TESTIMONY OF GABOR RONA
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HEARING ON
THE U.S. DETENTION FACILITY AT GUANTANAMO BAY

BEFORE THE
UNITED STATES COMMISSION
ON SECURITY AND COOPERATION IN EUROPE
(HELSINKI COMMISSION)

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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 conflict. 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 chose 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

[1] The 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."

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 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.

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[2] 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, rejects the U.S. concept of "unlawful combatant."

[3] See, 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 Political 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, Inuman 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.

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 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

[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).

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 reveled 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 from its resources and let it die than to kill every insurgent… Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents 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

[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.

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

"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.

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

[8] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," Washington Post, March 24, 2007.
[9] Thom 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.
[11] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," Washington Post, March 24, 2007.

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 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

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

[13] While 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.

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 appears 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

[14] The 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).

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

[16] *Id. See*, Bounty Flyer, attached.

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 community," 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

[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-abuomar9jun09,0,3786556.story?coll=la-home-world
[19] http://www.libertysecurity.org/article1055.html
[20] Ron 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."

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?

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.

[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

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 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 system 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

[22] For 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.

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.

[23] September 2, 2006, page 10.

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.

Psychological Operations (PsyOp)

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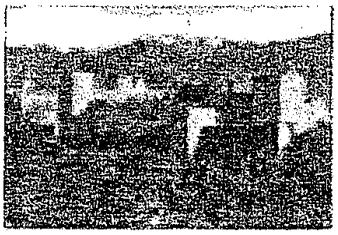

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