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USA: Unlawful detentions must end, not be transferred

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“If I pick up someone who will do harm to America”, said the Director of the Central Intelligence Agency (CIA), “I think I realistically have three options: I can detain him under the authorities the President has given us if he meets certain criteria. I can conduct a rendition. That is, taking that person to some other country, a third country. Or I can send that person to Guantánamo”.

Someone had suggested to the CIA Director that there was another option – the detainee could be put into the judicial process. He responded with a reminder that “this is a war, this is not a law enforcement activity.”

There it is in a nutshell: the USA’s global war paradigm being used to justify secret detention, secret detainee transfers and indefinite detention without charge or trial. The normal judicial process is given a back seat.

This statement by the CIA Director is not taken from some secret memorandum drafted in the wake of the attacks in the USA of six years ago. He said it a little over six weeks ago in a public interview. In other words, despite all the revelations about US detentions – from abductions in Milan and Macedonia, renditions to Guantánamo from Gambia and Sarajevo, deaths in custody in Bagram, torture in Abu Ghraib, to CIA “waterboarding” and other “enhanced” interrogation techniques in “black sites” in Thailand and elsewhere – the US government is still defending its global war paradigm and the detention regime it has constructed under it.

A central characteristic of this regime is this: that anyone who is designated as an “enemy combatant” is first and foremost treated as a potential source of intelligence. Treating detainees as individuals from whom information could be taken rather than individuals to whom process was due led to the removal of these detentions from the scrutiny of the courts, the development of a secret detention program, and the use of torture and other ill-treatment. It also led to the improvisation in 2004 of the wholly inadequate administrative review schemes in Guantánamo – Combatant Status Review Tribunals and Administrative Review Boards – that can rely upon secret information that the detainee cannot see as well as information coerced under torture or other ill-treatment in justifying indefinite detention.

Meanwhile, military commissions were established that could also rely on coerced information in handing down convictions, and even death sentences, if any detainee ever was brought to trial. At a Senate subcommittee hearing on 11 December 2007, US Air Force Brigadier General Thomas Hartmann, Legal Adviser to the Convening Authority in the

Pentagon's Office of Military Commissions, refused to rule out the admission by these bodies of information coerced from detainees subjected to "waterboarding", simulated drowning (in this regard, the destruction of videotapes of CIA interrogations may make it even more difficult for any military commission defendants to challenge how certain information was obtained). At the same hearing, General Hartmann described the military commissions as "an honour to the American justice system" and asserted that "what makes America the most benevolent nation in the history of warfare" is its "bestow[al] upon our enemy the rights we, and others, deem fundamental to a fair process under the rule of law."

Fair process, however, has been absent, and trials have to date been treated by the administration as a distant second priority to maintaining its indefinite detention regime. Of the nearly 800 detainees who have been held at Guantánamo, only one has been convicted by the USA, and that was the result of a guilty plea under a pre-trial arrangement that meant the detainee could get out of the base and return to his native Australia.

Guantánamo has been at the heart of the USA's unlawful and coercive detention regime, and remains at the centre of legal challenges. Despite US Supreme Court rulings against the government in 2004 and 2006, this executive detention regime – now with the help of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 – survives relatively intact with detainees held in harsh, isolating and indefinite custody. The narrow judicial review to which they now have access has not yet been carried out, six years after detentions began. Every one of the approximately 500 releases and transfers from Guantánamo has been the result of an executive decision; none has been by judicial order.

On the question of closing Guantánamo, the government has put out mixed signals. On the one hand, President Bush has been saying for some two years that he wants the facility closed. On the other hand, the government has built new expensive prison facilities there. The concrete monstrosity that is Camp Six has not even been operating for a year. Also, while detainees continue to be released, the authorities have transferred some 19 detainees into the base in the past 15 months, with the Pentagon emphasizing their alleged "high value" or "dangerous" quality. Guantánamo is once again being portrayed as a place to hold the most "dangerous terrorists".

On 20 December 2007, Secretary of State Condoleezza Rice was asked whether, in the face of such mixed signals, the government genuinely wanted to close the Guantánamo facility. She responded that "of course, we'd like to see Guantánamo closed. There's only one problem: What are you going to do with the bad people who are there?" She added that it would be helpful if countries would take detainees back "with constraints and make sure that they're not going to be a danger to society again. So we need some help in closing Guantanamo."

The USA has built itself a problem. The government has spent the last six years branding these detainees as "enemy combatants", "terrorists", and "bad people", who are a threat to the USA and its allies. It is now asking other countries to take them. Unsurprisingly, other countries are displaying a certain reticence in this regard. Nevertheless, while the USA has the prime responsibility for bringing about a just and lawful end to the Guantánamo regime, other governments should do what they can to facilitate this. However, any step that would

mean transferring unlawful detentions elsewhere, or exposing detainees to more human rights violations in other countries, must be rejected.

Secretary Rice said that “we will do everything that we can to thin the [Guantánamo detainee] population”, but adding that “this is a long war”. Perhaps such “thinning” will be speeded up in the coming weeks and months to pre-empt a possible adverse ruling in June 2008 from the Supreme Court, which heard oral arguments on the Guantánamo regime on 5 December 2007. Under such a scenario, the possible reliance on diplomatic assurances or agreements under which the USA seeks the humane treatment and the continued indefinite detentions by other countries will be a cause for heightened concern.

A danger now is that the USA’s detention policies and practices in the “war on terror” have been so extreme that some may tolerate any improvement even if the change were to represent a policy that in earlier times would not have been acceptable.

Perhaps the administration will turn to Congress for legislation authorizing some form of preventive detention to cover detainees the USA decides neither to try nor release. At the Senate subcommittee hearing on 11 December 2007, Senator Dianne Feinstein said: “What is the government’s plan to deal with the indefinite detention, without charge, of detainees for what may be decades? And I think we have to come to grips with that question. I think there has to be an answer and if we need to legislate, we should.” She continued: “With respect to Guantánamo and its closure, we’ve just done an inventory of super max[imum security prison] beds and if there are 305 detainees currently [in Guantánamo], then we can add up those super max beds and come to 326 available beds today in the United States between maximum security, military brigs, and maximum security federal prisons”.

The concern here would not only be preventive detention *per se*, but that the US government may be looking to recreate Guantánamo detentions on the mainland under another name, and in effect target those individuals whose trials the USA has jeopardized through its unlawful treatment of them over the years.

Meanwhile, secret detention remains authorized by President Bush. There has been no accountability for this unlawful program. It is not known if anyone is now being held in it – one CIA detainee was transferred to Guantánamo during 2007 – but the fact of its authorization is in and of itself a matter for deep concern. Seven years ago, the notion that the US President would give the green light to what has amounted to a program of enforced disappearance – an international crime – would surely have seemed far fetched.

Inroads have been made into the unlawfulness, but efforts must continue. Secret detention must end. *Habeas corpus* must be restored. Trials – in independent, impartial and competent courts – must be full and fair. The prohibition on torture and other ill-treatment – as defined under international law and standards – must be fully upheld. Full accountability for human rights violations must be ensured. The USA’s notions of “enemy combatants” and a global war paradigm in which human rights law can be disregarded must be challenged. The war paradigm must give way to a framework that embraces a commitment to human rights and the rule of law.

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