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Legal Questions Raised by Implementation of Guantanamo Closure Decision

by Rafał Kownacki

By his executive order of 22 January 2009, U.S. President Barack Obama decreed a cessation of military commission proceedings against Guantanamo base detainees and the closure of the camp itself. The decision, however, does not necessarily mean an end to the U.S. violating its international commitments over human rights—something that should be kept in mind by governments of the countries asked to take some of those released from Guantanamo.

Guantanamo, Bagram. The Guantanamo base, leased by the U.S. from Cuba, has since January 2002 been a place of detention for some 800 people captured in the course of "war on terror" hostilities. It is not the only such facility under U.S. jurisdiction; the prison at Bagram airbase in Afghanistan, set up during the war against the Taliban, has a similar function. And although Guantanamo serves as a symbol of U.S. violations of international law, it is Bagram that seems to pose a bigger problem, given its higher prisoner population (600 at present, against Guantanamo's 245), worse conditions of detention, absence of access to legal counsel (or even military quasi-trials), and more frequent accusations of torture. In respect of those held at Guantanamo, President George W. Bush established special military commissions. Their proceedings came under criticism for violation of the right to appeal and public trial, and because verdicts may be based on unlawfully obtained evidence—but the situation is much worse at Bagram, where detainees are denied the right to any kind of judicial review, being treated as captured directly on the battlefield.

While ordering to close the Guantanamo camp, President Obama did not give up the planned expansion of Bagram prison, which may produce the impression that the move by the new U.S. administration was made merely for propaganda purposes.

Executive Order of 22 January 2009. It requires that the Guantanamo camp be closed within a year. Each detainee was given the right to appeal against illegality of detention, and those who have broken the law and in respect of whom sufficient evidence has been gathered will be presented with formal charges. The attorney general will head a taskforce to review the legal basis for handing over prisoners to the U.S. judiciary or to other countries. In the meantime, the executive order suspended proceedings against detainees before military commissions.

The executive order discussed here is one of three such documents issued on 22 January 2009 and relating to anti-terrorist activities. The other two ban the use of torture as an operational technique and order the closure of the CIA's secret jails—but this does not yet mean a definitive departure from questionable practices. President Obama instructed interrogators to act with the confines set by the Army Field Manual, which rules out torture. But at the same time he set up a team which, in extraordinary circumstances, can find the Manual ineffective for anti-terror operations, which would open the way to the administration's renewed consent to at least some operational techniques smacking of torture. Similar doubts are provoked by the closure of the CIA's existing secret jails and ban on the creation of new ones: the executive order itself speaks of the possibility that similar

facilities can lawfully operate outside U.S. territory, provided they serve to keep the detainees for a short period, for transition purposes.

Fate of Guantanamo Detainees. The Guantanamo prisoners can be divided into three groups: those whose cases are supported by sufficient evidence and therefore can be brought to court; those involved in activities against U.S. security, but without trial-worthy evidence; and those presumably innocent. The first group will go through the regular process of trial by federal courts. As for the second group, the U.S. may consider repatriation to their respective countries of origin for either release or rehabilitation/reintegration. But the release option may prove dangerous, as in the case of Mullah Abdul Kayum Sakir, who after transfer to Afghan custody in 2008 and his subsequent release, resumed the fight as Taliban commander. And a less-than-full effectiveness of reintegration schemes is attested to be the example of Said Ali al-Shihri, released from Guantanamo in 2007 and handed over to Saudi Arabia for participation in a rehabilitation programme. Upon release, al-Shihri became Al-Qaida chief in Yemen and the mastermind behind the attack against U.S. Embassy in Sanaa. This is probably the reason why the U.S. has been refusing to repatriate the Yemeni detainees, the largest group of Guantanamo prisoners (some 90 people), despite the Yemeni government's declared readiness to accept them.

Regarding the third group, those presumably innocent, the U.S. will often be unable to transfer them to their respective countries of origin without risking accusations that it is violating Article 3 of the Convention against Torture, which bans returning people to states where they would be subjected to torture. For this reason, the Uyghur prisoners seem to be in the direst straits. Found uninvolved in terrorist activity back in 2005, they largely remain at Guantanamo—17 individuals, after five were granted asylum in Albania—because their repatriation to China would spell long-term imprisonment or death sentences.

In respect of the prisoners who have been found innocent (between 70 and 100 persons), the U.S. administration seems to wait for assistance from other, mostly European, countries. The governments of Portugal, Spain, France, Finland, Lithuania and Ireland have made preliminary declarations about possible acceptance of some detainees, and the European Parliament appealed to the same effect in a resolution of 4 February 2009. On the other hand, countries such as Austria, the Netherlands, Sweden, Denmark and Poland expressed misgivings about taking former inmates, who only grew more radical during their Guantanamo incarceration.

Conclusions. While the Guantanamo closure removes an ignominious symbol, the event in itself, against assurances from the new U.S. administration, is not necessarily equivalent to abandoning human right violating practices. This, in particular, should be remembered by the EU member states, which are about to be asked by the U.S. government to host some of the detainees. It is not without reason that the U.S. seeks to transfer those individuals to other countries, rather than letting them set up in America. Explanations about local communities' probable hostility towards Guantanamo inmates do not sound particularly convincing. On the other hand, one could expect that in some cases the sense of being wronged might prod some of those individuals towards revenge not only against the U.S. but also U.S. allies. Furthermore, radical milieus may lionize a former prisoner, around whom terrorist groupings may emerge or reactivate.

Each EU member state should have the right to decide on its own about a possible reception of Guantanamo detainees (such were also the EU Council conclusions of 26 January). European governments could link a possible transfer of prisoners with demands to sanction Bagram camp status and definitely ban torture and capture, previously used by U.S. intelligence operatives as means of the fight against terror. As stated by Foreign Minister Radosław Sikorski, the taking of prisoners by Poland would be extremely difficult logistically, politically and legally. Furthermore, if a group of EU member states accept such an obligation, the Polish government should reserve itself the right to refuse entry to Guantanamo dischargees and state that it expects these countries to take steps to effectively monitor the whereabouts of the people in question, which is especially important in view of the EU's freedom of movement and Poland's participation in the Schengen zone.