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## USA: The show trial begins Five former secret detainees arraigned at Guantánamo

06 June 2008

AI Index: AMR 51/056/2008

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*As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11<sup>th</sup>, 2001, can face justice.*

President George W. Bush, 6 September 2006

Speaking on the evening of the attacks of 11 September 2001, President Bush said that he had “directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice.” Nearly seven years later – on 5 June 2008 – the US government brought into a courtroom five of the men it says were involved in the 9/11 attacks. This was no ordinary court, however. It was a military commission room in the USA’s offshore prison camp in Guantánamo. The government intends to seek the death penalty against the five at their forthcoming joint trial.

The military commissions are designed to facilitate the conviction and even execution of foreign nationals designated as “enemy combatants” by the US military, as well as their continued detention in the event of acquittal, while keeping secret the intelligence methods used by the USA. Torture, enforced disappearances, and secret detention have been among these methods. Crimes by non-state actors have been met with crimes by state officials in the “war on terror”, and the government has developed a detention and trial system that may whitewash the abuses from its side of the ledger. For justice read injustice.

Amnesty International, which had an observer at yesterday’s arraignment proceedings, considers the 9/11 attacks to have been a crime against humanity, and has consistently called for justice and security to be pursued within a framework of strict adherence to international law. The US government has systematically failed in this regard.

The five men who appeared at the arraignment – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz ‘Ali (‘Ammar al Baluchi) and Mustafa al Hawsawi – were first detained in Pakistan in 2002 and 2003. Rather than being brought to trial, however, they were held in secret incommunicado detention by the Central Intelligence Agency (CIA) at unknown locations outside the USA for between three and four years. Their fate and whereabouts concealed, they became victims of enforced disappearance, like torture a crime under international law. Prolonged secret incommunicado detention can facilitate torture or other cruel, inhuman or degrading treatment and can itself amount to such treatment. At least one of the

defendants, Khalid Sheikh Mohammed, was subjected to the form of water torture known as “waterboarding”, simulated drowning. Which other “standard” or “enhanced” interrogation techniques were used against these and other CIA detainees has not been revealed by the US authorities, and any techniques used against the men, their conditions of detention, and the location of CIA detention facilities, remain classified at the highest level of secrecy.

Amnesty International considers that, by design or effect, the US government’s use of classification is concealing human rights violations, including possible crimes under international law.

The word torture was mentioned by the defendants on a number of occasions during the arraignment on 5 June. The defendants had clearly been told, however, that giving any specific details of their time and treatment in secret custody was off-limits. At one point in the proceedings, Khalid Sheikh Mohammed began chanting verses of the Koran. After a few minutes, the military judge interrupted him and explained that that while the defendant would be given an opportunity to speak, this would not be indefinite, and Mohammed here was using up his time. Khalid Sheikh Mohammed protested that, while he had been given “red lines and green lines”, the red lines that were not to be crossed involved torture and locations (of detention), not verses of the Koran. “I do not mention the torturing”, he said “I know this is a red line”.

The courtroom itself is designed to keep classified information from becoming public. For those observing the proceedings from a gallery separated from the courtroom by five large window panes of soundproofed glass, the sound they hear broadcast from the courtroom is on a 20-second delay, and the authorities can hit a mute button if what is being said is deemed classified. A security adviser – reportedly a private national security consultant – sits by the military judge, and his job is to cut the transmission feed when he believes the information being aired is classified. After such an occurrence, the judge and security advisor confer, with the judge making a determination as to whether or not the information was indeed classified. The presumption is in favour of classification. For the lawyers and other personnel in the court, if they become party to classified information they are bound not to disclose it, and any notes they have taken on the subject themselves become classified. The mute button was used on a number of occasions yesterday (see below).

The longest part of yesterday’s proceedings involved the right to counsel. A motion to postpone the arraignment had previously been filed on the grounds that lawyers for the five men (both military and civilian) had had insufficient time to build a rapport with their clients. These defendants were in detention for as long as five years or more before getting access to counsel more than a year after their transfer from secret custody to Guantánamo. Under such circumstances it would take time to establish the necessary trust and confidence which should form the basis of any attorney-client relationship. Yet several of the civilian lawyers had only recently received the necessary clearance and had met their clients for the first time shortly before the arraignment. Security clearance for Mustafa al-Hawsawi’s civilian counsel had not yet been received, while al-Baluchi’s civilian counsel had only been cleared at 9pm the night before the proceedings.

The motion for a postponement was denied, with no reason given as to why there could be no delay. After years of no trial proceedings, speed now seemed to be the order of the day. It is worth recalling here that the former Chief Prosecutor of the military commissions, Colonel Morris Davis, who resigned in 2007 after concluding that “full, fair and open trials were not possible under the current system” which “had become deeply politicized”, has alleged that the case of the 9/11

defendants have particularly fallen foul of this politicization. After these five so-called “high-value” detainees were charged in February 2008, Colonel Davis said in a radio interview that he was “not surprised. As I’ve stated before, there is some impetus to get these cases moving and to get some momentum... There will be a new administration coming in less than a year... And certainly getting some cases into the system, and particularly cases like Khalid Sheikh Mohammed, and energizing the families of the victims of 9/11 and getting them, you know, energized and engaged in this process will – I think the view is that’ll get some momentum behind this and make it hard to stop”.

The military judge, Marine Colonel Ralph Kohlmann, proceeded to explain to the defendants their right to counsel. Under the Military Commissions Act (MCA), unless they choose to represent themselves they must be represented by a US military lawyer. They can also choose to be represented by US civilian counsel with the appropriate security clearance, but the government will not pay for any such lawyers. The judge pointed out to the defendants the risks of self-representation, given the nature of the charges and their unfamiliarity of the law. He also asked the defendants if they understood that the charges carried the death penalty, to which Khalid Sheikh Mohammed replied “This is what I wish. I look to be martyred. I fought the Russians and now finally I will get what I want, I understand very well”. Ramzi bin al-Shibh also said that he “had been seeking martyrdom for five years”.

All five defendants said that they wanted to represent themselves. The military judge has accepted this in the case of Khalid Sheikh Mohammed, Walid Bin Attash, and ‘Ammar al Baluchi, but delayed decisions on the other two defendants.

Khalid Sheikh Mohammed said to the military judge “we have been tortured for five years. I meet them [lawyers] two times. You say I give you advice to let them represent you – but after five years under torture, then they transfer us to Guantánamo to this inquisition, and you say sit down and talk to my counsel. I will represent myself – I can ask him [counsel] questions”. The judge ruled that Mohammed could represent himself and that his military counsel could act as stand-by advisors. Walid bin Attash, having elected to represent himself, requested that both military and civilian lawyers act as stand-by counsel. When asked if he had read the rules and procedures of the military commissions, he responded that the authorities had refused to translate them for him. Walid bin Attash asked, in the event that “we are executed, will we be buried in Guantánamo or sent back to our home countries?” The judge did not answer. Walid bin Attash had also asked the judge if he, the judge, was arrested, how long it would take him to get a lawyer. Colonel Kohlmann told the defendant that he would have to learn how to ask relevant questions if he was to be allowed to represent himself.

Under the MCA the defendant has the right to represent himself if he so chooses, as long as “his deportment and the conduct of the defense [conforms] to the rules of evidence, procedure, and decorum applicable to trials by military commission”. If he fails in this regard, the military judge may wholly or partially revoke the defendant’s right to self-representation.

One of the occasions on which the sound to the observation gallery was blocked (for about a minute and a half) came after ‘Ammar al-Baluchi said that if the US government had given him a lawyer in the first days after his arrest, “I would have appreciated it greatly”. A US journalist present at the hearing has suggested that the sound was blocked just as it seemed al-Baluchi was about to describe the circumstances of his arrest. During his questioning on the right to counsel, al-Baluchi said that he was “not satisfied with the whole process”, including that he and his lawyer

could not speak freely. He said: "I am here after five years of torture. It does not make sense to bring me to justice after five years. The US government talks about human rights but failed to treat me as a human for five years." He continued that "even though the government tortured me free of charge for all of these years, I cannot accept the lawyers. They are a decoy, a decoration. They can't talk; there are no rules." He suggested that his counsel would not be able to "use their expertise in a place where jungle law is applied and where law is made up at night for political gains".

In the case of Ramzi bin al-Shibh – who was in shackles bolted to the floor – his military lawyer asked for a delay in the decision on representation, including because the defendant is on medication, raising questions about his competence to waive his right to counsel. The sound being fed to observers was again muted when Ramzi bin al-Shibh was speaking about why he was on medication. He said that he was "forced to take it" and that if he did not, "my situation will be worse than it was previously". The sound to the observation room was cut for some three to four minutes. Observers were later told that the sound had been cut under the Health Information Protection Act (HIPA). Such an explanation suggests that even if the US Constitution and international law are deemed by the US authorities not to apply to the detainees, this piece of legislation does.

Mustafa al Hawsawi's military lawyer moved to have the decision on his representation delayed, including on the grounds that al Hawsawi had been intimidated by other defendants into choosing self-representation. At a subsequent press conference the lawyer said that he had observed his client's mood deteriorate during the arraignment, and until al Hawsawi had come into the courtroom and joined his co-defendants, he had said that he wanted his military lawyer to act for him. It also seemed that al-Hawsawi did not understand some of the charges against him or the nature of the sentence he faced. His military lawyer pointed out that he had spent 20 hours with his client, but that he himself was in the same uniform that was associated with his client's detention. It would take time and effort to build a client-attorney relationship under such circumstances. The military judge postponed ruling on al Hawsawi's representation.

As there have been in previous commission proceedings, there were problems with the quality of interpretation. While Colonel Kohlmann noted the concern about this, he said that what was important was that the interpreter helped the accused to understand and present ideas between the defendant and counsel. According to Amnesty International's observer, the military judge did not seem overly concerned if the interpretation was not 100 per cent accurate. The right to interpretation – which should be competent and accurate for this right to be meaningful – is a fair trial right, as provided in the International Covenant on Civil and Political Rights and other international instruments. The UN Human Rights Committee has stated that this right is "of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence".

At a press briefing held in Guantánamo on the eve of the arraignment proceedings, Air Force Brigadier General Thomas W. Hartmann, the legal advisor to the convening authority in the Pentagon's Office of Military Commissions, said that "fair, just and transparent hearings in these cases is the No. 1 legal services priority of the entire Department of Defense". NGO delegates at Guantánamo to observe the arraignments were excluded from the briefing.

At a press conference on the evening of 5 June 2008 after the end of the arraignment proceedings, the chief of the US military defence lawyers for the military commissions said that

the system was geared to the prosecution. Quoting a country and western song, he said there "ain't no right way to do a wrong thing". Amnesty International agrees. The military commission system is fundamentally flawed and should be abandoned. Any trials should be moved to the federal courts on the US mainland. The death penalty should never be an option. In addition to full and fair trials for those individuals whom the government charges with recognizable criminal offences, there should be full accountability for any and all human rights violations committed by government agents.

The decision of the US government not to try those whom it claims perpetrated the 9/11 attacks in a fair and public trial in the USA, and instead submit them to an unfair trial in a secluded offshore military base, not only violates the rights of the defendants. The victims and their families have a right to see real justice done; to learn the full truth about what has happened; and to know beyond a reasonable doubt the identity of the perpetrators. The USA's approach, in addition to undermining the rule of law, also serves to deny the victims and their relatives those rights.

See also:

USA: Way of life, way of death: Capital charges referred against five former secret detainees, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/041/2008/en>.

USA: Another CIA detainee facing death penalty trial by military commission, 2 April 2008, <http://www.amnesty.org/en/library/info/AMR51/027/2008/en>.

USA: Impunity and injustice in the 'war on terror': From torture in secret detention to execution after unfair trial? 12 February 2008, <http://www.amnesty.org/en/library/info/AMR51/012/2008/en>.

USA: Law and executive disorder: President gives green light to secret detention program, August 2007, <http://www.amnesty.org/en/library/info/AMR51/135/2007/en>.

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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**INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM**

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