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Guantánamo detainees: Human rights are not negotiable

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In two news releases issued on 25 November 2003, the Australian and US governments announced that they had reached agreement that any trials by military commission of Australian nationals held in the US naval base in Guantánamo Bay, Cuba, would be fair. Meanwhile, the UK authorities reportedly remain in discussions with their US counterparts about the fate of the nine UK nationals held there, including Moazzam Begg and Feroz Abbasi who were named by President Bush in July as eligible for trial by military commission.

In a speech on 25 November, a judge from the UK's highest court said: "It may be appropriate to pose a question: Ought our government to make plain publicly and unambiguously our condemnation of the utter lawlessness at Guantánamo Bay?" Noting that he was "a lawyer brought up to admire the ideals of American democracy and justice", Lord Steyn said that trials by the military commissions would be "a stain on United States justice".

Governments should defend the rights of their nationals detained by other governments. At the same time governments should speak out firmly against all violations of international law, including if an ally is the violator. Amnesty International believes that the Australian authorities are in the process of betraying their two nationals held in Guantánamo as well as international law. They should use their influence with their US counterparts to ensure compliance with, not make compromises on, international fair trial and detention standards.

The Pentagon said that the USA had provided Australia with "significant assurances, clarifications and modifications that benefited the military commission process" in the event that either of the Australian nationals is charged. The Australian Minister for Foreign Affairs and Attorney General said that their government had "reached an understanding with the US concerning procedures which would apply to possible military commission trials of the two Australians detained at Guantánamo Bay, David Hicks and Mamdouh Habib." Their news release stated that the USA had "made significant commitments on key issues".

Top of the list is that the USA has promised not to seek the death penalty against the Australian detainees "given the circumstances" of their cases. The same commitment has been given to the UK government on its nationals. In his speech, Lord Steyn said: "This gives a new dimension to the concept of 'most-favoured nation' treatment... How could it be morally defensible to discriminate in this way?"

It is not clear if the US government's promise is a genuine concession, or if it had never actually intended to seek death sentences against these particular prisoners. Whatever the concessions agreed by the USA, however, the military commissions remain fundamentally flawed. Inter-governmental discussions should be aimed, not at fixing the unfixable, but at ensuring that the commissions are abandoned before they begin, and that prompt and acceptable solutions to end the legal limbo of the Guantánamo detainees are found.

The military commissions do not meet basic internationally recognized standards for a fair trial. The system is an entirely closed loop, controlled by the US executive. There will be no right of appeal to any court. The defendant will be represented by a military lawyer, even if that goes against the defendant's wishes. There would be substantial restrictions on defence counsel. The commissions would allow a lower standard of evidence that is admissible in ordinary courts, including hearsay evidence and possibly evidence extracted under coercion.

Resort to trials by military commission would mean that justice will neither be done, nor be seen to be done. These would be the sort of trials that the US State Department criticizes in its annual human rights reports on other countries. This time the USA would be the perpetrator.

Another major concern around the looming commissions is the mental state of any prospective defendants and the fear that their detention conditions may result in coerced confessions or guilty pleas. Many of the detainees have been held in Guantánamo Bay for almost two years, without any sort of legal process, and no access to lawyers or their families. In recent months the International Committee of the Red Cross has said that it has observed a "worrying deterioration" in the mental health of a large number of the detainees, and that their psychological condition has become a "major problem". The six detainees made eligible for trial by military commission by President Bush in July are believed to have been held since in isolation away from the other prisoners, heightening concern for their well-being.

Dr Daryl Matthews, a forensic psychiatrist who visited Guantánamo in June at the invitation of the Pentagon, recently revealed that he had the same concerns about the psychological impact of the detention regime. As a result, he said that the "whole military commission process is so unfair that an ethical psychiatrist can perhaps not ethically participate in the proceedings". He characterized the commissions as a "very, very troubled and troublesome solution", and as having problems that were "very, very major". He suggested that "any good defence counsel" would have to raise questions about the mental health of the defendants, their fitness to stand trial, and the reliability of any confessions introduced as evidence.

At a press conference on 20 November with Prime Minister Blair, President Bush asserted that the Guantánamo detainees "are illegal, non-combatants [sic], picked up off of a battlefield...There is a court procedure in place that will allow them to be tried in fair fashion." In the absence of a public correction by the UK Prime Minister to this assertion, Amnesty International reiterates that the military commissions will not be independent and impartial courts, but executive bodies. It further notes that an unknown number of the detainees were not taken into custody on the "battlefield" in Afghanistan, but were taken from other countries, including Pakistan, Bosnia-Herzegovina, and Gambia.

On 10 November, the US Supreme Court announced that it would consider whether the US courts have jurisdiction to be able to consider challenges to the legality of the Guantánamo detentions. The right of detainees to challenge the lawfulness of their detention is a fundamental principle of international law. The executive should not wait for the Supreme Court to rule. After all, the USA's National Security Strategy includes the assertion that "America must stand firmly for the non-negotiable demands of human dignity", including "the rule of law" and "limits on the absolute power of the state". President Bush has repeated this assertion on several occasions. He should act now to bring an end to the legal black hole his administration has created in Guantánamo Bay. All those held there should be promptly charged, brought to fair trial in full accordance with international standards, or else released.

Last week, 20 detainees were released from the naval base, but another 20 were transferred there, leaving a total of around 660 detainees in the base. The US government did not reveal the identities or nationalities of the transferees. This human rights scandal continues.

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