

PUBLIC

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Further information on UA 199/03 (AMR 51/099/2003, 8 July 2003) and follow-ups* - Legal concern / Death penalty / Health concern

USA **Feroz Ali Abbasi (m), UK national, aged 23**
 Moazzam Begg (m), UK/Pakistan national, aged 35
 David Hicks (m), Australian national, aged 28
 Salim Ahmed Hamdan (m), Yemen national, aged 34
 Ali Hamza Ahmed Sulayman al Bahlul (m), Yemen national
 Ibrahim Ahmed Mahmoud al Qosi (m), Sudan national

A US federal judge has issued a landmark order resulting in the suspension of military commission proceedings at Guantánamo Bay. On 8 November 2004, pre-trial proceedings were underway in the case of Yemeni detainee Salim Ahmed Hamdan when a soldier entered the commission room and handed a piece of paper to the commission's presiding officer. The latter immediately called a recess. Shortly afterwards, the panel came back into the commission room and announced that the proceedings were in indefinite recess.

The proceedings were halted because Judge James Robertson, the US District Judge who is presiding over Salim Ahmed Hamdan's *habeas corpus* appeal in federal court in Washington DC, issued an order stating that the defendant could not be tried by a military commission as charged. Judge Robertson ordered that unless and until a "competent tribunal", as required under Article 5 of the Third Geneva Convention, determined that Salim Ahmed Hamdan is not entitled to prisoner of war status, he may only be tried by court-martial under the USA's Uniform Code of Military Justice (UCMJ). "Until or unless such a tribunal decides otherwise", Judge Robertson wrote, "Hamdan has, and must be accorded, the full protections of a prisoner-of-war".

Judge Robertson dealt a blow to a central tenet of the US administration's "war on terror" detention policy – President Bush's determination that the Geneva Conventions did not apply to alleged *al-Qa'ida* suspects captured during the war in Afghanistan, and that neither they nor Taliban suspects were entitled to prisoner of war status. Judge Robertson concluded that "[n]otwithstanding the President's view ... the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there." He noted that "[t]he President is not a tribunal", and also pointed out that the Combatant Status Review Tribunals (CSRTs), set up by the administration following the US Supreme Court's decision in June 2004 that the federal courts have jurisdiction over the Guantánamo detainees, did not constitute the "competent tribunals" required by the Third Geneva Convention.

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

Judge Robertson held that even if Salim Ahmed Hamdan was found not to have prisoner of war status by a "competent tribunal" which satisfied the requirements of the Third Geneva Convention, given the current military commission rules permitting the exclusion of the defendant from certain sessions and the withholding of certain classified or "protected" evidence from him, his trial before the military commission would be unlawful. Judge Robertson stressed his concern that under the commission rules "the accused himself may be excluded from proceedings" and "evidence may be adduced that he will never see (because his [military]

lawyer will be forbidden to disclose it to him)". It is "obvious", Judge Robertson wrote, that such a "dramatic deviation" from US constitutional law "could not be countenanced in any American court", including a court-martial under the UCMJ. The judge also pointed out that the right to be tried "in one's presence" is a principle of international humanitarian and human rights law.

Since December 2003, Salim Ahmed Hamdan had been held in pre-trial isolation in Camp Echo in Guantánamo Bay, in what Amnesty International considers to have been cruel and inhuman conditions of detention with potentially serious psychological consequences. Just before the oral arguments held in Judge Robertson's court on 25 October 2004, the government advised that it had moved Salim Ahmed Hamdan out of Camp Echo and back into a segregation wing of Camp Delta. Judge Robertson noted this change in circumstances, and that the government was "capable of repeating" the Camp Echo isolation regime "which has evaded review". However, he pointed out that the fact that the government might resort to repetition of such treatment in the future was not something that he could review in the context of the current *habeas corpus* proceedings. He did order, however, that Salim Ahmed Hamdan "must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some other than the pending charges against him requires different treatment".

Amnesty International has been informed that David Hicks, Ali Hamza Ahmed Sulayman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, and UK nationals Moazzam Begg and Feroz Abbasi, who were moved to Camp Echo some time after they had been made eligible for trial by military commission in July 2003, have also now been moved out of Camp Echo and to a segregation wing of Camp Delta.

The US administration is seeking an emergency stay of Judge Robertson's decision and has said it will immediately appeal it. Amnesty International encourages the US administration, despite its immediate negative reaction to the ruling, to recognize it as another sign of the serious concern, national and international, about the military commissions and to abandon such trials once and for all. The organization also continues to campaign for all Guantánamo detainees to be brought to trial in full accordance with international fair trial standards, without resort to the death penalty, or else released.

For further information, please see the following Amnesty International publications:
- USA: *Guantánamo: Military commissions - Amnesty International observer's notes, No. 3*, 9 November 2004 <http://web.amnesty.org/library/Index/ENGAMR511572004>
- USA: *Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, <http://web.amnesty.org/library/Index/ENGAMR511452004>

No further action by the UA Network is requested at this stage. Many thanks to all who sent appeals.

* *Previous Urgent Action updates issued on this case: (1) AMR 51/106/2003, 25 July 2003; (2) AMR 51/131/2003, 28 October 2003; (3) AMR 51/028/2004, 11 February 2004; (4) AMR 51/066/2004, 22 April 2004; (5) AMR 51/105/2004, 24 June 2004; (6) AMR 51/131/2004, 19 August 2004.*