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USA: Military commissions, like CSRTs, threaten to whitewash detainee abuse

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In the “war on terror”, detainees in US custody have been treated as potential sources of information first and criminal suspects a distant second. However, this secondary aspect is now coming into focus. Plucked from years of secret or virtually incommunicado detention, a few people held in the US Naval Base at Guantánamo Bay in Cuba are facing trial by military commission.¹

These trials cannot be divorced from the backdrop against which such proceedings would occur. The hallmarks of the USA’s “war on terror” detention regime – secret detention, prolonged incommunicado detention, and indefinite detention without charge – *per se* violate international law and are inherently coercive. Detainees have been subjected to repeated interrogations without access to lawyers or the courts. Interrogation techniques and detention conditions amounting to torture or other ill-treatment under international law have been authorized and used.

The military commissions are effectively tailored to fit the unlawful practices that have preceded them. Information coerced by cruel, inhuman or degrading treatment will be admissible. At the same time, the government may introduce evidence while keeping secret the methods used to obtain it.

To this extent, the military commission system mirrors the Combatant Status Review Tribunals (CSRTs), set up to review Guantánamo detentions in mid-2004, more than two years after detentions began at the base. The CSRTs consist of panels of three military officers who can rely on secret or coerced evidence in affirming or rejecting a detainee’s “unlawful enemy combatant” status. The burden is on the detainee, without legal representation and generally denied the possibility of obtaining witnesses or evidence, to disprove his “enemy combatant” status.

A recent study of CSRT records found that more than 14 per cent of detainees asked to see the classified evidence against them. All such requests were denied. In more than half of the cases where a detainee asked to call a witness for his CSRT hearing, the witness sought was an individual who was not a fellow detainee held at Guantánamo. *All* such requests for a witness from outside the base were denied. On the question of coerced evidence, the study found that:

“No Tribunal considered the extent to which any hearsay evidence was obtained through coercion...[T]he Tribunal usually makes note of allegations of torture, and refers them to the convening authority. This is less surprising than the fact that several Tribunals found a detainee to be an enemy combatant before receiving any results from such an investigation. While there is no way to ascertain the extent, if any, that witness statements might have been affected by coercion, fully 18% of the

¹ USA: *Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, 22 March 2007, <http://web.amnesty.org/library/Index/ENGAMR510442007>.

detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the Tribunal.... In each case, the panel proceeded to decide the case before any investigation was undertaken”.²

A CSRT finding of “unlawful enemy combatant” status makes the detainee eligible for trial by military commission. As well as having this “enemy combatant” label attached to them, detainees have also had their right to be presumed innocent systematically undermined by a pattern of prejudicial commentary. “Killers”, “terrorists”, and “bad people” are among the labels that have been applied to them by senior officials, including the Commander in Chief of the Armed Forces, the President.

President Bush issued an executive order on 14 February 2007 establishing military commissions under the Military Commissions Act (MCA), legislation largely drafted by officials of his administration and passed by Congress last September in the charged atmosphere of congressional elections and the fifth anniversary of the 9/11 attacks. Amnesty International is deeply concerned that the military commissions convened under this discriminatory legislation will lack the independence necessary to confront internationally unlawful activities that have been conducted under the authority of the President.

Ten detainees were charged for trial under the previous military commission system, established under a November 2001 presidential order, but held to be unlawful by the US Supreme Court in the landmark *Hamdan v. Rumsfeld* ruling in June last year. Those 10 individuals are likely to be the first to face trial under the revised commissions.

In addition, 14 “high-value” detainees were transferred to Guantánamo in early September 2006 from years of secret CIA detention for the stated purpose of trial by military commission. These 14 detainees were subjected to enforced disappearance, a crime under international law. Where they had been held, and how they had been treated, remains classified as “top secret”.

Their detentions are currently being reviewed by CSRTs in closed session because, according to the Pentagon, the 14 “might divulge highly classified information” about the CIA secret detention program. This presumably would be the same at their trials, at which the military judge can close proceedings to prevent disclosure of classified intelligence activities.

If this happened beyond the perimeters of the Guantánamo base, it would likely feature in the US State Department’s annual reports on human rights violations in other countries. The most recent entry on Cuba, for example, noted that the courts there “often failed to observe due process rights nominally available to defendants. While most trials were ostensibly public, trials were closed when there were alleged violations of state security.”³

Six months after their transfer to Guantánamo, the 14 so-called “high-value” detainees are still being denied access to lawyers even as the government builds its case against them. In addition, as a part of the CSRT process, the government has been releasing details of their alleged confessions to involvement in serious crimes. At the same time, it has censored from public view allegations of torture made by at least one of the detainees.⁴

Amnesty International believes that in at least some cases, perhaps a majority of the 24 cases of detainees of 14 nationalities currently identified as potential defendants, the military

² *No-hearing hearings. CSRT: The modern habeas corpus? An analysis of the proceedings of the government’s Combatant Status Review Tribunals at Guantánamo.* Mark Denbeaux and Joshua Denbeaux. http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

³ Cuba. Country Reports on Human Rights Practices, 2006. <http://www.state.gov/g/drl/rls/hrrpt/2006/78887.htm>.

⁴ See USA: *All allegations of torture must be investigated*, AI Index: AMR 51/045/2007, 15 March 2007, <http://web.amnesty.org/library/Index/ENGAMR510452007>.

commissions lack the competence – in the sense of having the jurisdiction under international law and standards – to conduct trials at all.

Civilians arrested outside of zones of armed conflict – as many Guantánamo detainees were, including the 14 transferred there in September – should not be tried by military tribunals of any kind. In similar vein, criminal offences should not be categorized as war crimes if they did not occur in an armed conflict. Simply labelling the context as a “war” does not justify bypassing civilian jurisdiction.

The military commissions will operate in something approaching a legal vacuum. Under the MCA, defendants cannot turn to international human rights law, the Geneva Conventions or the US Constitution for protection. The military commissions are part of a universe absent of judicial remedy for detainees and their families.

Exoneration will not necessarily end a detainee’s ordeal. Even if a detainee is acquitted, he may be returned to indefinite detention as an “enemy combatant”. In such circumstances, and with the right to *habeas corpus* already foreclosed, the right to trial within a reasonable time – guaranteed in international and US law, but not under the MCA – is rendered meaningless by a detention regime that has already kept the detainees in legal limbo for years.

The pervasive unlawfulness that has marked the past five years of detentions cries out for remedy and for full and fair trials. Yet these military commissions threaten to add a new layer of human rights violations by cutting corners in pursuit of a few convictions. In so doing, they would add to the injustice that the Guantánamo detention facility has come to symbolize.

On 7 March 2007, US Secretary of Defense Robert Gates acknowledged that “Guantánamo has become symbolic, whether we like it or not, for many around the world”.⁵ It since been reported that in his first weeks after taking over from Donald Rumsfeld, Secretary Gates argued that the detention facility should be shut down as quickly as possible, and that any trials of detainees held there should be moved to the US mainland.⁶

Amnesty International agrees. It is calling on the US government to abandon the military commissions and to bring any Guantánamo or other “war on terror” detainees it charges to trial in the ordinary federal courts, without recourse to the death penalty. The Guantánamo detention facility should be closed down.

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⁵ Defense Department Media Roundtable with Secretary Gates and Gen. Pace from the Pentagon, 7 March 2007, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3900>.

⁶ *New to job, Gates argued for closing Guantánamo*. New York Times, 23 March 2007.