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## USA: More military commission proceedings at Guantánamo

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This week, the US government will be conducting further military commission proceedings at Guantánamo Bay in Cuba. Amnesty International will once again have an observer at these pre-trial proceedings.

Two of the three detainees – so-called “enemy combatants” – whose cases are due to come before military judges this week were under 18 at the time they were taken into custody. They are Mohammed Jawad, an Afghan national who was 16 or 17 years old at the time of his detention in Kabul in December 2002, and Omar Khadr, a Canadian national who was 15 years old at the time he was taken into US custody in Afghanistan in July 2002. Amnesty International considers that no one under 18 years old should ever have been transferred to Guantánamo, and that no one who was a child at the time of their alleged crime should be subject to a military commission trial. Moreover, these military commissions have no juvenile justice provisions whatsoever, as required under international law.

Omar Khadr is facing five charges, including a murder charge in relation to the death of US Army Sergeant Christopher Speer who was killed by a grenade during the firefight in which Omar Khadr was himself shot and captured. Mohammed Jawad is charged with attempted murder and intent to cause serious bodily injury in relation to another grenade incident in which two US soldiers and an Afghan interpreter were injured. The third detainee facing proceedings this week is Ahmed Mohammed Ahmed Haza al Darbi, a Saudi Arabian national, who has been charged with conspiracy and providing material support for terrorism in relation to his alleged involvement with *al-Qa’ida*.

The Pentagon has said that it expects as many as 80 detainees to face trial by military commission. To date 13 Guantánamo detainees have had charges sworn against them or referred on for trial under the Military Commissions Act of 2006 (MCA), including six “high-value” detainees whom the US government intends to try jointly and against whom it intends to seek the death penalty (the charges against these six have not yet been referred on for trial). Of the nearly 800 detainees who have been held at Guantánamo since detentions began there in January 2002, the only conviction by military commission to date is that of David Hicks, an Australian national, who pleaded guilty in March 2007 to providing material support for terrorism and was sentenced to seven years in prison. Six years and three months of this sentence was suspended under a pre-trial agreement which also saw him transferred to Australia to serve the remainder of the nine months there. He was released from prison in Adelaide in December 2007.

The USA’s military commission proceedings cannot be divorced from the backdrop against which they are being conducted. 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 will be victims of enforced disappearance, secret detention, secret transfer, torture or other cruel, inhuman or degrading treatment. Their treatment has not only been arbitrary and 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 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 specifically tailored to be able to turn a blind eye to government abuses.

Even though the commission system established unilaterally by the administration under a November 2001 Military Order was blocked by the US Supreme Court in June 2006, the successor version authorized by Congress under the MCA has not solved their shortcomings. Amnesty International believes that justice will neither be done nor be seen to be done in trials before these sub-standard tribunals, as it outlined in its March 2007 report, 'USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act', available at <http://www.amnesty.org/en/library/info/AMR51/044/2007>. Among the flaws of the military commissions are the following:

- The military commissions lack independence from the executive branch of government that has authorized and used systematic human rights violations against detainees;
- In violation of international law, the military commissions may admit information obtained under cruel, inhuman or degrading treatment or punishment. Although the military commission rules prohibit the admission of information obtained under torture, the US government's definition of torture clearly does not meet international law. For example, the USA has admitted to using "waterboarding", a form of water torture that simulates drowning. The US administration has said that this technique was authorized as lawful by the Justice Department. The authorities have refused to rule out the admission in military commission proceedings of information coerced from detainees by waterboarding;
- The pre-requisite for trial under the MCA is that the individual is an alien "unlawful enemy combatant", a status as used by the USA that is unknown in international law. Among those facing trial are civilians detained outside any zone of armed conflict. Using military tribunals to try civilians runs counter to international standards;
- The right to trial within a reasonable time is not guaranteed under the MCA. Indeed, even if a detainee is acquitted by a military commission, he may be returned to indefinite detention as an "enemy combatant" should the US administration so decide;
- The right to be represented by a lawyer of the detainee's choice is restricted;
- The rules on hearsay and classified information may severely curtail a defendant's ability to challenge the government's case against him;
- The right of appeal is limited, essentially to matters of law, not fact;
- The military commissions apply only to non-US citizens. They are discriminatory, in violation of international law.

Amnesty International continues to campaign for any trials of Guantánamo detainees to be held in the ordinary civilian federal courts on the US mainland. Anyone who is not to be charged with recognizable crimes and brought to trial in accordance with international fair trial standards should be released with full protections against further abuses. The government should drop any pursuit of the death penalty. The Guantánamo detention facility should be shut down.

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