



Congressional Oversight Hearing on Guantánamo

before the

House Committee on Foreign Affairs

Subcommittee on International Organizations, Human Rights and Oversight

“The Mistakes of Guantánamo and the Decline of America’s Image”

Testimony of

Emi MacLean

Center for Constitutional Rights (CCR)

Rayburn House Office Building, Room 2172

May 6, 2008

Good afternoon. Thank you, Chairman Delahunt, Ranking Member Rohrabacher and the House Oversight Subcommittee, for hosting this hearing and being seized of this important issue.

My name is Emi MacLean and I am a Staff Attorney at the Center for Constitutional Rights, or CCR. CCR is a forty-year old litigation and education organization dedicated to advancing and protecting the Constitution and international human rights. We have been representing the men detained at Guantánamo since the prison opened in 2002. Through litigation and advocacy, we have been engaged in efforts to close Guantánamo and restore the rule of law.

In the past six years, we have seen two Supreme Court decisions call for habeas hearings to proceed in federal court for the prisoners at Guantánamo – allowing them that most basic right, to challenge the legality of their detention in a fair hearing. Yet there have been 500 men released from Guantánamo, and 275 who remain – and not a single one has had a fair hearing. Only one Guantánamo prisoner has been convicted – and only then on a plea agreement negotiated by political actors to secure his release. And day by day, the military commission process intended to try a very small number of the Guantánamo prisoners is losing any semblance of legitimacy. Indeed, just last week, the former military commission chief prosecutor testified of behalf of a defendant.

If there ever was any doubt, it should be clear now. The continued existence of Guantánamo as an offshore prison facility intended to be outside of the reach of the law is destructive for the U.S. image abroad and counter-productive for human rights and national and international security. This statement has been said enough times by a diverse enough array of voices that one would hope that it would no longer need to be said. But the prison continues, and 275 men remain.

One group of men remaining at Guantánamo have particularly compelling stories, and have been particularly forgotten: fifty detainee-refugees currently imprisoned at Guantánamo – most for more than six years – simply because no country has agreed to open its doors to them. It

is for the restoration of the rule of law, and for the sanity, survival and dignity of these wrongly detained men, that I am both honored and saddened to be speaking here today.

In many ways, the prison at Guantánamo is a place devoid of fortune. Yet one's lot in Guantánamo is shaped in large part by the great vagaries of fortune or misfortune that is the country of one's birth.

The prisoners from Europe were released from Guantánamo years ago – not because of threat assessments that said they never should have been there, but because their countries demanded their return. In almost all cases, European governments found that there was no evidence that would justify a prosecution of any of their nationals who had been brought to Guantánamo.

The sole westerner remaining in Guantánamo in 2008 has been removed from the psychologically deadening solitary confinement, 23 hours a day, day after day, and instead placed in a small communal living quarters. His government's advocacy urged it.

The prisoner from Australia had a plea agreement negotiated at the highest levels of the Australian and US governments – and out of earshot of the military commission prosecutor who was theoretically responsible for his case. After serving a nine-month sentence, that single convicted Guantánamo detainee was released and is now free.

And on the distant other end of the spectrum of fortune at Guantánamo, the most unfortunate may be the detainee-refugees – those men who either were born in brutal human rights abusing regimes and have individualized fears of return or those who are effectively stateless. These men do not have a nation fighting to have them safely repatriated. Indeed, they face quite the opposite – return to possible persecution and torture in their country of nationality. And their home governments certainly do not advocate for them to receive a fair trial, or to be treated humanely in Guantánamo.

Instead, these men are faced with an impossible choice: to be detained indefinitely in the U.S. extrajudicial prison camp at Guantánamo Bay or to be repatriated to countries in which they face certain torture or persecution, in clear violation of the international law prohibition against *refoulement*. Almost to a person they remain imprisoned in solitary confinement at a supermaximum security prison – with almost no human interaction aside from the clanging of a food slot for the meal that breaks the monotony.

The Stories of Guantánamo's Refugees

There are approximately 50 refugees who remain at Guantánamo today. These men are from countries whose nationals comprise large swaths of the U.S. refugee and asylum population – places like Algeria, China, Libya, Russia, Syria, Tajikistan, Tunisia and Uzbekistan. These men have never been charged with any crime and are not expected to be charged with any crimes by military commission or any other process. Indeed, approximately 30 already have been acknowledged by the United States to have been “cleared” for release – some months or years ago – which means that the U.S. has officially recognized that it has no interest in detaining them any longer.

As with so much else at Guantánamo, the term “cleared for release” is relatively meaningless – and not just because these men remain in prison many months or years after

official “clearance.” According to the Defense Department, there were 118 men transferred *out* of Guantánamo in 2007. About 1/3 of them were officially “cleared”; the remainder were not cleared but flew home all the same. The terminology is political. The processes – to the extent they exist – are fundamentally flawed. And despite the perpetuation of unsubstantiated language about the “worst of the worst” at Guantánamo, the decisions about the fate of individuals are largely based on geopolitics and little more. Cleared or not, the refugees at Guantánamo have been dealt the weakest cards in the geopolitical game that governs their fate. And they remain in Guantánamo, or they are sent home to face even worse.

Who are these men, imprisoned at Guantánamo after more than six years without charge? These men are afraid of both a transfer to torture and, alternatively, that their long and unjustifiable imprisonment at Guantánamo will continue unabated.

- ❖ There are 17 Chinese Uighurs still imprisoned in Guantánamo. Adel Noori is one. He suffered in China because he was well-connected to literary and progressive movements. His friends – authors and activists – have been imprisoned by the Chinese state for exercising their expression. Adel, like the other Uighurs, escaped the persecution of the Chinese government and made his way to safety in a small refugee community in Afghanistan with other Uighurs. Forced to flee when, in October 2001, the war started in Afghanistan, the Uighurs were taken in by Pakistanis on the border but then were sold for bounty to the United States. The U.S. had peppered Afghanistan and Pakistan with flyers promising “wealth and power beyond your dreams” for the handover of unknown enemies. The Uighurs, like many others, were caught up in a dragnet relying on limited intelligence and manufactured incentives. Five were eventually declared to be not enemy combatants. Years later they were released to Albania, the first country to agree to accept non-nationals detained at Guantánamo. The remaining 17, despite virtually identical factual circumstances regarding their stays in and escape from Afghanistan, remain in Guantánamo because neither the United States nor any other country has yet opened its doors to them.
- ❖ Abdul Ra’ouf Al Qassim is a Libyan refugee who deserted the Libyan Army when he was young and fled religious persecution in his home country. He was living with his pregnant Afghan wife in Kabul when the war forced him and his wife to flee to Pakistan. Mr. Al Qassim’s house was subjected to a raid in which he was turned over to U.S. authorities, likely for a sizable bounty. The U.S. has twice attempted to transfer Mr. Al Qassim to Libya despite Libya’s known record of egregious human rights abuses, and the increased risks that Mr. Al Qassim would face if repatriated because he deserted the army and has been tarnished by false and unsubstantiated allegations that he was associated with a group opposed to the Qadhafi regime.
- ❖ Ravil Mingazov is a Russian ballet dancer who fled Russia because of religious intolerance and persecution by the Russian intelligence and military services. He fled in search of a new home that would be tolerant of his faith and hospitable to his family. Instead, he found himself a refugee twice over – fleeing religious persecution in his home country and war in another. His fearful second flight hoping for safety led him to Guantánamo in the chaos of war. He remains there today.

All of these men, and approximately 45 other refugees, remain in Guantánamo today, tomorrow, and the foreseeable future unless some intervention alters their situation and they are given the opportunity to live again.

An Impossible Choice: Indefinite Detention at Guantánamo *or* Torture and Persecution in the Countries of One's Birth

The impossible choice faced by these men is neither acceptable nor legal. The prohibition against torture, and transfers-to-torture, is one of the most widely recognized obligations of international law.

The Convention Against Torture – of which the U.S. is a party along with over 140 other nations – states unequivocally that “No State shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. . . .” This non-*refoulement* principle is the bedrock of refugee law – and it requires an individualized determination of whether someone is at risk prior to a transfer.

In an international hearing on the issue, the U.S. recently implied that the Red Cross serves a function akin to an individualized refugee status determination – something that the Red Cross is neither trained to do, nor has as part of its mandate. Refugee status determinations, however, are exactly within the mandate of the United Nations High Commissioner for Refugees and what UNHCR is trained to do. Yet, thus far, the United States government has not asked the UNHCR to serve this role – which would be a valuable step in properly classifying these individuals as refugees and finding safe haven for them.

Instead, almost 40 men have been transferred by the United States from Guantánamo to notorious human rights abusing regimes with no process in place to determine whether these men face individualized risks of torture or persecution upon their repatriation. They have been returned to countries like Uzbekistan, Libya, Tunisia and Egypt. In 2006 and 2007, the U.S. sent two men from Guantánamo to Libya without any process to determine whether they should be granted a reprieve, and even though our own State Department report for 2006 acknowledges that in Libya, “security personnel routinely tortured prisoners during interrogation or as punishment,” including through gruesome measures, such as “chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice in open wounds, ” and the list continues. No information about these men’s safe whereabouts has been made available. A similar laundry list of egregious treatment inflicted on detainees in Tunisian custody, described in the 2006 U.S. State Department report of Tunisia, did not prevent the U.S. from transferring two men to the custody of the Tunisian government. Both men immediately were jailed and subjected to abusive treatment.

In these transfers, the U.S. has relied largely on secretly-negotiated diplomatic assurances – the vague and unenforceable promises made by human rights abusing regimes that they will treat returnees humanely even if they have flouted their obligations under international law with myriad others caught up in the state security apparatus. The U.S. government has aggressively challenged the judicial oversight of such transfers. Subsequent to the enactment of the Military Commissions Act, the lack of judicial oversight is explicit – with dramatic consequences. Under the Military Commissions Act, no non-citizen detainee classified as an “unlawful enemy combatant” is entitled to challenge any aspect of his transfer or conditions of confinement, in any way. What this court-stripping provision has meant is that the government’s actions with respect to the transfer of Guantánamo detainees have virtually no judicial review. Further, no diplomatic assurance agreement for a detainee ever has been subject to any form of review.

Ending Guantánamo's Refugee Crisis and Finding Safe Haven for its Victims

The United States has for generations loudly spoken about the importance of human rights norms and refugee protection – and is still the largest receiving country of resettled refugees from around the world. Yet, the United States has, to its shame, consistently refused to open its doors to any of the men it brought halfway around the world to a U.S. military prison on extraordinarily limited information. Instead, Albania – one of the poorest countries in Europe – became the first country to accept any non-citizens who had been caught up in the dragnet of Guantánamo in the months after the Afghan invasion. In 2006, Albania agreed to accept eight refugees from Guantánamo – five Uighurs, one Uzbek, one Egyptian and one Algerian. The U.S. should safely release the remaining refugees in the United States or in third countries if they cannot safely be repatriated. In addition to the integrity of this country and our adherence to the rule of law, human lives are at stake.

The U.S. should demonstrate that it is committed to preventing the transfer of these men to torture and to facilitating an official review of the individual refugee claims by UNHCR, or asylum claims by the Department of Homeland Security. Representatives of the U.S. government have insisted that they have asked dozens of countries to accept some of these men into their borders. However, if the U.S. is serious about finding a solution, we would commit to adhere to the international law principle of non-*refoulement* as the U.S. is legally obligated to do; invite UNHCR to conduct refugee status determinations in Guantánamo; and accept at least some of Guantánamo's refugees into our own borders. While a solution is being found, these men without a country should at the very least not be held in brutal conditions in solitary confinement simply because no government has advocated for better for them. They should be transferred out of Camp 6 to communal living urgently.

The situation at Guantánamo for these men is desperate. Abdulghappar Turkistani, one of the Uighurs at Guantánamo, recently wrote an exasperated letter to his lawyers. “Although in 2004 and 2005 we were told that we were innocent . . . we are being incarcerated in jail for the past 6 years . . . We fail to know why . . .” One of his fellow Uighurs at Guantánamo had been on a hunger strike while in solitary confinement and was forcibly fed with the assistance of a riot squad and a rubber tube. Abdulghappar wrote in his letter to his lawyers that he was worried about his friend's health but cognizant that his intolerable reality seemed to force such an impossible choice: “If the oppression were not unbearable, who would want to throw himself on a burning fire?”

Fifty refugees were brought to Guantánamo in 2002 on the most tenuous of evidence – many after being handed over to the United States with the vaguest of allegations in expectation of widely-publicized bounties. Like the hundreds of others who have since been released, they were picked up and brought halfway around the world without any process in place to separate the guilty from the innocent. Any meaningful oversight was consistently averted. The result is that these men remain at Guantánamo in 2008 – afraid of being transferred to torture, and afraid also that their debilitating confinement in Guantánamo will never end.

We must rectify this wrong. Our commitment to uphold our legal obligations and realize a humanitarian solution for these desperate men must be more powerful than our desire to avoid recognizing the mistakes that have been made.

Thank you.