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USA: Not too late to abandon military commissions

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Military commission proceedings are taking place this week at the US Naval Base at Guantánamo Bay in Cuba, including on more government motions to suspend proceedings while the administration works with Congress to reform procedures under the Military Commissions Act of 2006 (MCA). These are hearings on procedural issues, not trials on the merits.

On 14 July 2009, the chief prosecutor in the Office of Military Commissions, US Navy Captain John Murphy, said that his office was preparing cases against some 66 Guantánamo detainees and was "awaiting our direction from the administration" as to whether to proceed to trial by military commission in any of the cases. At a Senate hearing a week earlier, the General Counsel for the US Department of Defense, Jeh Johnson, indicated to the Armed Services Committee that the administration had not yet decided which cases would go to trial, and in which forum.

Amnesty International continues to urge the USA, as part of the shutting down of the Guantánamo detention facility, to abandon its military commission experiment, begun by President George W. Bush in November 2001 and revised under the MCA in September 2006. The organization believes that the military commissions cannot be a part of any real solution to the disregard for human rights that has marked the USA's response to the attacks of 11 September 2001. De-militarizing trials of Guantánamo detainees and others accused of similar conduct should be a key part of bringing this regrettable chapter to a close and towards ensuring the USA's future respect for its human rights obligations.

Amnesty International fully recognizes that it was a previous US administration that initiated the military commission experiment and later obtained congressional approval for substantive parts of its scheme. The organization nevertheless considers that no amount of tinkering, with or without congressional approval, can render the discredited machinery of the commissions capable of ensuring that, in any trials before them, justice will both *be done and be seen to be done*, and that equality before the courts and equal protection of the law, and other international standards, will be fully respected and fulfilled.

In a statement on 15 May 2009, President Barack Obama said that his administration would reform the military commissions to make them "a legitimate forum for prosecution, while bringing them into line with the rule of law". Among the reforms would be to bar the admission at trial of statements obtained under interrogation techniques that violated the prohibition, under US law, of cruel, inhuman or degrading treatment; a tightening of the rules on the use of hearsay evidence; and "greater latitude" for detainees to choose their US military lawyers. In a major national security speech on 21 May 2009, the President said that his administration would work with Congress to "ensure that these commissions are fair, legitimate and effective". Legislation to amend the MCA is currently under development.

In his 21 May national security address, President Obama said that, "when feasible", trials of Guantánamo detainees would be conducted in federal court, but military commissions would be retained for trials of detainees "who violate the laws of war", where there was a need to protect "sensitive sources and methods of intelligence-gathering", or where there was a need to use "evidence gathered from the battlefield that cannot be effectively presented in federal courts".

President Obama is seeking to reform what, as a presidential candidate in 2008, he had described as an "enormous failure". Amnesty International considers that this military commission experiment failed, as

it was doomed to, because its design was never actually about determining criminal responsibility through fair trial. It was about short-changing justice by weighting the system in favour of the government. The organization considers that the commissions have been so tainted as to put them beyond effective reform.

Amnesty International described in 2007 its concerns about how the rules and procedures under the MCA failed to offer full guarantees of fair trial.¹ The organization believes that even if some of the shortcomings of the military commissions are addressed through reforms, there would remain a number of reasons why they would remain incompatible with international standards.

- The military commissions were conceived in 2001 as part of a global war paradigm under which human rights principles have been relegated or disregarded. Reborn under this framework in 2006 with congressional approval, the commissions are set to be resuscitated in 2009 as a part of a continued sweeping invocation and application of a body of international law designed only for the exceptional context of international armed conflicts, to situations where it is the ordinary systems of criminal justice in a framework of international human rights that should apply.
- The military commissions are not tribunals of demonstrably legitimate necessity, but creations of political choice. The USA has a fully functioning criminal justice system with the experience, capacity and procedures to deal with complex terrorism cases, as it has demonstrated in a number of cases. Turning to military commissions in this context for these detainees contravenes international standards. Further delaying trials in order to reform unnecessary tribunals violates the right under international law of the detainees to be brought to fair trial without undue delay. The new administration has been in office for almost six months. It has charged one Guantánamo detainee (for trial in federal court).
- Whatever modifications are made, these tribunals will still be *military*, not civilian, bodies. Amnesty International opposes any trial of civilians by military courts of any kind, and subjecting someone who is not a member of armed forces to trial by military tribunals in these circumstances would be inconsistent with international standards. In addition, compelling a civilian defendant to be represented by a military lawyer is incompatible with the right under international law to legal representation of one's choosing. Two detainees who were children when taken into custody are still facing trial by military commission, despite the conclusion in 2008 of the treaty monitoring body, the UN Committee on the Rights of the Child, that the USA should try no such detainee before a military tribunal.
- The military commissions lack independence, whether in substance or appearance, from the political branches of government that have authorized and condoned human rights violations against the very category of detainees that would appear before them, and that have failed to this day to ensure accountability and remedy for these violations. Given this backdrop, the need for such independence could not be greater, even with a new leadership in the executive and legislative branches.
- The military commissions only apply to foreign nationals. If the US authorities constitute a tribunal which provides foreign nationals inferior fair trial protections than those a US citizen accused of the same conduct would receive in the ordinary courts, the trials before it will by definition violate the USA's international legal obligations to ensure that all individuals, regardless of national origin, are equal before its courts, and receive equal protection of the law.
- While the Obama administration has proposed to bar admission into evidence at military commission trials statements obtained under cruel, inhuman or degrading treatment, this improvement is likely to have only limited impact in practice if unaccompanied by changes to ensure that the definitions the commissions apply of such treatment incorporate all conduct – including detention conditions and interrogation techniques – covered by the prohibition of torture and ill-treatment under international law; that it is the government that must demonstrate the absence of any such abuse; and that all potentially relevant evidence on this

issue is disclosed to the defence. At the same time, military commission defendants would still be denied the fuller protections on this issue that they would receive in the federal courts.

- The military commissions do not sit well with a commitment to transparency, a commitment made by the new administration in the name of accountability. The failure of the US government to act on accountability issues, and the continuing invocation of secrecy that has the effect of blocking accountability, raises serious concerns in the context of a military commission system designed to be less than transparent than would be ordinary criminal courts and to facilitate convictions at the same time as protecting from investigation and prosecution human rights violators on the government side.
- The military commissions will have the power to hand down death sentences after trials which do not conform to article 14 of the International Covenant on Civil and Political Rights. Any execution after any such trial would violate the right to life as a matter of international law. Amnesty International opposes the use of the death penalty in all cases, unconditionally.²

In his 21 May speech, President Obama also raised the possibility that his administration would consider the use of indefinite detention without criminal trial, apparently entirely outside of the ordinary criminal justice system and applying lower standards of proof or fairness even than those applicable in the military commission system, for detainees whom the government deems can neither be released nor prosecuted.

Under the current rules by which the government has been implementing the MCA, even if a detainee is tried by a military commission and acquitted, he may be returned to indefinite detention. This rule is not one of those that the administration has said it is proposing to change. Indeed, at the hearing on military commission in front of the US Senate Armed Services Committee on 7 July 2009, the Pentagon's General Counsel said that if a detainee were to be acquitted by military commission, but was still considered to be a security threat, the administration could continue to detain him. Jeh Johnson said: "I think that as a matter of legal authority, if you have the authority under the laws of war to detain someone..., that is true irrespective of what happens on the prosecution side".

So, under the USA's global war framework, those brought before military commissions in the future may continue to face the possibility that whether they are convicted or acquitted makes no real difference to their situation of indefinite imprisonment.

Amnesty International will continue to urge the US authorities not to sanction indefinite detention outside the criminal justice system. In this regard, one of the organization's concerns is that the resuscitation of the military commissions may be part of an approach that seeks to keep the thumb firmly placed on the government's side of the scales of justice, with decisions made on detainees taken according to which avenue is deemed most likely to achieve government "success" rather than according to adherence to principles of equality, due process and human rights.

In a hearing in the US House of Representatives on military commissions on 8 July 2009, the Chairman of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Representative Jerrold Nadler, suggested the following description of what "we seem to be going toward":

"We're going to divide the prisoners into different classifications: Those whom we have good evidence against will get fair trials; those we have weak evidence against we'll give less fair trials; those we have no evidence against, we'll just keep them locked up in preventive detention without any trial at all. In other words, we'll fit the process to the result and in effect have kangaroo justice".

As it seeks to end the Guantánamo detentions, the new US administration undoubtedly faces the serious consequences of unlawful policies pursued under the Bush administration. Whatever measures the

administration takes, however, detainees should not pay for the error of the USA's ways. Any "clean-up" should not amount to a cover-up of any human rights violations that have been committed. Neither should it place any obstacle in the way of remedy for detainees unlawfully treated, or release of detainees unlawfully held whom the USA does not intend promptly to charge. This outcome is long overdue.

No government should be permitted to diminish the quality of justice to compensate for its own past injustices, even if that injustice took place under a previous executive and legislature. The human rights violations of the past cannot provide any valid excuse for further disregard of human rights in the present. If a Guantánamo detainee cannot be brought to fair trial – *for whatever reason, and whoever the detainee is* – he should be released. This is true whether the government does not have enough evidence to bring a prosecution or whether the evidence the government does have has been rendered inadmissible in a fair trial by the way in which it was obtained. To jeopardize this rule would be to give governments a green light to gather evidence and treat detainees in any way they see fit and face no consequences for their actions.

The assault on human rights principles that came to be a hallmark of the USA's response to the 9/11 attacks leaves the international community with a clear interest in seeing the USA consign to history all remnants of its unlawful detention policies and practices. Amnesty International believes that the international legitimacy of any trials of Guantánamo detainees – all of whom are *non-US* nationals whose rights under *international* law have been violated by the USA – will be as important as domestic acceptance of them. It considers that the military commission trials will lack international legitimacy.

It is still not too late to abandon this experiment. The Guantánamo detainees should be charged for trial in federal court applying international fair trial standards, or immediately released.

For further information, see 'USA: Trials in error: Third go at misconceived military commission experiment', 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>.

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¹ See 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>.

² Five detainees are currently facing capital charges under the MCA. The US Justice Department is currently considering whether it will seek the death penalty against a sixth man, transferred in June 2009 from Guantánamo to New York for trial in federal court. See Amnesty International Urgent Action, 3 July 2009, <http://www.amnesty.org/en/library/info/AMR51/081/2009/en>.