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USA

Guantánamo: Day two of military judge questioning 9/11 accused about self-representation

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On 10 July 2008, military commission judge US Marine Colonel Ralph Kohlmann held further proceedings to question the men accused of orchestrating the attacks of 11 September 2001 about their decision to represent themselves at their forthcoming death penalty trial in the US Naval Base in Guantánamo Bay, Cuba. Amnesty International had an observer at the proceedings.

The primary purpose of the hearings was to inquire of each of the accused individually about whether they had been intimidated before or during their arraignment on 5 June 2008 into making a choice to represent themselves, or whether this decision had been made knowingly and voluntarily. Judge Kohlmann had questioned two of the accused, 'Ali 'Abd al-'Aziz 'Ali ('Ammar al Baluchi) and Mustafa al Hawsawi at individual sessions held on 9 July (see <http://www.amnesty.org/en/library/info/AMR51/076/2008/en>). He had scheduled sessions for the other three men, Khalid Sheikh Mohammed, Walid bin Attash and Ramzi bin al-Shibh on 10 July. In the event, Ramzi bin al-Shibh refused to come to his session. It seems unlikely that the military judge will question him again on the matter of legal representation until the issue of Ramzi bin al-Shibh's mental competency is addressed at a hearing scheduled to take place next month (see <http://www.amnesty.org/en/library/info/AMR51/074/2008/en>).

Both Khalid Sheikh Mohammed and Walid bin Attash denied that they had been intimidated or that any intimidation had taken place. Walid bin Attash said that he had communicated his decision to represent himself to his lawyer before the arraignment. He said that it was only at the arraignment that he met his co-accused for the first time in the past five years. He said: "To assure you about my decision: I met with the lawyer about two months ago. As for my other four brothers, I have not met them during the last five years, until we were coming to the courtroom. My decision to represent myself was communicated to my lawyer. He is here – he is my witness about my decision".

Khalid Sheik Mohammed said that the five men had not met for five years; that there was no intimidation; that no one could threaten him nor could he threaten anyone: "We are not gangs in US jails. Everyone respects each other's convictions".

Walid bin Attash said that he would represent himself and that he wanted to drop his assigned military lawyers and be assisted only by his civilian lawyer. The judge explained that under the rules, the military lawyers that had been appointed to represent him would now act as his standby

lawyers – an accused representing himself was not required to call on the assistance of standby counsel, but they were there to assist and to take over in case his right to represent himself was withdrawn by the military judge.¹

Walid bin Attash explained that his decision to represent himself was his “religious duty. I believe in the Koran. In the Koran, god is protector and defender of all faithful. The defence relates to the closeness of the individual to God. Given my faith, I do not need a lawyer to defend me. I want my relation to be directly with God, This is my reason: religious. There is a religious justification to it.”

After the two days of proceedings on this issue, the question of legal representation for the five men has been so far resolved as follows:

Khalid Sheik Mohammed will represent himself and has asked his military lawyer to act as standby counsel and his two civilian lawyers were confirmed by the judge as legal consultants;²

Walid Bin Attash will represent himself. Over his objection, but pursuant to the rules, the judge appointed his military lawyers as his standby counsel and his civilian counsel as his legal consultant. As Walid bin Attash has said that he does not wish to work with the military lawyers, the civilian lawyer will take the lead advisory role;

Ramzi Bin al-Shibh’s absence from the proceedings means that his military lawyers, as well as his civilian counsel will continue to act on his behalf for the time being;

‘Ammar al Baluchi will represent himself; his military lawyers will act as standby counsel and his civilian counsel as legal consultants;

Mustafa al Hawsawi has yet to make up his mind on the question of legal representation. The judge has ordered the military lawyer assigned to the case to remain on it, and the civilian lawyer could serve as a legal adviser, unless and until al Hawsawi indicated to the contrary.

While the question of legal representation is a crucial one, it must not be forgotten that these five men were denied legal representation for years. Before being transferred to Guantánamo in 2006, they were held in secret incommunicado detention by the Central Intelligence Agency (CIA) for between two and three years after being arrested in Pakistan in 2002 and 2003. Their fate and whereabouts concealed, they became victims of enforced disappearance. The government has

¹ Under Section 949a(3) of the Military Commissions Act, the defendant will be able 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.

² Rule 506 of the military commission rules states: “The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by the detailed [military] defense counsel. The accused is not entitled to be represented by more than one military counsel.” Under this rule, “Subject to the discretion of the military judge, and such regulations as the Secretary of Defense may prescribe, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under [rule] 502.”

confirmed that 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 him and the 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.

Even if represented by security-cleared lawyers, the accused may face a possibly insurmountable barrier in relation to testing certain classified evidence used against them, an obstacle even greater in the case of those representing themselves. For military commissions convened under the Military Commissions Act, any classified information “shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security”. The prosecution may be permitted to introduce evidence while protecting from disclosure “the sources, methods, or activities by which the United States acquired the evidence”, if the military judge finds that the evidence is “reliable” and the sources, methods or activities classified. An unclassified summary of the “sources, methods, or activities” may be provided to the defence, but only “to the extent practicable and consistent with national security”. Of overriding concern is the applicability of these provisions even to any classified evidence that “reasonably tends to exculpate the accused”. Thus, the defendant may be denied access to some or all government evidence that would serve to prove his innocence, if that evidence is classified and the government with the assent of the military judge considers it “impracticable” to provide a summary version. The prosecution may also object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take “suitable action to safeguard such classified information”.

In the course of pointing out to Khalid Sheikh Mohammed the disadvantages of representing himself, and in particular in relation to the question of classified information, the military judge noted that there was a lot of such material, to which Khalid Sheikh Mohammed responded, “I know. It’s five years torturing, There is sure to be a lot.” Judge Kohlmann went on to say that if Khalid Sheikh Mohammed represented himself, his standby counsel could look at classified documents but would be prohibited from disclosing the contents to him. Khalid Sheikh Mohammed continued: “May I ask, will I be able to see evidence from when we were arrested in March 2003 or only after that?” No reply was forthcoming.

Walid bin Attash said: “The accusation is against me. My lawyer [who can see the classified material] is not going to be sentenced. I feel that I have a right to review classified documents before trial. I am facing the death sentence.” He asked: “As a judge appointed by the US government, as I am going to receive the death penalty, do you consider this a fair trial, a just trial?” The judge responded that his personal views were irrelevant.

In similar vein, Khalid Sheikh Mohammed said “It is a capital case - the death sentence. It makes no sense that I cannot see classified evidence”. Asked later if he understood the rules about classified documents and the requirement that he will have to abide by the commission rules – and that if he does not, his self-representation would be terminated and his US military lawyer would take over – Khalid Sheikh Mohammed responded, “I understand, but it is not acceptable”.

It is clear that the right of the accused who choose to represent themselves in their trial proceedings is at this time a right in name only. It has no real substance. Detained in isolation in Guantánamo's Camp 7 – the location and conditions of which remain classified – without access to a law library, computers, witnesses, research resources, or certain classified materials, and with the difficulties of communicating with their standby legal counsel, their right to conduct an effective defence is clearly severely curtailed.

The US has had custody of these men for years. When they were transferred to Guantánamo in September 2006, President Bush had said that it was for the purpose of bringing them to trial by military commission (indeed, he exploited their cases to seek congressional approval of the Military Commissions Act). Nearly two years on, the authorities have still failed to put processes in place to facilitate the right to defence, even under the fundamentally flawed military commission procedures (which already curtail the right to be represented by counsel of choice).

The quality and availability of translation and interpretation has long been an issue at the hearings and Guantánamo more generally. The failure to ensure translation of documents for any accused representing themselves was also raised during yesterday's hearings

When Colonel Kohlmann asked whether Walid bin Attash had received some court documents to be reviewed during today's hearings, he said that he had only that morning received the translation of the Judge's order of 1 July relating to the conduct of the hearings to take place on 9 and 10 July. At the time he received the translation he said he was handcuffed and could not read it. He also said that he had not received another communication from the judge that was issued on 8 July. The judge then called a recess to give Walid bin Attash time to read the translated documents. In the course of the proceedings it became clear that no system was in place to ensure that documents in English were translated into the language of the accused, including those who are representing themselves. The judge said that he would take the issue "under advisement".

Everything that Khalid Sheikh Mohammed or his co-accused says or writes is deemed presumptively classified. Yet there is reported to be no system in place to declassify such information for the purpose of submitting it to the commission or to his standby counsel. Khalid Sheikh Mohammed apparently wrote to his lawyers in May and June, but the letters were never received. It was also revealed that he had written a motion for submission to the court on 8 July; but it had not been forwarded to the judge. In contrast, the prosecution had drafted and filed a motion on the same day – that was submitted to the judge without a problem.

At yesterday's hearing it was revealed that Khalid Sheikh Mohammed is not allowed to have A4 paper, on which motions must be filed with the judge. Colonel Kohlmann told him to submit this and other matters (including difficulties encountered in communicating with counsel) in writing to the court. He is therefore now in the position of having to write a motion to request the paper on which to write a motion. When he does write such a motion, the written request will be deemed presumptively classified. Will the authorities have the procedures in place to ensure it reaches the judge?

Amnesty International reiterates its call to the US government to abandon these trials by military commission and turn to the ordinary federal courts instead. At the same time, it should drop its pursuit of the death penalty.

See also:

USA: 9/11 defendants warned on lack of access to classified information and other disadvantages of self-representation, 10 July, <http://www.amnesty.org/en/library/info/AMR51/076/2008/en>.

USA: Guantánamo: Military judge to question capital defendants on decision to represent themselves, 8 July 2008, <http://www.amnesty.org/en/library/info/AMR51/074/2008/en>.

USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody, 2 July 2008, <http://www.amnesty.org/en/library/info/AMR51/071/2008/en>.

USA: The show trial begins. Five former secret detainees arraigned at Guantánamo, 6 June 2008, <http://www.amnesty.org/en/library/info/AMR51/056/2008/en>.

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>

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