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US ALL.**

**STOP TORTURE
AND ILL-TREATMENT
IN THE 'WAR ON TERROR'**

Military commissions for “war on terror” detainees

Amnesty International’s campaign to stop torture and ill-treatment in the ‘war on terror’

Human rights are under threat. The absolute ban on torture and other cruel, inhuman or degrading treatment – one of the most universally accepted human rights – is being undermined. In the “war on terror”, some governments are not only using torture and ill-treatment, they are seeking to justify it. They argue that interrogation methods which amount to torture or ill-treatment, and detention conditions which constitute ill-treatment, are both justifiable and necessary.

This is a crisis in the struggle to eliminate torture and ill-treatment, and Amnesty International is therefore redoubling its efforts. The organization is urging the widest possible network of people to join it in reasserting the absolute ban on torture and ill-treatment, including methods currently being described as “coercive interrogation”. No euphemisms can justify the unjustifiable. Amnesty International wants to stop the torture and ill-treatment that is being inflicted in the “war on terror”.

Military commissions

Ten detainees held at Guantánamo Bay have been charged by the US authorities and are facing trial by military commission.¹ All those held at the detention centre at the US naval base in Cuba face the prospect of unfair trial by these commissions, as do any foreign nationals designated by President George W. Bush as “enemy combatants”².

The US government has designated those captured in the armed conflict in Afghanistan, together with other foreign nationals captured in the context of the “war on terror”, as “enemy combatants”, a designation which has no status in international law. The US government has stated that it can detain such detainees until they have no intelligence value or pose no threat to the USA or its allies, or until the end of the “war on terror”.

¹Yemeni nationals Salim Ahmed Hamdan and Ali Hamza Sulayman al Bahlul, Sudanese national Ibrahim Ahmed Mahmoud al Qosi, Australian national David Hicks, Canadian national Omar Khadr, Ethiopian national/UK resident Binyam Ahmed Muhammad [a.k.a Benyam Mohammed al Habashi], Saudi Arabian nationals Ghassan Abdullah al Sharbi, Jabran Said Bin al Qahtani, Algerian national Sufiyan Barhoumi, and Afghan national Abdul Zahir.

² Ali-Saleh Kahlah al-Marri, a Qatari national, is the only remaining “enemy combatant” held on the US mainland.

The detention of persons held in relation to the “war on terror” is subject to international human rights law. This includes: the right to a prompt judicial review of the lawfulness of their detention, the right to be released if that detention is found by the court to be unlawful, and, if prosecuted, the right to be tried in proceedings which meet international standards for fair trial.³

Amnesty International considers that the military commissions fall far short of international standards for fair trial, including those set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the USA is a state party. Regardless of superficial procedural changes introduced in August 2005 they flagrantly violate fair trial rights:

- They are not independent of the executive. They are executive bodies – not independent courts – whose rules are determined by the executive and whose personnel are selected by the executive. As such, they violate the right to be heard by an independent tribunal.
- The right of appeal to a higher court is severely limited. The US Court of Appeals for the District of Columbia Circuit is the only higher court with the jurisdiction in the military commission process but it is only allowed to review whether decisions of the commissions adhere to their own flawed rules. There is also a right to appeal on the standards and procedures of the commissions, but only “to the extent the Constitution and laws of the United States are applicable”.
- The right to a lawyer of one’s choice and to an effective defence is severely restricted. Defendants are assigned US military lawyers. Detainees may request another military lawyer or a civilian lawyer. Civilian lawyers must be US citizens, and have passed stringent security clearance. Civilian lawyers are not guaranteed access to classified information or presence at “closed commission proceedings”. In addition, the US government does not meet the costs of civilian defence lawyers for detainees. The procedures governing military commissions make no provision for defendants to defend themselves. For example, **Ali Hamza Sulayman al Bahlul**, when first appearing before a military commission in August 2004, expressed his desire to represent himself or, failing that, to be represented by a Yemeni lawyer. When pre-trial hearings resumed for him in 2006, he was denied this request and therefore decided to boycott the proceedings.⁴
- Secret evidence, which defendants do not see and cannot challenge, can be admitted.
- Defendants can be excluded from parts of the proceedings.
- Only foreign nationals are eligible for such trials. This violates the prohibition on the discriminatory application of fair trial rights.
- The commissions can admit as evidence statements obtained as a result of torture or other ill-treatment

Decisions by the US authorities to bring people to trial before the military commissions appear to be made arbitrarily in that there are no clear criteria known and the decisions appear to be influenced by the attitude of the detainees’ home governments. It was originally proposed that UK nationals **Feroz Abbasi** and **Moazzam Begg** would face trial by military commission, but the UK government strongly opposed these proposals stating that the military commissions “would not provide sufficient guarantees of a fair trial according to international standards”⁵. The two men have since been released

³ See e.g. International Covenant on Civil and Political Rights, Articles 9(3) and 9(4).

⁴ Article 14. 3 (d) of the ICCPR states that all those facing criminal charges shall be entitled to “be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”.

⁵ Foreign and Commonwealth Office *Human Rights Annual Report 2004*, p 18

to the UK, where they have not been subject to any criminal charges. In contrast, **David Hicks**, who is Australian, remains scheduled to be tried by military commission, and Australian Prime Minister John Howard has indicated support for the USA in this. David Hicks is currently applying for UK citizenship on the basis of his mother's nationality.

Death Penalty

Despite the myriad flaws inherent in the military commission procedures, the commissions have the power to hand down the death penalty, the ultimate cruel, inhuman and degrading punishment.

Until August 2005 the detainees who would potentially receive a death sentence after an unfair trial had no right to appeal their sentence in any court. Currently, detainees who are sentenced to death will have the validity of the judgement of the commissions reviewed by the US Court of Appeals for the District of Columbia Circuit. This review is severely limited, however, as the court can only review the decision to the extent that it was "consistent with the standards and procedures" set out in Military Commission Order No.1 of August 2005 or any other subsequent military order which supersedes this.

Admission as evidence of statements obtained under torture or other ill-treatment

The rules of the military commissions do not rule out the admission as evidence of statements made as a result of torture or other ill-treatment. During the March 2006 proceedings against Ali Hamza al Bahlul, the Presiding Officer in the case stated that he could not absolutely rule out admitting evidence obtained under torture.

Article 15 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the USA is a state party, prohibits statements obtained as a result of torture being used as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. US law prohibits evidence obtained from coerced confessions being used in a criminal proceeding. Yet military commissions can make use of such information as evidence.⁶

Military commissions can also admit evidence, often using unverified translations, based on hearsay and statements from other detainees held in the coercive detention regime at Guantánamo and elsewhere. As well as the consistent and specific allegations of torture and ill-treatment from detainees, Amnesty International believes that the conditions in which many of the detainees are held in Guantánamo Bay amount to cruel, inhuman or degrading treatment.

Both **Salim Ahmed Hamdan** and **David Hicks** have alleged that they have been tortured. Salim Ahmed Hamdan also alleges that he considered signing false confessions in the hope that this would improve the conditions he faced in Guantánamo.

Sufiyan Barhoumi and **Ghassan Abdullah al Sharbi** were both captured in Pakistan on 28 March 2002 along with Abu Zubaydah. Abu Zubaydah is believed to be currently held in indefinite secret detention by the USA, and Amnesty International fears he is at risk of torture or other ill-treatment. Military commission rules allow statements by detainees such as Abu Zubaydah to be admitted as evidence even though the defence will not have an opportunity to confront them on the witness stand and challenge the credibility of their testimony.

⁶ The US Department of Defense announced on 22 March 2006 that it "may" ban the use of evidence extracted under torture in the military commissions. Even if such a "ban" were put in place, the rules still permit hearsay evidence and evidence from anonymous witnesses, meaning that evidence extracted under torture could still be used.

Binyam Ahmed Muhammad [a.k.a. Benyam Mohammed al Habashi]⁷ was a victim of the US practice of “rendition”,⁸ arrested in Pakistan and flown to Morocco and Afghanistan before being transferred to Guantánamo. He alleges that he was severely tortured in these places and forced into signing false confessions, confessions which could be used at his military commission hearing. Binyam Ahmed Muhammad states that, while in Morocco, “one of [his guards] took my penis in his hand and began to make cuts. He did it once and they stood still for maybe a minute, watching my reaction. I was in agony, crying... They must have done this 20 to 30 times. There was blood all over”. He stated that this torture was repeated once a month for the next 18 months. His torturers would reportedly add to the pain by pouring chemicals onto his wounds.

Omar Khadr⁹, arrested in 2002 in Afghanistan, was 15 years old when taken into custody. Amnesty International is particularly concerned that information obtained from Omar Khadr under coercion may be used as evidence against him. Omar Khadr alleges that he has been subjected to torture and other ill-treatment while held in custody in Afghanistan and Guantánamo. Court documents filed in the USA and Canada indicate that he has undergone repeated interrogations by US and Canadian officials, and document such abuses as the prolonged use of stress position, threats of rape, pouring pine solvent on him and using him as a human mop after he had urinated on himself and the floor.

What Amnesty International is calling for

- The US authorities should stop trials before military commissions and the President should revoke the Presidential Order that established them.
- If there is no evidence against detainees they should be released. If there is evidence against them then they should be charged and tried, in accordance with internationally accepted standards of fairness, before an independent and impartial court that does not impose the death penalty.
- The US authorities should ensure that they comply with their obligations under Article 15 of the Convention against Torture and not use the use of information obtained under torture or other cruel, inhuman or degrading treatment as evidence in any proceedings.

Take action!

- Take action as part of AI’s campaign – see our action on military commissions at <http://web.amnesty.org/pages/usa-250705-action-eng> and the campaign home page at <http://web.amnesty.org/pages/stoptorture-index-eng>
- Contact your national section/structure to get involved in their work on the campaign: see <http://web.amnesty.org/contacts/engindex> for contact details.

For further reading see *Guantánamo and Beyond: The continuing pursuit of unchecked executive power*, May 2005, AI Index AMR 51/063/2005, part 10, <http://web.amnesty.org/library/Index/ENGAMR510632005>

⁷ See *Who are the Guantánamo detainees? Case sheet 12: Ethiopian national/UK resident Benyam Mohammed al Habashi*, AI Index AMR 51/152/2005 <http://web.amnesty.org/library/Index/ENGAMR511522005>

⁸ See “*Rendition and secret detention: Questions and Answers*”, AI Index POL 30/03/2006 <http://web.amnesty.org/library/Index/ENGPOL300032006>

⁹ See *Who are the Guantánamo detainees? Case sheet 14: Canadian national Omar Khadr*, AI Index AMR 51/184/2005 <http://web.amnesty.org/library/Index/ENGAMR511842005>

Background

Military commissions timeline

- 13 November 2001: Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001, established military commissions to prosecute “enemy combatants who violate the laws of war”.¹⁰
- August 2004: pre trial hearings were held for **Salim Ahmed Hamdan**, **Ali Hamza Sulayman al Bahlul**, **Ibrahim Ahmed Mahmoud al Qosi**, and **David Hicks**.
- November 2004: A court challenge by **Salim Ahmed Hamdan** led to the suspension of the military commissions.¹¹ US District Court for the District of Columbia ruled that Hamdan, who was captured during the international armed conflict in Afghanistan, should have been presumed to be a prisoner of war until a “competent tribunal” had ruled otherwise, and stated that the military commissions were not such a “competent tribunal”. Moreover, the court ruled that, even if found not to be a prisoner of war, he could not be tried by the military commissions as the rules of the military commissions were unlawful. For example, with regard to the fact that the rules of the commissions permitted the accused to be excluded from some of the proceedings, the court stated that “such a dramatic deviation” from the US constitutional right to a fair trial “could not be countenanced in any American court”.
- 15 July 2005: The US Court of Appeals for the District of Columbia Circuit ruled in favour of the US Government’s appeal of the *Hamdan* decision.¹² The US Department of Defense (DoD) announced the next day that it would restart trials before military commissions “as soon as possible”.
- 31 August 2005: the US Department of Defense announced changes to the procedures of military commissions, saying that it had reviewed “international legal standards and suggestions from outside organizations”. The changes were set out in Military Commission Order No.1 (31 August 2005) and included more – but not complete - access to evidence for the accused and a limit on the ability of the Presiding Officer to exclude the accused person from the hearing. The US Department of Defense claims that these rules make the commissions “more like a judge and jury model” and will ensure “full and fair trials” for detainees. However, AI takes the view that the amended procedures will not provide “full and fair trials” and do nothing to address the fundamental flaws inherent in these military commissions.
- November 2005: the US Supreme Court agreed to review the decision of the Court of Appeals in the case of Salim Ahmed Hamdan, and thereby the legality of the commissions, with hearings expected to begin around March 2006. Salim Ahmed Hamdan’s trial before the commissions was put on hold. Another of the detainees, Australian **David Matthew Hicks**, subsequently won a stay of proceedings in his case until the *Hamdan* case is decided by the Supreme Court. Despite the fact that the Supreme Court has yet to rule on whether the commissions are legal, the US government has gone ahead with pre-trial proceedings against the detainees.

¹⁰ United States Department of Defense (DoD) factsheet
www.defenselink.mil/news/Sep2005/d20050908process.pdf

¹¹ *Hamdan v. Rumsfeld*, No. 04-1519, United States District Court for the District of Columbia (Judge Robertson) , 8 November 2004.

¹² *Hamdan v. Rumsfeld*, No. 04-5393, United States District Court for the District of Columbia (04cv01519), 15 July 2005.

- 7 November 2005: the US Department of Defense announced that **Omar Khadr, Binyam Ahmed Muhammad** [a.k.a **Benyam Mohammed al Habashi**] and **Ghassan Abdullah al Sharbi** Saudi Arabian national **Jabran Said Bin al Qahtani** and Algerian national **Sufiyan Barhoumi** would face trial by military commission. Also on 7 November, Appointing Authority John D. Altenburg lifted the stay in the case of **Ali Hamza al Bahlul**, clearing the way for his trial to proceed.

- 16 December 2005: the US authorities announced that they had referred to the military commissions the charges against these men, and that the Presiding Officer would be contacting attorneys to initiate a trial schedule. On 18 January 2006, the US authorities announced they had referred the charges of Afghan national **Abdul Zahir**. Pre-trial hearings for Canadian national **Omar Khadr** and Yemeni **Ali Hamza al Bahlul** were held in January 2006. Pre-trial hearings for **Sufiyan Barhoumi, Ghassan Abdullah al Sharbi** and **Ali Hamza Sulayman al Bahlul** were held in February and March 2006.

- 30 December 2005: President George W. Bush signed into law the Detainee Treatment Act of 2005,¹³ which provides some very limited scope for review of the decisions of the military commissions. It provides for the US Court of Appeals for the District of Columbia Circuit to determine the validity of any final decision rendered by the military commissions. However, such a review will be automatic only if the sentence imposed is the death penalty or 10 years or more imprisonment; in other cases any review is at the discretion of the court. Moreover, the court can only review the decision to the extent that it was “consistent with the standards and procedures” set out in Military Commission Order No.1 of August 2005 or any other subsequent military order which supersedes this.

Amnesty International has sent an observer to the military commission proceedings on the four occasions to date that hearings have taken place.

¹³ As incorporated into the National Defense Authorization Act for Fiscal Year 2006. H.R.1815 Title XIV – Matters Relating to Detainees, Sec. 1405 - Procedures for Status Review of Detainees Outside the United States, and Department of Defense Appropriations Act HR 2863, Sec. 1005 Procedures for Status of Review of Detainees Outside the United States