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USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody

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On 30 June 2008, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, called on the US government to discontinue all military commission proceedings currently underway against Guantánamo detainees. He raised particular concern about the cases of those detainees against whom the US authorities are intending to seek the death penalty. His analysis of the Military Commission Act (MCA) and information gathered during his recent mission to the USA “indicate clearly that these trials utterly fail to meet the basic due process standards required for a fair trial under international humanitarian and human rights law”. It would violate international law, he continued, to execute someone after such a proceeding.

On the same day, however, the US Department of Defense announced that capital charges had been sworn against another Guantánamo detainee, Saudi Arabian national ‘Abd al-Rahim al-Nashiri, for trial by military commission. In contrast to the position of the UN Special Rapporteur, Brigadier General Thomas Hartmann, Legal Advisor to the Convening Authority at the Pentagon’s Office of Military Commissions, asserted that trial standards under the MCA “are specifically designed to ensure that every accused, particularly Mr al-Nashiri [sic], receives a fair trial consistent with American standards of justice”.

The question of US standards of justice is at the heart of this and other cases of detainees in the “war on terror”. ‘Abd al-Nashiri, detained in November 2002 in the United Arab Emirates, was held for nearly four years in unknown locations in the secret detention program of the Central Intelligence Agency (CIA), becoming the victim of enforced disappearance. He was also subjected to torture in CIA custody, under the water torture technique known as “waterboarding”, simulated drowning. That he was subjected to this interrogation technique was confirmed by the CIA Director in February 2008. Al-Nashiri was transferred from secret CIA custody to virtually incommunicado military detention in Guantánamo in September 2006. Since then, he has made further allegations that he was tortured in CIA custody. Any specific details of such allegations have been censored from the public record on the grounds that the CIA program – including which interrogation techniques have been used, where detainees have been held, and in what conditions – is classified at the highest level of secrecy. Classification, by design or effect, is obscuring details of human rights violations, including the international crimes of torture and enforced disappearance.

In 2007, ‘Abd al-Nashiri told a Combatant Status Review Tribunal (CSRT) – a panel of military officers convened behind closed doors to review his “enemy combatant” status – that he had “made up stories during the torture in order to get it to stop”, and that “once he made a confession, his captors were happy and they stopped torturing him”. At his CSRT hearing on

14 March 2007, 'Abd al-Nashiri, through an interpreter, said: "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." The CSRT President told 'Abd al-Nashiri that his allegations "will be included in the record of these proceedings" and "will be reported for investigation that may be appropriate". The CSRT subsequently confirmed al-Nashiri's "enemy combatant" status. Amnesty International does not know what if any investigation has been carried out into his torture allegations. In any event, the CSRT can rely on coerced and secret evidence in making its determinations about a detainee's "enemy combatant" status.

'Abd al-Nashiri is charged under the MCA with "conspiracy", "murder in violation of the law of war", "using treachery or perfidy", "destruction of property in violation of the law of war", "intentionally causing serious bodily injury", "terrorism", "providing material support for terrorism", and "attempt to commit murder in violation of the law of war". The charges, five of which carry the death penalty, allege that as a member of *al-Qa'ida* he organized and directed the attack on the *USS Cole* in Yemen in October 2000, in which 17 members of the US Navy were killed and others injured. It is also alleged that he was involved in the October 2002 attack on the *SS Limburg*, a French supertanker, in which a member of the crew was killed.

The Pentagon has said it expects as many as 80 detainees to face trial by military commission. By 1 July 2008, 22 Guantánamo detainees had had charges sworn against them or referred on for trial, with 20 still facing trial.¹ 'Abd al-Nashiri is one of six detainees against whom the US government is currently intending to seek the death penalty. A seventh who was facing capital charges, has had the charges against him dismissed.²

The US government has suggested that one reason why military commissions are necessary is that "our criminal courts simply do not have extraterritorial jurisdiction" over the detainees it has in its custody. As Amnesty International has pointed out, this justification does not bear scrutiny. Signing the MCA into law, President Bush said that it would be used to try by military commission not only 9/11 conspirators, but also those believed responsible for the attack on the *USS Cole* and "an operative" suspected of involvement in the bombings of the US embassies in Kenya and Tanzania in August 1998.³ Yet individuals had already been indicted or tried in US federal court for their alleged involvement in these crimes.

The USA has long accused 'Abd al-Nashiri of involvement in the *Cole* bombing, without bringing him to trial. He was described in the 2004 9/11 Commission report as "the mastermind of the *Cole* bombing". In May 2003, six months *after* his arrest, the USA charged two Yemeni nationals – who were not in US custody – in connection with the *USS Cole* bombing. Jamal Ahmed Mohammed Ali al-Badawi and Fahd al-Quso (aka Abu Hathayfah al-

¹ There has been one conviction, based not on a full trial but a guilty plea. In March 2007, after five years in Guantánamo, David Hicks pleaded guilty to providing material support for terrorism, and was sentenced by commission to seven years in prison, six years and three months of which was suspended under a pre-trial agreement. He was transferred to Australia to serve the remainder of the nine months.

² See USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/042/2008/en>.

³ See 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>.

Adani) were indicted in US federal court in New York – not in a military commission in Guantánamo – with various offences, including conspiracy to murder and the murder of US nationals; conspiracy to use, using and attempting to use weapons of mass destruction; conspiracy to destroy, attempting to destroy and destroying US property and US defense facilities; using and carrying bombs and dangerous devices; and providing material support to a terrorist organization. In the indictment, ‘Abd al-Nashiri was named as an “un-indicted co-conspirator”, yet he remained in secret custody for another three and a half years, and is now facing trial by military commission rather than ordinary federal court.

Detainees held by the USA 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 tolerate government abuses, including by allowing the admission into evidence of information coerced under ill-treatment.

No one has been brought to account for the violations of the human rights of these detainees. 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.

Any executions after unfair trials in Guantánamo would not only violate international law, as the UN Special Rapporteur stated, 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. 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).⁴ 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 military commissions do not comply with these standards. In his statement on 30 June 2008, the UN Special Rapporteur said that the due process flaws of the military commission system are such that “the current procedures constitute a gross violation of the right to a fair trial”.

The US government should abandon the 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.

⁴ 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).

See also:

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: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/042/2008/en>.

USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission, April 2008, <http://www.amnesty.org/en/library/info/AMR51/028/2008/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: Disturbing appearance of Mohammed Jawad, child 'enemy combatant', at Guantánamo military commission hearing, 13 March 2008, <http://www.amnesty.org/en/library/info/AMR51/019/2008/en>

USA: A tool of injustice: Salim Hamdan again before a military commission, 5 December 2007, <http://www.amnesty.org/en/library/info/AMR51/189/2007>.

USA: Law and executive disorder: President gives green light to secret detention program, August 2007, <http://www.amnesty.org/en/report/info/AMR51/135/2007>.

Off the Record: US responsibility for enforced disappearances in the 'war on terror', June 2007, <http://www.amnesty.org/en/report/info/AMR51/093/2007>.

USA: Cruel and inhuman: conditions of isolation for detainees at Guantánamo Bay, April 2007, <http://www.amnesty.org/en/library/info/AMR51/051/2007>.

USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act, March 2007, <http://www.amnesty.org/en/library/info/AMR51/044/2007>.

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