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USA: Another CIA detainee facing death penalty trial by military commission

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Q: What is your explanation of why the United States is charging these people in a military system, rather than in the American civilian system?

A: Fundamentally it's because the president of the United States and the Congress of the United States created the Military Commission Act and determined that that was the appropriate place to proceed with these people.¹

The US government's pursuit of its flawed military commission scheme continues. On 31 March 2008, the Pentagon announced that charges had been sworn against Ahmed Khalfan Ghailani, a Tanzanian national held in US military detention in Guantánamo since September 2006. Prior to that date he had been held in the custody of the Central Intelligence Agency (CIA) for two years at undisclosed locations. He now faces the prospect of a military commission trial, the procedures of which do not meet international fair trial standards, and at which the government intends to seek the death penalty.

Ahmed Ghailani is charged with crimes related to the bombing of the US Embassy in Dar es Salaam in Tanzania on 7 August 1998, in which 11 people were killed and dozens injured. Among other things, he is accused of having purchased explosives and detonation equipment, assisting in the purchase of the truck used in the bombing, scouting the embassy with the suicide driver, and meeting with co-conspirators. He has been charged under the Military Commissions Act (MCA) with murder in violation of the law of war, murder of protected persons, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, and terrorism. He is additionally charged with conspiracy, as well as providing material support to terrorism in relation to his alleged activities with *al-Qa'ida* after the bombing.

Amnesty International fully recognizes the duty of governments to bring alleged perpetrators of crime to justice. At the same time, all governments must adhere to internationally-recognized principles of human rights and the rule of law, including when responding to threats or acts of terrorism. Indeed, the UN General Assembly has emphasised that "respect for human rights for all and the rule of law" is "the fundamental basis of the fight against terrorism".² Since

¹ Department of Defense news briefing with Brigadier General Thomas Hartmann, Legal Advisor to the Convening Authority in the Pentagon's Office of Military Commissions, 11 February 2008.

² UN General Assembly resolution 60/288, "The United Nations Global Counter-Terrorism Strategy", 20 September 2006, adopted by consensus.

the attacks in the USA on 11 September 2001, the USA has systematically failed in this regard in its treatment of detainees captured abroad and suspected of involvement in terrorism.

Ahmed Ghailani was taken into custody on 25 July 2004 in Pakistan, and handed over to US custody the following month. He was then held incommunicado in secret locations by the CIA as part of its High Value Terrorist Detainee Program. His treatment in custody is unknown, but prolonged incommunicado detention in undisclosed locations itself violates the prohibition of torture or other cruel, inhuman or degrading treatment.³ Placing a person outside the protection of the law through such techniques constitutes enforced disappearance.

In early September 2006, Ahmed Ghailani became one of 14 detainees transferred to Guantánamo shortly before President Bush confirmed publicly for the first time the existence of the CIA's secret detention program. In his announcement, the President exploited the cases of the detainees in the charged atmosphere of the fifth anniversary of the 9/11 attacks and looming congressional elections in seeking to obtain the approval of Congress for the MCA. This discriminatory legislation strips the US courts of jurisdiction to consider *habeas corpus* petitions from foreign nationals designated by the administration as "enemy combatants"; provides for the trial by military commission of alien "unlawful enemy combatants"; apparently seeks to decriminalize certain violations of Article 3 common to the four Geneva Conventions that had been war crimes under the US War Crimes Act, including the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (i.e. denial of a fair trial); and, according to President Bush, allows the secret detention program to continue. The MCA is incompatible with international law.

The US government has suggested that one reason why military commissions are necessary for the few "enemy combatants" it decides to bring to trial is its claim that the US courts do not have extraterritorial jurisdiction over the detainees it has in its custody. This justification does not survive scrutiny. Indeed some of those now facing trial by military commission, including Ahmed Ghailani, have previously been indicted in the US federal courts for the same or related crimes. A former official of the Federal Bureau of Investigation (FBI) who worked on the embassy bombings case is quoted as saying of the charges against Ahmed Ghailani: "I'm shocked and amazed at this. He's already been charged with all of that in federal court. Why the hell do they need to do this? Are they afraid of the court system?"⁴

Ahmed Khalfan Ghailani was indicted in 1998 in US federal court in New York on numerous counts in relation to the embassy bombing, including murder, attempted murder, conspiracy to murder, conspiracy to kill US nationals, conspiracy to use weapons of mass destruction, and conspiracy to destroy building and property of the United States.⁵ Four men were convicted in federal court in 2001 in relation to the 1998 embassy bombings in Kenya and Tanzania, and sentenced to life imprisonment. At that time, the Director of the FBI stated that "Through skill and perseverance, FBI personnel overcame major logistical challenges, which are inherent to crime scenes located in foreign countries, to conduct a thorough investigation that led to the

³ He is now believed to be held in isolation in the undisclosed conditions of Camp 7 at Guantánamo.

⁴ *Pentagon pursues Guantánamo tribunal for embassy bombing suspect*, LA Times, 1 April 2008.

⁵ Indictment at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/binladen/usbinladen1.pdf>.

verdict rendered today.”⁶ Presumably, neither the skill nor perseverance of the FBI has diminished; only the policy has changed, one in which certain trials have been militarized, with the adoption of lower standards than would apply in the US courts and for US citizens, raising concern about inconsistent, arbitrary and discriminatory application of fair trial rights.

For his March 2007 Combatant Status Review Tribunal (CSRT) – the military body tasked with reviewing the “enemy combatant” status of those held at Guantánamo – Ahmed Ghailani asked if one of these prisoners tried in US federal court, Khalfan Khamis Mohamed, could be a witness for him at the CSRT. The CSRT presiding officer responded that Mohamed, also a Tanzanian national, was not reasonably available to attend as he was in prison in the USA. The CSRT officer also reported that Khalfan Mohamed, “through his representatives”, had declined to give a statement for use in the tribunal.

Khalfan Mohamed’s own transfer to US custody in 1999 itself serves as a reminder that the history of human rights violations in the name of counter-terrorism did not begin in September 2001. Mohamed was one of at least nine criminal suspects transferred without due process by other States to the effective control of US agents between 1987 and 1999, including two other men suspected of involvement in the embassy bombings in Kenya and Tanzania in August 1998.⁷ Mohamed was arrested in Cape Town on an international warrant alleging his involvement in the Dar es Salaam embassy bombing. He was held incommunicado, interrogated without legal counsel, and summarily deported to the USA.⁸

Indeed, the six and a half years since the attacks of 11 September 2001 have seen the USA conduct a systematic assault on international human rights and humanitarian law. It has built upon, rather than eliminated, past practices that violate human rights. For example, it has broadened its policy of “renditions” – the transfer of individuals from the effective control of

⁶ Verdict rendered in the trial of four individuals associated with the 1998 bombings of the U.S. Embassies in Kenya and Tanzania. FBI press release, 29 May 2001, <http://www.fbi.gov/pressrel/pressrel01/tankenbo.htm>.

⁷ Mohamed Daoud al-'Owhali and Mohamed Sadeek Odeh, co-defendants in Khalfan Mohamed’s capital trial (the fourth defendant was Wadih el-Hage), were transferred in August 1998 from Kenya to the USA by what the US government called “irregular rendition” (as it also characterised Khalfan Mohamed’s transfer). Another suspect in the embassy bombings, Mamdouh Mahmoud Salim was extradited from Germany in December 1998 on the basis of assurances provided to the German government that he would not face the death penalty.

⁸ See 28 May 2001 Judgment of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC). The Court ultimately ruled that government officials had violated their constitutional and legal obligations by surrendering him to the USA without first seeking assurances that he would not face the death penalty on return. Khalfan Mohamed was later convicted by the US Court; after three days of deliberation, the jury could not reach the requisite unanimity for a death sentence, and he was sentenced to life imprisonment. The jury forewoman said that seven of the 12 jurors had concluded that “if Khalfan Mohamed is executed, he will be seen as a martyr and his death may be exploited by others to justify future terrorist acts”. After the trial, a woman whose husband was killed in the embassy bombing in Tanzania welcomed the fact that a death sentence had not been passed: “Speaking for myself and perhaps for other victims who oppose the death penalty, this verdict is a profound relief. We will not have to be confronted with yet another death in the wake of the bombings tragedy”. *Jury rejects death penalty for terrorist in embassy bombing*. New York Times, 11 July 2001.

one state to another by means that bypass judicial and administrative due process⁹ – beyond a means of bringing suspects to trial before ordinary courts in the USA (as was the case with Khalfan Mohamed). Renditions as practiced since September 2001 have become a means by which detainees have been transferred to enforced disappearance, torture and other ill-treatment in secret detention, indefinite detention without charge and possible military commission trial. The choice of Guantánamo as one location for such detentions and trials built on existing US jurisprudence limiting the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals. Meanwhile declassified CIA interrogation training manuals from the 1960s and 1980s describe “coercive techniques” that echo the “enhanced” techniques sanctioned in today’s secret detention program.

Detainees held in the name of counter-terrorism have had their right to the presumption of innocence systematically undermined by a pattern of official commentary on their presumed guilt. They have been subjected to enforced disappearance, secret detention and torture or other cruel, inhuman or degrading treatment, including in terms of the interrogation methods and detention conditions employed against them. Such abuses heighten the need for any trials to take place before courts independent of the executive and legislative branches which have authorized or condoned these human rights violations. Instead, trials are looming before military commissions lacking such independence and specifically tailored to be able to turn a blind eye to government abuses, including by allowing the admission into evidence of information coerced under ill-treatment.

The Pentagon has said it expects as many as 80 detainees to face trial by military commission. By 1 April 2008, 15 Guantánamo detainees had had charges sworn against them or referred on for trial. There has been one conviction, based not on a full trial but a guilty plea.¹⁰ Ahmed Ghailani is one of seven detainees against whom the US government is currently intending to seek the death penalty.

Any executions after unfair trials in Guantánamo would not only violate international law, but take place in an increasingly abolitionist world. A recent sign of the global tide against the death penalty was apparent in December 2007 when the UN General Assembly adopted a resolution calling on all states to impose a moratorium on executions.¹¹ The resolution calls on states that still maintain the death penalty to respect international safeguards in capital cases, in particular the minimum standards set out in 1984 by the UN Economic and Social Council (ECOSOC).¹² Safeguard 5 of the ECOSOC resolution states: “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights [ICCPR]”. The UN Special

⁹ Amnesty International considers that renditions violate international law by failing to respect requirements of due process, typically involving multiple human rights violations.

¹⁰ In March 2007, after five years in Guantánamo, David Hicks pleaded guilty to providing material support for terrorism, and was sentenced by military commission to seven years in prison, six years and three months of which was suspended under a pre-trial agreement. He was transferred to his native Australia to serve the remainder of the nine months.

¹¹ A/RES/62/149 (18 December 2007)

¹² ECOSOC, “*Safeguards guaranteeing protection of the rights of those facing the death penalty*”, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

Rapporteur on extrajudicial, summary or arbitrary executions has also emphasised that fair trial safeguards in death penalty cases must be implemented without exception or discrimination, and that “proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.”¹³ The military commissions do not comply with these standards. Indeed, the USA has taken the position that neither the protections of the ICCPR nor the mandates of the Special Rapporteurs extend to the trials or treatment of “enemy combatants”.

Like Ahmed Ghailani, five of the Guantánamo detainees currently facing capital charges were held for years in the CIA’s secret detention program, and subjected to enforced disappearance or torture, or both. The seventh, Mohamed al-Qahtani, was the subject of a “special interrogation program” authorized by then Secretary of Defense Donald Rumsfeld in 2002. According to leaked official documents, al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days in Guantánamo. He was subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.

No one has been brought to account for the violations of the human rights of these detainees, including the international crimes of enforced disappearance and torture. This lack of accountability is one reason why the military commissions, lacking full independence from the same branch of government that has authorised such violations in the first place, convenes the military commissions, and brings the prosecutions, will not be a forum at which justice will either be done or be seen to be done.

The US government should abandon its military commissions. Any trials should be conducted before the appropriate, regularly-constituted criminal courts in the USA, with the full fair trial protections required by international human rights law. The government should drop its pursuit of the death penalty once and for all.

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¹³ UN document E/CN.4/2001/9, 11 January 2001, para.86; UN document E/CN.4/1997/60, 24 December 1996, para.81.