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USA

Guantánamo: Military judge to question capital defendants on decision to represent themselves

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"Further, proceedings must not only be fair, they must appear fair to all who observe them".
US Supreme Court, 19 June 2008¹

Five Guantánamo detainees accused of involvement in the attacks of 11 September 2001 in the USA are due to appear in front of a military judge this week, beginning tomorrow, as pre-trial hearings in the case resume. Amnesty International will have an observer at the proceedings.

The defendants are Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, 'Ali 'Abd al-'Aziz 'Ali ('Ammar al Baluchi) and Mustafa al Hawsawi. The government intends to try the men in a joint trial and to seek the death penalty against them.

Before being transferred to Guantánamo in September 2006, these five men had been held in secret incommunicado detention by the Central Intelligence Agency (CIA) for between two and three years after being arrested in Pakistan in 2002 and 2003. Their fate and whereabouts concealed, they became victims of enforced disappearance, like torture a crime under international law. At least one of the defendants, Khalid Sheikh Mohammed, was subjected to the form of water torture known as "waterboarding", simulated drowning. Which other "standard" or "enhanced" interrogation techniques were used against these and other CIA detainees has not been revealed by the US authorities, and any techniques used against the men, their conditions of detention, and the location of CIA detention facilities, remain classified at the highest level of secrecy.

The military judge overseeing the case, Marine Colonel Ralph Kohlmann, will hold separate hearings over the next two days with each of the men. The main issue at the sessions will be the question of legal representation, and specifically the voluntariness of the decisions taken by the men at the arraignment on 5 June 2008 to represent themselves (*pro se* representation) As Amnesty International's observer at the arraignment reported, there were indications that at least one of the men, Mustafa al Hawsawi, may have been intimidated by one or more of the

¹ *Indiana v. Edwards*, quoting *Wheat v. United States* (1988), internal quote marks omitted.

other defendants into opting for self-representation.² In addition, ‘Ammar al Baluchi’s stand-by counsel has told the judge that al-Baluchi has indicated his wish to withdraw his *pro se* representation request made at the arraignment and to proceed with representation by a lawyer, but that the defendant is likely to seek to represent himself “while in the courtroom and in the presence of three of the defendants”. The lawyer has told the judge that “the Defense further expects that Mr al Baluchi (Mr Ali) will move between proceeding *pro se* and with representation throughout his trial”.

In an order dated 1 July, Colonel Kohlmann wrote that at this week’s sessions, he “intends to address the issue of what role, if any, perceived or actual intimidation between the several accused played or is playing in the *pro se* elections requested by the several accused.” The judge said that he “intends to discuss this matter with each of the accused on the record and in five separate sessions where each of the accused will appear outside the presence of the other accused”. Judge Kohlmann also made clear that while al Baluchi would “clearly be permitted to withdraw from his *pro se* status, this matter will need to be clarified in court, and with the understanding that he will not be permitted to change back and forth between represented and *pro se* status.” Colonel Kohlmann said that until such time as al Baluchi “clearly withdraws from his *pro se* status”, the military lawyer would continue to operate only as stand-by counsel.

The sessions for Mustafa Hawsawi and ‘Ammar al Baluchi are scheduled for 9 July, with the other three defendants due to appear before the judge in sessions on 10 July. It is not yet clear if there will be a hearing on 11 July with all of the defendants. In his 1 July order, Colonel Kohlmann said that such a joint hearing will be held “as necessary”.

Another issue is the question of a joint trial versus separate trials. Colonel Kohlmann wrote that he “intends to discuss” the question of separating trials “in the event it appears that an accused or the Government is prejudiced by a joint or common trial”. He instructed the prosecution to prepare a brief on this issue “addressing the Government’s position on severance of the proceedings for one or more or all of the accused”. The brief is due by 18 July, and any response by any of the accused has to be submitted by 25 July. If necessary, a hearing on the severance motion would be held at Guantánamo on 14 August 2008.

Colonel Kohlmann set 15 August 2008 as the date for a competency hearing for Ramzi bin al-Shibh. At the June arraignment, it was revealed that bin al-Shibh, who was shackled to the floor during the proceedings, was on medication, raising questions about his mental competence. Under Rule 909 of the military commissions, “No person may be brought to trial by military commission if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against him or her”. Under commission Rule 706, if evidence

² At the 5 June 2008 arraignment, the five defendants were taken to the courtroom about 15 to 20 minutes before the public observers (NGOs and media) were allowed into the viewing gallery. This was believed to have been the first time that the detainees had seen or spoken to each other since their arrests. It appeared later in the proceedings that there was pressure from within the group for the defendants to elect to reject their counsel and to represent themselves. See also <http://www.amnesty.org/en/library/info/AMR51/056/2008/en>.

arises, post-charging, that a defendant “lacks capacity to stand trial”, the military judge may order an inquiry into the matter. The submission to the judge “may be accompanied by an application for a mental examination”.

In the unclassified version of an affidavit signed on 28 June 2008, a doctor retained by Ramzi bin al-Shibh’s legal counsel indicates that two or more of the medications being administered to the defendant “are medically known to produce direct and significant impact on functioning, including adverse side effects that disrupt and compromise physical and mental health”. The doctor concluded that “an independent, thorough, and reliable review and assessment” of all relevant records was required in order to be able to “assess the medical necessity for the current course of Mr Al Shibh’s chemotherapy or to enable him to make an informed, knowing and intelligent decision about any course of action available to him.” The doctor also noted that unless it can be clinically ruled out that Ramzi bin al-Shibh has been subjected to torture or other ill-treatment in US custody, any medical evaluation of the defendant must follow the “standard of care afforded individuals who have been tortured”.

Colonel Kohlmann said in his order of 1 July that “if operated properly, the Military Commission process should provide a workable trial system that can deal with the complex dynamics of a worldwide theatre of military operations. While this process might differ in some regards from trial procedures in other courts, its design does not contemplate a truncated process of justice.”

Amnesty International sees it differently. These trials cannot be divorced from the backdrop against which such proceedings are occurring. This backdrop is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt. Among the defendants are victims of enforced disappearance, secret detention, secret transfer, prolonged incommunicado detention, torture and other cruel, inhuman or degrading treatment. Their treatment has not only been unlawful, it has been highly and deliberately coercive in terms of the interrogation methods and detention conditions employed against them. This heightens the need for any trials to take place before courts structurally independent of the executive and legislative branches which have authorized or condoned human rights violations. Instead, trials are looming before military commissions lacking such independence and specifically tailored to tolerate government abuses and to admit information obtained under such abusive conduct.

Amnesty International continues to urge the US government to abandon the military commission trials, and to bring any defendants before the ordinary federal courts, without resort to the death penalty.

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>.

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>.

USA: Way of life, way of death: Capital charges referred against five former secret detainees, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/041/2008/en>.

USA: Another CIA detainee facing death penalty trial by military commission, 2 April 2008, <http://www.amnesty.org/en/library/info/AMR51/027/2008/en>.

USA: Impunity and injustice in the 'war on terror': From torture in secret detention to execution after unfair trial? 12 February 2008, <http://www.amnesty.org/en/library/info/AMR51/012/2008/en>.

USA: Law and executive disorder: President gives green light to secret detention program, August 2007, <http://www.amnesty.org/en/library/info/AMR51/135/2007/en>.

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>

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