



USA: 'We have the ability to do things'

President and Congress should apply human rights principles and close Guantánamo

The US prison camp at Guantánamo is back on the political agenda. And the politicking again threatens to derail the already long overdue goal of closing it. This is what happens when a government operates a detention regime that flouts human rights and the rule of law and then fails to apply human rights principles in ending it.

A year ago, it was a [hunger strike](#) involving some 100 detainees at the US naval base that prompted President Obama to break his relative silence on the detentions and recommit to closing the facility. Now it is the transfer on 31 May of five Afghan men held without charge or trial there for more than a decade in exchange for a US soldier held for five years in Taliban custody that has sparked some familiar congressional opposition to the President's aim of ending the detentions.

Senator Lindsay Graham, an ardent advocate of indefinite detentions and military commission trials at Guantánamo, lost little time in calling for a hearing before the Senate Armed Services Committee. He said that by transferring to Qatar what he dubbed the "Taliban Dream Team," or "five terrorists" who were the "hardest of the hard-core," the Obama administration had broken US law and jeopardized national security.

The US administration has not made public the memorandum of understanding with Qatar it signed on 12 May, except to say that it includes "specific risk mitigation measures and commitments from the government of Qatar, like travel restrictions, monitoring, information sharing and limitations on activities, as well as other significant measures". Secretary of State John Kerry has also sought to quell the political furore. The Qatar authorities are "not the only ones keeping an eye" on the five transferred detainees, he said in a media interview on 7 June, and if any of the five men were to break the conditions of their transfer to Qatar, "we have the ability to do things." Indeed, he said, "if these guys pick a fight with us in the future", they "have the ability to get killed doing that." Presumably this was diplomatic-speak for "we have the ability to kill them."

Such assurances appear not to have satisfied congressional opponents. On 9 June Senator Ted Cruz, announcing his intent to introduce a bill to block detainee transfers, said that "Until President Obama can make his case and convince the American public that this swap was in our national interest, prudence dictates that all further transfers and releases from Guantánamo Bay should be off the table." On 10 June, the House Appropriations Committee, describing the transfer of the five as a "violation of trust" on the grounds that the administration did not give Congress sufficient prior notice, voted for an amendment to the 2015 Defense Appropriations bill blocking the Pentagon's use of funds for Guantánamo detainee transfers conducted without such notification. On 11 June, citing the "illegal" transfer of the five Afghan detainees to "a beach resort in Qatar", two US Representatives introduced the Providing Rigorous Oversight to Terminate Extreme Criminal Transfers (PROTECT) Act to prevent the transfer of Guantánamo detainees into the USA, emphasising that "under this legislation unlawful transfers may be punished by a maximum of five years in prison and or a fine."

Whether euphemism or hyperbole is the tone adopted, or something in between, there has been no reference to international human rights principles on the part of US officialdom. This is par for the course where Guantánamo is concerned. This detention facility was conceived in a human rights vacuum, and a reason we are now more than four years past President Obama's deadline for its closure, with nearly 150 detainees still held there, is the USA's continued failure to change its legal and policy [framework](#) from one of "global war" to one that is consistent with international human rights law.

Amnesty International has long called for the Guantánamo detainees to be charged and brought to fair trial or released (into the USA if prompt repatriation or other third safe country solution is not possible), and for the USA to ensure that closure of the facility is done in a manner consistent with international human rights law, and US obligations on truth, accountability and remedy are fully met. The phrase "we have the ability to do things" in this context, however, appears not to include applying human rights principles, even if criticizing other governments for not doing so seems to come easily enough to US authorities. Just a few weeks ago, it was Secretary Kerry himself who launched the USA's latest human rights assessments of other countries. As in previous years, a major theme running through the entries, including on [Afghanistan](#), was impunity for human rights violations. The report, said Secretary Kerry in his launch statement, "is about accountability. It's about ending impunity."

Accountability for past human rights violations seems to be something that the USA expects of other countries, but not of itself. For example, those who authorized and carried out the crimes under international law of torture and enforced disappearance at “black sites” operated by the Central Intelligence Agency (CIA) – which included Guantánamo in its early years – continue to enjoy impunity. Those subjected to such violations – including several current Guantánamo detainees whom the USA wants to execute after military commission proceedings falling short of international fair trial standards – are denied redress.

Among those who have been held at Guantánamo are individuals who should have promptly been investigated for responsibility for criminal acts fundamentally incompatible with human rights, such as the crimes against humanity committed on 11 September 2001 or other crimes under international law, such as war crimes committed during the civil war in Afghanistan which preceded the US intervention in 2001. Anyone against whom the USA had sufficient admissible evidence of responsibility for such crimes should have been charged and brought to trial years ago. The government’s failure to do so not only deprived detainees at Guantánamo of their fair trial rights, and jeopardized the possibility of fair trials, it has deprived the victims of such crimes of their rights to see those responsible brought to justice and truth established through prompt, proper and public trials.

But the pursuit of justice was not why the Guantánamo detention facility was set up. As President Obama said in 2009, it was established under “the misplaced notion that a prison there would be beyond the law.” It was part of a wider detention system used to interrogate or warehouse foreign nationals in incommunicado or virtually incommunicado detention. In May 2009, for example, former Vice President Richard Cheney recalled that after Khalid Sheikh Mohammed was arrested in Pakistan in March 2003, “American personnel were not there to commence an elaborate legal proceeding, but to extract information from him.” This detainee was not brought to trial in a US federal court (where he had previously been indicted), but instead put into secret CIA custody for the next three and a half years. Three days after his arrest, then Attorney General John Ashcroft said that “Khalid Sheikh Mohammed’s capture is first and foremost an intelligence opportunity.” That same month, this detainee was subjected 183 times to “water-boarding”, effectively mock execution by interrupted drowning – torture. He is now among those facing capital trial by military commission at Guantánamo after the Obama administration earlier tested the political temperature and did a U-turn on its decision to bring him and four other “9/11 defendants” to federal court. Meanwhile, no one has been brought to justice for the crimes under international law committed against such detainees.

The five Afghan men transferred to Qatar were likewise not taken to Guantánamo in 2002 for reasons of justice, but “to provide information” on, among other things, “Taliban intelligence offices located throughout Afghanistan”; “Taliban weapon shipments from Mazar-e-Sharif to Kandahar in 1998”; the “demography of the Herat area”; “Iranian intelligence collection capabilities”; “procedures of the Kabul border security department”; and “Taliban communication equipment and procedures.” Amnesty International does not know what treatment they faced beyond year after year of detention without charge or trial. The US Secretary of Defense told the House Armed Services Committee on 11 June 2014 that the five “have not been implicated in any attacks against the United States, and we had no basis to prosecute them in a federal court or military commission.”

Anyone suspected of crimes under international law, including war crimes or crimes against humanity, must not be granted immunity from prosecution, including, in the case of a Guantánamo detainee, as part of any deal to transfer him out of the base. Anyone suspected of such crimes, as are at least two of the five transferred to Qatar, should be appropriately investigated, and, if appropriate, brought to trial in accordance with international fair trial standards, and without recourse to the death penalty.

Meanwhile, explaining his decision to authorize the prisoner swap of 31 May, President Obama pointed out that the parents of Sergeant Bowe Bergdahl, the US soldier freed from Taliban custody (who arrived back in the USA on 13 June), “hadn’t seen [their son] in five years and weren’t sure whether they’d ever see [him] again”. The President should now consider the families of Guantánamo detainees, who are forced to share the twilight world of despair inhabited by their relatives. Detainee and family alike have no idea about when, if ever, release or fair trial will come. For example, Obaidullah, an Afghan man who has been in US custody since July 2002, is held without trial at the naval base, some [8,000 miles](#) from home. His daughter, born two days before he was seized, is now nearly 12, only seven years younger than Obaidullah himself was when taken from his home by US forces and allegedly subjected to torture or other ill-treatment in Afghanistan before being transported to Guantánamo.

Musa’ab Al Madhwani has also been held in Guantánamo since 2002. His allegations of ill-treatment in secret US custody in Afghanistan before his transfer to Cuba have been found credible by a [US judge](#). Last year, this Yemeni man recalled: “Both of my parents have died during the time that I have been in prison in Guantánamo Bay. They were waiting for me to come home and now they are gone. I am afraid that my entire family will be dead before I am released from this prison... I am dying of grief and pain on a daily basis because of this indefinite detention”.

When the Bush administration chose to flout international law in its detention and interrogation policies in what it called the “global war on terror,” it set in train a sequence of events that generated injustices for individuals and their families that continue to fester to this day. The failure of the Obama administration and Congress to put this situation right – as they are obliged to do under US international human rights obligations – leaves the USA operating a detention facility from which detainees get out, not by judicial ruling or other transparent process equally applied, but by executive discretion (or [death](#)). This is not rule of law, but an affront to human rights.
