
Resolution 1433 (2005)¹

Lawfulness of detentions by the United States in Guantánamo Bay

1. The Parliamentary Assembly recalls and restates its outrage and disgust at the terrorist attacks on the United States of America of 11 September 2001, the horror of which has not been dimmed by the passage of time. It shares the United States' determination to combat international terrorism and fully endorses the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives.

2. Whilst the Assembly therefore offers its full support to the United States in its efforts to fight terrorism, this must be on condition that all measures taken are fully respectful of human rights and the rule of law. Conformity with international human rights and humanitarian law is not a weakness in the fight against terrorism but a weapon, ensuring the widest international support for actions and avoiding situations which could provoke misplaced sympathy for terrorists or their causes.

3. The United States has long been a beacon of democracy and a champion of human rights throughout the world and its positive influence on European development in this respect since the Second World War is greatly appreciated. Nevertheless, the Assembly considers that the United States Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror". These errors have perhaps been most manifest in relation to Guantánamo Bay.

4. At no time have detentions at Guantánamo Bay been within a "legal black hole". International human rights law has at all times been fully applicable to all detainees. For those captured during the international armed conflict in Afghanistan, protection of certain rights may have been complemented by the provisions of international humanitarian law (IHL) for the duration of that conflict. Since that international armed conflict ceased, however, international human rights standards have applied in the normal fashion.

5. The Assembly applauds and supports the work of the International Committee of the Red Cross (ICRC) and the various United Nations human rights protection mechanisms, along with that of non-governmental organisations including Human Rights First, the Center for Constitutional Rights and Amnesty International, in striving to improve detention conditions at Guantánamo Bay and ensure that detainees' rights are respected. It also thanks the European Commission for Democracy through Law (Venice Commission) for its opinion on the possible need for further development of the Geneva Conventions, produced in response to a request from the Assembly's Committee on Legal Affairs and Human Rights.

6. The Assembly recalls the evidence provided by Mr Jamal Al Harith, former detainee, along with lawyers representing current and former detainees and other international experts, at the hearing held by its Committee on Legal Affairs and Human Rights in Paris on 17 December 2004.

7. On the basis of an extensive review of legal and factual material from these and other reliable sources, the Assembly concludes that the circumstances surrounding detentions by the United States at Guantánamo Bay show unlawfulness and inconsistency with the rule of law, on the following grounds:

- i. many if not all detainees have been subjected to cruel, inhuman or degrading treatment occurring as a direct result of official policy, authorised at the very highest levels of government;
- ii. many detainees have been subjected to ill-treatment amounting to torture which has occurred systematically and with the knowledge and complicity of the United States Government;
- iii. the right of those detained in connection with the international armed conflict previously conducted by the United

States in Afghanistan to be presumptively recognised as prisoners of war (POWs) and to have their status independently determined by a competent tribunal was not respected;

iv. there have been numerous violations of various aspects of all detainees' rights to liberty and security of the person, making their detention arbitrary;

v. there have been numerous violations of various aspects of all detainees' rights to fair trial, amounting to a flagrant denial of justice;

vi. the United States has engaged in the unlawful practice of secret detention;

vii. the United States has, by practising "rendition" (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement*;

viii. the United States' proposals to return or transfer detainees to other countries, even where reliant on "diplomatic assurances" concerning the detainees' subsequent treatment, risk violating the prohibition on *non-refoulement*.

8. The Assembly therefore calls on the United States Government to ensure respect for the rule of law and human rights by remedying these situations and in particular:

i. to cease immediately all ill-treatment of Guantánamo Bay detainees;

ii. to investigate, prosecute and punish all instances of unlawful mistreatment of detainees, no matter what the status or office of the person responsible;

iii. to allow all detainees to challenge the lawfulness of their detention before a regularly constituted court competent to order their release if detention is not lawful;

iv. to release immediately all those detainees against whom there is not sufficient evidence to justify laying criminal charges;

v. to charge those suspected of criminal offences and bring them for trial before a competent, independent and impartial tribunal guaranteeing all the procedural safeguards required by international law, without delay, whilst excluding imposition of the death penalty against them;

vi. to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made;

vii. to cease immediately the practice of secret detentions and to ensure full respect for the rights of any detainees currently held in secret, in particular the prohibition on torture and cruel, inhuman or degrading treatment and the right to have relatives informed of the fact of detention, to recognition as a person before the law, to judicial review of the lawfulness of detention and to release or trial without delay;

viii. to allow access to all detainees by family members, legal representatives, consular representatives and officials of international humanitarian and human rights organisations;

ix. to cease the practice of "rendition" in violation of the prohibition on *non-refoulement*;

x. not to return or transfer detainees in reliance on "diplomatic assurances" from countries known to engage in the systematic practice of torture and in all cases unless the absence of a risk of ill-treatment is firmly established;

xi. to comply fully and promptly with the recommendations of the ICRC and to avoid any actions that might have the effect of undermining its activities, reputation or standing.

9. Furthermore, the Assembly also calls on the United States Government to ensure that the "war on terror" is conducted in all respects in accordance with international law, particularly international human rights and humanitarian law.

10. In addition, the Assembly calls on member states of the Council of Europe:

i. to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not;

ii. with respect to any of their citizens, nationals or former residents who have been returned or transferred from detention at Guantánamo Bay:

a. to treat such persons according to the usual provisions of criminal law, respecting the presumption in favour of immediate liberty on arrival;

b. to provide such persons with all necessary support and assistance, in particular legal aid to bring cases relating to detention at Guantánamo Bay;

c. to protect such persons from prejudice or discrimination and to ensure their mental and physical well-being during the process of reintegration;

d. to ensure that such persons do not suffer detriment to their rights or interests as a result of being held in unlawful detention at Guantánamo Bay, especially in relation to immigration status;

iii. not to permit their authorities to participate or assist in the interrogation of Guantánamo Bay detainees;

iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made;

v. to refuse to comply with United States' requests for extradition of terrorist suspects liable to detention at Guantánamo Bay;

vi. to refuse to comply with United States' requests for mutual legal assistance in relation to Guantánamo Bay detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court;

vii. to ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law;

viii. to respect the *erga omnes* nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees.

11. Finally, the Assembly resolves to pursue this issue further through bilateral dialogue with the United States Congress.

1. *Assembly debate* on 26 April 2005 (10th Sitting) (see [Doc. 10497](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr McNamara).

Text adopted by the Assembly on 26 April 2005 (10th Sitting).