

ORIGINAL: FRENCH

**Report on Guantanamo**  
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**Introduction**

A delegation went to Guantanamo for the third time from 26 to 27 March to take stock of the procedures for transferring detainees, the conditions under which they were kept, and on how the military commissions set up were operating. The delegation was composed of the rapporteur, Vice-President of the OSCE Parliamentary Assembly, the Secretary General of the OSCE Parliamentary assembly, Mr Spencer Oliver, and Messrs Simon Petermann (expert), Thibaut de Cardon de Lichtbuer (Belgian Senate) and Patrick Stevens (Belgian Federal Police).

Pursuant to the recommendations of the previous report, the rapporteur capitalised on the previous year to delve into greater depth in one of said recommendations aimed at encouraging the United States to reduce the number of prisoners. She established frequent contacts with the Pentagon and suggested to European ministers for foreign affairs and several European officials to consider the possibility of transferring a certain number of releasable detainees, in particular 16 Uighurs and 4 Uzbeks, to countries other than their country of origin, where the United States cannot repatriate them, so as to avoid cruel and inhuman treatment. For the record, 5 Uighurs were transferred after lengthy negotiations to Albania more than a year ago, although they were wanted by China for terrorist activities.

This report is therefore proposing, as a continuation of the previous reports, to take stock of the situation of the detainees and to spell out certain recommendations already made. It has been drawn up on the basis of many discussions, in particular at the Pentagon with Mr Gordon England, Deputy Secretary of Defence; Brigadier General Thomas W. Hartman, in charge of military commissions, and other officials responsible for the detainees at Guantanamo; at the State Department, with Mr John B. Bellinger, Legal Adviser. It is also based on a critical examination of official sources and of information coming from the media and human rights organisations (in particular the *Center for Constitutional Rights*, *Human Rights Watch*, *Human Rights First*, *Amnesty International*). Finally, information collected on location during a briefing organised by Commander Mark Busby, was subjected to careful scrutiny. The rapporteur also met with the representative of the Uighur community in Washington D.C., M. Seytoff, as well as with representatives of the *Center for Constitutional Rights*. As at the time of previous visits, no private conversations with the detainees were allowed.

**1) Preliminary considerations**

The Guantanamo detention centre continues to elicit frequent criticism of the United States in many countries. The issue of closing the centre is on the agenda of the candidates for the American presidential election. Hillary Clinton and Barack Obama are clearly in favour of closing the centre. For his part, the republican candidate, John McCain has also suggested that the centre should be closed and that some of the detainees should be transferred to high-security prisons on US soil. The most virulent criticism is levelled by human rights organisations. They concern essentially the military commissions set up to try the detainees considered the most dangerous, the absence of legal guarantees under this system, and interrogation methods tantamount to torture and to cruel, inhuman and degrading treatment. The American media continue to report regularly on severe interrogation techniques accepted by the Administration (in particular blows, sleep privation, and waterboarding) which confirm the allegations of numerous human rights organisations and the testimony of former detainees.

In spite of its efforts, the US Administration has not managed to convince the international public opinion about its policy in dealing with individuals presumed guilty of acts of terrorism. The fact of having transferred to Guantanamo, prisoners considered dangerous, from CIA secret prisons located outside American territory, has not helped to improve the image of the United States, especially in the Muslim world. The same applies to the release and transfer of a large number of detainees to their country of origin or to other host countries, although no tangible proof of their involvement in terrorist acts has been produced.

The US Administration obviously wishes to accelerate these proceedings and is negotiating with countries of origin or with third countries susceptible of taking detainees. But such releases or transfers often come after several years of detention and after the charges levelled against the detainees have turned out to be too weak to warrant indictments. This is how Sami al Hajj, a cameraman for Al-Jazira, held in Guantanamo for several years without being indicted or tried, was released and transferred to Sudan, his country of origin, and was banned from working henceforth in the Gulf states. He had always contested his status as "enemy combatant," had gone on a hunger strike on several occasions, and his fate had mobilised many human rights organisations.

The transfer of detainees moreover poses serious problems to the US Administration, as approximately fifty of them refuse to go back to their country of origin where they fear, undoubtedly with reason, that misfortunes, including torture, await them. This is how 2 Yemeni detainees refused categorically to be transferred to Yemen, where the conditions of detention are even worse than in Guantanamo.

Figures released by the Pentagon show that 23 detainees were transferred and 31 freed (out of 496) in 2005; 63 detainees were transferred and 37 released (out of 396) in 2006; and 199 were transferred and none released (out of 277) in 2007. According to our information, several of these detainees, all of whom were declared "*no longer enemy combatants*," could not be transferred to their country of origin for humanitarian reasons. Negotiations have continued into 2008 for other detainees, and rehabilitation programmes are "sponsored" by the United States in Saudi Arabia for the reintegration of transferred detainees into society, and could serve as a model for certain countries, like Yemen. The return of a Kuwaiti detainee into action obviously curbed the process, after he was used as a suicide bomber in Iraq.

One initial observation stands out. The number of detainees has been reduced considerably from previous years. At the time of the visit, there were 278 detainees of 34

different nationalities at Guantanamo, in particular from Yemen, Afghanistan, Algeria, Saudi Arabia, Sudan, Pakistan, Tunisia, Libya and Syria. Since the previous report, 120 detainees have been sent back to their country of origin.

## 2) Military commissions

The military commissions were set up after the enactment of the *Military Commission Act of 2006* and are charged with trying the *Unlawful Enemy Combatants*. The first trials started under difficult conditions, deemed unacceptable by the defenders of the detainees and by human rights organisations. It is worth pointing out that under its unrestricted prerogatives, the US Administration had decided to try some of the detainees at Guantanamo – those it chose, and according to its own rules. After numerous adventures, several detainees have been chosen to appear before the military commissions that recognised the presumption of innocence, but authorised prosecutors to use testimony collected among co-detainees.

It is also worth bearing in mind that in December 2007, the US Supreme Court started to look into whether the detainees at Guantanamo could go to court to contest the legality of their detention. The lawyers defending the detainees had always argued that those held in Guantanamo must have the right to *habeas corpus*, which enables an individual to contest the lawfulness of his detention before an independent and impartial court, and to be released if said detention was found to be illegal. Several individuals and organisations, including *Amnesty International*, had actually submitted memoranda before the Supreme Court for the detainees to be granted *habeas corpus*.

The military commissions are composed of 5 military judges (12, if the death penalty is at issue). The accused, who is presumed innocent, is defended by a military attorney, who may nonetheless be assisted by a civil attorney and his assistants. He is entitled to hear of the evidence against him, but the Secretary of Defence and the Attorney General have the right to ask for “exceptions.”

According to the American authorities, the military commissions are perfectly legal and provide sufficient legal guarantees. The trials are in open court and can be attended by the media and human rights organisations. When classified documents are presented, the sessions will be held in camera, but the accused will be present. If the accused tries to disrupt the court, he will be sent to a cell where he can follow his trial via closed-circuit television. If he is found guilty, he can appeal to a *Court of Military Commission Review*, and if necessary to the Court of Appeal in Washington D.C. Finally, an appeal can be lodged with the US Supreme Court. Our contacts at Guantanamo insisted on many details tending to prove the impartial character of the military commissions and the guarantees offered to the detainees who appear before them.

The fact remains that since our visit, the legal imbroglio started a few years ago seems to continue and could ultimately compromise the system established. Already in April 2008, Justice James Robertson of a federal court, ordered the suspension of a trial before a military commission in Guantanamo intended to judge Salim Ahmed Hamdan, a 34 year old Yemeni, suspected of having been Osama Bin Laden’s driver. The federal judge not only contested the legitimacy of this form of military justice, but went even further by contesting the Pentagon’s choice to refuse detainees in Guantanamo the protection provided by the Geneva Conventions which the United States has signed. At Guantanamo, the decision had been served during the hearings before the military commission. Colonel Peter Brownback, who was presiding the

military commission, adjourned the session for an unspecified period. The federal judge ruled that the operating rules of the military commissions had to be reviewed in order to comply with the Code of Military Justice. The Department of Justice disagreed with this decision. This is only one episode in the legal battle that was engaged in January 2002, when the legal experts of the US Administration invented the concept of “*Enemy Combatant*” for the presumed terrorists captured in Afghanistan to avoid the application of the Geneva Conventions, and subjected them to constant, often violent interrogations if the testimony of former detainees is to be believed, at Guantanamo or other secret detention centres. It is worth bearing in mind that the legal experts of the US Administration have always contested this view of things.

Today, it is the military attorneys charged with defending the accused before the military commissions who contest, in the name of the law, the way these commissions operate. It is reasonable to surmise that the legal imbroglio we have reported on above will continue, and that it risks compromising, in fact, the functioning of the military commissions.

As a matter of fact, on June 12, 2008, the Supreme Court of the United States challenged the bases of the “war on terror” policy of President George Bush and the Congress. The Court was called on to pronounce on the lawfulness of the imprisonment in Guantanamo for the third time since 2004 and ruled that the detainees had the right to appeal to civilian courts on US soil to challenge their confinement.

### **3) « Camp Justice »**

A new complex has been built for the military commissions on the former military airport of the base. At the outset, the project entailed the construction of three courtrooms, to hold several trials at the same time, accommodation for nearly 1000 military personnel, attorneys and journalists, a garage for one approximately hundred official vehicles and a cafeteria sitting 100. The budget, initially exceeding US\$ 100 million, was reduced substantially, but the facilities were built on schedule. The main courtroom features sophisticated equipment (computers, screens, etc.) and a room for the public, which can follow the trial, but the sound is broadcast with a slight delay to enable the judge to cut it off, if classified information is disclosed. The room for the public (journalists, members of NGOs, etc.) has a restricted capacity. Conversely, a vast pressroom was arranged in the former hangar of the airport, with outlets for plugging in computers.

Near the building where the trials are to be held is a vast camp of military tents (nearly 70) intended for the hundreds of journalists and members of NGOs who will come to attend the trials. These tents are equipped in a convenient, if military manner, with 6 beds, cupboards, tables and chairs. An air-conditioning system has also been installed. Special tents are provided for showers and toilets.

Next to these tents has been pitched another camp composed of 5 or 6 small, prefabricated bungalows turned into offices. These bungalows are intended for the lawyers of the detainees who are on trial. They are also furnished (beds, desks, showers, toilets) and air conditioned. The entire set-up is impressive and is known as “Camp Justice.” The military officials are particularly proud of these facilities in which, according to them, the first American trials for war crimes are to be held since World War II.

The first trials of detainees presumed to be the most dangerous are scheduled for May 2008. According to information provided by the Pentagon, 13 detainees are to be tried by the military commissions: Omar Kahdr, Salim Hamdan, Mohammed Jawad, Ahmed Mohammed al Darbi, Ali Hamza Ahmad Suliman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, Mohammed Kamin, Khalid Sheik Mohammed, Walid Bin Attash, Ramzi Binashibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adam al Hawsawi and Mohammed al Kahtani. The last six names cited are those of detainees presumed to have been involved in the 9/11 attacks. According to military officials, some of these trials could last two to three years. It would appear that the military authorities have already gathered sufficient evidence against 50 detainees and they expect to have enough for 80 detainees.

#### **4) Detention conditions**

The detention conditions are the same as those noted during the previous visit. Camp 4 (« *medium security* ») intended for the more cooperative detainees (dressed in white) seems to have been made more secure than in 2007. By way of reminder, we had mentioned serious incidents that had occurred there in our report of July 2007. During our visit, we noted that Camp 4, with a capacity of 160 detainees, was gradually being emptied. There were only some fifty detainees left in the camp. Many detainees have already been transferred. Those left apparently pose no problems.

The detention conditions have remained comparable to those noted during our previous visit (collective cells, recreation areas, etc.). Certain “items of comfort” have been added and educational activities offered to detainees, in particular literacy courses and/or courses on interpreting the Koran. An English instruction class has been set up, and has a room equipped with a TV screen protected by thick glass. The detainees are apparently authorised to watch programmes on the *National Geographic* television channel. Films are shown on Thursdays and Fridays. They are usually old films that contain no scenes likely to irritate the detainees, or to make them angry, and football matches. The camp officials stress in particular the activities on offer for the detainees. The library has nearly 5,000 volumes, including ten volumes of Harry Potter in Arabic, classics like *Oliver Twist*, and an eclectic choice of other works translated in nearly 19 languages spoken by the detainees.

According to information gathered on location, there were still 6 detainees on a hunger strike, but their number has diminished. In general, the hunger strikers are quieter. Detainees on trial are treated differently from those who will not be tried.

It is worth pointing out that the Uighurs that were eligible for release were not in Camp 4. According to military officials, after several incidents of non-compliance with the rules in force in this camp, they were transferred to Camp 5 or 6. It was noted that there were no common rules for detainees who are eligible for release or transfer. Their location is determined by their behaviour and acceptance of the rules set by the command. Camp 6, the most modern, had been slightly modified for the grouped management of detainees (we were not able to ascertain that the Uighurs were held there) who have behavioural problems, are aggressive, or who have problems of communication, especially with language.

Overall, the detainees seemed quieter compared with our previous visit. But surveillance is particularly strict. In Camps 5 (with a capacity of 100 detainees) and 6 (with a capacity of 170 detainees), the cells are checked nearly every three minutes, or even every minute. The detainees improved their mutual co-ordination, the level of sophistication in

communicating between them is increasing, and some of them are authorised to telephone relatives and lawyers.

During our previous visit in Camp 5, we were authorised to enter the central area with sets of secured metal tables and chairs. This year, this area could not be visited. Conversely, we saw detainees “relaxing and engaging in sports” in the area reserved for this purpose. It is worth pointing out that the individual cells are lit day and night, and that sleeping masks have been distributed to some detainees. Some “items of comfort” have been added, in particular a small, battery-operated razor, which is withdrawn immediately after use. The black mark painted on the ground in each cell about fifty centimetres from the door clearly indicates that the detainee is not authorised to cross this short space when in contact with the guards. The detainees are entitled to only two hours of exercise per day in an enclosed area for this purpose. In Camp 6, we noted two facilities intended for first aid, and in particular, for dental care. We also noted that the guards (MP) wore protective masks and blue latex gloves soaked in a disinfectant.

Camp 5 has a room with tables and chairs where the detainees can talk to their lawyer or with members of the ICRC. During the discussion, the detainee is chained to a steel ring fixed on the ground.

In spite of the apparent calm, the number of incidents is apparently on the rise. Detainees and their guards often do not see eye to eye. Such friction is not due only to the nervousness, anxiety and stress of the detainees, or the aggressiveness of the guards, but also to the radicalisation we had already noted in a previous report. This phenomenon is now openly acknowledged by the military officials, but it is put into perspective. Officials speak for that matter of very cooperative detainees, who cannot show it openly, so as not to be perceived as collaborating with the Americans. It would appear that those most determined in their convictions and those most politicised dominate the other detainees. It is very likely that the presence of detainees presumed to have been involved in the 9/11 attacks has had an influence on all the detainees. We should not forget, for that matter, that many detainees have still not been officially indicted and that many of them have been held at Guantanamo for years. No statistics on incidents were supplied to us, although they are scrupulously compiled, as we mentioned in our previous report.

## **5) Hospital for the detainees**

As during our previous visit, the delegation was granted access to the hospital. At the time of the visit, only one detainee was hospitalised according to the doctors. We noted that the medical facilities were similar to those visited the year before. The medical staff comprise some one hundred persons and the hospital has some twenty beds, that can be extended to thirty. The previous report contained numerous details on the medicines distributed to the detainees. No significant changes seem to have occurred on this front. The information gathered indicates that 17% of the current detainees have psychiatric problems.

## **6) What can we still learn from the detainees after 6 years?**

We had already mentioned this problem in the previous report. What is the intelligence value we can obtain from detainees who have been held in Guantanamo for several years? The answers to this question are always the same. The head of the *Intelligence Joint Task Force* continues to aver, as he had done during our previous visit, that some detainees still have useful information in the fight against terrorists of Al Qaida and those around it. According to him, information provided by some detainees made it possible to avert attacks in Europe recently. We have obviously not been able to verify such allegations. In his eyes, Guantanamo is still a unique source of information on the networks, recruiting methods, the location of training camps, the financing of terrorist groups, etc. Some detainees are still considered to be dangerous and must therefore be kept out of the “battle field” at any price.

We expressed our scepticism in previous reports as to the added value of information gathered after years of detention, as well as the degree to which certain detainees are dangerous. As regards the latter point, we must bear in mind the fact that a large number of detainees who were released and transferred clearly shows many of them wound up in Guantanamo almost by chance, because they kept suspect company or because they were at the wrong place at the wrong time. Conversely, it cannot be doubted that individuals transferred to Guantanamo after spending several years in CIA secret prisons outside the territory of the United States, are highly dangerous. It remains to be seen whether the evidence compiled against them will be sufficient and whether the information they have provided was not extracted under constraint and even torture, as their defenders and human rights organisations assert.

## **7) Final considerations and recommendations**

### **a) Final considerations**

It is clear that the atmosphere is today very different among civil and military officials who gauge the changes that will come about in Washington D.C. after the presidential elections in November 2008 and the inauguration of the new administration in January 2009. During our visit, particular emphasis was placed on the operation of the military commissions.

The possible closing of the detention camp has been raised, but our contacts insisted on the fact that this could only be done gradually, and that only a symbolic act will be possible by the end of 2008, because the problem will persist.

We have moreover noted the presence of a branch of the OIM on the base. Facilities are available or under construction to accommodate any refugees from the Caribbean – to indicate a rapprochement with the IOM so as to create a refugee status for certain detainees who cannot be transferred.

**b) Recommendations**

Your rapporteur:

- 1) Notes that the policy aimed at transferring the detainees has proved its efficacy and that it should be continued and accelerated. The reticence of the US Administration is understandable, particularly when some of the transferred detainees “return to combat,” in particular a Kuwaiti who was used as a suicide bomber in Iraq. Such transfers can lead to the application of reintegration programmes, as the United States has conducted jointly with Saudi Arabia. The efforts to reach an agreement with Yemen can be deemed positive. Against such a background, certain participating States in the OSCE have shown their solidarity with the United States in order to define such reintegration programmes. Other countries, including among partner countries, are still in negotiations;
- 2) Notes that a particular community, that of the Chinese Uighurs, who can be released, are still in Guantanamo; recommends to the participating States of the OSCE that have Uighur communities among their population to examine the feasibility of an integration programme for such detainees who are waiting to be transferred;
- 3) Notes that the American Authorities consider that all the detainees still at Guantanamo continue to pose different degrees of threat to the security of the United States, and that some 80 of them will be tried by the military commissions;
- 4) Notes that the military commissions established after the enactment of the « *Military Commissions Act* » in September 2006 are starting to function and recommends to the American authorities to spare no effort to ensure that the right of the detainees to a fair and transparent trial is guaranteed;
- 5) Notes the ruling of the Supreme Court of June 12, 2008 which gives detainees the right to challenge their confinement in civilian courts on US soil;
- 6) Reasserts her commitment to an independent and impartial justice, even if it is not for her to determine the most suitable judicial procedure for judging individuals presumed guilty of terrorist acts;
- 7) Notes that the implementation of the recommendation aimed at encouraging the participating States of the OSCE to negotiate transfers has been made very cumbersome by the absence of an international status for detainees who do not hold the nationality of a participating State. The international effort to censure the Guantanamo detention centre and calls to have it closed should be accompanied by the establishment of an ad hoc status within the competent international organisation (OIM, UNHCR) so as to facilitate reintegration from the legal point of view of the host State.

International humanitarian law is changing since the Parliamentary Assembly of the OSCE started examining this complex matter pertaining to the very nature of conflicts in the 21<sup>st</sup> century. As the report of our colleague Wolfgang Grossruck (Austria) shows, humanitarian law must be updated to take account of current gaps;

- 8) Recommends that a group of experts be created that involves the ICRC but also experts from countries engaged in the post 9/11 military confrontations, to start a reflection on the possible development of international humanitarian law regarding the general question of “new categories of combatants” in view of the recent development in international terrorism;
- 9) Notes that the future of the Guantanamo detention centre will obviously be linked to the choice of the future president of the United States; Recommends that a road map for closing this prison be drawn up. This would send a strong signal to the international community. If this road map involves various Member States of the OSCE, and does not isolate the United States from its efforts, it will lead to regained solidarity on human rights and the fight against terrorism in the OSCE;
- 10) Recommends to remain vigilant against international terrorism at a time when terrorist groups are attracting young recruits from Europe and elsewhere and when the danger in the Afghan and Iraqi region is maximal.