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Guantánamo: Military commissions - Amnesty International observer's notes, No. 3 -- Proceedings suspended following order by US federal judge

Amnesty International has had an observer at the pre-trial hearings by military commissions conducted this and last week at the US Naval Base in Guantánamo Bay, Cuba. The organization's observer, Jumana Musa (see <http://web.amnesty.org/library/Index/ENGAMR511292004>) has sent her third update (see also <http://web.amnesty.org/library/Index/ENGAMR511532004>, and <http://web.amnesty.org/library/index/engamr511552004>).

Four men have been charged in preparation for their trial by military commission -- David Hicks, Australian national; Salim Ahmed Hamdan, Yemen national; Ali Hamza Ahmed Sulayman al Bahlul, Yemen national; and Ibrahim Ahmed Mahmoud al Qosi, Sudan national.

Amnesty International continues to call for all Guantánamo detainees to be tried in accordance with fair trial standards or else released. It has opposed the military commissions ever since President George W. Bush signed a Military Order on 13 November 2001 providing for such trials. It will continue to campaign for the military commissions to be abandoned and the Military Order rescinded. For further information see: <http://web.amnesty.org/library/Index/ENGAMR511302004>.

The organization welcomes yesterday's ruling by a US federal judge as a result of which pre-trial proceedings against Salim Ahmed Hamdan were suspended. The organization urges the US administration to see Judge Robertson's order as an opportunity to end the military commissions once and for all. Regrettably, the US government's immediate reaction was to "vigorously disagree" with the ruling.

Today (8 November) was the first and last day of hearings on motions in the pre-trial military commission proceeding of Salim Ahmed Hamdan. Significant translation problems were widely reported during the first week of hearings in August. At that time, Hamdan's interpreter described the quality of interpretation provided by the commission as listening to a distant radio transmission that cut in and out. The commission proceedings had to be stopped several times because the translation was so poor that the defendant could not follow the proceeding.

Under international law and standards, everyone charged with a criminal offence has the right to the assistance of a competent interpreter, free of charge, if they do not understand or speak the language

used in court. This is an integral part of the right to defend oneself and the right to adequate time and facilities to prepare a defence. The right to an interpreter applies at all stages of criminal proceedings.

The Office of Military Commissions had replaced the previous interpreters and placed a booth in the commission room for them (they were previously seated at a table). The interpreter for Ibrahim Ahmed Mahmoud Al Qosi was listening to the interpretation of today's proceedings to check on the quality of translation since Al Qosi has a motion pending on this issue. He reported the interpreting as improved but still inadequate, describing it as "Swiss cheese (i.e. full of holes) instead of shredded cheese."

The main story, however, unfolded about 45 minutes into the proceedings when a soldier entered and handed a piece of paper to the commission's Presiding Officer. The latter immediately called a recess. Shortly afterwards, the panel came back into the commission room and announced that the proceedings were in indefinite recess.

The proceedings had been halted because Judge James Robertson, the US District Judge who is presiding over Hamdan's habeas corpus appeal in federal court in Washington D.C., issued an order stating that Hamdan could not be tried by a military commission as charged. Judge Robertson ordered that unless and until a "competent tribunal", as required under Article 5 of the Third Geneva Convention, determined that Salim Ahmed Hamdan is not entitled to prisoner of war status, he may only be tried by court-martial under the USA's Uniform Code of Military Justice (UCMJ). "Until or unless such a tribunal decides otherwise", Judge Robertson wrote, "Hamdan has, and must be accorded, the full protections of a prisoner-of-war". The judge found the Third Geneva Convention to be a "self-executing" treaty. In other words it is binding on the USA without the need for implementing legislation.

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

As a presumed prisoner of war, Judge Robertson said, Salim Ahmed Hamdan was due the same standard of justice as would be provided US soldiers, in other words, a court-martial under the UCMJ. Article 102 of the Third Geneva Convention states that "a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of member of the armed forces of the Detaining Power ...". Judge Robertson said that the "Military Commission is not such a court. Its procedures are not such procedures."

Judge Robertson held that even if Salim Ahmed Hamdan was found not to have prisoner of war status by a "competent tribunal" which satisfied the requirements of the Third Geneva Convention, given the current military commission rules permitting the exclusion of the defendant from certain sessions and the withholding of certain classified or "protected" evidence from him, his trial before the military commission would be unlawful. Judge Robertson stressed his concern that under the commission rules "the accused himself may be excluded from proceedings" and "evidence may be adduced that he will never see (because his [military] lawyer will be forbidden to disclose it to him)". It is "obvious", Judge Robertson wrote, that such a "dramatic deviation" from US constitutional law "could not be countenanced in any American court", including a court-martial under the UCMJ. In a court-martial under the UCMJ, all proceedings apart from the deliberations and voting of the court-martial's members "shall be held in the

presence of the accused". Judge Robertson emphasised that the military "has not found it impracticable to deal with classified material in courts-martial", with the development of an "extensive and elaborate process ... for dealing with such material". The judge also pointed out that the right to be tried "in one's presence" is a principle of international humanitarian and human rights law.

Since December 2003, Salim Ahmed Hamdan had been held in pre-trial isolation in Camp Echo in what Amnesty International considers to have been cruel and inhuman conditions of detention (see page 122 of USA: Human dignity denied: Torture and accountability in the 'war on terror', AI Index: AMR 51/145/2004, <http://web.amnesty.org/library/Index/ENGAMR511452004>). Just before the oral arguments held in Judge Robertson's court on 25 October 2004, the government advised that it had moved Salim Ahmed Hamdan out of Camp Echo and back into a segregation wing of Camp Delta. Judge Robertson noted this change in circumstances, and that the government was "capable of repeating" the Camp Echo isolation regime "which has evaded review". However, he pointed out that possible future treatment could not be reviewed by him as part of the current habeas corpus proceedings. He did order, however, that Salim Ahmed Hamdan "must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some other than the pending charges against him requires different treatment".

Five other detainees, made eligible for trial by military commission by a presidential determination announced in July 2003, were also moved to prolonged isolation in Camp Echo. Amnesty International has been informed that the other five -- David Hicks, Ali Hamza Ahmed Sulayman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, and UK nationals Moazzam Begg and Feroz Abbasi have now been moved out of Camp Echo and to a segregation wing of Camp Delta. The organization has long campaigned against the cruel conditions of Camp Echo (see, for example, Urgent Action update <http://web.amnesty.org/library/Index/ENGAMR511052004>).

The US administration is seeking an emergency stay of Judge Robertson's decision and has said it will immediately appeal it. A US Justice Department spokesperson said: "The Constitution entrusts to the President the responsibility to safeguard the nation's security. The Department of Justice will continue to defend the President's ability and authority under the Constitution to fulfil that duty."

The military commissions have caused widespread national and international concern since they were proposed in President Bush's November 2001 Military Order. They are fundamentally flawed and should be abandoned. Amnesty International encourages the US administration, despite its immediate negative reaction to Judge Robertson's ruling, to recognize it as another sign of such concern and abandon the trials by military commission once and for all.