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Report of Amnesty International's observer Jumana Musa on the arraignment proceedings before military commissions at Guantánamo on 4 June 2007 in the case of Omar Khadr and Salim Ahmed Hamdan.

The United States government suffered a serious setback today in its attempts to arraign two people before the newly configured military commissions. Struck down by the Supreme Court just under a year ago, the government reformulated the commissions under new legislation passed by the US Congress last year called the "Military Commissions Act" (MCA). By the end of the day, charges were dismissed without prejudice in the cases of Omar Khadr and Salim Ahmed Hamdan.

The US government's failed experiment with ad hoc justice started on November 13, 2001 when President Bush issued a military order establishing military commissions to try foreign nationals captured in the "war on terror" which stated that he alone had the authority to decide how such individuals would be detained and/or tried. In June 2006, the Supreme Court rejected this premise, finding that the president had exceeded the authority granted to him by Congress when he constructed his own judicial system and striking down the military commissions as unconstitutional. The administration then went to Congress and pushed for the legislation that President Bush signed into law in October 2006 (the MCA), creating new military commissions that closely resembled the earlier version but this time with a Congressional stamp of approval.

So far, only three people have been charged before the new commission system. The first was David Hicks, whose case ended with a plea deal that has resulted in his return to Australia where he will serve the remainder of his nine-month sentence and be free before 2008. Second was Omar Khadr, a fifteen-year-old child when detained by US forces, and sixteen when transferred to Guantánamo. Khadr's case had begun under the previous military commissions and he was charged with additional charges under the new commission system.

Last week, just days before his arraignment was scheduled to go forward, Khadr fired all of his US attorneys, including his assigned military defence counsel and his civilian attorneys. When he appeared in the commission room that morning, he looked old beyond his twenty years. He moved slowly and his eyes betrayed no emotion, rather a look of numbness. His beard had filled in and his curly hair was overgrown and matted. He wore his tan prison uniform and standard issue flip-flops into the commission room.

The proceeding on 4 June did not follow the set pattern, which begins with informing the accused of his right to an attorney and asking if he is satisfied with his current representation. With that question having been answered days before the arraignment began, the defence, which now consisted of a military defence counsel who was not previously on the case and two Canadian attorneys who serve as "foreign attorney consultants" who the rules do not allow to argue before the commission, asked for time to establish a relationship with Khadr. They reserved their plea for a later date, which by all accounts should have been the end of the proceeding.

However, at that moment, Col. Peter Brownback, the military judge presiding over the case, raised a motion “sua sponte” meaning he raised it himself without anything being filed by the defence or prosecution. He pointed out that the military commission rules as established by the MCA required a finding that the accused be designated an “unlawful enemy combatant” (UEC) in order for the commission to have jurisdiction to try that individual. Khadr had been designated an “enemy combatant” (EC) by a combatant status review tribunal (CSRT) (an administrative body) in October 2004, but nowhere was there a record of him being designated an “unlawful enemy combatant.”

The prosecution argued that the determination by the CSRT was sufficiently similar to the UEC definition under the MCA to grant the military commission jurisdiction over the case. They also argued that the CSRT finding, in conjunction with the President’s February 2002 memo regarding the general status of alleged al-Qa’ida or Taleban detainees in US custody, amounted to a designation of UEC under which the commissions had jurisdiction to proceed. Col. Brownback disagreed.

Brownback pointed out that a military commission is a court of limited jurisdiction. He told the prosecution that the definition of who could appear before military commissions was now law, contained in an act of Congress, and since the law passed by Congress differentiated between a lawful enemy combatant and an unlawful enemy combatant, a finding of enemy combatant by the CSRTs was not sufficient to impart jurisdiction. Col. Brownback dismissed the charges without prejudice, meaning that they could be re-filed in the future. Khadr did not appear to react and one had to wonder if he even understood what had occurred. The prosecution reserved its right to file an appeal within 72 hours.

After a three-hour recess, the commission reconvened to hear the arraignment of Salim Ahmed Hamdan, the first person to face a military commission under the old system. Hamdan’s initial appearance before a military commission was in August of 2004, nearly three years ago. Back then he came into the room looking hopeful, as if these new proceedings might bring about a resolution to his case. This time he came in looking tired and withdrawn. He appeared in the courtroom wearing a traditional long shirt / gown with a tweed sports coat and a Yemeni style head covering. He came across as defeated rather than hopeful, but he still appeared to be engaged with the proceedings.

The proceedings began by following the scripted (set) remarks, with Hamdan wishing to retain all of his attorneys. The first problem that presented itself was an old one for Hamdan, it was a translation issue. From the beginning, the military commissions have worked to have simultaneous translations of the proceedings into the accused’s native language. This is the most difficult form of translation, requiring the translator to listen to what is being said and translate immediately while the proceedings continue. Usually, there are at least two translators for any session involving simultaneous translation to give them the opportunity to switch back and forth. For these commissions, the government only brought one translator who found to difficult to keep up with the fast pace of the proceedings. At times she was paraphrasing what was happening in the proceedings and at other times she stopped translating all together, leaving the accused to wonder what was being said. Anyone facing a criminal trial deserves to have a word for word translation of the proceedings that are adjudicating his guilt or innocence, not an approximate version. Three years later, one would have hoped that this was a problem that the US government would have solved.

One of Hamdan’s civilian attorneys raised the jurisdictional issue that the judge presented in the Khadr case, challenging the fact that Hamdan, like Khadr, was never designated an unlawful enemy combatant. Both sides argued their case, and Navy Captain Keith Allred took a 1 ½ hour break before rendering his decision, which was to dismiss charges against Hamdan. Allred listed four reasons for his finding that Hamdan was not properly designated to appear before the commission. First, the CSRTs designated the accused an EC for the purpose of continued

detention, but did not consider whether or not a military commission had jurisdiction over him. Second, the CSRT standard employed a different, more general, definition to that of the MCA definition of an UEC. Third, the CSRTs preceded the MCA by two years and were not intended to impart jurisdiction. Finally, the President's designation in February 2002 that al Qa'ida and Taleban fighters were not subject to protection under the Geneva Conventions was a group designation, and did not satisfy the individual designation needed to impart jurisdiction. Thus, a second military judge found that the military commissions did not have jurisdiction to try an accused person who had never been declared an unlawful enemy combatant by a competent tribunal. Captain Allred dismissed the charges against Hamdan without prejudice. The prosecution, as they had in the Khadr case, reserved the right to appeal.

There are a few glaring issues that presented themselves at the end of the day. While this appears as a critical blow to the ad hoc system of justice that the Administration has been attempting to implement in Guantánamo, in reality it means little on its face to those charged or detained there. First, even if a military commission was able to function and proceed to its conclusion, an acquittal would not mandate the release of a detainee. Because the administration has taken the position that it is properly holding all the men in Guantánamo as "enemy combatants," it asserts the right to hold them till then end of the conflict. The government sees this right as separate and apart from any criminal proceedings so a person acquitted by military commission could remain in detention as an "enemy combatant." Second, only three men have been charged so far under this new system, and by the government's own admission it does not intend to charge more that 75 or 80. This leaves hundreds of men who are detained at Guantánamo indefinitely with no legal recourse, since the MCA also suspended their right to challenge their detention by filing a writ of habeas corpus.

Another issue that presents itself is directly linked to the nature of a justice system that is being developed on the fly. While both prosecution teams have reserved the right to appeal, the MCA requires that the first appeal must go the Court of Military Commission Review. The problem for the prosecution is that, much like the military commissions, this is not a court that existed before it was authorized under the present legislation. At present, the prosecution must file its appeal before a court that has not yet been set up.

This entire exercise serves as an indictment of US law and policy regarding the detention and trial of foreign nationals in Guantánamo and elsewhere. It is a clear indication of the need for the US to use existing laws and established systems of justice such as federal courts to try people accused of war crimes, crimes against humanity and terrorism related offences. It also shows why it is not prudent for the United States to create new categories of people not recognized by its own or international law. By exposing the serious deficiencies of its own framework in open court, the United States has created the most compelling argument for ending the military commissions and closing Guantánamo, once and for all.

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For more information please call Amnesty International's press office in London, UK, on +44 20 7413 5566

Amnesty International, 1 Easton St., London WC1X 0DW. web: http://www.amnesty.org

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