

USA

AIMING FOR EXECUTION, DENYING FAIR TRIAL

GOVERNMENT WANTS DEATH PENALTY
OPTION AT UPCOMING MILITARY
COMMISSION TRIALS IN GUANTÁNAMO

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The Pentagon's announcement that military commission prosecutors are looking to pursue the death penalty against five Guantánamo detainees accused of leading involvement in the attacks of 11 September 2001 comes as no surprise. Both President Barack Obama and Attorney General Eric Holder had already made it clear that they support the capital option against these particular detainees.¹

In this regard, little has changed under the Obama administration. Indeed this news from the Pentagon comes three years to the month after it announced that the Bush administration would be seeking death sentences against these five men at their military commission trials.² These charges were withdrawn and dismissed in January 2010, a year after President Obama took office and ordered a review of the Guantánamo cases. While this review led to a suspension of military commission proceedings, it regrettably did not bring them to an end.

Despite the USA's continued enthusiasm for execution as a criminal penalty, with it now looking to take that policy choice to Guantánamo, the international tide against the death penalty continues to mount. Since 2008, Argentina, Burundi, Gabon, Togo and Uzbekistan have joined those countries to have abolished the death penalty for all crimes, and today a total of 139 countries are abolitionist in law or practice. In recent years, the UN General Assembly has repeatedly called for a worldwide moratorium on executions with a view to abolition. International human rights standards direct governments to work towards this goal.³

The USA's growing isolation on the death penalty – and the damage to human rights principles caused by its post-9/11 counter-terrorism policies – can only deepen if the administration gets its way and obtains death sentences after unfair military commission trials.

Since the attacks of 11 September 2001, in which nearly 3,000 people were killed, Amnesty International has called for those responsible for this crime against humanity to be brought to justice in accordance with international fair trials standards, and without resort to the death penalty.

Amnesty International opposes the death penalty unconditionally. While international human rights law recognizes that some countries retain the death penalty, it prohibits the imposition and execution of a death sentence based on a trial that has not met the highest standards for fairness.

The need for stringent adherence to fair trial standards in such cases could not be greater given what has gone before. In place of prompt charges and ordinary criminal trials without undue delay, these and other detainees were ill-treated during years in unlawful detention.

More generally, the failure of the USA to provide the victims and the general public the opportunity to see those responsible for the 9/11 attacks and other such crimes under international law brought to justice in fair trials has been shameful. It has been inconsistent with the USA's human rights obligations to the victims, as well as the accused: victims of terrorism and other armed group violence have the right, like all victims of human rights abuses, to respect for and fulfilment of their rights to justice, reparation, and the truth.

The USA responded to the attacks of 11 September 2001 by developing a global "war" framework under which its interpretation of the laws of war would apply to the exclusion of international human rights law. Torture and other ill-treatment, enforced disappearance,

secret detainee transfers, and indefinite detention outside the criminal justice system were among the practices that resulted. The five detainees who have just been recharged for trial by military commission, for example, were all subjected to enforced disappearance – for up to four years – before being brought to Guantánamo in September 2006. During their period in the custody of the USA's Central Intelligence Agency they were also subjected to interrogation techniques or detention conditions that violated the international prohibition of torture and other cruel, inhuman or degrading treatment. No one has been held accountable for the crimes under international law that were committed against them.

Trials by military commission are also a product of the USA's global "war" paradigm. The military commission system has been revised over the years and is now in its third version since President Bush first established it by executive order in November 2001.⁴ However, the commissions still fail to meet international fair trial standards.

Among other flaws, the commissions lack independence, whether in substance or appearance, from the political branches of government that have authorized, condoned, and blocked accountability and remedy for, human rights violations committed against the very category of detainees that will appear before them. The commissions are creations of political choice, not tribunals of demonstrably legitimate necessity, and turning to them in this context against these detainees contravenes international standards.⁵ Indeed, the fact that the USA has civilian federal courts open and capable of conducting complex terrorism trials has been recognized by the Obama administration itself. In November 2009, Attorney General Holder announced that the five Guantánamo detainees now facing possible death penalty trials by military commission would be brought to trial in civilian court in the mainland USA. The reason it reversed that decision can be put down to domestic political considerations – not any legal justification.

The military commissions are discriminatory. If any Guantánamo detainee slated for prosecution was a US national, he could not be tried by these military commissions: under US law he would have the right to a civilian jury trial in an ordinary federal court, not before a panel of US military officers operating under rules and procedures that provide a lesser standard of fairness. The same standard of fair trial should be applied to all, regardless of national origin: that is a fundamental principle of human rights and the rule of law.

The UN Human Rights Committee, established by the International Covenant on Civil and Political Rights to oversee implementation of that treaty, has emphasised that fair trial guarantees are particularly important in cases leading to death sentences, and that "the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)."⁶ Any use of the death penalty based on these military commission trials would be a violation of international human rights law.

In 2007, the UN Special Rapporteur on counter-terrorism and human rights called on the USA to disestablish the military commissions.⁷ In 2009, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged the USA not to conduct any capital prosecutions before military commissions.⁸

Such appeals have fallen on deaf ears. On 31 May 2011, the Department of Defense announced that military commission prosecutors had sworn charges against Pakistani nationals Khalid Sheikh Mohammed and 'Ali 'Abd al-'Aziz, Yemeni nationals Walid bin Attash and Ramzi bin al-Shibh and Saudi Arabian national Mustafa al Hawsawi alleging their leading involvement in the 9/11 attacks. The prosecutors have recommended that the death penalty be an option at the trial. This must be approved in advance by the "convening

authority” of the military commissions, an official appointed by the Secretary of Defense. Under the Bush administration, the convening authority approved the pursuit of the death penalty against all of these five defendants.

The Pentagon’s announcement comes a month after it announced that military commission prosecutors were also seeking authorization to pursue the death penalty against Saudi Arabian national ‘Abd al Rahim al Nashiri. This Guantánamo detainee – also previously held and tortured in secret CIA custody before being transferred to the US Naval Base in Cuba – is accused of having had a leading role in the attack on the USS Cole in Yemen on 12 October 2000 in which 17 US sailors were killed and 40 others wounded, and in the attack on the French oil tanker MV Limburg in the Gulf of Aden on 6 October 2002 in which a crew member was killed.

Even as the USA moves towards death penalty trials in Guantánamo under a military commission system that falls short of international standards, the Obama administration has professed a commitment to international human rights principles:

“The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected. As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations.”⁹

The USA’s pursuit of military commission trials against Guantánamo detainees and its aim to secure death sentences at such trials, at least, cannot by any reasonable measure be described as advancement for human rights or a championing of the rights enshrined in the Universal Declaration of Human Rights: quite the opposite. The convening authority should not authorize the death penalty to be an option in military commission prosecutions. And, even at this late stage, the US administration should abandon its military commission experiment altogether. Congress should cooperate in this and end its blocking of prosecutions of Guantánamo detainees being conducted in civilian federal courts.

¹ “I fully expect to direct prosecutors to seek the death penalty against each of the alleged 9/11 conspirators”. Attorney General announces forum decisions for Guantánamo detainees, 13 November 2009, <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>. Asked about the views of those offended by the prospect of the trial being conducted in federal court where the constitutional protections afforded to US citizens would apply, President Obama responded: “I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him”. See Obama on terror trials: KSM will die. Politico.com, 18 November 2009, <http://www.politico.com/news/stories/1109/29661.html>

² 9/11 co-conspirators charges referred. US Department of Defense news release, 13 May 2008, <http://www.defense.gov/releases/release.aspx?releaseid=11921>.

³ For example, the UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights to monitor its implementation, has said that article 6 (which recognizes the existence of the death penalty) “refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life”. Human Rights Committee, General Comment No. 6 on the right to life (Article 6), 1982. The USA ratified the ICCPR in 1992.

⁴ See: USA: Trials in error. Third go at misconceived military commission experiment, July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>.

⁵ See, for example, Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, para 22.

⁶ Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, para 59.

⁷ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the Mission to the United States of America, UN Doc A/HRC/6/17/Add.3 (22 November 2007).

⁸ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Report on the Mission to the United States of America, UN Doc A/HRC/11/2/Add.5 (28 May 2009).

⁹ US human rights commitments and pledges, April 2009, <http://www.state.gov/documents/organization/121976.pdf>