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Guantánamo: A monstrous failure of justice

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The following was adapted by the IHT from the 27th F.A. Mann Lecture, delivered in London on Tuesday. Lord Steyn is a Lord of Appeal in Ordinary, one of 12 judges who sits on Britain's highest court.

The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the U.S. naval base at Guantánamo Bay, where they await trial on capital charges by military tribunals.

Democracies must defend themselves. Democracies are entitled to try officers and soldiers of enemy forces for war crimes. But in times of war, armed conflict or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis. One tool at hand is detention without charge or trial. Ill-conceived, rushed legislation is passed granting excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation. Often the loss of liberty is permanent.

Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination.

In the context of a war on terrorism without any end in prospect, this is a somber scene for human rights. But there is the caution that unchecked abuse of power begets ever greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.

After the horror of Sept. 11, 2001, Congress rushed through the Patriot Act which gave to the executive vast powers to override civil liberties. Congress promptly authorized President George W. Bush to use all necessary force against, inter alia, those responsible for the terrorist attacks of Sept. 11 to prevent further attacks. On Oct. 7, 2001, the air campaign against Afghanistan began.

On Nov. 13, 2001, the president issued an order providing for the trial by military commissions of persons accused of violations of the laws of war. That order has been repeatedly amended. Since January 2002, about 660 prisoners have been transferred at first to Camp X-Ray and then Camp Delta at Guantánamo Bay. The number included children between the ages of 13 and 16 as well as the very elderly. Virtually all the prisoners are foot soldiers of the Taliban. By a blanket presidential decree, all the prisoners have been denied prisoner-of-war status.

How prisoners at Guantánamo Bay have been treated we do not know. But what we do know is not reassuring. At Camp Delta the minute cells measure 1.8 meters by 2.4 meters (6 feet by 8 feet). Detainees are held in these cells for up to 24 hours a day. Photographs of prisoners being returned to their cells on stretchers after interrogation have been published. The Red Cross described the camp as principally a center of interrogation rather than detention.

The purpose of holding the prisoners at Guantánamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess. On the contrary, the rules expressly provide that statements made by a prisoner under physical and mental duress are admissible "if the evidence would have value to a reasonable person" i.e. military officers trying

enemy soldiers.

At present we are not meant to know what is happening at Guantánamo Bay. But history will not be neutered. What takes place there today in the name of the United States will assuredly, in due course, be judged at the bar of informed international opinion.

The regime applicable at Guantánamo was created by a succession of presidential orders. It can be summarized quite briefly. The prisoners at Guantánamo, as matters stand at present, will be tried by military tribunals. The prisoners have no access to the writ of habeas corpus to determine whether their detention is even arguably justified. The military will act as interrogators, prosecutors, defense counsel, judges, and when death sentences are imposed, as executioners.

The trials will be held in secret. None of the basic guarantees for a fair trial need be observed. The jurisdiction of U.S. courts is excluded. The military control everything. It is, however, in all respects subject to decisions of the president as commander in chief, even in respect of guilt and innocence in individual cases as well as appropriate sentences. The president has made public in advance his personal view of the prisoners as a group: He has described them all as "killers." The Court of Appeals for the District of Columbia Circuit has recently ruled that, despite the fact that the United States has had exclusive control over Guantánamo Bay since 1903, the courts have no jurisdiction to examine the legality of the detention of the prisoners. But on Nov. 10 the U.S. Supreme Court granted certiorari for the case to proceed to a substantive hearing on the question whether the lower courts were right to conclude that they had no jurisdiction to entertain habeas corpus applications. This will be the only issue on which the Supreme Court will rule. That hearing will take place in spring next year.

As matters stand at present the U.S. courts would refuse to hear a prisoner at Guantánamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants at all. They would refuse to hear prisoners who assert that they were simply soldiers in the Taliban army and knew nothing about Al Qaeda. They would refuse to examine any complaints of any individuals. The blanket presidential order deprives them all of any rights whatever.

As a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice.

The question is whether the quality of justice envisaged for the prisoners at Guantánamo Bay complies with minimum international standards for the conduct of fair trials. The answer can be given quite shortly: It is a resounding No. The term kangaroo court springs to mind. It conveys the idea of a preordained, arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice. Trials of the type contemplated by the United States government would be a stain on United States justice. The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely.

Looking at the hard realities of the situation, one wonders what effect it may have on the treatment of United States soldiers captured in future armed conflicts. It would have been prudent, for the sake of American soldiers, to respect humanitarian law.

Second, what must authoritarian regimes, or countries with dubious human rights records, make of the example set by the most powerful of all democracies?

Third, the type of justice meted out at Guantánamo Bay is likely to make mártirs of the prisoners in the moderate Muslim world with whom the West must work to ensure world peace and stability.

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What other route could the United States have taken? The International Criminal Court could not be used to try the Guantánamo Bay prisoners because the Rome Treaty applies prospectively only, and the prisoners were captured before the Treaty came into force in July 2002. The United States courts could have assumed universal jurisdiction for war crimes. The prisoners would have received fair trials before ordinary United States courts. It would have been an acceptable solution. On the other hand, the Muslim world would probably not have accepted this as impartial justice. The best course would have been to set up through the Security Council an ad hoc international tribunal. That would have ensured that justice is done and seen to be done.

There is, of course, a dilemma facing democracies. Aharon Barak, President of the Supreme Court of Israel, presided in a case in which the court held that the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts. He said:

"Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties." Such restraint is at the very core of democratic values.

It may be appropriate to pose a question: Ought the British government to make plain publicly and unambiguously its condemnation of the utter lawlessness at Guantánamo Bay?

John Donne, who preached in the Chapel of Lincoln's Inn, gave the context of the question more than four centuries ago:

"No man is an Island, entire of it self; every man is a piece of the Continent, a part of the main; . . . any man's death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; it tolls for thee."

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