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USA: More of the same: New Manual for Military Commissions confirms acquittal may not mean release

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A matter of hours before pre-trial proceedings were due to resume in Guantánamo in the case of Omar Khadr – a Canadian national held in US military custody for nearly eight years, since he was 15 years old – the Pentagon released the rules governing the military commission proceedings. The hearing in Omar Khadr’s case which had been due to begin on the morning of 28 April 2010, was delayed until the afternoon to allow his lawyers to take their first look at the 280-page manual.¹ Amnesty International will also be reviewing the manual and raising its concerns. Here the organization raises one particular issue.

Like its predecessor – released by the Bush administration in 2007 – the new Manual for Military Commissions confirms that the current US administration, like its predecessor, reserves the right to continue to detain individuals indefinitely even if they have been acquitted by a military commission. Continuing to hold such a detainee after acquittal, the rules note, “may be authorized by statute, such as the 2001 Authorization for Use of Military Force, as informed by the laws of war”.² Thus the Obama administration has chosen to follow the Bush administration in invoking a concept of “global war”, essentially claiming that US counter-terrorism laws, policies, and practices in this area need be measured only against the law of war (and even then, only by vague analogy), to the exclusion of international human rights obligations.³ This flies in the face of judgments of the International Court of Justice and authoritative legal conclusions stated by the UN Human Rights Committee.

The Authorization for Use of Military Force (AUMF) is a broadly-worded resolution passed by Congress on 14 September 2001, authorizing the President to “use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001”. The Bush administration did not believe the AUMF placed “any limits” on presidential authority to determine the “method, timing, and nature of the response” to the attacks,⁴ but cited it anyway in seeking to justify a range of policies, including secret detention, indefinite detention without criminal trial, trials by military commissions, and secret wiretapping. The AUMF was passed with little substantive debate, legislator confusion about what specifically it was they were voting for, and no reference to, or express provision for, the issues it has subsequently been used to justify. Regrettably, the Obama administration has cited the AUMF as providing it the authority to continue detentions at Guantánamo.⁵

For the Guantánamo detainees, many of whom have been held for more than eight years, the question of trials within a reasonable time has long been ignored in their plight, not least by the policy decision of the Bush administration to make trials secondary to detention and interrogations, and by the delays and indecision under the Obama administration relating to the forums in which to bring trials.⁶ In any event, the Military Commissions Act (MCA) of 2009, signed into law by President Obama in October last year, makes no provision guaranteeing the right to trial within a reasonable time. Indeed, as under the 2006 version of the MCA, the new Act states that “any rule of courts-martial relating to speedy trial” under the Uniform Code of Military Justice “shall not apply to trial by military commission”.

The military commission system’s lack of institutional independence as compared to the ordinary federal judiciary leaves it vulnerable to political interference and prevarication on the timing of trials. An independent civilian court would not be so exposed to such machinations. And even if military commission authorities were to dismiss charges against a defendant with prejudice to the government

(that is, without leaving it the option of re-filing military commission charges), the remedy that would be available to someone charged with a criminal offence in the USA – judicially ordered *and guaranteed* release from custody – may be unavailable to the Guantánamo detainee.

Thus it seems that the administration wants to keep all its options open. In the case of detainees whom it decides it cannot release or transfer to the custody of other governments, “when feasible” they will be tried in federal court. Where this is deemed by the executive as not feasible, it will turn to military commissions for prosecutions. Even in a case of acquittal by military commission, the outcome may be continued detention. And where no trial is deemed possible, indefinite detention without any criminal trial may yet be individual’s fate.⁷

Today’s resuscitation of the military commissions – originally conceived in late 2001 as part of an unlawful interrogation and detention regime – thus appears still to be part of an approach that seeks to keep the thumb firmly placed on the government’s side of the scales, with decisions on the fate of detainees taken according to which avenue is deemed most likely to achieve government “success” rather than according to adherence to principles of equality before the law, due process and human rights. The backstop to an “unsuccessful” trial is continued indefinite detention.

So, under the USA’s “global war” framework, those brought before military commissions may continue to face the possibility that whether they are convicted or acquitted makes no real difference to their situation of indefinite imprisonment. Indeed, it appears the administration and Congress are currently looking to enact new legislation to further entrench the existing system of indefinite detention without criminal trial that has grown on an ad-hoc basis through a mixture of executive, judicial, and congressional decisions taken (or not taken, as the case may be) over the past years without a full consideration by any of those bodies of the implications or long-term consequences of the cumulative effect of their decisions.

As has been shown by the current habeas corpus cases relating to Guantánamo detainees, even if a federal judge rules such a detainee unlawfully held, judicially ordered release is no guarantor of liberty. The judges only order, for example, “all necessary and appropriate steps to facilitate” the detainee’s release. Because the USA refuses to release any Guantánamo detainee in the US mainland, this judicial deference effectively allows the executive to continue to hold the detainee so long as it says it is seeking a solution to the case, a solution that may be months or years in coming to pass.

Amnesty International remains convinced that both military commissions and the use of indefinite detention without criminal trial undermine the ordinary systems of criminal justice and principles of human rights. Both policies should be abandoned, and any plan to close the Guantánamo detention facility must ensure that closure does not come at the expense of full respect for human rights.

¹ 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>

² Rule 1101, discussion., page II-139. United States Manual for Military Commissions (2010 Edition),

³ 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>

⁴ The President's constitutional authority to conduct military operations against terrorists and nations supporting them, John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001.

⁵ USA: Different label, same policy? 16 March 2009, <http://www.amnesty.org/en/library/info/AMR51/038/2009/en>.

⁶ USA: Double standards or international standards? Crucial decision on 9/11 trial forum 'weeks' away, 28 April 2010, <http://www.amnesty.org/en/library/info/AMR51/034/2010/en>

⁷ The administration is seeking congressional support for its plan to use the Thompson Correctional Center in Illinois to hold in indefinite detention the 48 Guantánamo detainees it currently says it cannot release or prosecute.