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## **REPORT**

with a proposal for a European Parliament recommendation to the Council on the Guantanamo detainees' right to a fair trial (2003/2229(INI))

Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy

Rapporteur: Ole Andreasen



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## PROCEDURAL PAGE

At the sitting of 20 November 2003 the President of Parliament announced that he had referred the proposal for a recommendation by Baroness Ludford on behalf of the ELDR Group, by Anna Terrón i Cusi on behalf of the PSE Group, by Monica Frassoni on behalf of the Verts/ALE Group and by Marianne Eriksson on behalf of the GUE/NGL Group on the Guantanamo detainees' right to a fair trial (B5-0426/03) under Rule 49(1) of the Rules of Procedure to the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy as the committee responsible and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for its opinion.

At its meeting of 4 November 2003 the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy decided to draw up a report on the subject under Rule 49(3) and Rule 104, and appointed Ole Andreasen rapporteur (2003/2229(INI)).

The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy considered the draft report at its meetings of 20 January 2004, 18 and 19 February 2004.

At the latter it adopted the proposal for a recommendation by 34 votes to 3, with 0 abstentions.

The following were present for the vote: Elmar Brok (chairperson), Baroness Nicholson of Winterbourne (1st vice-chairperson), Geoffrey Van Orden (2nd vice-chairperson) and Christos Zacharakis (3rd vice-chairperson), Ole Andreasen (rapporteur), Per-Arne Arvidsson, Bastiaan Belder, John Walls Cushnahan, Gianfranco Dell'Alba (for Emma Bonino pursuant to Rule 153(2)), Rosa M. Díez González, Andrew Nicholas Duff (for Joan Vallvé), Hélène Flautre (for Per Gahrton), José María Gil-Robles Gil-Delgado (for Armin Laschet pursuant to Rule 153(2)), Alfred Gomolka, Elisabeth Jeggle (for Michael Gahler pursuant to Rule 153(2)), Giorgos Katiforis (for Alexandros Baltas), Catherine Lalumière, Jules Maaten (for Bob van den Bos), Minerva Melpomeni Malliori (for Véronique De Keyser pursuant to Rule 153(2)), Cecilia Malmström, Helmuth Markov (for André Brie pursuant to Rule 153(2)), Emilio Menéndez del Valle, Hans Modrow (for Pedro Marset Campos), Raimon Obiols i Germà, Arie M. Oostlander, Jacques F. Poos, Jannis Sakellariou, José Ignacio Salafranca Sánchez-Neyra, Jürgen Schröder, Elisabeth Schroedter, Ioannis Souladakis, The Earl of Stockton (for David Sumberg), Charles Tannock, Paavo Väyrynen, Demetrio Volcic, Peder Wachtmeister (for Hugues Martin pursuant to Rule 153(2)), Karl von Wogau, Jan Marinus Wiersma.

The opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs is attached.

The report was tabled on 25 February 2004.

## PROPOSAL FOR A EUROPEAN PARLIAMENT RECOMMENDATION TO THE COUNCIL

### on the Guantanamo detainees' right to a fair trial (2003/2229(INI))

*The European Parliament,*

- having regard to the proposal for a recommendation to the Council tabled by Sarah Ludford, on behalf of the ELDR Group, by Anna Terrón i Cusí, on behalf of the PSE Group, by Monica Frassoni, on behalf of the Verts/ALE Group, and by Marianne Eriksson, on behalf of the Confederal Group of the European United Left/Nordic Green Left (B5-0426/2003),
- having regard to the draft Treaty establishing a Constitution for Europe of 18 July 2003, prepared by the European Convention,
- having regard to the Transatlantic Declaration on EU/US relations of 1990 and the New Transatlantic Agenda of 1995 (NTA),
- having regard to the European Council Declaration on Transatlantic Relations annexed to the Presidency Conclusions of the European Council meeting in Brussels on 12-13 December 2003,
- having regard to the Conclusions and Plan of Action of the extraordinary European Council meeting in Brussels on 21 September 2001<sup>1</sup>, the Declaration by the Heads of State or Government of the European Union and the President of the Commission on the attacks of September 11, 2001 and the fight against terrorism made at the informal European Council in Gent on 19 October 2001<sup>2</sup>,
- having regard to the EU Guidelines on Torture, Death Penalty and the EU Guidelines on Children Affected by Armed Conflict, adopted by General Affairs Council in December 2003,
- having regard to UN Security Council Resolutions 1368 (2001), adopted by the Security Council at its 4370th meeting on 12 September 2001<sup>3</sup>, 1269 (1999), adopted by the Security Council at its 4053rd meeting on 19 October 1999<sup>4</sup> condemning all acts of terrorism, irrespective of motive, irrespective of wherever such acts are committed and whoever commits such acts, and reaffirming that the suppression of international terrorism, including that in which national states are involved, is an essential contribution to the maintenance of international peace and security, and 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001<sup>5</sup>,
- having regard to the Universal Declaration of Human Rights, adopted and proclaimed

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<sup>1</sup> <http://ue.eu.int/pressData/en/ec/140.en.pdf>.

<sup>2</sup> <http://ue.eu.int/pressData/en/ec/ACF7BE.pdf>.

<sup>3</sup> <http://www.un.org/Docs/scres/2001/res1368e.pdf>.

<sup>4</sup> <http://www.un.org/Docs/scres/1999/99sc1269.htm>.

<sup>5</sup> <http://www.un.org/Docs/scres/2001/res1373e.pdf>.

by General Assembly resolution 217 A (III) of 10 December 1948<sup>1</sup>, to the Charter of Fundamental Rights of the European Union<sup>2</sup>, and to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>3</sup>,

- having regard to the International Covenant on Civil and Political Rights of 9 December 1966,
- having regard to the Third Geneva Convention relative to the Treatment of Prisoners of War and the Fourth Geneva Convention relative to the protection of civilian persons in time of war, both adopted on 12 August 1949, and having regard to Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977,
- having regard to the Vienna Convention on Consular Relations of 24 April 1963,
- having regard to the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C of 31 July 1957 and 2076 of 13 May 1977,
- having regard to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 9 December 1988,
- having regard to The Convention on the Rights of the Child as adopted by the UN General Assembly in November 1989 and to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts as adopted by the UN General Assembly in May 2000,
- having regard to the Convention relating to the Status of Refugees of 22 April 1954,
- having regard to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984,
- having regard to its resolutions of 17 May 2001 on the state of the transatlantic dialogue<sup>4</sup>; of 13 December 2001 on EU judicial cooperation with the United States in combating terrorism<sup>5</sup>; of 7 February 2002 on the detainees in Guantanamo Bay<sup>6</sup>; of 15 May 2002 on Reinforcing the Transatlantic Relationship: Focusing on Strategy and Delivering Results<sup>7</sup>; of 4 September 2003 on the situation as regards fundamental rights in the European Union<sup>8</sup>; of 19 June 2003 on a Renewed Transatlantic Relationship for the Third Millennium<sup>9</sup>; of 4 December 2003 on the preparation of the European Council

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<sup>1</sup> <http://www.un.org/Overview/rights.html>.

<sup>2</sup> OJ C 364, 18.12.2000, p. 1.

<sup>3</sup> <http://conventions.coe.int/treaty>.

<sup>4</sup> OJ C 34 E, 7.2.2002, p. 359.

<sup>5</sup> OJ C 177 E, 25.7.2002, p. 288.

<sup>6</sup> P5\_TA(2002)0066.

<sup>7</sup> P5\_TA(2002)0243.

<sup>8</sup> P5\_TA(2003)0376.

<sup>9</sup> P5\_TA(2003)0291.

in Brussels on 12 and 13 December 2003<sup>1</sup> ; and to its Recommendation of 3 June 2003 to the Council on the EU-USA agreements on judicial cooperation in criminal matters and extradition<sup>2</sup> ,

- having regard to the results of the Hearing on Guantanamo: The Right to a Fair Trial held in Brussels on 30 September 2003,
  - having regard to Rule 49(3) and Rule 104 of its Rules of Procedure,
  - having regard to the report of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0107/2004),
- A. Whereas both the United States of America and the Member States of the EU have repeatedly reaffirmed their commitment to the democratic values which are the foundation of both the transatlantic community and solidarity: freedom, democracy, the rule of law and human rights,
- B. whereas the US military operation in Afghanistan was a consequence of the terrorist attacks of 11 September 2001 and whereas this operation enjoyed widespread support among the international community,
- C. whereas since January 2002 some 660 prisoners from some 40 countries have been transferred, first to Camp X-Ray and then to Camp Delta, in Guantanamo Bay Naval Base, in both cases deprived of any access to justice,
- D. whereas around twenty of the prisoners at Guantanamo Bay are nationals of an EU Member State and thus have the right to consular protection from their respective states of nationality, while several others are long-term legal EU residents meriting consular assistance,
- E. whereas the European prisoners also enjoy European Union citizenship, which under Art. 20 of the EC treaty confers the right to consular protection from all EU states,
- F. whereas the US Administration opposes access to US courts by detainees held at Guantanamo Bay Naval Base, and the question of whether Guantanamo Bay Naval Base constitutes part of the territory of the United States and whether the detainees, like US citizens, enjoy guarantees under the US Constitution is presently before the US Supreme Court, and whereas furthermore the detainees at Guantanamo Bay are being denied the safeguards of international human rights standards and international humanitarian law,
- G. whereas EU Institutions, Member States and public opinions are increasingly concerned about conditions at the Guantanamo Bay Naval Base and about the physical and mental states of the detainees and have called for the prisoners to be treated according to 'the rule of law', regardless of their nationality or origin,

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<sup>1</sup> P5\_TA-PROV(2003)0548.

<sup>2</sup> P5\_TA(2003)0239.

- H. whereas the fight against terrorism cannot be waged at the expense of established, basic, shared values such as respect for human rights and the rule of law,
- I. whereas both the US and the Member States are a party of the Third Geneva Convention (relative to the treatment of prisoners of war) and the Fourth Geneva Convention relative to the protection of civilian persons in time of war, and whereas Protocol 1 Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts forms part of international customary law, and whereas the US is a party to the International Covenant on Civil and Political Rights, which constitute the relevant legal framework to establish whether the detention of detainees held in Guantanamo Bay could or could not be considered arbitrary,
- J. whereas neither the Military Order issued by President Bush on 13 November 2001 on "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism" nor the subsequent Military Commission Orders issued by the Defense-Secretary should be considered as an appropriate framework for implementing the due process and fair trial requirements of international law,
- K. whereas every prisoner should be tried without undue delay in a fair and public hearing by a competent, independent and impartial tribunal,
  - 1. Addresses the following recommendations to the Council:

**As regards the legal consideration of detainees held in Guantanamo Bay**

- (a) ask the US authorities to immediately put an end to the current legal limbo in which the detainees held in Guantanamo Bay have, since their arrival, been placed and to guarantee an immediate access to justice in order to determine the status of each individual detainee on a case-by-case basis to ensure those being charged with war crimes receive a fair trial according to international humanitarian law and with full respect to international human rights instruments;
- (b) express its regret that an "Ad hoc" International Criminal Court has not been yet established by the UN Security Council as the most expedient way of dealing with the present case;
- (c) urge the US administration to confirm that the "ad hoc military commissions" established in the President's Military Order of 13 November 2001 and the subsequent Military Commission Orders issued by the Defense-Secretary as a "competent court" will meet all international law standards within the meaning of Article 5 of the Third Geneva Convention and Article 14 of the UN International Covenant on Civil and Political Rights;
- (d) consider therefore that any trial not conforming with standards under the International Covenant on Civil and Political Rights in respect of due process would be a direct violation and infringement of international law;
- (e) ask the US authorities to give official representatives of national states, relevant international institutions, family relatives and independent observers access as



appropriate to sites of detention, free communication consistent with due legal process with the detainees, and to allow them to attend and to observe any military commissions proceedings against the detainees;

- (f) call on all states whose nationals are held at Guantanamo Bay to take appropriate action according to the Geneva Convention;
- (g) call on the Member States and the Commission to implement EU measures, through concerted action by the diplomatic and consular missions of the Member States and the Commission (Art. 20 TEU), with a view to liaising with the US authorities at the highest level;
- (h) rectify the failure of the Council to discuss or decide on the submission of an 'amicus curiae' brief to the US Supreme Court on behalf of the European Union arguing for an interpretation of US law in respect of all 660 prisoners which conforms to Article 9 of the International Covenant on Civil and Political Rights;
- (i) insist that the US administration must allow 'habeas corpus' and due process for all prisoners that it is detaining anywhere under assumed executive powers, and make the names available to their families and legal representatives.
- (j) note with satisfaction that the American authorities have released a Spanish detainee from Guantanamo to stand trial in Spain; to share the hope that this is a sign of change in the policy of the American authorities towards all detainees;

#### **As regards the possible impact on the EU-US partnership**

- (k) share the view that the transatlantic relationship is invaluable and irreplaceable and could be a formidable force for good in the world as stated by the European Council only if basic human rights - such as the right to fair trial and the prohibition on arbitrary detention - are clearly respected as universal and non-negotiable and remain the core of values and common interest that the EU and the US maintain;
- (l) recall that security is an all-encompassing collective concept that requires a multilateral approach, and that international treaties are the basic elements upon which the foundation of such a multilateral framework for human security and a renewed transatlantic partnership must be laid;
- (m) reiterate its call for the Council Presidency to raise the issue of the right of prisoners detained at Guantánamo Bay to a fair trial with the US authorities and to include this issue on the agenda for the next summit between the European Union and the United States;
- (n) come up with a concerted strategy, with the Commission's support, before the EU-US Summit in June 2004 consisting of a common position (Article 15 of the EU Treaty) and the necessary joint actions (Article 14 of the EU Treaty) of the EU and its Member States reflecting as well the views expressed by the European Parliament;

- (o) recommend to the forthcoming EU-US Summit the creation of a long-term collaborative framework and the launching of a joint Action Plan for the Fight on Terrorism, pointing out that international terrorism must be combated firmly, not only by military means but also by addressing the roots of the tremendous political, social, economic and ecological problems of today's world;
- (p) call upon the US to comply fully with its obligations under international human and humanitarian law with respect to proper determination of status of combatants, treatment of child, abolishing the death penalty, and safeguarding the treatment of prisoners of war in the wake of the recent conflicts; in particular, urges once more the US to abolish the death penalty and accede to the Rome Statute of the International Criminal Court;
- (q) call upon the US to comply with its obligations under The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as adopted by the UN General Assembly in December 1984, art. 3, which prohibits the expelling, return ("refoulement") or extradition of a person to countries where there are substantial grounds for believing he or she would be subjected to torture;

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2. Instructs its President to forward this recommendation to the Council and, for information, the Commission, the parliaments of the Member States and the President and Congress of the United States of America.

7 October 2003

### **PROPOSAL FOR A RECOMMENDATION B5-0426/2003**

pursuant to Rule 49(1) of the Rules of Procedure  
by Sarah Ludford, on behalf of the ELDR Group, Anna Terrón i Cusí, on behalf of the PSE Group, Monica Frassoni, on behalf of the Verts/ALE Group, and Marianne Eriksson, on behalf of the GUE/NGL Group

on the Guantanamo detainees' right to a fair trial

*The European Parliament,*

- having regard to its resolution of 13 December 2001 on EU judicial cooperation with the United States in combating terrorism (B5-0813/2001),
  - having regard to its resolution of 7 February 2002 on the detainees in Guantanamo Bay (B5-0066/2002),
  - having regard to its report of 6 June 2003 on the EU-US judicial cooperation agreement (A5-0172/2003),
  - having regard to its report on the situation as regards fundamental rights in the European Union (2002) (A5-0281/2003),
  - having regard to the Third Geneva Convention relative to the treatment of prisoners of war, which was adopted on 12 August 1949,
  - having regard to the hearing on the Guantanamo detainees' right to a fair trial, which was held at the European Parliament on 30 September 2003,
- A. whereas the USA has adopted a President's executive order on military tribunals,
- B. concerned that in some respects the American and European approaches are incompatible and that this weakens the common fight against terrorism,
- C. whereas the capture and continued detention in the circumstances in which the prisoners are held in Guantanamo Bay and elsewhere outside the USA contravenes the Geneva Conventions as well as other international humanitarian instruments,
- D. whereas the US Government must respect the provisions of the Third Geneva Convention (1949), under which the detainees would be categorised as prisoners of war unless a competent tribunal, as provided for in Article 5 of the Convention, had determined otherwise,
- E. whereas in the absence of such determination it is essential for the matter to be dealt with in accordance with Article 14 of the United Nations International Covenant on Civil and Political Rights (1966), to which the USA is party;

F. whereas Article 14 on the right to a fair trial must be respected – including the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; the right to adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing; and the right to legal assistance without payment,

1. Recommends that Council urgently:

- establish a common position on matters relating to the second and third pillar,
- on the basis of this common position, start discussions with the USA at the highest political level on the matter of the Guantanamo detainees' right to a fair trial.

## EXPLANATORY STATEMENT

### 1. Introduction

The on-going struggle against terrorism that the US is carrying out started with the war in Afghanistan in the aftermath of the September 11, 2001 attacks. The conflict has so far resulted in some 660 prisoners of over 38 different nationalities being held at Guantanamo Bay detention camp without charge and in the most irregular circumstances. Some 87 of them have been already released. From the point of view of the rapporteur, this situation presents obvious implications, at least from two perspectives. Firstly, there are two classical questions that from an international law point of view remain unanswered: What is the applicable legislation? What is the competent jurisdiction? Secondly, a sensible political question needs to be addressed in parallel: What are the implications of the existing situation in Guantanamo for EU-US Transatlantic relations?

Legislation and jurisdiction questions will be dealt with in more detail by the LIBE Committee opinion, though some related key elements will also be considered in the present report. Specific attention will be paid, however, to the implications resulting from this anomalous situation for EU-US Transatlantic relations, which are at the core of the European Union foreign policy.

### 2. The applicable legislation

The present question does not refer to the Hague Conventions of 1899 and 1907 on the rules of engagement during combat, but rather to the second branch of the law of conduct during war ("ius in bello"), that is, the Geneva Conventions and international humanitarian law, which emphasises human rights and responsibilities derived from armed conflicts. From this perspective, it is true that President Bush did in fact change the United States' initial position that was contrary to the application of the Geneva Conventions of 1949 regarding the detainees held in Cuba, with the announcement that Taliban fighters are covered by the Geneva Conventions, while Al Qaeda fighters are not, Al Qaeda not being a state and therefore not a party to the Conventions<sup>1</sup>. The reality is, however, that neither Taliban nor Al

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<sup>1</sup> The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict. Members of a regular armed force and certain others, including militias and volunteer corps serving as part of the armed forces, are entitled to specific privileges as POWs. Members of volunteer corps, militias and organised resistance forces that are not part of the armed services of a party to the conflict are entitled to POW status if the organisation (a) is commanded by a person responsible for his subordinates, (b) uses a fixed distinctive sign recognisable at a distance, (c) carries arms openly, and (d) conducts its operations in accordance with the laws of war. Groups that do not meet these standards are not entitled to POW status and members of such groups who commit belligerent acts may be treated as civilians under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. These "unprivileged" or "unlawful combatants" may be punished for acts of violence for which legitimate combatants could not be punished. The above-mentioned four criteria are therefore at the centre of the debate about the POW status of any detainees. The main issue is whether these four criteria established in Article 4 A (2) of the Geneva Convention for the Treatment of Prisoners of War apply only to irregulars, as the text and structure of the treaty suggests, or whether they form a part of customary international law and apply to *all* combatants.

Qaeda fighters are being treated as prisoners of war (POWs) and that in practice the Bush Administration considers all of the detainees to be "unlawful combatants," who may be held indefinitely without trial or even despite any eventual acquittal by a military tribunal. Taking quite an opposite position, the rapporteur agrees with the view of those who consider that both President Bush's decision and current Bush Administration practice relies on an inaccurate interpretation of the Geneva Convention for the Treatment of Prisoners of War. The rapporteur considers that all combatants captured on the battlefield are entitled to be treated as POWs until an independent tribunal has determined otherwise. In such a case, they must fall under either the Third Geneva Convention (lawful combatants entitled to prisoner of war protections) or the Fourth Geneva Convention (civilians); there is no intermediate status, as correctly underlined in LIBE's Opinion. The rapporteur therefore shares the unanimous views of the UN High Commissioner on Human Rights (UNHCR), the Council, LIBE and some human rights organisations and specialists and recommends this approach to the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy.

### **3. The competent jurisdiction**

Guantanamo Bay constitutes part of the territory of the Republic of Cuba, although there is clearly no question of the Guantanamo detainees availing themselves of the protection of Cuban law. In fact, the US have been exercising effective control over the territory of the military base since Cuba was granted independence, in accordance with the bilateral agreement concluded in 1903 between the two countries concerning the coaling and naval station on that part of the island - and in spite of "the facto" opposition of the Cuban Government since 1959. However, the US Supreme Court has so far taken the view that there is no US Federal court which is competent to entertain petitions from aliens detained by American forces on foreign territory and that, unlike US citizens, such detainees enjoy no guarantees under the US Constitution. This is not the view of the rapporteur, who shares instead the legal position adopted by the International Committee of the Red Cross (ICRC) stating that the legal status of the detainees at the base in Guantanamo Bay (prisoner of war or otherwise) must be determined by the US authorities on an individual basis for each detainee. It is assumed, therefore, that the US may establish a 'competent court' within the meaning of the Geneva Convention or designate an existing body, or a body provided for therein, to assume that role and that, pursuant to the 1968 Vienna Convention on the Law of Treaties, that requirement may be disputed only by the circumstance that, with regard to the reception of the detainees, US domestic law provides that they have no means of legal remedy before US, foreign or international courts.

The problem is that POWs accused of crimes are entitled to trial by court-martial or regular civil court, whereas by denying POW status the US executive have opened up the possibility that the detainees may be tried by so-called military commissions<sup>1</sup>. In fact, on 3 July 2003,

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<sup>1</sup> Following the Geneva Conventions the military has jurisdiction to try enemy POWs and civilians, including "unlawful belligerents" for violations of the law of war but not, for example, to try detainees for pre-capture acts not committed within occupied territory or in connection with the armed conflict. Moreover, Article 102 of the Geneva Convention for the Treatment of Prisoners of War clearly states that, "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power... ". Further, Article 84 provides: "In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised, and, in particular, the procedure of which does not afford the accused the rights

President Bush decided that six of the detainees would be subject to possible trial by military commissions for terrorist activities against the US. It should be recalled however that even for the trial of any possible "unlawful belligerent" not considered either POW or a civilian but rather in a separate category outside of the Geneva Convention, the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people is strictly forbidden.

Therefore, whilst supporting the fight against terrorism, the rapporteur considers that many of the characteristics of the military commissions in their current form actually render them unjust: firstly, because they do not constitute independent or impartial tribunals; secondly, because they do not offer enough process guarantees such as those provided under the US Constitution (and in particular the US Uniform Code of Military Justice), the International Covenant on Civil and Political Rights and other international human rights standards; thirdly, because there are unacceptable restrictions on the right to counsel and the ability to conduct an effective defence; finally, because they imply an unacceptable extension of military jurisdiction over non-military criminal conduct. For these reasons, the rapporteur recommends stressing the EP's previous position (as declared in its previous resolutions on judicial cooperation between the EU and the US in combating terrorism and on EU-US judicial cooperation) that the US Patriot Act, which discriminates against non-US citizens, and President Bush's Military Order issued on 13 November 2001 authorising the use of military commissions are contrary both to the provisions of the Geneva Convention and to the principle of the protection of fundamental rights.

#### **4. Implications for EU-US Transatlantic relations**

Both the continuing failure of the US to determine the status of the detainees at Guantanamo Bay under Article 5 of the Third Geneva Convention and the functioning of the military commissions in their current form are clearly damaging the reputation of the US. As has been correctly underlined, this lack of respect of humanitarian law could bring dire consequences in relation to the treatment of US soldiers captured in future armed conflicts. It could even serve as a justification for foreign governments wishing to free themselves of the restraints of human rights obligations. Even worse, such behaviour is certainly counter-productive since it risks making martyrs of the prisoners in the moderate Muslim world. Further, US behaviour at Guantanamo Bay is likewise damaging the EU-US Transatlantic relationship. This Parliament has always been well aware of the substantive implications for the EU-US partnership deriving from the terrorist attacks of 11 September 2001 on the US. As has been underlined, these attacks involve a new and different kind of conflict aiming to undermine open societies. It is indispensable to establish reinforced ties between the US and the EU, given both the community of values that are now at risk and the interests that both sides have in common.

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and means of defence provided for in Article 105 (under which the POW shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter, to be advised of these rights by the Detaining Power in due time before the trial, etc.). Other procedural guarantees include a prohibition on punishment for *ex post facto* crimes, prompt notification of the charges and a speedy trial, etc. In addition, Article 106 adds that "Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial...".

However, the European Parliament has likewise stressed that the fight against terrorism cannot be waged at the expense of basic shared values, such as respect for human rights and civil liberties, a situation that is currently happening at Guantanamo Bay. To avoid this, the rapporteur considers it more urgent than ever that the next EU-US Summit results in agreement to build a long-term Transatlantic collaborative framework and an Action Plan for the Fight against Terrorism. This has been suggested by the EP on different occasions. The final aim must be to combat international terrorism firmly, using all effective means against terrorist groups or individuals and their networks in order to defend the democratic system and the rule of law and protect fundamental rights and freedoms. That must be done not only by military means but, above all, by a civilian approach in the framework of conflict prevention and by addressing the roots of the tremendous political, social, economic and environmental problems of today's world. In any event, the most strict respect of the fundamental rights and the humanitarian law must be at the basis of this combat if democratic values, which are the foundation of the Transatlantic community (freedom, democracy, the rule of law and human rights), are to prevail.

## **5. Conclusions**

A. Explicit support should be given to the Council's view that the Third Geneva Convention of 12 August 1949 on the treatment of prisoners of war must be interpreted to mean that, in the event of doubt, the detainees being held at Guantanamo Bay must be treated as prisoners of war until it is established that they do not fulfil the conditions required for them to be treated as such. In that case, they must fall under either the Third Geneva Convention (lawful combatants entitled to prisoner of war protections) or the Fourth Geneva Convention (civilians).

B. Neither the Military Order issued by President Bush on 13 November 2001 on "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism" nor the subsequent Military Commission Orders issued by the Secretary of Defense, Ronald Rumsfeld establishing the relevant procedure should be considered by the EP as an appropriate procedural framework unless the US administration confirms that the "ad hoc military commissions" will meet all international law standards within the meaning of Article 5 of the Third Geneva Convention and Article 14 of the UN International Covenant on Civil and Political Rights.

C. The long lasting situation in Guantanamo is clearly damaging the reputation of the US in legal and political terms. In addition, it could bring dire consequences for EU-US Transatlantic relations since the European Union cannot accept these legal and judicial irregularities which undermines the most fundamental values of the rule of law. The forthcoming EU-US Summit should, therefore, deal with this issue as a priority and design a joint Action Plan for the Fight against Terrorism which combines strong determination and action against terrorism with full respect for international humanitarian standards.



10 février 2004

**OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS,  
JUSTICE AND HOME AFFAIRS**

for the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy

on Guantanamo detainees' right to a fair trial  
(B5-0426/2003 - 2003/2229(INI))

Draftswoman: Baroness Ludford

**PROCEDURE**

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Baroness Ludford draftswoman at its meeting of 17 November 2003.

It considered the draft opinion at its meeting of 26 November 2003, 22 January 2004 and 9 February 2004.

At the latter meeting it adopted the following suggestions by 25 votes, with 1 abstention.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairwoman), Baroness Ludford (draftswoman), Roberta Angelilli, Carmen Cerdeira Morterero, Carlos Coelho, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Timothy Kirkhope, Ole Krarup, Lucio Manisco (for Ilka Schröder), Bill Newton Dunn, Arie M. Oostlander (for Eva Klamt), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Hubert Pirker, Bernd Posselt, José Ribeiro e Castro, Martine Roure, Ole Sørensen (for Francesco Rutelli), Patsy Sørensen, Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco and Christian Ulrik von Boetticher.

## SHORT JUSTIFICATION

1. The issue of the prisoners captured in Afghanistan, and incarcerated for the past 2 years under executive order without charge or trial in Camp Delta at the US naval base at Guantanamo Bay in Cuba, has been discussed on many occasions by the European Parliament. Whilst supporting the fight against terrorism, Parliament declared that *'the US Patriot Act, which discriminates against non-US citizens, and President Bush's executive order on military tribunals'* were contrary to the principle of the protection of fundamental rights<sup>1</sup>. It should be recalled that other prisoners are detained in Afghanistan and (apparently) on the British island leased to the US, Diego Garcia.

2. In the reported words of one detainee: 'you don't have the right to have rights.' The US Government has refused to release the names of the prisoners, but unofficial information suggests 660 from 40 countries, including three children, of which one is 13. The best guess is that there are about 25 EU nationals and residents, of which 12 are British. Access is permitted only to the International Committee of the Red Cross and some foreign diplomats, but no lawyers or family members. Mail is infrequent and censored. Lights are kept on 24 hours, and there have been 32 reported suicide attempts. It is reported that 'stress and duress' ('torture lite') techniques are used in interrogation, which are likely to breach the bans on torture or inhuman or degrading treatment. The ICRC, breaking its normal habit of silence, recently said the indefinite detention without legal safeguards was unacceptable due to the 'open-endedness of the situation and its impact on mental health...'. Along with the threat of the death penalty, this Kafkaesque situation must make guilty pleas, 'confessions' and plea-bargaining both more likely and more suspect.

### Illegality of detention

3. The US Government has refused to acknowledge that these prisoners must fall under either the Third Geneva Convention (lawful combatants entitled to prisoner of war protections) or the Fourth (civilians); there is no intermediate status. It categorically rejects designation of any of the alleged Taliban or al-Qa'ida supporters as POWs, and refuses to submit their status for resolution by a competent tribunal as required in case of doubt. If POWs, they would have protection against interrogation and could be held only until cessation of hostilities, unless tried for war crimes under due process in a court martial, which, unlike the Bush/Rumsfeld military commissions, offers virtually every regular court protection except jury trial. But if not POWs they are civilians, who must be tried in the normal American criminal justice system for any crimes allegedly committed. For both categories when charged with a crime, the protections of the International Covenant on Civil and Political Rights would apply, especially Articles 9 and 14 (these guarantees being of course reflected in the US Constitution) and the right to challenge lawfulness of detention ("habeas corpus") is an absolutely core safeguard.

4. The Bush administration has argued that the Geneva Conventions are obsolete when dealing with terrorists and has chosen to apply neither those conventional laws of war nor the criminal law in which human rights norms (ICCPR and US Constitution) should apply. They have tried to straddle both by inventing a new residual category of 'unlawful combatant' in the

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<sup>1</sup> B5-0813/2001 of 13 December 2001. European Parliament resolution on judicial cooperation between the European Union and the United States of America in combating terrorism. (Also the resolution on EU-US judicial cooperation)

potentially unlimited 'war on terror' (transformed from a metaphorical to a literal term), but such status is unknown in international law. Paradoxically, it portrays al-Qa'ida as a liberation movement rather than the most dangerous criminal organisation that has ever existed.

5. Britain's Court of Appeal has criticised as 'objectionable that [British detainee Feroz Abbasi] should be subject to indefinite detention in territory over which the US has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.' Its description of this detention as 'a legal black hole' was echoed in a recent lecture by one of the judicial members of the House of Lords (i.e. UK supreme court judge), Lord Johan Steyn. The UN Commission on Human Rights' Working Group on Arbitrary Detention has condemned the detentions as arbitrary.

6. In addition, double standards and discrimination are practised. White US citizen and Taliban fighter John Walker Lindh was prosecuted in the normal civilian criminal justice system, whereas not only the foreigners but fellow Americans Yaser Hamdi and Jose Padilla have been subject to incommunicado military detention (although in their case on US territory).

7. The denial of the prisoners' right to access the normal civil courts and the protection of the US Constitution has so far sadly been backed by the US courts, on the grounds that Guantanamo Bay, even though the US is in actual control of the base, is not sovereign US territory. It is welcome that the Supreme Court has now said it will decide on whether US courts have jurisdiction (though not, itself, on legality of detention).

### **Illegality of military commissions**

8. Lord Steyn said "*trials of the type contemplated by the US government would be a stain on US justice and 'the term kangaroo court springs to mind'.*":

*'The regime applicable at Guantanamo Bay was created by a succession of presidential orders. ....The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners. The trials will be held in secret. of the basic guarantees for a fair trial need be observed. The jurisdiction of the United States courts is excluded. The military control everything. It is, however, in all respects subject to decisions of the President as Commander-in-Chief even in respect of guilt and innocence in individual cases as well as appropriate sentences. It is an awesome responsibility...'*

9. There is no appeal process as such, only a review body under the authority of the Defence Secretary and the President and to which no submissions can be made. The choice of civilian counsel is severely restricted (without legal aid) to American citizens who will have only limited rights of access to evidence and to parts of the trial, if the presiding officer permits. Rights for the accused to produce evidence in defence are restricted. Military counsel is allowed free access to all evidence but cannot obtain clients' instructions on it. In all matters except the right to a translator, this procedure is in flagrant breach of the ICCPR.

### **Conclusion**

10. The failure to give access to any independent court by imposing indefinite detention through executive order, and the military commissions' denial of ICCPR protections are, without doubt, blatant violations of international law. The additional disregard of the rule of

law exhibited by the prejudicial remark of President Bush (the prospective 'appeal judge') that all the prisoners were 'bad people' and 'killers' marks a further deterioration. These compromises of US standards in the name of 'national security' deprive the US of the moral authority to achieve human rights' goals including elimination of terrorism, dismaying her friends, delighting her enemies and providing a precedent being smugly followed by some very nasty regimes.

Some governments including the UK and Australia have been 'negotiating' better trial conditions (e.g. no death penalty) or repatriation for their nationals, but with no final outcome yet.

## SUGGESTIONS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. whereas around twenty of the prisoners at Guantanamo Bay are nationals of an EU Member State and thus have the right to consular protection from their respective states of nationality, while several others are long term legal EU residents meriting consular assistance,
- B. whereas the European prisoners also enjoy European Union citizenship, which under Art. 20 of the EC treaty confers the right to consular protection from all EU states,
- C. whereas EU citizens have suffered discriminatory treatment compared to US citizens in access to due process and constitutional rights,
- D. whereas the United States of America is in control of Guantanamo Bay and, being party to the Geneva Convention, it is therefore bound to provide humanitarian treatment and due process,
- E. whereas every prisoner should be tried without undue delay in a fair and public hearing by a competent, independent and impartial tribunal,
- F. whereas representations have apparently been made by several Member States without yet obtaining any notable results, and believing that the EU itself must now be active in using the powers it has under the Treaties in diplomacy and in transatlantic judicial co-operation on crime and extradition <sup>1</sup> to safeguard fundamental rights,
- G. whereas it is essential that we reinforce respect for the rule of law throughout our own democratic societies in these times when 'we are in danger of allowing ourselves to be governed by our fears, rather than our values'<sup>2</sup>,

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<sup>1</sup> Council Decision of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters (2003/516/EC), OJ L 181, 19/7/03.

<sup>2</sup> ACLU Testimony at a Hearing on 'America after 9/11: Freedom Preserved or Freedom Lost?' Before the Senate Judiciary Committee, **Submitted by Nadine Strossen**, President and Timothy H. Edgar, Legislative Counsel

1. Calls on the Council, with the Commission's support, to come up with a concerted strategy consisting of a common position (Article 15 of the TEU) and the necessary joint actions (Article 14 of the TEU) of the EU and its 15 (and soon to be 25) Member States;
2. Calls on the Council to convey forcefully to the US administration the European Union's position in the context of the New Transatlantic Agenda which emphasises shared values, and of the agreements on judicial cooperation in criminal matters and extradition, which emphasise the need both to share information and uphold the law if threats like terrorism are to be combated;
3. Calls on the Member States and the Commission to implement EU measures, through concerted action by the diplomatic and consular missions of the Member States and the Commission (Art. 20 TEU), with a view to liaising with the US authorities at the highest level;
4. Regrets the failure of the Council to discuss or decide on the submission of an 'amicus curiae' brief to the US Supreme Court on behalf of the European Union arguing for an interpretation of US law in respect of all 660 prisoners which conforms to Article 9 of the International Covenant on Civil and Political Rights;
5. Insists that the US administration must allow 'habeas corpus' and due process for all prisoners that it is detaining anywhere under assumed executive powers, and make the names available to their families and legal representatives.