

## Report on Guantanamo Bay<sup>1</sup>

### *Introduction*

In 2003, the Parliamentary Assembly of the OSCE (OSCE PA) emphasized the importance of reconciling the fight against terrorism with democratic values and respect for human rights. In its “Resolution on the Prisoners Detained by the United States at the Guantanamo Base”, which it adopted in July 2003 during its Rotterdam Annual Session, the OSCE PA was concerned about the “unlawful combatant” status accorded to those prisoners. One year later, in its “Resolution on Torture”, adopted during its Edinburgh Annual Session, the OSCE PA again expressed its concern for the fate of certain Guantanamo detainees, who have been held for years without trial or legal representation.

Given the growing interest of OSCE PA members in this controversial situation and their desire for a parliamentary delegation to be permitted to visit the site, the President of the Parliament, a Democratic member of the US Congress, made the decision during the Vienna Winter Meeting in February 2006 to appoint a Special Representative on Guantanamo. As I was then already an elected Rapporteur of the General Commission on Human Rights, Democracy, and Humanitarian Questions, he entrusted this mandate to me.

On 4 July 2005, during the Washington Annual Session, I had presented an initial report, in which I recommended the establishment of a timetable for the closure of the detention camp, underscoring, in addition, the need to intensify the exchange of information and co-operation between the various intelligence services.

At the end of 2005, the US authorities acceded to my repeated requests to be allowed to visit the site, without however allowing me to talk to the detainees. The visit took place on 3 March 2006, in the company of experts and a representative of the International Secretariat of the OSCE PA. We wanted to draft a report that was as objective, precise, and constructive as possible. I presented this report to the OSCE PA on 3 July 2006 during its Brussels Annual Session.

My hope is that, in the coming months, one international organization or another will take the initiative of constituting an international committee of legal experts charged with reflecting on the possibility of developing international law to deal with the general question of the “new categories of combatants” and the recent evolution of international terrorism.

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<sup>1</sup> The following text is adapted from the Report on Guantanamo Bay by Mrs Anne-Marie Lizin, Special Representative of the President of the OSCE Parliamentary Assembly, Mr Alcee Hastings, 30 June 2006.

The report, which updates the one addressed to the President of the OSCE PA at the time of the Washington Session in July 2005, takes stock of the situation at the Guantanamo Bay Detention Facility and makes new recommendations. It was compiled by critically examining many sources: official reports from the US administration; information from the media; reports from intergovernmental organizations; reports from non-governmental organizations; information provided by lawyers acting for certain detainees, and so on. It also drew upon official talks at both the US State and Defense Departments, as well as on the data collected during my visit to the Guantanamo Bay Detention Facility in March 2006.

Since July 2005, the Guantanamo Bay Detention Facility has constantly been at the centre of the concerns not only of human rights organizations, but also of institutions such as the European Parliament<sup>2</sup> and the European Commission. On 27 February 2006, a report on the situation of the people held in Guantanamo Bay, prepared by five independent experts, was submitted to the Human Rights Commission<sup>3</sup> of the United Nations.

The US administration has been called upon to answer criticisms emanating from these various organizations. Following a court decision on 23 January 2006, the US Department of Defense was compelled in March 2006 to publish interrogation reports, plus a list of 558 names. A new list of 759 names was published on 17 May 2006.

The report does not revisit the objections of a legal nature that have been widely discussed in many documents. In Section I, it presents observations and comments relating to the conditions of detention, interrogation techniques, the quality of the information obtained, and the medical care provided to detainees, stemming from the visit to Guantanamo Bay by an OSCE PA delegation in March 2006. The allegations of human rights violations and torture advanced by the aforementioned organizations and by lawyers acting for certain detainees, as well as the US administration's arguments, have been taken into account. Section II presents the conclusions and the recommendations.

#### *Assessment of the Visit to the Guantanamo Bay Detention Facility: Observations and Comments*

The one-day visit to the facility, requested for nearly a year, took place in March 2006. It was preceded by talks at the US State Department and De-

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2 On 16 February 2006, the European Parliament called on the US administration to close the Guantanamo Bay Detention Facility and insisted that every prisoner should be treated in accordance with international humanitarian law and tried without delay in a fair and public hearing by a competent, independent, impartial tribunal. On 13 June 2006, a new resolution was voted upon calling on the US to close Guantanamo Bay.

3 The UN Commission on Human Rights was replaced by the Human Rights Council on 15 March 2006.

partment of Defense. At Guantanamo Bay, the delegation was able to have talks with officers of every rank, guards, doctors and nursing staff, kitchen staff, an Islamic advisor, and with the interrogators themselves. The conditions of the visit precluded the holding of private talks with detainees. The delegation also had access to a number of documents concerning the management and infrastructure of the facility as well as certain detainee files.

### *Detention Conditions*

Following the detection of abuses in detention centres in Afghanistan and Iraq, strict measures have been taken to avoid such acts in Guantanamo Bay. General Jay Hood, the detention facility's commanding officer at the time of the visit, declared that he was taking particular care to rule such things out. To this end, he has set up a Joint Task Force Standardization Team, which is acting as an internal auditor at all levels (interrogation, security, medicine, kitchen, etc).

Visits to various internment camps were instructive in more ways than one. According to the experts accompanying the OSCE PA delegation, who had visited Guantanamo Bay on several occasions, the current conditions have nothing in common with those of Camp X-Ray, which had been set up in a largely makeshift manner in 2002. Today they are closer to those of ordinary American prisons.

According to the information gathered at the time of the visit, the facility was holding 490 detainees. Following the closure of Camp X-Ray, there remain the five distinct detention blocks in Camp Delta, named Camps 1, 2, 3, 4, and 5, as well as Camp Echo. An additional building called Camp 6 is under construction in Camp Delta. Camp 1 contained 42 per cent of the detainees; Camps 2 and 3 contained one and two per cent, respectively. Thirty-nine per cent were in Camp 4, while the 16 per cent considered to be the most dangerous were housed in Camp 5.

Made of steel, the detention blocks can accommodate 48 detainees in individual cells, separated by thick, small-mesh wire fencing, and with better protection from the sun than in the initially open camp in 2002. The cells have a minimum of conveniences (running water and toilets). An arrow painted on the ground indicates the direction of Mecca. Each detainee receives a copy of the Koran in his own language, a prayer mat, prayer beads, bedclothes, soap, and clothing including sandals. The call to prayer is broadcast five times per day in the camp by means of loudspeakers and is followed by periods of prayer observed by all of the detainees.

During prayer time, yellow cones are placed in the camp's corridors to remind the guards to carry out their tasks in silence and not to disturb the detainees' prayer.

The delegation had a long meeting with the detention facility's Islamic advisor. He maintained that he had many contacts with the detainees. He also

organizes training sessions for members of the military personnel with the aim of introducing them to Muslim culture. In fact, he even seems to serve as an interface between the detainees and the facility's Commanding Officer.

The detainees receive and send mail on a regular basis. In 2005, the number of letters sent and received (by post or via the International Committee of the Red Cross, ICRC) amounted to 18,580. All letters are subject to military censorship, which has led to complaints from detainees and their lawyers. The latter have denounced the fact that certain letters either did not reach their recipients, or did so only after considerable delay.

The OSCE PA delegation visited Delta Camp 4, whose wire fencing is covered by a green synthetic fabric. It contains the rooms of ten detainees that are allowed to circulate freely. These detainees, who dress in white, are allowed to talk to each other and seemed to be busy with their own occupations. They had been selected by the interrogators or guards because they had shown themselves to be co-operative. Areas were set aside in the centre of the camp where sports (football, volleyball) could be played. The star-shaped structure of Camp 5 gave the impression of being permanent.

The detainees receive *halal* meals three times per day. The menus include vegetarian options and cater to any possible medical needs. On certain days, supplements are provided for the detainees of Camp 4.

In general, security is exceptionally tight. The standards applied are almost identical to those in force in the ordinary American prison system. The guards (male or female, with very many of the latter) apply the security instructions to the letter.

Contrary to what occurs in the American prison system, however, where the guards are encouraged to get to know the prisoners better, in Guantanamo Bay, verbal contact with detainees is prohibited. Exchanges are purely utilitarian, often based on gestures. According to statements by the people in charge of the camp, both male and female guards are insulted on a daily basis. Detainees in orange suits are transported in chains from their cells to the interrogation centres by soldiers using small carts.

#### *Medical Facilities and Healthcare*

The hospital for detainees is fitted, like all military hospitals, with modern, good-quality medical equipment. It has some twenty beds (rising to thirty if necessary). According to the army medical officers who were questioned, the care dispensed to the detainees, including dental care, is the same as that enjoyed by the soldiers on the base.

Allegations have been made by detainees and their lawyers claiming slowness in the provision of medical and dental care and contending that some detainees have been deprived of such care for punitive and/or coercive reasons. The delegation was unable to check these allegations.

At the request of the OSCE PA delegation, additional information was provided concerning detainee medical care and illnesses. This showed that nearly 500 detainees had had 2,500 medical contacts per month, and that access to the facility's medical services was possible 24 hours a day seven days a week.

With respect to illnesses, since 2002, there have been 275 surgical operations, primarily orthopaedic, linked to combat wounds. Common surgical operations, such as appendectomies, repairs of groin and umbilical hernias, tonsillectomies, and haemorrhoid treatments have also been performed. There is monitoring of chronic pathologies, such as hypertension, gastro-intestinal disorders, diabetes, coronary artery diseases, and cardiac de-compensation. Regular eye and dental check-ups are carried out. All necessary diagnostic examinations – including those requiring CT scanners – have been carried out.

A more specialist service regularly monitors eight per cent of the incarcerated population for mental disorders. The prevalence of mood disorders among the population of the facility is 18 per cent at any given moment, compared to 20 per cent of the United States prison population. Twelve per cent of the detainees of Guantanamo Bay have developed anxiety disorders, and nearly 17 per cent suffer from psychotic disorders, percentages which are distinctly higher than the American prison population (of which roughly six per cent suffer from psychotic disorders). Personality disorders have been noted among 35 per cent of the detainees, also a very high figure.

This medical report indirectly shows the significant impact of prolonged detention on the detainees' mental health.

The main medications provided to detainees in the hospital are:

- Antidepressants, anxiolytics (anti-anxiety drugs), and sedatives such as amitriptyline;
- Benzodiazepines such as clonazepam;
- Proton pump inhibitors (omeprazole);
- Anti-inflammatory non-steroids, such as ibuprofen, meloxicam (Mobic), naproxen (Naprosyn);
- Antihistamines (loratadine);
- Second level pain killers such as cyclohexane (tramadol);
- Anti-psychotics (drugs used not mentioned).

The hospital's pharmacy is entirely comparable, in terms of quality and quantity of supplies, to that of a normal, small-scale hospital.

According to information provided by lawyers from the New York-based Center for Constitutional Rights (CCR), the organization from which most of the litigation over detention without trial originates, rolling hunger strikes have been observed since July 2005 by dozens of detainees (210 according to the lawyers, 200 according to the Pentagon) as a sign of protest

against their unlimited detention and the non-observance of the Geneva Conventions.

In conformity with the practice enforced in American prisons, the detainees are actually fed by drip or by mouth if their condition requires it. Certain sources indicate that the hunger strikers are attached to their beds, others that the guards leave them at least one free hand. The army prefers to talk of detainees being “fed involuntarily” rather than “fed by force”.

According to information gathered *in situ*, a small number of detainees (three were hospitalized in March 2006) have been force-fed, i.e. by use of digestive probes inserted through the nose. This kind of probe, a specimen of which the delegation was able to procure, is identical to the one used in hospitals all over the world. According to US authorities, most of the strikers seem to have given up their hunger strikes of their own free will. Certain members of the medical staff confided to the delegation that the detainees thanked them for being fed, thus allowing them to escape a hunger strike that was imposed on them by their leaders.

On 6 October 2005, a Pentagon spokesman claimed that the lawyers’ concerns “were exaggerated”, and that the detainees were striking on a rotational basis. It was confirmed to us, in March 2006, that no death as a consequence of this hunger strike had been recorded.

It should be mentioned that a team from the ICRC, which has no permanent presence at Guantanamo Bay, visits the camp every six weeks and that between those stays, short visits take place. The members of the ICRC are the only people apart from the lawyers who have direct contact with the detainees.

Faced with this hunger strike, the ICRC had communicated its position to the American authorities in October 2005. The ICRC was opposed to any feeding by force, on the basis of the declarations of the World Medical Association (WMA) of Tokyo and Malta (1975 and 1991), which specify that doctors should not lend themselves to force-feeding practices but should inform hunger strikers of the sometimes irreversible consequences of their actions.

This practice was also denounced by the British weekly medical magazine *The Lancet* in a petition that was signed by 263 doctors practising in Great Britain, Ireland, the United States, Australia, Germany, and Italy. This initiative followed the submission of testimony given by former detainees of Guantanamo Bay, in which they contended that they had been force-fed at the time of a hunger strike.

Beyond the hunger strike, it should be noted that this type of detention has confronted the medical world with serious ethical problems. Until June 2004, according to human rights organizations such as the *Physicians for Human Rights* group, the doctors responsible for advising the interrogators in Guantanamo Bay had access to the detainees’ medical files. This meant they were aware of any psychological problems and could exploit them.

Yet another aspect has been criticized: the use of teams of behavioural science advisers to design the interrogation techniques. A report by the medical doctor in charge of health policy in US jails recommended, at the beginning of July 2004, that the army should discontinue the practice of using doctors and psychiatrists for this purpose. Complaints of violations of medical ethics were lodged at the beginning of the summer of 2004 by several of the detainees' lawyers against the medical staff of Guantanamo Bay for tolerating a system in which carers withdrew medication from detainees if the latter were not sufficiently co-operative.

According to various sources, there may have been as many as 40 attempted suicides in the camps since 2002. Certain detainees were suffering from behavioural disorders even before they were transferred to Guantanamo Bay. Others, under the effects of isolation, prolonged detention, and frequent interrogation may have been driven to attempt suicide. Certain sources report that a dozen suicide attempts may have been ascribed to a single detainee, which somewhat obscures the use of these statistics.

At the time of the visit, none of these attempts had resulted in death. According to the lawyers of certain detainees, suicide attempts have been reclassified as "manipulative self-injury behaviour". On 18 May 2006, it is thought that four detainees tried to commit suicide, while several others attacked the warders who sought to intervene. On 10 June 2006, three detainees actually did commit suicide. These first deaths in Guantanamo Bay emphasize that it is more urgent than ever to declassify the information related to the reasons for those detentions. Since the end of May 2006, several dozens detainees have taken part in a new hunger strike.

### *Interrogation Techniques*

As was already indicated in the report of July 2005, most of the criticisms levelled at Guantanamo Bay Detention Facility concern both the conditions of detention and the methods of interrogation employed by the US Army. These criticisms have been repeatedly made since 2002 and not only by human rights organizations. The previous report had already mentioned that the FBI, in its report of 10 May 2005, had expressed reservations about the interrogation techniques authorized by the Secretary of Defense on 2 December 2002 and redefined on 16 April 2003.

The US authorities have always denied that the interrogation techniques used to obtain information, including those described as "aggressive", amounted to torture. They have however recognized that a limited number of cases of abuse or ill-treatment have been noted and sanctioned. According to official sources, more than 100 American soldiers have been the subject of court martial proceedings. The sentences they have received have ranged in severity from demotion to a simple reprimand. According to American

sources, no serious sanction has been handed down to soldiers on duty in Guantanamo Bay.

In the aftermath of the tragic events of 11 September 2001, discussions took place in the United States in certain official circles and in the press on the possible use of techniques that could be considered to amount to torture. The very fact that these discussions took place, in the emotional climate of the time, insinuated the idea that torture was no longer completely taboo into the public consciousness. Incontestably, these discussions have provoked negative reactions against the United States.

The US authorities stress that their position with regard to torture is clear. It is governed not only by American criminal law, but also by the obligations under the terms of treaties prohibiting torture.<sup>4</sup> However, the application of these obligations and even the definition of torture and other cruel, inhuman, or degrading treatment or punishment in a situation of conflict were, in 2002 and 2003, the subject of the greatest confusion on the ground and accompanied by public statements on the part of certain political leaders, which indicated a strong desire for vengeance.

This question was at the heart of the debate that took place in the American Senate on 5 October 2005. On 15 December 2005, President George W. Bush accepted the McCain amendment to the 2006 Department of Defense Appropriations Bill. The amendment prohibits cruel, inhuman, or degrading treatment or punishment in the case of people held by the Department of Defense and placed under guard or control of the government of the United States anywhere in the world, thus codifying the prohibition of such treatment and clarifying certain rules that had tended to cause confusion.

Nevertheless, allegations of ill-treatment and torture of the detainees of American prisons in Afghanistan, Iraq, and at Guantanamo Bay are recurrent and are helping to propagate a negative view of the United States in the world. Certain particularly cruel images taken at Abu Ghraib prison, which is now closed, continue to be shown all over the world, nurturing anti-American propaganda.

Chapter III on "Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment" of the report by United Nations experts that was submitted on 27 February 2006 to the Human Rights Commission explicitly suggests that the treatment of the detainees of Guantanamo Bay approaches the definition of torture as it appears in the Geneva Conventions. The experts' report drew upon discussions with former detainees (particularly those in the United Kingdom), answers given by lawyers representing other detainees, declassified information, and answers provided by the American authorities.

On 10 March 2006, the government of the United States retorted point by point in a memorandum, which disputed the allegations of the UN experts,

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4 In particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (which came into force on 26 June 1987).

who had refused to go to the site because of the ban on private discussions with the detainees.

It should be noted that the allegations of ill-treatment and torture were generally based on the testimony of a limited number of former detainees, who had since been released or transferred, and whose names appear repeatedly in the relevant reports, and on the testimony of their lawyers. According to the experts, many of the remarks made by the detainees were not necessarily reliable. Once released, certain detainees tend, for political or venal – and obvious – reasons, to exaggerate possible acts of ill-treatment.

Furthermore, not all detainees claim ill-treatment. Certain Afghan detainees have extolled the United States for the humane treatment that they received, for the care that was lavished on them, for the quality of the food, and for the relative comfort of the cells, which are equipped with electricity and running water. Recently, some released Yemenis have admitted to being treated humanely. Others, on the other hand, have denounced barbarian acts of torture

Generally, it should be noted that the testimony of many people agrees and that the most aggressive interrogation techniques have caused debate even within the US armed forces, as shown by the memorandum dated 18 June 2004 from Alberto J. Mora, General Counsel of the United States Navy.<sup>5</sup>

As a result of this debate, Guantanamo Bay is now in the spotlight, and is visited frequently by American members of Congress, journalists, and lawyers.

It should also be remembered that the US authorities have always contended that many detainees have been specially trained to learn how to resist interrogation and to systematically accuse their guards of ill-treatment and torture.

According to the statements of the interrogators we met, the most aggressive authorized interrogation techniques (sensory and sleep deprivation, confiscation of elements of comfort, wearing of a hood, stress position, total isolation for a prolonged period, etc.) have been abandoned in favour of non-violent and non-coercive psychological techniques.

The delegation was able to witness an interrogation via a video link but was unable to draw any conclusions from it: The detainee, who was dressed in orange, was rather passive, remained seated, and was able to eat and drink during the interrogation.

The people in charge of Guantanamo Bay contend that 125 detainees still have usable information and that 35 of them are regularly questioned. These interrogations are currently carried out by 32 people of both sexes, all of whom work under contract to the Pentagon. Each interrogator is accompanied by an interpreter and an analyst. The interrogators are Pentagon-trained. Some of them have a solid knowledge of the detainees' culture and

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5 Revealed by the *New Yorker* on 27 February 2006.

thought processes, and understand or speak Arabic or other languages spoken by the detainees. Through contact with the detainees, certain interrogators admit to having been able to expand their own knowledge.

#### *Relevance of the Information Obtained and the Evidence Adduced in Support*

With respect to the question of the quality of the information obtained after three or four years of detention, the answers from American authorities were positive. According to interrogator statements, information was still being received from Afghanistan, Iraq, and the intelligence services, and, in particular, may have enabled a terrorist network in Italy to be dismantled. The information sometimes mentions a detainee's name or alias. It may enable a detainee to be identified and the statements he has made during the many interrogations to which he has been subjected since his arrival at Guantanamo Bay to be checked.

It should however be noted that, according to our sources, certain detainees (those dressed in white) are now interrogated only rarely (once a year in certain cases). This could mean that they are waiting to be released or transferred or that they have retreated into total silence.

The American authorities emphasise the fact that the information gathered since 2002 by means of interrogation has led to a better understanding of how terrorist networks operate, the type of armaments they use, the recruitment process, and the ramifications of all this. However, according to certain experts, Guantanamo Bay has not enabled the establishment of an exhaustive database on Al-Qaeda.

The same applies to the evidence that was shown to the delegation. Some of this evidence was overwhelming (a notebook with recipes for manufacturing explosive devices, detailed description of targets, false identity papers, counterfeit money, etc.), while some was weak (in particular the many watches of the Casio F-91W brand, known to be used by Al-Qaeda) and would not be enough to prove guilt before a civilian court. And then there are the problems associated with homonyms. Certain detainees claim, indeed, to have been captured by mistake, their names being identical to those of alleged Al-Qaeda members. Others proclaim their innocence even though they were, according to the US authorities, in a zone of military operations at the time of their capture.

#### *Degree of Detainee Dangerousness*

According to the people in charge of the facility, a number of detainees (nearly seventy) are particularly dangerous militants. If they were returned to freedom, they would join the *jihad* to fight the United States and its allies. Of approximately 270 transferred or released detainees, some fifteen individuals have been recaptured after re-offending and committing acts of terrorism.

According to the US authorities, this justifies the continuing detention of those who have clearly expressed their intention to resume the fight against the United States and its allies should they be released. According to certain sources, recapture was particularly common in the case of the Taliban members sent back to Afghanistan.

The delegation viewed the files of seven detainees considered to be dangerous. Among them were an Al-Qaeda member, a training specialist for the manufacture of explosives, a member of an Afghan terrorist cell who had orchestrated an attack on a journalist, and several Al-Qaeda members who had developed a prototype of a shoe-borne explosive device designed to blow up aeroplanes, as well as a limpet mine for attacking ships.

More precise information on other detainees could not be obtained. It seems clear that certain detainees have been radicalized during their lengthy incarceration. Others who found themselves feted as heroes on their release had no choice but to join the *jihad* to avoid being considered American collaborators.

Only the military authorities are qualified to determine the dangerousness of a detainee. Our interlocutors emphasized the fact that many detainees had already been released or transferred to their countries of origin, but that certain countries had refused the repatriation of their nationals. The authorities fear above all that certain released detainees would join networks to continue the fight against American forces.

It is likely that a range of alternative solutions are being considered, but nobody within the US administration is calling for the closure of the short-term facility. The State Department has expressed its desire to reduce the number of detainees as rapidly as possible. President Bush stated on 7 May 2006 that he personally wanted to close Guantanamo Bay and bring the detainees before the courts, without however giving a timetable for closure or detailing how he envisions doing this. During the EU-US summit in Vienna on 21 June 2006, President Bush declared that he “would like to end Guantanamo” and that the United States wanted to send the detainees back to their home countries. He added that they would be tried either in local courts or in the USA.

According to official figures, nearly 460 detainees remain in Guantanamo Bay at present (compared to 490 in March 2006).

On 23 January 2006, in response to a petition filed by the American news agency Associated Press (AP), a Federal judge, pursuant to the Freedom of Information Act (FOIA), ordered the US government to reveal the identities of the detainees mentioned in the 558 hearings conducted in Guantanamo Bay. As a result of this decision, the Pentagon was required to publish 5,000 pages of interrogation reports. These documents revealed, for the first time, the names and nationalities of 317 detainees. Only the names of the officers taking part in the hearings had been effaced. It should be recalled that a total of approximately 900 detainees have been held in the facility since its

opening in 2002. Until March 2006, the Pentagon had never provided a list of either individuals currently or previously held in Guantanamo Bay or of those who had been released. The Pentagon always held the view that secrecy had to be maintained to protect the detainee's life and to prevent his family from being subject to reprisals if he co-operated with the Americans.

In 2005, a federal judge ordered that a survey be taken among the detainees. At the time, those in charge had asked each one if he wanted his identity to be revealed to the AP. The questionnaire was received by 317 detainees, 202 did not answer, 63 answered in the affirmative, 17 answered negatively, and 35 returned the form unanswered. The judge ruled that the Pentagon's justifications lacked substance and that even the 17 detainees who had opposed it could not reasonably expect to remain anonymous when they had called upon the courts to challenge their detention.

Among the detainees still incarcerated in Guantanamo Bay, none has been convicted. Only ten of them, accused of plotting against the United States or of complicity in such plots, have been subjected to examination and designated to appear before a special military court, called a Military Committee. The first Military Committees were constantly interrupted by the lawyers seeking remedy at law and none was concluded. The Supreme Court should embark on an examination of the legality of those courts without delay.

Since the Supreme Court's decision of 28 June 2004, many detainees have brought *habeas corpus* actions before the American civil courts. They regularly (three or four times a year) receive visits from their civilian lawyers. The latter are usually accompanied by an interpreter. According to statements made by certain lawyers, the facility's interpreters have translated badly, or worse, have distorted the clients' remarks.

On 20 April 2006, the Pentagon published a list of 558 names of people who were or had been detained in Guantanamo Bay. A new list of 759 names was published on 17 May 2006. This new list contains the names, nationalities, identification numbers, dates and places of birth of approximately 200 detainees whose status had not been examined because they had previously been transferred or released. It should be noted that no known Al-Qaeda leader appears on this list, no leader of a known Islamic terrorist group or of the Taliban regime that ruled Afghanistan until 2001. Among the 125 Afghans appearing on the list, some are identified only by a single name ("Hafizullah", "Nasibullah", or "Sharbat"). As there are many homonyms in Afghanistan and Pakistan, it cannot be ruled out that a number of individuals may have been arrested by mistake or that they may have given false names. Various sources contend that certain detainees have been arrested by the Pakistani secret services and then sold to coalition forces. Few detainees were captured while holding weapons. Many of them were detained only because they were living in a house associated with the Taliban or working for an organization related to the Taliban regime.

According to the US authorities, the only way of knowing the names of certain detainees, most of whom had no papers at the time of their arrest, is by interrogating them. They admit that there may be inaccuracies in the list but emphasize that the interrogations have made it possible to obtain interesting information on the structure of Al-Qaeda, its financing, recruitment and training mechanisms, and on the NGOs that lend it assistance.

It appears once again that the US intelligence agencies could have obtained better results if they had agreed to share the information more – and more quickly – with the intelligence agencies of the countries engaged in the fight against terrorism.

The first report had already mentioned the fact that many countries had informally referred investigators to locations to interrogate their nationals. Thanks to the information thus obtained, investigations could be carried out that led to substantial results. But co-operation between US and foreign secret services has frequently been insufficient and has at times proved difficult. The information provided by other nations – when it was not ignored completely – was not always used correctly by the Americans. I should here like once again to emphasize the need for co-operation between the intelligence services and police involved in combating Islamic terrorism, the more so as it involves complex, mobile groups, with international ramifications.

If the Guantanamo Bay Detention Facility no longer constitutes a mine of information, the American authorities implicitly admit that its true utility perhaps lies elsewhere. Indeed, the interrogations have led to the acquisition of invaluable insights into Islamic extremism, the roots of anti-American hatred, and the careers of terrorist recruits.

*The Joint Task Force Guantanamo* is to some extent a Defense Department laboratory for training interrogators and analysts in anti-terrorism techniques. After spending time at Guantanamo Bay, sources indicate that interrogator teams have gone on to continue their work in Afghanistan and Iraq. The interrogation camp has thus morphed into a training camp for an army that for too long has neglected intelligence and the need to patiently learn its enemy's customs and habits.

Be that as it may, the US authorities believe that the continued detention of a number of supposed terrorists in Guantanamo Bay is essential for preventing new attacks against the United States and its allies engaged in the “global war on terror”.

## Conclusions and Recommendations

### Conclusions

1. To understand the US administration's attitude in the case of Guantanamo Bay, one must remember the importance of the 9/11 attacks on the territory of the United States. Since that date, the US has considered itself to be in a state of war against international terrorism. And the executive's response is enshrined in history. One can discern in it the heritage of a 1798 act (Enemy Alien Act), which has never been repealed. This act gave the president the power to detain without an arrest warrant any "enemy alien" originating from a country at war with the United States. It was applied during the two World Wars and during the Cold War. It should be remembered that, on each occasion, the judiciary, including the Supreme Court, confirmed the executive's decisions. The Vietnam War constituted a turning point. Today, the US judiciary has become far more critical. One need only recall the Supreme Court's decision in 2004, which did not support the executive's opinion on the constitutionality of the detention of "enemy combatants" in Guantanamo Bay.
2. The expression "global war on terror" poses a problem for many experts. It is used only by the United States and a number of other OSCE participating States. In countries that deal with terrorism using ordinary criminal procedures, it is not. The use of military means to combat terrorism is criticized as excessive and likely to confer greater legitimacy on *jihadi* terrorists than they already have. At what level of violence can one talk of war? Furthermore, a war has a beginning, an end, and an identifiable enemy, whereas the "global war on terror" is open-ended and likely to extend over decades, as even the US authorities admit. That is the nub of the question. All legal argumentation of the US administration rests on this term "war".
3. On several occasions, our American interlocutors emphasized the *sui generis* nature of this war, which resembles neither a traditional conflict nor a police operation carried out with the use of armed forces. Terrorist organizations act from the territory of sovereign states and are able to generate threats that, up to now, could only have emanated from nation states. Whether they are invited or whether they impose themselves on the sovereign territory, it is impossible to dissuade these entities from acting: Either they have nothing to lose or they aim to conceal the origin of their attacks. Nor can one negotiate with them, since they are usually not looking to compromise with, but rather to annihilate their adversary.
4. While this is accepted, experts nevertheless believe that the terrorist threat must be put into perspective. Islamic terrorists certainly do constitute a danger, a serious nuisance, but they are not a real threat to our

civilization and our way of life as long as they have no weapons of mass destruction. Osama Bin Laden has become an emblematic figure in the Salafist *jihād* and the Al-Qaeda label has become a referent for the most radical Islamic elements worldwide. If the destruction of the Afghan sanctuary incontestably dealt Osama Bin Laden and his accomplices a very hard blow, they did not result in the eradication of the Al-Qaeda-related networks. The *jihadi* terrorists remained capable of conducting spectacular operations. The attacks on London, Madrid, Egypt, and Bali, for instance, have shown that no country is truly safe, especially if the perpetrators of these attacks have no direct operational ties with Al-Qaeda but are inspired by its methods and by an ideology that is widespread in certain milieus.

5. One question that repeatedly arises concerns the status of the people captured in the course of armed operations in the context of the “global war on terror”. Alleged terrorists thus captured (described as “enemy combatants”) and detained in Guantanamo Bay are not considered by the US authorities as prisoners of war and therefore do not benefit from the protections of the 1949 Geneva Conventions. This situation has been widely denounced by human rights organizations. The criticisms focus particularly on the fact that the deprivation of liberty of prisoners of war and civilian prisoners for an indefinite period in order to be able to continue to interrogate them is incompatible with Clause 17 (3) of the Third Geneva Convention, and with Clause 31 of the Fourth Geneva Convention.
6. In response to these criticisms, the US authorities have drawn attention to the fact that the Geneva Conventions, which were drafted shortly after the Second World War and have been repeatedly refined ever since, in particular by the two additional Protocols of 1977 and 2005,<sup>6</sup> clearly stipulate that the following are to be considered prisoners of war: (1) members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces; (2) members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. The problem at the heart of the debate is therefore to know whether the Geneva Conventions and international humanitarian law apply to the

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6 The three additional Protocols were signed but not ratified by the United States.

new category of people who have been arrested at the time of an international armed conflict.

7. There is incontestably some legal haziness surrounding this question.<sup>7</sup> One can legitimately wonder whether the Geneva Conventions apply to an international terrorist organization such as Al-Qaeda. It is, indeed, difficult to sustain the notion that the members of this organization are identified with a state. The Taliban could, at a stretch, be regarded as regular forces of a state, in this case Afghanistan, up to October 2001. But the Taliban regime had clearly established an active partnership with Al-Qaeda, and the members of this organization come from many countries and, in addition, are not easily identifiable because of the use of various names and false documents. Al-Qaeda is, indeed, a non-state organization that has nothing to do with any national liberation movement. It is made up of cells, organized in fluid and mobile networks, without territorial bases, which are reconstituted as soon as they are dismantled. This organization cannot therefore be regarded as being a party to the Geneva Conventions. It does not recognize those conventions, nor does it respect the standards of conduct that they espouse. It carries out its operations in obvious violation of the laws and customs of war, in particular by targeting innocent civilians.
8. The US authorities thus believe that they have the right to detain the supposed terrorists for the time necessary to shed light on their individual situations, in particular to find the proof that they are indeed associated with an international terrorist organization and represent a permanent threat against the United States and its allies.
9. One thing appears obvious. Since 9/11, international terrorism has taken on a new dimension with the emergence of international terrorist organizations of a military nature for which no precedent exists. Recruitment to these organizations knows no borders. Their goals are often diffuse. They let fly at various types of targets, individual or collective, in many countries. Their non-traditional methods are capable of causing mass destruction. International law must adapt to this new situation and it may be worth considering whether additional instruments could be necessary in the future to counter or prevent these new threats to international peace and security.
10. If it appears that the Geneva Conventions do not apply in the case of “enemy combatants”, international humanitarian law and human rights do nevertheless continue to apply, a fact which, moreover, is not disputed by the US authorities. The latter, as we have noted above, refute the charges of torture and cruel or degrading treatment.
11. The US authorities contend that they want to transfer a large number of detainees to their countries of origin as soon as possible. This poses a

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<sup>7</sup> See the opinion of the Council of Europe’s Commission of Venice of 17 December 2003 on the possible need for the Geneva Conventions to be adapted.

serious problem when these countries refuse to receive their nationals or, more seriously, when it is proven that torture is practised in their prisons. Six Chinese detainees belonging to the Muslim Uyghur minority originating from the province of Xinjiang were thus released and transferred, under the terms of protracted negotiations, to Albania rather than China, where they were likely to have faced persecution. According to our sources, negotiations are being conducted with other countries, in particular with Saudi Arabia, Bahrain, Kuwait, and Turkey, to transfer to them some of their nationals who are still detained in Guantanamo Bay. Of six detainees of Turkish nationality, five have been released but negotiations are still in progress for the transfer of the sixth, who is considered to be an “enemy combatant”. On 18 May 2006, some 15 Saudi detainees were indeed released and repatriated to Riyadh. A governmental representative in Kabul said very recently that the United States was about to extradite the 96 Afghan detainees from Guantanamo to Afghanistan, where they would be judged.

12. An internal political debate is in progress at various levels, particularly between the State Department and the Pentagon. According to comments received by the delegation, members of both are apparently wondering about the need to maintain the detention facility and are sceptical of just how effective it really is in the fight against terrorism. It should also be noted that American public opinion appears to be increasingly divided. A poll published on 11 May 2006 by the Programme on International Policy Attitudes (PIPA) of the University of Maryland, showed that 63 per cent of the respondents believed that the United States should change its treatment of the detainees in Guantanamo Bay in order to conform to the standards of the UN Human Rights Commission. In the international community, more and more voices are being raised to demand the closure of Guantanamo Bay. Angela Merkel, Chancellor of the Federal Republic of Germany, and other European political leaders have clearly expressed their opinions to this effect.
13. The Rapporteur has addressed a letter to the defence ministers of countries that have forces operating within the framework of the International Security Assistance force in Afghanistan (ISAF) to learn the fate of any prisoners that may have been captured during military operations. From the answers obtained, it appears that most countries did not make any arrests, while others handed over the arrested persons to the Afghan authorities. Some countries have a memorandum of understanding with the Afghan authorities in which they give assurances that they will treat the detainees in accordance with the provisions of international law. According to our sources, the reality of the practice on the ground leads to the prisoners being entrusted to the American forces. The variety of answers demonstrates, *de facto*, the uncomfortable nature of the legal situation. This also underscores the urgent need to co-

ordinate procedures amongst NATO countries as well as with OSCE participating States that are not members of NATO but participate in ISAF. It is essential to set up a working group to avoid differences in procedures leading to serious incidents.

### *Recommendations*

The Rapporteur:

1. Notes that the Guantanamo Bay Detention Facility is continuing to seriously tarnish the reputation of the United States in the world and enabling its enemies to devalue the fight against terrorism by substantiating the idea that it is incompatible with respect for the rule of law and for human rights.
2. Notes that the recommendations of the report of July 2005 have had a certain effect on the way in which the facility is being run.
3. Notes that, since her visit to Guantanamo Bay, the US authorities have begun to treat detainees as “protected people” in the meaning of Clause 4 of the Third Geneva Convention, even if the status of prisoner of war is officially denied them.
4. Takes note of the publication of several detainee lists by the United States Department of Defense.
5. Recommends to the US authorities that they transfer a number of detainees to their countries of origin as soon as possible by accelerating the negotiation of those transfers that are being refused by the detainee’s country of origin. This type of impasse can be particularly prejudicial to detainees whose release is imminent; she also recommends avoiding sending detainees back to countries where they might be tortured or exposed to cruel, inhuman, and degrading treatment.
6. Suggests that OSCE participating States and NATO members that still have nationals detained in Guantanamo Bay negotiate with US authorities to accelerate the transfer of their detainees and, if necessary, to do so with the assistance of concerned international organizations.
7. Recommends to the US authorities that they clarify their commitments with regard to the elementary guarantees envisaged by international humanitarian law. Treating detainees in accordance with their rights is the best way of showing that the fight against terrorism does not contradict respect for human rights.
8. Recommends that the information obtained at Guantanamo Bay be the subject of evaluation and exchange within a new international task force, composed of the intelligence and police services of the participating States, thus ensuring better co-operation in the fight against terrorism.

9. Recommends that the US authorities do their utmost to facilitate the declassification of relevant information in the fight against terrorism and commit themselves to sharing useful information with the OSCE participating States; this has become all the more imperative since three detainees committed suicide on 10 June 2006.
10. Recommends the creation of an international commission of legal experts tasked to continue to reflect on possible developments in international law on the general question of “new categories of combatants” and recent developments in international terrorism. This international commission should ask itself whether additional instruments will in future be necessary to counter or prevent these new threats to international peace and security, examining in particular the international status of prisoners taken in these new conflicts in the light of the current lack of legal and practical clarity.
11. Suggests that other international missions, including further OSCE delegations, be welcomed at Guantanamo Bay to continue the work started by this report.
12. Calls on all the countries concerned to organize transfer flights in full compliance with the law and suggests to the OSCE participating States that a dialogue be started with the United States and the European Union to assist countries supporting the war on terrorism that have detention facilities in which security still needs to be improved.
13. Takes note that the Supreme Court of the United States on 29 June repudiated the US administration’s plan to put Guantanamo Bay detainees on trial before military commissions, ruling broadly that the commissions were unauthorized by federal statute and violated international law.
14. In consequence of the foregoing, she recommends to the US authorities that they announce as soon as possible the disbandment of the Guantanamo Bay Detention Facility by publicizing in July 2006 an accurate and detailed timetable for the transfer of the detainees and for the organization of the practical modalities of the closure. In the view of the Rapporteur, it is realistic to have this timetable run from July 2006 until December 2007, at the latest.