INTERNATIONAL HUMAN RIGHTS FUNDERS GROUP

SEMI-ANNUAL CONFERENCE
NEW YORK CITY
JULY 21-22, 2008

Guantanamo & Beyond: Detention of Terror Suspects

Monday, July 21, 2008, 1:30 – 3:00pm

Facilitator:
Wendy Patten, Senior Policy Analyst, Open Society Institute

Panelists:
Elisa Massimino, Executive Director, Human Rights First
Ken Roth, Executive Director, Human Rights Watch

Wendy Patten opened the session with an overview of the situation in Guantanamo and the increasing debate on and urgency of developing a rights respecting detention and prosecution policy for handling terrorist suspects.

Ken Roth noted that there is a broad recognition that Guantanamo needs to be closed, but there is little consensus on the legal standing of remaining detainees (about 120 of whom the Bush administration claims are too dangerous to be released but cannot be prosecuted) and their rights to federal proceedings. The Bush Administration continues to push for prosecution of terrorist suspects in military commissions, which allow trials based on coerced evidence, while many human rights advocates promote using regular criminal or military courts. The Supreme Court's recent decision in *Boumediene* confirmed that detainees have the right to challenge their detention before federal courts, but left open the question of whether there is a legal basis to continue holding terrorist suspects in long term, preventive detention without filing charges. The only rationale that remains for the existence of Guantanamo is the question of which, if any, states would agree to detain these suspects within its borders.

Elisa Massimino explained that the main premise behind arguments for preventive detention and national security courts is that if Guantanamo is closed the U.S. government will have in its custody a large number of people that potentially cannot be tried in existing courts (due to lack of hard or admissible evidence) yet are considered too dangerous to be released. She outlined the principal arguments currently being advanced by advocates for preventive detention and national security courts, including: (1) A new system with at least the trappings of due process would be better than Guantanamo; (2) If terrorist suspects are integrated into the criminal justice system, it will weaken that system as a whole by demanding significant procedural compromises and coming dangerously close to prosecuting association; (3) The U.S. already preventively detains sex offenders, the mentally ill, and individuals through health quarantines; (4) The U.S. is at war and it is incumbent upon us to take up that challenge with more muscularity than our criminal justice system provides; and (5) Allied countries (such as France and the U.K.) use

preventive detention and the U.S. cannot afford to ignore their example. Massimino proceeded to rebut these arguments throughout the session.

Roth added that proponents of preventive detention rely on two main rationales: a **war powers argument** and a **critique of the criminal justice system.** The war powers argument cites two extraordinary powers available to the government in wartime, namely to summarily kill combatants and to detain somebody until the end of the conflict. These powers, however, are unrestrained in the "Global War on Terror," given there is no battlefield and at best an arbitrary ending point. The criminal justice system is critiqued as overly restrictive especially with regard to interrogation and as only looking backwards and therefore ineffective at preventing terrorism. In countering this latter assertion, Roth noted that many suspects in the criminal justice system still bargain and are responsive to attorney questioning even with Miranda law protections, and that Miranda protections limit the use of statements at trial but do not restrict the interrogation of suspects for intelligence purposes; and Roth cited conspiracy laws and the material support for terrorism statute as examples in which the criminal justice system proactively prevents crimes from being completed and which can be used in terrorist suspect cases. Roth noted that not all terrorist suspects would be able to be prosecuted and that some would need to be released.

Roth and Massimino also rebutted characterizations of the criminal justice system as ineffective at handling cases that implicate national security. Massimino noted that in a speech just that morning the U.S. Attorney General had referred to evidence leaked from the federal trial on the first World Trade Center bombing which tipped Osama bin Laden off to the fact the U.S. was tracking his cell phone, when, in fact, an investigation had revealed that the information became public not because it was leaked, but because the prosecution had neglected to protect sensitive information.

Patten asked the panelists to comment on how funders can support efforts to promote human rights within the national security debate, with a focus on detention issues. One suggestion was that funders invest in educating legislators and policy makers in Washington, D.C., on the complexity of these issues. Another was launching a more intense public education strategy to ensure that these issues are debated actively in the press, and that the debate involves national security experts as well as human rights and civil liberties advocates.

During the lively discussion period which followed the speakers' remarks, a participant asked Roth to comment on how the practices of the Bush administration have had reverberations in other regions. Roth told the story of visiting Egypt to discuss issues of rendition and torture, and simply being told by leadership there that the U.S. engages in torture as well.

Another question centered on what an effective and fundable public education and media campaign would look like. Roth, noting that in an ideal world popular uprising would lead to policy change, discussed the use of the press as a surrogate for popular mobilization around complex issues. Massimino emphasized that in order to make sustainable gains we must challenge and debunk the notion that Americans approve of these policies through some form of accountability process. Roth also discussed effective ways to counter the simplistic view that being "tough" (e.g. using torture in interrogations) makes us safer.

Other questions centered on a comparative analysis with the U.K. and other European countries and whether human rights advocates should focus on pragmatic or principled arguments against preventive detention. On a question about rendition, Roth confirmed that Human Rights Watch is not aware of ongoing extraordinary rendition, but that the CIA has left the option open. Participants also discussed detentions of Iraqis in Iraq; the international implications of the criminalization of dissent; and the need to support and connect litigation and public education and advocacy.

On the criminalization of dissent, Massimino noted that the spreading definition of who is a "terrorist" could potentially be used to criminalize the defense of human rights. If the terrorism definition is expanded broadly under a law of war framework, then it involves expansive use not only of preventive detention but also the power to use lethal force. Roth added that there has been relatively little attention paid to the criminalization of protest, especially when the definition of terrorism is tied to property crimes cases in the U.S.

Roth closed the session discussing how using the term "enemy combatant" and prosecuting terrorists outside of the criminal justice system can play into the narrative of people like Osama bin Laden. Roth noted how important it is, in trying to win hearts and minds, to shift the public perception of terrorists from "freedom fighters" or warriors to common criminals.