Statement by the American Civil Liberties Union to the OSCE Human Dimension Implementation Meeting

Warsaw, Poland
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My name is Jamil Dakwar, and I am Director of the Human Rights Program at the American Civil Liberties Union (ACLU). The ACLU is the largest civil liberties organization in the United States, with offices in 50 states and over half a million members. Since the tragic events of 9/11, a core priority of the ACLU has been to stem the backlash against human rights in the name of national security. We are honored to address this important forum as part of our commitment to ensure that the U.S. government complies with universally recognized human rights principles in addition to upholding the U.S. Constitution.

It is gratifying to hear the U.S.' recommitment to the Universal Declaration of Human Rights and the re-affirmation of its OSCE commitments[1]. But, we also believe that the U.S. must move beyond verbal commitments to human rights, the U.S. must recommit itself first and foremost to the rule of law and honor its international human rights obligations, especially in relation to the absolute and universal prohibition of the use of torture, freedom from arbitrary and secret detention, and the protection of the fundamental right to a fair trial. We believe that liberty and security are not mutually exclusive, but are rather closely linked. Safeguarding fundamental liberties under the Constitution and through internationally recognized human rights norms will make us more safe, not less. Unfortunately, in the name of national security, the United States has enacted laws and pursued policies that threaten our most cherished freedoms. Today, I will discuss the unfair trials currently conducted at Guantánamo Bay, Cuba.

[1] United States Mission to the OSCE Opening Plenary Statement as delivered by Ambassador W. Robert Pearson to the OSCE Human Dimension Implementation meeting, Warsaw, Poland, September 29, 2008. http://www.osce.org/documents/odihr/2008/09/33299_en.pdf

In October, 2006, U.S. President George W. Bush signed into law the Military Commissions Act (MCA). The Act was in response to a U.S. Supreme Court Decision which invalidated a previous attempt of the U.S. government to set up a military commissions system to try "alien unlawful enemy combatants"[2] detained as part of the U.S. government's "war on terror." The MCA lacks the basic substantive and procedural protections codified in the U.S. Constitution, the Geneva Conventions, and numerous international human rights treaties ratified by the U.S. These violations include the denial of the right of habeas corpus, the denial of an independent trial court, the curtailment of the right to judicial review, and the limitation of the right to a remedy for human rights violations.

The MCA turned the bedrock principle of presumption of innocence upside down by allowing for the inclusion of evidence obtained through coercive circumstances, including torture. Moreover, hearsay evidence is permissible as well as secret evidence, which the defendants are not given access to and are thus unable to refute. Defendants can only be represented by U.S. military defense lawyers or American civilian lawyers who are admitted to the Bar in the U.S. To add insult to injury, or worse yet, injury to injury, detainees must foot the bill if they prefer a civilian attorney. Furthermore, there is a significant imbalance in the allocation of resources between the prosecution and the defense. This violation of the principle of equality of arms is especially true in capital cases, a result that would not be tolerated in any fair criminal justice system. In short, the military commissions established under the MCA are anything but a fair and independent system.

The MCA explicitly allows for the use of the death penalty, and since its enactment the U.S. government has asked for the death penalty for six out of the twenty-three prisoners charged before a military commission at Guantánamo. Moreover, under the MCA only non-citizens can be tried before a military commission, a grave violation of the prohibition on the discriminatory implementation of the right to a fair trial. Since January 2002, when the first detainee landed at Guantánamo, only one trial was completed and over 230 prisoners continue to be held indefinitely without charge or trial.

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[2] Under chapter 47A of the MCA the term 'unlawful enemy combatant' means —
"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or
(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."

Finally, the U.S. has failed to meet international juvenile justice standards. These basic standards require that children be treated consistent with their unique vulnerability, capacity for rehabilitation, and lower degree of culpability. The detention, prosecution, and treatment of the Canadian national Omar Khadr and Afghan national Mohammed Jawad, who were under 18 at the time of their transfer to and imprisonment at Guantánamo and face charges before a military commission, are both shameful and unlawful and must be addressed by this forum.

Despite the serious deficiencies in the current system of military commissions, highlighted by blatant political interference which has led to the resignations of four military prosecutors including the chief military prosecutor, the hearings and proceedings continue. What is even more troubling about the current unlawful system is that even an acquittal by these commissions does not result in release. Such detainees are simply returned to the general population at Guantánamo, where they are held indefinitely as "enemy combatants."

A recent report published by Human Rights First studied more than 120 international terrorism cases prosecuted in U.S. courts and found that the federal criminal justice system adequately balanced the U.S. government's need to protect sensitive national security information with defendants' right to a fair trial. The report found that specially tailored federal anti-terrorism laws and other generally applicable federal criminal statutes provided an adequate basis for detaining and monitoring suspects and offer a broader spectrum of prosecutable offences than the military commissions, which have jurisdiction only over war crimes.[3]

In light of the massive deficiencies in the protection of basic human rights especially the right to fair trial, we call on the U.S. government to respect its human rights commitments made to the members of the OSCE by shutting down Guantánamo and its failed military commissions system and turn those individuals who have committed crimes against the United States to federal courts or, when applicable, to military courts under the U.S. Uniform Code of Military Justice.

Thank you.

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[3] Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, available at: http://www.humanrightsfirst.org/us_law/prosecute/