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Hamdan case tests legality of Guantánamo military commissions

On 28 March 2006, the US Supreme Court will begin to hear arguments in the case of Salim Ahmed Hamdan regarding the legality of trials before military commissions at Guantánamo Bay, Cuba. Despite the Supreme Court challenge the US government is going ahead with proceedings before the commissions, with pre-trial hearings scheduled to take place next week.

The Supreme Court faces an enormous responsibility in the Hamdan case. At stake are principles of fair trial, constitutionality and equality before the law -- basic values on which the entire US legal system is based. Amnesty International will be watching the Supreme Court case with great interest, while continuing to call for an end to the military commissions and the closure of the detention facility at Guantánamo Bay altogether. The US government should now take this opportunity to show its commitment to international human rights standards and abolish trials by military commission at Guantánamo and revoke the Military Order which enables them.

AI is concerned that, far from abandoning military commissions, or putting cases on hold pending the Supreme Court's decision, the US government seems determined to push ahead with these sham trials. Indeed, in January the government filed a petition seeking to nullify the Hamdan appeal, citing a law passed by Congress in December 2005 which severely curtails the right of Guantánamo detainees to bring cases before the US courts. The government argued that the law should be applied retroactively to more than a 150 pending Guantánamo appeals, including Hamdan. Although this issue has yet to be decided by the Supreme Court, the government's stance presents yet another obstacle to justice in the cases.

Amnesty International has repeatedly urged the US government to abolish the commissions as they breach fundamental standards for fair trial. It is deeply concerned that US authorities are proceeding with pre-trial hearings at Guantánamo despite their serious flaws which, at worst, include possible death sentences and the admission of evidence obtained under torture, as well as severe limitations to the right of appeal and restrictions on the right to a lawyer of one's own choice. They are also discriminatory in that only foreign nationals are subjected to such unfair procedures, which would not be permitted for trials of US citizens.

The US government has recently announced that it is considering banning statements obtained under torture from military commission proceedings. Amnesty International believes that such a step can only be welcomed if the ban is to include all forms of cruel, inhuman and degrading treatment as required by the UN Convention against Torture. Otherwise, the US administration's limited definition of what constitutes torture will render such a ban meaningless. In addition, since the commissions are constructed

at the whim of the executive, no rule change indicates permanence. This move underscores the lack of any certainty in the commission rules from day to day.

Among the detainees who will appear before the commissions in two weeks' time are Omar Khadr, a Canadian citizen who was just 15 when taken into US custody in Afghanistan, and Binyam Mohammad al-Habashi, a victim of the US practice of rendition.

Both Omar Khadr and Binyam al-Habashi have alleged that they have been subjected to torture and other ill-treatment whilst at Guantánamo and elsewhere. AI is particularly concerned that Omar Khadr is facing trial by military commission on the basis of alleged acts committed when he was a child. Throughout his detention he has been held as an adult and interrogated repeatedly without a lawyer or the presence of a parent or guardian – treatment which violates international standards which recognize that children are entitled to special care and protection. Such circumstances would render his trial in any adult court unfair.

Amnesty International has sent an observer to each of the pre-trial hearings at Guantánamo and will attend the next round of proceedings. AI's observer Jumana Musa said:

"What has been most apparent in observing these hearings is that the lack of rules and established process make it difficult, if not impossible, to plan an effective defense. With rules that are constantly changing and no guidance from past precedent or case law, the accused and his lawyer are left with little or no guidance. The result is that not only are a significant number of fair trial rights severely restricted or totally absent, but the process itself appears ad hoc. Although lawyers for the prosecution and defense have been zealous and competent, the system is designed to ensure convictions despite a vigorous and well reasoned defense. Crimes were created to fit the evidence by the same body that selected and charged the detainees, wrote the rules, and selected the panel to hear the case. The presiding officer is answerable only to the Appointing Authority who appointed him. In such a circular system, no trial can be 'full and fair' "

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