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USA: Double standards or international standards? Crucial decision on 9/11 trial forum 'weeks' away

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As part of our commitment to the principle of universality of human rights, the United States commits to working with our international partners in the spirit of openness, consultation, and respect and reaffirms that expressions of concern about the human rights situation in any country, our own included, are appropriate matters for international discussion

US Human Rights Commitments and Pledges, April 2009[1]

The next few weeks may be the last opportunity to influence whether five Guantánamo detainees accused of involvement in the attacks of 11 September 2001 (9/11) are tried in US civilian court or in front of military commissions.[2] Over more than eight years, Amnesty International has called for anyone responsible for the 9/11 attacks to be brought to justice in fair trials in accordance with international standards.[3] The organization would consider any decision to use military commissions for these trials to be an unjustifiable U-turn by the US administration and a serious setback for human rights.[4]

On 13 November 2009, Attorney General Eric Holder announced that five detainees held at the US Naval Base in Guantánamo Bay in Cuba and previously charged by the Bush administration for trial by military commission would be transferred for prosecution in civilian federal court in New York. He said that "After eight years of delay, those allegedly responsible for the attacks of September the 11th will finally face justice."[5] An accompanying Justice Department press release asserted that "the Attorney General and the Secretary of Defense understand and share the concern of the victims of terrorist attacks about the length of time it has taken to bring the perpetrators to justice. Justice has been delayed far too long."[6]

More than five months later, however, the delay continues and the five detainees – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, 'Ali 'Abd al-'Aziz and Mustafa al Hawsawi – remain in Guantánamo, where they have now been held for three and a half years without trial. Prior to that, they had been detained incommunicado by the USA for up to four years at undisclosed locations, subjected to the crime under international law of enforced disappearance and other human rights violations.

This US administration has been in office for more than 15 months. It has charged only one Guantánamo detainee for trial in federal court.[7] Regardless of the failings of the previous administration, the USA's failure to ensure within a reasonable time fair trials or release of other detainees is unacceptable, and violates the right to trial without undue delay.[8] A fully functioning civilian judicial system, with the experience, capacity and procedures to deal with complex terrorism prosecutions, was available from day one.

This federal judicial capacity has been recognized by, among others, the USA's chief law enforcement official himself. In his November 2009 announcement, Attorney General Holder said "I am confident in the ability of our courts to provide these defendants a fair trial, just as they have for over 200 years. The alleged 9/11 conspirators will stand trial in our justice system before an impartial jury under long-established rules and procedures." Although such cases, he said, "can often be complex and challenging, federal prosecutors have successfully met these challenges and have convicted a number of terrorists who are now serving lengthy sentences in our prisons." Trained and experienced personnel would be able to deal with "the security challenges posed by this case", he added.

Since then nothing has changed with the US federal courts. They remain open for business and with the capacity and experience to conduct such trials. What has changed is the domestic political temperature. Attorney General Holder's announcement was met with something of a political backlash which in turn, it seems, is causing a degree of backtracking by the executive. To the extent that it is not the Attorney General steering this issue raises further concern that political considerations rather than matters of law will now determine the degree of judicial independence and fairness of procedures for the trials of these individuals.

On 14 April 2010, Attorney General Holder told the US Senate Judiciary Committee that the administration was reviewing the question of where to prosecute the five detainees and that "no final decision has been made about the forum" in which they would be tried. He said "we expect that we will be in a position to make that determination, I think, in a number of weeks". He said that the question of where the men should be tried was "a very close call" and that there were many legal, national security and practical factors" that had to be taken into account. He said that "New York is not off the table", but that concerns expressed by local officials and the community about locating the trial in New York City had to be considered.

In a speech the following day, Attorney General Holder reiterated his confidence in the federal courts: "Our civilian courts have well-established rules, significant experience and more than 200 years of precedents", he said. "In short, they have a reliability that establishes credibility. Although I'm confident we've done a good job of reforming and improving military commissions, they do not, yet, have the same time-tested track record of civilian courts."[10]

Why then, would the US authorities risk prosecuting anyone, let alone in one of the highest profile cases in decades, in an essentially untested tribunal the international reputation of which is so tainted, which lacks the institutional independence of the ordinary federal judiciary, and which by any measure fails to include the full range of fair trial procedural guarantees recognized as necessary in trials before the ordinary courts?

"Our civilian courts are well respected internationally", Attorney General Holder continued, reiterating what he had written to US Senators two months earlier when he said that "our partners overseas… have great faith in our criminal justice system".[11] "Our allies are comfortable with the formal and informal

The task force established under President Obama's 22 January 2009 executive order to close the Guantánamo detention facility is reported to have recommended that about 35 of the detainees be prosecuted by the USA, either in federal courts or military commissions, while a further 48 should be held without charge or trial. The administration has proposed purchasing Thompson Correctional Center in Illinois, including for the indefinite detention in military custody of such detainees, but is still seeking congressional support for this plan. Meanwhile releases of other Guantánamo detainees have been few and slow coming, including because of the USA's refusal to allow detainees who cannot be returned to their home countries for fear of the human rights violations they would face there to be released in the US mainland.[9]

Over the past year, US detentions in the context of counter-terrorism – particularly the question of what to do with the Guantánamo detainees – have taken on a renewed domestic political dimension that has proceeded without any regard for the USA's international human rights obligations. Congress has blocked progress on the detainee cases in a variety of ways, and further legislation is pending. On 2 February 2010, for example, a number of US Senators introduced proposals aimed at cutting off funding for the trials of the five detainees whose prosecution in federal court Attorney General Holder announced in November 2009. On 4 March 2010, Senators John McCain and Joe Lieberman introduced another bill – the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 – into the Senate. Senator McCain, emphasizing his claim that the USA was engaged in a global "war", said that the bill would authorize detention without charge "for the duration of hostilities" of anyone labelled as an "unprivileged enemy belligerent". It would prohibit any such individual from being provided a lawyer after arrest – "we should not be providing suspected terrorists" with defence lawyers, Senator McCain said. If it eventually was decided to hold a criminal trial in such a case, he added, his bill would require exclusive use of military commissions.

mechanisms to transfer terrorism suspects to the United States for trial in civilian court."[12] He expressed the "hope" that other governments would "grow more willing to cooperate with commission trials" as the USA provided proof of their "effectiveness and fairness". Amnesty International does not believe that any such proof will come with practice and considers that no government should offer its cooperation with trials that do not meet international standards of fairness and which discriminate in the fairness of their procedures, on the basis of national origin alone and at the arbitrary discretion of the executive. All should be urging the USA to abandon its military commission system in favour of the same form of trials which the US government would be compelled to provide its own citizens in civilian federal courts.

Amnesty International opposes the use of military commissions to try the detainees currently held at Guantánamo Bay. The UN Basic Principles on the Independence of the Judiciary state:

> "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".[13]

The UN Human Rights Committee has stated, in its General Comment interpreting the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights (ICCPR), that the trial of civilians (anyone who is not a member of a state's armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is "necessary and justified by objective and serious reasons", and where "with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".[14]

In a speech in May 2009, President Barack Obama had said that, "where feasible", Guantánamo detainees would be prosecuted in civilian federal courts.[15] The US government has pointed to no reason showing why trials of these five detainees in federal court would be unfeasible. Only domestic politics are getting in the way. Internal affairs of a state provide no justification for a state's failure to abide by its international obligations.[16]

The military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice. Amnesty International has opposed use of the military commissions ever since President George W. Bush signed an executive order in November 2001 establishing them for the trial of alien "enemy combatants" in what he called the "war on terror".[17] That system was overturned by the US Supreme Court in 2006, but was replaced with a slightly revised system established under the Military Commissions Act (MCA) of 2006. President Obama signed a revised MCA into law in October 2009.

Especially given the continuing failure of the USA to meet its obligations of independent investigation, accountability, justice, and effective remedy, for the now well-documented allegations of torture and other ill-treatment, enforced disappearance, and other similar human rights violations against the individuals selected for trial by military commission, the military commissions cannot be divorced from the unlawful detention and interrogation regime for which they were developed. Neither a shift in location for such trials, nor a modification of the rules under which they operate, can cleanse them of this stained association or their own ill-conceived origins.

Even under the revised MCA passed in 2009, the military commissions will not meet international fair trial standards. International law requires that trials be conducted in independent courts; military commissions are not independent. As already noted, trial of civilians by military tribunals is inconsistent with international standards, especially when civilian courts are readily available. Applying inferior trial protections on the basis of nationality – US nationals cannot be tried by the military commissions – would violate the right to equality before the law, including as enshrined in article 14(1) and 26 of the ICCPR.[18] Indeed, the fact that under US law, US citizens who were accused of precisely the same acts of

which these men are accused, could not be tried by the military commissions but only by the ordinary US courts, further demonstrates that the military commissions cannot even be said to meet the standards of necessity articulated by the UN Human Rights Committee.

The USA will not only be guilty of resorting to two standards of justice – reserving a second class version for selected foreign nationals – but also of double standards, directly contradicting its stated commitment to universality and accountability. Releasing the State Department's latest report on the human rights records of other countries, Secretary of State Hillary Clinton said that the USA is committed to the universality of human rights and to "holding everyone to the same standard, including ourselves."[19] In the entry on Egypt in that very report, for example, the USA criticized emergency legislation under which executive referral of criminal cases to emergency or military courts lacking "constitutional protections of the civilian judicial system" could be made. The State Department also reported that in Egypt during 2009 "there were cases of pre-trial detention exceeding legal limits."

Here, within the USA's own jurisdiction, Khalid Sheikh Mohammed and his co-defendants have been held without trial for up to seven and a half years. The US administration is considering prosecuting them before military tribunals lacking the procedural guarantees of fairness applicable in the civilian justice system, even despite the fact that it has previously acknowledged that the federal courts are available and capable of handling the cases.

With the question of double standards in mind, one might recall a once-secret memorandum written in the US Justice Department in 2005 – giving the green light to torture or other ill-treatment against detainees, such as these five men, held in secret US custody:

> "Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques… nudity, water dousing, sleep deprivation, and food deprivation… We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise".[20]

A clear break from the past must mean an end to such double standards. It must mean an end to military commission trials. Indeed, along with the question of whether the USA can be persuaded to abandon indefinite detention without charge or criminal trial of terrorism suspects in what it considers a global "war" against *al-Qa'ida* and associated groups, the decision as to which forum will be chosen for trials in this context will be a defining moment in the USA's post-9/11 history. A decision to use military commissions rather than the readily-available civilian courts will symbolize continuity with the assault on international human rights standards that began under the administration of President George W. Bush; turning to the time-tested ordinary courts will represent a real break from the double standards of the past and a positive step towards living up to the USA's international legal obligations and to the Human Rights Commitments and Pledges this administration made in April 2009.

Amnesty International has long called for any Guantánamo detainee whom the USA intends to prosecute to be promptly charged and brought to fair criminal trial in an independent and impartial tribunal applying fair trial standards. Any detainee the USA does not intend to prosecute should be immediately released. Any plan to close the Guantánamo detention facility must ensure that closure does not come at the expense of full respect for human rights. Turning back to military commission trials, where justice will neither be done nor seen to be done, would be a huge step backwards – that is to say, in exactly the wrong direction.

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[1] Available at http://www.state.gov/documents/organization/122476.pdf
[2] Amnesty International has been calling on the Obama administration to abandon military commissions. See, for example, USA: The promise of real change. President Obama's executive orders on detentions and interrogations, February 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en, and US administration wavers on civilian 9/11 trial, 11 March 2010, http://www.amnesty.org/en/library/info/AMR51/021/2010/en
[3] See, for example, letter from Amnesty International to President George W. Bush, 21 September 2001, http://www.amnesty.org/en/library/info/AMR51/144/2001/en
[4] See also, USA: Military commission proceedings against Omar Khadr resume, as USA disregards its international human rights obligations, 26 April 2010, http://www.amnesty.org/en/library/info/AMR51/029/2010/en
[5] Attorney General announces forum decisions for Guantánamo detainees, 13 November 2009, http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html. Amnesty International welcomed the decision in relation to the five as a positive, if belated, development.USA: Five more Guantánamo detainees to be tried in federal court, 13 November 2009, http://www.amnesty.org/en/library/info/AMR51/116/2009/en
[6] Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees, 13 November 2009, http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html
[7] Ahmed Khalfan Ghailani. See Amnesty International Urgent Action, USA: From Secret Detention to the Death Penalty? 3 July 2009, http://www.amnesty.org/en/library/info/AMR51/081/2009/en, and update 8 October 2009, http://www.amnesty.org/en/library/info/AMR51/110/2009/en.
[8] Under international law, persons who are detained pending trial on criminal charges must be tried within a reasonable time or released pending trial (Articles 9(3) of the ICCPR, article 7(5) of the American Convention, article 5(3) of the European Convention, article 60(4) of the ICC Statute). Furthermore, international law requires that proceedings in criminal cases be completed without undue delay (Article 14(3)(c) of the ICCPR, article 8(1) of the American Convention, article 6(1) of the European Convention, article 67(1)(c) of the ICC Statute). This extends not just to the trial itself, but also to periods of pre-trial detention.
[9] See USA: Still failing human rights in the name of global 'war', January 2010, http://www.amnesty.org/en/library/info/AMR51/006/2010/en, and USA: Daily injustice, immeasurable damage, 5 March 2010, http://www.amnesty.org/en/library/info/AMR51/020/2010/en.
[10] Attorney General Eric Holder speaks at the US Constitution Project Awards Dinner, 15 April 2010, http://www.justice.gov/ag/speeches/2010/ag-speech-1004152.html
[11] Attorney General Letter to Senators on detention, interrogation of Umar Farouk Abdulmutallab, 3 February 2010, http://www.justice.gov/opa/pr/2010/February/10-ag-119.html
[12] Attorney General speaks at US Constitution Project Awards Dinner, *op. cit.*
[13] UN Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[14] UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc CCPR/C/GG/32, 23 August 2007, para. 22.
[15] See USA: President Obama defends Guantánamo closure, but endorses 'war' paradigm and indefinite preventive detention, 22 May 2009, http://www.amnesty.org/en/library/info/AMR51/072/2009/en
[16] Indeed, not even provisions of the internal *law* of a state may be invoked as justification for its failure to perform a treaty: UN Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 4; 1969 Vienna Convention on the Law of Treaties, article 27; Articles 3 and 32 of the Articles on Responsibility of States for internationally Wrongful Acts, UNGA resolution 56/83 of 12 December 2001.
[17] See, for example, USA: Presidential order on military tribunals threatens fundamental principles of justice, 15 November 2001, http://www.amnesty.org/en/library/info/AMR51/165/2001/en, and 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
[18] See Trials in error: Third go at misconceived military commission experiment, July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en.
[19] Remarks to the press on the release of the 2009 Country Reports on Human Rights Practices, 11 March 2010, http://www.state.gov/secretary/rm/2010/03/138241.htm.
[20] Re: Application of United States obligations under Article 16 of the Convention Against Torture to certain techniques that may be used in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.