everywhere. They can use America's poor example to

shield themselves from international criticism and pressure. Guantanamo enables them to say, to their own people as well as to the world, “we are just the same as everybody else.”

Back in the days of the Cold War, when the Helsinki Final Act was adopted, the Communist leaders of Eastern Europe tried to do the same thing. But it didn’t work. Dissidents and ordinary people behind the Iron Curtain knew that America wasn’t perfect. But they believed that the United States was at least dedicated to the principle that governments were bound by law to respect human rights. It was profoundly important to them to know that the government of the world’s other superpower limited its power in accordance with this principle. It gave them hope that a different way of life was possible, and the courage to fight for it.

Leaders like Putin understand how powerful America’s example has been in the past, and they use Guantanamo to tear that example to shreds. They use it to tell their people that all this American inspired talk about democracy and freedom is hypocritical rubbish. “Even self-righteous America,” they say, “which preaches moral ideals to the world, tortures prisoners and locks people up without a trial. Even America throws away the legal niceties and behaves ruthlessly when it feels threatened. The Americans use human rights talk to beat up their enemies, but they’re really just the same as us. And if you think that things can ever be different here or anywhere else, you’re just naive.”

These are cynical men, and Guantanamo helps them to spread their cynicism. They use it to demoralize dissidents and anyone who’s ever been inspired by America’s example to demand their human rights. The Bush administration has given them this weapon. It’s time to take it away. It is time for the United States to be once again the country it professes to be. It is time for the United States to close this prison and bring its detention policies in line with the values it has long championed to the world.

Can the United States do this and still fight terrorists effectively? The real question is can America fight terrorists effectively if it does not do this? That question may be beyond the scope of this hearing, but I’ll just say that I agree with General David Petraeus that:

“Adherence to our values is what distinguishes us from our enemy. This fight depends on securing the population, which must understand that we, not our enemies, occupy the moral high ground.”

I agree with the U.S. Army’s new counter-insurgency manual, the U.S. military’s basic document for fighting non-traditional foes like al Qaeda, that in such a conflict killing or capturing every enemy fighter is impossible. You win such a fight by cutting off the enemy’s “recuperative power”—it’s ability to recruit new fighters to its ranks. You win by convincing the people in contested countries that your vision and values are more attractive than those of your enemies. As the Army Manual says, illegitimate policies, including “unlawful detention, torture, and punishment without trial,” make that task impossible.

Does anyone believe we are really made safer by detaining in Cuba at most a few hundred of the hundreds of thousands of angry young men in the Muslim world who on any given day wish Amer-

ica harm? There is, sadly, no shortage of potential suicide bombers in the world today. Guantanamo makes that problem worse, not better. It creates far more enemies for America than it takes off the battlefield. It is a key source of al Qaeda's recuperative power.

There is no question that some of the people detained there truly are dangerous al Qaeda terrorists, including alleged 9/11 mastermind Khalid Sheikh Mohammed. But by holding these people in military detention, by treating them as combatants, by comparing the "war" with them to the struggle with Hitler, the administration gives them a status symbol they crave. Throughout history, terrorists have longed to be viewed as soldiers in a war, because that status justifies, in their minds, the killing of their enemies. When he was brought before a military review panel in Guantanamo, Khalid Sheikh Mohammed proudly embraced the label of enemy combatant. That is why wise governments have always treated terrorists as the lowest form of criminals, not as combatants.

What should be done with these prisoners if Guantanamo is closed? Again, you have not asked us to specifically address that question, Mr. Chairman. But the administration has admonished its critics for stopping at the simple slogan of "close Guantanamo" and not confronting the dilemma of what comes next. I think that's a fair point. I also think it's fair to acknowledge that there is no straightforward answer to this question. Sending detainees home is not as easy as it sounds, and many detainees shouldn't be sent home because of the risk they will face torture and persecution.

I would be happy to discuss this challenge in further detail if you like. But in short, I believe that those prisoners who haven't committed crimes and who can't be prosecuted, should be sent home. It will take a vigorous diplomatic effort to find appropriate and lawful arrangements in the detainees' home countries and places of asylum for the small number who can't go home. I believe that such an effort could succeed if the United States made a clear, public commitment to close the camp, and enlisted its allies in a common venture.

As for those prisoners who have committed or conspired to commit terrorist crimes, they should be brought to justice before civilian courts. I am tired of hearing that using civilian law enforcement institutions would be a sign of weakness, or of a "pre 9-11" mentality. Since 9/11, the Bush administration's own Justice Department has successfully prosecuted dozens of international terrorist suspects in the civilian courts, putting many away for life in maximum security prisons. In all this time, the system at Guantanamo has succeeded in prosecuting one Australian kangaroo-trapper to a nine-month sentence, which he is serving in Australia. No one else there has been held accountable for their crimes. They remain a source of unending grief for America.

The terrorists who were prosecuted by civilian institutions are, to use one of President Bush's favorite phrases, no longer a problem for the United States of America. Every last one of the prisoners in Guantanamo is a continuing problem for the United States. The system at Guantanamo is a miserable, embarrassing, and complete failure, not just in moral but in national security terms. It has hurt America far more than it has hurt America's enemies. The answer is not to perpetuate this failure, but to end it.

**PREPARED STATEMENT OF GABOR RONA, INTERNATIONAL
LEGAL DIRECTOR, HUMAN RIGHTS FIRST**

I. INTRODUCTION

Chairman Hastings, Co-Chairman Cardin and Members of the Commission, thank you for inviting me to be here today to share the views of Human Rights First on these important issues. We appreciate the work of the Helsinki Commission and in particular its leadership among OSCE member states in the areas of human rights and humanitarian affairs—"the human dimension." Human Rights First is honored to have the opportunity to express its views to you today about how best to ensure that U.S. policy on the detention, interrogation and trial of terrorist suspects is effective, humane and consistent with our laws and values.

My name is Gabor Rona and I am the International Legal Director of Human Rights First. For more than a quarter century, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

You have asked me to lay out the international law applicable to the detainees being held at Guantanamo and others detained in the so-called "War on Terror" and I will make recommendations designed to bring U.S. policies and practices back into the fold of the international legal order that the United States shares with its OSCE partner-States.

II. THE FRAMEWORK OF INTERNATIONAL LAW

The issue facing you today is one of great urgency and import. The policy of detention, interrogation and trial of terrorist suspects at Guantanamo has been a failure. Some have called it a scar on the reputation of the United States as a standard bearer for human rights worldwide. More than a scar, it is an open wound that continues to divide the United States from its allies. It undermines the ability of the United States to promote human rights and to protect national security. And it continues to divide Americans of good faith who seek progress on these fronts.

The debate about Guantanamo is part of the larger debate about the meaning of the words "war on terror." This debate, pitting advocates of the war paradigm against those advocating a "law enforcement" approach reminds me of H.L. Mencken's admonition that to every complicated problem there is an answer that is simple, clear and wrong. In this case, a simple and clear "either/or" answer to the question is wrong. Having spent several years in the legal division of the International Red Cross, the guardian of the laws of armed conflict, I have come to understand that the correct answer is not either/or but both: when terrorist acts and counterterrorism responses amount to armed conflict, they are governed primarily by international humanitarian law—the law of armed con-

flict. When they do not amount to armed conflict they are governed by other domestic and international law, including international human rights law. It is not a question of which legal framework one prefers, but rather, which one or ones are triggered by facts on the ground. Consequently, there is no right or logic to treating the legal frameworks like a Chinese restaurant menu—you cannot choose one rule from column A and another from Column B to suit perceived interests. To do so renders the legal frameworks meaningless chaos.

The Geneva Conventions make it absolutely clear that when one State uses armed force against another, such as in the U.S. and allied invasion of Afghanistan, the international humanitarian law of international of armed conflict applies. It requires that detained members of the opposing armed forces be accorded PoW status and protections and that those of enemy nationality who are not PoWs be accorded civilian status and protections, even if those civilians have taken part in hostilities without a privilege to do so.

The Geneva Conventions also make clear that when a State is engaged in armed conflict with an organized armed group, the international humanitarian law of non-international armed conflict applies. Here, questions of degree of organization of the armed group and frequency and severity of attacks make it more complicated to determine the existence of such armed conflict than in the case of State-to-State hostilities, but there is no reason why the United States cannot be engaged in a non-international armed conflict against a transnational armed group. Members of such a group are not entitled to PoW status, but the Conventions still require that they be treated humanely and given fair trials, if they are to be prosecuted.

Detainees in international armed conflict—armed conflict between two or more States—may be detained until the end of the conflict according to the Geneva Conventions. But the Conventions say no such thing about detainees in non-international armed conflict. This is no omission. Because non-international armed conflict fighters do not have the privilege to fight that members of armed forces have, because such fighters are violating domestic criminal laws when they take up arms, they remain subject to the same laws that apply in peacetime: domestic law and international human rights law, which enables their prosecution and entitles them to challenge their detention in a court. This is not a “get out of jail free” card. It is merely a means of putting the decision to detain ultimately in the hands of an independent judicial body.

Of course, those who commit war crimes, including engaging in acts of terrorism by targeting civilians, may be prosecuted and sentenced, whether they are civilians or combatants, whether in war or in peacetime.

To revert to the original question: is the war on terror a “real” war, the answer is no, since terror cannot be a party to an armed conflict and parties are essential to bear the rights and responsibilities that the laws of war create. One commentator wryly noted that proper nouns like Japan and Germany are good enemies, since they can surrender and promise not to do it again. You’ll never get that out of a common noun like “terror.” But what of the next question: is the war against al Qaeda a real war? Probably so, but since

al Qaeda fighters are not privileged belligerents, they should not be afforded the mantle of “combatant” even though it may be permissible under the laws of war to target them. If detained, they should be treated like the criminals they are when they engage in attacks against civilians.

This should lay to rest another straw man argument: one need not choose between either affording terrorists the protections of prisoners of war to which privileged belligerents who fight in accordance with the laws are entitled, or holding them in a law-free “black hole.” They can be targeted while directly participating in hostilities, and if captured, they can be interrogated, detained and tried in accordance with domestic and international law.

And so, the U.S.—invented status of “enemy combatant” and “unlawful combatant” is wrong. It is wrong because, as applied through the Military Commission Act of 2006, it fails to respect obligations under the Geneva Conventions to accord proper status and rights to either privileged or unprivileged belligerents, that is, PoWs and civilians in international armed conflicts.¹ It is wrong because it triggers procedures for judicial challenge of detention that fall far short of international standards of due process applicable in non-international armed conflict. And it is wrong because it fails to apply requirements for fair trials in accordance with international standards of due process for those who are charged with crimes in either international or non-international armed conflict. But the most pernicious consequence of “enemy combatant” is its broad definition by which the United States attempts to claim extraordinary powers of wartime without geographic or temporal limitation, and beyond the bounds of that which is truly armed conflict, all the while denying the subjects of those claims their commensurate rights and protections under the laws of armed conflict.²

One further point of departure between the United States and much of the rest of the western world concerns the scope of application of human rights law. The United States clings to two short-sighted positions: 1) that human rights treaty obligations do not follow the flag—that they impose no limits on how Americans treat persons beyond the borders of the United States, and 2) that human rights law does not apply in situations of armed conflict. Mr. Bellinger, who has worked hard to negotiate a middle ground between the U.S. administration and its detractors and to assure America’s allies of the U.S.’s continued commitment to the rule of international law, has steadfastly advocated these unfortunate positions. International treaties, international and national jurisprudence and international legal scholars affirm the extraterritorial application of human rights in armed conflict.³ As recently as last

¹The determination by President Bush in a Memorandum of February 7, 2002 that members of the Taliban are not entitled to PoW status and that members of al Qaeda are not covered by the Geneva Conventions has been hotly debated. While these conclusions are questionable as a matter of law, the Memorandum is less noted for its remarkable assertion that there exist classes of detainees “who are not legally entitled to (humane) treatment.”

²The Israeli Supreme Court’s recent decision, *Public Committee against Torture in Israel, et al v. The Government of Israel, et al*, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM, rejects the U.S. concept of “unlawful combatant.”

³See, e.g., Human Rights Committee General Comment 31 on Article 2 of the International Covenant on Civil and Political Rights, adopted March 29, 2004, CCPR/C/21/Rev.1/Add.13; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 3; Art. 4 of the International Covenant on Civil and Polit-

week, so did the House of Lords, and last year, so did the Israeli Supreme Court.⁴ The United States would better serve its own interests and follow suit, rather than cling to tenuous and tendentious arguments that deny human rights in order to support illegal and counterproductive policies such as secret detention that violates the International Covenant on Civil and Political Rights and interrogation methods and “extraordinary rendition” in violation of the Torture Convention.

And yet, I submit that the concept of Americans being from Venus and Europeans from Mars when it comes to defining the war on terror is an overstatement and an oversimplification. Europe, which has had more war and more acts of terrorism on its soil than has America, if I may generalize, does not deny the application of the laws of war when the “war on terror” is manifested in armed conflict. It simply appears to have a more measured and more accurate view of when, where, to what, to whom and how the laws of war apply, than does the U.S. administration.⁵

III. GUANTANAMO—A FAILED POLICY

The decision to hold detainees at Guantanamo in the first place was driven at least in part by a desire of the Administration to insulate U.S. actions taken there—detention, interrogation, and trials—from judicial scrutiny, and even from the realm of law itself. Early on, one administration official called Guantanamo “the legal equivalent of outer space.” That goal—to create a law-free zone in which certain people are considered beneath the law—was illegitimate and unworthy of this nation. And any policy bent on achieving it was bound to fail.

The policy at Guantanamo has been a failure in several important respects. First, and most obviously, it has failed as a legal matter. The Supreme Court has rejected the government’s detention, interrogation and trial policies at Guantanamo every time it

ical Rights, which allows for some provisions to be subject to derogation, while other provisions are non-derogable, including in “time of public emergency which threatens the life of the nation”; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2), Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), U.N.T.S. 85 (entered into force June 26, 1987); “No exceptional circumstances whatsoever, whether a state of war or threat of war . . . may be invoked as a justification of torture”; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, ICJ Reports 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, para. 106; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69; Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, Vol. 87, No. 858 *International Review of the Red Cross* 376, pp 377–378 (June 2005); L. Doswald-Beck and S. Vité, *International humanitarian law and human rights law*, *International Review of the Red Cross*, No. 293, March-April 1993, p. 94; R.E. Vinuesa, *Interface, correspondence and convergence of human rights and international humanitarian law*, *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, The Hague, 1998, pp.69–110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002; H. Heintze, *On the relationship between human rights law protection and international humanitarian law*, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 798

⁴ Opinions of the Lords of Appeal for Judgment in the Cause *Al-Skeini and Others vs. Secretary of State for Defence*, [2007] UKHL 26 (June 13, 2007); The Israeli Supreme Court’s recent decision, *Public Committee against Torture in Israel, et al v. The Government of Israel, et al*, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM, also accepts the complementary application of human rights and humanitarian law in situations of armed conflict.

⁵ For further elucidation on the criteria required to trigger application of the laws of armed conflict, see, Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 *Fletcher Forum of World Affairs* 2, pp55–74 (Summer/Fall 2003).

has examined them. And it likely will do so again. Military commissions at Guantanamo have also failed to hold terrorists accountable for the most serious crimes. Even the sole case to be resolved, the plea bargain of the Australian David Hicks who, after five years in U.S. custody pled guilty to a crime (material support for terrorism) that didn't exist in the laws of war at the time Hicks allegedly committed it, has rightfully received more derision than praise on account of the haphazard way in which it was pursued and the seemingly politicized way in which it was concluded.

In addition, fueled by the assertion that it was a “legal black hole,” Guantanamo became the laboratory for a policy of torture and calculated cruelty that later migrated to Afghanistan and Iraq and was revealed to the world in the photographs from Abu Ghraib. These policies aided jihadist recruitment and did immense damage to the honor and reputation of the United States, undermining its ability to lead and damaging the war effort.

But perhaps most importantly from a security perspective, the policy at Guantanamo—which treats terrorists as “combatants” in a “war” against the United States, but rejects application of the laws of war—has had the doubly pernicious effect of degrading the laws of war while conferring on suspected terrorists the elevated status of combatants.⁶ By taking the strategic metaphor of a “war on terror” literally, the United States Government has unwittingly ceded an operational and rhetorical advantage to al Qaeda, allowing them to project themselves to the world—including to potential recruits and a broader audience in the Middle East—as warriors rather than criminals.

Khalid Sheik Mohammed revealed in this status at his “combatant status review tribunal” hearing at Guantanamo not long ago. After ticking off an itemized list of 31 separate attacks and plots for which he claimed responsibility (including the 9/11 attacks and the murder of Daniel Pearl), he addressed—as if soldier-to-soldier—the uniformed Navy Captain serving as president of the military tribunal. Proudly claiming the mantle of combatant (“For sure, I am American enemies”), he lamented, in effect, that war is hell and in war people get killed: “[T]he language of any war in the world is killing . . . the language of war is victims.” He compared himself and Osama bin Laden to George Washington (“we consider we and George Washington doing [the] same thing”).

Those whose job it is to take the fight to al Qaeda understand instinctively what a profound error it was to reinforce al Qaeda’s vision of itself as a revolutionary force in an epic battle with the United States. General David Petraeus, Commanding General of the Multi-National Forces in Iraq, oversaw the drafting of the Army’s new Counterinsurgency Manual, which incorporates lessons learned in a variety of counterinsurgency operations, including Iraq. The Manual stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a political struggle, one that must focus on isolating the enemy and delegitimizing it with its potential supporters, rather than elevating it in stature and importance. As the Manual states: “It is easier to separate an insurgency

⁶ See Kenneth Anderson and Elisa Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment*, (Muscatine, Iowa: Stanley Foundation, March 2007) available at http://www.stanleyfoundation.org/publications/other/Mass_Ander_07.pdf.

from its resources and let it die than to kill every insurgent . . . Dynamic insurgencies can replace losses quickly. Skillful counter-insurgents must thus cut off the sources of that recuperative power.”⁷

But U.S. counterterrorism policy has taken just the opposite approach. Prolonged detention at Guantanamo without access to judicial review, interrogations that violate fundamental human rights norms, and flawed military commissions have nurtured the “recuperative power” of the enemy. It is up to Congress to force a clean break from this misguided approach and begin to construct a counterterrorism policy that conforms to the logic of counterinsurgency operations, adheres to fundamental human rights standards and capitalizes on the advantages of our system of laws.

IV. THE WAY FORWARD

A. Close Guantanamo

Human Rights First takes seriously the human rights and legal challenges posed by the ongoing detention of prisoners at Guantanamo. Closing the prison raises many complex questions about what to do with prisoners being held there—those the United States believes have committed crimes against it, and those being held without charge “until the end of the conflict.” We have not been among the groups calling for closure of the prison over the last several years, in large part because, in our view, it matters less where prisoners are held than that their detention, interrogation and trial comport with U.S. and international law. It is, however, beyond serious question—even among many who initially supported the decision to detain prisoners at Guantanamo—that Guantanamo has become an enormous diplomatic liability, impairing the capacity of the United States to lead the world, not only in counterterrorism operations but on many other issues of priority on which international cooperation is necessary. As Secretary of Defense Gates said recently, “There is no question in my mind that Guantanamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States.”⁸ Indeed, Guantanamo has become an icon, in much the same way as the picture of the hooded Iraqi prisoner at Abu Ghraib has become an icon, a symbol of the willingness of this country—in the face of security threats—to set aside its core values and beliefs. Respect for the law and fundamental rights are not the only things that have disappeared into Guantanamo’s “black hole”—American credibility is in there somewhere, too.

Of course, while it is important to take into consideration the views of our closest allies, all of whom have called on the United States to close the prison, no one argues that we should change U.S. policy simply because other nations don’t like it. The most important questions about the current policy are: Is it smart? Is it working? Does it serve the overall objective? Does it comport with our laws and values? Guantanamo policy fails all those tests.

⁷U.S. Department of Defense, FM 3–24/MCWP 3–33.5, Counterinsurgency, (December 2006), p. 1–23.

⁸Karen DeYoung and Josh White, “Guantanamo Prison Likely to Stay Open through Bush Term,” Washington Post, March 24, 2007.

Secretary Gates is reported to have argued that the continued detention of prisoners at Guantanamo is undermining the war effort and that the prison should be shut down as soon as possible. His views echo the conclusion that has now been reached by a broad spectrum of national security policymakers and Members of Congress that, whatever its original utility, the policy at Guantanamo has outlived its usefulness. State Department and Pentagon officials quoted in the New York Times have said that U.S. policy at Guantanamo is “making it more difficult in some cases to coordinate efforts in counterterrorism, intelligence and law enforcement.”⁹ Former Secretary of State Colin Powell stated recently that Guantanamo ought to be closed “not tomorrow, but this afternoon” and that he would “get rid of Guantanamo and the military commission system and use established procedures in federal law.”¹⁰ According to the Washington Post, former Attorney General John Ashcroft had argued that Guantanamo’s liabilities outweighed its usefulness.¹¹

Again, this is not surprising. As the Army’s Counterinsurgency Manual states: “A Government’s respect for preexisting and impersonal legal rules can provide the key to gaining widespread and enduring societal support . . . Illegitimate actions,” such as “unlawful detention, torture, and punishment without trial . . . are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law.”¹²

Despite the self-defeating nature of the policy and the growing consensus that it should end, Administration spokespeople have said that the detention facility at Guantanamo will likely remain open throughout President Bush’s term in office. Far from moving to close the facility, the Administration continues to transfer new detainees to Guantanamo. The Administration asserts that one new transferee, Mohammad Abdul Malik, who reportedly confessed to involvement in the 2002 hotel bombing in Kenya, was sent to Guantanamo because he represents a “significant threat.” It is increasingly clear, however, that the reason many detainees were sent to Guantanamo, rather than being indicted and tried in federal court, was not because that was the smartest or most strategic option available, but because it was the one that relieved the government of the burden of making difficult choices. But if U.S. counterterrorism policy consists of detaining or killing everyone who harbors hostility towards the United States (and one hopes that is not the policy), we must face the reality that the nearly 400 men at Guantanamo are a drop in that bucket, and that holding them there without charge or trial in fair proceedings will eventually mean that we will need to get a much bigger bucket. A more rational policy would be to chart a way out of the trap that Guantanamo has become, not only for the detainees who have been held

⁹Thom Shanker and David E. Sanger, “New to Job, Gates Argued for Closing Guantánamo Prison,” New York Times, March 23, 2007.

¹⁰<http://www.newsmax.com/archives/ic/2007/6/10/112623.shtml?s=tn> , June 10, 2007.

¹¹Karen DeYoung and Josh White, “Guantanamo Prison Likely to Stay Open through Bush Term,” Washington Post, March 24, 2007.

¹²U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-22.

there for so many years, but for U.S. counterterrorism policy itself. The first step is to shut it down.¹³

B. Release or Transfer Detainees Not Charged with Crimes and Bring the Rest to the United States

Last July, President Bush said “I’d like to close Guantanamo, but I also recognize that we’re holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts.” State Department lawyers continue to shop the world for countries that will agree to take the Guantanamo detainees off our hands, but this attempt to sell the Guantanamo problem “retail” is inadequate and unsatisfactory as it leaves U.S. policy at the mercy of other governments, many of whom have no interest in helping. Despite the growing sense even inside the Administration that the Guantanamo policy is hurting U.S. interests, paralysis has set in and no one in the Administration appears to be prepared to move.

Part of the reason for this is that the current system lacks incentives that would force decisions about who to try and who to release. Under current policy, detainees at Guantanamo can be held without trial for an indefinite period. If they are tried and convicted in a military commission, they remain in detention; if they are tried and acquitted, they may also remain in detention.

If the detainees were brought to the United States, that incentive structure would change, and there would be a new sense of urgency to separate those who the United States suspects of having committed crimes against it from those it does not. Detainees not suspected of having committed crimes against the United States should be released to their home countries, if possible, in accordance with U.S. obligations under international human rights and humanitarian laws. Where release to the home country is not possible (for example, because there is a fear that a detainee will be subjected to torture), detainees should be released to a third country in accordance with U.S. obligations under international human rights and humanitarian laws.

U.S. allies, particularly the Europeans who have called most loudly for the prison to be closed, should do much more to help on this score. The United States climbed into this hole alone, but its allies have a shared responsibility to help it get out; this is more than just a U.S. problem now. Manfred Nowak, the Austrian U.N. special rapporteur on torture, has urged European governments to assume greater responsibility for helping with third country resettlement of these people. “Europe should help empty it,” Nowak has said. “No country is eager to accept people who are accused of having al-Qaeda links. But there should be burden-sharing.” We agree.

But the United States works against its own immediate interest of resettling Guantanamo detainees by clinging to rhetoric that ap-

¹³While world attention has been fixated on Guantanamo as the embodiment of U.S. misconduct in counterterrorism policy, Guantanamo is not the only prison with which Congress should be concerned. The continued assertion by the President, even after passage of the Military Commissions Act of 2006, of the authority to seize individuals anywhere in the world and hold them in secret prisons without access to the Red Cross or notification to their families is every bit as—if not more—troubling than the prolonged detention at Guantanamo. Congress should ban the practice of holding ghost prisoners and force the closure of any place of detention in which the U.S. holds prisoners in violation of international human rights and humanitarian law.

pears increasingly out of touch with reality as the facts come out. One study, released in 2006 and using the government's own statistics derived in part from its Combatant Status Review Tribunal (CSRT) process,¹⁴ concluded that 55% of the detainees were not found to have committed any hostile acts, that only 8% were characterized as al Qaeda fighters and that 60% were being detained merely because of alleged association with a group or groups that the government asserts are terrorist organizations.¹⁵ The study also highlighted the fact that 86% of the detainees were handed over to the United States by Pakistan or the Northern Alliance at a time when the United States was widely publicizing its offer of large financial bounties for the capture of suspected enemies.¹⁶

In contrast to these facts, White House spokesperson Tony Snow recently responded to questions about Guantanamo with the assertion that the prisoners are "extraordinarily dangerous killers" . . . who have "waged active warfare against democracy" and were "plucked off the battlefields and trying to kill Americans."¹⁷ These characterizations have become as much a part of the Administration's mantra as have the assertions of superior nutrition, superior health care and sensitivity to Islamic cultural and religious values; all the while detainees are slowly going crazy from isolation, uncertainty and a failure of justice. Scores have attempted to commit suicide; four have succeeded in taking their own lives.

It is no wonder that the United States is having difficulty out-placing Guantanamo detainees. It is also no wonder that the United States is experiencing a crisis of credibility with its allies. This is not because Europeans see a law enforcement problem where Americans see a war. No European leaders have denied that the United States is involved in an armed conflict in Afghanistan and Iraq, both of which feature significant elements of international terrorism. And while the existence of a world-wide armed conflict with Al Qaida is arguable, it is not this argument that is undermining transatlantic cooperation. Italian prosecutors charge that CIA kidnapping operations there violate Italian law.¹⁸ The Supreme Court of Spain characterizes American actions in Guantanamo in terms similar to those that preceded Spanish efforts to prosecute human rights violations in Pinochet-era Chile.¹⁹ It is because even where the application of wartime procedures are apt, Europeans see a great nation fudging the law, fudging the facts, and acting out of its great character. A most telling exchange is the one in which an unnamed member of the Administration patiently informed a reporter that he was from "the reality based commu-

¹⁴The CSRTs were found by one federal judge to fail to comport with Fifth Amendment due process requirements. Judge Joyce Hens Green noted that the CSRTs use an overly-broad definition of "enemy combatant," they fail to provide the detainee with adequate notice of, and an opportunity to rebut the evidence used against him, and they fail to preclude the use of evidence gained through torture or other coercion. In re: Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

¹⁵Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, Mark Denbeaux, Prof., Seton Hall University School of Law, February 7, 2006; available at <http://law.shu.edu/aaafinal.pdf>.

¹⁶Id. See, Bounty Flyer, attached.

¹⁷<http://biz.yahoo.com/bw/070612/20070612006144.html?v=1> Press Briefing, June 12, 2007.

¹⁸[http://www.latimes.com/news/nationworld/world/la-fg-](http://www.latimes.com/news/nationworld/world/la-fg-abumar9jun09,0,3786556.story?coll=la-home-world)

¹⁹<http://www.libertysecurity.org/article1055.html>

nity,” whereas this Administration “creates its own reality.”²⁰ This is a vision from which others rightfully recoil.

C. Amend the Definition of Enemy Combatant

Congress is now wisely considering the restoration of habeas corpus, a right that was ill-advisedly removed by the Detainee Treatment Act and Military Commissions Act. Even if that effort succeeds, Congress must also tackle the critical issue of what constitutes an enemy combatant. The Military Commissions Act defines combatants not only as those who take part in hostilities, but includes people who “purposefully and materially” support hostilities against the United States, including people arrested far from the battlefield. This definition risks converting people who would never be considered combatants under the laws of war—such as a doctor who operates on a wounded rebel or a permanent resident of the United States who commits a criminal act completely unrelated to armed conflict—into “combatants” who can be placed in military custody and tried by a military commission. Even more troubling, the MCA deems anyone—regardless of whether they fit the above definition—who has been determined to be an “unlawful enemy combatant” based on a determination of a combatant status review tribunal or “another competent tribunal” established by the president or the secretary of defense to be an enemy combatant. This “you’re a combatant if we say you are” approach flies in the face of established humanitarian law and has ramifications that go far beyond the status of detainees at Guantanamo.

Under the laws of war, combatants may in most situations be lawfully attacked and killed; civilians (unless they take part in hostilities) cannot. The MCA definition blurs that vital distinction, with potentially dangerous consequences. Congress should consider carefully the precedent it will set if this definition is allowed to stand. For example, is it in the interest of the United States to endorse a definition of enemy combatant that would allow Russian President Vladimir Putin to pick up anyone he deems to have provided “material support” to the Chechens (as many human rights NGOs in Russia who document abuses in Chechnya could be under this broad definition) and treat them as if they were combatants? Would we be comfortable with the Chinese government using this definition to label peaceful Uighers as enemy combatants? Or President Uribe in Colombia, who earlier this year described some members of the political opposition as “terrorists in business suits?” What about the American citizen in Kenya, cleared by the FBI of terrorist connections, but deemed by the Kenyan government to have “engaged in guerrilla war against the democratically elected government” of Somalia and rendered last month by the Kenyans to Ethiopia?

²⁰Ron Suskind, *New York Times Magazine*, October 17, 2004: “The aide said that guys like me were “in what we call the reality-based community,” which he defined as people who “believe that solutions emerge from your judicious study of discernible reality.” . . . “That’s not the way the world really works anymore,” he continued. “We’re an empire now, and when we act, we create our own reality. And while you’re studying that reality—judiciously, as you will—we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out. We’re history’s actors . . . and you, all of you, will be left to just study what we do.”

D. Repeal the MCA

In July of last year, Human Rights First testified before the Senate Armed Services Committee which was at that time deliberating how to try terrorist suspects in the wake of the Supreme Court's ruling in the Hamdan case that the Administration's military commissions were unlawful. At that hearing, we argued that terrorist suspects at Guantanamo should be tried either pursuant to the rules for courts martial under the UCMJ or in regular federal courts. Such trials would satisfy the requirement of the laws of war—and of our own laws—that sentences be carried out pursuant to a “previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²¹ That remains our view.

Human Rights First opposed the Military Commissions Act. Even some Members of Congress who voted for it did so while expressing the hope that the courts would step in to remedy its many defects.

With respect, Mr. Chairman, this is no way to run a railroad. Congress should not wait for the courts to come to the rescue, nor should it merely tinker with the machinery of military commissions. Instead, Congress should scrap the Military Commissions Act altogether, and embrace its responsibility to ensure that suspected terrorists are brought to justice in proceedings worthy of this country.

The defects of the MCA are many and have been well-documented by Human Rights First and others. They encompass issues beyond those related to the rules for military commissions. There are the unconstitutional restrictions on habeas, an overly broad definition of enemy combatant, the removal of certain offenses from the scope of acts punishable as war crimes, the addition of other offenses that are not war crimes and that the Military Commission system is attempting to apply retroactively, and the attempt to undermine the means of enforcing compliance with the Geneva Conventions. One approach Congress could take would be to identify a list—and we certainly have one—of the most egregious flaws and amend the statute to fix them.

The military commissions fly in the face of 200 years of U.S. court decisions by permitting evidence obtained through coercion—including cruel, inhuman and degrading treatment, if obtained before December 20, 2005. A coerced statement can be admitted if found to be “reliable,” sufficiently probative, and its admission is “in the interest of justice,” and if the interrogation techniques used to obtain the information are classified, it could be extremely difficult for a defendant to show that coerced evidence should not be

²¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>

admitted. Although evidence obtained through torture is not permitted in military commissions, there is an increased likelihood that convictions may rest on such evidence because the rules allow for coerced evidence and hearsay and permit the prosecution to keep sources and methods used to obtain evidence from the defendant.

In violation of a fundamental tenet of the rule of law, defendants before a military commission can be convicted for acts that were not illegal when they were committed. Basic due process requires that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was taken. But military commissions may punish individuals for offenses—including the crimes of conspiracy and “providing material support for terrorism”—that were either (i) not illegal before the passage of the MCA, or (ii) not recognized as war crimes under the laws of war.

The scope of judicial review of military commission decisions is restricted and inadequate. The review by the initial appeals court, the Court of Military Commission Review, is limited only to matters of law (not fact) that “prejudiced a substantial trial right” of the defendant. This provision would prevent the first appellate court, the U.S. Court of Appeals for the District of Columbia, and the U.S. Supreme Court from considering factual appeals, including possible appeals based on a defendant’s factual innocence.

Finally, the military commission rules for classified evidence are so broad that they would prevent the defense from seeing evidence that tends to show innocence or a lack of responsibility. Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The government has no duty to disclose classified information that could result in a more lenient sentence for the defendant. The judge is specifically permitted to limit the scope of examination of witnesses on the stand, which could hamper the ability of the defense to challenge a witness’s testimony or basis for classification.

One of the most telling indictments of the original military commissions was the way the ad hoc and constantly-changing system looked up close, in practice. It often looked as if the rules were being written in real time, the very antithesis of the rule of law. Unfortunately, little has changed under the new MCA system. Recently, a Human Rights First staff member attended the first proceedings under the newly constituted MCA commissions, and it is clear that there is little to distinguish the new system from the old. Even after the issuance of a military commissions manual, the fundamental ad hoc character of the system has not changed.²²

There is no question that the commissions are staffed by many talented, dedicated and honorable service personnel. But the sys-

²²For example, on the morning of his “trial,” defendant David Hicks had three civilian lawyers; by the end of the day, he had only one. Why? One of his civilian defense counsel was told he would have to sign a form, created by the judge, vowing to comply with DOD regulations for civilian defense counsel. But the regulations have not yet been issued by DOD. So the lawyer, reluctant to agree to rules he had not seen for fear of risking ethical violations, agreed to abide by “existing” rules for civilian defense counsel. That wasn’t good enough. The judge told the lawyer he could not represent Hicks, though he could sit at counsel table and consult. Another member of the defense team was excluded by the judge based on his interpretation of a contested—and poorly drafted—provision of the rules for military lawyers detailed to represent detainees.

tem itself is illegitimate, and no amount of good will or good lawyering can change that. It is abundantly clear from our observations why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by a “regularly constituted court.” The post-MCA system in operation at Guantanamo does not come close to passing that test.

E. Try Suspects in Courts Martial or Federal Courts

The last thing that we would want is to convict an individual for terrorism and then have that conviction overturned because of fatal flaws in the Military Commissions law passed in the previous Congress. That risk is quite real. Khalid Sheik Mohammed would likely have few defenses in a fair trial. But in a military commission under the current rules, he will have the defense that the trial is not fair. The United States can deprive him of that defense by moving his trial to either a court martial or, preferably, to a regular federal criminal proceeding. That not only would guard against the risk of having his conviction overturned, but it is just smart counterterrorism policy. As the Counterinsurgency Manual points out, “to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support.”

Trials in federal court would also offer the advantage of a venue capable of exercising jurisdiction over a much broader spectrum of criminal conduct. The decision to treat terrorism suspects as “enemy combatants” was made in order to justify targeting, detention and trial practices that could not be supported outside of an armed conflict paradigm. There are many reasons, legal and practical, why this decision was, and continues to be, a mistake. One reason is that it has led to the establishment of military commissions that have jurisdiction only over war crimes, limiting the offenses with which terrorist suspects can be charged. This limitation led the administration and Congress to try to expand the jurisdiction of military commissions to include acts such as intentionally causing serious bodily injury; mutilating or maiming; murder and destruction of property in violation of the law of war; terrorism; material support for terrorism; and conspiracy that do not constitute war crimes by simply calling them war crimes.

These acts are not criminal under the laws of war if the targets are legitimate military objectives. And though they are war crimes if committed “in violation of the laws of war,” it appears from the charges brought so far that they are erroneously being construed to include any act of unprivileged belligerency, which is not a violation of the laws of war. Application of these new crimes to events that occurred before the passage of the law is a textbook violation of the prohibition of ex post facto prosecution, raising additional and legitimate bases for defense counsel to challenge the military commission convictions. These problems can be avoided by using civilian criminal courts and the broader spectrum of established criminal laws available there.

On the other side of the ledger, those who insist that it would be impossible to try terrorist suspects in the federal courts say that such trials would be too dangerous for judges, juries and witnesses.

But the risk of reprisals against juries, witnesses, and judges—while extremely serious—is certainly nothing new.

The judiciary has long taken measures to prevent threats of violence from undermining the trial process. We protect those involved in the trial of murderous mob bosses through witness relocation, anonymous juries, and employing the Marshal Service for the safety of judges. We secure courtrooms with Plexiglas shields, extra layers of security screening, metal detectors, and additional police. Our experience with prosecution of organized crime, including violent members of drug cartels throughout much of the twentieth century, indicates that terrorism cases present no unique challenge in this realm.

Those skeptical of the feasibility of moving these cases to federal court also assert that such prosecutions would force the government to reveal classified information to the defense in order to satisfy constitutional requirements for a fair trial. Leaving aside the fact that terrorist suspects are even now being tried in the federal courts, these are serious concerns that should be explored and fully addressed. But the fact that terrorism cases pose difficult challenges for the criminal justice system should not preclude trials from proceeding successfully to conviction without damage to sensitive information. Given the enormous strategic and political costs of the alternative—the status quo—it is incumbent upon those who would abandon the criminal justice system to demonstrate why the existing procedures, such as the Classified Information Procedures Act (CIPA), designed to protect against such disclosures, are insufficient to protect the government's legitimate interests in these cases. Many judges believe that these procedures are adequate to meet the special challenges presented by terrorism cases. Judge Royce Lamberth recently remarked: "I have found the Classified Information Procedure Act to provide all the tools that I have needed as a district judge to successfully navigate the tricky questions presented in spy cases, as well as terrorist cases." In fact, of the hundreds of CIPA motions filed in criminal cases since the law came into effect, there have been no reversible errors found on appeal. Human Rights First is studying these issues carefully. We urge Congress to consider them as well and to explore whether amendments to CIPA or other measures are needed in order to move forward with these prosecutions in federal court.

V. CONCLUSION

Human rights advocates normally chafe at the idea of U.S. exceptionalism, and for good reason, since we believe that human rights and the obligation to adhere to the rule of law are neither situational nor culturally bound, but are universal. However, there is at least one respect in which the United States is exceptional, and that is in the degree to which it has positively influenced the human rights agenda in the post-WW II era. And of course, there is now the corollary: the extent to which its practices, policies and pronouncements remain a template for others, for better or worse. The Economist recently said that in a battle that is largely about

ideas, America's practices and policies have been "hugely counter-productive."²³

The big question, then, is how can the US effectively promote national security and contribute to the global effort to combat terrorism and at the same time, regain its well-deserved reputation as a beacon for human rights, a reputation tarnished by the legacy of Abu Ghraib, Guantanamo, extraordinary rendition, secret detention, torture memos and the specter of unfair trials?

As a general organizing principle, there is the premise of a natural antagonism between collective security and individual rights—the belief that the two comprise a zero-sum game in which the effort to advance one necessarily comes at the expense of the other. Attorney General Gonzales used the word "quaint," to describe the Geneva Conventions in the post-9/11 world. The word acts as a talisman for the assumption that circumstances have overtaken the efficacy, if not applicability, of time-tested rules. This assumption reflects a belief that we cannot counter terrorism without restricting our own rights and liberties—that compromising our rights and liberties will indeed buy us added security.

Oddly enough, we have seen little, if any, evidence that this is true. I was still in the legal division of the ICRC when post-9/11 arguments against proper application of international humanitarian law and human rights norms began to surface. I recall how consistently the critics assailed reliance upon the "old rules" in relation to the "new threat," but just as consistently failed to identify what exactly they wanted to do to suspected terrorists that existing law did not permit. Shoot them on sight? Already permitted in armed conflict and a terrible idea beyond the circumstances in which it is permitted. Detain them without trial? Already permitted in international armed conflict and under certain circumstances, in other situations, as well, but subject to judicial review. Abuse them and subject them to trials that fail to comport with international standards of humanity and due process? Another terrible idea that quite obviously has negative repercussions for our collective security interests.

Evidence suggests that cutting legal corners has reaped little more than derision and distrust, fueling further animosity toward the United States and creating obstacles to international cooperation with it. While Ben Franklin is reputed to have said that those who are willing to sacrifice liberty for security deserve neither, our experience is that we will in fact, lose both. Human rights do not compete with security; they are a prerequisite for it.

It is time for a clean break from these policies. The United States has the opportunity to set a new course, one that takes seriously the long and difficult road ahead in combating the threat of terrorism, while recognizing that adherence to our values and our system of laws is a source of strength in that effort. That is the course designed to bring American back into the fold of ideals and practices for which the OSCE stands.

Thank you.

²³ September 2, 2006, page 10.

Psychological Operations (PsyOp)

Leaflet No. TF11-RP09-1



**GET WEALTH AND
POWER BEYOND
YOUR DREAMS -
HELP THE ANTI-
TALIBAN FORCE
RID AFGHANISTAN
OF MURDERERS
AND TERRORISTS**



FRONT

**"Get wealth and power beyond your dreams.
Help the Anti-Taliban Forces rid Afghanistan
of murderers and terrorists"**

**YOU CAN RECEIVE MILLIONS OF DOLLARS
FOR HELPING THE ANTI-TALIBAN FORCE
CATCH AL-QAIDA AND TALIBAN MURDERERS
THIS IS ENOUGH MONEY TO TAKE CARE OF
YOUR FAMILY, YOUR VILLAGE, YOUR TRIBE
FOR THE REST OF YOUR LIFE -
PAY FOR LIVESTOCK AND DOCTORS
AND SCHOOL BOOKS AND HOUSING FOR
ALL YOUR PEOPLE**

**PREPARED STATEMENT SUBMITTED FOR THE RECORD BY
THE INTERNATIONAL HELSINKI FEDERATION FOR HUMAN
RIGHTS**

PREFACE

The International Helsinki Federation for Human Rights (IHF) is grateful for the opportunity to submit written testimony to the hearing of the US Commission on Security and Cooperation in Europe (“Helsinki Commission”) on implications of the US detention facility at Guantanamo Bay, Cuba, for US leadership on human rights.

The present contribution is based on the premise that Guantanamo is not only a particular detention facility, but also—and more so—a symbol for the approach toward fundamental human rights principles that the government of the United States has displayed in the context of the campaign against terrorism pursued in the aftermath of the events of 11 September 2001. It examines the impact of policies symbolized by Guantanamo on the effectiveness of the US as an advocate and defender of human rights in several Helsinki signatory states, as well as on the promotion and protection of human rights in the Organization for Security and Cooperation in Europe (OSCE) region more generally.

The contribution has been prepared in cooperation with IHF members and partners in a number of OSCE participating States, which can be described as either “new democracies” or “democracies in the making” and therefore can be considered potentially receptive to US efforts to promote democracy and human rights.

SUMMARY

In the post-September 11 period, hundreds of terrorist suspects have been detained indefinitely without charge, denied access to courts and allegedly subjected to abusive treatment at the US detention facility at Guantanamo Bay. Around the world, Guantanamo has become a symbol for the willingness of the US to sacrifice basic human rights principles and circumvent international standards on detention, due process, trials and torture in the “war on terror.” Thus, it has become emblematic of how human rights can be trampled in the name of enhancing security.

The policies symbolized by Guantanamo have had profound and potentially long-lasting impacts not only on US leadership on human rights but also on the broader protection of human rights in the OSCE region. Above all, they have seriously undermined or even reversed perceptions of the US as an example of a government respectful of human rights and as an essential ally of the region’s democratically oriented civil society movements, thereby weakening America’s ability to contribute to the advancement of human rights in the region.

More specifically, the following trends have been identified in this contribution:

- The credibility of the US as a proponent of human rights has been severely damaged and it can no longer effectively address problems such as torture, arbitrary detention and disappearances in other countries;

- The US is perceived generally to have downplayed human rights in its foreign policies and to have allowed security and other issues to take precedence over human rights in bilateral political dialogues;
- The leverage of the US to address egregious abuses such as those perpetrated in the name of fighting terrorism in Chechnya and Uzbekistan has been greatly diminished;
- Governments with inferior human rights records have been emboldened by the US example of circumventing human rights principles and have sought to justify their own policies by arguing that they are only doing what the US is doing;
- Non-democratic regimes have found a convenient opportunity to reinforce charges of political bias and double standards in the US approach to human rights;
- The US and other western governments have been accused of seeking to meddle in the internal affairs of countries of the former Soviet Union when leveling criticism of human rights conditions in these countries, although they themselves violate international rules;
- Authorities of countries in a weak position to challenge the US have been pressured to allow security interests to override human rights concerns in individual cases in the “war on terror”;
- Respect for the US and the US model of democracy has waned, and nationalist movements have openly exploited alleged US abuses to fuel anti-American sentiments in their countries;
- US is perceived to have withdrawn support for “politically sensitive” activities by civil society groups in the region;
- Human rights NGOs have been accused of promoting political interests of the US and other western countries when accepting grants from foreign donors;
- Those involved in efforts to promote human rights have faced a more hostile working environment due to growing cynicism and disillusionment about human rights, often reinforced by negative government propaganda.

BACKGROUND ABOUT THE IHF

The IHF is a community of 46 human rights NGOs in the OSCE region that work together at the international level to promote compliance with the human rights provisions of the Helsinki Final Act and its follow-up documents, as well as with other international human rights standards. The IHF focuses primarily on civil and political rights, and has a historical mandate to support and protect civil society activists who are at risk because of their efforts to hold their governments accountable to international human rights obligations.

Most of the Helsinki committees are among the leading independent human rights groups in their countries, and many of them have been encouraged and supported by the US government, both prior to and after the fall of the Iron Curtain.

In the post-September 11 period, the IHF has consistently emphasized that human rights must be respected when fighting terrorism and that any counter-terrorism campaign that undermines human rights is morally and legally unjustified as well as self-defeating.

At the IHF General Assembly held in November 2001, the Helsinki committees adopted a statement expressing concern about counter-terrorism measures taken by various governments in the immediate aftermath of September 11, insisting that “a campaign against terror ought to be a campaign for human rights and democracy.”¹ They also established a task force to monitor and analyze the human rights implications of the “war on terror,” which eventually resulted in the publication of a lengthy IHF report on this topic in April 2003.²

The issue of counter-terrorism and human rights has remained high on the agenda of the IHF, and in 2006 the IHF carried out a federation-wide campaign to promote adherence to the global ban on torture in the fight against terrorism.³

The IHF has appealed on numerous occasions to the US government to comply with international human rights obligations when combating terrorism. A few months after September 11, the Helsinki committees sent a joint letter to President Bush to urge him to repeal an emergency order creating special military commissions to try aliens suspected of terrorism, noting that there was no precedent for such an order “in either American or international law.” They also emphasized that the measure set a “very bleak example not only for non-democratic regimes, but also for emerging democracies established in the last 15 years, many of which countries we now represent.”⁴

TEN TRENDS AFFECTING HUMAN RIGHTS PROTECTION IN THE OSCE REGION

On the basis of ongoing monitoring as well as comments received from the representatives of member and partner organizations in Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Kazakhstan, Russia and Uzbekistan, the IHF has identified a number of trends regarding the implications of US policies against terrorism for the role of the US as an advocate and defender on human rights and the broader protection of human rights in the OSCE region:

1. The abusive practices employed by the United States in the campaign against terrorism have severely damaged its credibility as a proponent of human rights. Because of its own disregard for international human rights law with respect to terrorist suspects who have been apprehended and incarcerated since September 11, the US can no longer credibly address problems such as torture, arbitrary detention and disappearances in other countries. The US remains an advocate for democracy and freedom in the world, but its moral authority to speak out about human rights violations has been diminished. One human rights defender responded to the IHF that “Human rights are no longer a viable rationale for US ac-

¹“No Contradiction Should Exist Between Combating Terrorism and Promoting and Protecting Human Rights,” 18 November 2001, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=1207

²Anti-terrorism Measures, Security and Human Rights (April 2003), at http://www.ihfhr.org/documents/doc_summary.php?sec_id=58&d_id=4082

³For more information see http://www.ihf-hr.org/cms/cms.php?sec_id=79

⁴“Open Letter to the President of the United States of America Mr. George W. Bush,” 17 November 2001, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=1120

tions,” while another remarked that the US “cannot speak about violations of human rights in one place and violate them itself in another.”

A resolution adopted by the Parliamentary Assembly of the Council of Europe in March 2007 reflects the concerns of NGOs:

The United States of America, an observer state to the Council of Europe, has traditionally been and remains Europe’s long-standing ally in resisting tyranny, upholding the rule of law and defending human rights. Since the Second World War, the United States has led efforts to create a modern, multilateral, rule-based system of international law and has been among the principal driving forces in establishing the current architecture of international institutions.

The Parliamentary Assembly recognises that the United States remains strongly committed to a significant number of international legal norms [. . .]. However, [. . .] in pursuit of its so-called “war on terror”, the American Administration has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms considered by it to be overly constraining or otherwise inappropriate in view of the perceived new situation. In so doing, it has done a disservice to the cause of justice and rule of law and has tarnished its own hard-won reputation as a beacon in defending human rights and in upholding well-established rules of international law.⁵

2. There is a widespread perception among the civil society community in the OSCE region that the US has noticeably downplayed human rights in its foreign policies in the post-September 11 period because of changing political priorities and loss of credibility to raise concerns. Many of the members and partners of the IHF share the impression that the US has allowed security and other issues to take precedence over human rights in its interactions with the authorities of their respective countries, and that human rights no longer feature as prominently in political dialogues but primarily are dealt with on a pro forma basis. One human rights defender remarked that the US “does not speak clearly about human rights” anymore, while another concluded that the US and its allies have stopped “playing the human rights card.”

A Kazakh civil society activist stated that the US used to be an outspoken defender of human rights in his country, but because of Guantanamo its voice has been diminished, and the Kazakh authorities now have a pretext for opting for the alternative of a “dialogue” on human rights promoted by some European countries.

3. Because of Guantanamo, the US has lost opportunities to address some of the most serious human rights situations in the OSCE region. The attempts by the Russian government to portray Chechnya as another front in the “war on terror” have gone largely unchallenged by the US government,⁶ and the Bush administration

⁵Parliamentary Assembly of the Council of Europe, Resolution 1539 (2007): The United States of America and international law, 16 March 2007, at <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1539.htm>

⁶For more information about Russian counter-terrorism policies in Chechnya see the chapter on “Counterterrorism Measures and the Ban on Torture” in IHF, Human Rights in the OSCE Region. Report 2007 (Events of 2006), at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4387

has refrained from raising specific concerns about the pattern of gross abuses taking place in the region. A Russian human rights activist pointed out that the US, in the current situation, cannot expect to have any impact when it speaks alone on this and other persistent human rights problems in Russia since any criticism coming from it is received with derision by Russian authorities.

As a result of close counter-terrorism cooperation with Uzbekistan, the United States has also failed to effectively challenge the Uzbek government about its brutal and indiscriminate campaign against alleged religious extremists, which has been waged for more than a decade already but has been reframed as a contribution to the global fight against terrorism in the aftermath of September 11.⁷ The authoritarian Uzbek regime became a strategic partner of the US when agreeing to let the US use its airspace and airbases after the terror attacks on New York and Washington, and it has reportedly assisted in the implementation of US rendition operations by acting as a “surrogate jailer.”⁸ The intimate US-Uzbek relationship only cooled down after the May 2005 killings of civilians in the Uzbek city of Andijan.

In the view of an Uzbek human rights defender, it appears that the Bush administration was aware of the well-documented abusive practices employed by the Uzbek government when inviting it to join the international counter-terrorism coalition after September 11. He finds that this policy of “embracing a dictator” for the purpose of fighting terrorism raises serious doubts about the rationale of that fight, and questions why the US has not consistently protested the methods of the Uzbek authorities—which he describes as “state terrorism”—if it is really interested in combating terrorism in all its forms.

4. The human rights violations committed by the US in the campaign against terrorism have, further, emboldened governments with poor human rights records and made it possible for them to cite the US example to justify their own abusive policies or to deflect criticism of these policies. According to United Nations Special Rapporteur on Torture Manfred Nowak, governments around the world have tried to rebut criticism of how they treat detainees by stating that they are only doing what the US is doing. “Today, many other governments are kind of saying, ‘But why are you criticizing us, we are not doing something different than what the United States is doing?’” he was quoted as telling journalists at a news conference in October 2006.⁹

In the OSCE region, Russian President Vladimir Putin has repeatedly sought to divert attention from the human rights situation in Russia by calling for increased attention to alleged abuses of terror suspects held by the US at Guantanamo Bay and elsewhere,¹⁰

⁷For more information about abuses related to Uzbek counter-terrorism policies see *ibid.*

⁸“US recruits a rough ally to be a jailer,” *The New York Times*, 1 May 2005, at <http://www.nytimes.com/2005/05/01/international/>

[01renditions.html?ex=1272600000&en=932280de7e0c1048&ei=5088&partner=rssnyt&emc=rss](http://www.nytimes.com/2005/05/01/international/01renditions.html?ex=1272600000&en=932280de7e0c1048&ei=5088&partner=rssnyt&emc=rss)

⁹“Many Follow U.S. Example on Detainees,” *Associated Press*, 25 October 2006.

¹⁰For example, he used the opportunity at a meeting with human rights leaders in Moscow in January 2007 to criticize Guantanamo, the situation at which he called “lamentable.” At a press conference ahead of the G8 meeting in Germany in June 2007, he cited the example of the US to parry questions about Russia’s record, saying “Let’s look what happens in North America—sheer horror: torture, the homeless, Guantanamo, keeping people in custody without

and he has referred to the Abu Ghraib scandal to argue that responsibility for the endemic problem of torture in Chechnya rests solely with low-ranking soldiers.¹¹ In late 2006 UN Special Rapporteur Nowak was forced to cancel a planned visit to the Russian North Caucasus region after Russian authorities refused to allow him to talk privately to detainees, similarly to US authorities with respect to Guantanamo Bay.¹²

Belarus President Lukashenko has called on the international community to be less concerned with human rights in Belarus—one of the countries with the worst records in the entire OSCE region—and to care more about ensuring “independent trials” for Guantanamo detainees and “defending the rights” of torture victims at Abu Ghraib.¹³ The government of Uzbekistan has compared its actions following the May 2005 Andijan events to the US response to the September 11 attacks, thereby hoping to escape criticism for arbitrary mass arrests, show trials of alleged religious extremists and an unprecedented crackdown on human rights defenders and others challenging the official account of what happened in Andijan.¹⁴

5. Similarly, non-democratic governments have used the example established by the US to support claims that human rights are violated “everywhere” and that criticism of their human rights practices by foreign governments reflect double standards and attempts to meddle in the political affairs of their countries. Such rhetoric has been particularly prominently used by the Russian government, with other governments in the former Soviet Union following its lead.

In a recent example, the Russian Foreign Ministry dismissed the annual US State Department report on human rights practices released in March 2007 as “politically biased,” asserting that it featured “skewed,” “exaggerated” and “groundless” information about developments in Russia, while remaining silent on the “ambiguous” record of the US. The ministry stated that Russia remained open for “a constructive dialogue,” but would not tolerate “using democracy and human rights issues as a cover for interference in its internal affairs.”¹⁵ Both houses of the Russian parliament subsequently adopted statements denouncing “provocative assessments”

trial or investigation.” See “Putin Blasts US Over Guantanamo Prison Camp,” *Mosnews*, 12 January 2007; “I’m the world’s only true democrat says Putin,” *Reuters*, 4 June 2007, at <http://www.reuters.com/article/worldNews/idUSL0454405820070604?feedType=RSS&rpc=22>

¹¹ “Angry Putin rejects public Beslan inquiry,” *The Guardian*, 7 September 2004, at <http://www.guardian.co.uk/russia/article/0,2763,1298905,00.html>

¹² For an IHF comment see “Torture Epidemic in Russian North Caucasus Region Makes UN Access to Detention Sites Essential,” 5 October 2006, at http://www.ihfr.org/documents/doc_summary.php?sec_id=58&d_id=4312

¹³ Statement by President of the Republic of Belarus Alexander Lukashenko at the 60th Session of the United Nations General Assembly, at <http://www.president.gov.by/en/press11510.print.html>

¹⁴ Following the publication in February 2007 of an IHF report on human rights defenders in Uzbekistan, the Uzbek foreign ministry issued a set of comments in which it staunchly defended the actions taken by the Uzbek authorities in the wake of the Andijan events, e.g. by claiming that they “were carried out in accordance with the law and in the interests of national security” and that they “were no different” from actions taken by the US authorities following the September 11 events. The comments are available on the IHF website, at http://www.ihfr.org/documents/doc_summary.php?sec_id=58&d_id=4378

¹⁵ U.S. human rights report fails to reflect reality—ministry, *RIA Novosti*, 2 April 2007, at <http://en.rian.ru/russia/20070412/63523048.html>; “Russia Criticizes U.S. Human Rights Report,” *Associated Press*, 12 March 2007.

of the human rights situation in Russia as well as “unprecedented attempts” by the US to interfere in Russia’s political processes.¹⁶

The Belarus government has likewise spoken out against the “political exploitation” of human rights and sought to counter UN censure of its human rights policies by introducing a draft General Assembly resolution referring to criticism raised by US and international NGOs regarding arbitrary detentions, disappearances and other abuses committed by the US in the “war on terror.”¹⁷

6. Broadly speaking, governments looking to the United States for guidance have been encouraged to allow security interests to override human rights concerns in the campaign against terrorism. For example, the Azerbaijani government, which has been eager to demonstrate loyalty to the US in its counter-terrorism endeavors, has extradited numerous terrorist suspects to countries where they risk abusive treatment in violation of international human rights standards.

Moreover, some governments in a weak position to challenge the US have been pressured to comply with US requests for cooperation despite human rights objections. In Bosnia and Herzegovina, the so-called “Algerian case” has become an infamous example of the sacrifice of human rights in the fight against terrorism. In early 2002, six men of Algerian origin were handed over from Bosnia and Herzegovina to the United States, which thereafter brought them to Guantanamo Bay, although the Human Rights Chamber created under the Dayton agreement had ruled against such a move.¹⁸ Local civil society representatives consider this case to represent a step toward declining attention to human rights in the country, whereby human rights issues have increasingly slipped off the political agenda.

7. In another distinct trend, US counter-terrorism policies have contributed to waning respect for the US and worsening attitudes toward the country. In a recent poll commissioned by BBC World Service, 51% of those interviewed in 26 countries said that the US is having a mostly negative influence in the world, while 69% expressed disapproval of US treatment of detainees at Guantanamo and elsewhere.¹⁹ Another survey conducted by the Pew Research Center in 2005 showed that the United States was broadly disliked in most of the 16 countries covered, with only a minority of re-

¹⁶“Russian Lawmakers Lash Out at US ‘Meddling,’” CSN News, 13 April 2007, at <http://www.csnnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200704/INT20070413d.html>

¹⁷A resolution to this end was unsuccessfully introduced by the Belarus in November 2006 in response to a US-sponsored resolution on Belarus. The text of the resolution is available at http://www.belarusembassy.org/news/digests/US_human_rights_record.pdf

¹⁸The Chamber, which is comprised of six Bosnian and seven international judges and enjoys powers under the Dayton Agreement to issue decisions binding on the authorities of Bosnia and Herzegovina, ordered that themen not be forcibly taken out of the country pending a full examination of their cases on the basis of complaints filed by the lawyers of the men. The Chamber later concluded that the men had been arbitrarily expelled and that the expulsion had exposed to a real risk of being tried by a military commission that is not independent from the executive branch and operates with significantly reduced procedural safeguards, while enjoying powers to impose the death penalty. For more information on this case see the chapter on extraditions, expulsions and deportations in *Anti-terrorism Measures, Security and Human Rights* (April 2003), at http://www.ihfhr.org/documents/doc_summary.php?sec_id=58&d_id=4082; and the chapters on Bosnia and Herzegovina in various issues of the IHF report on Human Rights in the OSCE Region at http://www.ihfhr.org/cms/cms.php?sec_id=71

¹⁹See “America’s Image in the World,” Testimony of WorldPublicOpinion.org before House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, 6 March 2007, at http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/326.php?nid=&id=&pnt=326&lb=btvoc

spondents expressing a favorable opinion of the US in major European countries such as France, Germany and Spain.²⁰

In Bosnia and Herzegovina, the US has lost much of the high standing it enjoyed after its crucial role in ending the 1992–1995 war and bringing about the Dayton agreement, which rendered it an image as a symbol of hope and peace. Among Uzbek civil society activists, American democracy used to be the major point of orientation, but the strategies used by the US government in the campaign against terrorism—in particular its engagement with Uzbek President Islam Karimov—has ruined its reputation as a model. According to a local human rights defender, it is a widespread popular perception in Uzbekistan that both the Uzbek and the US government use the “war against terrorism” as a pretext for pursuing interests that have nothing to do with terrorism. In Kazakhstan, there has reportedly been a growing favorable perception of the Arab world vis-à-vis the US and Europe in the post-September 11 period.

In some countries, nationalist political movements have openly exploited alleged US abuses to fuel anti-American sentiments. For example, in Bulgaria, this tactic has been employed by the extremist nationalist party Ataka (“Attack”), which has established itself as a major political actor in the country since it gained representation in parliament in 2005 and its leader won more than 24% of the vote in the second round of the presidential elections in 2006. Anti-Americanism has also recently been on the rise in Russia, with political leaders and state-controlled media reviving propaganda of the past to depict the US as the number one enemy. In the view of Russian human rights defenders, this development is not directly related to the abusive counter-terrorism policies of the US, but these policies have made it more difficult for the US to defend itself against attacks on its reputation, as well as for Russian NGOs to support it.

8. While the US continues to support the work of civil society groups in different countries, it is the impression of several of the affiliates of the IHF that the “war on terror” has impacted US donor programs. In their experience, funding allocated to human rights groups has shrunk, and it has become more difficult to obtain grants for projects that address “sensitive issues.” According to one human rights defender, funding is preferably given to projects that do not explicitly focus on human rights but are differently framed, e.g. as a contribution to the fight against corruption. Another defender noted that issues such as fair trial violations in cases involving alleged terrorist suspects and extraditions of terrorist suspects to countries that practice torture are now “taboo” and do not qualify for US support.

9. At the same time as US funding priorities have changed, NGOs that receive funding from US sources have been accused of promoting political interests of the US, a charge that has been leveled together with the argument that US human rights policies are characterized by hypocrisy and political prejudice. Russian government officials have frequently alleged that NGOs funded from

²⁰See Result of Pew Global Attitudes Survey at <http://pewglobal.org/reports/display.php?ReportID=247>

abroad serve as fronts for “foreign powers” seeking to influence political developments in the country and foment a “color revolution” of the kind seen in other countries of the region. President Putin has set the tone by, *inter alia*, claiming that NGOs supported by US or other foreign donors “cannot bite the hand that feeds the”²¹ and “he who pays the piper calls the tune.”²² This kind of rhetoric was used to justify the adoption in late 2005 of new NGO legislation, which enhanced oversight of NGOs and greatly increased their reporting burden, e.g. by requiring them to report in detail on all funds received from foreign sources and how these are allocated or used. Most of Russia’s pro-democracy and human rights groups are currently heavily dependent on US and other foreign funding since domestic sources of funding have dried up in the last few years.

Authorities of other countries of the former Soviet Union have resorted to similar language as Russian authorities and used it as basis for adopting harsher measures against NGOs in their countries, which are equally dependent on assistance from abroad. A Kazakh NGO representative stated that authorities of his country scornfully tell human rights groups that accept US money to “challenge the US,” and that these groups are generally “on the defensive about their relationships to the US.” US organizations operating in the country are told to “go home” and deal with human rights there. An Azerbaijani human rights defender reported that pro-governmental groups in his country campaign against “Western grant-eaters,” scolding them for being “anti-national.”

10. In the post-September 11 period, human rights NGOs in the OSCE region have also faced a more hostile working environment due to decreasing public confidence in human rights. Many of the members and partners of the IHF witness that the human rights violations committed by the US and other western democracies in the name of fighting terrorism have contributed to growing cynicism and disillusionment about human rights in their countries, often reinforced by the rhetoric used by governments.

In the view of one human rights defender, the entire international human rights machinery has been tainted by US claims for exception to universal standards and its conduct of a “war without rules,” while another defender commented that “the concepts of human rights and rule of law as such have been discredited” and “human rights law is no longer considered law.” As a result of these developments, it has become more difficult for human rights groups to attract attention to the concerns they raise and to gain support for their actions, and they increasingly find themselves confronted with mistrust and suspicion among their constituencies. According to a human rights leader in the IHF network, the human rights community in his country is now essentially “alone” in its struggle for human rights, and the struggle is more of an uphill one than ever before.

²¹This expression was used by President Putin in his 2004 state of the nation address.

²²Putin made this remark at a meeting with human rights activists in Moscow in July 2005.

CONCLUSIONS

The trends described in this written testimony have contributed to an overall setback for human rights in the OSCE region and had the effect of isolating and leaving in an exposed position, civil society movements that can play a key role in the advancement of democracy, rule of law and human rights in their countries.

The only way for the United States to remedy the situation and to regain lost ground as a beacon of human rights and democracy is to change course and get back on a human rights track in the fight against terrorism. All abusive practices must end and the United States must ensure that its policies fully conform to international standards. Among the most important steps to this end would be an immediate closure of the detention facility at Guantanamo Bay and abolition of the military tribunal system for trying terrorist suspects, measures recently supported by former US Secretary of State Colin Powell.

In the words of a Russian human rights defender, the United States will have to “clean its own house” before it can credibly act as a human rights proponent again and exercise influence when it raises human rights concerns with other governments. Current US policies send the signal that the US is not serious about human rights. The longer US practices encourage this message to persist, the more harm will be done, not only to US interests but also to those of people around the world who seek to have their rights honored and protected.



This is an official publication of the
**Commission on Security and
Cooperation in Europe.**

★ ★ ★

This publication is intended to document
developments and trends in participating
States of the Organization for Security
and Cooperation in Europe (OSCE).

★ ★ ★

All Commission publications may be freely
reproduced, in any form, with appropriate
credit. The Commission encourages
the widest possible dissemination
of its publications.

★ ★ ★

<http://www.csce.gov>

The Commission's Web site provides
access to the latest press releases
and reports, as well as hearings and
briefings. Using the Commission's electronic
subscription service, readers are able
to receive press releases, articles,
and other materials by topic or countries
of particular interest.

Please subscribe today.