

## **Report on Guantanamo** **by the Bureau of the OSCE PA Third General Committee**

From 25 to 29 January 2015 the Chairperson and Vice-Chairperson of the OSCE PA General Committee on Democracy, Human Rights and Humanitarian affairs held meetings in Washington, DC and with personnel at the Joint Task Force Guantanamo at the U.S. Naval Station Guantanamo Bay, Cuba. The delegation particularly focused on efforts to close down the detention facility, as well as the status and legal access accorded to detainees held at Guantanamo.

The visit was a continuation of long-standing engagement by the OSCE Parliamentary Assembly in issues related to the detention facility at Guantanamo. The Assembly has previously conducted high-level visits in 2006, 2007 and 2008, and has adopted several resolutions on the issue.<sup>1</sup> The delegation expresses its thanks to the U.S. government and the personnel at JTF Guantanamo for their open approach to discussing issues raised by the Members and for facilitating the visit.

At the conclusion of their visit Chairperson Isabel Santos (MP, Portugal) and Vice-Chairperson Mehmet Sevki Kulkuloglu (MP, Turkey), called on OSCE countries to proactively assist the United States in efforts to close the facility and expressed concern regarding the legal context for detainees. The delegation stated that the continued detention of well over 100 people at Guantanamo for many years remains a dark spot on the United States' reputation in the sphere of human rights and rule of law. It was also noted that the facility remains a powerful symbol and is widely considered a recruiting tool for criminal terrorists globally.

This report is intended to share the conclusions of the delegation with colleagues in the OSCE Parliamentary Assembly, facilitating work by the Assembly on Guantanamo. It is hoped that this can serve as a basis for continued engagement to close Guantanamo, as well as a basis for reflection on how to uphold fundamental human rights in the fight against terrorism.

### **A. Status of detainees**

At the time of the visit, 13 years since the establishment of the facility, Guantanamo reportedly housed 122 detainees.<sup>2</sup> The delegation was informed that the detainees were being held at Guantanamo to keep them off of the battlefield. Citing the laws of war, the U.S. government asserted that detainees could be held until the end of hostilities.

According to information provided, 54 detainees had already been cleared for transfer to other countries. 10 were in the process of prosecution before military commissions established by the

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<sup>1</sup> Reports on previous engagement by the OSCE Parliamentary Assembly, as well as previous recommendations, can be found at: [www.oscepa.org](http://www.oscepa.org)

<sup>2</sup> 780 people are understood to have been detained in Guantanamo since the opening of the detention facility. Please see: NY Times, 'The Guantánamo Docket', <http://projects.nytimes.com/Guantanamo>.

U.S. government. The remaining 58 detainees' status is regularly reviewed to determine if they could be eligible for transfer. Such reviews are based on an assessment of the continued threat posed by the detainee, and authorities stressed that this was a robust internal process. However, the delegation feels that this process could benefit from added transparency and additional scrutiny.

## **B. Prospects for closing down the facility**

The United States government's strong commitment to closing Guantanamo was repeatedly underlined to the delegation, and they noted that Presidents George W. Bush and Barack Obama had both expressed their wish to close the facility. Late 2014 and early 2015 has seen a significant number of detainees transferred to third countries. The delegation saw this as a positive step and as evidence of the U.S. government's efforts to achieve the goal of shutting down the facility. Fulfilling this goal requires greater co-operation both domestically and internationally.

Within the OSCE, the following countries are understood to have resettled detainees that were not their citizens: Albania, Belgium, Bulgaria, Estonia, France, Georgia, Germany, Hungary, Ireland, Kazakhstan, Latvia, Portugal, Slovakia, Spain, and Switzerland.<sup>3</sup>

The delegation urges every OSCE participating State to re-examine the possibility to host some of the 54 detainees approved for transfer, as this would be an important step in efforts to close the facility. Such efforts do not, however, absolve the United States of its own responsibilities to take further action to close the facility and to provide improved access to an effective legal system for detainees.

The delegation regrets the opposition by some lawmakers in Congress to closing the facility and the legal obstacles that Congress has put in the way of government efforts. Such obstruction not only undermines the United States' security by perpetuating Guantanamo as a symbol of injustice and a recruiting tool for terrorists, but also raises questions among allies regarding the United States' commitment.

The delegation expressed concern regarding previous cases in which detainees had reportedly suffered severe harm following transfer to another country. The delegation was informed that decisions regarding the transfer of detainees to other countries involves not only a security assessment but also considers the human rights record of each country. Detainees reportedly can raise objections to their resettlement to a particular country. They can also receive support for integration processes, including for example language instruction, prior to transfer.

## **C. Conditions of detention**

The delegation is unable to comment on previous facilities or treatment practices at Guantanamo. The information provided by JTF personnel and the example facilities shown to the delegation was helpful and generally gave the impression of a professionally-run facility. The delegation was given a briefing by senior military personnel covering aspects including medical coverage, legal access,

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<sup>3</sup> Miami Herald, 'By the Numbers', <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article2163210.html> (accessed 18 January 2015).

religious sensitivities, and the daily routine and behavior of detainees. The delegation was also given a tour of camps five and six, including example detention cells, but was not permitted to view camp seven, which reportedly requires a high level of security clearance.

Despite numerous requests, the delegation was not permitted to speak with detainees. The delegation noted that the International Committee of the Red Cross conducts visits and meets with detainees. However, without personal access to detainees, the delegation was not able to adequately assess their conditions, and the request for OSCE PA representatives to meet and speak to detainees still stands.

#### **D. Access to legal recourse**

According to information provided to the delegation, only a small number of the remaining 122 detainees were facing or are likely to face formal charges before a court. Those who currently face charges are brought before military commissions, a unique procedure established by the United States within the military apparatus and separate from regular domestic courts and from regular military courts martial. Military commission rulings can, however, be appealed to domestic federal courts. Detainees have the ability to challenge the lawfulness of their military detention in U.S. federal court and are entitled to defense lawyers, either from within the U.S. military or civilian lawyers. The delegation was informed that Congressional restrictions currently prohibit transfer of Guantanamo detainees to the United States, including for prosecution in U.S. federal courts.

During the visit the delegation viewed through closed-circuit television pre-trial proceedings of the military commission established for Abd al Hadi al-Iraqi. United States authorities also facilitated conversations with representatives of prosecution and defense counsel engaged in the military commissions process.

The legal context for detainees has changed several times since the opening of Guantanamo. Responding to domestic court rulings regarding detainees' rights, the U.S. Congress passed laws in 2006 and 2009 setting out a framework and legal basis for military commissions.<sup>4</sup> While important in that they established clearer guidelines and jurisdiction, the changing legal context has resulted in very significant delays in trials, challenging the right to a trial within a reasonable time. In addition, certain aspects of the military commissions still raise concerns. The admission of hearsay evidence, intended to accommodate battlefield circumstances, is a challenge to a fair trial. Also, defense lawyers informed the delegation that the large amount of material that is considered classified limited what lawyers can discuss with their clients and presented serious challenges to their ability to mount a defense.

The delegation took note of individual concerns raised by detainees' defense counsel particularly to do with communication with detainees and classification of protected materials, some of which conflicted with information provided by JTF personnel. Specifically, the delegation was given conflicting accounts regarding the ability for detainees to communicate by telephone regularly and

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<sup>4</sup> For analysis of the development of military commissions please see: Elsa, Jennifer K., 'The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues', Congressional Research Service, 4 August 2014.

openly with their defense counsel, but was not able to corroborate without speaking to detainees themselves.

The vast majority of those detained at Guantanamo have not, and are not expected to face charges and prosecution. Instead, citing the laws of war, the U.S. government asserts that detainees could be held until the end of hostilities. While noting that there is a long tradition internationally of holding prisoners during war time to keep them out of active combat on battlefields, the delegation concluded that application of this approach to criminal terrorists captured when fighting terrorism is not reasonable. With no clearly defined battlefield and a ‘war’ that does not have a clear-cut end, this legal theory has worrying consequences for the long-standing principle of the right to a fair trial within a reasonable time. For decades the United States has been a leader in championing respect for human rights principles globally – it should not allow existing security challenges, however real they may be, to override its own application of human rights.

### **E. Recommendations**

1. The United States, working with other OSCE countries, should step up efforts to close the facility at Guantanamo. The United States Congress and government should work to develop a national consensus on achieving this objective, which is in the best interests of the country’s security and international standing.
2. OSCE parliamentarians should encourage their governments to actively explore the possibility to host detainees cleared for transfer. Such efforts are crucial to shutting down the detention facility, as called for in OSCE PA resolutions.
3. The United States government should reconsider the application of traditional laws of war in the fight against terrorism in view of the amorphous and open-ended character of this fight.
4. OSCE parliamentarians and participating States should engage in an active discussion to consider if an alternative legal framework, beyond domestic criminal law and outdated laws of war, is necessary to address modern security threats. Terrorists and non-state actors continue to pose significant security threats across the OSCE and beyond, and a purely state-based legal framework may no longer be sufficient to address these concerns.
5. The United States government is strongly encouraged to be more transparent regarding detainees and their information. Specifically, classification rules should be relaxed and contact with detainees by high-level domestic and international delegations should be facilitated. This is crucial to develop confidence about conditions at Guantanamo among a skeptical global public.
6. To ensure confidence in the military commissions process, the United States government should ease classification rules to enable defense lawyers to access all relevant material and to discuss such material with their clients.
7. For those detainees that have been and are going to be released following detention without trial, the United States government should contribute to their reintegration process as compensation for time detained without trial.
8. The OSCE Parliamentary Assembly should remain actively engaged in assessing the situation at Guantanamo and in assisting in efforts to close the facility.

## **Annex: Delegation and list of interlocutors**

### **OSCE PA Delegation:**

- Isabel Santos (MP, Portugal), Chair, OSCE PA General Committee on Democracy, Human Rights and Humanitarian Questions
- Mehmet Sevki Kulkuloglu (MP, Turkey), Vice-Chair, OSCE PA General Committee on Democracy, Human Rights and Humanitarian Questions
- Gustavo Pallares, OSCE PA Deputy Secretary General
- Andreas Baker, OSCE PA Director of Elections

The delegation met with:

### **Congress**

- Senator Benjamin Cardin, former OSCE PA Vice-President, member of the U.S. Helsinki Commission and the U.S. Delegation to the OSCE PA

### **Washington Meetings**

#### **Senior Officials**

- Paul Lewis, Special Envoy, Guantanamo Detention Closure, Office of the Under Secretary of Defense, Department of Defense
- Charles Trumbull, Acting Special Envoy for Guantanamo Closure, Department of State
- Steven Dalbey, Director, Office of Detainee Policy, Office of the Under Secretary of Defense, Department of Defense
- L. Victor Hurtado, Principal Deputy Director, Office of European Security and Political Affairs, Department of State
- Wendy Kelly, Chief, Operations, Office of Military Commissions, Department of Defense
- Col Karen Mayberry, Chief Defense Counsel, Office of the Chief Defense Counsel, Department of Defense

#### **Staff**

- Liam Apostol, Associate Deputy General Counsel, Office of General Counsel, Department of Defense
- Amy Apostol, Associate Deputy General Counsel, Office of General Counsel, Department of Defense
- Jamie Briggs, Office of the Legal Adviser, Department of State
- Jason Foster, Associate Deputy General Counsel, Office of General Counsel, Department of Defense
- Mark Hobel, Office of the Special Envoy for Guantanamo Closure, Department of State
- Audrey Hsieh, Office of the Special Envoy for Guantanamo Closure, Department of State
- COL James Mitchell, Deputy Branch Chief, Office of Detainee Affairs, Joint Staff, Department of Defense
- Natalya Scimeca, Office of the Legal Adviser, Department of State
- Ashika Singh, Office of the Legal Adviser, Department of State
- Bridgette Walker, Office of European Security and Political Affairs, Department of State

### **Joint Task Force Guantanamo Meetings**

- Rear Admiral Kyle J. Cozad, USN, Commander, Joint Task Force Guantanamo
- Brigadier General Ronald E. Paul, USAF, Deputy Commander, Joint Task Force Guantanamo
- Sargent Major Juan M. Hidalgo, USMC, Command Sargent Major, Joint Task Force Guantanamo

### **Civil Society**

- Members of the delegation also spoke with a number of individuals engaged with issues related to Guantanamo including from think-tanks, non-governmental organizations and journalists.