



## USA: 'I'm not sure what they're basing that on'

### Human rights principles sidelined as Libyan man seized in Tripoli remains incommunicado

Libyan national Nazih Abdul-Hamed al-Ruqai, also known as Abu Anas al-Libi, remains in incommunicado detention after being seized by US Special Forces in Libya on 5 October 2013 and removed from the country. He is reportedly being held on a US navy vessel, the *USS San Antonio*, which was in the Mediterranean at the time of the abduction. However, on 9 October, the Department of State again refused to confirm where he was being held.<sup>1</sup>

What the Libyan government knew about US plans to seize Abu Anas al-Libi, and whether it had "tacitly" approved such an operation, as has been alleged by unidentified "senior American officials", remains unclear.<sup>2</sup> Outside of anonymous briefing to the media, the White House has refused to say whether it had sought the extradition of Abu Anas al-Libi before conducting the raid or whether the Libyan government had prior knowledge of it. At an official press briefing on 7 October, the White House spokesperson would say only that "we're in regular communication with the Libyan government on a range of security and counterterrorism issues and we don't get into the specifics of those communications".<sup>3</sup> In official statements, the Libyan government has denied any prior knowledge of the operation. On 7 October, the Libyan Minister of Justice summoned the US ambassador in Libya in order to seek clarification over the abduction of Abu Anas al-Libi.<sup>4</sup>

Whether this was a unilateral US action or one taken with prior knowledge of the Libyan authorities, such an abduction, followed by prolonged incommunicado detention at an undisclosed or unconfirmed location, can hardly be said to comply with human rights principles or to meet a crucial element of justice – that it be done *and be seen to be done*. Moreover, such practices can only undermine efforts to establish the rule of law in Libya at a time when it is in need of international support to develop institutions that uphold human rights and deliver justice. While refusing to say whether the USA sought extradition before resorting to abduction – something it should come clean about – the White House stated that it supports "the aspirations of the Libyan people as they participate in their democratic transition after 42 long years of dictatorship. So we'll continue to work with Libya and its other international partners to strengthen that democratic transition, and support Libya as it rebuilds the country's institutions."<sup>5</sup>

The abduction of Abu Anas al-Libi has sparked demonstrations across Libya and criticism of the government by political groups and militias, which have refused to disband since the end of the conflict in 2011. On 10 October, Prime Minister Ali Zeidan was abducted from his place of residence by members of Libya's Revolutionaries Operations Room and the Crime Combating Unit both nominally under government control. He was released a few hours later apparently unharmed; the exact reasons behind his abduction remain unclear.

Amnesty International is concerned that Abu Anas al-Libi might be held incommunicado for weeks. This is what happened in the case of Ahmed Abdulkadir Warsame in 2011. After being seized on a boat in the Gulf of Aden on 19 April 2011 as he was travelling back to Somalia from Yemen, this Somali national, then 23, was held incommunicado on a naval vessel for some two months before being brought to New York in early July 2011. He was charged with various terrorism-related offences and in December 2011 pleaded guilty on all counts and agreed to cooperate with the US authorities, who in turn would provide him with witness protection if necessary. He faces a possible life sentence.

This guilty plea was made public in March 2013, at which point the US Attorney for the Southern District of New York described the Warsame case as an "intelligence watershed". He recalled that Ahmed Warsame had been "questioned for intelligence purposes for more than two months", after which he was read his "*Miranda* rights" (right to remain silent, right to legal counsel). After he waived those rights, he was then questioned over the course of several days for "law enforcement" purposes. The case, the US Attorney asserted, represented "a seamless orchestration by our military, intelligence, and law enforcement agencies".<sup>6</sup>

The White House had told ABC News on 6 July 2011 that Ahmed Warsame was detained on the Navy vessel under the “law of war” and that the International Committee of the Red Cross (ICRC) was told of the detention and that it had had the “opportunity” to “interview the detainee aboard the ship”. It was reported that the ICRC was notified of the detention in May and was allowed to see Warsame in June, at least six weeks after the detention began.

At a press briefing at the US Department of State on 8 October, the spokesperson asserted that the USA had been “in touch with the ICRC” in relation to Abu Anas al-Libi and that “we’re going to continue talking to them about his case” including on “possible access” to the detainee at some point in the future. Clearly, for now, Abu Anas al-Libi is being held and interrogated incommunicado.

It is also clear that the USA considers Abu Anas al-Libi to be in “law of war” detention, as unilaterally defined by the USA under its “global war” theory. This mirrors the Ahmed Warsame case, where the US authorities responded to Amnesty International’s concern about his treatment prior to being transferred to New York by saying that “the US Government has consistently asserted that it is at war with al Qaida and its associated forces, and that it may take all lawful measures, including detention, to defeat the enemy”.<sup>7</sup> In other words, this was a case of prolonged incommunicado detention and interrogation carried out under the USA’s theory of a global war against al-Qa’ida and associated groups.

The White House and the Department of State have confirmed that the USA conducted the 5 October operation in Libya, and is holding Abu Anas al-Libi, under the Authorization for Use of Military Force (AUMF), the broad resolution passed by Congress on 14 September 2001 and signed into law four days later by President George W. Bush. This is what the US authorities consider as the legal underpinning for what the Bush administration called the “global war on terror” and what the Obama administration continues to pursue in all but name, to the exclusion of international human rights law. The USA uses the AUMF, among other things, to justify its indefinite detention without charge or trial of foreign nationals in Guantánamo. While the US administration has said that Abu Anas al-Libi will not be transferred to Guantánamo, as the administration’s “policy is not to send any new detainees to Guantánamo”,<sup>8</sup> the corrosive effects on human rights and ordinary criminal justice principles of the USA’s AUMF detention regime is nevertheless present here as at Guantánamo.

The operation to take Abu Anas al-Libi, the State Department spokesperson said on 8 October, was not undertaken “for the purposes of law enforcement” – instead, “we believed he was a lawful target under the AUMF”, and his indictment in US federal court was “not the reason” the operation was undertaken. However, she also said that the indictment would “be a part of this going forward”. Of concern, then, is that two days later, even this minimal level of certainty had dissipated. At the State Department briefing on 10 October, while emphasising that Abu Anas al-Libi is “indicted in the Southern District of New York for two bombings of embassies”, the spokesperson said that “we don’t know what his final disposition would be... There’s a couple of different options... So we don’t have a timeframe” and “he remains in US military custody”. Pressed on whether this meant Abu Anas al-Libi might not be brought to the USA, she repeated that “his final disposition just hasn’t been decided. We’ve talked about a number of different things, whether it’s military commissions, Article 3 [federal civilian] courts. We just don’t have any further details about where he might end up.” Asked about whether he had yet received consular access, the spokesperson again stressed that “I don’t know what his final disposition will be. He remains in US military custody.”<sup>9</sup>

Once again, we see how, under the USA’s “global war”, justice delayed is no longer justice denied. During the Bush administration this thinking and a distorted interpretation of international humanitarian law led directly to crimes under international law such as torture and enforced disappearance, crimes for which, under the Obama administration, there has remained an absence of accountability and remedy, in violation of the USA’s international law obligations. It also led to prolonged arbitrary detention and the development and use for selected detainees of military commissions falling far short of international fair trial standards.

Amnesty International categorically rejects the administration’s assertion that international humanitarian law, which applies only in actual situations of armed conflict, is applicable to the detention of Abu Anas al-Libi. He is an indicted suspect in serious crimes committed in 1998 outside any armed conflict. He has been abducted in Tripoli, Libya, in circumstances unrelated to an actual armed conflict. Abu Anas al-Libi’s purported association with al-Qa’ida does not change the fact that the facts of his case mean that USA’s treatment of him is governed by international human rights law – not international humanitarian law.

Amnesty International reiterates its call to the US administration to immediately confirm Abu Anas al-Libi’s whereabouts and to provide him immediate and continuing access to legal counsel, medical care and family members. As a foreign national, he should also be informed of his right to communicate with officials of his government.<sup>10</sup> On this latter question, the US administration has stated that “consular access is clearly something we care deeply about all around the world. It’s a topic of conversation right now with the Government of Libya”.<sup>11</sup>

At the US Department of State press briefing on 8 October, one of the participants raised the fact that Amnesty International had issued a document the previous day asserting that the USA was violating human rights principles in the Abu al-Libi case.<sup>12</sup> The spokesperson responded: "I'm not sure what they're basing that on".<sup>13</sup> Amnesty International takes this opportunity, then, to reiterate that the USA remains on the wrong side of its international human rights obligations in this case and to elaborate what the organization is "basing that on".

Under article 9 of the International Covenant on Civil and Political Rights (ICCPR), anyone who is deprived of their liberty "by arrest or detention" has the right to take their case before a court in order that the lawfulness of the detention be decided "without delay". Anyone arrested or detained under a criminal charge "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power". The government must ensure to all individuals under its control the rights recognized under the ICCPR, "without distinction of any kind", including on the basis of national origin.

Under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "[p]romptly after arrest and after each transfer from one place of detention or imprisonment to another" a detained person has the right to notify or have notified members of his family or other appropriate persons of his detention and where he is being held (Principle 16). The Body of Principles defines 'arrest' in this context to mean the apprehension of a person by action of an authority, including but not limited to apprehension for the alleged commission of an offence. The Body of Principles allow for delay of such a notification only "for a reasonable period where exceptional needs of the investigation so require" but specify that "communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."

The UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 10, states: "Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned." These instruments also require that deprivation of liberty be subject to prompt judicial control.

The US administration has said that Abu Anas al-Libi is being treated "humanely". While Amnesty International notes this assurance, it remains concerned. Not only does Appendix M of the US Army Field Manual allow for prolonged isolation and for limited and disrupted sleep over a prolonged period, the USA applies the prohibition of torture and other cruel, inhuman or degrading treatment or punishment only as defined in US law and not international law, due to the limiting conditions attached by the USA to its ratification of human rights treaties.<sup>14</sup> The possibility remains that particular applications of techniques might be considered to be consistent with the Field Manual yet still violate international human rights standards.

The UN Human Rights Council (and the Commission on Human Rights before it), as well as the General Assembly, have recognised that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment and can in itself constitute a form of such treatment, and have accordingly urged all states to respect the safeguards for liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished. The UN Human Rights Committee has stated that provisions should be made against the use of incommunicado detention. The Committee has found incommunicado detention to violate not only the right to liberty, but also the right of detainees to humane treatment, under the Covenant on Civil and Political Rights, in decisions on individual complaints brought before it, including in cases of incommunicado detention of two weeks in duration.<sup>15</sup> The Committee against Torture has called for the elimination of incommunicado detention, and the UN Special Rapporteur on torture has for several decades called for incommunicado detention to be recognised as unlawful.

Access to the outside world, including legal counsel and independent medical care, is of course a safeguard against torture or other cruel, inhuman or degrading treatment of those deprived of their liberty, and the need for this to be promptly applied is because ill-treatment has frequently been shown to occur in the early stages of detention and interrogation. The Human Rights Committee has stated that detained persons should have "immediate access to counsel and contact with their families". The UN Committee against Torture has recommended "unrestricted access to counsel immediately after arrest". The Special Rapporteur on torture has stated: "In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer".

At a press conference on 8 October, President Obama was asked whether the detention of Abu al-Libi complied with international law. The President avoided that particular question, and answered only with "We know that Mr al-Libi planned and helped to execute plots that killed hundreds of people, a whole lot of Americans. And we have strong evidence of that. And he will be brought to justice."<sup>16</sup>

If Abu Anas al-Libi is taken to the USA, where he was indicted in 1998 and 2000 for his alleged involvement with al-Qa'ida, including in the attacks on the US embassies in Kenya and Tanzania, the US government should not pursue the death penalty against him. Some of the charges he faces under that indictment are potentially capital. If the USA indeed intends to prosecute him, it should do so in federal court in conformity with international fair trial standards, and not before a military commission.

The question of Abu Anas al-Libi's detention, and Amnesty International's concern about the case, was raised again at the State Department press briefing on 9 October. The spokesperson said that the administration believed that the abduction complied with international law. Pressed on this, she replied that Abu Anas al-Libi was being treated in accordance common Article 3 of the Geneva Conventions. Pressed further, she responded:

"Let me see if I can get you a specific. What our folks have talked about here is – we're operating domestically under an AUMF, but it speaks to the international laws of war, the fact that we have an ability under international law to self-defend. That's – the AUMF is based in part, right – and I'm not a legal scholar, so this is not a legal definition – but in part on this notion that we have a right to self-defense, and that under international law and the laws of war, and I can see if there's a more specific thing I can point to, but that's my understanding that that's what we're operating under."

At the 10 October briefing, the question of the compatibility of the abduction and detention with international law was again raised. The spokesperson responded:

"So I got a little bit more. I don't know if it will satisfy everyone, but I tried to get a little bit more. So Mr al-Libi, as I said yesterday, was lawfully apprehended and is lawfully detained under the Law of Armed Conflict. We also call it the Law of War; it's what I mentioned yesterday. And that's comprised of a body of international law that consists both of treaties, like the Geneva Convention and others, and customary international law. So as we've explained, the United States is in an armed conflict with al-Qaida and its associated forces, and as such, we can lawfully use force in that conflict, including to capture and detain individuals who are part of al-Qaida or its associated forces. So that's the international legal basis for what we're talking about."

Amnesty International remains concerned at the failure of the USA to apply international human rights principles, a direct result of its continuing resort to its unilaterally defined law of war framework. In its earlier document, the organization pointed out that it has raised its concerns about the Warsame case, Appendix M, and the wider implications for human rights of the USA's "global war" paradigm with the UN Human Rights Committee, the expert body established under the ICCPR to oversee implementation of that treaty, which the USA ratified in 1992.<sup>17</sup> Regrettably, review of the USA's Fourth Periodic Report to the Committee – which had been scheduled to take place on 18 to 21 October 2013 in Geneva – was on 9 October postponed until March 2014, at the request of the USA, citing the current US government "shutdown".<sup>18</sup>

With the USA now not facing this particular scrutiny of its human rights record in October, it is even more crucial that all possible pressure is put on the USA to meet its international human rights obligations in this and other cases.

Under the corrosive effects of its law of war framework, the position of the US administration still appears to be that the *actual entitlement* of a given person to enjoyment of his or her human rights can, in effect, be switched on or off based simply on a discretionary decision by US officials as to *the desirability of and most convenient timing for treating the individual as being entitled to enjoyment of human rights*. It is not hard to see why such a position is fundamentally incompatible with the overall framework of international human rights law and the international rule of law. The organization will continue to urge the USA to recognize the applicability of international human rights law in the context of its international counter-terrorism operations, and to ensure that policies and practices are brought into line with international human rights law and standards.

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## ENDNOTES

<sup>1</sup> US Department of State press briefing, 9 October 2013, <http://www.state.gov/r/pa/prs/dpb/2013/10/215252.htm>. Q: "Now al-Libi's being held onboard a US warship in international water, presumably. Isn't it subject to US laws in this case, a US warship?" A: "I'm not going to confirm where he's being held."

<sup>2</sup> See US officials say Libya approved commando raids, New York Times, 9 October 2013.

<sup>3</sup> Daily briefing by the Press Secretary, White House, 7 October 2013, <http://www.whitehouse.gov/the-press-office/2013/10/07/daily-briefing-press-secretary-10713>

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- <sup>4</sup> See also Department of State spokesperson at press briefing, 8 October 2013, <http://www.state.gov/r/pa/prs/dpb/2013/10/215200.htm> (“I can confirm that on Monday, Ambassador Jones met with Libyan Justice Minister Salah al-Marghani. They discussed matters related to the detention of Abu Anas al-Libi as well as other issues.”)
- <sup>5</sup> White House press briefing, 7 October 2013, *op. cit.*
- <sup>6</sup> Manhattan US Attorney announces guilty plea of Ahmed Warsame, News Release, US Attorney for Southern District of New York, 25 March 2013 <http://www.justice.gov/usao/nys/pressreleases/March13/WarsameUnsealingPR.php>
- <sup>7</sup> Letter from William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, 23 August 2011.
- <sup>8</sup> US Department of State briefing, 7 October 2013, <http://www.state.gov/r/pa/prs/dpb/2013/10/215183.htm>
- <sup>9</sup> US Department of State briefing, 10 October 2013, <http://www.state.gov/r/pa/prs/dpb/2013/10/215296.htm>
- <sup>10</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16(2). “If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national...”
- <sup>11</sup> State Department briefing, 9 October 2013, *op. cit.*
- <sup>12</sup> USA: Abduction in Libya violates human rights, undermines rule of law, 7 October 2013, <http://www.amnesty.org/en/library/info/AMR51/065/2013/en>
- <sup>13</sup> State Department press briefing, 8 October 2013, *op. cit.*
- <sup>14</sup> See USA: Life, liberty and the pursuit of human rights: A submission to the UN Human Rights Committee, 16 September 2013, §B(3), <http://www.amnesty.org/en/library/info/AMR51/061/2013/en>
- <sup>15</sup> See for instance *Arutyunyan v Uzbekistan* (2004), UN Doc.: CCPR/C/80/D/917/2000, ¶16.2.
- <sup>16</sup> Press conference, 8 October 2013, <http://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president>
- <sup>17</sup> See, USA: Life, liberty and the pursuit of human rights, *op. cit.*
- <sup>18</sup> See <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/ReviewUSA.aspx> (9 October 2013).