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Double standards and second-class justice

Federal judge clears way for first military commission trial

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As assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.
US Supreme Court, 1940[1]

The USA considers itself to be a country committed to due process for those suspected of criminal conduct. It even preaches what it says it practices. In its annual assessment of human rights around the world, for example, the USA condemns unfair trials occurring at the hands of other governments. Cuba, for one, routinely comes in for criticism. In the latest US report, the Cuban authorities were brought to task for trials which the USA said "failed to observe due process rights". Restrictions on the right to a defence, a lack of transparency in proceedings involving state security, and the use of confessions "obtained under duress and without legal advice", were among the issues that drew the critical words of the US State Department.

"It is a good divine", wrote William Shakespeare, "that follows his own instructions".[2] The USA is not following what it instructs others, however. In its offshore prison camp in Guantánamo Bay, it is about to open a new chapter in its unlawful treatment of detainees in the "war on terror". On 17 July 2008, US District Court Judge James Robertson cleared the way for the first US trial by military commission for more than half a century, when he refused to stop the trial of Salim Ahmed Hamdan. This Yemeni national – now in his seventh year in Guantánamo – had sought to challenge the constitutionality of the commission system following last month's *Boumediene v. Bush* ruling by the US Supreme Court that the Guantánamo detainees have the constitutional right to *habeas corpus* in the US federal courts. However, Judge Robertson ruled that Hamdan's "claims of unlawfulness are all claims that should first be decided by the military commission and then raised on appeal". Salim Hamdan's military commission trial is scheduled to begin next week, under procedures that if concocted the other side of the 17-mile fence that separates the US naval base from the rest of Cuba, would surely lead to vigorous protests on the part of the USA.

[1] *Chambers v. State of Florida*, 309 U.S. 227, 12 February 1940.
[2] Merchant of Venice, Act I, Scene II.

At a pre-trial hearing in front of a US military judge in late April 2008, Salim Hamdan put it thus, according to Amnesty International's observer at the proceedings:

> "There is no such thing as justice here. The law is clear. International law is clear. But this is not justice: I see a piece of paper – I say it's white, you say it's black. I say black, you say it's white. I am not speaking to you, Judge. I am speaking to the American Government. These words are not directed at you… America tells the world about freedom and justice. Hundreds of detainees do not see justice…. Give me a just court… Give me my human rights."

The US government says it aims to "hold governments accountable to their obligations under universal human rights norms and international human rights instruments."[3] Judge Robertson yesterday missed an opportunity to hold the US government accountable for a trial system that does not meet international fair trial standards and should be called to a halt.

This is the US government's second attempt since 2001 to try foreign nationals it has branded as "unlawful enemy combatants" in front of military commissions. The first system – for four years promoted by the administration as guaranteeing full and fair trials – ended in June 2006 when the US Supreme Court ruled that the "structure and procedures" of the commissions violated US and international law.[4] The response of the political branches was not to turn to the existing US courts, but to continue the experiment and legislate to replace the condemned commissions with a revised system that offered little improvement on its predecessor.

These are second-class trials to which the US government would not subject its own nationals. The very law under which they are convened is incompatible with the international prohibition on discrimination. "I want to emphasize that the Military Commissions Act does not apply to American citizens", said the US Attorney General the day after the MCA passed into law in October 2006; "Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law".[5] Displaying the disregard for the presumption of innocence that has become a hallmark of the US administration's public commentary on the "war on terror" detainees, the country's then chief law enforcement officer added that under the MCA,"every terrorist will receive a full and fair trial".

According to such commentary, the "unlawful enemy combatant" label is synonymous with "terrorist", and any foreign national so labeled does not deserve the same trial standards as "lawful combatants", ordinary criminal offenders, or US citizens. As Vice President Dick Cheney has said: "They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process"; "The fact of the matter is the president has said specifically [military commission trials] will apply to terrorists."[6]

[3] See http://www.state.gov/g/drl/hr/.
[4] *Hamdan v. Rumsfeld* (the case at the centre of this ruling was Salim Hamdan's).
[5] Alberto Gonzales hosts 'Ask the White House', 18 October 2006, http://www.whitehouse.gov/ask/20061018.html.
[6] Remarks by Vice President Dick Cheney to the U.S. Chamber of Commerce, 14 November 2001, and Interview of Vice President Cheney with Diane Sawyer of ABC, 29 November 2001.

Seeking congressional approval for the MCA, President George W. Bush said: "today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes."[7]

A chronology of a military commission experiment

- 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. He is held in Bagram and Kandahar airbases in Afghanistan
- 7 February 2002 – President Bush issues memorandum asserting that no "war on terror" detainee would qualify as a prisoner of war and Article 3 common to the four Geneva Conventions would not apply
- June 2002 – Salim Hamdan transferred to Guantánamo
- July 2003 – Made eligible for trial under Military Order
- 14 July 2004 – Hamdan charged with "conspiracy". The Pentagon describes the military commissions under the Military Order as a "tool of justice", guaranteeing "full and fair trials" for the accused.
- 8 November 2004 – District Court rules in *Hamdan v. Rumsfeld* that military commissions are unlawful.
- 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) becomes law. DC Circuit Court of Appeals 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 in *Hamdan v. Rumsfeld*, ruling that the military commissions violate US military and international law, and Common Article 3 applies
- 17 October 2006 – Military Commissions Act (MCA) becomes law
- 13 December 2006 – District Court dismisses Hamdan's *habeas corpus* petition on the grounds that §7 of the MCA has stripped the federal courts of jurisdiction to consider such appeals
- 2 February 2007 – Charges under MCA of "conspiracy" and "providing material support for terrorism" sworn against Hamdan. The charges allege that he acted as Osama bin Laden's personal driver and bodyguard, that he transported weapons and other supplies for *al-Qa'ida* members and associates, and that he received weapons training. The charges are non-capital.
- 1 May 2007 – Charges referred on for trial by military commission
- 12 June 2008 – Supreme Court rules in *Boumediene v. Bush* that §7 of the MCA is unconstitutional and that the Guantánamo detainees have the constitutional right to *habeas corpus*
- 17 July 2008 – District Court refuses to stop Salim Hamdan's trial on the base of the *Boumediene* ruling, saying that Hamdan can only challenge the constitutionality of the system after his trial
- 21 July 2008 – Salim Hamdan's trial due to begin

Yet whether someone is guilty of "terrorism" is a matter to be decided at a fair trial, applying international standards. Here, the US government effectively labels the defendant as guilty, makes that label a prerequisite for military commission jurisdiction, and subjects the individual to trial before a tribunal that is not structurally independent from the branch of government applying the label to the detainee in the first place. The presumption of "guilt" can continue even after an acquittal. Even if Salim Hamdan were to be acquitted by military commission, he could be returned to detention if the government so decided. [8] Clearly, in such a case, the international legal right to trial within a reasonable time – already a fiction in Guantánamo – would have little meaning to the individual in question.

One of the accusations that the USA levels against trials in Cuba – the admission into evidence of coerced statements – was a part of the US military commission system under the Military Order, and is part of the revised system under the MCA. In violation

[7] President Discusses Creation of Military Commissions to Try Suspected Terrorists, 6 September 2006.
[8] It is not yet clear what impact the *Boumediene* ruling will have, and when it will have it.

of international law, the military commissions can admit information extracted under cruel, inhuman or degrading treatment.[9] The MCA differentiates between statements obtained before 30 December 2005, when the USA's Detainee Treatment Act (DTA) came into force (prohibiting cruel, inhuman or degrading treatment, as defined in US rather than international law), and statements obtained after that date. Under the MCA, in both pre- and post-DTA cases, statements "in which the degree of coercion is disputed" may only be admitted if the military judge finds that the statement is "reliable" and possesses "sufficient probative value" and if "the interests of justice would best be served by admission of the statement into evidence". In the case of statements obtained after 30 December 2005, the military judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment as defined and prohibited under the DTA. In the first 20 months of his detention alone – more than three years *before* the DTA was enacted – Salim Hamdan was subjected to at least 30 interrogations, some of them reportedly lasting for days, all of them without access to a lawyer.

As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if "statements contained in them may be independently established as true", because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.[10] The fact that the military commissions can admit such statements into evidence illustrates the distance between their procedures and commonly held notions of due process.

Salim Hamdan's right not to be subjected to ill-treatment has been systematically violated by the cruel and coercive conditions in which he has been held, including since being made eligible for trial by military commission on 3 July 2003. From December 2003 to October 2004, he was put into solitary confinement in Camp Echo in a windowless cell that lacked natural light and fresh air. In a meeting in October 2003 between the International Committee of the Red Cross (ICRC) and the Guantánamo authorities, according to a leaked military document, 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.

Again, if such use of isolation were to happen at the hands of other governments, the US authorities would likely condemn it. Every year since the USA began operating its Guantánamo detention facility, for example, the State Department's entries on Cuba in its annual human rights reports have – under the heading torture and other cruel, inhuman or degrading treatment or punishment – criticized the Cuban authorities for subjecting prisoners to prolonged isolation in punishment cells.

An April 2003 Pentagon report on interrogations, originally classified as secret, noted that "the stated purpose of detainee interrogations is to obtain information of intelligence value", but

[9] The fact that the US administration's definition of torture does not comply with international law could also mean that information extracted under torture is admitted as evidence, even though the military commission rules purport to prohibit such admission.
[10] *Rochin v. California* 342 U.S. 165 (1952).

added that "information obtained as a result of interrogations may later be used in criminal prosecutions". It asserted, for example, that isolation had "high" utility value in contributing to intelligence collection, but noted that it could affect admissibility at trial 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".

Salim Hamdan's lawyers have recently said that they have received information suggesting that for 50 days from 11 June 2003, Hamdan may have been put into a program of sleep disruption and deprivation known as "Operation Sandman".[11] This program involved sleep interruptions and frequent cell relocations, and was apparently primarily targeted at Saudi Arabian detainees to keep them "mentally off balance, to isolate them linguistically or culturally, and to induce them to cooperate", according to a recent report by the US Justice Department's Inspector General.[12] In the entries on Iran, Jordan, Libya, Saudi Arabia, Tunisia, Pakistan and Turkey in its human rights reports covering 2003, the US State Department reported that sleep deprivation was among the "torture" techniques alleged in those countries.

Salim Hamdan's then US military lawyer (from late 2003) stated that the government's plan was to begin the military commission process under the Military Order with those detainees who would plead guilty. The lawyer said that he was instructed that he could only negotiate a guilty plea, which the authorities apparently believed Hamdan was ready to make. This lawyer, who found that Hamdan did not want to negotiate such a plea, later told Senators that he believed the government was engaged in a "clear attempt to coerce Mr Hamdan into pleading guilty".[13]

Dr Daryl Matthews, a forensic psychiatrist invited to Guantánamo by the Pentagon, stated in March 2004 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." In a declaration filed in federal court, Dr Matthews said that "Mr Hamdan's current conditions of confinement place him at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms. Additionally the conditions of his confinement make Mr Hamdan particularly susceptible to mental coercion and false confession".

In October 2004, Judge Robertson in the District Court in Washington, DC, found that the military commission system was unlawful and additionally ordered that Salim Hamdan be

[11] Detainee's lawyers make claim on sleep deprivation, New York Times, 15 July 2008. Two detainees facing military commission trials for alleged crimes committed when they were under 18 (Mohammed Jawad and Omar Khadr) were subjected to such a program, known as the "frequent flyer program".
[12] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, May 2008.
[13] Statement of Lieutenant Commander Charles D. Swift, JAGC, USN, before the Senate Committee on Judiciary on detainees, 15 June 2005. See also Lawyer says military tried to coerce detainee's plea, New York Times, 16 June 2005.

moved out of isolation. Hamdan was subsequently moved into the medium security Camp 4, where inmates have some social contact, and access to natural air and light. In December 2006, however, Judge Robertson dismissed Hamdan's *habeas corpus* petition under the newly enacted MCA, and the detainee was moved out of Camp 4 and into the harsh conditions of Camp 6. There he was held in isolation for 23 hours a day in a cell with no natural air or light.[14] Salim Hamdan's mental health reportedly deteriorated once again. Despite this, he was moved a year later, not to Camp 4, but to Camp 5, where the conditions are similar to those of Camp 6. In February 2008, a psychiatrist reported, after 70 hours of meetings with Salim Hamdan, that she had concluded that he was suffering from post-traumatic stress disorder and major depression, and that in her opinion he was "unable to materially assist in his own defense".

It is clear that Salim Hamdan's trial – or any of the other military commission trials looming at Guantánamo – cannot be divorced from the backdrop against which such proceedings are occurring.[15] This backdrop is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt. Among the defendants already charged are victims of enforced disappearance, secret detention, secret transfer, prolonged incommunicado detention, torture and other cruel, inhuman or degrading treatment. Their treatment has not only been unlawful, it has been highly and deliberately coercive in terms of the interrogation methods and detention conditions employed against them. This heightens the need for any trials to take place before courts structurally independent of the executive and legislative branches which have authorized or condoned human rights violations. Instead, trials are looming before military commissions lacking such independence and constructed to tolerate government abuses and to admit information obtained under such abusive conduct.

Amnesty International considers that justice will neither be done nor be seen to be done in trials before these military commissions. Despite yesterday's ruling by Judge Robertson, the organization will continue to campaign for the USA to bring anyone held at Guantánamo against whom it has evidence of criminal wrongdoing to full and fair trials in the federal civilian courts or release them. The military commissions should be abandoned and the Guantánamo detention facility closed down.

See also: 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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[14] USA: Cruel and inhuman: conditions of isolation for detainees at Guantánamo Bay, April 2007, http://www.amnesty.org/en/library/info/AMR51/051/2007.

[15] To date 22 Guantánamo detainees have been charged under the MCA. One, David Hicks, was convicted on the basis of a guilty plea pursuant to a pre-trial agreement that saw him released from Guantánamo after five years there and serve a short prison term in his native Austrialia. Another, Mohamed al-Qahtani, has had his charges dismissed, leaving 20 detainees currently facing trial.