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USA: Different label, same policy?

Administration drops 'enemy combatant' label in Guantánamo litigation, but retains law of war framework for detentions

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Soon after taking office, President Barack Obama was asked about his predecessor's broad framing of the "war on terror" and responded that "the language we use matters".[1] Amnesty International would agree, and would stress that the use of the term "war" since the attacks of 11 September 2001 has gone far beyond rhetoric; indeed it has distorted and continues to distort the approach that some governments, courts and others have taken to the relationship between human rights and the measures taken in the name of countering terrorism.

The global war doctrine adopted by the USA has been used to facilitate human rights violations, including against those subjected to detention, without the due process and other human rights protections required under international law, at the US Naval Base in Guantánamo Bay, Cuba. Amnesty International considers that it is well past time for the US administration and courts to recognize that the Guantánamo detainees should not continue to be held in indefinite detention without charge or trial.

A change in language is contained in a memorandum filed in US District Court on 13 March 2009 by the US Justice Department. The memo sets out the new administration's view of its authority to detain those still held at Guantánamo, who currently number around 245. In an accompanying press release, the Justice Department emphasized that, in the case of these particular detainees, it was dropping the "enemy combatant" label which had been attached to them by the Bush administration.

The withdrawal of the "enemy combatant" label would appear to be largely cosmetic, however, as the new administration's underlying claim to authority to hold these detainees seems to be substantially the same as its predecessor's and does not jettison the overarching law of war framework or expressly recognize the applicability of international human rights law to these detentions.

The reach of the memorandum is expressly limited to the current Guantánamo detentions only. It states that it is not, "at this point, meant to define the contours of authority for military operations generally, or detention in other contexts". In the US airbase in Bagram in Afghanistan, for example, there are more than 500 detainees currently being held as "enemy combatants", as far as Amnesty International is aware. None of these detainees has access to the courts or to a lawyer. Some have been held for years. In an earlier District Court filing in

[1] Interview with al-Arabiya, 26 January 2009.

another case, the new administration adopted wholesale the Bush administration's position on the Bagram detainees. [2]

The 13 March memorandum was filed as part of ongoing litigation on the Guantánamo cases that has followed the US Supreme Court's ruling in June 2008 that the detainees have the constitutional right to challenge the lawfulness of their detention in US federal courts. In the *Boumediene v. Bush* ruling, the Supreme Court did not address whether the President has authority to hold the Guantánamo detainees. This and other questions regarding the lawfulness of their detentions, it said, were to be resolved in the first instance by the District Court. Among these questions would be the formal articulation by the government, and assessment by the court, of the purported legal basis for the detention of those the administration had labelled "enemy combatants".

Under the Bush administration's July 2004 Order establishing Combatant Status Review Tribunals (CSRTs) for use at Guantánamo, an "enemy combatant" was 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."

This definition of "enemy combatant" was the one chosen by the so far only District Court judge to have made such a decision in the post-*Boumediene* habeas corpus litigation. In an order issued on 27 October 2008, Judge Richard Leon explained that he had opted for this CRST definition because it had been "blessed by Congress" when it passed the Military Commissions Act in 2006.

This definition – global in reach and not limited to individuals directly engaged in a particular international armed conflict as that term is understood in international law, or indeed in any hostilities whatever – casts a broad net. This is shown by the fact that among those Guantánamo detainees affirmed as "enemy combatants" by CSRTs were people detained far from any international "battleground" as traditionally understood, and not in the territory of a state at war with the USA: detainees were taken from, among other countries, Azerbaijan, Thailand, Bosnia and Herzegovina, Indonesia, Kenya, Gambia and Mauritania, as well as others arrested in houses and streets in Pakistan. Others were taken in Afghanistan, both in and outside of situations of combat. In its definition, and consequences under US law, the concept of "enemy combatant" invoked by the USA at the time went far beyond the limited concept of 'combatant' as that term is understood by international law as applicable in situations of actual armed conflict.

The 13 March memorandum came in response to requests by several District Court judges with habeas corpus petitions for Guantánamo detainees pending before them for any revision by the

[2] Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, http://www.amnesty.org/en/library/info/AMR51/021/2009/en; Urgent need for transparency on Bagram detentions, 6 March 2009, http://www.amnesty.org/en/library/info/AMR51/031/2009/en. Administration opts for secrecy on Bagram detainee details, 12 March 2009, http://www.amnesty.org/en/library/info/AMR51/034/2009/en.

new administration to its predecessor's position on the "enemy combatant" question. In the memorandum, the Justice Department proposes a revised "definitional framework" for the purposes of the post-*Boumediene* Guantánamo litigation:

> "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces".

The Justice Department stresses that the concept of "substantial support" does not justify the detention at Guantánamo of individuals "providing unwitting or insignificant support" to the organizations in question. This would seem to rule out, for example, a person whose charitable donation, unbeknownst to them, ended up being diverted to such organizations.[3] The definition still describes a broad detention power, however, that risks bypassing the ordinary systems of criminal justice and human rights in a manner not contemplated by international law (notwithstanding the assertion by the administration that the laws of war, by analogy, support the definition).

Evidence of whether an individual was "part of" al-Qa'ida or Taleban forces, the Justice Department states, "might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases, by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces". In each case, "judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances". The memorandum states that the precise contours of "substantial support", as well as of

[3] In January 2005, District Court Judge Joyce Hens Green concluded that the Bush administration's overbroad definition of "enemy combatant", with its use of the word "includes", showed that the government considered that it could subject to indefinite executive detention even individuals who had never committed a belligerent act or who never directly supported hostilities against the USA or its allies. During a hearing in December 2004, Judge Green had asked the government a series of hypothetical questions to ascertain how broadly it interpreted its detention powers. The government responded that it could subject to indefinite executive detention: "'A little old lady in Switzerland who writes cheques to what she thinks is a charity that helps orphans in Afghanistan, but [what] really is a front to finance al-Qaeda activities'; a person who teaches English to the son of an al-Qa'ida member; and a journalist who knows the location of Osama Bin Laden, but refuses to disclose it to protect her source." In a subsequent hearing in front of Judge Richard Leon, the Principal Deputy Associate Attorney General suggested that in the example of the Swiss woman, he had been misquoted and that what he had said was that "in the fog that is often the case in these situations that it would be up to the military applying its process and in going through its classification function to determine who to believe. If in fact this woman, there was some reason to believe this woman did know she was financing a terrorist operation, that would certainly merit a detention both theoretically and practically". The government's position would still be that she could be held indefinitely without charge or trial or judicial review of the merits of her case.

"associated forces", as grounds for detention will require further development on a case-by-case basis in the habeas corpus proceedings.

A month earlier, the new administration had sought to put off a decision on the "enemy combatant" question. Following President Obama's executive order of 22 January 2009, requiring the closure of the Guantánamo detention facility within a year, District Court Judge John Bates had invited the Justice Department to submit to him "any refinement" of the previous administration's position on the "appropriate definition" of "enemy combatant". In its response on 9 February 2009, the Justice Department urged Judge Bates not to address the question of "enemy combatant" definition "in the abstract" but only at the merits stage of habeas corpus proceedings in any particular case. It pointed to the interagency review of the Guantánamo cases ordered by President Obama in his executive order, which "will result in the release, transfer, prosecution, or other disposition of the detainees". The administration told Judge Bates that both that review and another review of "prospective US detention policy" ordered by President Obama in another executive order signed on 22 January, would be considering "the proper legal bases" for detaining any of the Guantánamo detainees "who are not transferred, released, or prosecuted at the completion of their reviews".

The new administration argued that for the District Court only to address the legal basis for detention on a case-by-case basis would "potentially avoid unnecessarily ruling on important issues regarding the scope of the President's detention authority". This approach would be wise, it suggested, given that the number of habeas corpus cases might be reduced by the executive review ordered by the new President.

On 11 February 2009, almost eight months to the day after the *Boumediene* ruling, Judge Bates issued an order in which he noted that "the date by which the parties and the Court will need to begin wrestling with the merits of these cases is fast approaching" (emphasis in original). He wrote that "well before" such hearings the parties and the court "must have a clear, uniform understanding of the key legal standard to be applied". In these cases this would be the "core controlling legal standard of 'enemy combatant' to be applied to the specific facts in each individual detainee's case". He stated that the new administration's rationale for delay on the definitional issue was "not persuasive", and he rejected its contention that the "scope of the Government's detention authority" should be made on a case-by-case basis, adding that "the definition of the central legal term 'enemy combatant' is not a moving target, varying from case to case" (emphasis in original). He ordered the administration to submit any change to the government's proposed definition of "enemy combatant" by 13 March 2009. The Justice Department's memorandum is the result.

The extent to which the new administration has adopted the global "war" paradigm in this memorandum, for these detentions, is not entirely clear. The document mainly focuses on the conflict in Afghanistan, referring to "Operation Enduring Freedom" (OEF), the military campaign which began in Afghanistan in October 2001, and to the fact that the "United States and its coalition partners continue to fight resurgent Taliban and al-Qaida forces in this armed conflict". OEF was seen as part of a global "war on terror" by the previous administration. As already noted, those currently held in Guantánamo – to whom this memorandum applies – were originally detained in a range of countries around the globe, including Afghanistan.

According to the Justice Department's memorandum, the organizations covered by the government's detention authority in this context are not limited to al-Qa'ida or the Taleban, and neither is the detention authority provided limited to individuals "captured on the battlefields of Afghanistan". Rather, substantial support provided by someone to al-Qa'ida forces "in other parts of the world" is "sufficient to justify detention" at Guantánamo. Here the memorandum cites the case of Belkacem Bensayah whom Judge Leon concluded was lawfully held in military custody in Guantánamo, under the "enemy combatant" label developed by the Bush administration, despite being seized in Bosnia and Herzegovina seven years earlier, "over a thousand miles away from the battlefield in Afghanistan", as Judge Leon himself put it.[4] In addition, the Justice Department's new memorandum states that it would be irrelevant that "that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan". Precisely what the scope of the phrase "places like Pakistan" includes is not clear.

In issuing the memorandum, the administration stated that, at least in relation to the current Guantánamo detainees, it does not seek to rely on the President's constitutional authority as Commander-in-Chief of the Armed Forces to justify the detentions. Instead, it is basing its detention authority on the Authorization for Use of Military Force (AUMF), a resolution passed by US Congress in the immediate aftermath of the attacks of 11 September 2001. The AUMF authorized the President to "use all necessary and appropriate force" against anyone involved in the attacks "in order to prevent any future acts of international terrorism against the United States".

While the Justice Department's position on the AUMF may go some way to assuaging domestic concern about the health of the constitutional "checks and balances" system of the USA's three-branch government after a period in which some startling claims to presidential authority have been made, it does not in itself bring the USA any closer to compliance with its human rights obligations under international law.[5] Indeed, in post-*Boumediene* litigation, the Bush

[4] USA: Federal judge orders release of five of six Guantánamo detainees seized in Bosnia in 2002, 20 November 2008, http://www.amnesty.org/en/library/info/AMR51/141/2008/en.

[5] The previous administration did not consider it needed congressional approval for its actions anyway. Signing the AUMF into law on 18 September 2001, President Bush said, "In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force..." This position was articulated in an administration memorandum a few days later. The AUMF cannot "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make". The President's constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President, From John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001. Five days before the inauguration of President Obama, the Justice Department issued a memorandum (released by the new Attorney General on 2 March 2009) stating that a number of OLC opinions issued in 2002 and 2003, "advanced a broad assertion of the President's Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the Global War on Terror". The January 2009 memorandum stated that while the President "certainly has significant constitutional powers in this area", the broad assertion made in the

administration had similarly sought to justify the Guantánamo detentions by reference to the AUMF. It told Judge Leon, for example, that he "need look no further than the AUMF itself for the authority to detain persons who were members or supporters of al-Qaida". The Bush administration emphasised that "the AUMF is extremely broad. Its sweeping scope does not limit the use of force against state actors, and it also authorizes force against 'organizations'. It does not limit the geographic scope or duration of the authorizations".

It is true that the AUMF is broad and sweeping. It gives the President the freedom to decide who was connected to the attacks of 11 September 2001, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any temporal or geographical limits. In May 2008, a federal judge described the AUMF as "the most far-reaching bestowal of power upon the Executive since the Civil War… The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America."[6]

The Bush administration exploited the AUMF to argue a range of actions, which constituted violations of human rights, were lawful under US law, including the Guantánamo detentions. The military order signed by President Bush on 13 November 2001, providing for trials by military commission as well as indefinite detention without charge, trial or judicial review, cited the AUMF as a supporting authority. A Justice Department memorandum dated 1 August 2002 justifying torture of "enemy combatants" cited the AUMF as among those authorities that "recognized" the President's constitutional power to use force to defend the USA. When President Bush re-authorized the Central Intelligence Agency's secret detention and interrogation programme in 2007 – a programme in which the international crimes of enforced disappearance and torture had already occurred – he cited the AUMF as supporting law. The AUMF was also cited by the administration in defending President Bush's authorization of a secret wiretapping programme by the National Security Agency.

Because of the abuses that have been committed in the name of the AUMF, Amnesty International has called since 2006 for its revocation. The organization has called on the new administration to clarify that it will not interpret the AUMF as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law, or as otherwise providing authority for such violations.

Given the new administration's use of the AUMF as a purported legal basis for the continued indefinite detention of these detainees – at least for as long as it takes it to conduct the executive review of their cases ordered by President Obama on 22 January 2009 – it is worth reflecting on how this resolution came into being. The AUMF was passed by Congress on 14 September 2001 by 516 votes to 1 after little genuine debate. Indeed, there seemed to be considerable confusion among legislators as to whether they were voting for a declaration of

earlier opinions "does not reflect the current view of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President". See "Memorandum for the files: Status of certain OLC opinions issued in the aftermath of the terrorist attacks of September 11, 2001", Steven Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 15 January 2009.

[6] *Al-Marri v. Pucciarelli*, US Court of Appeals for the Fourth Circuit, 15 July 2008, Judge Gregory, concurring in the judgment.

war or not; some felt the resolution did not go far enough, others felt it went too far; some opined that the President had all the power he needed without a resolution; others stressed the limiting effect of the resolution and the need for continuing congressional oversight. One legislator said that she would be voting for the resolution "with great reservations" because "to be honest, I do not know what this means. The language of this resolution can be interpreted in different ways". Another who voted for the resolution admitted that "the literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power". Despite the apparent concerns and confusion, legislator after legislator voted for the resolution. One congressman speaking in favour of the resolution described such support as "join[ing] the choir".[7] The resulting resolution has been a central part of establishing a legal vacuum in which individuals were denied the rights to which they would ordinarily be entitled under national and international laws. During the AUMF debate, only one member of the US House of Representatives, out of more than 400, referred to international law, and then only in a passing assurance that subsequently remained unmet.[8]

Amnesty International regrets the absence of any reference to human rights obligations in the Justice Department's memorandum of 13 March 2009. The Bush administration asserted to international treaty monitoring bodies examining the USA's conduct against those it labelled as "enemy combatants" that the law of war, and not international treaties such as the UN Convention against Torture or the International Covenant on Civil and Political Rights, was "the applicable legal framework governing these detentions". The treaty bodies disagreed, but the USA disregarded their concerns.

Nevertheless, the Justice Department's memorandum of 13 March 2009 does hold out the possibility of future substantive change in US detention policy. Referring to the executive reviews ordered by President Obama on 22 January 2009, it puts the District Court on notice that "the Executive Branch has, at the President's direction, undertaken several forward-looking initiatives that may result in further refinements". Amnesty International will continue to urge the USA to fully recognize and adhere to its international human rights obligations in all situations, as well as its obligations under international humanitarian law in the particular situations where the laws of armed conflict apply (i.e. in situations of armed conflict as understood under international law).

Meanwhile, the various District Court judges conducting habeas corpus proceedings in the Guantánamo detainee cases will make decisions as to what detention authority the government has in relation to these detainees. They are not bound by the new administration's "definitional framework".

[7] For references, see USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/087/2008/en.
[8] Rep. Clayton: "Congress will… work with the President to ensure that our actions under this resolution are necessary and appropriate, consistent with our values… and in accordance with international laws".

Selected recommendations: [9]

- The theory that the USA is entitled to detain any individual anywhere in the world at anytime, and hold them in detention indefinitely, on the premise that it is involved in an all-pervasive global and perpetual armed conflict against non-state actors, is inconsistent with international human rights and humanitarian law and should be expressly disavowed and rejected by President Obama and his administration, Congress, and the courts.
- The US administration should make it clear that it will rely on ordinary criminal offences and procedures alone to justify detention of individuals who are unconnected to any ongoing international armed conflict and are accused of essentially criminal conduct.
- The concept of "enemy combatant" – whether as expressly so named by the previous administration or as revised by the new administration in its 13 March 2009 court filing (and whether or not it is renamed) – as grounds for detention under international law must be reserved in its application to situations recognized by international humanitarian law (the law of war) as constituting international armed conflicts.
- In respect of non-international armed conflicts, legal grounds for detaining individuals must be clearly set out in national laws of the territory in question. These laws should themselves comply with the state's international human rights obligations, such that those laws can form a basis for review of the lawfulness of each individual's detention.
- The USA must recognize that, even where international humanitarian law does apply, it does not displace international human rights law. Rather, the two bodies of law complement each other.

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[9] See also, USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.