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# Can the U.S. Courts Learn from Failed Terrorist Trials by Military Commission in Turkey and Peru?

by Richard Wilson

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President George W. Bush signed a military order in November 2001 that provided for trial by military commission for any person designated by the president as an illegal combatant. All of the detainees in Guantanamo Bay, Cuba, along with three U.S. citizens held in Defense Department custody on the U.S. mainland, have been so designated. That designation makes military commissions their only legal redress, if they are to be tried at all. This leaves both the decision to try them and the structure and procedure of their trials exclusively in the hands of the executive branch.

This article examines the controversial issue of trial by military commission and the convictions of alleged terrorists in Turkey and Peru by such commissions. This year, reviewing courts overturned these convictions and pre-empted any future death sentences. Both decisions found that the defendants' rights to due process and fair trial had been denied, thus necessitating expensive and prolonged new trials before legitimate civilian courts. These cases suggest that careful review by the judiciary can keep excessive actions by the executive branch in check, but only if the judiciary of the United States is willing to step in to provide the needed objectivity and dispassionate review of executive decision-making.

## THE DETAINEES AT GUANTANAMO BAY: TWO YEARS WITHOUT REDRESS

STARTING TWO YEARS AGO in November 2001, the United States Department of Defense began to detain foreign nationals without charges or trial at Camp Delta, a prison that is part of a larger U.S. military installation at Guantanamo Bay, Cuba. Although names and nationalities are not published by the military, it is believed that the detainees now total around 650, some of whom are known to be children, and that they come from more than 40 countries around the world, not just Afghanistan. The U.S. military has potential space for up to 1,000 detainees and a 10-year operating budget. Press reports indicate that detainees were moved into Camp Delta as recently as March 2003: with transfers there from other countries such as Bosnia and Gambia. Although some detainees have been released, the number of detainees remains approximately the same. As of July 2003, there had been at least 29 suicide attempts by 18 individuals held in the detention facility.

All of the Guantanamo detainees have been effectively denied the protection of the Geneva Conventions, which govern the treatment of prisoners of war. No Guantanamo detainee has yet been brought before a competent tribunal to determine his status as soldier or civilian as required by the Geneva Conventions. None of the Guantanamo detainees has had access to any court or legal counsel, and family members have not been permitted to visit them in Cuba. The need for a judicial determination of status is made all the more urgent by ongoing transfers into the facility from locations other than Afghanistan, which rebut the government's assertion that all the prisoners are "battlefield" detainees. The detainees face two equally odious realities: Some will be chosen by the president for trial by military commission while others will be kept in indefinite detention.

In July 2003, the Defense Department issued a comprehensive and final set of procedures for the military commissions, and pursuant to

those procedures the secretary of defense named military lawyers as both chief prosecutor and chief defense counsel. Soon thereafter, the president announced that six detainees were eligible for trial by the commissions, including two British citizens, but no trials have begun as of this writing. The commission rules include limitations on the right of the accused to choose their defense counsel, significant interference with the full abilities of defense counsel to prepare and mount an adequate defense, improper and lower standards of due process for non-citizens, no review of decisions of the commissions by independent courts, and the death penalty as a potential sanction. The provisions for trial by military commission also apply to the three U.S. citizen detainees. It seems that the government can invoke the provisions at any time, even during a pending civil trial.

Such seems to be the case in the trial of Zacarias Moussaoui, a French national charged with terrorist activities awaiting trial in a federal court in the state of Virginia. The trial judge recently sanctioned the prosecutors, telling them that they could not seek the death penalty if they continued to refuse Moussaoui access to key witnesses who might provide exculpatory evidence on his behalf, but who are being held in secret detention and interrogation facilities by the government. The government is considering transferring the case to a military commission as one viable option for the completion of the proceedings.

Any detainee designated as an illegal combatant, whether citizen or non-citizen, but who is not tried by military commission, faces an even more daunting fate. They will remain prisoners until they are released by the military without trial or until the end of the war on terrorism, a seemingly endless prospect.

## LESSONS FROM TURKEY: THE FAILED TRIAL OF ABDULLAH ÖCALAN

IN MARCH 2003, the European Court of Human Rights decided the case of Abdullah Öcalan, former leader of the Kurdish Worker's Party (PKK). The PKK supported independence for Kurdish communities in Turkey and Iraq. The party was outlawed in Turkey and is included on the U.S. State Department's list of designated foreign terrorist organizations. Öcalan became the leader of the PKK during the mid-1980s and operated from a safe haven in neighboring Syria. The PKK army carried out more than 6,000 attacks in Turkey alone, leaving a total of 30,000 dead rebels, soldiers, and civilians. In 1999, when the Turkish government threatened to invade Syria if it continued to protect him, Öcalan moved through several countries before ending up in Nairobi, Kenya, where he was captured and forcibly returned to Turkey by the security police without any judicial process. On the day of his arrest in Kenya, there were riots, both pro and con, in the streets of Turkey and other countries in Europe.

Back in Turkey, Öcalan was immediately transported to the tiny, uninhabited island of Imrali, in the Sea of Marmara, where he was the sole inmate in a facility where his trial was to be held under State Security Court procedures. The three-judge panel that initially heard his case was made up of one military officer and two civilians, but the military judge was removed and replaced by a civilian judge during the trial. The replacement required a special act of the Turkish National Assembly,

taken in the face of international criticism that Öcalan could not receive a fair trial before a court with strong military influence. His lawyers were given only limited access to their client before the trial, the number of lawyers permitted to visit him was limited, and all conversations between them and their client were monitored by government officials.

In June 1999, Öcalan was convicted of training and leading a gang of armed terrorists in carrying out acts designed to bring about the secession of a southwest territory in Turkey, and he was sentenced to death. On the day of his sentencing, families of his victims in attendance at the court proceedings spontaneously broke into singing the Turkish national anthem. Despite domestic appeals and a commutation of the death sentence by the Turkish National Assembly, again in the face of European pressure, Öcalan's conviction was upheld. He then filed a petition for human rights violations with the European Court of Human Rights (European Court).

The decision of the European Court in *Öcalan v. Turkey* was critical of the domestic proceedings in four key respects that relate to the proposed military commission trials in Guantanamo. First, the government defended the independence of the State Security Court because the military judge was removed from the proceedings and the judgment of the panel was made by an all-civilian court. However, in keeping with the extremely restrictive view of the role of military tribunals, the European Court found that "the last-minute replacement of the military judge was not capable of curing the defect in the composition of the court."

Second, the European Court condemned the Turkish government for its delays in the adjudicative processes afforded to the accused. The European Court found that a delay of seven days from Öcalan's return to Turkey before being presented before a judge violated the requirement under international human rights law that an answer be brought "promptly" before a judge. Similarly, Turkey violated Öcalan's right to a speedy remedy to determine the lawfulness of his detention when he was kept incommunicado for ten days from his lawyers, and how he "could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer."

Third, the European Court found that Turkey had seriously interfered with Öcalan's right to prepare and conduct a defense, where there were lengthy denials of access to defense counsel, where the length and time of meetings with counsel was severely restricted, and where all confidential conversations between counsel and client were required to be conducted within the sight and hearing of prison officers, which the government defended as necessary "to ensure the applicant's security."

Fourth, despite the amendment of Turkish domestic law to bar the death penalty against Öcalan, the European Court went to great lengths to note that the imposition of the death penalty at the conclusion of an unfair trial constituted inhuman treatment in itself and thus a violation of his human rights.



*Abdullah Öcalan at trial in Turkey.  
Credit: courtesy of International  
Initiative of Freedom for Öcalan*

## LESSONS FROM PERU: THE TRIAL OF ABIMAEI GUZMAN

ABIMAEI GUZMAN BECAME THE INTELLECTUAL and military leader of the *Sendero Luminoso*, or "Shining Path", guerrilla movement in Peru in the late 1960s. The group, inspired by Marxist and Maoist ideologies, began armed actions in 1980 under the slogan "Elections no; People's War yes." Between 1980 and 1990, Guzman and the Shining Path carried out over 120,000 attacks throughout Peru, leaving 19,000 dead, including some 10,000 innocent civilians. In fact, the recent truth commission report in Peru notes that the number of deaths caused by the insurgents exceeded those caused by military and police forces.

Alberto Fujimori, president of Peru at the time of Guzman's arrest in 1992, made decisive and aggressive military and legal action against the Shining Path a hallmark of his administration. Fujimori bent the law to his will and temporarily became a national hero for his decisive actions in the name of national security. He later fled the country to avoid arrest in the midst of growing revelations of scandal and corruption in the high ranks of his administration.

Guzman was arrested, tried and sentenced during September and October of 1992. Before his trial, he was kept on prominent public display, donning a striped suit in an open cage, and the prison where he was held maintained extreme measures of security. He was tried and sentenced by a special military court dealing with terrorist crimes to life imprisonment. President Fujimori personally decreed that the sentence be served in the total darkness of an underground cell so that Guzman would never see the light of day again in his lifetime.

After Guzman's trial, Fujimori called for the re-adoption and retroactive application of the death penalty, abolished in the 1979 constitution. Fujimori asserted that nine out of ten Peruvians called for Guzman's death and announced that he was prepared to withdraw from the most basic Inter-American human rights treaty, which forbids re-institution of the death penalty by those countries that have abolished it, to appease the people of his country. The Fujimori administration took active steps in that direction throughout the 1990s.

The path of judicial review for Guzman was a long and complex one, not nearly as direct as that taken by Öcalan in the European human rights system. The first issue presented for international review was the legality, under the American Convention on Human Rights (American Convention), of the proposed amendment to the Peruvian Constitution to permit the re-institution of the death penalty. That issue was resolved against Peru in Advisory Opinion OC-14/94 of the Inter-American Court of Human Rights (Inter-American Court), decided in December 1994. Article 4.3 of the American Convention explicitly prohibits the reestablishment of the death penalty in states that have abolished it. The case did not present the Inter-American Court with an actual controversy, and the name of neither Guzman nor the Shining Path was on the court's docket, but it made clear in its conclusions that "promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the [American] Convention is a violation of that treaty." Peru could not readopt the death penalty without violating international law, and Guzman could never be sentenced to death.

It was not the advisory opinion, however, that led the Peruvian government under President Fujimori to attempt to withdraw from the jurisdiction of the Inter-American Court in 1999. That action came in the wake of a series of decisions by the Inter-American Court that were highly critical of the Special Military Court, a tribunal created to deal with terrorists through summary trials before so-called "faceless," or unidentifiable, military judges, without judicial review or other safeguards. The two decisions of *Loayza Tamayo v. Peru* and *Castillo Petruzzi*

## Can the U.S. Courts Learn

*v. Peru* were devastating indictments against the failed attempts by military courts to mete out justice to alleged terrorists. The Inter-American Court condemned both the specific use of “faceless” judges and military trials in general, even in the case of alleged terrorist acts by persons “associated with insurgency groups.” The Inter-American Court noted that military personnel cannot maintain impartiality in judging those who are its enemies in the field. Moreover, because superior military officers decided appointments to the military court as well as the promotion in rank of judges, the Inter-American Court called into question the independence of these judges.



Protest over trial of Ocalan.  
Credit: courtesy of *International Initiative of Freedom for Ocalan*

The other violations found by the Inter-American Court in *Castillo Petrucci* set out a catalog of the shortcomings of military commissions: the offenses for which the alleged terrorists could be convicted were overly broad, thus violating the principle of legality; the conditions of confinement were cruel, inhuman, and degrading; confessions were coerced through torture or other cruel and degrading treatment; the defendants did not have the time and facilities to meet with defense counsel to prepare an adequate defense; the rules of evidence did not permit fair participation of the defense during trial; and there was no right to appeal to civilian courts.

Peru eventually returned to the fold of the inter-American human rights system under the presidency of Alejandro Toledo. In January of this year, in what is called one of its most significant decisions, the Constitutional Court of Peru decided *Marcelino Tineo Silva et. al.*, a case brought by more than 5,000 citizens who sought the review and unconstitutionality of the terrorism and military court decrees issued by the executive branch during the Fujimori years. The Constitutional Court, following the roadmap laid out for it by the Inter-American Court, struck down all the anti-terrorist decrees and ordered the retrial of Guzman and an estimated 2,000 other persons convicted during those years. In late July 2003, the government prosecutor recommended to a civilian court a sentence of 20 years for Guzman for his alleged involvement in the May 1991 terrorist attacks in the capital city of Lima.

### THE ILLEGITIMACY OF TRIAL BY MILITARY COMMISSION FOR GUANTANAMO DETAINEES

WHILE COMPARING THE SEVERITY OF TERRORIST actions is difficult to measure, the attacks orchestrated by Öcalan and Guzman seem every bit as vicious and destructive as those of the Al Qaeda network to date. The cases in Turkey and Peru against these two notorious terrorists are analogous in many ways to the U.S. government’s proposed trials by military commission of the Guantanamo detainees.

In both the Öcalan and Guzman proceedings, military judges

played key roles in the decision-making. The Guantanamo military commissions will be staffed by three to seven military officers, and both the chief prosecutor and chief defense counsel are also military lawyers. Moreover, the only appeal from their decisions is within the Department of Defense and to the president, and access is not permitted to the civilian justice system on appeal from judgments of the commissions. The respective decisions in Öcalan and Guzman both criticized the lack of effective access and review by civilian courts.

Detainees in Guantanamo have experienced delays in access to the courts of up to two years in some cases. In the Öcalan proceedings, periods of seven and ten days without access to the courts or counsel were deemed excessive under relevant human rights norms. The rules for defense counsel at the Guantanamo military commissions also include provisions similar to those faced by the lawyers for Öcalan and Guzman. They include a requirement that civilian defense counsel sign an affidavit, which permits open monitoring of confidential attorney-client conversations by government officials “for security and intelligence purposes.”

In both the Turkey and Peru cases, international tribunals found that domestic justice had failed these two individuals and hundreds of others condemned through the same processes, and new trials were required.

## CONCLUSION

IN HIS JULY 2002 REPORT to the UN Sub-Commission on the Promotion and Protection of Human Rights, Louis Joinet, the Special Rapporteur on the Issue of the Administration of Justice through Military Tribunals, wrote that “In all circumstances, the competence of military tribunals should be abolished in favour of those of the ordinary courts, for trying persons responsible for serious human rights violations.”

The Universal Declaration of Human Rights (Declaration), the foundational expression of human rights principles, recognizes that not all human rights are absolute. Article 29(2) of the Declaration permits states to limit the exercise of human rights, provided that the sole purpose is to secure “due recognition and respect for the rights and freedoms of others” and of meeting “the just requirements of . . . public order.” The Declaration also recognizes, however, that a state cannot justify its limitation on human rights if its actions are “aimed at the destruction of any of the rights and freedoms” proclaimed in the Declaration. The “public order” justifications offered by the United States government for its proposed use of military commissions, as well as its potentially indefinite confinement of the Guantanamo detainees, have destroyed all human rights protections for the detainees.

The United States, with one of the strongest and most respected criminal justice systems in the world, has chosen to deal with the Guantanamo prisoners, and all others designated “illegal combatants,” not through our much-lauded criminal processes, but in trials that will take place totally outside our system of civilian justice. If brought to trial before military commissions designed in the heat of a post-September 11 passion for vengeance, there is every reason to believe that the Guantanamo detainees will be subject to the same criticisms as the courts that convicted Öcalan and Guzman. Because the United States refuses to submit to the jurisdiction of international human rights bodies, it is up to the domestic courts of the United States to take a firm stand against abuses by the executive branch. They are the last legal hope for the detainees, whether they face trial by military commission or indefinite *incommunicado* detention. *HRB*

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