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ADDENDUM TO NOTE

from :	Counter-Terrorism Coordinator
to :	Delegations
Subject :	Additional information related to the Joint Commission/Counter-Terrorism Coordinator information paper on the closure of the Guantanamo Bay detention centre

The present paper has been prepared with contributions from Commission services.

1. US POLICIES RELATED TO GUANTANAMO

1.1 Executive Orders by President Obama on detention and interrogation policies

On January 22, 2009, President Obama issued Executive Orders addressing detention and interrogation policies in the fight against terrorism. While some decisions take effect immediately, other policies will be determined in the future: The President ordered a thorough review of detention, trial and transfer policies in the fight against terrorism within the next 120 or 180 days. These reviews will be carried out at cabinet level and include all the relevant government departments and agencies.

a) "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities"[1]

The Order recognizes the "significant concerns raised by these detentions, both within the United States and internationally" and states that Guantanamo closure would "further the national security and foreign policy interests of the United States and the interests of justice".
To achieve the closure of Guantanamo within one year, a Special Interagency Taskforce led by the Attorney General has been tasked to

- undertake immediate review of all Guantanamo detentions, including consolidation of detainee information,
- work promptly towards release and transfer of individuals
- review whether prosecution of detainees is possible and whether it is feasible to do so in the regular US criminal courts
- explore "other disposition" for those detainees who cannot be released, transferred or prosecuted [NB: this leaves open the possibility of detention without trial for some "dangerous detainees" who cannot be tried]
- work on legal, logistical and security issues relating to the potential transfer of individuals to the US and work with Congress on appropriate legislation.

[1] http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/

In the meantime, detention conditions at Guantanamo have to be reviewed to ensure humane standards of confinement, in line with international law.

On re-settlement: "New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantanamo." "The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order."

President Obama also requested a suspension of trials before Military Commissions for 120 days to review the cases and the Military Commission process more generally.

b) "Ensuring lawful interrogations"[1]

The goal of the Order is to ensure that interrogation and transfer policies by all government agencies are in line with international law. It ends secret detention and "enhanced interrogation".

The Order revokes previous interpretations of torture and Common Art. 3 of the Geneva Conventions issued since 9/11 and explicitly prohibits outrages upon personal dignity including humiliating and degrading treatment. The unclassified **Army Field Manual** of 2006 which authorizes a limited number of techniques is now the interrogation standard for all government agencies, including the CIA.

Furthermore the CIA shall close as expeditiously as possible any detention facilities it currently operates and not operate any such detention facility in the future. All detainees in the custody of the US have to be notified to the ICRC which has to be given timely access.

The order establishes a special interagency **Task Force on Interrogation and Transfer Policies** which is to report in 120 days. The task is to review whether the techniques authorized in the Army Field Manual are sufficient for other government agencies than the Pentagon and **if warranted recommend different/additional guidance (**hence, additional techniques could be added**)**.

[1] http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations/

It is important to note that the Order does not end the practice of "rendition". Instead, the Task Force has to **review transfer policies** to ensure that transfers to other nations comply with US obligations under international law. [1]

c) "Review of detention policy options" [2]

This order creates a Special Interagency Task Force to conduct a comprehensive review of the lawful options available for the detention, trial, transfer, release or other disposition of individuals captured or apprehended "in connection with armed conflicts and counter-terrorism operations that are consistent with the national security and foreign policy interests of the US and the interests of justice". NB: The order does not use the term "global war against Al Qaeda" or "global armed conflict with Al Qaeda".

In the context of a landmark case about the scope of the "war against Al Qaeda" concept and the related detention policies which is currently pending before the US Supreme Court (al-Marri)[3], President Obama ordered a review of the detention of al-Marri and the exploration of alternatives. The distinguishing features of the case are that al-Marri is a US permanent resident, has never fought the US in Afghanistan or any other battlefield and is the only individual the Department of Defense is currently holding as an "enemy combatant" inside the US. This indicates that the Obama Administration will not simply follow the Bush line of argument on detentions.

1.2 "Categories" of detainees and policy context of Guantanamo closure

The complex issues regarding the legal basis for detention, the status of the detainees and the applicable international law framework have been discussed in-depth in the informal EU-US dialogue on counter-terrorism and international law among Legal Advisers.

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1 The review has to ensure that transfers do not lead detainees "to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the US to ensure the humane treatment of individuals in its custody and control."

2 http://www.whitehouse.gov/the_press_office/Review_of_Detention_Policy_Options/

3 http://www.scotusblog.com/wp/court-to-rule-on-domestic-detention/

a) Categories under the Bush Administration

There is no comprehensive public record of all the relevant information regarding the detainees and the reasons for their detention. While some detainees were captured during the armed conflict in Afghanistan, others were captured elsewhere in the world, outside of armed conflicts in the legal sense.

The Pentagon has never released a full list of all detainees currently and formerly held at Guantanamo. The latest press release by the Pentagon of December 16, 2008 [1] states that there are *"approximately 250*" detainees currently at Guantanamo, of which government has determined *"approximately 60"* to be "eligible for transfer or release". Any information about the detainee population, the detainee categories, their definitions and their impact on transfers or release is therefore approximate and needs to be confirmed.

There are basically three groups [2] of detainees currently at Guantanamo:

- Persons designated as "enemy combatants" who are detained to prevent their return to the battlefield.
- Persons designated as "enemy combatants" who have been brought to trial or are expected to be brought to trial.
- Persons who have been “cleared for transfer or release” to a foreign country but remain detained. These persons have been either designated "no longer enemy combatants" or have been designated "enemy combatants" but are no longer considered a threat to US security and hence continued detention by the US is no longer warranted.

[1] No. 1017-08, http://www.defenselink.mil/release/release.aspx?releaseid=12394

[2] These groups have been identified by the Congressional Research Service Report for Congress: "Closing the Guantanamo Detention Center: Legal Issues, January 22, 2009, p. 1

A Brookings report [1] provides the following nationalities of the remaining detainees: Yemen (94), Afghanistan (27), Saudi Arabia (20), China (17), Algeria (13, including 3 residents from Bosnia-Herzegovina - these were sent back to Bosnia after an habeas corpus ruling in their favour), Tunisia (10), Syria (9), Libya (8), Iraq (6), Kuwait (6), Pakistan (4), Uzbekistan (4), Egypt (3), Palestine (3), Somalia (3), Malaysia (2), Mauritania (2), Morocco (2), Sudan (2), Azerbaijan (1) Canada (1), Chad (1), Ethiopia (1), Indonesia (1), Kenya (1), Lebanon (1), Russia (1), Tajikistan (1), Tanzania (1) and United Arab Emirates (1). (Total 246)

Military Commission proceedings have been initiated against twenty-one individuals. [2] Only two cases have been completed.

The status of Guantanamo detainees was reviewed by administrative "Combatant Status Review Tribunals" (CSRT) that placed detainees in one of two categories: "unlawful enemy combatant" or "no longer enemy combatant". Some "enemy combatants" later were cleared for transfer or release. Hence the "enemy combatant" classification and transfer/ release are independent of each other. It is important to note that with the "no longer enemy combatant" classification the US did not take a position on whether the detainee had been a threat in the past.

b) Habeas corpus [3] cases of Guantanamo detainees

Since the determination by the US Supreme Court in June 2008 that Guantanamo detainees have habeas corpus rights, US Courts have decided 23 habeas cases. In 22 cases, the courts determined that the detainees had to be released.

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1 Brookings Institution: Benjamin Wittes and Zaahira Wyne, "The Current Detainee Population of Guantanamo: An Empirical Study", December 16, 2008

2 http://www.defenselink.mil/news/commissions.html.

3 Habeas corpus is the right to full review of the factual and legal basis of detention by US courts. Courts can order release when there is no basis for detention.

Two cases - which each deal with a group of detainees - are relevant, because 19 of the 22 detainees whom the courts have ordered released remain in Guantanamo:

The **Uighur** [1] case has now been decided by the Court of Appeals[2] which upheld the position of the US government that courts lack the power to order the release of alien Guantanamo detainees into the US. Previously, the District Court[3] had ordered the release of 17 Uighurs to the US, a decision the government had appealed.

17 Uighurs had been designated by the CSRT as "enemy combatants", but all have since been cleared for transfer or release. In the context of earlier litigation in which the courts determined that the government had not provided sufficient proof that the Uighurs were indeed "enemy combatants" [4], the government determined that it would treat the Uighurs "as if they are no longer enemy combatants". The district court conceded that the Uighurs had been captured initially consistent with the laws of war. The Court calls the term "no longer enemy combatants" used by the government "Kafkaesque" because it "deliberately begs the question whether these petitioners ever were enemy combatants". The government argued in the district court that while it would not be a security risk to release the detainees to another country, it would be a security risk to release the Uighurs into the US because they had received paramilitary training in order to take up arms against another country. This would make the petitioners ineligible for asylum in the US. The government argued it had "wind-up" detention authority until third countries are willing to take the detainees -

the US had approached about 100 countries without success (although some Uighurs had been received earlier in Albania). American Uighur communities, churches and NGOs declared their commitment to housing and other re-integration support for the Uighurs, both short-term and long-term - these commitments were presented in court. The district court ordered the Uighurs to be released into the US. The judge was open to put conditions on their residence in the US and to review compliance periodically - but made clear that the Uighurs had to be set free.

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1 Chinese citizens belonging to the Uighur ethnic minority

2 US Court of Appeals for the District of Columbia Circuit, 18 February 2009, Jamal Kiyemba, next friend et al vs. Obama, No. 08-5424 (2:1 decision)

3 US District Court for the District of Columbia, In re: Guantanamo Bay Detainee Litigation

4 Parhat case

The Court of Appeals overruled this decision on separation of power grounds: courts do not have the authority to order release of alien Guantanamo detainees into the US because there was no express authorization in the law to do so. The Appeals Court stated that historically the authority to admit aliens into the US rested exclusively with the political branches. Courts could only review the government's determination not to admit aliens into the country based on express authorization in the law, which did not exist. Habeas jurisdiction did not allow courts to fashion remedies - what the petitioners asked for was not simple release. "Never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population." Furthermore, none of the petitioners had applied to enter the US under immigration laws so that possible admission to the US under this body of law was not decided in the case.

The other habeas case was about **six Algerians** [1], all of whom were also Bosnian citizens or permanent residents and had been captured in Bosnia. The court ordered five of these to be released as the government had not provided sufficient evidence that they were "enemy combatants". Three of them have since been returned to Bosnia. The others remain in Guantanamo. One detainee was considered to be lawfully detained as "enemy combatant".

c) Reductions in the detainee population since 2002

The Bush Administration tried to return detainees to their home countries or other countries. The former detainees have been sent either for continued detention, to face trial, or to be released. No former detainees were sent to the US.

[1] US District Court for the District of Columbia, Boumediene v Bush Case 1:04-cv-10066-RJL

According to the Pentagon[1], "approximately 250" detainees have departed Guantanamo since 2002. (NB: Other reports state that nearly 800 detainees have passed through Guantanamo [2], which would mean that about 550 detainees have been released or transferred.)

Since 2002, former Guantanamo detainees have been sent to *inter alia* the following countries, including some EU Member States: Albania, Algeria, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Germany, Egypt, France, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Tunisia, Turkey, Uganda, United Kingdom and Yemen. [3]

The Pentagon has claimed that some released ex-detainees have "returned to the battlefield". Reports suggest that in the past the Pentagon has defined this term broadly so as to include film making and giving interviews. [4] It is not clear what these persons actually did and how many belong to that group.

The biggest repatriated groups have been Afghan and Saudi ex-detainees. About 102 former Guantanamo detainees have been repatriated to **Afghanistan**, where many remain detained. Reports suggest about 113 ex-detainees have been returned to **Saudi Arabia**, where the US has acknowledged that going through the rehabilitation and reintegration programme would mitigate any threat.

5 **Uighurs** designated "no longer enemy combatants" were transferred to Albania in 2006.

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1 Press Release No. 1017-08, http://www.defenselink.mil/release/release.aspx?releaseid=12394

2 Congressional Research Service Report for Congress: "Closing the Guantanamo Detention Center: Legal Issues, January 22, 2009, p. 1

3 Press Release No. 1017-08, http://www.defenselink.mil/release/release.aspx?releaseid=12394, see also Brookings Institution: Benjamin Wittes and Zaahira Wyne, "The Current Detainee Population of Guantanamo: An Empirical Study", December 16, 2008.

4 The Meaning of Battlefield, An Analysis of the Government's representations of "Battlefield" capture and "recidivism" of the Guantanamo detainees. Mark Denbeaux, Professor, Seton Hall University School of Law and Director of Seton Hall Law, Center for Policy and Research.

d) Obstacles to returning detainees to home countries

Under international law, the State of nationality of expelled persons is bound to receive them on its territory. [1] However, some 60 individuals awaiting release from Guantanamo cannot, under Article 3 of the UN Convention against Torture (CAT), be returned to their countries of origin, because they face a substantial risk of torture. With the exception of Albania, no country has agreed to receive ex-detainees other than their own nationals or residents. Several Uighurs made an asylum application to Canada in early February 2009.

The Bush Administration took the position that Art. 3 CAT did not apply as a matter of law to transfers outside US territory, but nevertheless applied Art. 3 CAT as a matter of policy. In deciding whether there are "substantial grounds", the US applies a test of "more likely than not" standard in line with its reservation with the CAT.

Under the EU Guidelines against Torture, the EU consistently urges countries not to expel individuals to third countries where they will be at risk of torture or cruel, inhuman or degrading treatment.

There is a substantial risk of torture in the countries with the highest numbers of detainees still remaining in Guantanamo. The US has already returned former detainees to some of these countries.

Return to States where there is a risk of torture was possible in the past because the US relied in some cases on classified diplomatic assurances from the receiving State that the individuals concerned would be treated in compliance with the prohibition of torture. The precise content or monitoring system of these assurances is unknown. It is unclear whether and if so how the Obama Administration will continue the use of diplomatic assurances.

[1] Oppenheim's International Law, 9th Ed, Vol 1, p. 858, Nottebohm (Judgment on the Merits) ICJ Reports (1955) 4 at 47

The largest group still detained in Guantanamo are about 95 **Yemenis**. Almost no Yemenis have been returned in the past, reportedly due to US security concerns and US demands that the Yemeni authorities were not willing or able to fulfil.[1]

e) Categories under the Obama Administration

As President Obama has ordered the full review of all Guantanamo detentions and policies (see above). The way ahead is:

- The US will bring detainees to **trial** before courts in the United States wherever possible.
- The US will **clear some detainees for transfer or release**. It is unclear whether the difference between "cleared for transfer" and "cleared for release" is the same as under the Bush Administration and what the conditions attached to this are.
- The review has to determine what to do with the detainees who **cannot be tried** but are regarded as **too dangerous for transfer or release**.

The review will determine who will be in which group, the definitions and conditions. The Obama Administration has not yet released details about the nature of these categories. It is important to note that the executive orders do not mention the "enemy combatant" framework. The ongoing habeas corpus cases could add to the complexities (risk of conflicting determinations with the Administration's own review).

f) Legal status of Guantanamo and US obligation to accept detainees under US law

The US Naval Station at Guantanamo Bay, Cuba, was leased by Cuba to the US by virtue of a 1903 Agreement. The legal status of the US military base at Guantanamo Bay under US law has been determined by the US Supreme Court in the Boumediene case[2]. The Court held that because of "the obvious and uncontested fact that the US, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory".

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1 "Yemenis now biggest group at Guantanamo", by Michael Melia, USA Today, January 11, 2008

2 http://www.scotusblog.com/wp/wp-content/uploads/2008/06/06-1195.pdf

Since the opening of the detention facility, a substantial number of detainees have initiated proceedings in US courts to review their detention. Since the Supreme Court decided in June 2008 that Guantanamo detainees had constitutional habeas corpus rights, litigation is focusing more on the rights detainees enjoy, including release into the US as discussed above in the Uighur case. Virtually all Guantanamo detainees have habeas actions pending. It is still being litigated which parts of US law apply to Guantanamo and what rights the detainees have.

2. RECEPTION OF EX-DETAINEES IN THIRD COUNTRIES

This section looks at the conditions under which the EU could support reception in third countries.

Conditions and form of possible EU support to reception of ex-detainees in third countries (both in their home countries and other countries)

An important pre-condition for the EU to assist in the reception of former detainees in third countries is that the human rights of the former detainees are respected: No continued detention without trial. In the case of criminal trials, fair trial rights have to be ensured and the death penalty avoided. Torture and ill-treatment have to be prevented.

It is important to note that the EU has a wider range of concerns regarding transfers to third countries than the United States. In the past, the US did not oppose - instead sometimes even demanded - continued detention. There do not seem to have been US concerns about the criticized trials of former Guantanamo detainees in Afghanistan. The US does not oppose the death penalty. In addition, the US interprets its non-refoulement obligations in a narrow way. Hence the US could transfer a detainee to another country in accordance with its obligations under international law as interpreted by the US. However, EU Member States could not support such a transfer.

Therefore, before supporting the transfer of detainees to any third country, it would be necessary for the EU to make a thorough assessment of whether the human rights of the detainees would be respected in the receiving country. If necessary, measures should be taken to ensure the respect for the human rights of the former detainee.

Based on the experience of the Bush Administration, there are three scenarios regarding re-settlement: Transfer for trial, transfer for continued detention without trial and release. It remains to be seen whether the Obama Administration continues transfers for continued detention without trial.

The EU cannot support the re-settlement of detainees that would remain detained without trial in a third country as this would simply continue the indefinite detention of Guantanamo.

3. RECEPTION OF FORMER DETAINEES IN EU MEMBER STATES

The purpose of this section is to analyse the possibility for former detainees cleared for release by the US to enter into and stay in a Member State. It considers in particular the ways in which decisions on entry and stay taken by one Member State may affect other Member States as a result of Community rules.

All EU nationals that were previously held at Guantanamo have already returned to their countries of nationality. Thus there is no obligation stemming from general international law that would compel Member States to accept the remaining Guantanamo detainees.

As soon as Member States would take responsibility for former detainees, they must treat them in full respect of fundamental rights. This includes in particular the obligation not to send a person to a country where there are substantial grounds to believe that the person concerned faces a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment, independent of his legal status of stay in the Member States and independent of the grounds for expulsion or extradition.

In practice, the reception of a former detainee would be pre-arranged between the US and the Member State in question. Such arrangements would concern only those former detainees who would not settle in the US and who cannot or do not want to return to their country of origin. They would also be conditional upon the former detainee in question wanting to move to the Member State that envisages receiving him.

3.1 Entry & stay of former detainees

The decision by a Member State to receive a former detainee and grant him a residence permit belongs to its exclusive competence. [1]

Consultation between Member States would be obligatory where a Member State envisages issuing a residence permit to a former detainee who is the subject of a ban on entry and stay entered in the Schengen Information System by another Member State. [2] Given the incompatibility between such a ban and the issuing of a residence permit, Member States would have to coordinate their actions to ensure that either the alert is withdrawn or the former detainee is not received.

In principle, a residence permit issued by a Member State, together with a valid travel document, automatically entitles its holder to a 3 month right of free movement, provided that the person fulfil all the entry conditions into the Schengen area. It is possible that a former detainee would not be in possession of a passport delivered by the country of origin. In that case Member States may issue a travel document (e.g. an alien's travel document, a refugee's travel document or stateless person's travel document). Other Member States and third countries are free to recognise or not the validity of these documents.

Member States could also limit themselves to granting a right of entry on the basis of a visa. Long stay visas are intended for visits exceeding three months and are national visas issued by one of the Member States in accordance with its national legislation. These visas are valid in the territory of the State which issues them but may also in certain circumstances be valid for travel to or via other Schengen States.

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[1] A Member State may decide to tolerate the stay of a third-country national on its territory without issuing a residence permit. In that case, the stay is limited to the territory of the Member State concerned.

[2] Such alerts are entered on the basis of the provisions of Article 96 of the 1990 Schengen Convention.

The right to free movement may be limited in two ways. First, the national law of the receiving Member State may provide for residence permits that do not confer a right of free movement within the Schengen area. More importantly, Member States may decide that a person may not travel into their territory on the basis of his / her residence permit where they consider that person to be a threat to public policy or national security. [1] The residence permit holder should be informed of any such restriction attached to his / her rights of movement.

Therefore, decisions on entry and stay taken by one Member State are relevant for all other Member States which are part of the Schengen area of free movement. Bulgaria, Cyprus Ireland Romania and the United Kingdom would not be concerned since they do not participate in the relevant aspects of the Schengen acquis. On the other hand, Norway, Iceland and Switzerland would be affected as a result of their association to Schengen cooperation. Coordination would have to be sought with these associated countries.

Community law regulates neither the question of whether restrictive measures may be linked to the issuing of residence permits nor the question of the rights conferred by legal residence status.[2] Member States are therefore free to limit the rights afforded by a residence permit or impose restrictive measures in accordance with national law. Issues resulting from the status of legal resident such as access to education, access to the job market, and means of subsistence are also to be determined by national law, while taking into account the Member States' international obligations as well as their obligation to respect fundamental rights.

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1 Article 21(1) of the 1990 Schengen Convention.

2 Common EC rules apply where a person has resided legally and continuously within the territory of a Member State for five years. This does not apply to beneficiaries of international protection.

3.2 The international protection of former detainees

Asylum rules may also be relevant in relation to the reception of former detainees in two different scenarios: First, some Member States accept asylum applications made from outside of their territory. Second, it cannot be excluded that a former detainee received by a Member State and due to be granted a residence permit submits an application for international protection once he is present in the territory of the Member State in question. Any such application has to be assessed on its merits as it would constitute an administrative procedure separate from that leading to the issue of a residence permit. The principle that a Member State should not return the applicant for international protection to a country where there is a risk of unsafe conditions (the non-refoulement principle) would apply in such cases.

On the basis of the Qualification Directive[1], a person having been granted international protection status has the right to obtain a residence permit of three years (refugee on the basis of the Geneva Convention) or one year (person granted subsidiary protection), as well as the right to be issued with a valid travel document unless there are considerations of public order or public security. Many of the rights of a person granted international protection must be equivalent to those of other third country nationals legally resident in that country, notably as far as travel and access to employment are concerned.

It should be underlined that a person representing a danger for public order or public security or having committed a particularly serious crime is excluded from the possibility to obtain or keep international protection in accordance with EC law. This does not prevent however the possibility for this person to be granted leave to stay on the territory of a Member State if he/she cannot be sent back to his/her country of origin for humanitarian reasons (e.g. risk of torture).

Finally it should be stressed that the status to be granted would be determined on the basis of an individual examination of the file of the person concerned. Relevant International organisations might contribute, if appropriate, to the assessment of the situation of the persons concerned.

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[1] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. *OJ L 304, 30.9.2004, p. 12–23*

3.3. Possibilities for access to rehabilitation

If ex-detainees apply for international protection and/or obtain an international protection status in the Union, they would be covered by the asylum *acquis* rules. Of particular relevance are the Reception Conditions Directive[1] and the Qualification Directive.

The Reception Conditions Directive obliges Member States to take into account the specific situation of vulnerable asylum seekers. Member States shall also ensure that, if necessary, these persons receive appropriate treatment.

Under the Qualification Directive, Member States shall provide, under the same eligibility conditions as nationals, adequate health care to beneficiaries of international protection who have special needs.

If ex-detainees are granted legal residence status pursuant to national law e.g. for humanitarian reasons, access to rehabilitation would also be governed by national law.

3.4 Experiences of EU Member States with the reception of nationals and residents

For example, the UK has accepted the return of 13 individuals from Guantanamo Bay: 9 UK nationals (returned in 2004 and 2005) and 4 former UK residents (in 2007). In the case of the former residents consideration was given to their immigration status on arrival on a case by case basis. These considerations were conducted within the normal framework of UK immigration law.

In all cases the returnees signed up to voluntary agreements concerning their behaviour following release. These were negotiated in parallel processes between their legal advisers and the US authorities, and then with the UK, taking into account the threat assessment received from the US and the need to maintain national and international security. More information from the US on the personal background of the detainees to facilitate reception and re-integration would have been desirable.

[1] Council Directive 2003/9/EC of 27 January 2003 on reception conditions for asylum seekers. OJ L 31 of 6.2.2003, p 18-25.

The agreements with returnees cannot generally be legally enforced, although in some cases involving non-nationals there are restrictions which might be enforced under UK immigration law and that go some way to meeting provisions sought by the US.

Several other Member States have also received former Guantanamo detainees, namely their own nationals and residents.

4. THE PALESTINIAN PRECEDENT

In April 2002 Israeli forces surrounded the Church of the Nativity in Bethlehem because a group of Palestinians suspected by Israel of terrorist offences had taken refuge within it. A violent 5 week stand-off ensued. The crisis was resolved when, according to an understanding reached between the Palestinian Authority and the government of Israel, the most wanted thirteen of these Palestinians would be transferred abroad. Such a transfer was possible because some Member States agreed to receive those Palestinians.

The Council adopted Common Position 2002/400/CFSP concerning the temporary reception by Member States of certain Palestinians [1] to ensure that a common approach existed at the level of the European Union. It was considered important that in exercising their responsibilities in law and order in their own territories and safeguarding of their own internal security, the receiving Member States take account of the public order and security concerns of other Member States.

[1] OJ L 138 of 28.5.2002, p. 33.

According to the terms of the above Common Position, twelve of these Palestinians were to be received, on a temporary basis and exclusively on humanitarian grounds, by certain Member States (BE, GR, ES, IE, IT and PT). Each of those Member States was to provide the Palestinians it received with a national permit to enter its territory and to stay for a period of up to 12 months (Art. 3§1). The validity of this permit was limited to the territory of the Member State concerned, and its issue could be made subject to specific conditions to be accepted by the Palestinians before their arrival (Art. 3§2). Furthermore, it was provided that the receiving Member State could take appropriate measures within its legal system to protect the personal safety of the Palestinians and to prevent them from compromising the public order or internal security of the Member States (Art. 4).

In addition to recalling the obligations under existing provisions of Community law and acts adopted pursuant to Title VI TEU, the Common Position provided for an information exchange mechanism on the application of measures taken pursuant to the Common Position as well as on the living conditions, housing, relations to family members, access to employment and training (Arts. 5 and 6)

Finally, it was also provided that if the receiving Member State received a request for the extradition of a Palestinian, it was to inform and consult the other Member States within the Council before taking a decision, with a view to seeking a common approach (Art. 7).

Although the national permits were to be valid only for a period of up to 12 months, they have been regularly extended for further 12-month periods. Such extensions have been coordinated, the last time through Common Position 2008/822/CFSP [1].

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[1] OJ L 285 of 27.10.2008, p. 21.