

**Selected Press Statements & Reports of Amnesty International's Observer for the military commission proceedings re: Omar Khadr (January 2006 to Sept 2007)**

# **AMNESTY INTERNATIONAL**

## **Public Statement**

AI Index: AMR 51/014/2006 (Public)

News Service No: 009

13 January 2006

## **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:

- The commissions lack independence from the executive.
- The defendant can face secret evidence which he will be unable to rebut.
- The defendant can be excluded from certain parts of the proceedings.
- The commissions can admit as evidence statements obtained through torture or other ill-treatment.
- The right to appeal to an independent and impartial tribunal is severely curtailed.
- The commissions discriminate against non-US nationals, as only foreign nationals are eligible for such trials.
- 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.

# AMNESTY INTERNATIONAL

## Public Statement

AI Index: AMR 51/064/2006 (Public)

News Service No: 090

6 April 2006

## **USA: Guantánamo pre-trial military commission proceedings Amnesty International's trial observations - Day 2**

Pre-trial hearings before military commissions at Guantánamo are going ahead despite a pending

Supreme Court decision on their legality. A representative of Amnesty International is observing the hearings.

Amnesty International has long been calling for the military commission trials to be cancelled and for the Military Order enabling these trials to be revoked, on the grounds that the Military Order is fundamentally flawed and any trial under its provisions will violate international fair trial standards. As such, the organization has expressed its deep regret at all steps taken to proceed with the trials, including the pre-trial hearings.

A summary of Amnesty International's initial findings from the second day of this round of proceedings (5 April 2006) are below.

### **Omar Khadr – Inhuman treatment and conditions of detention at Guantánamo**

The hearings on 5 April began with a statement from Omar Khadr, a Canadian national who was 15 years old at the time of his alleged crime – he is accused of killing a US soldier during a battle in Afghanistan. Amnesty International is particularly concerned that Omar Khadr is facing trial by military commissions on the basis of alleged acts committed when he was a child and that throughout his detention he has been treated in violation of international standards which recognize that children are entitled to special care and protection.

He was recently transferred from Camp Four, the least harsh facility, to Camp Five, Guantánamo's most restrictive facility. Camp Five is modelled on the US super-maximum security facilities, where detainees are held for up to 23 hours a day in a solitary cell with no sunlight.

Reading a written statement, Omar Khadr claimed that he was being treated inhumanely even though he had been cooperating with the commissions' process. He declared his intention to boycott the proceedings until the situation was remedied.

Omar Khadr is represented by two military defence lawyers and two civilian defence lawyers. They asked that the presiding officer hear a motion to remedy Omar Khadr's situation. One of the defence lawyers, Lt. Col. Vokey, explained that his client had asked them not to participate in the proceedings until the issue of his living conditions was addressed. The presiding officer refused to hear the motion until the defence had an opportunity to brief him with applicable law and the prosecution had a chance to find out why Omar Khadr had been moved from Camp Four to Camp Five. He then asked the defence lawyer to proceed with the day's business. Lt. Col. Vokey expressed concern about proceeding in contravention of his client's wishes, telling the presiding officer he believed going forward would violate his and other defence lawyers ethical obligations and threaten their bar membership. The defence was scheduled to voir dire (question) the presiding officer and argue two motions. The presiding officer told Omar Khadr that if his lawyers did not go forward with the proceedings scheduled, he would consider Omar Khadr's right to question him and argue the motions to be waived. Facing forfeiting their client's rights, defence lawyers went ahead under protest.

This is not the first time a defence lawyer has been ordered to move forward with representation against a client's wishes. Ali Hamza Al Bahlul, a Yemeni national facing trial by military commission, has repeatedly refused his military defence lawyer and asked to represent himself. In protest against the denial of his right to self representation, Ali al-Bahlul boycotted the proceedings. His military lawyer asked to withdraw citing his client's wishes and his ethical and professional obligations. The presiding officer in that case also ordered the lawyer to continue representing the detainee.

The presiding officer stated that the issue of Omar Khadr's conditions of detention would be considered later in the week. Amnesty International continues to observe the ongoing proceedings at Guantánamo, including the case of Omar Khadr.

[note: the proceedings on Day 1 (April 4) of this military commission did not deal with Omar Khadr's case].

# AMNESTY INTERNATIONAL

## PRESS RELEASE

AI Index: AMR 51/078/2007 (Public)  
News Service No: 082  
25 April 2007

### **USA / Guantánamo: Omar Khadr to face trial by military commission**

Reacting to the charges brought against Guantánamo detainee Omar Khadr, Amnesty International said:

“The treatment of Omar Khadr over the past five years exemplifies the USA’s disregard for international law in the ‘war on terror’. Unless the US authorities bring him to trial in a civilian court, taking full account of his age at the time of any alleged offences, he should be returned to Canada.”

Amnesty International reiterates its call to the US authorities to abandon trials by military commissions and to bring any prosecutions of Guantánamo detainees in the ordinary civilian courts. Anyone who is not to be tried in full accordance with international standards should be released.

#### **Background Information**

Canadian national Omar Khadr is accused of offences committed in the armed conflict in Afghanistan when he was 15 years old. Instead of taking his age into account when US authorities took him into custody in 2002, as they were obliged to do under international law, they subjected him to years of indefinite detention without charge in Guantánamo.

Omar Khadr, who has alleged that he has been ill-treated in Bagram and Guantánamo, was one of 10 detainees to be charged for trial by the earlier military commissions struck down as unlawful by the US Supreme Court in 2006. Omar Khadr has now been charged for trial under the Military Commissions Act, under procedures that fail to comply with international law and standards.

For further information, please see: *USA: Justice delayed and justice denied? Trials under the Military Commissions*

At <http://web.amnesty.org/library/Index/ENGAMR510442007> (For information on Omar Khadr and the issue of children, see pages 25-26).

# AMNESTY INTERNATIONAL

## PRESS RELEASE

### News Flash

AI Index: AMR 51/095/2007 (Public)

News Service No: 100

4 June 2007

### **Guantánamo: Amnesty International responds to Military Commission Judge's ruling to drop Khadr charges**

Jumana Musa, Amnesty International's legal observer at the military commission hearings in Guantánamo Bay for the last two years issued the following statement in response to today's significant ruling by the military commissions judge to drop charges against Omar Khadr:

"Today's ruling is the most significant setback since the U.S. Supreme Court threw out the original military commissions. It also signals that these commissions need to be scrapped and the detention facility at Guantánamo Bay must be closed now. The judge's decision clearly indicates that a fair trial is not possible within a system that is being developed as it proceeds. It raises more questions about the Bush administration and Congress' wisdom and logic in rushing to patch together a new system of justice, when there are fully functioning federal courts that can not only offer fair trials but also come with established procedure."

**For more information, please see *United States of America: Justice delayed and justice denied? Trials under the Military Commissions Act* on <http://web.amnesty.org/library/Index/ENGAMR510442007>**

# AMNESTY INTERNATIONAL

## External Document

AI Index: AMR 51/098/2007 (Public)

News Service No: 101

5 June 2007

## **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 defense 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 defense, which now consisted of a military defense 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 defense 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 it 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 Qaeda 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 Guantanamo, 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 Guantanamo as "enemy combatants," it asserts the right to hold them till the 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 than 75

or 80. This leaves hundreds of men who are detained at Guantanamo 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 to 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 Guantanamo 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 offenses. 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 Guantanamo, once and for all.

# AMNESTY INTERNATIONAL

## Public Statement

AI Index: AMR 51/147/2007 (Public)  
News Service No: 183  
25 September 2007

### **USA/Guantánamo: Military commissions incompatible with justice**

The USA should abandon military commissions because justice will neither be done nor be seen to be done in trials by these tribunals, which lack independence and can admit coerced evidence, among other flaws.

The Pentagon has indicated that it will resume military commission proceedings following yesterday's ruling by the Court of Military Commission Review (CMCR) a tribunal established by the Secretary of Defense in June 2007.

Trials under the 2006 Military Commissions Act (MCA) stalled in early June after two military judges dismissed charges against Canadian national Omar Ahmed Khadr and Yemeni national Salim Ahmed Hamdan on the grounds that the commissions lacked jurisdiction over them. These detainees are among the more than 300 foreign nationals still held in the US Naval Base in Guantánamo where Combatant Status Review Tribunals (CSRT) – administrative review bodies established by the Pentagon – had affirmed their classification as “enemy combatants”. The jurisdictional question arose because under the MCA, military commission trials are reserved for foreign nationals classified as “unlawful enemy combatants”.

In the appeal in Omar Khadr's case, the CMCR ruled that the military judge had erred by not allowing the government the opportunity to present evidence in support of its contention that Omar Khadr was an “unlawful enemy combatant”. It ruled that the military judge was also wrong to have found that he lacked the authority to decide whether the defendant was an “unlawful enemy combatant” for the purpose of establishing the military commission's jurisdiction.

It is not clear if the decision can or will be appealed to the federal US Court of Appeals for the District of Columbia Circuit.

Amnesty International considers that the absence of due process for Omar Khadr and the other Guantánamo detainees has left them arbitrarily detained in violation of international human rights law. They should either be charged and brought to fair trial in independent, impartial and competent tribunals, or released.

If the USA genuinely intends to bring any of the Guantánamo detainees to trial, it must do so in a way which demonstrates a commitment to restoring the rule of law. It should promptly charge any such detainee in the federal courts with recognizable criminal offences. Trials in the form provided for under the MCA as currently enacted are unacceptable, yet currently such trials appear to be the only ones being contemplated by the US administration.

With this in mind, and given the indications that the administration continues to seek to bring Omar Khadr and Salim Hamdan to trial by military commission under the MCA, Amnesty International calls upon the Canadian and Yemeni governments to join Amnesty International and others in doing all they can to persuade the USA to bring its treatment of these detainees into full compliance with international law. As long as the USA continues to fail to apply international fair trial standards, these two governments should move to protect their citizens by seeking their repatriation and, if there is sufficient and admissible evidence, arranging for a trial in their home country, which must meet international fair trial standards.

In Omar Khadr's case, the USA's failure to apply international law has meant that an individual who was 15 years old when he was taken into custody in Afghanistan in mid-2002 has been held for a quarter of his life in untried military custody, with no account taken of his age and his captors ignoring the requirement under international standards to do all they could to facilitate his rehabilitation and reintegration into society. The Canadian government should do what it can to make up for the USA's failure.

As US Secretary of Defense Robert Gates said in March 2007, "Guantánamo has become symbolic, whether we like it or not, for many around the world". The military commissions – a revised version of the military commission scheme found unlawful by the US Supreme Court in 2006 – are part of the reason why the Guantánamo detention facility has been widely condemned by the international community. The detention facility should be shut down, without transferring the human rights violations elsewhere.

**For more information, please see *USA: Justice delayed and justice denied? Trials under the Military Commission Act, March 2007***

**[http://web.amnesty.org/library/pdf/AMR510442007ENGLISH/\\$File/AMR5104407.p  
df](http://web.amnesty.org/library/pdf/AMR510442007ENGLISH/$File/AMR5104407.pdf)**