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USA: A tool of injustice

Salim Hamdan again before a military commission

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"*Military commissions are a tool of justice*" – US Department of Defense, 24 August 2004

Today, 5 December 2007, Salim Ahmed Hamdan is facing a pre-trial military commission hearing at the US Naval Base in Guantánamo Bay, Cuba, more than three years after the first commission system he appeared before was abandoned, and more than six years after he was taken into US custody.

To look back over the past six years of Salim Hamdan's life is to trace the failure of the USA to put respect for human rights and the rule of law at the heart of its response to the attacks of 11 September 2001. Indeed, the US government has effectively treated this Yemeni national as little more than a human guinea pig in its experiment with military commissions, the "tool of justice" it is still trying to wield in Guantánamo.

Salim Hamdan was captured by Northern Alliance forces in November 2001 during the international armed conflict in Afghanistan. He was sold into US custody, and held in Afghanistan for several months. He would later tell his US military lawyer that during this time he was "beaten, that he was held for about three days in a bound position, cold… dragged, kicked, punched".

According to his current lawyers, US forces in Afghanistan initially designated Salim Hamdan as an "Enemy Prisoner of War", consistent with US Army Regulation 190-8 and the Third Geneva Convention. In a memorandum issued on 7 February 2002, however, President Bush determined that no alleged Taliban or *al-Qa'ida* member taken into US custody would qualify as a prisoner of war, and that Article 3 common to the four Geneva Conventions – prohibiting among other things unfair trials, torture, cruel treatment and "outrages upon personal dignity, in particular, humiliating and degrading treatment" – would not apply either. This presidential decision had followed advice from the then White House Counsel, Alberto Gonzales, that such a decision would "preserve flexibility" in a "new kind of war" which "places a high premium on…the ability to quickly obtain information from captured terrorists and their sponsors" and "renders obsolete Geneva's strict limitations on questioning of enemy prisoners". He also advised that it would "substantially" reduce the threat of future domestic criminal prosecutions of US agents for war crimes.

By transforming detainees into individuals from whom information could be taken rather than to whom process was due led to the removal of these detentions from the scrutiny of the courts, the erosion of protections against torture and other ill-treatment, and the creation of administrative review schemes and military commission trial systems lacking independence from the executive and that could rely upon information obtained under unlawful conditions.

Salim Hamdan was transferred to Guantánamo in June 2002 as an "enemy combatant", a status as used by the USA that is unrecognized in international law. In July 2003, he was made eligible for trial by military commission under a Military Order signed by President Bush on 13 November 2001.

As revealed in recently leaked copies of the Camp Delta Standard Operating Procedures, dated March 2003 and March 2004, isolation has been used by the Guantánamo authorities to "exploit the disorientation" of detainees in the interrogation process and in "fostering dependence of the detainee on his interrogator". In a meeting in October 2003 between the International Committee of the Red Cross (ICRC) and the Guantánamo authorities, 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.

Salim Hamdan was moved to Camp Echo in December 2003, where he was held in a windowless cell in solitary confinement for nearly a year. Dr Daryl Matthews, a forensic psychiatrist invited to Guantánamo by the Pentagon, stated that Salim Hamdan had "described his moods during this period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation." Meanwhile, the government refused to move Salim Hamdan out of solitary confinement on the grounds that it "would create an undue risk of destroying the environment that the military is trying to create at Guantanamo in order to facilitate intelligence gathering". The authorities only moved him out of solitary confinement in Camp Echo when threatened with judicial action, and even then manufactured *de facto* isolation for Hamdan in Camp Delta.[1]

An April 2003 Pentagon report on interrogations, originally classified as secret, noted that "the stated purpose of

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 sold to US forces

7 February 2002 – President Bush issues memorandum asserting that no detainee would qualify as a prisoner of war and Article 3 common to the four Geneva Conventions would not apply

June 2002 – Hamdan transferred to Guantánamo

July 2003 – Salim Hamdan made eligible for trial under Military Order

December 2003 – assigned military lawyer

14 July 2004 – charged with "conspiracy"

24 August 2004 – first military commission hearing

3 October 2004 – Combatant Status Review Tribunal (CSRT) hearing held for Salim Hamdan. It confirmed his status as an "enemy combatant"

8 November 2004 – District Court rules in *Hamdan v. Rumsfeld* that military commissions are unlawful. Proceedings stayed while ruling is appealed

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) signed into law. Court of Appeals for DC Circuit 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 ruling and finds in *Hamdan v. Rumsfeld* that the military commissions are unlawful as not authorized by Congress

17 October 2006 – President Bush signs Military Commissions Act (MCA) into law

10 May 2007 – Salim Hamdan charged under the MCA with "conspiracy" and "providing material support for terrorism"

4 June 2007 – Charges dismissed by military judge on jurisdictional grounds, but decision overturned by Court of Military Commission Review

5 December 2007 – Salim Hamdan's case resumes before military commission convened under MCA

[1] See pages 72-73 of *USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power*, http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf.

detainee interrogations is to obtain information of intelligence value", but added that "information obtained as a result of interrogations may later be used in criminal prosecutions". Contradicting the government's claim that military commissions are the only practicable forum for trials of "enemy combatants", it noted that the US could prosecute detainees in the federal civilian courts, courts-martial or military commission, and that "depending on the techniques employed, the admissibility of any information may depend on the forum considering the evidence". It asserted, for example, that isolation had "high" utility value in contributing to intelligence collection, but noted that it could affect admissibility of statements obtained under this technique. However, it added that such concern would be a "lesser issue for military commissions" than it would in the federal courts or courts-martial. In other words, military commissions were tailor-made for the coercion that was inherent to the detention regime the USA had constructed for "enemy combatants".

In July 2004, Salim Hamdan was charged with "conspiracy", and was brought to a pre-trial hearing the following month. The Pentagon trumpeted this "first US military commission in more than 50 years" as a "tool of justice implemented under President Bush's November 2001 order", and asserted that the Department of Defense was "committed to ensure each accused receives a full and fair trial". A little over three months later, the fact that the US authorities were committing themselves to little more than a kangaroo court was laid bare by a federal judge. District Court Judge James Robertson ruled that as someone who should have been presumed to be a prisoner of war (PoW), Salim Hamdan could only be tried before a tribunal which would try members of the US forces. The latter would normally be tried by court martial. "The Military Commission is not such a court", stressed Judge Robertson; "Its procedures are not such procedures". Indeed, even if Hamdan was adjudged not to be a PoW, he could not be tried by military commission because the rules were unlawful.

Military commission proceedings were suspended while Judge Robertson's opinion was appealed. In July 2005, the DC Court of Appeals overturned his ruling, but a year later, the US Supreme Court in turn reversed that decision and found, in *Hamdan v. Rumsfeld*, that the military commission system was unlawful, and had not been authorized by Congress. It wrote that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction". Four of the Justices noted that the conspiracy in which Hamdan had allegedly been involved extended from 1996 to November 2001, all but two months of which preceded the 11 September 2001 attacks. The four Justices held that "none of the overt acts that Hamdan is alleged to have committed violates the law of war". The Court also reversed President Bush's 2002 decision on common Article 3.

Historically, the Supreme Court noted, military commissions were "born of military necessity". Four of the Justices noted that any such urgency in Hamdan's case was "utterly belied by the record". Hamdan had already been in detention, thousands of miles from any battlefield, for well over two years by the time he was charged. Nevertheless, the administration was not willing to give up its "tool of justice", and produced its trump card to reacquire it. After the *Hamdan* ruling, President Bush asked Congress to pass the Military Commissions Act (MCA). In so doing, he exploited the cases of 14 so-called "high-value" detainees who until then had been held in secret CIA custody for years. If Congress passed this legislation, President Bush said, these 14 – transferred to Guantánamo a few days earlier – could be brought to justice in a newly authorized military commission system – a revised version of its predecessor that again could allow the admission of information coerced under cruel, inhuman or degrading treatment, and allow the government to keep secret methods it had used to obtain information.

With congressional elections looming, Congress duly passed the MCA, an Act incompatible with international law. More than a year later, none of the 14 – whom President Bush said

include the architects of the 9/11 attacks – has been charged. Instead, Salim Hamdan, an allegedly low-level member of *al-Qa'ida* is facing the unfair trial procedures of the MCA. To date, after six years of detentions, the USA has convicted one person out of the nearly 800 who have been held in Guantánamo, and in that case the detainee pleaded guilty to charges under the MCA of providing material support to terrorism in a pre-trial agreement that would see him get out of the cruel and coercive conditions of Guantánamo after five years there and go home to his native Australia.[2]

Salim Hamdan was brought to an arraignment proceeding on 4 June 2007, but the military judge dismissed the charges against him because, while he had been designated as an "enemy combatants" in Guantánamo, nowhere was there a record of his designation as an "unlawful enemy combatant", the label which (when attached to a non-US national) is a prerequisite for trial by military commission under the MCA.[3] The government successfully appealed this decision to the Court of Military Commission Review it had just set up, and Salim Hamdan's preliminary commission hearing was reset for 5 December. At this hearing, the commission is expected to hear arguments on the PoW and the "unlawful enemy combatant" issues. Amnesty International will have an observer at the proceedings.

The military commission experiment continues. Perhaps if things go smoothly for the government in Salim Hamdan's case, it will charge other detainees. It has stated that as many as 80 detainees could ultimately face trial by military commission.

In the pursuit of national security and intelligence-gathering, the US government has put justice to one side for those it labels as "enemy combatants", replacing it with the injustice of indefinite military detention without trial or proper judicial review. Trials have been a very distant second priority. Indeed, even someone who is acquitted by military commission under the MCA can be returned to indefinite detention as an "enemy combatant", if they are considered to pose a threat to security or to have intelligence value, or for any other reason asserted by the government.

As it pursues its case against Salim Ahmed Hamdan, the US administration will continue to promote the military commission system as a route to justice. It is not. It is a tool of injustice set against a backdrop of – and tailored to compensate for – six years of the unlawful treatment of detainees.

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[2] See *USA: Another day in Guantánamo: David Hicks sentenced by military commission; UK resident and victim of rendition released; former CIA detainee alleges torture*, 2 April 2007, http://web.amnesty.org/library/pdf/AMR510552007ENGLISH/$File/AMR5105507.pdf.

[3] In his recent report following his mission to the USA in May 2007, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has described the USA's use of the term "unlawful enemy combatant" as a "description of convenience" and one "without legal effect" under international law. UN Doc.: A/HRC/6/17/Add.1, 28 November 2007. Addendum: communications with governments. The Special Rapporteur was due to attend Salim Hamdan's military commission hearing on 5 December.