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USA

9/11 defendants warned on lack of access to classified information and other disadvantages of self-representation

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Two of the five men accused of orchestrating the attacks of 11 September 2001 and facing a death penalty trial by military commission appeared separately in front of a military judge yesterday in Guantánamo to be questioned about their decision to represent themselves. The three other defendants are scheduled to appear before the judge, US Marine Colonel Ralph Kohlmann, today. Amnesty International has an observer at the proceedings.

As the judge had made clear in an order issued on 1 July, a primary issue was to tackle the question of the voluntariness of the decisions taken by the men at their arraignment on 5 June 2008 to represent themselves.¹ There were indications that one or more of the defendants may have felt coerced by the other defendants into opting for self-representation.

'Ali 'Abd al-'Aziz 'Ali ('Ammar al Baluchi), a Pakistani national, and Saudi national Mustafa al Hawsawi were the two defendants who were questioned by the judge yesterday. Both men denied having been intimidated by any other of the accused into making their decision on representation. Mustafa al Hawsawi said that the defendants had talked with each other during the arraignment and "reached some common ground". When asked whether any of the other four accused had done anything that he perceived as an order or a threat, or an instruction as to how to act in the proceedings, Hawsawi responded "without doubt, no" and "absolutely no". 'Ammar al Baluchi told the military judge that the allegations of intimidation were a misunderstanding as a result of the interpreter not understanding their culture and a joke told by Khalid Sheikh Mohammed at the expense of Mustafa al Hawsawi.

Al Baluchi told the judge that he had chosen freely to represent himself for a number of reasons, including religious and ethical ones, and because "these proceedings – I am not satisfied with them. He said that, "simply", the "justice" of this "top secret trial" was in

¹ Under Rule 506 of the military commissions, "The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure."

question. He acknowledged that he “may be compromised by my lack of experience of law”, but added that, due to his “lack of contact with the lawyers, I do not know what they do or will do in my absence. No one could tell me what they are doing in my absence. So I choose to represent myself.”

He also related a number of issues of concern that if left unremedied Amnesty International considers would represent a substantial violation of his right to be able to conduct his defence. He noted that, despite his decision to represent himself, the authorities had refused to deliver to the judge two letters and a motion he had written; that he had no access to a computer; that he had no access to a law library; that it was difficult to contact and consult with his standby counsel – they could not come to Guantánamo often and they could not email and letters took a long time (if delivered); and that while lawyers could send the judge emails and letters and file motions, he could not.

Judge Kohlmann made a finding that al Baluchi had knowingly and voluntarily chosen self-representation, that the defendant wanted his US military lawyers to act as standby counsel, and that his US civilian counsel could act as legal consultants. Al Hawsawi said that he had not yet made up his mind whether or not he wanted to accept his military or civilian counsel. The judge ordered the military lawyer assigned to the case to remain on it, and the civilian lawyer could serve as a legal adviser, unless and until al Hawsawi indicated to the contrary.²

The judge warned Mustafa al Hawsawi of the disadvantages of self-representation, including that he was facing very serious charges, and that defending them requires demanding work, normally carried out by lawyers who are trained and familiar with the special rules and laws and their application. Moreover, a lawyer would have better access to witnesses and research materials, and would be better placed to investigate the case than a detained defendant. Judge Kohlmann reportedly said “If it sounds as if I am trying to talk you out of representing yourself, that would be accurate”.

The question of classified information also arose. Amnesty International has previously raised its concern that defendants, even if represented by security-cleared lawyers, may face a possibly insurmountable barrier in relation to testing certain classified evidence used against them (see below). It seems that this obstacle may be even greater in the case of defendants representing themselves.

In his session with al Hawsawi, for example, Colonel Kohlmann told the defendant that if he chose to represent himself, he would not be given access to classified documents prior to trial because he does not have security clearance, and he would not be given access to any sensitive materials which the judge considered should be protected in the interest of national

² Rule 506 of the military commission rules states: “The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by the detailed [military] defense counsel. The accused is not entitled to be represented by more than one military counsel.” Under this rule, “Subject to the discretion of the military judge, and such regulations as the Secretary of Defense may prescribe, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under [rule] 502.”

security. Lack of access to such material would significantly hinder the defendant's ability to represent himself, the judge warned.

When asked if he understood, al Hawsawi answered via the interpreter, "I understand that you appointed a lawyer for my defence. My lawyers are deprived of some materials... If you do not trust the lawyers, with all respect to the lawyers present, how do you expect me to trust them? For the sake of justice you must provide us with what we are requesting. I ask you for anything concerning my case, and for the sake of justice, as far as I know justice means fairness."

Before being transferred to Guantánamo in 2006, these two men and their three co-defendants 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. 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. Amnesty International considers that the USA's use of secrecy is by design or effect serving to shut down scrutiny of human rights violations and facilitate impunity.

For military commissions convened under the Military Commissions Act, any classified information "shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security". The prosecution may be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities by which the United States acquired the evidence", if the military judge finds that the evidence is "reliable" and the sources, methods or activities classified. An unclassified summary of the "sources, methods, or activities" may be provided to the defence, but only "to the extent practicable and consistent with national security". Of overriding concern is the applicability of these provisions even to any classified evidence that "reasonably tends to exculpate the accused". Thus, the defendant may be denied access to some or all government evidence that would serve to prove his innocence, if that evidence is classified and the government with the assent of the military judge considers it "impracticable" to provide a summary version. The prosecution may also object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take "suitable action to safeguard such classified information".

Today, three separate sessions will be for Khalid Sheikh Mohammed, Walid bin Attash and Ramzi bin al-Shibh, again principally to consider the question of legal representation and the men's decision to represent themselves. Colonel Kohlmann has said that a joint hearing with all five defendants will be held tomorrow "as necessary".

The question of legal representation is a crucial one, and one that the military judge is right to examine closely. It must not be forgotten, however, that these defendants were denied legal representation for years while crimes under international law such as torture and enforced disappearance were committed against them and others. So while the government pursues

these convictions and possible executions, the question remains, when will it ensure accountability on the other side of the equation? Amnesty International does not consider the military commission system to be one that brings this outcome any closer. Rather, it has been built to tolerate rather than shine a light on government abuse.

Even if the questions about the men's legal representation are resolved, the deep flaws of the military commissions will not be. 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.

Amnesty International considers the 9/11 attacks to have been a crime against humanity, and has consistently called for justice and security to be pursued within a framework of strict adherence to international law. The US government has systematically failed in this regard. Its decision not to try those whom it claims perpetrated the 9/11 attacks in a fair and public trial in the USA, and instead submit them to an unfair trial in a secluded offshore military base, not only violates the rights of the defendants. The victims and their families have a right to see real justice done; to learn the full truth about what has happened; and to know beyond a reasonable doubt the identity of the perpetrators. The USA's approach, in addition to undermining the rule of law, also serves to deny the victims and their relatives those rights.

See also:

USA: Guantánamo: Military judge to question capital defendants on decision to represent themselves, 8 July 2008, <http://www.amnesty.org/en/library/info/AMR51/074/2008/en>.

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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