Public

amnesty international

UNITED STATES OF AMERICA
Trial and error

A reflection on the first week of the first military commission trial at Guantánamo

30 July 2008 **AI Index: AMR 51/084/2008**

Both the President of the United States and the Secretary of Defense have troubled themselves to identify [Salim Hamdan] by name as one whose case should be tried by military commission.

US Navy Captain Keith J. Allred, military judge, 20 July 2008[1]

The first trial to take place before a military commission convened under the Military Commissions Act of 2006 (MCA) opened on 21 July 2008 at the US Naval Base in Guantánamo Bay, Cuba. Amnesty International had an observer at the first week's proceedings. The defendant is Yemeni national Salim Ahmed Hamdan, who has been in US military custody for more than six and a half years after being detained in Afghanistan in November 2001. He pleaded not guilty to what the prosecution has controversially referred to as "war crimes": charges of "conspiracy" and "providing material support for terrorism".

If convicted, Salim Hamdan faces the possibility of a life sentence. Even if he is acquitted, however, he could be returned to indefinite military detention as an "enemy combatant" if the US government so chooses.[2] In a ruling issued the day before the trial began, the military judge acted on the basis that "as a battlefield detainee in an ongoing conflict", Hamdan "will continue to be detained whether this prosecution proceeds or not".[3] With this, Hamdan's claim that he has been denied his right to be brought to trial within a reasonable time – already a fiction in Guantánamo – was dismissed.

By the end of the week, serious problems raised by this system of special military trials, which abandon established international human rights and humanitarian law standards, were already evident. Many of these concerns have been discussed more generically in previous Amnesty International reports.[4] However, the trial of Salim Hamdan is a first opportunity to see the trial

[1] *USA v. Hamdan*, D-046. Ruling on motion to dismiss – speedy trial. 20 July 2008.
[2] In these circumstances, whether release following acquittal would be obtained under judicial review in federal court following the US Supreme Court's ruling in June 2008 (*Boumediene v. Bush*) that the Guantánamo detainees have the right to *habeas corpus*, would remain to be seen.
[3] *USA v. Hamdan*, D-046. Ruling on motion to dismiss – speedy trial. 20 July 2008.
[4] See, for instance, USA: Justice delayed and justice denied? Trials under the Military Commissions Act, AMR 51/044/2007, 22 March 2007, http://www.amnesty.org/en/library/info/AMR51/044/2007/en.

procedures operate in practice. Perhaps this is why the first case to be selected for trial is one of the less complicated ones, in the sense that it involves someone who is accused primarily of being a driver and bodyguard rather than of having higher-level involvement with *al-Qa'ida*, and who is not known to have been subjected to the more extreme forms of ill-treatment employed by the USA in the "war on terror", such as water-boarding, a form of torture.

As Amnesty International has previously pointed out, the US government has effectively treated Salim Hamdan as little more than a human guinea pig in its experiment with military commissions over the past nearly seven years.[5] Following last week's trial proceedings, a former US Justice Department war crimes prosecutor has been quoted as saying, "This is essentially a new legal system, and they are using Hamdan to work out the kinks. It's a guinea pig trial." [6] Whatever the verdict, said another former Justice Department official, the administration is "going to claim this is a success. It shows that there can be trials and that the process will go forward."[7] The government has said it intends to try as many as 80 people in front of the military commissions. The pre-trial proceedings of some of the so-called "high-value" detainees – who were subjected in the USA's secret detention program to enforced disappearance or torture, or both, and whose cases were exploited by the President in seeking congressional approval of the MCA – are in their early stages.[8]

The abuses Salim Hamdan is known to have suffered are not necessarily the most severe to have been publicly exposed so far, and the military judge in charge of the trial, US Navy Captain Keith J. Allred, has visibly sought to apply what are inherently unfair procedures and rules in as impartial a manner as possible. Despite this, the first week of the trial has already further exposed how Hamdan's treatment since late 2001, through to his present trial under the MCA, have entailed multiple violations of his human rights.

Trial by special military courts of persons not recognised as members of a state's armed forces or as a prisoner of war

Salim Hamdan is being tried by a special military tribunal, far removed in time and space from any battlefield, even though the USA does not recognise him as a prisoner of war or a member of the armed forces of a state. Indeed it does not appear that he is alleged to have participated in the planning, organization, implementation or execution of any particular armed attack. Nor by the government's own admission is there any evidence he ever fired a single shot.

[5] USA: A tool of injustice. Salim Hamdan again before a military commission, AMR 51/189/2007, 5 December 2007, http://www.amnesty.org/en/library/info/AMR51/189/2007/en.
[6] Goal of Hamdan trial: Credibility. Washington Post, 27 July 2008.
[7] *Ibid*.
[8] "As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice." President Bush, announcing that 14 detainees whose fate and whereabouts were hidden for up to four and a half years were being transferred from secret CIA custody to military detention in Guantánamo Bay, 6 September 2006. See e.g., USA: The show trial begins: Five former secret detainees arraigned at Guantánamo, AMR 51/056/2008, 6 June 2008, http://www.amnesty.org/en/library/info/AMR51/056/2008/en. USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody, AMR 51/071/2008, 2 July 2008, http://www.amnesty.org/en/library/info/AMR51/071/2008/en.

A few months before the trial, but some six years after Salim Hamdan was first taken into detention, the military judge had determined after an adversarial hearing that Hamdan was not entitled to prisoner of war status under the Third Geneva Convention. Neither, the judge ruled, was he a civilian protected by the Fourth Geneva Convention.[9] Instead, Salim Hamdan is labelled as an "alien unlawful enemy combatant", a prerequisite for trial by military commission under the MCA and a status which, under US law, strips him of many rights to which he would otherwise be entitled. The government maintains that, in any event, under Section 948b(g) of the MCA, "no alien unlawful enemy combatant subject to trial by military commission… may invoke the Geneva Conventions as a source of rights". Amnesty International disagrees with the military judge's conclusion that a gap exists between the Third and Fourth Geneva Conventions that would leave a person detained in an international armed conflict without the status of either prisoner of war or civilian.

A chronology of a military commission experiment

- 13 November 2001 – President Bush issues Military Order authorizing trials by military commission for foreign nationals
- 24 November 2001 – Salim Hamdan captured by Northern Alliance in Afghanistan, and transferred to US forces
- 7 February 2002 – President Bush issues memorandum asserting that no "war on terror" detainee would qualify as a prisoner of war and Article 3 common to the four Geneva Conventions would not apply
- May 2002 – Salim Hamdan transferred to Guantánamo
- July 2003 – Made eligible for trial under Military Order
- 14 July 2004 – Hamdan charged with "conspiracy". The Pentagon describes the military commissions under the Military Order as a "tool of justice", guaranteeing "full and fair trials" for the accused
- 8 November 2004 – District Court rules in *Hamdan v. Rumsfeld* that military commissions are unlawful
- 15 July 2005 – US Court of Appeals for District of Columbia (DC) Circuit overturns District Court's *Hamdan* ruling
- 30 December 2005 – Detainee Treatment Act (DTA) becomes law. DC Circuit Court of Appeals given exclusive jurisdiction to "determine the validity of any final decision" handed down by military commission
- 29 June 2006 – US Supreme Court reverses Court of Appeals in *Hamdan v. Rumsfeld*, ruling that the military commissions violate US military and international law, and Common Article 3 applies
- 17 October 2006 – Military Commissions Act (MCA) becomes law
- 13 December 2006 – District Court dismisses Hamdan's *habeas corpus* petition on the grounds that §7 of the MCA has stripped the federal courts of jurisdiction to consider such appeals
- 2 February 2007 – Charges under MCA of "conspiracy" and "providing material support for terrorism" sworn against Hamdan. The charges allege that he acted as Osama bin Laden's driver and bodyguard, that he transported weapons and other supplies for *al-Qa'ida* members, and that he received weapons training. The charges are non-capital
- 1 May 2007 – Charges referred on for trial by military commission
- 12 June 2008 – Supreme Court rules in *Boumediene v. Bush* that §7 of the MCA is unconstitutional and that the Guantánamo detainees have the constitutional right to *habeas corpus*
- 17 July 2008 – District Court refuses to stop Salim Hamdan's trial on the base of the *Boumediene* ruling
- 21 July 2008 – Salim Hamdan's trial begins

Amnesty International does not consider Salim Hamdan's trial by this military court to be lawful under international law, including due to the executive's blanket denial of prisoner of war status to him or any other detainees captured in Afghanistan; and the circumstances of his capture and timing and nature of the particular acts and crimes of which he is accused.[10]

[9] *USA v. Hamdan*, D-013. Ruling on motion for order implementing Fourth Geneva Convention, 24 March 2008

[10] See *Justice delayed and justice denied?,* pages 17-27.

In its authoritative interpretation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), that treaty's monitoring body, the UN Human Rights Committee, has said:

> "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."[11]

The fact that only regular civilian US courts would have jurisdiction, and be used, to undertake any trial of crimes identical to those alleged against Salim Hamdan if committed by US nationals, demonstrates that the ordinary courts are capable of doing so (see also page 11 below, on 2002 Justice Department memorandum). To the extent that Salim Hamdan's prosecution relies heavily on admissions obtained through coercion (see below), which would not be admissible in civilian (or even ordinary military) courts, this cannot be valid grounds for saying special military courts are required, especially given the absolute non-derogable nature of the prohibition of torture and all other cruel, inhuman or degrading treatment or punishment.

In a ruling on Salim Hamdan's case issued on 20 July 2008, Captain Allred stated that "the United States clearly has the power and ability to guarantee all of the Constitution's rights to detainees held in its power should it choose to do so", but that there are "substantial practical arguments against providing jury trials to detainees in Guantánamo Bay".[12] It is important to recall, then, that the administration chose the Naval Base in Cuba for such detentions upon Justice Department advice that under existing constitutional law the federal courts should not be able to "properly entertain an application for a writ of habeas corpus by an enemy alien" captured abroad and detained in the base, including those held "pending possible trial by military commission". [13] In other words, as stated by a former Assistant Attorney General, "because [Guantánamo] was technically not a part of US sovereign soil, it seemed like a good bet to minimize judicial scrutiny". [14] Thus, an ill-conceived and illegitimate motive to keep detentions away from independent judicial oversight (the denial of *habeas corpus* was found unconstitutional by the US Supreme Court in *Boumediene v. Bush* in June 2008), followed by years of unlawful detention, now culminates in trial procedures that do not comply with international law. The "practical" obstacles to ordinary criminal jury trials were, in fact, deliberately and illegitimately manufactured by the administration, in its attempt to keep those it labelled as "enemy combatants" as far from independent courts as possible. This original motivation and its current results are not consistent with international human rights or humanitarian law.

[11] General Comment 32 (the right to equality before courts and tribunals and to a fair trial), para. 32.
[12] *USA v. Hamdan*, D-048. Ruling on motion for indictment and trial by jury, 20 July 2008.
[13] *Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, From Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, 28 December 2001.
[14] Jack Goldsmith. *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton, 2007, p.108.

Denial of equality before the courts

The MCA only applies to non-US nationals. It thus imposes far lower standards for criminal trials and conviction to non-nationals than would be applied in respect of the very same conduct by its own nationals, who would face trial only in the ordinary federal criminal courts.[15] The UN Human Rights Committee has said that "[p]rocedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26 [which include 'national origin'] ... to the enjoyment of the guarantees set forth in article 14 of the [ICCPR], not only violate the requirement of paragraph 1 of this provision that 'all persons shall be equal before the courts and tribunals,' but may also amount to discrimination."[16]

In March 2008, the UN Committee on the Elimination of Racial Discrimination took issue with the US government's position that the International Convention on the Elimination of all Forms of Racial Discrimination does not apply to the treatment of foreign detainees held as "enemy combatants". The Committee reminded the USA that:

> "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice".[17]

Salim Hamdan is a Yemeni national. If the sole change to the facts alleged against him were that he was a US national, he would not and could not be tried under the unfair procedures of the MCA.

Ordinary guarantees of independence and impartiality are missing

In the USA, the selection of a jury as the trier of fact for a serious criminal offence in the ordinary criminal courts begins with a pool of individuals randomly chosen from the local population. In the special military tribunals established under the MCA, the selection of members of the commission (as the triers of fact or 'jury' in the trial) begins with a group of members of the armed forces chosen by the US Secretary of Defense, or his designee, in a non-transparent process.[18] The institutional character of the members and judge in the commission, as they are all ultimately members of the executive branch of government rather than the judiciary or general population, also lack fundamental guarantees of independence and impartiality that would apply in ordinary criminal trials.[19]

---

[15] Or, in respect of some offences covered by the MCA (but not those with which Hamdan is charged), in ordinary courts-martial.

[16] UN Human Rights Committee General Comment 32, paragraph 65. See also *Justice Delayed and Justice Denied?* pages 31-33.

[17] UN Doc.: CERD/C/USA/CO/6, Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America.

[18] The situation in respect of courts-martial under the Uniform Code of Military Justice in the United States is similar; however, this too is controversial and there have been several attempts to introduce random pre-selection into that process to correct perceived deficiencies in the perceived independence and impartiality of the process. See *Justice Delayed and Justice Denied?* page 30.

[19] See *Justice Delayed and Justice Denied?* Pages 27-31. The same is true of courts-martial under the Uniform Code of Military Justice. However, in the case of members of the armed forces of the USA or

Salim Hamdan's commission is made up of six officers from the US armed forces: two colonels, three lieutenant colonels, and a captain. The judge is a captain in the US Navy.

While the presiding military judge appears to be seeking to apply the rules within which the commission operates in as impartial a manner as possible in the circumstances, those rules are themselves fundamentally at odds with international human rights standards. This means the presiding judge ultimately lacks the power in any event to fully correct the breaches of international standards that the US Congress and the administration made an inherent part of the military commission scheme.

A theory of pervasive and perpetual global armed conflict as an excuse for refusing to recognise or apply human rights

The assertion by the military commission of jurisdiction over Salim Hamdan's alleged crimes, particularly insofar as the charged offences relate almost entirely to conduct prior to US involvement in hostilities in Afghanistan in October 2001, relies heavily on the premise put forward by the USA that it has been involved in a global 'armed conflict', as that concept is defined under international law, with terrorist organizations since at least 1996.[20] The theory also posits that the USA will continue to be involved in that armed conflict for the foreseeable future.

The prosecution of Salim Hamdan is thus part of an invocation of a sort of permanent worldwide 'state of emergency' in which practically anyone anywhere can be denied their human rights at the discretion of the USA if it decides they fall within its "enemy combatant" label. This theory is fundamentally inconsistent with international law, both in terms of whether the situation as a whole qualifies as an "armed conflict" under international law, and as to the effect on international human rights law if it does.[21]

other states, the justification or mitigating factor often offered to this is that members of the armed forces of a state have a special expertise in questions of fact and reasonableness arising on the battlefield, which civilians could not as readily appreciate. In Salim Hamdan's case, the charges are material support for terrorism and conspiracy, for the most part in relation to events (aside from the immediate circumstances of his capture) far from any battlefield. Such offences would normally be tried by civilian courts.

[20] In contrast, the authoritative interpreter of the Geneva Conventions, the ICRC, has stated: "Whether or not an international or non-international armed conflict is part of the 'global war on terror' is not a legal, but a political question. The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict." The relevance of IHL in the context of terrorism, 21 July 2005, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument.

[21] See *Justice Delayed and Justice Denied?* pages 12-17. Clearly specific situations in Afghanistan and Iraq qualify as armed conflicts under international law. However, the USA's theory is that it is involved in an essentially global and permanent (or at least utterly indefinite) armed conflict under international law that has existed for at least a decade and will continue for the foreseeable future, an unacceptably unilateral and wholesale departure from the very concept of the international law of armed conflict as it has existed to date.

It is under this theory that the USA has rejected the jurisdiction and concerns of numerous UN treaty monitoring and other expert bodies about its "war on terror" detention and trial regime for "enemy combatants". The USA has responded to the concerns of the UN Committee Against Torture and the UN Human Rights Committee, for example, with its position that "the United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the [UN Convention against Torture or International Covenant on Civil and Political Rights] is the applicable legal framework governing these detentions".[22] Yet international human rights law applies at all times, as the International Court of Justice has ruled. Detentions and trials at Guantánamo do not comply with international human rights law.[23]

Coerced evidence, other involuntary and self-incriminating evidence, denial of right to counsel

The MCA allows to be admitted into evidence statements from the accused or other persons that were obtained through coercion. This radical departure from procedures in ordinary US criminal trials or courts-martial was described by US District Court Judge James Robertson as "startling" when he nevertheless refused to block Hamdan's trial on the eve of its opening.[24]

Admission of statements obtained through cruel, inhuman or degrading treatment prior to 30 December 2005 (when the Detainee Treatment Act, DTA, prohibiting such treatment, was enacted) is expressly contemplated by the MCA. Statements obtained after that date under treatment that violated the DTA, or at any time under torture, must be excluded. However, the "reservations" and "understandings" that the USA attached to its ratification of the ICCPR and the Convention against Torture undermine even these partial protections.[25]

In an order issued on 20 July, the military judge prohibited the prosecution from admitting into evidence statements made by Salim Hamdan in US custody in late 2001 in Panshir and Bagram in Afghanistan. The judge ruled that "the interests of justice are not served by admitting these statements because of the highly coercive environments and conditions under which they were made". In Panshir, for example, Hamdan had been interrogated, in his words,

[22] UN Docs: CAT/C/USA/CO/2/Add.1 (6 November 2007), para. 11, and CCPR/C/USA/CO/3/Rev.1/Add.1 (12 February 2008), page 3.

[23] On 21 July 2008, the US Attorney General urged Congress to "acknowledge again and explicitly that this nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans, soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations." Remarks of Attorney General Michael Mukasey at the American Enterprise Institute for Public Policy Research. If Congress were to do so, it would only take the USA further down the road of ignoring international law, which does not recognize such an all pervasive and permanent situation as a whole as an "armed conflict".

[24] *Hamdan v. Gates*, Memorandum Order, US District Court, District of Columbia, 17 July 2008. See USA: Double standards and second-class justice. Federal judge clears way for first military commission trial, AMR 51/082/2008, 18 July 2008, http://www.amnesty.org/en/library/info/AMR51/082/2008/en.

[25] See *Justice Delayed and Justice Denied?* pages 38-42 and 52-61.

"in the manner of torturing". His feet and hands were tied, he had a bag put over his head, he was repeatedly knocked down by his interrogators, and was "duck walked" to and fro. In the US air base in Bagram, where he was taken on or around 1 December 2001, he was held in isolation in harsh and cold conditions. His hands and feet were tied 24 hours a day. During interrogations, he was surrounded by armed soldiers.[26]

However, other statements that appear to have been obtained under coercive conditions, including treatment that could amount to violations of the international prohibition of torture and other cruel, inhuman and degrading treatment or punishment, were admitted over the objections of Salim Hamdan's counsel. For instance, the judge admitted into evidence videos of two interrogations that were carried out by US forces shortly after Salim Hamdan's transfer to their custody and shortly after he had been beaten and threatened with death by the Afghani forces who captured him. In the videos, Salim Hamdan is at times hooded, and armed guards appear by him with their faces hidden behind balaclavas. Some of their statements recorded on video may also have contained implicit threats.[27] Yet the judge ruled, referencing the MCA standard, that "the totality of the circumstances renders these statements reliable and possessing sufficient probative value… The interests of justice will best be served by the admission of the statements into evidence". Such a result would likely not have been permitted in ordinary civilian or military courts.

Statements obtained from Salim Hamdan while he was held in Guantánamo were also admitted over the objection of his counsel, even though the judge acknowledged that "Hamdan was exposed to a variety of coercive influences over the past seven years".[28] The statements which will be allowed into evidence apparently include those taken during and following a period of some 210 days after his capture during which he was held incommunicado. An FBI agent testified that he had helped arrange in June 2002 for Salim Hamdan to telephone his wife. The agent testified that Hamdan was concerned that she would think he was dead. Such prolonged incommunicado detention could, if it did indeed effectively conceal his fate and whereabouts, amount to an enforced disappearance, a crime under international law. Yet in the military commission, this revelation of Hamdan's seven months incommunicado detention "did not cause a ripple", in the words of a journalist present for the New York Times.[29]

[26] *USA v. Hamdan*, D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008.
[27] For instance [English translation from Arabic]: "Q: Fine. We will contact the Pakistani government, informing them that we have arrested you here and that you are a member of al Qaeda organization, or a member of the Arab mujahideen, and that your family is residing in Karachi. We will ask them to let us talk to your wife, not to your daughter, since she is very young. H: Yes. Q: So we will ask the Pakistani government to get in touch with your wife in Karachi so that we can speak with her. [Pause; detainee does not react]. Or… we will talk to you." It is also possible that the following exchange was intended as a threat to return Mr Hamdan to the hands of the Afghanis who had already beaten him and threatened to kill him, as the interrogator seemed to raise the issue out of the blue: "Q: Naturally, it is not possible to send you away to Kabul, Kandahar and other places because you were found with the weapons, missiles and explosives belonging to al Qaeda organization, do you understand everything? H: Yes, I understand. You will not let me go. Q: We cannot send you to Kandahar, Pakistan or Yemen for that matter…."
[28] *USA v. Hamdan*, Ruling on motion to suppress statements based on coercive interrogation practices, *op. cit.*
[29] A US trial by its looks, but only so. New York Times, 28 July 2008.

The military judge noted that "Hamdan was subjected to various types of coercive treatment, or treatment that seemed coercive to him, while at Guantánamo Bay."[30] This included Hamdan being "placed in different camps and cells under different levels of security, some of which have some characteristics of solitary confinement". Amnesty International has previously reported that from December 2003 to October 2004, as the US authorities were preparing to bring him to trial – and apparently seeking to have him plead guilty – under the previous system of military commissions later ruled unlawful by the US Supreme Court, Salim Hamdan was put into solitary confinement in Camp Echo in a windowless cell that lacked natural light and fresh air. In a meeting in October 2003 between the International Committee of the Red Cross (ICRC) and the Guantánamo authorities, according to a leaked military document, the ICRC protested about the "excessive isolation" of detainees, and about how interrogators would "attempt to control the detainees through the use of isolation". The ICRC expressed its particular "shock" at Camp Echo, a facility it considered had "extremely harsh" conditions.

Under his discussion of coercive treatment, the military judge also noted that Salim Hamdan had been force fed to "force him to end his hunger strike": "After a medically appropriate tube insertion for force feeding, he was force fed again, in a non-medical setting, perhaps by non-medical personnel, and restrained in a chair until he soiled himself".[31]

In addition, the military judge said, euphemistically, that Salim Hamdan was a "participant" in "Operation Sandman" from 10 June 2003 to 31 July 2003, a period of 50 days.[32] This program involved sleep interruptions and frequent cell relocations, and was apparently primarily targeted at Saudi Arabian detainees to keep them "mentally off balance, to isolate them linguistically or culturally, and to induce them to cooperate", according to a recent report by the US Justice Department's Inspector General.[33] Yet, in his ruling on 20 July, the military judge said that "Operation Sandman did not involve sleep deprivation, but was an appropriate effort by camp commanders to maintain discipline in the camp". These seemingly contradictory conclusions cannot be reconciled by the public, as the details of the program remain secret.

An April 2003 Pentagon Working Group report on interrogations had discussed and recommended various interrogation techniques for use against "enemy combatants". Against a number of the techniques, the report warned that the use of techniques such as sleep disruption, sleep deprivation, slaps, threat to transfer the detainee to a country that would torture, isolation, prolonged standing, and exploitation of phobias, could affect the admissibility of statements at any subsequent trial, but that this would be a "lesser issue for military commissions".[34] The military judge's apparent acceptance of the legitimacy of Operation Sandman appears to be another example of a general tolerance of abusive practices

[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, May 2008.
[34] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

by Department of Defense authorities, already operating a deliberately coercive regime via the isolating, indefinite and virtually incommunicado conditions of detention. Despite acknowledging the evidence of "a coercive atmosphere and practice in the detention camp", Judge Allred wrote that because detention is "a fundamental and accepted incident to war", he would give "little weight to the coercive effect that may have otherwise have resulted from long detention" without access to the outside world and repeated interrogations by his captors.[35]

At the end of the first week of Salim Hamdan's trial, only his statements from 17 May 2003, one of the many days of interrogations to which he was subjected in Guantánamo, remained potentially to be excluded on grounds of coercion. The ruling on this statement was delayed as the government had only just provided to the defence lawyers some 600 pages of information regarding Hamdan's treatment immediately before and after the interrogation in which this particular statement was made. The prosecution had provided this material on the night of Sunday 20 July 2008. The trial was due to begin the following day.

As long ago as February 2002, the Secretary of Defense said that the USA was beginning the process of interrogating detainees with a view to possible prosecution.[36] Yet Hamdan, like all the other Guantánamo detainees, was never provided access to legal counsel in the context of interrogations, including those conducted thousands of miles from any battlefield and months and years after being taken into detention.[37] The military judge found that Salim Hamdan "was never advised of a right to remain silent, or warned that his statements could later be used against him in a criminal trial". Yet statements obtained under these circumstances form the main part of the evidence against him so far.

At Salim Hamdan's trial on 24 July 2008, six special agents of the Federal Bureau of Investigation (FBI) testified for the prosecution, with one of them testifying anonymously as "witness #1". The interrogations at issue took place in Guantánamo. At no time had Hamdan been advised of his right to remain silent or provided with counsel before questioning. In each case, when asked why no advice of rights was given before questioning, the FBI agent's response was it was not FBI policy at that time to give warnings to anyone held at Guantánamo Bay. If this had occurred a few hundred kilometres away in the United States, or apparently anywhere in the world but Guantánamo Bay, any subsequent statements thereby obtained would likely have been rendered inadmissible in evidence in US courts.

[35] *USA v. Hamdan*, Ruling on motion to suppress statements based on coercive interrogation practices, *op. cit.*

[36] Secretary of Defense interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2818. The Pentagon's Criminal Investigative Task Force (CITF) conducted interrogations for the military commission process.

[37] Everyone arrested or detained – whether or not on a criminal charge – and everyone facing a criminal charge – whether or not detained – has the right to the assistance of legal counsel. Principle 1 of the UN Basic Principles on the Role of Lawyers, principle 17(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 55(2)(c) of the ICC Statute.

Section 7-1 of the FBI's Legal Handbook for Special Agents states: "The most important limitations on the admissibility of an accused's incriminating statements are the requirements that they be voluntary; that they be obtained without the government resorting to outrageous behaviour; and that they be obtained without violating the accused's right to remain silent or to have a lawyer present." Section 7-2 states: "A conviction based on an involuntary statement, without regard to its truth or falsity, is a denial of the accused's right to due process of law. A coerced confession will undermine the legitimacy of a conviction". Section 7-15 states: "Persons interviewed by Agents while in police custody in a foreign country must be given the usual warning of rights under American Federal law as fully as possible". After 11 September 2001, FBI agents found themselves working jointly with military and other government agencies, in situations where "prosecution of crimes was not necessarily the primary goal of the interrogations" and "the evidentiary rules of the US Article III courts did not necessarily apply".[38]

This policy decision to disregard the rules normally governing the gathering of information for use in criminal investigations forms at least part of the reason for choosing trials by military commission. In early 2002, the Justice Department advised the Pentagon that the protection against self-incrimination under the Fifth Amendment of the US Constitution would not be applicable to defendants facing trial by military commission for violations of the law of war. Therefore, such detainees did not have to be given "Miranda" warnings (right to remain silent, right to a lawyer) before being interrogated, whether for intelligence-gathering or prosecutorial purposes.[39] The fact that the detainees could have been brought to trial in federal courts was reflected in this memorandum, which noted that the decision about which courts any trials would be held in had "not yet been made" and so "the possibility still exists that some detainees may be prosecuted on criminal charges in Article III courts [i.e. civilian federal courts]." However, the memorandum advised that, unlike in the case of military commissions, the issue of the admissibility of statements in ordinary courts would be more complex, and would turn on questions relating to whether the interrogation was conducted for prosecutorial or intelligence-gathering purposes, or a mixture of both. The memorandum stated that "to the extent that the only trial-related use of statements obtained in an interrogation will be before a military commission, there is no need to provide Miranda warnings". At some point in 2002, it was reportedly determined within the administration that "not one single [detainee] will see the inside of a courtroom in the United States".[40]

[38] Pages 49-50, A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, May 2008.

[39] "US military tribunals convened abroad are not required to grant aliens rights under Self-Incrimination Clause". Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002. *Miranda* warnings refer to the 1966 US Supreme Court ruling, *Miranda v. Arizona*, holding that detainees must be told of their right to remain silent and their right to a lawyer. The Fifth Amendment, together with *Miranda*, governs the admissibility of statements given in custody in the USA.

[40] Page 78, A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, May 2008.

Consistent with this administration position, in his ruling on 20 July 2008, military judge Captain Allred concluded that "the 5th Amendment of the Constitution does not apply to protect Mr Hamdan", including because he is an "unlawful enemy combatant", and because "there is no necessity for the 5th Amendment to prevent injustice". He also held that there were "substantial practical arguments" against applying this protection in Guantánamo, namely that it would "hamstring American military and intelligence officials in the performance of important national security duties" and would be "devastating to our ability to effectively confront and respond to international terrorism". Thus, "although it is clearly within the power of the United States to grant 5th Amendment protections to unlawful combatants, there are also significant practical arguments and exigent circumstances weighing against it".[41]

Again, the military judge is glossing over a backdrop of violations. Since the attacks on 11 September 2001, events which raised questions about the quality of US counterterrorism intelligence and generated fears of further attacks, the US administration has viewed those it brands as "enemy combatants" as potential sources of intelligence to be subjected to a "continuous" interrogation cycle.[42] In effect, the US authorities have used detainees held indefinitely outside the rule of law in order to attempt to make up for past intelligence failures through prolonged interrogation. Access to lawyers disrupts the process, the theory goes, and puts national security at risk.[43] This detention and interrogation regime has flouted international law, and has led to torture and other cruel, inhuman or degrading treatment in a bid to gain information from detainees deemed outside of constitutional or international law protections.

Reversing the ordinary rule against use of hearsay (second-hand) evidence.[44]

In his ruling on 17 July 2008 allowing Salim Hamdan's trial to proceed, civilian District Court Judge James Robertson noted that the MCA "adopts fairly permissive standards for the use of hearsay". The military commissions rules effectively create a presumption in favour of the admission of hearsay evidence. Hearsay evidence is second-hand information – e.g. 'Person A told me that Person B was driving the car' – as opposed to direct eyewitness testimony – e.g. 'I saw person B driving the car'– and is generally excluded in ordinary criminal trials in the USA, due to concerns about verifiability and therefore reliability. Under the military commission rules, hearsay can even be admitted into evidence where the government insists on keeping the original source or methods or activities by which the information was obtained secret in the name of national security (effectively preventing any assessment of whether the information may have been obtained through violations of human rights or humanitarian law).

Though most of the government's case against Salim Hamdan has thus far relied on his own statements given to FBI and other interrogators (which themselves raise the concerns about coercion and lack of access to legal counsel stated above), there has also been admitted into

[41] *USA v. Hamdan*, D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008.
[42] Declaration of US Army Colonel Donald D. Woolfolk, 13 June 2002, filed in *Hamdi v. Rumsfeld*,
[43] *Ibid*.
[44] See *Justice Delayed and Justice Denied?* pages 43-45.

evidence a considerable amount of hearsay, and even double-hearsay (third-hand) evidence – e.g. 'Person A told me that Person B said that Person C was planning something'. In most or all cases, however, rather than relying on the special allowance for hearsay created specifically for military commissions, the prosecution has cited traditional exceptions, that would be narrowly applied in an ordinary court, but which the military judge has given abnormally wide scope in this military commission. At one point, after having several objections to hearsay overruled, defence counsel indicated that they would not continue to object in each instance.

Denial of right to trial within a reasonable time

The MCA makes no provision guaranteeing the right to trial within a reasonable time. Indeed, the Act expressly states that "any rule of courts-martial relating to speedy trial" under the UCMJ "shall not apply to trial by military commission".[45]

In his ruling dismissing the claim that Salim Hamdan had been denied his right to a trial within a reasonable time, US Navy Captain Allred wrote that "the Commission accepts the declaration that his family in Yemen is destitute, that he has been held for nearly seven years, and that he suffers mental and physical effects of his incarceration. But the Defense has not shown that any of this prejudice occurred only because one of the reasons for his detention is the trial". Rather, the military judge continued, "detainees at Guantánamo Bay are held because they are believed to represent a continuing threat to the security of the United States ongoing combat operations abroad". Finally the judge concluded that "In fact, the delay in finally getting Mr Hamdan to trial has produced at least one unlooked-for boon to his defense: the United States has located, captured, and brought to Guantánamo Bay no less than eight high ranking al-Qaeda leaders, several of whom are believed ready to provide exculpatory evidence on the accused's behalf. This factor weighs in favour of the Government."

Captain Allred's statement highlights his acceptance of the notion of an "enemy combatant", yet the legal consequences ascribed to this label by the USA are unrecognized in international law. And despite his positive interpretation, the reality is that the eight detainees to whom Captain Allred was referring had been in secret US custody for up to four and a half years before they were brought to Guantánamo.[46] His ruling thus seems oblivious to the backdrop of unlawful practices against which the military commissions operate, and which they have been designed to be able to tolerate.

Evidence of human rights violations for which no one is known to have been held accountable

Evidence before the military commission in Salim Hamdan's case has once again indicated that violations of human rights such as enforced disappearance or other prolonged incommunicado or secret detention, or torture or other ill-treatment, may have taken place without any apparent action to identify perpetrators or bring them to account. The military commission system, in Amnesty International's opinion, on the one hand facilitates convictions of "enemy combatants" on lower standards of evidence than apply in the ordinary courts, while also perpetuating a general level of impunity for human rights violations committed against

[45] See *Justice Delayed and Justice Denied?* Pages 35-38.
[46] USA: Impunity and injustice in the 'war on terror', AMR 51/012/2008, 12 February 2008, http://www.amnesty.org/en/library/info/AMR51/012/2008.

detainees on the other. Such an imbalance in itself virtually guarantees that justice will not be seen to be done via these trials.

Salim Hamdan is not only being denied a trial that meets the standards of fairness articulated in article 14 of the ICCPR and other international instruments. He is also being denied his right to remedy. Under Article 2.3 of the ICCPR, a state must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In an authoritative interpretation, the treaty monitoring body the UN Human Rights Committee has said:

> "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." [47]

All allegations of torture and other ill-treatment must also be investigated and accountability and redress for any violations be ensured.

As noted above, it appears from the testimony of the government's own witnesses that Salim Hamdan was not permitted to speak with his wife to let her know he was still alive, let alone his whereabouts, until some 210 days after his capture, indicating a possible enforced disappearance. As also mentioned above, a number of statements were excluded on the basis of 'highly coercive' conditions or treatment. Yet in the face of this evidence of possible grave violations of international human rights and humanitarian law, nothing has been said as to how the government will follow up to ensure that perpetrators of any such violations will be brought to account, including in criminal proceedings where required.

It appears there may well be much more evidence of human rights violations that trial observers and the public more generally are prevented from hearing about due to claims of national security secrecy which may have prevented even the security-cleared defence counsel from accessing relevant material, and use of classified documents that the counsel but not the public has been allowed to see.[48]

Indeed, under a protective order issued by Captain Allred prior to the trial, no records of CIA interrogations of Hamdan can be subpoenaed, no CIA agent can be called to testify, and even simply speaking the name "CIA" in the trial proceedings is prohibited. At least one classified document concerning a particular treatment or treatments apparently applied to Salim Hamdan, by "an agency" that cannot be named, in connection with interrogation was

[47] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 14.
[48] See *Justice Delayed and Justice Denied?* pages 46-51.

introduced into evidence by the defence, but its contents were concealed from the trial observers and the broader public. The defence has indicated that further similar documents will likely be presented in the following weeks. If these documents in fact contain direct evidence of violations of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, or other serious human rights violations, the invocation of national security secrecy would seem, by design or effect, to be blocking accountability for human rights violations.

The way forward

Salim Hamdan's trial is expected to continue for several further weeks, at which point the members of the commission would consider a verdict and, if they vote for a conviction, a sentence. Only two-thirds of the military commission's members must agree to a finding of guilt for conviction to occur.

The Chief of Defence Counsel has explained that Salim Hamdan's defence team is trying to do the best they can to represent him within the system, while also seeking to expose the system's flaws. Appeal of any conviction therefore seems highly likely, as well as a renewal of parallel efforts to challenge the system on applications of *habeas corpus* already before the ordinary US federal courts.

In a speech given on the day that Salim Hamdan's trial opened, the US Attorney General called on Congress to "make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Twenty individuals have already been charged, and many more may be charged in the upcoming months. Last Thursday [17 July 2008], we received a favourable decision from a federal court rejecting the effort of a detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. … Congress can and should reaffirm that habeas review for those combatants must await the outcome of their trials. The victims of the September 11 terrorist attacks should not have to wait any longer to see those who stand accused face trial."

Congress should not yield to such pressure from the Attorney General. It is not the appropriate demands for trials that respect international standards which have delayed justice for the victims of 9/11 or other crimes. Rather, it was the steadfast refusal of the administration to turn to already existing courts for trials of such offences, as well as prioritizing secret, incommunicado and indefinite detention over judicial proceedings. Had they used these existing tribunals at the first opportunity, rather than investing their energies for years to salvage the grossly inadequate and unlawful military commission system at Guantánamo Bay, all or many of these trials may well have been over by now.

The military commission system should be abandoned. Any trials should be conducted in the US federal courts. The Guantánamo detention facility should be closed down.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM