



Fédération internationale des ligues des droits de l'Homme
International Federation for Human Rights
Federación internacional de los derechos humanos
الفدرالية الدولية لحقوق الانسان



**EU / US Consultations on Human rights
29 January 2010**

FIDH-CCR Joint Contribution

Attention:

Juan Duarte, Chair of COHOM
Members of COHOM

CC:

Riina Kionka, Personal Representative of the
SG/HR on Human Rights – SG of the
Council /EEAS

Véronique Arnault, Director for Multilateral
Affairs and Human Rights – RELEX / EEAS

William E. Kennard, US Ambassador to the
EU

Brussels, New-York, 28 January 2010

Dear Chair of COHOM,
Dear Members of COHOM,

On the eve of the EU-US Consultations on Human rights, the International Federation for Human Rights (FIDH) and its member organization in the United States, the Center for Constitutional Rights (CCR), urge you to address the issue of accountability and effective redress to the serious human rights violations committed by the American government during the «War on Terror». One year after the inauguration of President Obama, the EU delegation should also question the US efforts to close the prison of Guantánamo and use this opportunity to explore concrete avenues to deepen the EU-US cooperation on the resettlement of detainees who cannot safely return to their home countries.

FIDH and CCR are presenting in this document the human rights issues that remain related to the «War on Terror» that should be prioritized in this dialogue. These concerns ought to be resolved urgently in order to avoid that illegitimate, unfair, and unlawful practices become established precedents and to put an end to the illegal and indefinite detention of Guantánamo detainees.

I- Accountability and Redress for Serious Violations committed during the “War on Terror”

A- Investigations and Prosecutions – or lack thereof – for Torture

B- Blocking Redress for Victims of Serious International Law Violations

II- Continuing Efforts to Close the Prison at Guantánamo Bay

A- Assessment of the situation one year after President Obama's executive order requiring the government to close Guantánamo Bay

B- Remaining obstacles to repatriate or resettle Guantanamo detainees

C- Lack of third countries willing to resettle detainees who cannot safely return to their home countries

APPENDIX

Profiles of two Guantánamo detainees in urgent need of humanitarian protection:

Djamel Ameziane, Algerian. The Inter-American Commission on Human Rights of the Organization of American States issued urgent precautionary measures on August 20, 2008, requiring that all necessary measures be taken to ensure that Mr. Ameziane is not transferred or removed to a country where he would likely face torture or other persecution.

Abdul Nasser Khantumani, a citizen of Syria, has been detained in Guantánamo for nearly eight years without charge. He faces torture or persecution if forcibly returned to Syria and will remain imprisoned until a safe third country offers him humanitarian protection. His son was resettled in Portugal in August 2009.

Thanking you for your kind attention and hoping that our concerns will be echoed in your exchanges with the US delegation, We remain,

Sincerely Yours

Antoine Madelin

Permanent Representative to the EU

FIDH director for IGOs

FIDH delegation to the EU

15, rue de la Linière

1060 Brussels, Belgium

tel. +32 2 609 44 22

fax. +32 2 209 44 33

mob. +32 485 22 22 87

amadelin@fidh.org

<http://www.fidh.org>

I- Accountability and Redress for Serious Violations committed during the “War on Terror”

Investigations and Prosecutions – or lack thereof – for Torture

It is widely known and well-documented that serious violations of international law were committed and encouraged in the years following the September 11th attacks, including torture.¹ Yet, even under the Obama Administration, no high-level U.S. officials have been held accountable for the egregious breaches of international and national law.² Indeed, even in the wake of the highly critical U.S. Senate Armed Services Committee Report on interrogation and detention policies³ and the disclosure of more “torture memos,” no independent, comprehensive investigation has been opened under the Obama Administration or by the Department of Justice. Effective investigations and prosecutions of those officials – including former high level officials – responsible for war crimes, torture, cruel, inhuman and degrading treatment must begin immediately.

At the time that he authorized the release of legal memoranda for the CIA which, in effect, authorized the torture of detainees, President Obama did not call for those who authored the memos or carried out the policies endorsed therein to be held accountable. Rather, he signaled an implicit acceptance of what has become a culture of impunity: “In releasing these [torture] memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution This is a time for reflection, not retribution.”⁴ This position stands contrary to how a country that operates under the rule of law should and must respond to the involvement of its officials in torture.

The release of the CIA Inspector General’s Report in August 2009 brought with it the first indications of an investigation and possible prosecutions related to the egregious violations of international law by U.S. officials. The results, however, are deeply disappointing and woefully inadequate. On 24 August 2009, Attorney General Eric Holder announced that the information contained in the IG Report, as well as the still-unreleased report of the Office of Professional Responsibility, which examined the legal memoranda produced by the Office of Legal Counsel related to “so-called enhanced interrogation techniques,” warranted “opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas

¹ The sources documenting torture and other serious violations of international law include Bush Administration memos, documents released through FOIA litigation, congressional hearings, court documents, the testimony of victims, innumerable investigative news articles and books and direct admissions by intelligence, military and administration officials.

² See, e.g., “*Prosecuting Abuses of Detainees in U.S. Counter-Terrorism Operations*,” ICTJ, November 2009, available at: http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf.

³ See, *Inquiry into the Treatment of Detainees in U.S. Custody*, available online at armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf

⁴ Statement of President Barack Obama on Release of OLC [Office of Legal Counsel] Memos, 16 April 2009, available online at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.

locations.”⁵ He explained that a preliminary review was used “to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter,” emphasizing however, that taking such steps does not mean “that charges will necessarily follow.”⁶ Twice in his five paragraph statement, Attorney General Holder stated that he will not place in “legal jeopardy” or indeed, “prosecute” those individuals who acted “in good faith and within the scope of legal guidance,”⁷ indicating not only that the investigation will be narrow in scope – limited to the certain interrogations conducted by the CIA – but apparently will also recognize the defense of superior orders, contrary to the teachings of Nuremberg and the Convention Against Torture. Notably, John Durham, who has been appointed to lead this preliminary review, is a career prosecutor at the Department of Justice, rather than a special or independent prosecutor. As such, he will be supervised by senior managers at the Justice Department. Nearly six years after the world learned of the torture of detainees at Abu Ghraib and the first torture memos were released, the time for “preliminary reviews” and “information gathering” is over;⁸ meaningful investigations aimed at holding those responsible for illegal acts accountable must begin now.

Accountability, including holding those individuals who ordered, supervised or implemented the torture program criminally responsible, is necessary to ensure that such violations do not occur again. The European Union must press the Obama Administration to launch serious and independent criminal investigations, and empower an independent, special prosecutor to hold those individuals accountable.

Unless and until a broad, independent investigation yielding appropriate sanctions is convened into torture and abuse by high-level U.S. officials and prosecutions begin, victims and organizations such as the CCR will continue to seek accountability and redress in alternative fora, including under the principle of universal jurisdiction, as necessary and appropriate. To date, European countries have failed to apply the principle of universal jurisdiction when faced with criminal complaints against U.S. officials.⁹ We

⁵ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available online at <http://www.usdoj.gov/ag/speeches/2009-ag-speech-0908241.html>.

⁶ *Id.*

⁷ *Id.*

⁸ We recall that private military contractors were found to be complicit in the torture and serious abuse of detainees at Abu Ghraib by General Antonio Taguba in his 2004 report. See A. Taguba, Art. 15–6: Investigation of the 800th Military Police Brigade (2004), available online at <http://www.dod.mil/pubs/foi/detainees/taguba/>. No private military contractor has been prosecuted for his role in the torture and abuse of Iraqi detainees. More than 330 Iraqi former detainees continue to press civil claims against contractors CACI and Titan/L-3 Services, (see, e.g., *Al Shimari v. CACI* at: <http://www.ccrjustice.org/ourcases/current-cases/al-shimari-v.-caci-et-al.>; and <http://www.ccrjustice.org/ourcases/current-cases/saleh-v.-titan>), although serious gaps in accountability and oversight mechanisms for private contractors continue to exist.

We note with concern that outsourcing of core governmental functions, including intelligence services, continues to occur under the Obama Administration. Indeed, the number of contractors hired in Afghanistan compared to the number of military deployed there even *exceeds rates* seen under the Bush Administration.

⁹ For more information on cases filed by CCR, FIDH and the European Center for Constitutional and

urge EU countries to apply their laws fully and in an politically neutral manner, thereby making it clear that there can be no impunity for torture and war crimes.

Blocking Redress for Victims of Serious International Law Violations

The Obama Administration, through the Department of Justice, has continued the policies of the Bush Administration in blocking attempts of victims of post-9/11 policies to seek accountability and redress in U.S. courts. To date, no victim of post-9/11 policies has been allowed to have his day in court, to tell his story, and to have an American jury decide who, if anyone, should be held accountable for the wrongs to which these individuals were subjected, purportedly in the name of “national security” and the so-called “war on terror.” Indeed, to date, no victim has even received an apology from the Executive Branch. Rather, the Obama Administration’s Justice Department has opposed specific detainees’ claims, including those of four British former detainees who sought damages for their arbitrary detention and torture while detained at Guantánamo.¹⁰ The Obama Administration’s Justice Department has invoked the “states secrets privilege” in an attempt to block a lawsuit brought by five men who allege they were subjected to “extraordinary rendition.”¹¹ Finally, in a case seeking damages on behalf of the families of two former detainees who were abused, arbitrarily detained and died at Guantánamo Bay, the Obama Administration’s Department of Justice has embraced the arguments put forth under the Bush Administration that torture can be within the scope of employment of U.S. government officials and members of the military – despite the universal recognition that torture can never be an official act.¹² The immunity that the Obama Administration seeks for U.S. officials – as the Bush Administration did before it – creates a culture of impunity that leaves open the possibility that such egregious conduct can occur again.

The Obama Administration will soon have its first opportunity to weigh in on one of the most well-known post 9/11 torture cases – the rendition to torture in Syria of Canadian citizen Maher Arar. Following a 7-4 decision by an *en banc* panel of the Second Circuit, plaintiff Arar will file a petition for certiorari with the U.S. Supreme Court on 1 February.¹³ It remains to be seen whether the Obama Administration will continue to fight Mr. Arar’s claims for redress and reject his calls for an apology.

Human Rights against Donald Rumsfeld and other U.S. officials in France and Germany, see <http://www.ccrjustice.org/case-against-rumsfeld>.

¹⁰ See *Rasul v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/rasul-v.-rumsfeld>.

¹¹ See *Mohamed v. Jeppesen Dataplan, Inc.* case page at: <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc>. We remain concerned about the use of the state secrets privilege despite the announcement of a “new policy” by the Justice Department in September 2009. The Obama Administration has not dropped any of the Bush Administration’s assertions of state secrets; its new policy on state secrets does not require the Justice Department to review the evidence in order to invoke the privilege (evidence that may not even be classified), nor does it require judicial review of the evidence.

¹² See *Al Zahrani v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/al-zahrani-v.-rumsfeld>.

¹³ See *Arar v. Ashcroft* case page at: <http://www.ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft>.

II- Continuing Efforts to Close the Prison at Guantánamo Bay

January 11, 2010 marked the eighth anniversary of the arrival of the first detainees at Guantánamo Bay. Many detainees have now begun their ninth year of imprisonment without charge or trial, and, despite their 2008 victory in *Boumediene v. Bush*, without having their habeas corpus cases decided by the federal courts. They remain in indefinite detention.

Almost exactly one year ago, on January 22, 2009, just two days after his inauguration, President Obama signed an executive order requiring the government to close Guantánamo Bay “as soon as practicable, and no later than one year from the date of [the] order.” Exec. Order 13492, § 3 (Jan. 22, 2009). To facilitate closure of the prison pursuant to the executive order, Attorney General Eric Holder established the Guantánamo Review Task Force, a working group comprised of law enforcement, intelligence and diplomatic officials from various government agencies, to conduct a detainee-by-detainee review of the remaining prisoners and determine what to do with them. The Task Force has apparently completed its work, but the deadline to close the prison has now come and gone. The prison remains open and fully operational.

Currently, there are approximately 192 detainees who remain at Guantánamo Bay. According to recent news reports, the Task Force has divided these detainees into three groups – about 35 who will be prosecuted in federal courts or before military commissions; 110 who will be transferred or released; and about 50 who will be detained without charge or trial ostensibly under the laws of war and/or pursuant to the Authorization for Use of Military Force, a resolution passed by Congress in the wake of the September 11th attacks. Also according to the public news reports, the group of about 110 cleared detainees consists of two groups – 80 detainees, including about 30 Yemenis, eligible for immediate repatriation or resettlement in a third country; and roughly 30 other Yemenis “placed in a category of their own, with their release contingent upon dramatically stabilized conditions in their home country, where the government has been battling a branch of al-Qaeda and fighting a civil war.”¹⁴ A breakdown of which specific detainees fit into which categories – i.e., whether slated for transfer or release, prosecution or indefinite detention – has not been disclosed by the Task Force.

Apart from the very troubling decisions by the Obama Administration to revive the military commissions (which remain fundamentally flawed despite some recent improvements pursuant to the Military Commissions Act of 2009), and to continue to hold about 50 detainees indefinitely, without charge or trial, subject to judicial review through habeas corpus, there remain several obstacles to repatriating or resettling detainees who are eligible for transfer or release – i.e., apparently more than half the detainees who remain imprisoned – and thus to closing the prison at Guantánamo Bay.

¹⁴ Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees Be Held Indefinitely*, Wash. Post, Jan. 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104936.html>.

These obstacles include the following:

- The failure of the Obama administration to resettle any detainees in the United States, including the remaining Uighur detainees. The U.S. Supreme Court will hear arguments on March 23, 2010, in *Kiyemba v. Obama*, concerning whether a federal court may order the Uighurs released into the United States for lack of any other country willing to offer them safe resettlement. A decision is not expected until late-spring or early-summer.
- Congress has enacted a variety of legislation barring the expenditure of funds to transfer or release any detainees into the United States except for the purpose of prosecution. These legislative measures are subject to court challenge in *Kiyemba*, but absent judicial intervention are unlikely to be eliminated (if at all) before the end of the year.
- A spate of legislation has also been introduced recently in the House of Representatives to bar the transfer or release of detainees into the United States, or to any country that has been recognized as “a haven for terrorist activity or that has been classified as a state sponsor of terrorism.”¹⁵ The latter would presumably bar transfers or releases to a number of countries, including those to which some detainees would wish to be repatriated, including Afghanistan, Pakistan, Saudi Arabia and Yemen.
- In response to the attempted bombing of a Northwest Airlines flight on December 25th, a decision by President Obama to halt all repatriations to Yemen despite the fact that many of the Yemeni detainees have been cleared for release.¹⁶

A further significant obstacle to closing Guantánamo Bay is lack of a sufficient number of third countries willing to resettle detainees who cannot safely return to their home countries and who as a practical matter will not be resettled in the United States absent a court victory in *Kiyemba*. At this point, several countries mainly in Europe have accepted a few detainees each for resettlement, including without limitation France, Hungary, Ireland, Portugal, Slovakia, Switzerland and the United Kingdom. Additional countries such as Spain have indicated publicly that they intend to do so as well.¹⁷ We are very grateful for such support in closing Guantánamo Bay. However, notably absent among the countries which have publicly expressed a willingness to resettle detainees are Germany, Austria, Luxembourg, Netherlands, Norway, Sweden, Finland and Denmark. Also notably absent are non-European countries such as Australia, Canada and South Africa, as well as any countries in Central or South America

¹⁵ Prevent Terrorists from Reuniting with Terrorist Cells Act (H.R. 4464) (introduced Jan. 19, 2010); Stop Terrorist Entry Program Act of 2010 (H.R. 4441) (introduced Jan. 13, 2010).

¹⁶ About half of all remaining detainees are from Yemen. The next largest groups of detainees are from Afghanistan, Saudi Arabia and Algeria, respectively.

¹⁷ Italy has accepted detainees for criminal prosecution.

(Argentina, Brazil, Chile, Uruguay, Costa Rica and Mexico).

As there are approximately 40 remaining detainees who we believe still need safe resettlement – mainly detainees from China (Uighurs), Syria, the Palestinian Territories and North Africa (Algeria, Libya and Tunisia) – there is a continuing need for countries such as France, Portugal and Ireland to accept additional detainees, as well as a need for other countries within Europe and elsewhere in the world to accept detainees for resettlement. Among the detainees who we believe require resettlement, for example, is Algerian detainee Djamel Ameziane, who speaks French and English fluently, as well as Arabic and some German, and who fears forcible repatriation to his home country. Mr. Ameziane previously lived legally in Austria and Canada, and it is our hope that another country will offer him humanitarian protection.¹⁸ Abdul Nasser Khantumani of Syria is also in need of resettlement. Mr. Khantumani's son was thankfully resettled in Portugal in August, and he continues to hope for his own long-awaited release.¹⁹

¹⁸ A profile of Mr. Ameziane is attached in English, French and Spanish. We make no representations concerning Mr. Ameziane's status at Guantánamo Bay. All such inquires should be directed to the U.S. government.

¹⁹ A profile of Mr. Khantumani is attached. We make no representations concerning Mr. Khantumani's status at Guantánamo Bay. All such inquires should be directed to the U.S. government.