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Guantánamo: Military commissions -- Amnesty International observer's notes from proceedings

On 11 January 2006, exactly four years after the first detainees were transferred to the US military base at Guantánamo Bay, Cuba, pre-trial military commission proceedings commenced in the cases of Ali Hamza Ahmed Sulayman Al Bahlul and Omar Khadr.

Amnesty International's representative, Jumana Musa, who is currently at Guantánamo to observe the proceedings, said that they "raised unique issues that go to the heart of the defects inherent in the military commissions system".

Amnesty International's concerns

The military commissions have been established under the 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. They work according to the Military Commission Orders and Military Commission Instructions, all drafted by the Executive branch. By January 2006, nine Guantánamo detainees remain subject to the US presidential order and are scheduled to be tried by military commission.

Amnesty International unreservedly opposes trials by military commission at Guantánamo, as they violate international fair trials standards:

- o The commissions lack independence from the executive.
- o The defendant can face secret evidence which he will be unable to rebut.
- o The defendant can be excluded from certain parts of the proceedings.
- o The commissions can admit as evidence statements obtained through torture or other ill-treatment.
- o The right to appeal to an independent and impartial tribunal is severely curtailed.
- o The commissions discriminate against non-US nationals, as only foreign nationals are eligible for such trials.
- o The right to counsel of choice, which includes the right to represent oneself, and the right to an effective defence are severely restricted. The procedures before the commissions requires that a detainee has a military defense counsel assigned to their case.

A year and a half since the first pre-trial proceedings, this is only the third time that any proceedings have been held. In November 2004, a federal court judge halted the proceedings in the case of Salim Ahmed Hamdan questioning their fairness. The ruling was overturned on appeal and the Supreme Court is scheduled to hear the case in March 2006.

In the meantime, a few procedural changes have been made to the rules. However, they do not address the substance of Amnesty International's concerns.

Although both presiding officers appeared balanced and made every effort to ensure that the accused was able to understand and participate in the proceedings, their efforts do not remedy the underlying problems. Amnesty International continues to urge the United States to scrap the commissions and try any accused in courts that meet international fair trial standards.

Amnesty International has additional concerns with respect to Omar Khadr, who was a juvenile when he was first captured in Afghanistan. Under customary international law, children affected by armed conflict are entitled to special respect and protection, according to their age. The arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. Children who are deprived of their liberty must be held in quarters separate from those of adults. Amnesty International is also particularly concerned that evidence may be used derived during improper treatment while Omar Khadr was held as a juvenile with no access to a parent, guardian or legal representative and in conditions possibly amounting to torture.

The case of Ali Hamza Ahmed Sulayman Al Bahlul

Ali al-Bahlul, a Yemeni national, has been charged on a number of counts of conspiracy. His was the first case to be brought before the commission. This was only the second time that Ali al-Bahlul had appeared before the commission since his first appearance in August 2004. His proceedings were overseen by the Presiding Officer. The panel was not present due to a change in the original Military Commission Order.

When Ali al-Bahlul first appeared before the military commissions in August 2004 he expressed his desire to represent himself. In the alternative, he requested a lawyer from Yemen. If he was not granted either of his first two wishes, he said that he would “be forced to attend and [.]. be a listener. Only.”.

During the proceedings he raised two serious concerns about the commission. One was about the use of secret evidence, which is withheld from the accused. The other was about the discrimination based on nationality. The commissions are prohibited from trying US citizens, and Ali al-Bahlul pointed out that two nationals of the United Kingdom who had previously been designated for trial before military commissions were released without charge due in part to the intervention of the British government.

Ali al-Bahlul also declared that he did not recognize the court and its laws, and announced that he was going to boycott the proceedings, holding up a hand-written sign that read “boycott” in Arabic. After that point he removed the headphones in which he was listening to the Arabic translation of the court proceedings.

After Ali al-Bahlul stopped participating in the proceedings, the Presiding Officer ruled that he could not represent himself for two separate, distinct and independent reasons. The first was his refusal to participate in the proceedings, which would make a defense all but impossible. The other was the language of the Military Commission Order, Military Commission Instructions and presidential Military Order. Major Tom Fleener, Ali al-Bahlul’s military defense counsel, made a motion to withdraw his representation based on his client’s wishes, but the presiding officer ordered against this motion.

The case of Omar Khadr

Omar Khadr, a Canadian national who was arrested at age 15, has been in detention for approximately three and a half years and housed with the adult population throughout. He claims to have been subjected to torture and other ill-treatment during his time in US detention in Afghanistan and Guantánamo. Court documents filed in the US and Canada indicate that he has undergone repeated interrogations from 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. The Canadian Federal court ruled in August 2005 that the Canadian government are prohibited from further questioning of Omar Khadr. There is no indication that any attempts to educate or rehabilitate him have been made.

Omar Khadr has been charged on four counts including conspiracy and murder of a member of the US military. He was represented by a military defense counsel and a civilian attorney. The issue of the right

to choose one's own attorney was raised in this case as well, with Omar Khadr requesting a specific military attorney as allowed by the commission rules. A decision on the requested counsel is pending. Meanwhile, the Presiding Officer stated that the proceedings could continue, even though the request for a specific counsel would have halted proceedings in a US court martial.

The defense did ask the presiding officer to instruct the prosecutor's office from making inflammatory statements. During a press conference the previous day, the Chief Prosecutor made comments to the effect that Omar Khadr must be "lonely" on the Eid celebrations without his "friend" Osama Bin Laden, and other similar statements.

Additional concerns

The courtroom translations, which were riddled with problems early on in the commission process, were much improved but still not without issue. There were times when the translation was inaccurate and the interpreter was not interpreting word for word.

The defence team continues to be under resourced. Major Fleener was recalled to active duty to take this case less than three months ago and was also assigned to another trial in December 2005, while the prosecution had three prosecutors present in the court room and made reference to a fourth.