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U.S.: Guantanamo Tribunal Lacks Basic Knowledge of Law

Human Rights Watch
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(Guantanamo Bay, Cuba, November 6, 2004) This week's hearings at Guantanamo Bay highlighted serious deficiencies in the U.S. military commission members' understanding of the laws of war and principles of criminal justice, Human Rights Watch said today. Human Rights Watch, which has an observer at the hearings, once again called on the United States to end the use of ad hoc military commissions and instead to bring prosecutions before federal courts or courts-martial. This week, the military commission held hearings on preliminary legal questions in the case against David Hicks, a 29-year-old Australian who has been held at Guantanamo Bay for more than two and a half years, often in solitary confinement. Hicks, who was turned over to U.S. custody by Northern Alliance forces in Afghanistan in late 2001, has been charged with conspiracy to commit war crimes, attempted murder and aiding the enemy.

For three days, the commission's three members grappled with the laws of war and international criminal justice. While resolving these issues would have been a difficult task even for veteran judges, it has been an impossible exercise for the commission given that two of the three members who are supposed to rule on matters of law have no legal training or experience. Unsurprisingly, the two members without legal training had difficulty understanding introductory principles of the law of war or criminal justice.

"It's astonishing that the United States would try a case of historic importance with officials who are struggling to grasp basic legal concepts," said James Ross, senior legal advisor for Human Rights Watch, who observed the hearings. "Real courts with real judges should be trying these complex cases, not tribunals started from scratch."

During the hearings, the non-lawyers on the commission appeared to have difficulty with the basic legal concepts underlying the more complex issues that should have been the focus of the legal argument. In particular:

Right to a fair trial: The non-lawyers on the commission contested the meaning of ex post facto laws (laws that unfairly criminalize behavior after the fact) and the requirement that charges contain a specified criminal offense. For instance, one panel member expressed 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.

Laws of war: The commission members seemed unfamiliar with the legal meaning of such concepts as an "unprivileged belligerent" (a civilian who takes up arms) and the difference between an international and a non-international armed conflict.

"The hearings in the Hicks case resembled an introductory law school class" said Ross. "A man whose fate is hanging in the balance should not be tried by judges unfamiliar with the law."

Despite their apparent confusion about key legal concepts, the commission members seemed to dismiss Hicks defense team's explanations and rejected defense motions to allow expert testimony from six international law scholars. One commission member said he would only allow experts he specifically requested. When the presiding officer on the commission disagreed with a basic point of international law raised by one defense lawyer, he dismissed the lawyer with the remark "No way, sunshine," a demeaning moniker he repeated to the same lawyer later in the day's proceedings.

Human Rights Watch was also concerned by a prior commission ruling that two members who had been removed for potential bias would not be replaced. Commission rules require a two-thirds majority of the panel for a conviction, so where previously four out of five members had been needed to convict Hicks, now only two out of three are necessary. The commission rejected the defense motion that the defendant was being penalized by asserting his right to have an unbiased panel.

The military commission rejected several defense motions and the one prosecution motion. Rulings on the rest of the approximately 30 motions were deferred until a later date. The start of the trial was postponed from January to March 15 at the request of Hicks' lawyers.

Human Rights Watch has long characterized the military commissions established by the Bush administration in November 2001 as being fatally flawed because they do not meet international fair trial standards. The commissions deprive defendants of independent judicial oversight by a civilian court, impose severe restrictions on the right to conduct a defense, and permit military trials for offenses committed outside of an armed conflict.

On Monday, November 8, the military commission will hear motions in the case of Salim Ahmed Hamdan, a Yemeni national charged with being Osama Bin Laden's driver and bodyguard and with conspiracy to commit various war crimes. Wendy Patten, U.S. advocacy director for Human Rights Watch, will attend the hearings as an observer.