
amnesty international

UNITED STATES OF AMERICA To be taken on trust?

Extraditions and US assurances in the 'war on terror'

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*"Recent close cooperation between US and UK prosecutors has resulted in the United Kingdom's High Court ruling on November 30, 2006, which approved the extradition of two British citizens charged with terrorism offenses in the United States. The extraditions of Haroon Rashid Aswat, believed to have set up a terrorist training camp, and Babar Ahmad, wanted for conspiring to kill Americans and for running a Web site used to fund terrorists and recruit al Qaeda members, were conditioned upon US assurances that the two would not be subject to the death penalty or a military commission."*¹

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This document considers the question of detainee transfers to the United States of America (USA) in the context of the "war on terror", and was prompted by the US government's request for the extradition from the United Kingdom (UK) of two UK nationals, Babar Ahmad and Haroon Aswat, who have been indicted in US federal court on terrorism-related offences. The US Embassy in London has provided diplomatic assurances that the two men will be tried in federal court, will not be subjected to the death penalty, and not be designated as "enemy combatants" or prosecuted before a military commission. The two men are challenging their extradition in the European Court of Human Rights, raising their concerns that, in the context of the USA's conduct in the "war on terror", such diplomatic assurances do not guarantee respect for their human rights.

¹ *National security evidence and terrorism prosecutions: Cooperation between the United States and the United Kingdom*, by Jocelyn A. Aqua, Counterterrorism Section of the National Security Division, US Department of Justice, in US Attorneys' Bulletin, March 2007, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5502.pdf.

As this document details, Amnesty International considers that while the USA's "war" paradigm and ascribed legal framework remain in place, the designation as "enemy combatants" of foreign nationals in US custody suspected of involvement in international terrorism and their exclusion or removal from the criminal justice system will remain a possibility. The US executive has arrogated to itself wide ranging powers, as reflected in Justice Department and other government documents, including the authority of the President to override laws or treaties approved by Congress, or customary international law, or the findings of treaty monitoring bodies. At the same time, the USA's public assurances and assurances given to other governments asserting the humane and lawful treatment of detainees in US custody have been found wanting. Against this backdrop, Amnesty International is concerned that a Diplomatic Note issued through a US Embassy would not prevent the designating of its beneficiaries as "enemy combatants", with all the consequences that such designation potentially entails, if the President determined that national security required the bypassing of such an assurance.



Amnesty International fully recognizes the duty of governments to bring alleged perpetrators of crime to justice, and that international cooperation may be necessary to meet this goal, including in extradition cases. At the same time, all governments must adhere to internationally-recognized principles of human rights and the rule of law, including when responding to threats or acts of terrorism. As a US Supreme Court Justice said eight decades ago, "if the government becomes a lawbreaker, it breeds contempt for law".² In similar vein, 40 years ago, the Supreme Court said, "In the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves".³ More recently, the United Nations (UN) General Assembly called on all states, "while countering terrorism, to ensure due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949, in their respective fields of applicability".⁴ In similar vein, the UN Security Council, noting the obligation on states to bring to justice those involved in terrorism, including through extradition and prosecution, has emphasised the obligation upon states to "ensure that any measures taken to combat terrorism comply with all their obligations under international law... in particular international human rights, refugee, and humanitarian law".⁵ Indeed, in the Global Counter-Terrorism Strategy, adopted by the UN General Assembly on 8 September 2006, the member states of the United Nations resolved to recognize that "international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of

² *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis, dissenting.

³ *Jackson v. Denno*, 378 U.S. 368 (1964).

⁴ UN General Assembly Resolution 61/171. Protection of human rights and fundamental freedoms while countering terrorism. Adopted on 19 December 2006. UN Doc.: A/RES/61/171, 1 March 2007.

⁵ UN Security Council Resolution 1456, 20 January 2003, S/RES/1456 (2003).

the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law, and international humanitarian law.”⁶

Since the attacks in the USA of 11 September 2001 – acts which Amnesty International has condemned as a crime against humanity – certain US policies, practices and legislation relating to the detention, interrogation, and trial of individuals in connection with counter-terrorism efforts have called into serious question the USA's commitment to its international human rights obligations. While the US government has pursued counter-terrorism prosecutions in the ordinary criminal justice system, it has also operated under a global “war” paradigm. Under this framework, the US government has effectively rejected international human rights law and applied a selective, unilateral interpretation of international humanitarian law (IHL), the law of war, to the detention of those it designates as “enemy combatants”. It has done so in the face of considerable international concern. In October 2002, for example, an Embassy of a country the identity of which remains classified (but believed to be a European state) transmitted a Diplomatic Note to the US government on the subject of an individual believed to be held in Guantánamo. The State Department responded in November 2002 that “for operational and security reasons”, it was unable to respond on the specific circumstances of any particular detainee. It stated that all “enemy combatants” were treated humanely and continued:

“There is no law requiring a detaining power to prosecute enemy combatants or to release them prior to the end of hostilities. The authority to detain enemy combatants exists in law independent of the judicial or criminal justice system... [T]he decision whether, or when, to prosecute a combatant has no impact on the underlying authority to detain them during the armed conflict. Likewise, under the laws and customs of war, captured enemy combatants have no right of access to counsel or the courts to challenge their detention.”⁷

Five years later, in November 2007, the US government rejected certain conclusions of the UN Committee Against Torture relating to the USA's “war on terror” detentions. It emphasized that “the United States is in an armed conflict with al-Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention [against Torture], provides the applicable legal framework governing these detentions”.⁸ The USA has taken the same approach in relation to the International Covenant on Civil and Political Rights (ICCPR), which among other things, protects the right to judicial review of the lawfulness of detention and to a fair trial. In February 2008, rejecting certain conclusions of the UN Human Rights Committee

⁶ See <http://www.un.org/terrorism/strategy-counter-terrorism.html>.

⁷ Document available at <http://www.aclu.org/projects/foiasearch/pdf/DOS000754.pdf>. These and other such documents cited in this report were released, albeit in redacted form, following litigation under the Freedom of Information Act (FOIA) brought by the ACLU and others.

⁸ UN Doc.: CAT/C/USA/CO/2/Add. 1, 6 November 2007. Comments by the Government of the United States of America to the conclusions and recommendations of the Committee against Torture.

relating to "war on terror detentions", the US government stated that "the law of war, and not the [ICCPR], is the applicable legal framework governing these detentions". Among other things, according to the US government, this framework allows the USA to move "enemy combatants to secret locations" for interrogation in incommunicado detention.⁹

According to President George W. Bush, in November 2001, "we're at war. The enemy has declared war on us. And we must not let foreign enemies use the forums of liberty to destroy liberty".¹⁰ Speaking at a conference of US Attorneys (federal prosecutors), the President continued:

"Non-citizens, non-US citizens who plan and/or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life. And if I determine that it is in the national security interest of our great land to try by military commission those who make war on America, then we will do so".

In the same month, Vice President Cheney said that those whom the USA labels as unlawful combatants "don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."¹¹ Since then, a central plank of policy has been to remove certain foreign nationals from the reach of the ordinary courts. While the USA's global "war" framework has defined its detention regime operated outside the USA, including in the case of individuals abroad previously indicted in the US federal courts, it has also affected cases on the mainland, including defendants held in the USA who had previously been facing trial in these courts (see Padilla and al-Marri cases below).

International concern about this war paradigm has grown. On 29 February 2008, the UN High Commissioner for Human Rights, Louise Arbour, said: "The war on terror has inflicted a very serious setback for the international human rights agenda".¹² The International Committee of the Red Cross (ICRC), the authoritative interpreter of the Geneva Conventions, has said that it does "not believe that IHL is the overarching legal framework" applicable to the "war on terror".¹³ A 2006 report by five UN experts stated that "the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law".¹⁴ In late 2007, the UN Special Rapporteur on the

⁹ UN Doc.: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee.

¹⁰ President says US Attorneys in front line in war. 29 November 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011129-12.html>.

¹¹ Remarks by Vice President Dick Cheney to the U.S. Chamber of Commerce, 14 November 2001, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html>.

¹² *UN human rights chief to leave post*, Washington Post, 3 March 2008.

¹³ Developments in US policy and legislation towards detainees: the ICRC position. 19 October 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006>.

¹⁴ Situation of detainees at Guantánamo Bay. Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special

promotion and protection of human rights and fundamental freedoms while countering terrorism stated that "the international fight against terrorism is not a 'war' in the true sense of the word". He reminded the USA that "even during an armed conflict triggering the application of international humanitarian law, international human rights law continues to apply."¹⁵

Echoing these concerns in the context of UK counter-terrorism efforts, the Director of Public Prosecutions (DPP) for England and Wales said in 2007 that "London is not a battlefield." The people who were killed in the London bombings of 7 July 2005 "were not victims of war" and the perpetrators were not "soldiers" as they claimed. "We need to be very clear about this", the DPP continued, "On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'." He said: "Acts of unlawful violence are proscribed by the criminal law. They are criminal offences. We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice."¹⁶

This is in contrast to the continuing view of US authorities. In his State of the Union address in January 2004, President Bush said:

"I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments... After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got."¹⁷

More recently, the Director of the Central Intelligence Agency (CIA), General Michael V. Hayden, reiterated that:

"We're at war, and this city (New York)... has been a battlefield in that war... I've seen public references to, quote, 'the so-called war on terrorism' or, quote, 'the Bush administration's war on terrorism', but for us it's simply war. It's a word we use commonly without ambiguity in the halls of the Pentagon and at Langley [CIA headquarters]".¹⁸

Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc.: E/CN.4.2006/120, 27 February 2006, paras. 20 and 26.

¹⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America, Advanced Edited Version, UN Doc: A/HRC/6/17/Add.3, 25 October 2007. Summary.

¹⁶ *Security and Rights*, Ken Macdonald, QC, Director of Public Prosecutions, 23 January 2007. Full speech available at http://www.cps.gov.uk/news/nationalnews/security_rights.html.

¹⁷ President Bush, State of the Union Address, 20 January 2004, <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

¹⁸ Transcript of Remarks by Central Intelligence Agency Director, Gen. Michael V. Hayden at the Council on Foreign Relations, 7 September 2007, <https://www.cia.gov/news-information/speeches-testimony/general-haydens-remarks-at-the-council-on-foreign-relations.html>.

In February 2008, Vice President Richard Cheney referred to the time before the attacks of 11 September 2001: "[I]n those days we treated terrorism as a matter for law enforcement – where you go out and find the perpetrators, arrest them, try them, and put them in jail."¹⁹ "One great lesson of 9/11 was that we had to stop treating terrorist attacks merely as law enforcement problems – where you find out what happened, arrest the bad guys, put them in jail, and move on."²⁰ Six years earlier, he had said: "As the president deems necessary, non-U.S. citizens suspected of terrorist activity, whether captured here or abroad, will face trial by military commission. The mass murder of Americans by terrorists or the planning thereof is not just another item on the criminal docket. This is a war against terrorism. Where military justice is called for, military justice will be dispensed."²¹

Thus, a global war framework, the national security underpinnings of which the US Supreme Court has acknowledged are "broad and malleable"²², remains central to the USA's conduct, particularly in relation to foreign nationals it takes into its custody.²³ For example, on 24 October 2007, the CIA Director stated:

"If I pick up someone who will do harm to America, if we're able to somehow get our hands on someone like that, I think I realistically have three options: I can detain him under the authorities the President has given us if he meets certain criteria. I can conduct a rendition. That is, taking that person to some other country, a third country. Or I can send that person to Guantánamo... [S]omeone else had commented, well you could put him into a judicial process. That's the question that I see an awful lot of friction on.... Back to the premise, this is a war, this is not a law enforcement activity."²⁴

¹⁹ Vice President's Remarks to Soldiers of the First Cavalry Division, 26 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080226-2.html>.

²⁰ Vice President's Remarks at the Conservative Political Action Conference, 7 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080207-11.html>.

²¹ Remarks at the Federalist Society Annual Convention Dinner, 15 November 2001, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011127.html>.

²² *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²³ Indeed, the Military Commissions Act of 2006 has effectively backdated this "war" to before 11 September 2001 to allow the prosecution of individuals by military commission for crimes committed before that date ("A military commission...shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001" MCA § 948d). The US State Department's legal advisor has suggested that the setting up of military commissions will allow the prosecution of individuals for acts that did not violate US criminal laws at the time they were committed, in possible violation of the prohibition against the retroactive application of criminal liability ("They had not committed crimes that were in violation of our US criminal laws because those were not crimes that were on our books at the time in September 11, 2001... The answer is that a system needs to be designed in which those who had been conspiring to commit attacks on the United States or elsewhere around the world can be tried in a fair system for their crimes." Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, USA, 7 September 2006, <http://www.state.gov/s/l/rls/71939.htm>).

²⁴ Transcript of Director Hayden's interview with Charlie Rose, 24 October 2007, <https://www.cia.gov/news-information/press-releases-statements/interview-with-charlie-rose.html>.

The previous month, in a declaration filed in the US Court of Appeals for the District of Columbia Circuit in relation to efforts by the administration to narrow the scope of that court's review of the detentions of "enemy combatants" held in Guantánamo, the Director of the National Security Agency (NSA), Lieutenant General Keith B. Alexander, stated:

"As a result of the unprecedented attacks of September 11, 2001, the United States found itself immediately propelled into a worldwide war against a network of terrorist groups, centered on and affiliated with al Qa'ida... That war is continuing today, at home as well as abroad. The war against al Qa'ida and its allies is a very different kind of war, against a very different enemy, than any other war or enemy the Nation has previously faced."²⁵

The US Justice Department – responsible for prosecutions in the normal criminal justice system – also maintains this position. For example, on 11 December 2007, Deputy Assistant Attorney General Steven Engel reiterated to a subcommittee of the Senate Judiciary Committee that "the United States is currently engaged in an armed conflict unprecedented in our history."²⁶ Such statements echo a central policy memorandum issued in early 2002 in which President Bush stated that "the war against terrorism ushers in a new paradigm" which "requires new thinking in the law of war".²⁷ Or as then Secretary of Defense Donald Rumsfeld said, during a visit to Guantánamo soon after it opened in January 2002, "It's important for people to recognize that this is a different circumstance, the war on terrorism. It requires a different template in our thinking. All of the normal ways that we think about things simply don't work."²⁸



It is this sense of a "new", unprecedented situation which has contributed, in Amnesty International's view, to the USA's misconceived and highly selective interpretation of its international legal obligations. For example, the presidential decision not to apply Geneva Convention protections to detainees captured or held in Afghanistan followed advice from the then White House Counsel that such a decision would "preserve flexibility" in a "new kind of war" which "places a high premium on...the ability to quickly obtain information from captured terrorists and their sponsors" and "renders obsolete Geneva's strict limitations on questioning of

²⁵ *Bismullah v. Gates*, Unclassified Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency, US Court of Appeals for the District of Columbia Circuit, 7 September 2007.

²⁶ Statement of Steven A. Engel, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, before the Subcommittee on Terrorism, Technology and Homeland Security, Committee on the Judiciary, US Senate. Hearing on the legal rights of Guantánamo detainees, 11 December 2007, http://judiciary.senate.gov/testimony.cfm?id=3052&wit_id=6814.

²⁷ Memorandum. Subject: *Humane treatment of al Qaeda and Taliban detainees*, 7 February 2002.

²⁸ Secretary Rumsfeld Media Availability after Visiting Camp X-Ray, Department of Defense transcript, 27 January 2002, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2348>.

enemy prisoners".²⁹ At the same time, Vice President Cheney said of the Guantánamo detainees: "they're unlawful combatants... there's a real question about whether or not the Geneva Convention, as a convention, can be interpreted to apply to the new situation we're faced with... These are bad people. They may will [sic] have information about future terrorist attacks against the United States. We need that information, we need to be able to interrogate them and extract from them whatever information they have."³⁰ On 2 December 2002, the Vice President said, "Since the hour of the attacks on September 11th, our country has been fighting an unprecedented kind of war.... As the President has said, this is a fight to save the civilized world."³¹ On the same day, Secretary of Defense Rumsfeld signed a memorandum authorizing the detention authorities at Guantánamo, "as a matter of policy", to use stress positions, isolation, deprivation of light and auditory stimuli, hooding, removal of all comfort items (including religious items), removal of clothing, forced grooming, and using detainees individual phobias (such as fear of dogs) to induce stress.³² Five years later, President Bush said that "the events of September the 11th, 2001 demonstrated the threats of a new era... We saw the cruelty of the terrorists and extremists, and we glimpsed the future they intend for us... This war against these extremists and radicals who would do us harm is the great ideological struggle of our time. We're in a battle with evil men... And to find out what the terrorists know about planned attacks, we established a program run by the CIA to detain and question key terrorist leaders and operatives."³³ This program of secret detention remains authorized. Torture and enforced disappearance – and impunity for such international crimes – became part of this program.

Continuing revelations about the previously secret advice and discussions within the administration, and about its policies and practices, have undermined confidence in US assurances that it is committed to and engaged in lawful conduct, including in relation to the prohibition on torture and other ill-treatment. Such policies and practices have also involved a bypassing of the ordinary courts in some cases and not in others, an inconsistency which can only undermine the credibility of assurances that any particular defendant will not be removed or excluded from the normal criminal justice system. The experience of numerous detainees has indicated that the US government is not committed to trials in federal court – even when an individual has previously been indicted in such courts – when national security considerations under its global war paradigm are deemed to take priority.

²⁹ He also advised that it would "substantially" reduce the threat of domestic prosecutions of US agents for war crimes. Alberto Gonzales. Memorandum for the President: Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban, Draft, 25 January 2002.

³⁰ The Vice President Appears on ABC's This Week, 27 January 2002, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20020127.html>.

³¹ Remarks by the Vice President at the Air National Guard Senior Leadership Conference, 2 December 2002, <http://www.whitehouse.gov/news/releases/2002/12/20021202-4.html>.

³² Action memo. Counter-Resistance Techniques, 2 December 2002.

³³ President Bush Commemorates Fifth Anniversary of US Department of Homeland Security, 6 March 2008, <http://www.whitehouse.gov/news/releases/2008/03/20080306-4.html>.

On 20 July 2006, Uzair Paracha, a Pakistani national with legal resident status in the USA, was sentenced to 30 years in prison in US federal court on charges of providing material support for terrorism. He had been indicted in October 2003 and convicted in November 2005. Statements allegedly made in US custody by Majid Khan, another Pakistani national with legal resident status and family in the USA, were admitted at Uzair Paracha's trial.³⁴ Majid Khan had been seized in his brother's home in Karachi in March 2003. Taken into US custody, he was not brought to trial in federal court, allowed to challenge his detention in court, or have access to the outside world. Instead he became the victim of enforced disappearance in secret CIA custody at unknown locations, his fate and whereabouts concealed for more than three years, his family not knowing if he was alive or dead, until he was transferred in September 2006 to Guantánamo, where he remains virtually incommunicado over a year later, detained as an "enemy combatant".³⁵ Despite being transferred to Guantánamo for the stated purpose of bringing him to trial, Majid Khan had not been charged by early March 2008, more than 16 months later.³⁶

Majid Khan has alleged that he was tortured in CIA custody. His lawyers have filed Declarations detailing the alleged torture against Majid Khan and other detainees held in CIA custody, although all such detail has been redacted (censored) from the public record on the grounds of national security.³⁷ His lawyers state the following:

"Khan's torture was decidedly not a mistake, an isolated occurrence, or even the work of 'rogue' CIA officials or government contractors operating outside their authority or chain of command. To the contrary, as detailed in the Dixon Declaration, Khan [redacted] prisoners who were similarly abducted, imprisoned and tortured by US personnel at CIA 'black sites' around the world. The collective experiences of these men, who were forcibly disappeared by the government and became ghost prisoners, reveal

³⁴ *Pakistani man convicted of providing material support to al Qaeda sentenced to 30 years in federal prison*. News release, US Attorney, Southern District of New York, 20 July 2006, <http://www.usdoj.gov/usao/nys/pressreleases/July06/parachasentencingpr.pdf>.

³⁵ Majid Khan was granted access to a lawyer on 16 October 2007 – for the purpose of narrow judicial review under the Detainee Treatment Act – four and a half years after he was taken into custody. At an administrative review hearing in April 2007 in Guantánamo, Majid Khan said: "It has been four years. Can the United States government call me a terrorist and not yet, and not yet charge me? What is stopping them?"

³⁶ Because "we have largely completed our questioning of the men" they were being brought "into the open" and transferred from CIA custody to Guantánamo in order "to start the process for bringing them to trial". President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

³⁷ On the redactions of the lawyers' declarations, the government has stated: "We wish to make clear that these redactions should not be understood to mean that the redacted material contains truthful claims. In order to protect national security sensitive information, the Government is neither confirming nor denying the correctness of any of petitioner's many allegations". *Khan v. Gates*. Opposition to Petitioner's motions for preservation order and for declaratory judgment. In the US Court of Appeals for the District of Columbia Circuit, 20 December 2007. Nowhere in the US Government's unclassified brief is any express repudiation of the torture allegations. The government states that it has "transmitted [Majid Khan's] allegations to the proper authorities with the Department of Justice for investigation".

a sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law".³⁸

Senior administration officials have repeatedly stated that detainees will be treated humanely. In November 2001, for example, Vice President Cheney said: "These people are not going to be mistreated. They are going to be treated like the unlawful combatants that they are."³⁹ Four years later, President Bush said that "this government does not torture" and "we adhere to the international convention of torture [sic], whether it be here at home or abroad".⁴⁰

However, at a hearing in front of the Senate Select Committee on Intelligence on 5 February 2008, the CIA Director, General Hayden, confirmed that among its "enhanced" interrogation techniques, the CIA had used "waterboarding" – simulated drowning – against three detainees in 2002 and 2003.⁴¹ Amnesty International unequivocally condemns this practice as torture.⁴² On 8 February 2008, the UN High Commissioner for Human Rights told a press conference in Mexico City that in her opinion the practice of "waterboarding" falls squarely under the prohibition of torture.⁴³ On 12 February 2008, the UK Foreign Secretary confirmed that the UK government defines "waterboarding" as torture.⁴⁴ While the US authorities have said that the technique is not currently authorized as part of the CIA secret detention program, they have said that it – or any other interrogation technique not currently authorized – could be used in the future if the Attorney General approved its legality and the President authorized it.⁴⁵

In testimony to a subcommittee of the House Judiciary Committee on 14 February 2008, Steven Bradbury, the Principal Deputy Assistant Attorney General at the Justice Department's Office of Legal Counsel, suggested that the circumstances that could warrant resort to any such "new method" would be if it were determined that the technique was "necessary to obtain information on terrorist attack planning or

³⁸ *Khan v. Gates*, Motion for preservation of torture evidence, In the US Court of Appeals for the District of Columbia Circuit, 30 November 2007.

³⁹ Interview of Vice President Cheney with Diane Sawyer of ABC, 29 November 2001, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011129.html>.

⁴⁰ President Meets with McCain & Warner, Discusses Position on Interrogation, 15 December 2005, <http://www.whitehouse.gov/news/releases/2005/12/print/20051215-3.html>.

⁴¹ Hearing on the annual threat assessment, US Senate Select Committee on Intelligence, 5 February 2008.

⁴² USA: CIA 'waterboarding': Admission of a crime, now there must be a criminal investigation, AI Index: AMR 51/011/2008, 6 February 2008, <http://www.amnesty.org/en/library/info/AMR51/011/2008>.

⁴³ UN says waterboarding should be prosecuted as torture. Reuters, 8 February 2008.

⁴⁴ Foreign Secretary interviewed on BBC Radio, 12 February 2008, transcript available at <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1199212028772>.

⁴⁵ See USA: Impunity and injustice in the 'war on terror', AI Index: AMR 51/012/2008, 12 February 2008, <http://www.amnesty.org/en/library/info/AMR51/012/2008>. See also: Prepared statement of Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 14 February 2008.

the location of senior al Qaeda leadership".⁴⁶ In his testimony to the Senate Intelligence Committee on 5 February 2008, the CIA Director tried to justify what amounts to water torture as a means to obtain information from detainees at a time of perceived threat to public safety in the wake of the 11 September 2001 attacks, and because the intelligence community "had limited knowledge about al-Qa'ida and its workings." The administration's resort to torture to fill its intelligence gap leaves it today with a credibility gap in relation to its assurances.

On 8 March 2008, President Bush vetoed a bill intended to restrict the CIA to interrogation techniques authorized in the US Army Field Manual. "The procedures in this manual", the President asserted, "were designed for use by soldiers questioning lawful combatants captured on the battlefield. They were not intended for intelligence professionals trained to question hardened terrorists". He said that "we need to ensure our intelligence officials have all the tools they need to stop the terrorists".⁴⁷ Among other things, the Army Field Manual prohibits, "if used in conjunction with interrogations": "Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; "waterboarding"; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; depriving the detainee of necessary food, water, or medical care."⁴⁸

General Hayden has said that "the Agency's decision to employ waterboarding in the wake of 9/11 was not only lawful, it reflected the circumstances of the time... CIA's terrorist interrogation program, lawful and effective, was born of necessity... Unlike traditional law enforcement, the CIA's chief objective in interrogations is not forensics on past events, but actionable, forward-looking intelligence."⁴⁹ In other words, it would seem that if the administration's view of "necessity" demands it, methods prohibited under international law can be deemed lawful under US law.

The detainees against whom the US authorities have admitted using the form of water torture known as "waterboarding" are Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri, all non-US nationals. The three men were held at secret locations for more than three years before being transferred to Guantánamo in September 2006, where they remain in military detention as "enemy combatants" in the as yet unrevealed conditions of Camp 7.

In April 2002, Secretary of Defense Rumsfeld had described as "hypothetical" and "not on the radar screen", the notion that the USA would transfer Abu Zubaydah after his capture to a location outside of Pakistan, Afghanistan or the USA for

⁴⁶ Prepared statement of Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 14 February 2008.

⁴⁷ President's radio address, 8 March 2008, <http://www.whitehouse.gov/news/releases/2008/03/20080308.html>.

⁴⁸ FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations. Department of the Army, September 2006.

⁴⁹ Director's statement on lawful interrogation, 13 February 2008, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-on-lawful-interrogation.html>.

interrogation.⁵⁰ Subsequent reports indicate that Abu Zubaydah was transferred to a CIA "black site" in Thailand, and subjected to torture.⁵¹ In total, he was held for four and a half years at secret locations. Two US lawyers representing him in 2008 have written:

"Shuttled through CIA 'black sites' around the world..., Zubaydah's world became freezing rooms alternating with sweltering cells. Screaming noise replaced by endless silence. Blinding light followed by dark, underground chambers. Hours confined in contorted positions."⁵²

In April 2002, Secretary Rumsfeld, asked whether Abu Zubaydah would stand trial, replied "I would certainly assume so".⁵³ Nearly six years later, Abu Zubaydah, now held in Guantánamo, had not been charged.

On 6 December 2007, the CIA Director revealed that in 2005 the agency had destroyed videotapes made in 2002 of interrogations of detainees in secret US custody.⁵⁴ The videotapes apparently depicted hundreds of hours of interrogations against Abu Zubaydah and 'Abd al-Rahim al-Nashiri, both of whom have alleged that they were tortured in CIA custody, and both of whom the authorities have confirmed were subjected to "waterboarding". Abu Zubaydah was subjected to secret incommunicado detention for four and a half years, becoming the victim of enforced disappearance. 'Abd al-Nashiri, a Saudi Arabian national of Yemeni origin, was arrested in the United Arab Emirates in November 2002. In May 2003, six months after his arrest, the USA charged two Yemeni nationals – who were not in US custody – in connection with the bombing of the *USS Cole* in Yemen in October 2000. In the indictment in federal court, 'Abd al-Nashiri was named as an "un-

⁵⁰ Department of Defense news briefing with Secretary Rumsfeld and General Myers, 3 April 2002, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3390>.

⁵¹ For example, see *CIA holds terror suspects in secret prisons*. Washington Post, 2 November 2005.

⁵² Joseph Margulies and George Brent Mickum. *Inside the mind of a Gitmo detainee*. Washington Post, 23 February 2008.

⁵³ Secretary Rumsfeld Live Interview with MSNBC TV, 12 April 2002, Department of Defense transcript, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3400>.

⁵⁴ Director's statement on the taping of early detainee interrogations. General Michael Hayden, 6 December 2007, <https://www.cia.gov/news-information/press-releases-statements/taping-of-early-detainee-interrogations.html>. USA: *Destruction of CIA interrogation tapes may conceal government crimes*, 7 December 2007, <http://www.amnesty.org/en/for-media/press-releases/usa-destruction-cia-interrogation-tapes-may-conceal-crimes-20071207>. In his statement, General Hayden said that "videotaping stopped in 2002". Of relevance to the more general question of US government assurances relating to "war on terror" detentions, Amnesty International notes that at the time of writing this assertion was being challenged in the US courts. For example, lawyers for Majid Khan, whose claims surrounding the alleged torture of their client in CIA custody (see above) have largely been redacted from the public record, have said that General Hayden's "statement was demonstrably incorrect". The unclassified version of their brief goes on to note that "other unnamed intelligence officials have made a series of false statements about Khan's imprisonment and torture in CIA custody. For instance, officials have said that his interrogations were not videotaped; that all videotaping stopped in 2002; and that enhanced interrogation techniques were used on only a small number of prisoners." *Khan v. Gates*. Reply memorandum of law in further support of Petitioner's torture motions. In the US Court of Appeals for the District of Columbia Circuit, 4 January 2008.

indicted co-conspirator", but rather than being brought to federal court after he was taken into detention, he remained in secret custody for another three and a half years.⁵⁵ By early March 2008, he had still not been charged or brought to trial, but remained in indefinite, virtually incommunicado, military detention in Guantánamo as an "enemy combatant". Walid bin Attash was also named as an "un-indicted co-conspirator" in the federal court indictment in May 2003. Walid bin Attash had been arrested in Pakistan the previous month, but rather than being brought to federal court, he was also put into secret US custody at unknown locations until September 2006 when he was transferred to Guantánamo. On 11 February 2008, the Pentagon announced that Walid bin Attash was one of six Guantánamo detainees against whom it had that day sworn criminal charges in relation to the attacks of 11 September 2001 and against whom it would be seeking the death penalty at their joint military commission trial.

Another of the six is Khalid Sheikh Mohammed. In March 2003, asked about the detention of Khalid Sheikh Mohammed, the White House spokesperson responded that "the standard for any type of interrogation of somebody in American custody is to be humane and to follow all international laws and accords dealing with this type of subject. That is precisely what has been happening, and exactly what will happen".⁵⁶ Nevertheless, in clear violation of international law, Khalid Sheikh Mohammed was put into secret US custody for the next three and a half years. The CIA Director has confirmed that he was subjected to "waterboarding" and the detainee has alleged that he was subjected to other torture in incommunicado detention. Despite having previously been indicted in federal court, Khalid Sheikh Mohammed was not put into that judicial system. His arrest was instead treated as "first and foremost an intelligence opportunity", according to the US Attorney General.⁵⁷

Ahmed Khalfan Ghailani, a Tanzanian national, was indicted in 1998 in US federal court in New York on numerous counts in relation to the bombings of US embassies in Kenya and Tanzania in August 1998.⁵⁸ In 2001, the USA tried and convicted four men in federal court in relation to the embassy bombings. Nevertheless after Ahmed Khalfan Ghailani was arrested in Pakistan in July 2004 and handed over to the USA the following month, he was not brought to court, but instead put into secret CIA custody for the next two years. He is now detained as an "enemy combatant" in Guantánamo where, by early March 2008, he had neither been charged nor tried.

In June 2003, President Bush, who three years later would confirm that he had authorized the CIA's program of secret detentions, issued a statement proclaiming

⁵⁵ See p. 14-15, *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, <http://www.amnesty.org/en/report/info/AMR51/044/2007>.

⁵⁶ Press briefing by Ari Fleischer, 3 March 2003,

<http://www.whitehouse.gov/news/releases/2003/03/20030303-3.html#2c>.

⁵⁷ Prepared Remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing: "The Terrorist Threat: Working Together to Protect America", 4 March 2003.

<http://www.usdoj.gov/archive/ag/testimony/2003/030403senatejudiciaryhearing.htm>.

⁵⁸ Indictment at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/binladen/usbinladen1.pdf>.

that the USA was leading the global struggle against torture "by example".⁵⁹ His proclamation came a matter of weeks after Khalid Sheikh Mohammed was taken into custody and subsequently subjected to a form of water torture, and a matter of weeks after a Pentagon Working Group had produced a report, originally classified as secret until 2013, which included the assertion that as Commander-in-Chief of the Armed Forces, the President was not bound by US or international law prohibiting torture, and suggesting legal defences against criminal liability for any officials accused of torture.⁶⁰ A former CIA agent has recently indicated that "waterboarding" and other "enhanced" interrogation techniques were approved by the Justice Department and National Security Council in 2002, and added that "It was a policy decision that came down from the White House."⁶¹

Amnesty International considers that the administration has done considerable damage to the credibility of official assurances as they relate to the human rights obligations of the USA, including the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Its bypassing of the federal courts has damaged the credibility of the assertions it now makes that it will try particular individuals in those courts rather than hold them without trial as "enemy combatants" or try them in front of military commissions.

- IV -

Assurances have been provided to other governments that detainees are being treated humanely and in accordance with international law. When detainees were taken to Guantánamo, for example, the State Department sent US embassies a set of "talking points" for use when informing governments that one or more of their nationals had been transferred to the base. One of the "talking points" was that "all detainees have been and will continue to be treated humanely and consistent with the principles of the Third Geneva Convention. Representatives from the International Committee of the Red Cross are present at Guantánamo and will be given the opportunity to visit with each detainee privately".⁶² Despite such assurances, US practices at Guantánamo have included those entirely contradictory to principles of the Third Geneva Convention;⁶³ assurances of humane treatment have been followed by substantial evidence of torture and other ill-treatment of detainees (see further below); and even access to the ICRC has not been

⁵⁹ Statement by the President, 26 June 2003,

<http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>.

⁶⁰ Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

⁶¹ *Ex-CIA agent: Waterboarding 'saved lives'*, CNN, 11 December 2007,

<http://edition.cnn.com/2007/POLITICS/12/11/agent.tapes/#cnnSTCText>.

⁶² For example, *June 13 [2002] transfer of detainees to Guantanamo*, available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002075.pdf>.

⁶³ For example, Article 17 of the Third Geneva Convention prohibits any form of coercion to obtain information. As the recently leaked Camp Delta Operating Procedures confirm (see following page), creating coercive detention conditions to isolate, exploit and disorientate detainees for interrogation purposes was central to US policy at Guantánamo.

unhindered. According to a leaked Pentagon document, in a meeting with the Guantánamo authorities in October 2003, the ICRC reiterated its concerns about still not being able to see a number of the detainees.⁶⁴ One of them, Mohamedou Ould Slahi, detained in Mauritania and subject to "rendition" to Jordan before being transferred to Guantánamo via Afghanistan, was subjected to torture or other ill-treatment while denied access to the ICRC for more than a year in Guantánamo, where he remains as an "enemy combatant".⁶⁵ He has alleged that between June and August 2003, he was subjected to forced nudity, sexual molestation, sexual assault, subjection to cold temperatures, including while stripped naked and soaked with cold water, sleep deprivation, threats against himself and his family, and beatings.⁶⁶

A Diplomatic Note from the US authorities, dated 30 October 2002, to an unidentified government (believed to be European), asserted that "with respect to access to detainees at Guantánamo Bay, representatives of the International Committee of the Red Cross individually and privately visit the enemy combatants on a regular basis".⁶⁷ The recently leaked version of the Camp Delta Standard Operating Procedures, dated 28 March 2003, reveal that the purpose of the "Behavior Management Plan" adopted for those brought to Guantánamo was to "enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process". For at least the first 30 days, but longer if authorized by the interrogating authorities, the detainee would be denied any contact with the ICRC, as well as being denied basic items such as the Koran, prayer cap or beads, books and mail.⁶⁸ This is repeated in the March 2004 version of the Standard Operating Procedures subsequently leaked.⁶⁹ The Procedures reveal that all detainees are designated with one of four levels of ICRC contact, only one of

⁶⁴ Department of Defense Memorandum for Record. ICRC meeting with MG Miller on 9 Oct 03.

<http://washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>. The authorities justified such denial of access on the grounds of "military necessity", under its war paradigm.

⁶⁵ See *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AMR 51/149/2006, September 2006, <http://www.amnesty.org/en/report/info/AMR51/149/2006>.

⁶⁶ *Ibid.* Also Affidavit of Vincent James Iacopino, M.D., Re: Mohamedou Ould Slahi. 14 May 2007 ("Based on my knowledge of methods of torture and their physical and psychological effects, and extensive experience investigating and documenting medico-legal evidence of torture, it is my judgment that Mr. Slahi's allegations of torture and ill-treatment are entirely consistent with and supported by physical and psychological evidence documented in the medical records").

⁶⁷ Document available at <http://www.aclu.org/projects/foiasearch/pdf/DOS000754.pdf>.

⁶⁸ Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force – Guantanamo, 28 March 2003, §4-20. The 1992 version of the US military interrogation manual (FM 34-52) states that "threatening or implying" that rights under the Geneva Conventions would not be provided unless the detainee cooperated is an example of unlawful coercion. Article 34 of the Third Geneva Convention states "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties". Article 93 of the Fourth Geneva Convention requires the same for civilian internees. The USA criticizes such violations if they occur in other countries. For the past three years, for example, the entry on Syria in the State Department's human rights reports has criticized, under the heading torture or other cruel, inhuman or degrading treatment, the denial of "access to reading materials, including the Koran" to political prisoners.

⁶⁹ Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force – Guantanamo, 1 March 2004. §4-20. In this version, however, a Koran is allowed during this period of isolation.

which allows the ICRC "full access to talk to the detainee".⁷⁰ In the meeting in October 2003 between the ICRC and the Guantánamo authorities referred to above, the ICRC not only reiterated its concerns about not being able to see a number of the detainees, but also about the use of "excessive isolation", about how interrogators had "too much control over the basic needs of the detainees" and how they "attempt to control the detainees through the use of isolation". The Commander of Guantánamo detention responded by stating that the detainees were "enemy combatants" and that the focus of ICRC monitoring should not be interrogation methods.⁷¹ Meanwhile, the Public Affairs section of the Standard Operating Procedures emphasised that one of the "detainee international public information themes" is: "All detainees will be treated humanely and consistent with the principles of the Geneva Conventions".⁷² The government's assurances clearly did not match the reality of the detention regime.

Again, assurances have included those specifically given in response to the concerns of other governments. That such assurances have amounted to less than an absolute guarantee appears to be illustrated by the fact that the Canadian authorities have recently "sought and received *renewed* assurances from the United States that detainees are being treated humanely" following allegations of torture and ill-treatment (emphasis added).⁷³ Other governments have also sought and received assurances that detainees will be treated humanely and in accordance with international law by the USA. A heavily redacted telegram, dated January 2002, from the US Embassy in a country the identity of which has been classified (but is believed to be a Gulf state), indicates that the DCM (Deputy Chief of Mission) had informed the MFA (Ministry of Foreign Affairs) of the country that some of its nationals had been transferred to Guantánamo on 11 January. An official whose identity has been classified "stated that he had seen/read media reports of harsh treatment of the detainees. He strongly urged that the US abide by 'international conventions' in treating these detainees." The telegram states that the DCM "responded that they were being treated humanely".⁷⁴

Another redacted telegram from the US Embassy in London to the US Secretary of State in January 2002 noted that UK Prime Minister Tony Blair had responded to a parliamentarian's concerns about the treatment of UK nationals in Guantánamo by stating that "all detainees should be treated humanely 'in accordance with the Geneva Conventions and proper international law', and that the USG [US Government] has assured the UK Government that this is being done".⁷⁵ UK

⁷⁰ The other three are "No access: No contact of any kind with the ICRC. This includes the delivery of ICRC mail"; "Restricted: ICRC is allowed to ask the detainee about health and welfare only. No prolonged questions"; "Visual: Access is restricted to visual inspection of the detainee's physical condition. No form of communication is permitted. No delivery of ICRC mail". *Ibid.*, § 17.3.

⁷¹ Department of Defense Memorandum. ICRC meeting with MG Miller on 9 Oct 03, *op. cit.*

⁷² Standard Operating Procedures, *op. cit.*, §28-3(c).

⁷³ Letter to Associate Professor, University of Toronto, from Maxime Bernier, Minister of Foreign Affairs, 17 October 2007. Amnesty International members have received the same letter from the Canadian foreign ministry.

⁷⁴ Cable available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002414.pdf>.

⁷⁵ Cable available at <http://www.aclu.org/projects/foiasearch/pdf/DOS001966.pdf>.

nationals designated as "enemy combatants" by the USA are among those who have alleged that they have been subjected to torture or other ill-treatment by US personnel in Afghanistan and Guantánamo.⁷⁶ Shafiq Rasul, Asif Iqbal, Rihel Ahmed and Jamal al-Harith have claimed that they were beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication, as well as being subjected to harassment targeted at their religious beliefs.⁷⁷

A State Department email, dated 27 June 2002, advised that in responding to a UK Member of Parliament [Geraint Davies] about a UK national [Feroz Abassi] held in Guantánamo, personnel should "use interagency cleared language" which included assurances that all detainees were being treated humanely and that the ICRC "meet with detainees individually and privately".⁷⁸ Feroz Abassi and fellow UK national Moazzam Begg were subsequently put in Camp Echo, a facility at Guantánamo described by the ICRC as "extremely harsh".⁷⁹ Each detainee was held in a windowless cell in solitary confinement in Camp Echo for more than a year. The ICRC was denied access to meet Moazzam Begg from at least February to October 2003.⁸⁰

The government of France also sought assurances. In late January 2002, a telegram from US Secretary of State Colin Powell was transmitted to the US Embassy in Paris. The telegram asked the Embassy to forward a "response letter" to the French Minister of Foreign Affairs, Hubert Védrine, who had written to the US government on 15 January 2002 in relation to the Guantánamo detentions, which had begun a few days earlier. The US government's response to the French Foreign Minister read: "Please rest assured that [the detainees] are being treated humanely, consistent with the principles of the Third Geneva Convention of 1949 and are not subject to physical or mental abuse."⁸¹ Revelations since then have shown that Guantánamo detainees have been subjected to torture and ill-treatment, including as a result of authorized interrogation techniques and detention conditions. A Federal Bureau of Investigation (FBI) email stated that "extreme interrogation techniques were planned and implemented" against certain detainees held in Guantánamo.⁸² For example, a "special interrogation plan" was authorized by former Secretary of Defense Donald Rumsfeld for use against Mohamed al-Qahtani in late 2002.⁸³ According to leaked official documents, Mohamed al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days. He was

⁷⁶ See *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AMR 51/145/2004, October 2004, pp. 20-21, 28, 124, 184. <http://www.amnesty.org/en/report/info/AMR51/145/2004>.

⁷⁷ See *Rasul v. Myers*, US Court of Appeals for the District of Columbia Circuit, 11 January 2008.

⁷⁸ Email available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002806.pdf>.

⁷⁹ Department of Defense Memorandum for Record. 9 Oct 03, *op. cit.*

⁸⁰ *Ibid.* Moazzam Begg was detainee number 558.

⁸¹ Response to Formin Vedrine letter. To AmEmbassy Paris. From SecState WashDC, 30 January 2002, available at <http://www.aclu.org/projects/foiasearch/pdf/DOS000741.pdf>.

⁸² Email dated 9 July 2004. Referring to time period May to October 2002. Responses-87 at <http://foia.fbi.gov/guantanamo/detainees.pdf>.

⁸³ On 11 February 2008, the Pentagon announced that it had sworn criminal charges against Mohamed al-Qahtani and would be seeking the death penalty at his military commission trial.

subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.⁸⁴ FBI agents observed Mohamed al-Qahtani presenting behaviour "consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours)."⁸⁵ Numerous detainees and former detainees have made allegations of torture or other ill-treatment by US personnel in Afghanistan, Guantánamo or in CIA custody at secret locations.

Further evidence of the unreliability of the USA's assurances in the "war on terror" was revealed on 21 February 2008 by the UK Foreign Secretary, who stated that the UK territory of Diego Garcia had been used for rendition flights by the USA, contrary to earlier assurances provided by the US government. In a statement to parliament, he said that "Contrary to earlier explicit assurances that Diego Garcia had not been used for rendition flights, recent US investigations have now revealed two occasions, both in 2002, when this had in fact occurred."⁸⁶ In its June 2007 report on the involvement of Council of Europe member states in the USA's secret detention and rendition program, the Council's Committee on Legal Affairs and Human Rights had noted that "the UK Government has readily accepted 'assurances' from US authorities" relating to the alleged use of Diego Garcia in the rendition program, "without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner."⁸⁷

Official US assurances about the lawful and humane treatment of detainees in its custody – particularly those it brands as "enemy combatants" – must be treated with extreme caution. Amnesty International is concerned that the UK government – which has submitted to the European Court of Human Rights that there is no reason not to proceed with the extradition of Ahmad Babar and Haroon Aswat on the basis of the Diplomatic Notes in their cases – may be unlikely to proceed with the necessary caution, however, but to adopt instead a mutually convenient

⁸⁴ See *Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, June 2006, <http://www.amnesty.org/en/report/info/AMR51/093/2006>.

⁸⁵ Re: suspected mistreatment of detainees. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.

⁸⁶ The Foreign Secretary's oral statement is available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1199215094287>.

⁸⁷ Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, June 2007, <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>. The US State Department has said of the territory of Diego Garcia: "There was an exchange of diplomatic notes in 1966 and 1976. The 1976 exchange of notes between the US and the UK states, 'Ships and aircraft owned or operated by or on behalf of either government may freely use the anchorage and the airfield.'... I think a layman's understanding of it is each government has equal right to use, as they will, for the purposes of their government aircraft or ships, either of those facilities, either the anchorages or the airstrip." The spokesman said that with regard to the use of the Diego Garcia airstrip for renditions by the USA, the "understanding" between the two governments had "evolved" over the years since 2002, and was not a "formal agreement". Sean McCormack, daily press briefing, US State Department, 21 February 2008, <http://www.state.gov/r/pa/prs/dpb/2008/feb/101214.htm>.

endorsement of diplomatic assurances. Such concern is heightened by a UK government memorandum that was leaked in January 2006. That memo – reportedly sent from the UK Foreign Office to the UK Prime Minister's office in December 2005 – concerned questions of the legality of US renditions, the USA's position on torture and other ill-treatment, and potential UK complicity in US practices.

In relation to the USA's use of diplomatic assurances, the UK memo commented that "we would not want to cast doubt on the principle of such government-to-government assurances, not least given our own attempts to secure these from countries to which we wish to deport their nationals suspected of involvement in terrorism: Algeria etc)". In concluding, the memorandum advised that the UK government should "now try to move the debate on from the specifics of rendition, extraordinary or otherwise, and focus instead on [US Secretary of State Condoleezza] Rice's clear assurance that all US activities are consistent with their domestic and international obligations". In similar vein, the document stated that "more broadly, we should try to move the debate on from concentrating on whether the US practice torture, which they have clearly said they do not, and try to focus on the US's constructive reassurance that, in all respects, they have acted in a way consistent with their domestic and international legal obligations".⁸⁸ Since then, the USA has admitted to having used an interrogation technique – "waterboarding" – which is torture and which the UK government has recognized as torture (see above). Nevertheless, the US authorities have reserved the right to use the technique again if they determine it to be legal and the circumstances to require it. The UK government opposes the use of secret detention, and has told Amnesty International that the US administration "is well aware of our position".⁸⁹ The USA's secret detention program remains authorized.

- V -

In a Military Order of 13 November 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, asserting that the 11 September attacks had "created a state of armed conflict", President Bush authorized the indefinite detention without trial, "at an appropriate location designated by the Secretary of Defense outside or within the United States", of foreign nationals whom the President has determined there is "reason to believe":

- (i) *is or was a member of the organization known as al Qaida;*
- (ii) *has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or*

⁸⁸ Memorandum available at <http://www.newstatesman.com/pdf/rendition/rendition.pdf>.

⁸⁹ Letter to Amnesty International Secretary General Irene Khan from the UK Foreign Secretary, David Miliband, 16 October 2007.

(iii) *has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)...;*

*and... it is in the interest of the United States that such individual be subject to this order.*⁹⁰

In May 2006, the US administration told the UN Committee Against Torture that the detainees held in US custody as "enemy combatants" in Guantánamo and Afghanistan were held pursuant to this Military Order.⁹¹ The US government has not repudiated this position as far as Amnesty International is aware, and the Military Order remains in force.

Foreign nationals designated under the President's constitutional Commander-in-Chief powers as "enemy combatants" have had their rights systematically violated, not only at Guantánamo, but also in Afghanistan, at undisclosed locations when unlawfully transferred and detained there by the CIA, and inside the USA in the case of three individuals held as "enemy combatants" on the mainland (one of whom, Ali al-Marri (see below), remains in indefinite military custody after almost five years). As outlined further below, Amnesty International is concerned that, in addition to the human rights violations committed against this whole category of detainees – treatment that has stemmed from the deliberate and continuing attempt to avoid or minimize judicial scrutiny – the administration has shown itself willing to exploit individual cases of detainees to serve this end.

It is this backdrop which gives Amnesty International cause for concern in the case of individuals accused of terrorism-related offences and facing extradition to the USA. Before 11 September 2001 and the US government's response to those events, Amnesty International would generally not have had concerns about the extradition of suspects to trial in US federal court once the appropriate assurances were obtained by the sending country that any such person would not face the death penalty in the USA. Such assurances were considered reliable. The law and past practice nurtured such confidence.

Since 11 September 2001, Amnesty International and others have repeatedly called on the US government to adhere to its international obligations and the rule of law in carrying out counter-terrorism measures. In a report issued in November 2001, for example, Amnesty International noted with concern that, in the context of the "war on terror", the USA was seeking in its diplomatic relations with other countries "more efficient" alternatives to extradition. The organization called on the US authorities not to seek to dilute extradition protections or to turn to the technique

⁹⁰ Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

⁹¹ List of issues to be considered during the examination of the second periodic report of the USA. Responses of the USA. 5 May 2006, page 17, <http://www.state.gov/documents/organization/66172.pdf>. This was entirely contrary to what it had argued in federal District Court in *Rasul v. Bush*, when it categorically denied that any detainee was held under the Military Order, and asserted instead that they were held more generally under the President's Commander-in-Chief powers. Amnesty International has raised this apparent shifting status with the US authorities, but has received no response.

of "extraordinary rendition" – authorized under a 1995 order signed by President Clinton and included in the Justice Department's Criminal Resource Manual as an option for federal prosecutors – to circumvent human rights protections. Amnesty International argued that:

"The solution to the judicial barriers raised in capital extraditions is not the weakening of extradition safeguards as some have suggested – it is the total abolition of the death penalty by all countries which still retain it. Until then, retentionist countries like the USA must be prepared to relinquish pursuit of the death penalty for criminal suspects apprehended abroad. To do otherwise can serve only to undermine the search for justice."⁹²

Amnesty International deeply regrets that the US government indeed turned to the rendition of detainees – rendition to interrogation and indefinite detention without charge, rather than to trial – as part of its regime of secret and other unlawful detentions operated in the "war on terror".⁹³ The USA's decision to create and continue to operate this detention regime has negative consequences for international cooperation on law enforcement. In February 2008, for example, following the US administration's confirmation that the CIA had used "water-boarding" (see above), the Swedish Minister of Justice Beatrice Ask said:

"[G]reat caution must be observed when cooperating with States where human rights are not fully respected or where the judicial system does not fulfill fundamental criteria of the rule of law. Should such information emerge, the authorities concerned must carry out a careful assessment of the appropriateness of continued cooperation. In this case, the information about the use of so-called 'water-boarding' could have consequences for legal and police cooperation with the USA".⁹⁴

To repair such damage done, the USA must seek solutions not in the form of diplomatic arrangements, but by fully adhering to international law and human rights principles. The USA must relinquish those domestic laws, policies and practices which fail to comply with its international obligations. Other governments must not become complicit in US conduct that violates international law, just as the USA must not undermine human rights and the rule of law in its relations with other states.

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⁹² USA: *No return to execution – The US death penalty as a barrier to extradition*, AI Index: AMR 51/171/2001, <http://www.amnesty.org/en/report/info/AMR51/171/2001>.

⁹³ See USA: *Below the radar: secret flights to torture and 'disappearance'*, April 2006, <http://www.amnesty.org/en/report/info/AMR51/051/2006>. On 11 February 2008, the Pentagon announced that the USA would be seeking the death penalty against six Guantánamo detainees for their alleged role in the attacks of 11 September 2001. Five of the detainees had been subjected to the CIA's secret detention program prior to being transferred to Guantánamo in September 2006.

⁹⁴ Response of 21 February 2008 to written parliamentary question 2007/08:739 Polisens terroristbekämpning, 11 February 2008. (Amnesty International translation from Swedish original).

At the request of the US authorities, Babar Ahmad was arrested in London, UK, on 5 August 2004 on the basis of an arrest warrant issued by a US Magistrate Judge in the District of Connecticut on 28 July 2004. The US Government transmitted an official request for Babar Ahmad's extradition to the USA on 6 October 2004, after a federal grand jury charged Babar Ahmad with four offences: conspiracy to provide material support to terrorists, providing material support to terrorists, conspiring to kill, kidnap, maim or injure persons or damage property in a foreign country, and money laundering. The indictment alleges, among other things, that Babar Ahmad provided, via websites, email and other means, advice and assistance, equipment, training, false documentation, funding, and other support designed to assist people involved in terrorism in Chechnya, Afghanistan and elsewhere.

Haroon Aswat was arrested in Zambia in July 2005 and after a few weeks in custody was deported to the UK. Upon arrival in the UK in August 2005, he was arrested pursuant to an extradition request from the US authorities. He has been indicted in the Southern District of New York on charges relating to an alleged conspiracy to establish a "jihad training camp" in Bly, in the State of Oregon, for the purpose of training people to fight in Afghanistan. According to Haroon Aswat's appeal to the European Court of Human Rights, the information upon which the USA's case against him rests was obtained from a US citizen James Ujaama in return for a promise by the prosecution that he would not be designated as an "enemy combatant". If true, given the implications of "enemy combatant" status for the individual so designated, this could be considered information coerced by unlawful means.⁹⁵ The threat of "enemy combatant" status, like the threat of transfer to Guantánamo, has a coercive quality.⁹⁶ James Ujaama's plea agreement states that any material breach of the agreement would release the government to prosecute Ujaama in federal court and "in addition, the United States would be free to exercise all rights it may have to detain Defendant as an enemy combatant".⁹⁷

⁹⁵ The UN Committee Against Torture has called on the USA to close the Guantánamo detention facility, stating among other things that "detaining people indefinitely without charge, constitutes per se a violation of the Convention [against Torture]." Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 22.

⁹⁶ Detainees in Iraq were threatened with transfer to Guantánamo as an interrogation method. See *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, *op. cit.*, pp. 27, 72, 77, 132.

⁹⁷ *USA v. Earnest James Ujaama*. Plea agreement [redacted]. US District Court, Western District of Washington, Seattle, 14 April 2003. Also, as part of his pre-trial agreement in 2007 to obtain release from Guantánamo after five years there and return to his native Australia to serve a short prison sentence, David Hicks signed a statement that: "I agree that for the remainder of my natural life, should the Government of the United States determine that I have engaged in conduct proscribed by Sections 950q through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement, the Government of the United States may immediately invoke any right it has at that time to capture and detain me, outside the nation of Australia and its territories, as an unlawful enemy combatant." After more than two years in indefinite US military custody without charge or trial, Yaser Hamdi signed an agreement that allowed him to be released as an "enemy combatant" and deported to Saudi Arabia. He agreed that if he ever breached the terms of the agreement, "he may be detained indefinitely insofar as consistent with the laws of armed conflict" (which the USA considers includes the indefinite detention without trial of those it unilaterally designates as "enemy combatants"). Agreement available at <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html>. The plea agreement in the case of US

Although the offences with which Haroon Aswat and Babar Ahmad have been indicted make these two foreign nationals eligible for trial in the ordinary civilian justice system in the USA, they also place them within the scope of the Military Order of 13 November 2001, and the US administration's broadly-defined and flexible notion of "enemy combatant", a status, at least with the consequences ascribed to it by the USA, unknown in international law. Under a July 2004 Department of Defense Order, an "enemy combatant" is defined as:

"an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."⁹⁸

Prior to this, the Pentagon suggested that "enemy combatant status may be used to describe an individual who, under the laws and customs of war, has become a member of or associated himself with hostile enemy forces, thereby attaining the status of a belligerent."⁹⁹ In 2004, the US Supreme Court noted that "there is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such."¹⁰⁰ Indeed, "enemy combatant" is a term that a federal judge noted in 2007 has "proven to have an elastic nature".¹⁰¹ In October 2007, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism called on the USA to abandon the "enemy combatant" categorization of detainees. The Special Rapporteur has described this US detainee category as a "description of convenience", without legal effect under international law.¹⁰²

The question arises as to whether there remains a risk, despite their indictments in federal court, that these two UK nationals could at any time be placed in that parallel jurisdiction reserved for those labeled by the USA as "enemy combatants".

A Senior District Judge in the UK found that offences with which Babar Ahmad has been indicted made him potentially subject to the Military Order of 13 November

national John Walker Lindh in 2002 stated: "For the rest of the defendant's natural life, should the Government determine that the defendant has engaged in conduct proscribed by the offenses now listed at 18 U.S.C. § 2332b(g)(5)(B), or conduct now proscribed under 50 U.S.C. § 1705... the United States may immediately invoke any right it has at that time to capture and detain the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment." Agreement at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>.

⁹⁸ Memorandum for the Secretary of the Navy. Order establishing Combatant Status Review Tribunal, 7 July 2004, <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

⁹⁹ Enemy combatant taken into custody. Department of Defense news release, 23 June 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5481>.

¹⁰⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁰¹ *Bismullah v Gates*, US Court of Appeals for the DC Circuit, 20 July 2007, Judge Rogers concurring.

¹⁰² UN Doc. A/HRC/6/17/Add. 3. Advanced Edited Version, 25 October 2007, *op. cit.*, para. 55.

2001 and designation as an "enemy combatant". The judge held that "if such an order were made there is a substantial risk that the defendant would be detained at Guantánamo Bay or subjected to rendition to another country. He would be subject to military detention, detained incommunicado, and would not have the opportunity to seek representation of his choice. He could be detained indefinitely or he could be placed before a Military Tribunal which, depending on the nature of the charge preferred, could render him liable to the death penalty". The judge added that "there is no doubt in my mind" that if Babar Ahmad were subject to the Military Order, he would be deprived of his rights under the European Convention on Human Rights, and extradition should be barred.¹⁰³

However, the US Embassy in London had provided diplomatic assurances, in a note dated 23 March 2005, that if Babar Ahmad were to be extradited he would not be subjected to the death penalty. This assurance cited Article IV of the 1972 Extradition Treaty between the US and the UK.¹⁰⁴ The note gave further assurances, without reference to any law or treaty, that he "will be prosecuted 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". The Diplomatic Note also added that he would not be "treated or designated as an enemy combatant" or prosecuted before a military commission. The UK District Judge noted that while the "Diplomatic Note...does not provide any personal protection to this defendant, [it] does bind the American Government, which includes the President of the United States". The judge concluded that, as a result of the Diplomatic Note, the risk that Babar Ahmad would be designated as an "enemy combatant" was "almost entirely removed". Noting that this was a "difficult and troubling case", the judge held that there was no statutory bar to extradition and sent the case to the UK government for a decision on whether the extradition should proceed.

Babar Ahmad appealed to the High Court, and was joined by Haroon Aswat, who had raised similar concerns and whose case had generated a similar Diplomatic Note.¹⁰⁵ In November 2006, the High Court denied the appeals of both men. On the question of the reliability of the diplomatic assurances, the High Court essentially put its trust in them, finding no reason that they had been given in anything other than good faith, and having found no past examples in US/UK extraditions of assurances having been breached. In June 2007, the House of Lords refused leave to appeal and on 10 June 2007, Babar Ahmad and Haroon Aswat appealed to the European Court of Human Rights. That appeal is pending.¹⁰⁶

¹⁰³ *USA v. Ahmad*, Bow Street Magistrates' Court, 17 May 2005.

¹⁰⁴ Article IV of the treaty reads: "If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out."

¹⁰⁵ The Diplomatic Note in Haroon Aswat's case did not refer to the death penalty because the offences for which extradition was sought are not punishable by the death penalty.

¹⁰⁶ A pre-publication version of this Amnesty International report was filed in the European Court in late January 2008 by UK lawyers for the men facing extradition.

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In the context of the USA's extradition requests for foreign nationals suspected of involvement in terrorism, assessment of the protections afforded by US diplomatic assurances must today take account of the power that has been ascribed to the US President, including in the binding legal opinions of the Justice Department's Office of Legal Counsel (OLC).¹⁰⁷ A recent head of the OLC has written that:

"Most Americans (including most lawyers) think the law is what courts say it is, and they implicitly equate legal interpretation with judicial interpretation. But the executive branch does not have the same institutional constraints as courts, especially on national security issues... In addition, for many issues of presidential power there are no controlling judicial precedents. The Supreme Court has never resolved whether the President can use force abroad unilaterally without congressional authorization; or whether the President can terminate treaties; or the scope of executive privilege; or many other fundamental questions of presidential authority... When OLC writes its legal opinions supporting broad presidential authority in these contexts – as OLCs of both parties have consistently done – they cite executive branch precedents (including Attorney General and OLC opinions) as often as court opinions. These executive branch precedents are 'law' for the executive branch even though they are never scrutinized or approved by courts".¹⁰⁸

Such statements throw a spotlight on notions of presidential power indicated, for example, in President Bush's statement when signing the Detainee Treatment Act (DTA) in 2005. Referring to the DTA's prohibition on cruel, inhuman or degrading treatment (as defined in US law) of detainees in US custody abroad, President Bush said that "the executive branch shall construe" this part of the legislation "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President... of protecting the American people from further terrorist attacks."¹⁰⁹ In similar vein on 8 March 2008, vetoing legislation aimed at preventing the CIA from using "waterboarding" and other "enhanced" interrogation techniques in its secret detention program, President Bush stated that "I cannot sign into law a bill that would prevent me, and future Presidents, from authorizing the CIA to conduct a

¹⁰⁷ With few exceptions, the Office of Legal Counsel's legal opinions are binding on all executive branch agencies, although they can be overruled by the Attorney General or the President. Jack Goldsmith, the former head of the Office of Legal Counsel (2003-2004), has stated that "the President and Vice President always made clear that a central administration priority was to maintain and expand the President's formal legal powers". Jack Goldsmith, *The Terror Presidency*, W.W. Norton and Co (2007), page 132.

¹⁰⁸ Jack Goldsmith, *The Terror Presidency* (2007), *op. cit.*, page 36.

¹⁰⁹ President's Statement on Signing of H.R. 2863, the 'Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 30 December 2005, <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

separate, lawful intelligence program, and from taking all lawful actions necessary to protect America from attack."¹¹⁰

The former head of the Justice Department's OLC has said that "the administration chose to push its legal discretion to its limit and rejected any binding legal constraints on detainee treatment" in the "war on terror".¹¹¹ This included its aim "to go right to the edge of what the torture law prohibited, to exploit every conceivable loophole".¹¹² Thus, as part of its global war framework, conducted under the President's constitutional authority as Commander in Chief of the Armed Forces and his authority to conduct "foreign affairs", the administration has taken the position that the President is essentially unconstrained by US or international law. For example:

"Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon... [D]eterminations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response..., under our Constitution, are for the President alone to make".¹¹³ According to this memorandum, which has never been repudiated, not even the Authorization for the Use of Military Force (AUMF) "can place any limits on the President's determinations as to any terrorist threat". Amnesty International believes that the broadly-defined AUMF, a joint resolution passed by Congress in the wake of the 9/11 attacks, has been abused by the administration in justifying its detention policies, and the organization has called for its revocation.¹¹⁴

"[A]ny presidential decision in the current conflict concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a controlling Executive act that would immediately and completely override any customary international law norms... [A]llowing the federal courts to rely upon international law to restrict the President's discretion to conduct war would raise deep structural problems... The power to override or ignore customary international law, even the law applying to armed conflict, is an integral part of the President's foreign affairs power".¹¹⁵

¹¹⁰ Message to the House of Representatives, 8 March 2008, <http://www.whitehouse.gov/news/releases/2008/03/20080308-1.html>.

¹¹¹ *The Terror Presidency* (2007), *op. cit.*, pages.119-120.

¹¹² *Ibid.*, page 146.

¹¹³ Memorandum opinion for Timothy Flanigan, Deputy Counsel to the President. *The President's Constitutional authority to conduct military operations against terrorists and nations supporting them*. John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001, available at <http://www.usdoj.gov/olc/warpowers925.htm>.

¹¹⁴ See Section 9 of *USA: Justice at last or more of the same? Detentions and trials after Hamdan v. Rumsfeld*, AMR 51/146/2006, September 2006, <http://www.amnesty.org/en/report/info/AMR51/146/2006>.

¹¹⁵ Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. *Application of treaties and laws to al Qaeda and Taliban detainees*. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002 (internal quote marks omitted).

"We conclude that under the circumstances of the current war against al Qaeda and its allies, application of [the US law prohibiting torture by US agents abroad] to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional".¹¹⁶

"Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we... conclude that [the US law prohibiting torture abroad] does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority".¹¹⁷

"Trials by military commissions are not 'criminal cases' within the terms of the [Fifth] Amendment [of the US Constitution]. Rather, they are entirely creatures of the President's authority as Commander-in-Chief...and are part and parcel of the conduct of a military campaign."¹¹⁸

The recent admission by the CIA Director, General Michael Hayden, that detainees held in secret CIA custody were subjected to the torture technique of waterboarding was accompanied by the revelation that the authorities were reserving the right to

¹¹⁶ Memorandum for Alberto R. Gonzales, Counsel to the President. *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*. Jay S. Bybee, Office of Legal Counsel, Department of Justice, 1 August 2002. A replacement memorandum, issued in December 2004, did not repudiate this notion of presidential power to authorize torture, noting instead that the "discussion" of it was "unnecessary". The new document also noted that "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Legal standards applicable under 18 U.S.C. §§ 2340-2340A. Memorandum opinion for the Deputy Attorney General, 30 December 2004. The head of the Office of Legal Counsel who has said he was responsible for withdrawing the August 2002 memorandum has written that "I had not concluded that the actual interrogation techniques approved by the Justice Department were illegal". Jack Goldsmith, *The Terror Presidency*, *op. cit.*, page 152. These techniques are believed to have included "waterboarding". Amnesty International has suggested that the US government's recent revelations about its use of water torture indicate that the spirit of the now notorious 1 August 2002 memorandum live on. See: *USA: Impunity and injustice in the 'war on terror'*, *op. cit.*

¹¹⁷ Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003, § III.3.a. In December 2005, Congress passed the Detainee Treatment Act, prohibiting the cruel, inhuman or degrading treatment (as defined in US rather than international law) of detainees in US custody. Signing the Act into law, President Bush stated that the executive branch would interpret the legislation "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President... of protecting the American people from further terrorist attacks". Signing statement, 30 December 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

¹¹⁸ *Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense from Office of Legal Counsel, US Department of Justice, 26 February 2002.

use it or any other currently unauthorized techniques in the future, should they deem the "circumstances" to require it, and should the Attorney General deem the technique lawful and the President authorize it.

"Were waterboarding to be brought back into the program", Attorney General Mukasey testified to the House Judiciary Committee on 7 February 2008, the proposal to do so "would have to come initially from the Director of the Central Intelligence Agency and, I believe, the Director of National Intelligence to the Justice Department. And I would have to analyze that question..."¹¹⁹ Then, in the words of the White House spokesman on 6 February 2008, "the proposal would go to the President, the President would listen to the determinations of his advisors, and make a decision".¹²⁰ In other words, despite all the assurances that have been given to the contrary over the years, the US President appears still to be considered to have the power to authorize torture.¹²¹

An accountability gap is part of this equation. The current US Attorney General, Michael Mukasey, told the US House of Representatives Committee on the Judiciary on 7 February 2008 that he would not initiate a criminal investigation into the CIA's past use of waterboarding as its legality had been approved by the Office of Legal Counsel (OLC) of the Justice Department.¹²² The head of the OLC in 2003 and 2004 has said that:

"OLC speaks for the Justice Department, and it is the Justice Department that prosecutes violations of criminal law. If OLC interprets a law to allow a proposed action, then the Justice Department won't prosecute those who rely on the OLC ruling. Even independent counsels would have trouble going after someone who reasonably relied on one... One consequence of OLC's authority to interpret the law is the power to bestow on government officials what is effectively an advance pardon for actions taken at the edges of vague criminal laws... It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards".¹²³

¹¹⁹ Hearing on oversight of the Department of Justice, US House of Representatives Committee on the Judiciary, 7 February 2008.

¹²⁰ Press briefing by Tony Fratto, 6 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080206-3.html>.

¹²¹ Specifically asked if the President could override a Justice Department finding that "waterboarding" was illegal under current US law, Steven Bradbury declined repeatedly to give an unequivocal answer. Eventually, he responded that "in theory, the president stands at the top of the executive branch. Now in theory all of the authority of the executive branch officers, including the Attorney General, is subject to the ultimate authority of the president. That said, it is quite hypothetical, and I believe unsustainable, for the president to disregard an opinion of the Attorney General. Particularly a considered formal opinion..." Testimony to House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 14 February 2008.

¹²² *Ibid.*

¹²³ Jack Goldsmith, *The Terror Presidency, op. cit.*, page 96. The Justice Department's Office of Professional Responsibility is, however, investigating the department's legal approval of "water-boarding". See Durbin and Whitehouse: Justice Department is investigating torture authorization. Press release of Senator Sheldon Whitehouse, 22 February 2008, <http://whitehouse.senate.gov/record.cfm?id=293379&>.

There are numerous documents relating to the authorization and discussion of detentions and the treatment of detainees which remain classified. They include, for example, an 18-page Justice Department memorandum dated 1 August 2002 advising the CIA on the legality of "alternative interrogation methods". This memorandum remains classified. Apparently referring to this document at the House Judiciary Committee hearing on 7 February 2008, US Attorney General Michael Mukasey rejected the committee chairman's request to see it, on the grounds that it "discusses particular techniques that were part of what remains a classified program".

In addition, the US government has been non-transparent as to which conduct it considers to constitute torture and other cruel, inhuman or degrading treatment or punishment, and which acts it considers are unlawful remains open to question, in contrast to the unequivocal prohibition on such treatment in international law. The current US Attorney General, like his predecessor, has refused, for example, to state that water-boarding is unlawful in all circumstances.¹²⁴ Indeed, at the above-mentioned hearing in front of the House Judiciary Committee on 7 February 2008, Attorney General Mukasey was asked whether he was "ready to start a criminal investigation into whether this confirmed used of waterboarding by United States agents was illegal". The Attorney General replied: "No, I am not". He suggested that, because the Justice Department had authorized this water torture technique as part of the CIA program, it "cannot possibly be the subject of a criminal – of a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice".

In a memorandum which has never been withdrawn, the President indicated that the USA considers there are individuals who are "not legally entitled" to humane treatment, and that such treatment is a matter of policy rather than law.¹²⁵ In addition, the President has authorized practices which clearly violate the USA's treaty obligations, even after the government has expressly been informed by treaty monitoring bodies of this fact. The US government appeared before the UN Human Rights Committee and the UN Committee Against Torture in Geneva in 2006. These expert bodies – which monitor compliance with, respectively, the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) – were clear in their repudiation of the USA's secret detention program, at that time not yet officially confirmed. The Human Rights Committee stated:

"The State party should immediately abolish all secret detention and secret detention facilities...It should only detain persons in places in which they can enjoy the full protection of the law."¹²⁶

¹²⁴ USA: *Slippery slopes and the politics of torture*, AI Index: AMR 51/177/2007, 9 November 2007, <http://www.amnesty.org/en/report/info/AMR51/177/2007>.

¹²⁵ Para 3, Memorandum re: Humane treatment of al Qaeda and Taliban detainees, President George W. Bush, 7 February 2002.

¹²⁶ Human Rights Committee, United States of America: Concluding observations, UN Doc. CCPR/C/USA/Q/3/CRP.4, 27 July 2006.

In similar vein, the Committee Against Torture stated:

"The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such conditions constitutes, *per se*, a violation of the Convention... The State party should publicly condemn any policy of secret detention."¹²⁷

Within weeks of these UN treaty body reports, President Bush confirmed the existence of the secret detention and interrogation program and endorsed its continuation.¹²⁸ He was, in effect, admitting to having authorized enforced disappearance, a crime under international law.¹²⁹ On 20 July 2007, he issued an executive order authorizing continuation of the program.¹³⁰ This Order remains in force and since it was issued the US government has rejected the conclusions on secret detention of these two treaty monitoring bodies.¹³¹

It would seem possible, if not probable, that as the President is deemed to have the authority to override laws or treaties approved by Congress, or customary international law, or the findings of treaty monitoring bodies, a Diplomatic Note issued through a US Embassy would be seen as little more than a minor obstacle in the event the President determined that national security required bypassing such an assurance. Particularly given the government's past record on assurances during the "war on terror", as illustrated in this report, it might conclude that the damage done to the credibility of any future extradition assurances by breaching such an assurance now would be a price worth paying if national security considerations in this "unprecedented" global war were deemed to justify it.

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A number of US federal judges have themselves expressed concern about the administration's interpretation of the breadth of executive power in the context of "war on terror" detentions. In December 2003, for example, the US Court of Appeals for the Ninth Circuit ruled in the case brought on behalf of a Libyan national, Salem Ghorebi, detained in Guantánamo:

"Under the government's theory, it is free to imprison Ghorebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations

¹²⁷ Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006.

¹²⁸ President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹²⁹ See *Off the Record: US responsibility for enforced disappearances in the 'war on terror'*, AI Index: AMR 51/093/2007, June 2007, <http://www.amnesty.org/en/report/info/AMR51/093/2007>.

¹³⁰ Executive order: Interpretation of the Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency. 20 July 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>. See *USA: Law and executive disorder: President gives green light to secret detention program*, AI Index: AMR 51/135/2007, August 2007, <http://www.amnesty.org/en/report/info/AMR51/135/2007>.

¹³¹ UN Doc.: CAT/C/USA/CO/2/Add. 1, 6 November 2007, *op. cit.* UN Doc.: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, *op. cit.*

among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantánamo, the US government has never before asserted such a grave and startling proposition... a position so extreme that it raises the gravest concerns under both American and international law."¹³²

There has been much international concern also. In September 2006, for example, the UK Secretary of State for Constitutional Affairs said:

"It is a part of the acceptance of the rule of law that the courts will be able to exercise jurisdiction over the executive. Otherwise, the conduct of the executive is not defined and restrained by law. It is because of that principle, that the USA, deliberately seeking to put the detainees beyond the reach of the law in Guantánamo Bay, is so shocking an affront to the principles of democracy... Without independent judicial control, we cannot give effect to the essential values of our society. To give effect to our democratic values needs the participation of executive, legislature, and judiciary together."¹³³

Several former US diplomats, including 18 former Ambassadors, have expressed their concern about the US government's detention regime:

"Citizens of foreign countries cannot assume that what happened to the Guantánamo prisoners cannot happen to them. Neither citizenship in a friendly country, nor location far from hostilities, renders them safe from capture and transfer to Guantánamo... It is not evident why, if the Executive Branch can detain prisoners in Guantánamo free of effective judicial inquiry, it cannot expand the practice to establish a global criminal justice system with other prison camps like Guantánamo, similarly subject to no legal oversight and in which any foreigner deemed a danger by some official might be detained indefinitely. Indeed, our government acknowledged last year that it used secret prisons abroad [and has] made no commitment not to use secret prisons again in the future".¹³⁴

In *Rasul v. Bush* in 2004, the US Supreme Court ruled that US courts did have jurisdiction, at least under federal law, to consider *habeas corpus* petitions from foreign nationals held in Guantánamo. In *Hamdan v. Rumsfeld* in 2006, the Court ruled, among other things, that the military commissions established under the 13

¹³² *Gherebi v. Bush*, US Court of Appeals for the Ninth Circuit, 18 December 2003.

¹³³ *The Role of Judges in a Modern Democracy*. UK Constitutional Affairs Secretary and Lord Chancellor, Lord Falconer of Thoroton, Magna Carta Lecture, Sydney, Australia, 13 September 2006, <http://www.dca.gov.uk/speeches/2006/sp060913.htm>.

¹³⁴ *Boumediene v. Bush*. Brief of former US diplomats in support of the petitioners, US Supreme Court, August 2007.

November 2001 Military Order were unlawful. Nevertheless, the administration's interpretation of these rulings, and the passage of the Detainee Treatment Act and the Military Commissions Act in 2005 and 2006 respectively, have left hundreds of foreign nationals held as "enemy combatants" in an essentially "rights-free" zone of executive detention, deprived of effective judicial protection and remedies for human rights violations committed against them. These violations have included enforced disappearance, secret detention, prolonged incommunicado detention, extra-judicial transfer, torture and other cruel, inhuman or degrading treatment in the form of interrogation techniques and detention conditions, arbitrary detention, and unfair trial procedures by military commissions, bodies with the power to hand down death sentences after trials that fail to comply with international standards including in their admission of information obtained under cruel, inhuman or degrading treatment or punishment.¹³⁵ Even children have not been exempt from such violations. International concern for the human rights of such children has met with US silence or assurances that have failed to amount to guarantees.¹³⁶ An example of this relates to Omar Khadr, a Canadian national held taken into US custody in Afghanistan at the age of 15 and transferred to Guantánamo shortly after he turned 16.¹³⁷

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Amnesty International has documented evidence of how the US administration has shown itself willing to exploit individual cases of detainees in order to avoid judicial scrutiny.¹³⁸ For example:

¹³⁵ See *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, <http://www.amnesty.org/en/report/info/AMR51/044/2007>.

¹³⁶ For example, a request to the US State Department from the US Embassy in Mexico for information on the welfare and status of the child detainees in Guantánamo, prompted by a meeting with Amnesty International (AI) in Mexico City, led to an email within the State Department that the "only thing DoD [Department of Defense] will acknowledge is that all detainees at GTMO, regardless of their age, are considered enemy combatants. DoD will not discuss the other questions, or agree to provide [Government of Mexico] or AI updates." Email to Christopher Camponovo (Senior Adviser, Bureau of Democracy, Human Rights and Labor, State Department), dated 4 June 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002232.pdf>.

¹³⁷ At the time of writing, Omar Khadr was facing trial by military commission in Guantánamo after more than five years in military custody. He and others who were under 18 years old at the time they were taken into US custody have alleged that they were subjected to torture or other ill-treatment in incommunicado detention. The Canadian authorities have stated that they have "consistently sought to ensure that Mr Khadr receives the benefits of due process" and "to ensure that the treatment of Mr Khadr is consistent with internationally recognized norms and standards for the treatment of juvenile offenders, and that his juvenile status at the time the alleged events occurred is considered." Letter to Associate Professor, University of Toronto, from Maxime Bernier, Minister of Foreign Affairs, 17 October 2007, *op. cit.* Any such assurances sought and obtained have not resulted in treatment of Omar Khadr that complies with international law. Indeed, the UN Secretary General's Special Representative for Children and Armed Conflict has recently raised her concerns directly with the US government about its treatment of Omar Khadr and the disturbing international precedent his trial by military commission would represent. See UN protests US decision to try Omar Khadr. National Post, 19 November 2007,

Late on a Friday afternoon in October 2004, the government told the US District Court that Yemeni detainee Salim Hamdan had been moved out of the solitary confinement in Guantánamo in which he had been held for the previous 10 months. The Court had been due hear oral arguments the following Monday to consider the “urgent and striking claim” brought on behalf of Hamdan in a *habeas corpus* petition that this solitary confinement regime amounted to inhumane treatment. The judge stated that although the government was “capable of repeating” the solitary confinement regime, its announcement that it had moved Hamdan meant that the court could not review the claim.

On 11 January 2005, five days after allegations of the earlier rendition to Egypt and torture of Guantánamo detainee Mamdouh Habib were made public in documents filed in *habeas corpus* proceedings in District Court, the Pentagon announced that this Australian detainee – taken into custody in Pakistan in October 2001 – would be transferred from Guantánamo to Australia. Mamdouh Habib was flown to Australia two weeks later and released. According to the *New York Times*, Australian officials said that “the Bush administration told the Australians in January [2005] that it would not prosecute him because the CIA did not want the evidence about Mr. Habib being taken to Egypt, and his allegations of torture, raised in court”.¹³⁹

On 22 December 2005 a federal judge ruled that the continued indefinite detention of two Uighur detainees, Abu Bakker Qassim and Adel Abdul Hakim, nine months after they had been found to be “no longer enemy combatants” by CSRTs at Guantánamo, was unlawful, but the judge decided that he could provide no remedy.¹⁴⁰ The case was scheduled to be argued in the DC Court of Appeals at 9.30am on Monday 8 May 2006. At 4.30pm on Friday 5 May 2006, the detainees’ lawyers received a telephone call from the Department of Justice informing them that their clients, along with three other Uighur detainees, had been transported to Albania, where they had landed about one hour earlier. At 4.39pm on 5 May 2006, the administration filed an emergency motion in the District Court arguing that the case should be dismissed as moot because the detainees were now in Albania. It transpired that the detainees had been told by their military captors on or around 2 May 2006 that they were going to be sent to Albania, but had no way of contacting their lawyers. The lawyers had been informed “by highly placed sources that two western governments, each of which has a Uighur expatriate population, had made substantial progress toward a resettlement of the Uighurs in those countries prior to May 5, 2006. Yet the Executive elected to send the men to one of the poorest countries in Europe, a place

¹³⁸ *USA: No substitute for habeas corpus: six years without judicial review in Guantánamo*, AI Index: AMR 51/163/2007, November 2007 <http://www.amnesty.org/en/report/info/AMR51/163/2007> .

¹³⁹ *Australia uneasy about US detainee case*, New York Times, 10 April 2005.

¹⁴⁰ *Qassim v. Bush*, US District Court for the District of Columbia, Memorandum of 22 December 2005. The judge noted that the government “advised nobody” about the NLEC determinations.

with no real economic prospects for the men, and where the men have no family, friends, common language, or point of reference".¹⁴¹

Again, such measures aimed at avoiding the ordinary courts in detainee cases has served to undermine the US government's subsequent assurances that it is committed to those same courts in the cases of particular defendants or detainees.

In addition to the above cases, two other individuals – one US national and one foreign national – were held in the normal civilian justice system and facing trial in federal court, before being summarily labeled as "enemy combatants", plucked from the civilian system and placed into indefinite military detention (see cases of Jose Padilla and Ali al-Marri immediately below and that of Yaser Hamdi further below).

US citizen Jose Padilla was arrested at Chicago Airport in May 2002 on the suspicion of plotting to detonate a radioactive "dirty" bomb against a US target. On the basis of an executive order signed by President Bush on 9 June 2002, he was transferred from civilian to military custody two days before there was to be a court hearing on his case. The Justice Department asserts that this is within the President's authority as commander-in-chief of the armed forces.¹⁴² Padilla was held without charge or trial in military custody for the next three and a half years. The Pentagon announced it was granting him access to a lawyer nine days before the Supreme Court agreed to take the appeal challenging the lawfulness of his detention, 20 months after he had been put in incommunicado military custody.¹⁴³ The Court ultimately did not review the case, on the grounds that it had been filed in the wrong jurisdiction. In November 2005, with the question of the lawfulness of his detention again pending before the Supreme Court, President Bush issued a memorandum to the Secretary of Defense authorizing Padilla's transfer back to Justice Department custody to face criminal charges (not including any reference to a "dirty" bomb plot), and the government moved to have the Supreme Court dismiss consideration of the case. The Court did so over the dissent of three Justices. Three other Justices who agreed with dismissing the case acknowledged that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts".¹⁴⁴

¹⁴¹ *Qassim v. Bush*, Status report concerning petitioners-appellants and request for briefing schedule. US Court of Appeals for the DC Circuit, 16 May 2006.

¹⁴² For example, "On Sunday, June 9, 2002, President Bush, acting as Commander in Chief, determined that Abdullah al Muhajir, born in the United States as Jose Padilla, is an enemy combatant who poses a serious and continuing threat to the American people and our national security. Al Muhajir was subsequently transferred from the custody of the Justice Department to the control of the Defense Department." Statement of Attorney General John Ashcroft regarding the Padilla case, 20 February 2004, http://www.usdoj.gov/opa/pr/2004/February/04_ag_102.htm.

¹⁴³ Padilla allowed access to lawyer, 11 February 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7070>. The US Supreme Court granted *certiorari* in the *Padilla* case on 20 February 2004.

¹⁴⁴ *Padilla v. Hanft*, US Supreme Court, Justice Kennedy, with whom the Chief Justice and Justice Stevens join, concurring in the denial of *certiorari*. Nearly six years after he was first detained, Jose Padilla was

Qatar national Ali Saleh Kahlah al-Marri was due to go to trial on 21 July 2003 in an ordinary US federal court on charges of credit card fraud and making false statements to the FBI. On Friday 20 June 2003, the judge scheduled a hearing on pre-trial motions, including a motion to suppress evidence against Ali al-Marri allegedly coerced under torture. On the following Monday, 23 June 2003, before the hearing could be held, the government moved to have the indictment dismissed, and transferred Ali al-Marri to military custody on the basis of an executive order signed that morning by President Bush designating al-Marri as an "enemy combatant". Over four years later, Ali al-Marri remains in untried military custody in the USA. For the first 16 months of this custody, he was held entirely incommunicado, during which time he was allegedly subjected to torture or other ill-treatment. He remains in indefinite detention without charge or trial in military custody (see further below).

The High Court in the UK rejected the examples of Jose Padilla and Ali al-Marri as relevant because there had been no extradition proceedings, and therefore no diplomatic assurances had been "given on the international plane to another sovereign State". It added that there was "no reason to doubt that the American authorities would likewise give effect to the views of this court as to the critical importance of the integrity of the Diplomatic Notes". The criticisms that had been leveled at US policies, the High Court stated, "touch[ed] only upon the internal affairs of the United States" and therefore did not "constitute a premise from which this court should conclude that the Diplomatic Notes will not be fully honoured".

Amnesty International has no evidence to suggest that the diplomatic assurances themselves have not been issued in good faith, or to suggest that the US authorities are planning to remove either Babar Ahmad or Haroon Aswat from the criminal justice system after extradition, and it does not intend to call into question the independence of the federal prosecutors involved in this case. Nevertheless, the organization stresses that the administration has shown a tendency in the "war on terror" to improvise measures relating to detentions, under broad notions of presidential authority.¹⁴⁵ Indeed, until Jose Padilla and Ali al-Marri were designated as "enemy combatants" by presidential order, there were no public indications whatsoever that they would be taken out of the normal criminal justice system, and even their legal representatives were not forewarned. Thus, Amnesty International considers that the fact that Babar Ahmad and Haroon Aswat would be in that same system after their extradition is not in itself a guarantee that they would remain so.

Furthermore, the US government has shown itself to be apparently willing to risk diplomatic tensions in pursuing its "war on terror" detention policies, as well as to undermine notions of sovereignty and the views of judicial bodies abroad. A legal brief filed in August 2007 in the Supreme Court, for example, alleges that in

sentenced to 17 years and four months in prison in January 2008. See *USA: Jose Padilla sentenced: Concerns about justice remain*, AI Index: AMR 51/008/2008, 22 January 2002, http://www.amnesty.org/en/report/info/AMR_51/008/2008.

¹⁴⁵ See for example, the development of the Combatant Status Review Tribunal in 2004, and more generally evidence of the manipulation of individual detainee cases around times of judicial intervention. *USA: No substitute for habeas corpus, op. cit.*, November 2007.

October 2001 the Bosnian police arrested six men of Algerian origin resident in Bosnia and Herzegovina under threat from US officials that failure to do so would jeopardize diplomatic relations between the two countries.¹⁴⁶ On 17 January 2002, after a three-month international investigation failed to uncover evidence supporting the reason for the men's arrest, namely their alleged involvement in a plot to bomb the US Embassy in Sarajevo, the Supreme Court of the Federation of Bosnia and Herzegovina ordered them to be released. On the same day, the Human Rights Chamber for Bosnia and Herzegovina issued an order prohibiting the removal of the men from Bosnian territory. Nevertheless, under what has been characterized as "extraordinary pressure" applied by the US Embassy in Sarajevo,¹⁴⁷ the authorities in Bosnia and Herzegovina handed the men to the USA and the latter transferred them to Guantánamo where they have been held as "enemy combatants" ever since.¹⁴⁸ Again, if the USA is willing to dismiss the views of a foreign court in this way, it must be considered possible that it might do so with regard to the "views of [the UK High Court] as to the critical importance of the integrity of the Diplomatic Notes" in relation to these extradition cases, if national security demands were perceived to require it.¹⁴⁹

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¹⁴⁶ *Boumediene v. Bush*. Brief for the Boumediene petitioners. In the Supreme Court of the United States, August 2007.

¹⁴⁷ Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states. Draft report – Part II (explanatory memorandum). Rapporteur Dick Marty, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 7 June 2006.

¹⁴⁸ For three years, the entry on Bosnia and Herzegovina in the US State Department's annual Country Reports on Human Rights Practices in other countries, under the heading 'arbitrary arrest, detention or exile', reported developments in the case of 'six Algerian terrorism suspects' who were transferred 'to the custody of a foreign government' in January 2002. The State Department reported that in 2002 and 2003, the Human Rights Chamber ruled that the treatment of the men had violated their treaty-based human rights, including the right not to be arbitrarily deported in the absence of a fair procedure. In its report issued in February 2005, the State Department noted that the families of the men 'transferred to a foreign government's custody' had not yet been paid the compensation ordered by the Human Rights Chamber. What the State Department failed to point out was that the mysterious 'foreign government' in question was that of the United States of America. A heavily redacted State Department document from January 2002 on this case which has since been made public refers to a "purported Human Rights Chamber injunction", and suggests that one or more Bosnian government officials had accepted the USA taking custody of the men but had said that "no formal note would be sent in reply". The State Department note ended by commenting that "we need to stand by the [redacted] over the coming days, until the anticipated crescendo of public criticism dies down, as we expect it will".

<http://www.aclu.org/projects/foiasearch/pdf/DOS000052.pdf>. The detainees remain in indefinite military custody without charge or trial in Guantánamo six years later.

¹⁴⁹ A heavily redacted telegram from a US Embassy to the US Secretary of State in March 2003 appears to relate to a government (Ministry of Interior) request for information about two of the detainees taken from Bosnia. The text suggested for response includes the assurance that all detainees being held at Guantánamo are being treated humanely and "in accordance with the principles of the Third Geneva Convention". Cable available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002629.pdf>. A number of the detainees taken from Bosnia have alleged that they have been ill-treated. See: *USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power*, AI Index: AMR 51/063/2005, May 2005, pp. 16-18, <http://www.amnesty.org/en/report/info/AMR51/063/2005>.

Since the attacks on 11 September 2001, the US administration has viewed those it brands as "enemy combatants" as potential sources of intelligence who may be subjected to a "continuous" interrogation cycle.¹⁵⁰ Information gleaned from one detainee may be used to detain another, who is then himself put into indefinite detention as an "enemy combatant". This "continuous" cycle supposes that intelligence can be obtained from a detainee "years" after the interrogation process began.¹⁵¹ Under this process – "especially important in the War on Terrorism" and especially in the case of those identified as "enemy combatants" – there "is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods".¹⁵² Access to lawyers disrupts the process and puts national security at risk.¹⁵³ The use of coercion against detainees forms part of the cycle.¹⁵⁴

In the case of Ali al-Marri, for example, the Pentagon stated that he had been removed from civilian custody "due to recent credible information provided by other detainees in the War on Terrorism".¹⁵⁵ Under this framework, the naming of any foreign national by another detainee – regardless of whether that information had been obtained under torture or other cruel, inhuman or degrading treatment – could potentially lead to their designation as an "enemy combatant", a label that could mean detention without trial for the rest of their life, or unfair trial by military commission.

Numerous cases have indicated that the US authorities have been willing to label individuals as "enemy combatants" on minimal information or information of dubious quality. There is evidence, for example, that Murat Kurnaz, a Turkish citizen born in Germany, was held in Guantánamo for nearly four years after US authorities concluded that he had had no involvement in terrorism. In September

¹⁵⁰ Declaration of US Army Colonel Donald D. Woolfolk, 13 June 2002, filed in *Hamdi v. Rumsfeld*, <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdi61302wflkdec.pdf>. ("As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented... Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic.... [T]he intelligence gathering process must be continuous. As new information is learned from other sources it serves a new avenue of interrogation with detained enemy combatants").

¹⁵¹ Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9 January 2003, http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

¹⁵² *Ibid.*

¹⁵³ Woolfolk and Jacoby declarations, *op. cit.*

¹⁵⁴ For example, the documented torture and other ill-treatment of Mohammed al-Qahtani during his interrogation in Guantánamo, according to the Pentagon "provided detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantánamo". The torture and other ill-treatment of Mohamedou Ould Slahi, who has been held in Guantánamo since August 2002, appears to have been influenced by what a detainee held in secret US custody told his interrogators. See *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AMR 51/149/2006, September 2006, <http://www.amnesty.org/en/report/info/AMR51/149/2006>.

¹⁵⁵ *Enemy combatant taken into custody*. Department of Defense news release, 23 June 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5481>.

2002, a German intelligence officer wrote a memorandum that stated that "USA considers Murat Kurnaz's innocence to be proven. He is to be released in approximately six to eight weeks. The German authorities will be informed in advance, so that his release can be presented as having been effected by the Germans".¹⁵⁶ Murat Kurnaz was nevertheless held without charge or trial as an "enemy combatant" for another four years before being released from Guantánamo in August 2006. This was a year and a half after a federal judge had been highly critical of the USA's treatment of Murat Kurnaz, and had suggested that his detention violated basic principles of due process.¹⁵⁷

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Since the passage of the Military Commissions Act (MCA), which applies only to aliens held as "enemy combatants", foreign nationals must be considered more at risk of transfer from civilian to military custody than US citizens and to the unlawful treatment and absence of remedy that would ensue.¹⁵⁸ Indeed, after passage of the law, the then US Attorney General stated: "I want to emphasize that the Military Commissions Act does not apply to American citizens. Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law."¹⁵⁹ Under the MCA,

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in... section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Under the Detainee Treatment Act (DTA), judicial review is limited to a single federal court – the Court of Appeals for the District of Columbia Circuit, and

¹⁵⁶ *Evidence of innocence rejected at Guantánamo*. Washington Post, 5 December 2007 (includes link to memorandum), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/04/AR2007120402307_pf.html.

¹⁵⁷ See pages 57-59 of *USA: Guantánamo and beyond: the continuing pursuit of unchecked executive power*, May 2005, *op. cit.*

¹⁵⁸ In addition to its continued labelling of hundreds of foreign nationals as "enemy combatants" in US custody in Afghanistan and Guantánamo, the US administration has never repudiated its claim that it can unilaterally brand US citizens as "enemy combatants" and hold them indefinitely.

¹⁵⁹ Alberto Gonzales hosts 'Ask the White House'. 18 October 2006, The Attorney General was responding to the question: "If you, Mr Gonzales, were arrested and classified as an unlawful enemy combatant and you were an innocent person, what course of action would you take?" <http://www.whitehouse.gov/ask/20061018.html>.

essentially to whether the administration has properly applied the rules of its administrative review system – the Combatant Status Review Tribunal (CSRT). Applying its global war framework the US administration has viewed *habeas corpus* as an abuse rather than as a protection against abuse. The version of the *habeas corpus* stripping MCA which the administration sent to Congress on 6 September 2006, for example, stated that the legislation was necessary because “the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment... to the abuse of American legal processes” (that is, via *habeas corpus* petitions, filed by US lawyers). The CSRT is an *administrative* review scheme established by the same Department of Defense which the following year appeared to equate *judicial* process with terrorism when listing “vulnerabilities” of the USA. Its National Defense Strategy, released in March 2005, asserted that “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”¹⁶⁰

In an October 2007 brief to the US Supreme Court, the US government has maintained that the judicial review under the MCA/DTA regime “is a fully adequate substitute for habeas corpus in this extraordinary wartime context”.¹⁶¹ The US government has recently told the UN Committee Against Torture that “providing such an opportunity for judicial review *exceeds* the requirements of the law of war... These procedural protections are more extensive than those applied by any other nation in any previous armed conflict...”¹⁶²

Amnesty International has concluded that this system of review is fundamentally flawed and in no way an adequate substitute for the internationally-recognized right to *habeas corpus*, a fundamental rule of law procedure from which, even in times of emergency and war, however defined, there can be no derogation. The system is also discriminatory – targeted only at foreign nationals, in violation of international law.¹⁶³

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In its decision rejecting the appeals of Babar Ahmad and Haroon Aswat, the UK High Court concluded that a reason to trust the diplomatic assurances in their case was that the US President’s power to designate an individual as an “enemy combatant” is discretionary – and the fact that other terrorism suspects have been tried in the federal court system shows that the US authorities are prepared to forego such categorization in individual cases rather than regarding “such a course of action as mandatory or inevitable in every case where it might, on the facts, be put into effect”. Yet executive discretion, in Amnesty International’s view, has been at the core of the unlawfulness that has characterized the USA’s approach to detentions in

¹⁶⁰ The National Defense Strategy of the United States of America, March 2005, <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>.

¹⁶¹ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

¹⁶² UN Doc.: CAT/C/USA/CQ/2/Add. 1, 6 November 2007. Comments by the Government of the United States of America to the conclusions and recommendations of the Committee against Torture.

¹⁶³ USA: *No substitute for habeas corpus, op. cit.*

the "war on terror".¹⁶⁴ The case of Yaser Hamdi is a case in point. The Pentagon only allowed this detainee access to a lawyer in late 2003 after he had been in detention as an "enemy combatant" for two years. The authorities emphasised that it was taking this step "as a matter of discretion and military policy; such access is not required by domestic or international law and should not be treated as a precedent." It added that it was allowing access to counsel because he was a US citizen detained in the USA, because it had "completed its intelligence collection" from him, and because it had "determined that the access will not compromise the national security of the United States."¹⁶⁵ With such examples of discretion, the fact that "enemy combatant" classification is discretionary – and the fact that the individuals in question here are foreign nationals – adds to rather than assuages concern as to the reliability of diplomatic assurances.

Notably, the Pentagon's announcement that it was giving Yaser Hamdi access to counsel came only four weeks before the US Supreme Court would announce whether it would review the lawfulness of his detention. Indeed, of relevance to the question of whether diplomatic assurances can guarantee the government's respect for normal judicial processes, the USA's treatment of Yaser Hamdi is another case revealing an administration willing to manipulate detainee cases to avoid judicial scrutiny. Two months after the *Hamdi v. Rumsfeld* ruling in June 2004, which found that Yaser Hamdi had the right to challenge his detention, a federal judge ordered the government to explain why Hamdi was still being held in indefinite solitary confinement, as he had been held for more than two years, and which "without question" raised questions of inhumane treatment.¹⁶⁶ In a further order in early October 2004, the District Court judge expressed concern that three months since the Supreme Court's ruling, the detainee had not been provided "with a hearing of any kind by this Court, the military, or any other tribunal."¹⁶⁷ He ordered that either Yaser Hamdi be released or a hearing on the merits of his *habeas corpus* petition would be heard in his court on 12 October 2004, a hearing at which the government would have to produce Yaser Hamdi. On 11 October, the government released the detainee and transferred him to Saudi Arabia under a deal in which, among other things, Hamdi renounced his US citizenship, and agreed not to sue the USA for any violation of US, foreign or international law.¹⁶⁸

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Even if a foreign detainee was in custody inside the USA after extradition from abroad, in the event of a subsequent presidential decision to designate him as an "enemy combatant", the administration would likely take the position that the

¹⁶⁴ For example, see USA: *Guantánamo and beyond: The continuing pursuit of unchecked executive power*, AI Index: AMR 51/063/2005, May 2005, <http://www.amnesty.org/en/report/info/AMR51/063/2005>.

¹⁶⁵ Department of Defense announces detainee allowed access to lawyer, 2 December 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5831>.

¹⁶⁶ *Hamdi v. Rumsfeld*. Order. US District Court for the Eastern District of Virginia, 27 August 2004.

¹⁶⁷ *Hamdi v. Rumsfeld*, Order. US District Court for the Eastern District of Virginia, 5 October 2004.

¹⁶⁸ And agreed not to visit the USA for 10 years, and never to travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank or the Gaza Strip. See also footnote 97.

detainee had not "developed substantial connections with this country" and was therefore undeserving of constitutional protections under US Supreme Court precedent.¹⁶⁹ The administration has found support for this notion in the DC Circuit Court of Appeals which ruled in February 2007 in *Boumediene v. Bush* that the MCA did not violate the US Constitution, and that "precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States". The Court of Appeals included reference to its own 1960 ruling that "non-resident aliens...plainly cannot appeal to the protection of the Constitution or laws of the United States".¹⁷⁰

The US Supreme Court's decision on the *Boumediene* case – oral arguments were held on 5 December 2007 – is still pending. Even with a ruling that favours the detainees, a return to full respect for the rule of law and human rights principles will depend on the breadth of the ruling and the administration's interpretation of it and, potentially, legislation passed by Congress.¹⁷¹ Amnesty International is concerned by possible indications that the US government could seek to bring an end to the diplomatic embarrassment caused by the Guantánamo detention facility by, in effect, recreating it though legislation authorizing administrative detention on the mainland.¹⁷²

The administration's interpretation of the previous landmark rulings of *Rasul v. Bush* and *Hamdan v. Rumsfeld* has been narrow, leading to continued injustice for detainees. For example, the administration effectively responded to the *Rasul* and other rulings handed down on 28 June 2004 (*Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*) as ones that simply "defined the landscape for future litigation involving military detention of enemy combatants", rather than requiring the change in direction it was obliged to take under international law.¹⁷³ While that litigation slowly progressed through the courts over the ensuing years, the detainees remained entirely at the whim of the executive. In the case of the *Hamdan* judgment in June 2006, the administration was quick to stress "what is not in the court's ruling... Nothing in the holding affects the authority of the president in wartime to detain enemy combatants...[N]othing in the holding affects the status of

¹⁶⁹ In its October 2007 brief to the US Supreme Court in *Boumediene v. Bush* – the case in which the Court is considering the stripping of *habeas corpus* jurisdiction from the US courts under the Military Commissions Act – the government cited, as it has repeatedly, the 1990 Supreme Court decision in *United States v. Verdugo-Urquidez*. The government's brief emphasised that in that judgment, "this Court has declared, aliens 'receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country'".

¹⁷⁰ *Boumediene v. Bush*, US Court of Appeals for the District of Columbia Circuit, February 2007.

¹⁷¹ The prospects for a clear resolution to the issue from the US Supreme Court may have become more remote following the US administration's filing of its appeal to the Supreme Court in a related case. See *Gates v. Bismullah*, Government's petition for a writ of certiorari, In the US Supreme Court, February 2008. See also *Court reviews on detainees*, New York Times, 6 February 2008. Also Section 6 of *USA: No substitute for habeas corpus*, *op. cit.*

¹⁷² See *USA: Unlawful detentions must end, not be transferred*, AI Index: AMR 51/200/2007, 21 December 2007, <http://www.amnesty.org/en/report/info/AMR51/200/2007>.

¹⁷³ Statement of J. Michael Wiggins, Deputy Associate Attorney General, Department of Justice, to US Senate Committee on the Judiciary, 15 June 2005.

Guantánamo Bay or the continued detention of enemy combatants there one way or the other... The holding does not reject the president's authority to try...by military commission".¹⁷⁴ In addition, in response to the *Hamdan* ruling, the president exploited the cases of 14 "high value" detainees who had been the victim of enforced disappearance in CIA custody for years in order to obtain passage of the Military Commissions Act, discriminatory legislation that is incompatible with international law, and leaves foreign detainees designated as "enemy combatants" essentially without remedy for unlawful government conduct committed against them.¹⁷⁵

The administration maintains that even the case of Ali al-Marri – who was a legal resident in the USA when he was detained – is covered by the *habeas corpus*-stripping provisions of the MCA. In June 2007, a three-judge panel of the US Court of Appeals for the Fourth Circuit took issue with the government's assertions of presidential power:

"[A]ccording to the government, the President has 'inherent' authority to subject persons legally residing in this country and protected by our Constitution to military arrest and detention without the benefit of any criminal process, if the President believes that these individuals have 'engaged in conduct in preparation for acts of international terrorism'. This is a breathtaking claim, for the government nowhere represents that this 'inherent' power to order indefinite military detention extends only to aliens or only to those who 'qualify' within the 'legal category' of enemy combatants... The President cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention... To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them 'enemy combatants', would have disastrous consequences for the Constitution – and the country... It is that power – were a court to recognize it – that could lead to all our laws to go unexecuted, and the government itself to go to pieces. We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic".¹⁷⁶

However, the government appealed for a rehearing before the full Fourth Circuit court. The court agreed, and oral argument before the full court was held on 31 October 2007. The decision is pending and this issue is therefore as yet unresolved. The case is likely only to reach the Supreme Court in 2008. Even then, if the cases of Yaser Hamdi and Jose Padilla are any guide, in order to ward off or minimize the effect of an adverse judicial ruling, the administration might be expected to deport Ali al-Marri, if it decides not to transfer him back to civilian custody after, by then, some five years or more in military custody.

¹⁷⁴ Transcript of teleconference with senior officials regarding Supreme Court's ruling in the *Hamdan* case, 30 June 2006. Department of Justice, http://www.usdoj.gov/opa/pr/2006/June/06_opa_411.html.

¹⁷⁵ USA: *Justice delayed and justice denied? Trials under the Military Commissions Act*, *op. cit.*

¹⁷⁶ *Al-Marri v. Wright*, US Court of Appeals for the Fourth Circuit, 11 June 2007, internal quote marks omitted.

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Amnesty International is not in a position to assess the likelihood of Babar Ahmad or Haroon Aswat being designated as "enemy combatants" in the event that they are extradited to the USA. Nevertheless, the organization considers that while the USA's global "war" paradigm remains in place, this remains a possible outcome, despite the diplomatic assurances provided by the US Embassy in London. If at any point, perhaps after receiving new information from interrogations or other intelligence-gathering methods, or even in the event of an acquittal, the administration considered that either man constituted a particular risk to national security or a potential source of intelligence, it could decide to extract him from the criminal justice system and deposit him into its "enemy combatant" regime. This would fit a pattern in which the US authorities have treated hundreds of individuals it has taken into its custody as potential sources of intelligence or risks to security rather than agents with criminal liability, even as it has accused them publicly of involvement in terrorism.

The UK government continues to point to the case of Mohammed Al Hasan al-Moayad, a Yemeni national who was extradited to the USA from Germany in November 2003, tried in US federal court in 2005 on charges of conspiring to provide material support for terrorism and sentenced to 75 years in prison. He was extradited following a diplomatic assurance given to the German authorities by the US Embassy in Germany that he would not be subjected to trial by military commission. The UK government suggested in its October 2007 brief to the European Court of Human Rights that the al-Moayad example is "important", and the UK High Court stated that the al-Moayad case "lent some support" to the assertion that the diplomatic notes in the Ahmad and Aswat cases would be honoured. However, Amnesty International considers that, just as prior prosecutions in the federal courts did not stop the subsequent designation as "enemy combatants" of Jose Padilla and Ali al-Marri and their extraction from those same courts on the basis of presidential orders, the extradition and conviction of Mohammed al-Moayad does not obviate the risk faced by Babar Ahmad or Haroon Aswat. If the circumstances were deemed by the US authorities to so warrant, there is a real risk that they might in the future be removed from the normal criminal justice system and designated as "enemy combatants" in the name of national security.

Citing the al-Moayad extradition and conviction, the former US Attorney General stated that the criminal justice system was one "important tool we have in the fight against terrorists". He also stated that "terrorism cases are difficult to investigate and prosecute", which is "one of the reasons why the government has utilized all the authorities at its disposal to address the new situations presented by the war on terrorism. One such authority is the ability of the military to detain enemy combatants".¹⁷⁷ Amnesty International notes that an affidavit provided by a US

¹⁷⁷ Prepared remarks for Attorney General Alberto R. Gonzales at the Council on Foreign Relations, New York, 1 December 2005, http://www.usdoj.gov/ag/speeches/2005/ag_speech_051201.html.

federal prosecutor in support of the extradition of Babar Ahmad fails to rebut the assertion that there is no **legal prohibition** preventing his subsequent transfer to indefinite military custody. Instead the prosecutor simply states that Babar's "extradition is being sought so that he may be tried before [the District Court]... [T]his is the purpose for which his extradition is sought". As Amnesty International has outlined, the fact that there may be no current plan to transfer Babar Ahmad to military custody as an "enemy combatant" does not preclude that outcome, particularly in view of the US government's past practice in the "war on terror" and its notions of presidential power.

Amnesty International does not consider that the burden should rest upon the defendants or non-governmental organizations to prove the likelihood of "enemy combatant" determinations in any particular case. The process by which such determinations have been made has been non-transparent, and the administration's resort to secrecy in the name of national security render such assessments impossible. The burden should be on the government to prove that it will not resort to this classification.

In the absence of binding judicial guarantees, or cast-iron repudiation by the administration of past policies and practices relating to detentions in the "war on terror" that have violated international law and standards, Amnesty International believes that the known facts around these practices must inform the consideration of any extradition request by the USA for a non-US national it suspects of terrorism-related offences. Moreover, what is missing from the assurances is the provision of a clear legal basis or mechanism by which the extradited persons can enforce them in the event of a breach. The assurances are directed only to the UK and not to the detainees. It is unclear as to whether the detainee and their legal counsel would be able to rely on them in a court of law.

The US government itself has said that in detainee transfers where diplomatic assurances are involved its "analysis takes into account all relevant factors, including all available information about the compliance of the potential receiving state with its international obligations".¹⁷⁸ As this report has detailed, the USA is failing to meet its international obligations in relation to its "war on terror" detention regime. The US government has also stated that "in assessing the credibility of assurances that it receives" it looks at, among other things, the "country's human rights record".¹⁷⁹ The human rights record of the USA in this context has been poor. The government has further said that "when evaluating diplomatic assurances or other information provided by the requesting State" in the context of extraditions from the United States, the USA will consider, among other things, "the political or legal developments in the requesting State that would provide context for the assurances provided".¹⁸⁰ To reiterate: in the context of the "war on terror", such developments

¹⁷⁸ UN Doc.: CAT/C/USA/CO/2/Add.1, 6 November 2007, paragraph 6, *op.cit.*

¹⁷⁹ UN Doc.: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, *op. cit.*

¹⁸⁰ List of issues to be considered during the examination of the second periodic report of the United States of America by the UN Committee against Torture. Response of the USA, § 18, available at <http://www.state.gov/documents/organization/66172.pdf>.

have included a general disregard by the USA for international norms relating to detention.

The US administration has repeatedly emphasised its commitment to the "non-negotiable demands of human dignity", including the rule of law, in its National Security Strategy and other government documents and statements. This commitment has nevertheless proved to be a slippery concept in this context. Slippery concepts, loopholes, and detention practices that discriminate on the basis of nationality are unsafe grounds on which to authorize an extradition of a foreign national accused of involvement in terrorism. The rule of law requires transparency, predictability, consistency and adherence to fundamental human rights principles. Until this becomes a hard and fast rule in the USA's approach to terrorism-related detentions, its diplomatic assurances are an unsafe basis on which to approve extradition requests in the context of counter-terrorism.

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