
amnesty international

USA: Any return to unfair trials must be rejected Time to take military commissions off the table

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The US administration may be considering allowing military commission trials of Guantánamo detainees to resume after a 120-day suspension in proceedings which is due to expire on 20 May 2009. Amnesty International continues to oppose trials under the Military Commissions Act (MCA).¹ Any trials of Guantánamo detainees should be conducted before US federal civilian courts in trials that meet international standards. The administration should not seek the death penalty in any case.

Military commissions were suspended soon after President Barack Obama took office on 20 January 2009. In a memorandum issued that same day, Secretary of Defense Robert Gates ordered the Convening Authority for Military Commissions “to cease referring cases to military commissions immediately”. He also directed the Chief Prosecutor “to cease swearing charges”, to seek from the military commission judges 120-day suspension of proceedings in any cases that had already been referred on for trial, and to petition the Court of Military Commission Review “to hold in abeyance any pending appeals for 120 days”. The military judges mainly granted the requests; in the one case where a judge refused to do so, the government dismissed the charges against the detainee in question.²

The Secretary of Defense’s memorandum stated that the purpose of the requested stay was to provide the new administration sufficient time to “conduct a review of detainees currently held at Guantánamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution”. The memorandum ended with the line “this order does not preclude continued investigation or evaluation of cases by the [Office of Military Commissions]”.

Amnesty International called on the new administration to abandon the commissions altogether, withdraw all charges under the MCA, and to immediately transfer to the US mainland any Guantánamo detainee who was to be charged, bring him before a civilian judicial authority, and promptly charge him with specific offences under applicable federal law. Any

¹ See USA: Justice delayed and justice denied? Trials under the Military Commissions Act, March 2007, <http://www.amnesty.org/en/library/info/AMR51/044/2007/en>.

² The case was that of ‘Abd al-Rahim al-Nashiri, a Saudi Arabian national held in secret US custody for nearly four years before being transferred to Guantánamo in September 2006. See also USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody, 2 July 2008, <http://www.amnesty.org/en/library/info/AMR51/071/2008/en>.

such defendant should then have been brought to trial without undue delay in ordinary US federal courts.³

Three and a half months after taking office, however, the administration has not charged a single Guantánamo detainee and has not said which forum or forums it will turn to when it does so. It has kept the military commission option open. In a court filing in March 2009, for example, the administration noted that “at the direction of the Secretary of Defense, the Department of Defense continues to investigate and evaluate cases for potential trial by military commission”. In a hearing in front of the Senate Appropriations Committee on 30 April 2009, Secretary Gates said that the commissions are “still very much on the table”. In a media interview on 8 April 2009, Attorney General Eric Holder suggested that “a substantial number” of the people the administration decided to charge would be brought to trial in the civilian federal courts, while others could be taken to “military courts” with “some enhanced measures”.

Attorney General Holder said that one challenge was how to deal with detainees who had been subjected to “enhanced” interrogation techniques in US custody, that is, methods which violate the prohibition of torture and other ill-treatment. Amnesty International emphasizes that if prosecution in ordinary federal court is not seen as possible for a particular detainee because the court would be expected to exclude evidence obtained by torture or other ill-treatment, or to take other measures in order to ensure a fair trial, turning to other trial procedures that permit the evidence to be used is not a legitimate or lawful solution. It is unlawful to use information obtained by torture or other ill-treatment in any proceeding, and if a measure is necessary to guarantee the fairness of a trial before the ordinary federal court, it will in any event be equally necessary to guarantee the fairness of a trial before any other court. Further, the International Covenant on Civil and Political Rights, to which the USA is a party, prohibits discrimination on the basis of national origin in the fairness of trial procedures; at present the Military Commissions Act and its special trial procedures apply only to non-US nationals in flagrant violation of this rule. If it is not possible to produce sufficient evidence, admissible in ordinary federal court, to form the basis for the criminal charge of a person detained at Guantánamo, he should be immediately released.

Any proposal to use any form of military tribunal to try civilians would be of grave concern to Amnesty International. The organization opposes trial of civilians, including those accused of crimes against humanity or other similarly grave crimes, by military courts. The organization remains concerned that the new administration, although dropping the term “enemy combatant” in Guantánamo litigation and downplaying the use of the catchphrase “war on terror”, continues to apply a “law of war” framework to detentions unrelated to any ongoing “armed conflict” as that term is understood under the international law of armed conflict, and to the exclusion of international human rights law. Amnesty International continues to call on the USA to rely on ordinary systems of criminal justice alone to justify detention – pending trial – of individuals who are unconnected to any ongoing international armed conflict and are accused of essentially criminal conduct.

³ See USA: The promise of real change. President Obama’s executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>.

PREVIOUSLY CHARGED UNDER THE MCA

By 19 January 2009, 28 Guantánamo detainees had been charged under the MCA by the Bush administration. Three had been convicted – of whom two had been released to their home countries (Australia and Yemen), and a third, Yemeni national Ali Hamza al-Bahlul, was serving a life sentence in Guantánamo.⁴ Charges against a number of others had been dismissed by the Convening Authority of the commissions, including Binyam Mohammed, an Ethiopian national and UK resident who, in February 2009 became the first and so far only detainee to be released by the new administration.⁵ Charges against another detainee, Saudi Arabian national Mohamed al Qahtani, were dismissed in April 2008. In January 2009, the Convening Authority for the military commissions revealed that she had dismissed the charges because of the torture to which Mohamed al Qahtani had been subjected in US custody.⁶

The Bush administration charged under the MCA seven detainees who had been held in the USA's secret detention program before being transferred to Guantánamo in 2006, and was pursuing the death penalty against six of them. All seven had been subjected to enforced disappearance in the secret detention program. Some or all had been subjected to interrogation techniques or conditions of detention which amounted to torture or other cruel, inhuman or degrading treatment.⁷

Two of the detainees charged under the MCA were accused of offences alleged to have been committed at a time when they were children. Canadian national Omar Khadr was 15 years old when taken into US custody, and Mohammed Jawad, an Afghan national, was aged 16 or 17.⁸ The USA never took account of their age in its treatment of them, as it was required to do under international law, including under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Among those to have called for them not to be tried by any military tribunal is the UN Committee on the Rights of the Child. If the USA decides to go forward with their prosecution, it must do so only in ways that fully take into account their age at the time of their alleged crimes and their other human rights. Amnesty International believes, however, that given their years of unlawful treatment by the USA, serious consideration, on humanitarian and remedial grounds, should be given instead to their release for inclusion in suitable programs geared towards their successful reintegration into society. On 23 April 2009, the Federal Court of Canada ruled that the government of Canada “must present a request to the United States for Mr Khadr’s repatriation to Canada as soon as practicable” and that Canada’s ongoing refusal to do so “offends a principle of

⁴ See USA: Trial and error - a reflection on the first week of the first military commission trial at Guantánamo, 30 July 2008, <http://www.amnesty.org/en/library/info/AMR51/084/2008/en>.

⁵ See also USA: Federal court rejects government’s invocation of ‘state secrets privilege’ in CIA ‘rendition’ cases, 29 April 2009, <http://www.amnesty.org/en/library/info/AMR51/058/2009/en>.

⁶ See USA: Torture acknowledged, question of accountability remains, 14 January 2009, <http://www.amnesty.org/en/library/info/AMR51/003/2009/en>.

⁷ See USA: The show trial begins: Five former secret detainees arraigned at Guantánamo, 6 June 2008, <http://www.amnesty.org/en/library/info/AMR51/056/2008/en>.

⁸ See USA: In whose best interests? Omar Khadr, child ‘enemy combatant’ facing military commission, April 2008, <http://www.amnesty.org/en/library/info/AMR51/028/2008/en>; and USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’, August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>.

fundamental justice". The next military commission hearing on Omar Khadr's case is currently scheduled for 1 June 2009.

On 12 June 2008, the US Supreme Court ruled in *Boumediene v. Bush* that the Guantánamo detainees had the right to a "prompt" habeas corpus hearing in US federal court to challenge the lawfulness of their detention. Eleven months later, only a handful of detainees have had such a hearing. None of those previously charged for trial by military commission under the Bush administration have had a habeas corpus hearing. Indeed, in a number of their cases, the new administration has sought to have their habeas corpus petitions dismissed or suspended on the grounds that the charges against them are still pending.⁹

On 22 April 2009, a District Court judge refused to lift the stay of habeas corpus proceedings in the case of Baidullah Obaidullah, an Afghan national who had been charged under the MCA in September 2008 after more than six years in US custody. Judge Richard Leon instead ordered the government to provide on 17 July 2009 an update on the military commission process in Obaidullah's case.

On 27 April 2009, District Court Judge Ellen Segal Huvelle denied the government's motion to dismiss or hold in abeyance the habeas corpus petitions of Mohammed Jawad and Mohammed Kameen in light of the fact that the military commissions had been suspended. However, the judge said that the government could re-file its motion to dismiss if the charges against these two Afghan nationals were referred on for trial by military commission. The next *procedural* session in Mohammed Jawad's habeas corpus case in District Court is scheduled for 15 June 2009, more than a year after the *Boumediene* ruling and six and a half years after Mohammed Jawad was taken into US custody as a teenager.¹⁰

On 7 April, in the case of Ahmad Mohammad al Darbi, a Saudi Arabian national arrested by civilian authorities in Baku, Azerbaijan, in 2002 and transported to Guantánamo via Bagram in Afghanistan, District Court Chief Judge Royce Lamberth denied the government's motion to dismiss or suspend his habeas corpus petition. Given the suspension of the military commissions, the Chief Judge ruled, "Al Darbi can no longer exhaust his criminal proceedings because he has no active proceedings scheduled". To grant the motion to dismiss his habeas corpus petition would, the judge said, leave Ahmad al Darbi "in limbo". The government's motion was dismissed without prejudice "to consideration if and when [al Darbi] is slated to be tried in a criminal forum, military or civilian". On 27 April 2009, the military judge presiding over Ahmed al Darbi's military commission case issued an order in which he noted that "as of the date of this order, there has been no change in the statutory or regulatory scheme governing military commission". The military judge, Colonel James Pohl, therefore scheduled the next hearing in Ahmed al Darbi's military commission case for the morning of 27 May 2009 at Guantánamo. In setting this date, Colonel Pohl wrote, he was "not trying to influence the Administration's review" and he would consider adjusting or cancelling the hearing if there "are changes between now and 27 May 2009".¹¹

⁹ See USA: Detainees continue to bear costs of delay and lack of remedy, April 2009 <http://www.amnesty.org/en/library/info/AMR51/050/2009/en>.

¹⁰ A US military judge has found that Mohammed Jawad was subjected to torture in Afghan custody in the hours before being handed over to the USA, and to "cruel and inhuman treatment" in US custody.

¹¹ *USA v Al Darbi*, MJ 007 Docketing Order, 27 April 2009.

PLEASE TAKE ACTION

Please send appeals to one or more of the addressees listed below, using the following guide:

- o expressing concern that more than three months into the new administration not a single Guantánamo detainee has been charged in the ordinary courts and only one has been released;
- o calling on the US administration to entirely abandon the military commissions, flawed tribunals whose procedures do not comply with international fair trial standards;
- o calling on the administration to charge the detainees for trial in ordinary federal court, or release them;
- o calling for urgent consideration to be given to repatriation on remedial and humanitarian grounds in the case of detainees taken into custody when they were children, as noted above;
- o calling on the administration not to pursue the death penalty against any detainee it decides to charge.

ADDRESSES

President Barack H. Obama
Office of the President
The White House
1600 Pennsylvania Avenue NW
Washington DC 20500, USA
Email: president@whitehouse.gov
Fax: + 1 202 456 2461
Salutation: Dear Mr President

Attorney General Eric H. Holder
US Department of Justice
950 Pennsylvania Avenue, NW
Washington DC 20530-001, USA
Fax: + 1 202 307 6777; + 1 202 616 8470
Email: AskDOJ@usdoj.gov
Salutation : Dear Attorney General

Secretary of Defense Robert M. Gates
1400 Defense Pentagon
Washington DC 20301, USA
Fax: + 1 703 571 8951
Salutation: Dear Secretary of Defense

Please copy your appeals to diplomatic representatives of the USA accredited to your country.

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