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Legal Know-How Absent at Guantanamo Bay?

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Four months after the U.S. Supreme Court ruled that prisoners held at a special jail at Guantanamo Bay in the U.S. "war on terrorism" have the right to challenge their detention to an independent forum, the legal process appears far from fair, according to human rights groups.

WASHINGTON, Nov 8 (IPS) - New York-based Human Rights Watch (HRW) last week reiterated its call that the military tribunals set up to try detainees should be dissolved and the administration of U.S. President George W Bush must instead bring any prosecutions before the federal courts of courts-martial, which are subject to military law.

HRW and other groups continue to argue that the ad hoc procedures at the U.S. military base in Cuba fall far short of international standards for minimum due process.

It noted that at the first of the hearings the tribunal's three commissioners had for three days grappled with testimony regarding elementary laws of war and international criminal justice for which none of them had any training or experience.

This was particularly true, according to HRW, for the two members of the tribunal who have had no legal training at all.

"It's astonishing that the United States should try a case of historic importance with officials who are struggling to grasp basic legal concepts," said James Ross, HRW's senior legal advisor and the group's observer at the hearings. "Real courts with real judges should be trying these complex cases, not tribunals started from scratch," he added in a statement.

Observers from other human rights groups that have been permitted to monitor the proceedings expressed similar concerns. Both Amnesty International (AI) and Human Rights First (HRF) have observers who are filing daily reports on the proceedings, which are posted on their respective websites.

AI said one of the most dramatic moments of the past week came when the prosecution attempted to admit the record of one defendant's Combatant Status Review Tribunal (CSRT) into the commission's record.

CSRTs, three-hour hearings that began Jul. 30 after the Supreme Court ruled detainees could not be held indefinitely without a chance to challenge their detention in an independent process, have so far been conducted for 104 detainees, who have been denied, however, the right to call witnesses or be represented by an attorney.

"Amnesty International has pointed out that these tribunals in no way represent a substitute for full and proper judicial review, which none of the Guantanamo detainees has had more than four months after the (Supreme Court's) Rasul decision," Amnesty said.

"Indeed, the organisation has expressed its deep concern that the CSRT process may have been devised as an attempt by the government to narrow the scope of any judicial review."

While the commission put off a decision on whether to admit the CSRT record into evidence -- and delayed the trial of the defendant in question, Australian David Hicks, from January until

March -- the week's proceedings did not inspire confidence in the fairness of the commissions, which have been controversial since they were announced in November, 2001.

The Bush administration has insisted from the start that suspected terrorists captured on the battlefield are not entitled to protections guaranteed to prisoners of war (POWs) under the Geneva Convention. Under the convention, POWS must not only be treated humanely but can also challenge the grounds for their detention to an independent body.

In their decision, a majority of six justices of the U.S. Supreme Court ruled the 600 foreign terror suspects held at Guantanamo were at least entitled to lawyers and the chance to challenge their detention before an independent tribunal, although the ruling was vague about precisely how such a tribunal would look.

The Pentagon has taken advantage of that vagueness, both by establishing the CSRTs, which virtually all legal experts believe fall far short of the court's minimum requirements for independence, and by proceeding with the military commissions against selected terror suspects.

In its first hearings late last summer, the commissions were assailed by observers for, among other things, providing what observers called grossly inadequate interpretation services, as well as insufficient support and resources for defence attorneys.

Those lawyers also objected to the presumed bias by some of the six commissioners to the tribunal who had played some role in the apprehension or detention of defendants in Afghanistan, and asked that they be excused. Of the six, only one, Colonel Peter Brownback III, is a trained attorney.

Last month, Gen John D Altenburg, Jr (retired), the military commission appointing authority, agreed to remove three members of the commission in three pending cases.

In two of those, he said, he would replace the excused commissioners with new appointees, but he added he would not do so with respect to the case involving Hicks and Salim Hamdan, who allegedly served as a former driver and bodyguard for al-Qaeda chief Osama bin Laden.

That ruling raised new questions about the proceedings' fairness because, under the rules, a two-thirds vote of commissioners is necessary for a conviction.

In the case of a standard, five-member commission (plus one alternate), that rule would require a four-vote majority. In the case of a three-member commission, on the other hand, only two commissioners are needed to convict, significantly increasing the prosecution's advantage.

"It's good that Gen Altenburg has acted to address the real appearance of bias," said HRF's Deborah Pearlstein after the decision was released, "but it seems that justice is advancing one step forward and two steps backward at Guantanamo."

She noted that Altenburg had provided no explanation for not appointing a full panel in the Hicks and Hamdan cases, a point Amnesty said suggested retaliation against the two defendants' attorneys for mounting an aggressive defence.

These concerns have now been compounded by the past week's proceedings, including indications the two non-lawyer commissioners in the Hicks and Hamdan cases have been unable to grasp basic legal concepts.

HRW noted that the two contested the meaning of ex post facto laws -- laws that make criminal actions that were not crimes when they were committed -- and the requirement that criminal charges contain a specified offence. At one point, one commissioner suggested he had little

concern that Hicks could be charged with conspiracy to commit a war crime even if such a crime does not now exist under the laws of war.

Moreover, commission members appeared to reject out of hand defence motions to allow expert testimony from six international law scholars.

When Brownback, the presiding officer, disagreed with a basic point of international law raised by one defence lawyer, he dismissed him with the remark, "No way, sunshine," a phrase he used against the same attorney later in the hearing. HRW suggested that such conduct is unlikely to enhance confidence in the tribunal.