America's Non-Compliance

Gareth Peirce presents the case against extradition:

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During the first months of this year, the embers of a long running legal controversy have reignited in the United States. 'Of all the issues,' Rahm Emanuel was told by the senior Republican senator for South Carolina, Lindsey Graham, 'this is the one that could bring the presidency down.' The 'issue' is whether and where to try several dozen Guantánamo prisoners, in particular Khalid Sheikh Mohammed and four others accused of the 9/11 conspiracy. Should they be tried in a military commission or in a federal court? Bush administration lawyers say the obvious solution is not bothering to try them at all, while Senator Graham's view is that it is inappropriate to hold civilian criminal trials for persons suspected of involvement in terrorism.

Late last year, Obama's administration decided that Khalid Sheikh Mohammed and the others would be tried in the New York federal district court in Manhattan; six would face military commissions in a place yet to be decided; and 48 others (the number is undoubtedly higher) would be held indefinitely without charge. Obama had asked the US attorney general, Eric Holder, to make the decision 'in an effort to maintain an independent Justice Department', but is now reported to be centrally involved himself, recognising that his administration had miscalculated the political fallout. Graham has been trying to reach a deal with the White House over the attorney general's head, trading Republican support for the closing of Guantánamo in exchange for a military trial for Khalid Sheikh Mohammed. At stake is not just whether the man known as KSM and his co-conspirators receive a civilian court trial, but the legal fate of all terrorism suspects, the future of the Guantánamo Bay detention facility and the credibility of the US attorney general. This is dangerous ground for politicians and for lawyers.

The debate, portrayed as a battle between constitutionalists, who argue for jury trials, and hardliners, who want no such thing for men accused of terrorism, exposes serious shortcomings in the protections that constitutionalists contend would be in force if 'civilian justice' were achieved for these suspects. For a start, the determined political involvement in court proceedings undermines any claim to a clear separation between the judicial and executive branches of state in the US.

This battle has broken out just as decisions are about to be made in the European Court of Human Rights in Strasbourg on the extradition of a number of men whose cases led a court in London six years ago to state that no suspect should ever be extradited to the US if there were any risk that he might face trials of the sort that are now being argued for. Military commissions are not the only issue: many of America's basic criminal justice practices - how and where it tries those accused of crimes, how it obtains evidence, how it prosecutes and treats its prisoners - have, since 2004, been exposed to investigation, first by courts in London and then in Strasbourg. The scrutiny has been made necessary because the US wants to try a number of men, almost all of them British, but their extraditions from the UK have been frozen while the courts determine whether there is a serious risk that sending them to the US would be to deliver them up to flagrantly unfair trials, severe and prohibited ill-treatment, or the death penalty.

In the white heat of 9/11, Cheney, Rumsfeld and Bush considered the concept of due process irrelevant as they ransacked the world in search of suspects. Seeking justification they conjured up new definitions. An 'enemy combatant' was any individual judged to be actively aligning himself against America; 'military commissions' were constructed to deal with combatants thus defined. In parallel, America's ambition to extend its jurisdiction grew. A number of individuals, arrested in the UK, were astonished to learn that activities they had undertaken years before offended against US law. Two of those individuals, Babar Ahmad and Syed Talha Ahsan, had before 9/11 contributed in the UK to a website which, several years later, came to be construed by US prosecutors as having supported the Taliban; their misfortune was that the service provider for the website was located in Connecticut. A third, Haroon Aswat, had in 1999 spent two weeks on a farm in Oregon, where it had been suggested that military training for Muslims would be held (it never materialised). Two more, Adel Abdel Bary and Khalid al-Fawwaz, one of whom had in 1998 received faxes in an Islamic information office in London reporting that two US embassies in East Africa had been bombed that day, were charged with conspiring to cause those explosions. These individuals discovered, with equal astonishment, that the basic propositions put forward by the US prosecutor in their cases had a further dire consequence: they fell into a category created by Bush to deal with the 'worst of the worst'.

In each case, the extradition court, at Bow Street in London, swiftly found that the extraditee, by virtue of the breadth of the US definition, 'would meet the criteria which would permit the president of the United States to make an order designating the defendant as an enemy combatant', and thereby liable to be tried by a military commission. A military court, even if all its proceedings are identical with those in a conventional trial, cannot meet the mandatory European Convention requirement of judicial independence. Its judges are military employees within a hierarchical structure headed by their commander-in-chief, the president: there is no separation between the executive and the judiciary. As a result, the judge at Bow Street decided that any individual who ran a serious risk of being designated as an enemy combatant would lose his due process rights to a fair and public trial before an independent tribunal. If a man could be detained indefinitely 'subject to Military Order No. 1', it meant he would be 'deprived of his European Convention rights and extradition would be barred'.

The extradition requests would then have been dropped but for a flurry of diplomatic notes in which the US Embassy in London assured the UK government that the defendants would not be prosecuted before a military commission, or treated as enemy combatants: they would instead be tried before a federal court 'in accordance with the full panoply of rights and protections that would otherwise be provided to a defendant facing similar charges'.

Each of these extradition cases has subsequently been considered on these issues, on the value of such assurances and their limitations, first by Bow Street, then on appeal to the High Court in London. Ultimately, the UK's decisions fall to be externally judged in Strasbourg and by the sometimes exacting standards of the European Convention on Human Rights, where these cases and others have now been stalled for nearly three years. Could an unenforceable diplomatic promise hold good, in law or in practice, after the men have been extradited? And what action, if the men were tried before a jury and acquitted, might the US take if it nonetheless believed the defendants constituted a threat?

The concept of its own conformity with international legal principles being exposed to outside judgment is entirely alien to the US. When, for instance, Jordan refused to endorse the exemption of Americans from trial in the International Criminal Court for crimes against humanity, the US immediately threatened to withdraw its contribution of one-fifth of Jordan's annual budget. The Jordanian parliament promptly revoked its decision. More than half a century after the nation-states of the world committed themselves to a significant chain of treaty obligations intended to permit external scrutiny of their internal compliance with those treaties, America continues to maintain a remarkable isolationism. It opts out, not of the treaties, but of the provisions that allow inspection and sanction - the teeth of enforcement. While it is a party to the UN Convention against Torture, it has never ratified the treaty's optional protocol, and it doesn't accept the right of individual petition to the Committee for the Prevention of Torture. In those countries which have signed up, UN special rapporteurs on torture carry out unannounced inspections, intended to get behind the façade of impressive constitutions. They dig out grim truths and their reports are often biting and always public. America doesn't even accept the application of its own regional American Convention on Human Rights, which it signed but has never ratified. Thus no individual in the US can have recourse to the Convention's enforcement body, the Inter-American Court on Human Rights. Petitions can be sent to the Inter-American Commission on Human Rights, but its reports are not binding and findings are consistently ignored.

Although some US commentators give Obama credit for trying to demonstrate that the executive branch can wage war while also respecting the limits imposed on presidential power by the rule of law, that is not how it appears to the outside eye. When, in February 2009, a federal judge overseeing the cases of Guantánamo detainees asked whether the new administration wanted to modify the Bush position that the president could imprison people indefinitely without trial, Obama's Justice Department maintained the position that it could do so, if those persons were part of al-Qaida or its affiliates or their substantial supporters. This reinforced what the extraditees and their lawyers had argued, first before the UK courts and then in Strasbourg: there was strong jurisprudential doubt whether any diplomatic note could bind any future US commander-in-chief if national security were perceived to be at stake.

Acknowledging, in an interview with the Washington Post, the possibility that trials may be switched to military commissions, the attorney general attempted to rationalise the position: 'At the end of the day, wherever this case is tried, in whatever forum, what we have to ensure is that it's done as transparently as possible and with adherence to all the rules. If we do that, I'm not sure the location or even the forum is as important as what the world sees in that proceeding.' In fact, 'what the world sees' is of little consequence. The US is accustomed to filtering out external opinion, and will judge for itself whether or not it has adhered 'to all the rules', since it exempts itself from sanction when its actions fail to comply with international standards.

External observers, including men arrested on warrants for extradition to the US (as well as defence lawyers and no doubt many prosecutors), had watched with alarm in the years after 9/11 as José Padilla, a US citizen, and Ali Saleh al-Marri, a Qatari student in the US, were moved back and forth between conventional criminal trials before juries and military detention (they were held in a naval brig in Charleston, South Carolina, where they found themselves subjected to the same ill-treatment as others in secret sites around the world). Although at least one senior State Department lawyer, Harold Koh, maintains that the new administration's changes mean that the United States can now

claim that its national security policies are fully compliant with domestic and international law under 'common and universal standards, not double standards', the administration, unnerved by the political backlash, is swiftly beating a retreat from its early insistence on civilian trials and considering the retention of indefinite detention without trial. Perhaps most chillingly, it seems not to appreciate that almost every basic safeguard necessary to achieve a conventional fair trial for the accused has, in practice, long since been destroyed in the US.

Neither nation-states nor their courts are accustomed to stand in one another's way when a request for extradition is made concerning a person described, however inappropriately, as a 'fugitive'. Extradition arrangements originated in the ancient world as a practical way of demonstrating courtesy and goodwill between sovereigns. The language of governments and of the courts continues to be deferential, speaking of effective relations between sovereign states. 'It goes without saying that [the United States] will be true to its constitution,' the High Court asserted in Babar Ahmad's case. But the assurances given by the US since 2001 should have been greeted with more scepticism. Twice the foreign secretary has had to come before Parliament to apologise for the fact that US promises concerning rendition had not been kept; and in 2008 the Select Committee on Foreign Affairs recommended that US assurances should no longer be accepted, given the country's continuing denials that its interrogative practices met the universal definition of torture.

No assurances at all, fragile or not, are on offer to protect against the threat that extraditees, even if acquitted, might be subjected to rendition or indefinite detention, or the grim reality of solitary confinement in a small sealed prison cell before and after trial, or against sentences that could amount to a hundred years. No assurances against the threat that any or all of these possibilities might induce guilty pleas from the innocent as well as a promise to 'co-operate' in providing evidence with which to prosecute others. More than one extraditee still in the UK has been visited by a US prosecutor armed with a copy of the Federal Sentencing Guidelines. These sentences, of more than any man's natural life expectancy are, the prisoners are told, 'the facts of life'. The lawyers of Gary McKinnon (alleged to have hacked into the Pentagon computers), offered the opportunity of a guilty plea, were told that should he refuse, once in America he would 'fry'. More than 90 per cent of trials in the US are resolved by guilty pleas, an extraordinary statistic that is undoubtedly a result of the defendants' apprehension of what lies ahead - not just for the 'worst of the worst' - and their desire to avoid, at any cost, the risk of US law's most extreme application.

Each extraditee can picture himself, once in the US, in the position of those witnesses for the prosecution he now sees ranged against him. Improper pressure to achieve the co-operation of witnesses for the prosecution is loudly denied, but why then does the plea agreement for the co-operating (and only) witness against one extraditee, Haroon Aswad, contain the provision that, if he were to fail to continue to co-operate, 'the United States would be free to exercise all rights it may have to detain the defendant as an enemy combatant' and to return him to total isolation under the much feared Special Administrative Measures? And why did the co-operating witness's attorney, in communications with other lawyers which form part of the extradition court's record, write (before his client had agreed to give evidence against others): 'As it turns out, one of the key witnesses against my client is a British citizen who's being held at Guantánamo Bay as an enemy combatant'? Thus the dominoes fall one by one. Later, after the London court's decision in 2005, he wrote again:

It's pretty apparent the good guys were winning until the diplomatic note showed up. What a pity. I did find Š aspects of the ruling especially entertaining Š that the magistrate somehow thinks a diplomatic note stating that the US won't try this guy in military court will bind the president. Since when has our president - the greatest international scofflaw of our time - ever felt bound by any diplomatic accord?

For two of those awaiting extradition, Adel Abdel Bary and Khalid al-Fawwaz, there is an additional irony. They have watched with astonishment what has happened to their co-accused, Ahmed Ghailani, who, it is now proposed, will be tried with them in Manhattan and whose pending trial is intended by the authorities to have 'a two-pronged effect; justice will be done and the credibility of the courts will be re-established'.

A warrant for Ghailani's arrest was issued by the New York Federal District Court in 1998: he'd been indicted for involvement in the East Africa bombings of US embassies in that year. In January 2005 his captors reported from Pakistan that he had been handed over to the United States 'several months ago'. He was then held as a ghost prisoner in a secret prison run by the CIA. Reported by Human Rights Watch to be one of the significant 'disappeared', he finally emerged in 2006, but not in the Manhattan court; instead, on the precise basis of the indictment issued by the New York court in 1998, he was placed on trial before a different kind of court, a military commission in Guantánamo Bay, where charges were filed by military prosecutors for the bombing of the US Embassy in Tanzania. 'Officials were aware of the 1998 civilian indictment,' their spokesman, General Hartmann, explained, but were proceeding with a military case at Guantánamo. 'That is the avenue the president, the Congress and the Department of Defense established to deal with alleged war crimes in connection with the global war on terror.' Each development served to confirm the worst fears of Ghailani's co-accused in the UK. Their co-defendant was to be tried within a system specifically constructed to remove from him that 'full panoply of rights' assured to them, as well as to remove access to him by others. The United States had chosen to split the trial: half - Ghailani's trial - was to be conducted in Guantánamo in secret session, outside the conventional rule of law, and half in Manhattan.

Ghailani's position was to change yet again, however. In spring 2009 he was moved from Guantánamo into the civilian court system and transferred to New York to stand trial before the Federal District Court in Manhattan. Meanwhile, deep into its consideration of the extradition cases in Strasbourg, the European Court asked the UK government to provide some evidence: 'If extradited, approximately how long would the Applicants spend in pre-trial detention?' A simple response was given: the US constitution guarantees the right to a speedy trial. But what of Ghailani, who disappeared into a secret prison in 2004 and did not surface for trial until five years later, and then only after the abandonment of plans to try him before serving soldiers at Guantánamo Bay? His lawyers in New York assert that in those years he was submitted more than a hundred times to techniques 'amounting to torture' and 'appears to be so damaged' by his treatment that his ability to assist them in preparing his defence has been harmed.

From the perspective of the European Convention the future of the extraditees begins to appear as not just political but legal pandemonium. The guarantee that they will have a fair trial is in grave doubt. There is no reticence in America in commenting on an arrest, a trial, or the evidence the

prosecution claims loudly, from the outset, to possess. In the UK, the inhibiting Contempt of Court Act demands that any reporting that might influence a jury be prohibited; the flurry occasioned by arrest and charge, even in the most dramatically newsworthy cases, is immediately silenced until the trial begins. In the US the reverse is the case; the concept of freedom of speech as it has evolved permits free-ranging commentary and unlimited coverage. The decision to move Ghailani to the Manhattan court acted as the precursor of the current political storm. The New York Times of 10 February quotes Ghailani's prosecutors commenting without inhibition: 'Prosecutors have said that the delays in bringing him into the criminal justice system were justified on national security grounds and did not violate his speedy-trial rights. They said Mr Ghailani was a "long-standing al-Qaida terrorist" and was initially treated as an intelligence asset after his capture. "The United States was, and still is, at war with al-Qaida," prosecutors said.' Where in all of the sorry history of this one case does the presumption of innocence rest, as guaranteed by the UN Universal Declaration of Human Rights? Where is there any regard for the US constitutional right to a fair and speedy trial? Where is there respect for the concept of trial by a jury free from prior knowledge or opinion?

Each nation creates its own system of justice. For the European Court of Human Rights, required to address cases from 40 member states, each with a different system (some are inquisitorial, with an investigative juge d'instruction, others adversarial; some have lay juries, others professional judges), achieving a case law of precedent and setting minimum standards through its jurisprudence for Article 6 of the Convention (the right to a fair trial) is more problematic than meeting other minimum norms. Even in a system in which a professional judge makes the ultimate determination, there are taboos concerning public commentary. When a French government minister and the prosecutor publicly asserted the guilt of one defendant, Patrick Allenet de Ribemont, France was held by Strasbourg to have breached his right to a fair trial. How then to achieve a fair trial in the US, where it is open season on every accused, and where the very fact of entitlement to a trial in these cases is the most bitterly fought of current political battles - for the members of any potential jury pool just as much as for politicians?

European courts have themselves often had to consider equally challenging cases. Abdullah Ocalan, the Kurdish leader of the PKK, kidnapped in Kenya by Turkish intelligence agents, was prized as a 'high-value detainee' by Turkey, just as Khalid Sheikh Mohammed is by the US. Once captured, Ocalan was held in complete isolation, and his first hearing was before a panel of three judges, one of them a Turkish military officer. At the full trial he was convicted and sentenced to death. The Strasbourg court found against Turkey: Ocalan's right to a fair trial, guaranteed by Article 6 of the European Convention, had been irretrievably violated by his being held in isolation before the trial and by the military presence at his first hearing, and that in turn vitiated all claims to legitimacy for the sentence of death. His conviction could not stand.

Forced to investigate conditions in the US, and to enlist the help of defence lawyers there in establishing otherwise unreported data, extraditees have come to understand that practice after practice is accepted as standard in America which, in Europe, could risk the prohibition of a trial, or subsequently cause its nullification, or bring an end to the conditions of imprisonment it stipulated. Within a system of criminal justice that for all of us, from a lifetime of watching procedural dramas, seems more familiar than our own, there are profoundly disturbing features which do not accord with the assumptions we continue to maintain, despite the actions of the previous administration, about the constitution of the United States.

Not every shortcoming can be explained as a product of the Bush/Cheney assault on due process rights or a reflection of their enthusiastic embrace of coercive ill-treatment as an investigative tool - an issue that US lawyers, both civilian and military, have in the last decade combined in force with campaigners to resist. Many ugly practices have long been embedded in the day to day operation of the US criminal justice system and their opponents have found it difficult to mount collective sustained resistance to them, and have had no endorsement from court rulings, national or international, to help them.

American defence lawyers tell us, with resignation, that principles we believed prevailed there as here do not have a sound footing in US case law; evidence obtained from a prosecution witness by coercion, for example, cannot be excluded before a jury hears it. A senior counsel representing the United States in the High Court in London explained that US law permits the otherwise unlawful kidnapping of suspects elsewhere in the world, to bring them 'to justice' in the US. And every defence lawyer representing those held in isolation before trial has spoken to the Strasbourg court of the bleak hopelessness of the defendant, the deterioration of his mental state and the impotence of lawyers over many years in achieving redress. Those who represent Muslim defendants convicted of involvement in terrorist activity predict with certainty that none of their clients will ever escape from the most extreme forms of isolation American prisons can impose.

We read, year after year, obscene details of executions in the US: most are successful, but there are also descriptions of frustrated attempts, hour after hour, to find a vein to inject. For a long time, the UK had no cause for complacency. Capital punishment was abolished here in 1965, but Britain continued to extradite to countries that retained the death penalty, and would have continued to do so had not the European Court determined in 1989 in the case of Soering v. UK that the 'death row' phenomenon, in which a person might spend years awaiting execution while the legal process was exhausted, constituted inhuman and degrading treatment according to Article 3 of the Convention. Since then no European state has been permitted to extradite in the absence of an assurance that conviction would not bring the death penalty.

But what of extradition to a future of total isolation? Can we comfortably, and within the law, contemplate sending men to that fate? Some of the men who currently await extradition are imprisoned in a small unit, where they are at least in the company of other human beings, and within the unit's limits can talk, argue, study, cook, write, paint or exercise outdoors in whatever sunlight imprisonment in Worcestershire may afford them. This is not luxury. It is deprivation, of family life, of freedom and of hope. But once on American soil these men have been told by US prosecutors to expect total isolation. Each extraditee will be held under Special Administrative Measures until trial and then, on his anticipated conviction, in solitary confinement in a Supermax prison, ADX Florence in Colorado, potentially for life and without any prospect of parole. He will be confined in a cell 7 feet by 12 feet, with a moulded concrete bunk; his food will be delivered through a slot in the door; external communication, even with a doctor, will come via a closed-circuit television in his cell. For one hour in each day, he will be able to visit a small dark pit where he can exercise alone. His fellow prisoners (although he will not see them) will be 'the most severely psychotic people' the most experienced analyst of the effects of Supermax confinement, Terry Kupers, has seen in 25 years of psychiatric practice, and he will be likely, since the primary cause is isolation, to become one such himself. His solitary confinement can and perhaps will continue for life.

After his tour of America in 1842 Dickens wrote of the use of isolation in the American prisons he had seen: 'I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body.' By the late 19th century, evidence of the devastating effects of solitary confinement on prisoners' health had surfaced, and in 1890, the Supreme Court, considering the case of a death-row prisoner, echoed the language of today's doctors: 'A considerable number of the prisoners fell, even after a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them and others became violently insane; others, still, committed suicide.' In the 19th century, isolation was intended to provide an opportunity for the redemption of the prisoner's Christian soul, but Supermax prisons emerged, penologists argue, from a powerful 'rage to punish' felt by many politicians and members of the public in the late 20th century. Craig Haney, one of those penologists, believes that the US now celebrates and often demands, rather than lamenting or merely tolerating, official cruelty and the infliction of pain in its criminal justice system. What once passed for 'penal philosophy' now amounts to little more than devising 'creative strategies' to make prisoners suffer. Supermax confinement, built on the twin pillars of prolonged solitary confinement and extreme severity of conditions, is one of those strategies. The cells are carefully designed by architects to limit access to natural light, to eliminate stimulation or distraction, and reflect a total disregard for the principle that all prisoners are members of the human community. Although one US district court judge, in the case of Madrid v. Gomez in 1995, described conditions in a Supermax unit as pushing at 'the outer bounds of what most humans can psychologically tolerate' and in the case of mentally-ill prisoners has 'the equivalent of placing an asthmatic in a place with little air to breathe', no constitutional bar to their continuing use has been imposed by any court.

Even Denmark, a country considered by the UN special rapporteur on torture to be entirely compliant with every other human rights obligation, was warned following an inspection that to detain a suspect in solitary confinement, if it were done in the expectation that it might induce an admission of guilt, could constitute torture contrary to Article 3 of the Convention. The same special rapporteurs have expressed particular concern about conditions in maximum security prisons in the US which violate internationally protected rights, but they can do no more than register concern since they have no right to conduct internal inspections. Despite continual recommendations by the UN Human Rights Committee that the US government should scrutinise conditions in Supermax prisons and implement minimum UN standards, there have been no changes in practice, and the federal government is building more such facilities. Human Rights Watch found in 2000 that there were nearly 20,000 prisoners held in complete isolation in the US, nearly 2 per cent of the prison population (by now unofficial figures range between 25,000 and 70,000).

Such few judicial honours as can so far be awarded go to the extradition judge in Bow Street who so straightforwardly rejected the idea that a military commission conformed with the fair trial guarantees of the European Convention. On the isolation imposed by pre-trial SAMs he expressed extreme anxiety - 'It is in relation to these that I find the greatest grounds for concern' - and in the case of Abu Hamza, so disabled that he was likely if convicted to be imprisoned in ADX Florence only briefly before transfer to a prison hospital, he found that 'but for that fact' the brutal isolation would violate Article 3.

When the same issue has been considered in the high courts, the judges have sidestepped the facts: 'For a mature and sophisticated democracy that respects the rule of law, it would be unusual, to say

the least, if one of its lawful and carefully prescribed methods of incarceration were to be condemned for giving rise to an automatic violation of Article 3.' The inclusion of the word 'automatic' is intended to describe the protection that litigation provides for a prisoner once in solitary confinement, but the prospects for an effective challenge are non-existent; there is no funding for prisoner litigation in the US and administrative obstacles prevent even the most determined litigant having his case heard within ten years. In any event, even prisoners who have gone for years without speaking to anyone other than Federal Bureau of Prisons officials have not been able to establish a claim under the 8th Amendment to the constitution, which prohibits cruel and unusual punishment, since human contact is not classified as a 'single identifiable human need such as warmth, food or exercise'. Extreme isolation, even for life, is not considered under the US constitution to be a denial of the 'minimal civilised measure of life's necessities'.

Strasbourg, the European court of last resort, has been criticised in the past for a lack of imagination, or at least of judicial understanding, of the impact of solitary confinement on prisoners, and of having 'too ready an acceptance of state interests'. On the one hand, it has been reluctant to judge actual solitary confinement regimes as being in violation of the Convention, but, on the other, it has reminded itself of the irreducible nature of Article 3: 'States face very real difficulties in protecting their populations from terrorist violence Š the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.' But it is precisely the 'nature of the offence' that will condemn the extraditees to conditions of imprisonment and lengths of sentence that are an inevitable consequence of the civilian trials constitutionalists argue for, established as these practices have become within an entirely constitutional structure. Is indefinite military detention really any worse a prospect?

Observations are easily made on the defects of one jurisdiction from the safety of another. The beam in our own national eye concerns the UK's use of indefinite detention without trial and its complicity in torture perpetrated by others. We have not had to fight to end capital punishment in our own country or to participate in direct action to bring an end to the offshore illegality of Guantánamo. It is entirely by accident that we have come to see what probably remains unknown to most Americans.

One young American citizen, Syed Fahad Hashmi, was due to stand trial this month in Manhattan. He has been subjected to every coercive and unconstitutional practice at issue in the still outstanding extraditions in the three years since he was flown from the UK to the US. Before his transfer to the US, Hashmi was held in Belmarsh Prison in the same conditions as all other prisoners, accused of an offence that if tried in the UK would have merited at most a sentence of two or three years; since his extradition, he has been kept in total isolation in a tiny cell. He has not seen daylight since arriving in this New York prison.

The Anglo-American adversarial process is intended to rest on a guarantee of fairness, an equality of arms between prosecution and defence. Hashmi, under the disabilities that years of solitary confinement inevitably create, even for the strongest and fittest, faced a prosecution based on the evidence of a co-operating witness who pleaded guilty in the US to engagement in terrorist activity

in Pakistan, including the use of explosives and the attempted murder of the country's then president. The witness, having served the shortest of prison terms in the US, and having given evidence against others in a cluster of trials in a range of jurisdictions, claimed that Hashmi, a student in England, let him leave a suitcase in his London flat in which there were combat clothes and lent him his phone, on which he, the witness, rang a suspected terrorist in the UK. This was enough to secure his extradition. For this, the co-operating witness goes free and his victim stands trial on charges of providing material support for terrorism. On the eve of that trial, having maintained his innocence for three years, but faced with the prospect of a 70-year sentence, Hashmi changed his plea to guilty.

It is possible for Strasbourg to deliver a judgment to which the US, uniquely, must pay heed if it wishes extraditions to continue. Its granting of an interim freezing order on all extradition cases is exceptional and the length of time, now nearly three years, it has taken to wrestle with the acute legal problems thrown up by the practices of the United States in these cases is unprecedented. But, whatever Strasbourg's judgment, the failures of due process and the utter disregard for the rights of prisoners in the US has long cried out for attention.

Fuente:

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