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## **Set Them Free?**

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A new United Nations report claims that detainees at the Guantanamo Bay military prison have been denied due process and that some have been tortured, and it demands that the prison be closed and the detainees transferred to U.S. soil. The timing is particularly inconvenient for the Bush administration in light of ongoing protests in Muslim countries and the publication of new pictures of the Abu Ghraib prison abuses.

Reactions have been predictable. The administration denies the allegations and notes that the UN officials who prepared the report did not even visit the Guantanamo base on Cuba, while opponents claim that the report vindicates their long-held concerns. Just as predictably, high ranking UN officials, including Secretary-General Kofi Annan, have distanced themselves from it.

Yet, beneath the political finger-pointing, the UN report raises fundamental questions: Should the Guantanamo facility exist at all, and, if so, how should we treat the people interned there?

If the administration is correct that we are fighting a war on terror, then we need facilities to hold people detained in the course of the war - whether they are labeled prisoners of war, illegal combatants or something else. Nothing in international law requires a country to house war detainees on its own soil. So, if the only issue is the legal authority of the United States to create something like the Guantanamo prison, the answer is simple. But if we are not at war - as the UN report maintains - then these people should go free or be tried criminally for their actions. Either way, international law and constitutional norms require that they be treated humanely.

The problem is that the conflict with al-Qaida is neither a war nor a criminal investigation, and the detainees are neither prisoners of war nor criminal suspects. Rather, as the UN report recognizes, Guantanamo exists for an entirely separate purpose. The detainees are there to be interrogated in ways that often violate international law and that sometimes - as with the use of dogs and sleep deprivation - may amount to torture.

The goal of this interrogation is not to gain evidence for later criminal proceedings but to obtain information about al-Qaida. Indeed, at this point few of the detainees could ever be tried in a U.S. court. Most of the evidence against them would be inadmissible because of the way it was extracted, although that fact may not prevent trials of some detainees before military tribunals. Further, many detainees are not wanted by their own governments, who may be more than happy to allow the United States to continue housing them. There is also the risk that releasing the detainees would allow them to tell their stories to a world increasingly skeptical of U.S. policy.

Guantanamo, then, is more like a concentration camp or even - as Amnesty International infamously claimed last year - a gulag from which some detainees will never return, at least not with sound mind and body. Readers who recoil from those terms might prefer to think of supermax prisons, in which we house criminals deemed to be the "worst of the worst." Indeed, just as the UN report raises concerns about conditions and treatment of detainees at Guantanamo, human rights groups have long contended that supermax prisons are cruel and inhuman under the best of circumstances. Modern societies, it turns out, seem to generate facilities for warehousing people they consider dangerous in a manner that puts them out of sight and out of mind.

Yet supermax inmates have been convicted of crimes in a process that we widely accept as legitimate, whatever its flaws. The detainees at Guantanamo, by contrast, have received less than due process. The UN report and other accounts establish that the Combatant Status Review Tribunals, which were created in response to the Supreme Court's demand for greater scrutiny, fail international law standards. They function primarily as rubber stamps, and detainees are often powerless to rebut vague and unsubstantiated allegations that they are "associated" with al-Qaida.

At this point we come full circle. If this is a new kind of war against an ambiguous and shifting enemy - that is, if we live in exceptional times - then "better safe than sorry" could be the best policy. The bodies of possibly innocent detainees might even be a regrettable yet necessary price to pay.

But would we really reach that conclusion if the Bush administration told the truth about Guantanamo? That is a question the administration plainly does not want us answering, no matter who does the asking.

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