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USA: Shadow over justice

Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings

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When injustice anywhere is ignored, justice everywhere is denied
US Secretary of State Hillary Clinton, December 2009¹

The trial of a Tanzanian man transferred last year from the US Naval Base at Guantánamo Bay in Cuba to the US mainland for prosecution is set to begin in New York on 4 October 2010. The decision to prosecute Ahmed Khalfan Ghailani in ordinary federal court on charges of involvement in embassy bombings in 1998, rather than to continue to hold him in indefinite detention without criminal trial or to try him before a military commission, was and remains a welcome one. However, a shadow lies over the proceedings.

First, the trial will serve as a reminder that today Ahmed Ghailani remains the only Guantánamo detainee to have been transferred to the US mainland for prosecution. Nearly a year after the US Attorney General announced that five other detainees would be brought to New York to be prosecuted in relation to the attacks in the USA on 11 September 2001, the five men remain in Guantánamo without charge or trial, along with more than 150 others. Those detainees, and the survivors of the attacks in relation to which some of them have been accused, must it seems continue to wait for justice.

Second, although the government has succeeded in seeing off defence motions to have charges against Ahmed Ghailani dismissed because of his unlawful treatment prior to his transfer to New York, its failure to ensure accountability and remedy for such human rights violations – including the crimes under international law of enforced disappearance and torture – is an injustice that it must urgently and thoroughly address.

The trial of Ahmed Ghailani, who was arrested in Gujarat in Pakistan on 24 or 25 July 2004 and secretly handed over to US custody on a still classified date the following month, could and should have occurred years ago. However, the US authorities chose to subject him to two years in the secret detention program operated by the Central Intelligence Agency (CIA). During that time he was subjected to enforced disappearance and to detention conditions and interrogation techniques that violated the prohibition of torture and other cruel, inhuman or degrading treatment. He was transferred to indefinite military custody in Guantánamo in early September 2006 before being charged for trial by military commission in March 2008.

On 21 May 2009, four months after President Barack Obama took office, the Department of Justice announced that Ahmed Ghailani would be tried, not by military commission, but in federal court under an indictment that had been pending against him in the District Court for the Southern District of New York since March 2001 (which superseded an October 1998 indictment in which he had also been named). On 9 June 2009 he was transferred from Guantánamo to New York. He is charged with complicity in the

August 1998 bombings of two US embassies in Kenya and Tanzania in which 224 people were killed and many more injured. He faces a life sentence if convicted.

During pre-trial proceedings, the defence challenged the US government's treatment of Ahmed Ghailani prior to his being brought to New York, but the trial judge made it clear that the criminal trial will not be the forum in which accountability for this period will be addressed (if it is addressed at all), although he has acknowledged that the government and individual officials may indeed have a case to answer in relation to Ghailani's treatment.

Judge Lewis Kaplan ruled against a defence motion to have the indictment against Ahmed Ghailani dismissed on the grounds that he had been tortured in CIA custody before his transfer to Guantánamo in 2006. "Any remedy for any such violation", Judge Kaplan wrote in his opinion of 10 May 2010, "must be found outside the confines of this criminal case". If Ahmed Ghailani was tortured, the judge concluded, "he may have remedies". But such remedies "do not include dismissal of the indictment". Judge Kaplan noted that the government had given assurances that it would not use any statements made by Ahmed Ghailani while in CIA custody, "or the fruits of any such statement", in his prosecution. A decision to forego use of any statements obtained under torture or other ill-treatment is not only a crucial element of any effective remedy for Ahmed Ghailani, however, it is and was in any event a specific international legal obligation by which the US government was bound.²

Subsequently, on 12 July 2010, Judge Kaplan denied a defence motion to have the indictment dismissed on the grounds that Ahmed Ghailani's right to a speedy trial had been violated during the five years that he was held in CIA and US military custody. This time, Judge Kaplan noted that Ahmed Ghailani "is not alone in questioning the propriety of at least some of the techniques that the CIA was authorized to use on certain detainees", and added that some of the methods used by the CIA "might give rise to civil claims or even criminal charges". However, he ruled that "this is not the time or the place to pass judgment on whether those techniques, in and of themselves, were appropriate or legal."

Judge Kaplan's ruling threw the issue of accountability and remedy back to the political branches of government. The question for the court, Judge Kaplan concluded, was "not whether the CIA's treatment of Ghailani prejudiced him in the sense that it was distasteful or worse", but whether that treatment "prejudiced values protected by the Speedy Trial Clause" of the US Constitution.³ Judge Kaplan ruled that there were insufficient grounds for concluding that his treatment had compromised these values (as a matter of US domestic law). While the delay in bringing Ahmed Ghailani to trial "was long and entirely the product of decisions for which the executive branch of our government is responsible", Judge Kaplan wrote, "the decisions that caused the delay were not made for the purpose of gaining any advantage over Ghailani in the prosecution of this indictment".

In essence, he found, the Bush administration's failure to bring Ahmed Ghailani to trial stemmed from its policy decision to prioritize intelligence gathering over due process, and its decision to treat him as a captive in a situation of armed conflict (i.e. a pervasive global war with *al-Qa'ida* in which the USA has claimed human rights obligations are simply inapplicable). Whatever the judge's characterisations and conclusions regarding domestic US law, however, the fact that the USA has for a number of years now chosen to disregard its clear obligations under international human rights law and to rely on distortions of the international law of armed conflict, provides no justification under international law for the violations the USA has committed against Ahmed Ghailani, including enforced disappearance and violations of the prohibition of torture and other cruel, inhuman or degrading treatment.

Over a year after he was brought to New York, Ahmed Ghailani remains the only Guantánamo detainee to be charged for trial in federal court, despite the authorities eight months ago indicating that they may prosecute around three dozen of the detainees.⁴

On 13 November 2009, Attorney General Eric Holder announced that five Guantánamo detainees accused of involvement in the attacks of 11 September 2001, who like Ahmed Ghailani had previously been charged by the Bush administration for trial by military commission, would be transferred for prosecution in federal court in New York. An accompanying Justice Department press release stated that “Justice has been delayed far too long.” More than 11 months later, however, the delay continues and the five detainees – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz and Mustafa al Hawsawi – remain in Guantánamo, where they have now been held for over four years without trial.⁵ Prior to that, they had been detained incommunicado by the USA for up to four years at undisclosed locations in the CIA secret detention program and subjected to torture and other ill-treatment.

The Obama administration has been in office for more than 20 months. Regardless of the failings of the previous administration, the USA’s failure to ensure within a reasonable time fair trials or release of the Guantánamo detainees is unacceptable, and violates the right to trial without undue delay.⁶ A fully functioning civilian judicial system, with the experience, capacity and procedures to deal with complex terrorism prosecutions, was available from day one.

Also from day one, the administration was under an international human rights obligation to investigate the evidence of crimes under international law (e.g. enforced disappearance and torture) and other human rights violations associated with the CIA secret detention program and other policies, to bring those responsible to justice, and to ensure effective access to a real remedy for its victims. For individuals subjected to enforced disappearance or torture or other ill-treatment the right to a full and meaningful remedy goes well beyond the exclusion of any information obtained as a consequence of the abuse. The UN Convention against Torture, for instance, explicitly requires the USA to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”⁷

Particularly on the international stage, the USA continues to speak the language of human rights. President Obama recently told the UN General Assembly, for example, that “we stand up for universal values because it’s the right thing to do”.⁸ The administration has embedded respect for universal human rights as a core principle of its National Security Strategy.⁹ A commitment to human rights, said US Secretary of State Hillary Clinton shortly after international Human Rights Day last year, “starts with universal standards and with holding everyone accountable to those standards, including ourselves”.¹⁰ More recently she told the UN Security Council that as the world works to defeat terrorism, “we cannot abandon our values; we must defend them”. Countering terrorism, she said, means “strengthening our commitment to core values, particularly human rights and the rule of law. We cannot sacrifice those values in our zeal to stop terrorists.”¹¹

Ensuring effective remedy and accountability for the human rights violations committed in the CIA program is a human rights and rule of law obligation of the USA. So is bringing to trial without undue delay, in accordance with international fair trial standards, those in its custody it intends to prosecute.¹²

An overarching theme of the USA’s failure to meet its stated commitment to adhere to human rights principles while countering terrorism is its continuing and sweeping resort to a global “war” framework in a wide range of contexts, including far from any battlefield, to the exclusion of ordinary criminal justice and law enforcement frameworks. Indeed, this is yet another issue that has marked the Ahmed Ghailani case. In its arguments before Judge Kaplan in New York in late 2009, the US Department of Justice argued that, unlike four of Ahmed Ghailani’s co-defendants, who had been brought “expeditiously” to trial after their arrest and convicted in the District Court in New York in May 2001,¹³ Ahmed Ghailani had been “captured during a war”, and the US government had “justifiably opted to initially treat the defendant as an intelligence asset”. After it had held him for two years in secret detention, the Obama administration argued, the government had “made the entirely reasonable decision to continue holding him as an alien enemy combatant pursuant to the laws of war and to prosecute him in a military

commission”.¹⁴ Amnesty International considers that neither the secret detention program nor the Guantánamo detentions, nor the military commissions, were consistent with international law.

In a reflection of how pervasive the normalization of this corrosive global “war” paradigm, widely rejected elsewhere, has become within US institutions, contaminating not only the executive and congressional branches of government, but also the judiciary, Judge Kaplan himself effectively endorsed it in his pre-trial rulings.¹⁵ In his ruling that Ahmed Ghailani’s right to a speedy trial had not been violated, Judge Kaplan decided that none of the five-year period that Ahmed Ghailani had spent in CIA and military detention “subjected Ghailani to a single day of incarceration that he would not otherwise have suffered” because “he would have been detained for that entire period as an enemy combatant regardless of the pendency of this indictment”. He found that under US Supreme Court precedent, the executive, with congressional authorization, could detain “enemy combatants” for the duration of hostilities in what the previous administration had called the “war on terror”. Indeed, he wrote that Ahmed Ghailani “presumably will remain in US custody as long as hostilities with Al Qaeda continue, regardless of the outcome of this case”. The extent of the creeping normalization of “emergency” thinking and reasoning, and of the “global war” paradigm itself, is starkly represented by Ghailani’s case: he was arrested in Pakistan by Pakistani authorities, not on any battlefield in any armed conflict as that term is understood in international law.¹⁶ And, as noted above, a criminal indictment had been outstanding against him in the USA since October 1998.

Again, the Obama administration’s decision to bring Ahmed Ghailani to trial in federal court was a positive break from its predecessor’s approach to the case, as was its decision not to seek the death penalty against him.¹⁷ Bringing all those it accuses of involvement in the 11 September or other unlawful attacks to trials in federal courts would not only be a huge step towards respect for the rights of the detainees, it would be an important component of respect for the rights of the survivors and victims of those attacks.¹⁸ President Obama’s order to end the CIA’s use of long-term secret detention and “enhanced” interrogation techniques was also a welcome move to be built upon, and his as-yet unrealized declaration that the Guantánamo detentions would end held out the promise of change after years of unlawful detentions.¹⁹

Today, however, these positive moves have fallen under a shadow. This shadow can be dispersed by the USA living up to the universal human rights principles it says it is committed to and expects of others.

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¹ Remarks on the Human Rights Agenda for the 21st Century. Hillary Rodham Clinton, US Secretary of State, Georgetown University’s Gaston Hall, Washington DC, 14 December 2009, <http://www.state.gov/secretary/rm/2009a/12/133544.htm>

² UN Convention against Torture, article 15; Human Rights Committee, General Comment no. 20 (1992), para. 12, finding the same obligation to arise under article 7 of the International Covenant on Civil and Political Rights. See USA: Judge refuses to dismiss charges against former secret detainee, says remedy for torture or other abuses must be sought elsewhere, 13 May 2010, <http://www.amnesty.org/en/library/info/AMR51/040/2010/en>.

³ Under the Sixth Amendment to the US Constitution, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”.

⁴ See Final report of the Guantánamo Review Task Force, 22 January 2010, <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>

⁵ USA: Double standards or international standards? Crucial decision on 9/11 trial forum ‘weeks’ away, 28 April 2010, <http://www.amnesty.org/en/library/info/AMR51/034/2010/en>

⁶ “In the determination of any criminal charges against him, everyone shall be entitled”, among other things, “to be tried without undue delay”. International Covenant on Civil and Political Rights, article 14.3(c).

⁷ UN Convention against Torture, article 14(1). This right applies also to other ill-treatment (see Committee against Torture, General Comment no. 2 (2008), para 3; Human Rights Committee, General Comment no. 20 (1992), para 14; General Comment no. 31 (2004), para 16). The same right exists with respect to enforced disappearance: see Declaration on Enforced Disappearance, article 19 and International Covenant on Civil and Political Rights, article 2(3).

⁸ Remarks by the President to the United Nations General Assembly, 23 September 2010,

<http://www.whitehouse.gov/the-press-office/2010/09/23/remarks-president-united-nations-general-assembly>

⁹ See USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 23 June 2010,

<http://www.amnesty.org/en/library/info/AMR51/053/2010/en>

¹⁰ Remarks on the Human Rights Agenda for the 21st Century, *op. cit.*

¹¹ Remarks to the UN Security Council meeting on threats to international peace and security, US Secretary of State Hillary Clinton, United Nations Headquarters, New York City, 27 September 2010,

<http://www.state.gov/secretary/rm/2010/09/148057.htm>

¹² See International Covenant on Civil and Political Rights, article 14(3)(c), and Human Rights Committee, General Comment no. 32 (2007), paras 27, 35 and 61.

¹³ According to an FBI agent involved, the four co-defendants had been "brought expeditiously to the Southern District upon arrest". *USA v. Ghailani*, Declaration of Special Agent Philip A. Swabsin, 10 December 2009.

¹⁴ *United States of America v. Ahmed Khalfan Ghailani*, Memorandum of law in opposition to defendant Ahmed Khalfan Ghailani's motion to dismiss the indictment due to the denial of his constitutional right to a speedy trial. December 2009.

¹⁵ USA: Doctrine of pervasive 'war' continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>.

¹⁶ Precisely which authorities carried out the arrest remains classified Top Secret. Contemporaneous reports of the arrest indicate that the arrest at the house in Gujarat in which Ahmed Ghailani was living was the result of a joint Pakistan/US intelligence operation and was carried out by Pakistan police after a shootout of several hours. The Pakistan Interior Minister was quoted at the time as saying that, Ahmed Ghailani would be interrogated in Pakistani custody "to our satisfaction before handing him over to the US for the trial". Pakistan holds top Al Qaeda suspect, Washington Post, 30 July 2004.

¹⁷ See No death penalty for former secret detainee. Further information on Amnesty International Urgent Action, 8 October 2009, <http://www.amnesty.org/en/library/info/AMR51/110/2009/en>

¹⁸ See Security and human rights: counter terrorism and the United Nations, 3 September 2008, <http://www.amnesty.org/en/library/info/IOR40/019/2008/en>, Annex I.

¹⁹ USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>