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USA: Sounding a note of urgency

Judge loses patience over Guantánamo case; detention and interrogation policy
Task Forces delay reports

21 July 2009

AI Index: AMR 51/084/2009

On 5 August 2009, almost 14 months after the US Supreme Court ruled that the Guantánamo detainees are entitled to a “prompt” habeas corpus hearing to challenge the lawfulness of their detention, a federal judge will hear the case of Mohammed Jawad, who was taken into US custody in 2002 in Afghanistan when he was still a child and who remains in Guantánamo more than six and a half years later.

On 16 July, setting 5 August as the date for Mohammed Jawad’s habeas corpus hearing, District Court Judge Ellen Segal Huvelle warned the US authorities against “think[ing] for one minute that I am going to delay this thing so they can come up with some other alternative to going forward with the habeas and pull[ing] this rug from under the court at the last minute”. “Don’t bother”, she said, adding: “Let me just tell you, we’re going forward”. She referred to the government’s case against Mohammed Jawad as being “in trouble”, “riddled with holes”, “lousy”, “in shambles”, “absolutely shocking”, and “an outrage”. Amnesty International would add that the case also illustrates the unacceptable sidelining of international human rights law in the USA’s treatment of the Guantánamo and other detainees.

Judge Huvelle’s words sound a note of urgency into a detention situation that continues to be hallmarked by delay and prevarication. More than a year after the Supreme Court’s ruling, only a handful of detainees have had a habeas corpus hearing on the merits of their challenges. Even when such hearings have resulted in a judicial order for their immediate release, detainees have continued to face further indefinite detention. Thirteen Uighur detainees, for example, remain in Guantánamo some 10 months after a judge ordered their release into the USA, with an appeals court ruling against any judicial power to order this (or any effective) remedy for their continuing unlawful detention. Even the Supreme Court, in a move that itself seems inconsistent with its June 2008 ruling on “prompt” access to judicial review, has postponed until at least October 2009 its decision whether even to hear an appeal filed on behalf of the Uighurs in April. Domestic politics have continued to block release of any detainee into the USA and progress on the detentions more generally, with members of Congress and others using words “calculated to scare people rather than educate them”, as President Barack Obama pointed out in May.

In an executive order signed on 22 January 2009, President Obama ordered the Guantánamo detention centre closed “as soon as practicable” and no later than 22 January 2010. He ordered a review into each detainee’s case to determine who could be released, who could be prosecuted, and what should happen to anyone the review determined could neither be tried nor released. In the six months since then, one Guantánamo detainee has been transferred for trial in a federal court in New York, and 11 others have been transferred to Bermuda (4), Chad (1), France (1), Iraq (1), Saudi Arabia (3) and the UK (1).

In other words, for 95 per cent of the detainees who were in Guantánamo when President Obama took office, the change in administration has so far meant no change of real substance in their indefinite detention. The administration maintains that it is still on course to close the facility within a year. Nevertheless, the USA continues to hold 229 detainees in Guantánamo, including Mohammed Jawad, in violation of the international prohibition of arbitrary detention.

For the approximately 600 detainees held in the US air base in Bagram in Afghanistan, the change in US administration has likewise meant little or no change in their situation. Detainees held in the base still

have no access to judicial review and no access to legal counsel, with the administration continuing to apply a global “war” legal paradigm and resisting access to the US courts even for those who have been held for years after being arrested as far away from Afghanistan as Thailand and United Arab Emirates.

Meanwhile, two Task Forces established by executive order to review the USA’s interrogation and detention policies are reported to be delaying their findings to the President. Both were due to report on 21 July, although the executive orders establishing them built in the possibility of extensions.

The Special Interagency Task Force on Detainee Disposition, whose mandate is to review the options available to the USA on “the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations”, has been granted a six-month extension. The Special Interagency Task Force on Interrogation and Transfer Policies has received a two-month extension. Its mandate is to assess whether the interrogation practices and techniques in the US Army Field Manual, when employed by government agencies outside the military, “provide an appropriate means of acquiring the intelligence necessary to protect the Nation”. The Task Force has also to review “the practices of transferring individuals to other nations” to ensure compliance with US laws and international obligations.

The extensions being granted to the Task Forces are being explained by administration officials as being the result of the complexity of the issues facing them. The new US administration undoubtedly faces the serious consequences of unlawful policies pursued by its predecessor. Whatever measures it takes, however, detainees should not pay for the error of the USA’s ways. For example, if a Guantánamo detainee cannot be promptly charged with recognizably criminal offences and brought to fair trial – for whatever reason, and whoever the detainee is – he should be released. This is true whether the government does not have enough evidence to bring a prosecution or whether the evidence the government does have has been rendered inadmissible in a fair trial by the way in which it was obtained. To jeopardize this rule would be to give governments a green light to gather evidence and treat detainees in any way they see fit and face no consequences for their actions.

In a central memorandum on detentions signed on 7 February 2002, President George W. Bush said that the “war on terror” had ushered in a “new paradigm” that required “new thinking” in the laws of war. This “new thinking” led directly to old familiar abuses such as torture and other ill-treatment, detention without due process, enforced disappearance and military trials of civilians, as well as impunity for human rights violations. President Obama has taken substantial steps towards ending torture and limiting or ending secret detention, but his administration’s invocation of a law of war framework in a wide range of non-battlefield situations which it persists in treating as a “global war”, among other things, looks set to lead to revamped military commissions as well as the possibility of administrative detention at Guantánamo being replaced with a preventive detention regime on the mainland, bringing a similar set of grave human rights concerns with it.

The Task Forces should use their additional time to take a long hard look at US obligations under international human rights law. A hallmark of the Bush administration’s approach was its insistence on applying its own distorted interpretations of the international law of armed conflict to situations to which those rules were never intended to apply, to the grave detriment of fundamental human rights. Amnesty International will continue to urge the USA to turn more fully to its systems of ordinary criminal justice, within a framework of respect for universal human rights, in its global counter-terrorism efforts.

Judge Huvelle’s patience with the US authorities appears to have run out. The international community has also waited long enough. The assault on human rights principles that came to be a hallmark of the USA’s response to the attacks of 11 September 2001 leaves the world with a clear interest in seeing the USA consign to history all remnants of its unlawful detention and interrogation policies and practices. This is a matter for all branches of the US government. The human rights violations of the past are no excuse for a government not to meet its international human rights obligations today.

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