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NOTE

from : Commission/Counter-Terrorism Coordinator
to : Delegations

Subject : Joint Commission/Counter-Terrorism Coordinator information paper on the
closure of the Guantanamo Bay detention centre

Introduction

It has been the EU's longstanding position that the Guantanamo Bay detention centre should be closed. President Obama has decided to do this within one year. The Portuguese Minister of Foreign Affairs **Amado** put the issue of possible assistance to the US on Guantanamo closure on the EU agenda with his **letter** of December 10, 2008.

Elements for a possible EU approach were suggested by the former French Presidency in COREU PAR/1327/08 and were welcomed by PT (LIS 0173/08) and IT (ROM/0002/09).

Ministers of Foreign affairs discussed Guantanamo at the General **Affairs and External Relations Council** on January 26, 2009. Ministers welcomed President Obama's decisions to close the Guantanamo detention centre, to reaffirm the Geneva Conventions, and to end the practices of "secret detention" and "enhanced interrogation". The primary responsibility for closing Guantanamo rests with the United States but Ministers discussed whether there were ways in which they could assist the United States, given our common interest in counter terrorism, human rights and the rule of law. The question of whether Member States might accept former detainees is for national decision, but Ministers agreed to explore the possibility of coordinated European approach. The Presidency pointed to the desirability of a common political response.

On February 4, 2009 the **European Parliament** adopted a resolution "on the return and resettlement of the Guantanamo detention facility inmates". The EP recognizes the primary responsibility of the US and calls on the US "that any detainee who is not to be charged but cannot be repatriated owing to a real risk of torture or persecution in his home country is given the opportunity to be admitted to the United States, offered humanitarian protection on the United States mainland and afforded redress". Furthermore, Member States should – if requested by the US - cooperate in finding solutions and be prepared to accept former Guantanamo detainees in the Union. The EP recalls that Member States have a " duty of loyal cooperation to consult each other regarding possible effects on public security throughout the Union."

On February 7, 2009, **US Vice-President Biden** said: "As we seek a lasting framework for our common struggle against extremism, we'll have to work cooperatively with nations around the world - and we'll need your help. For example, we will ask others to take responsibility for some of those now in Guantanamo, as we determine to close it. Our security is shared. And so, too, I respectfully suggest, is our responsibility to defend it."

On February 16, 2009, France circulated to the Antici group a paper which includes principles for a possible EU approach and suggests questions to the US.

This paper examines some of the complex political, legal and security issues which need further study and consultation in an iterative process, including with the US which is engaged in its own process of review.

US policy in relation to Guantanamo

President Obama has decided to close Guantanamo within one year, addressing a major human rights concern. The EU has repeatedly asked the US to take this step.

To prepare the closure of Guantanamo, President Obama has ordered a high level inter-agency task force to review all detainees and to determine their disposition. Detainees are to be placed in one of three categories: to be tried by the US, to be released or transferred and those considered by the US still to present a security risk but who cannot be tried. A full list of all detainees currently and formerly held at Guantanamo has never been released. However, the Pentagon stated in December that there are "*approximately 250*" detainees remaining at Guantanamo.

The extent of the rights under US law of the detainees remaining in Guantanamo is unclear. Since the Supreme Court decided in June 2008 that Guantanamo detainees had constitutional habeas corpus rights, litigation focuses on the rights detainees enjoy, including release into the US. For example, a court has ordered 17 detainees that the US tries to re-settle to be released into the US, which the US refused to do. The ruling was overturned on appeal¹. In order not to interfere with litigation in the US, the EU should not accept detainees against their will, including whenever the detainee wants his final legal status within the US to be clarified.

¹ US Court of Appeals for the District of Columbia Circuit, 18 February 2009, Jamal Kiyemba, next friend et al vs. Obama, No. 08-5424, upholding the position of the US government that courts lack the power to order the release of alien Guantanamo detainees into the US.

The decision to close Guantanamo is part of a general review of US detention, transfer, trial and interrogation policies in the fight against terrorism. This is also the perspective from which the EU should examine the closure of Guantanamo. It would not be in line with the EU's policy regarding the protection of fundamental rights if Guantanamo was simply moved elsewhere (e.g. Baghram) without solving the underlying policy problems of indefinite detention without trial of terrorist suspects. Moreover, assisting the US in the closure of Guantanamo should also be viewed in the context of strengthening counter-terrorism cooperation with the Obama Administration.

Responsibility for the closure of Guantanamo lies with the US. The detainee population has already been reduced considerably (through release, or continued detention, trials or rehabilitation programmes in other countries). The reduction of the detainee population so far has been based mainly on repatriation - no detainees have been admitted to the US. Several Member States have already received nationals and residents from Guantanamo. An exchange of information and lessons learnt might be useful.

Further reduction of the detainee population by repatriation is difficult as 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 detainees to some of these countries using diplomatic assurances, but it is not clear whether and if so how this practice will continue under the Obama Administration.

The question of whether ex-detainees could be received within the EU

In the context of Guantanamo closure the non-refoulement prohibition enshrined in Article 3 of the Convention against Torture is important in several ways: The US applies this prohibition as a matter of policy to the transfers out of Guantanamo and therefore is not able to repatriate many of the remaining detainees. This is one reason why the question has arisen of whether EU Member States could consider receiving some of the detainees. However, any measures taken by the EU and its Member States would have to be fully compatible with fundamental rights and applicable legislation.

Ex-detainees that would be relevant for possible reception inside the EU are those who will not be prosecuted for any offence, are "cleared for release", will not be able to return to their home countries, and want to be transferred to Europe.

As there are no longer any EU nationals among the Guantanamo detainees, there is no obligation under general international law for EU Member States to accept former detainees. Were Member States to choose to accept former detainees, an individual assessment of the security risk of each former detainee based on comprehensive information received from the US would be required. The mere fact that the persons concerned had been to Guantanamo would not justify considering them - as a group - as "dangerous".

As far as possible reception in the EU of ex-detainees is concerned, decisions on the entry and stay of former detainees would fall within the exclusive competence of the receiving Member State. However, inside the Schengen area without internal border controls, any decision on the entry and stay of a former detainee by one Member State may have an impact on all other Member States as well as Norway, Iceland and Switzerland.

There are essentially two ways in which a former detainee could be received by a Member State:

- (i) The former detainee could be issued a residence permit. Member States would be free to grant legal residence status on their territory to ex-detainees on the basis of their national legislation. They could also determine the conditions attached to the residence permit (e.g. security measures or limiting the right of movement to their own territory). In principle, a residence permit grants the right to free movement in the Schengen area. However, this right can be limited both by the issuing Member State and other Schengen states.
- (ii) Former detainees could also be received by a Member State through international protection mechanisms (refugee status or subsidiary protection). If a former detainee were granted such protection, he would have the right to obtain a residence permit of one or three years, depending on the status. This domain is regulated by EC law.

Member States could implement special projects under the European Integration Fund or, if applicable, under the European Refugee Fund. There is, however, no possibility to provide additional financial support.

A precedent exists for the coordinated reception of third country nationals by EU Member States in the form of Common Position 2002/400/CFSP concerning the temporary reception by Member States of certain Palestinians. An explanation of this precedent is attached.

The question of whether the EU could assist with the reception of ex-detainees in third countries

Any examination of the possibility of assistance to third countries in the reception and rehabilitation of ex-detainees would have to look carefully at conditions in those countries in order to ensure that the human rights of the ex-detainees were respected and that adequate measures for rehabilitation and integration were foreseen. It is important to note that the EU has a wider range of human rights concerns regarding transfers to third countries than the United States. For example, the EU could not support transfers to countries where individuals might face execution or continued detention without trial.

Questions have been raised by Member States and in the European Parliament concerning the relevance of Community financial instruments in the context of the closure of Guantanamo. This issue could only be addressed in the light of further information on how the US Review process is progressing, what responsibility the US takes in transferring ex-detainees, a thorough legal and budgetary analysis and any modalities agreed by Member States for a co-ordinated EU response.

Next steps

When considering whether to develop a coordinated EU response, Member States may wish to consider the following principles:

- (1) Primary responsibility for the closure of Guantanamo rests with the US. This implies that the US would have to re-settle detainees "cleared for release" who cannot be returned to their home countries and want to live in the US.
- (2) Any EU response should be seen in the context of the ongoing reviews of detention, transfer, trial and interrogation policies more broadly: The underlying policy issues have to be addressed. Guantanamo must not simply be moved elsewhere.
- (3) With regard to the possible reception of ex-detainees in the EU, only those detainees who will not be prosecuted for any offence, who have been "cleared for release" and who want to be transferred to Europe should be considered.
- (4) Decisions to accept detainees would be taken on a case by case basis and would be in the exclusive competence of the receiving Member State. The Member States should assess independently of the US the risk of receiving a particular detainee based *inter alia* on comprehensive information and intelligence received from the US.
- (5) As a result of Schengen rules, a decision to accept a former detainee by one Member State would be relevant for other Member States. Therefore consultation and information sharing between Member States is needed. Norway, Iceland and Switzerland should be associated.
- (6) Measures for the rehabilitation and integration of former detainees received by EU Member States would need to be considered.
- (7) A co-ordinated EU response could take into account the precedent of the Common Position adopted in 2002 (reception of Nativity Church Palestinians), including information sharing between Member States and flexibility to allow for a case by case application of security measures. A coordination and consultation mechanism could be useful.

(8) The EU could only assist the US in the reception of former detainees in third countries through rehabilitation and integration programmes if the EU's human rights concerns were fully satisfied.

(9) Possible cooperation with international agencies such as the ICRC, the UNHCR and the IOM could be explored.

(10) The EU's response to the closure of Guantanamo should be an iterative process, including dialogue and consultation with the US. Consultations have to be undertaken with the US. More information is needed. Many questions remain open about the implementation of President Obama's order to close Guantanamo which it would be useful to discuss with the US. Open questions include:

- According to US law, what is the status of the detainees "cleared for release"? What is the difference between "cleared for release" and "cleared for transfer"? What conditions would be attached?
- Is the US willing to receive the detainees "cleared for release" inside the US? How many and which detainees "cleared for release" will be re-settled in the US?
- How does the US envisage the process for transfer and release? What is the timeline? How will exchange of (classified) information about the detainees "cleared for release" be organized? How has the US reached the conclusion that the detainees are not dangerous (anymore)?
- Could the US provide details of ex-Guantanamo detainees who have "returned to the fight"? What lessons have been learned?
- How does the US intend to prevent Guantanamo being recreated elsewhere (e.g. Baghram)?
- What will happen to detainees that remain in Guantanamo on January 22, 2010?
- Does the US intend to pay compensation to the detainees cleared for release?
- Does the US intend to provide assistance to non-EU countries in the reception and rehabilitation of former detainees?
- How does the US intend to proceed with those detainees who cannot be put on trial, but are considered by the US to be too dangerous to be released?

- Does the US intend to involve international organisations, e.g. the UNHCR or the ICRC?
- Can the EU receive a complete list of detainees currently detained at Guantanamo, including a list of detainees “cleared for release”?
- How many and which detainees want to be transferred the EU? How would be determined that the detainees want to be transferred in the EU?
- Would the US consider providing assistance for Member States accepting detainees?
- Is the US seeking assistance with the reception and rehabilitation of former detainees in third countries?

Explanatory note on the Palestinian precedent

The crisis at the Church of the Nativity in Bethlehem in 2002 was resolved in part because some Member States agreed to receive some of the Palestinians involved. The Council adopted Common Position 2002/400/CFSP concerning the temporary reception by Member States of certain Palestinians¹ to ensure that a common approach existed at the level of the European Union. It was deemed necessary to mitigate the security concerns of some Member States raised by the reception of Palestinians by other Member States.

Certain parallels between the 2002 situation and the detainees who might be released from Guantanamo exist. The reception of the Palestinians also raised the question of their entry into and stay in the territory of certain Member States, the conditions to be attached thereto and the impact on the other Schengen states.

Differences however also exist. The Palestinians belonged to a group of 13, all of whom were transferred together after the siege. The former detainees will not constitute a homogenous group. In the Palestinian case, the Member States received the most troublesome individuals who had behaved in an obviously violent manner. As regards the former detainees, the Member States are considering receiving only persons who have been assessed by the US authorities as "cleared for release". Within this group, some may nonetheless be considered to represent a threat to security, others may not.

As a result, restrictive measures of the type applied in the Common Position may be appropriate in respect of some detainees. In respect of others, however, Member States may choose to apply general rules on entry and stay. A case by case approach may therefore be required in relation to former detainees. Such an approach would require a degree of flexibility that Common Position 2002/400/CFSP did not need to contain.

¹ OJ L 138 of 28.5.2002, p. 33.

A coordinated approach at the level of the European Union in the form of a Common Position, focusing on the exchange of relevant information, and providing a differentiated security approach in respect of individual former detainees would allow the Member States to respect each others' prerogatives while recognising the common interests at stake resulting notably from Schengen cooperation. Norway, Iceland and Switzerland should therefore be associated to these discussions.
