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USA: Still failing human rights in the name of global 'war'

Pyrrhic court victories for administration as Guantánamo detentions enter ninth year and deadline for closure missed

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As detentions in the US Naval Base in Guantánamo Bay enter their ninth year, and the 22 January 2010 deadline for the detention facility's closure ordered by President Barack Obama approaches only to be missed, the administration has registered "wins" in two recent court decisions on the detentions. They are Pyrrhic victories for the authorities, however, coming at a high cost to human rights principles and ensuring that Guantánamo will remain synonymous with injustice well into the second year of the Obama administration.

Both decisions – one from the Court of Appeals for the District of Columbia (DC) Circuit on 5 January and the other from the DC District Court on 6 January – relate to the US Supreme Court's ruling in *Boumediene v. Bush* in June 2008 that the detainees held at Guantánamo had the right to a "prompt" habeas corpus hearing to challenge the lawfulness of their detention. Developing the precise contours of the habeas corpus proceedings was left to the District Court to formulate, leading to the protracted delays that have been the hallmark of the post-*Boumediene* habeas corpus litigation.[1] As Senior District Court Judge Thomas Hogan noted on 14 December 2009 during a hearing in the case of Musa'ab Omar Al Madhwani, a Yemeni man who has been held without charge in Guantánamo since late 2002, it is "an unfair process for the detainees in the sense that the law moves at a glacier pace".

It was Judge Hogan who took on the role of coordinating the scores of habeas corpus petitions pending in the DC District Court on behalf of Guantánamo detainees after the *Boumediene* ruling. Eighteen months later, on 6 January 2010, in the case of Musa'ab Al Madhwani, he ruled that the government could lawfully continue to hold the detainee without charge. Judge Hogan nevertheless made known his disquiet about Musa'ab Al Madhwani's ill-treatment in custody and said that he could not see why the detainee should not be released.

A day earlier, in a precedent-setting decision, the DC Circuit Court of Appeals upheld broad authority for the government to detain individuals the Bush administration had called "enemy combatants" in the "war on terror". The Obama administration has dropped both these labels, but has retained the position that the USA is engaged in a global war with no foreseeable end, and on this basis has continued to invoke a "law of war" framework that has distorted notions of due process and undermined human rights. Disturbingly, the judge who authored the Court of Appeals ruling made clear her view that the war paradigm "demands that new rules be written" because the "old wineskins" of international law and domestic criminal procedures are inadequate and can provide "only illusory comfort".

This paper looks at the two decisions and places them in the context of the USA's failure to end the Guantánamo detentions. It argues that the missed deadline is a symptom of the failure of the US government – all three branches of it – to properly confront the detentions as an international human rights issue.

[1] See USA: Detainees continue to bear costs of delay and lack of remedy: Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en.

DETENTION POWER UPHELD – FLAWED 'WAR' PARADIGM STILL UNDERMINING HUMAN RIGHTS

On 5 January 2010, a three-judge panel of the US Court of Appeals for the DC Circuit issued its decision in the case of Ghaleb Nassar Al-Bihani, a Yemeni man who has been held without charge in Guantánamo since 2002. This is the first time that the Court of Appeals has interpreted the Supreme Court's 2008 *Boumediene* ruling in such a case. Its ruling thereby goes beyond the specific case in question and unless overturned by a majority of the full Court of Appeals or the US Supreme Court, it will set a controlling precedent over the Guantánamo habeas corpus cases in the DC District Court.[2]

Soon after the June 2008 *Boumediene* ruling, it was decided that a single judge, Senior District Judge Thomas Hogan, would develop and coordinate procedures and issues common to the cases before transferring them to the District Court's various judges to hear the merits of each individual's challenge to his detention. Only two judges declined to allow the cases over which they had been presiding to be included in that process of coordination. One was Judge Richard Leon, before whom the case of Ghaleb Al-Bihani was pending.

The *Boumediene* ruling left it to the District Court to work out what precise procedures would apply in the Guantánamo habeas corpus cases. Among the issues would need to be a clear articulation of the test to be applied in deciding whether factual and legal grounds existed for each detention of those the Bush administration had labelled "enemy combatants". In October 2008, Judge Leon became the first District Court judge to articulate and apply such a test in the post-*Boumediene* litigation.[3] He said that the definition of "enemy combatant" formulated in 2004 by the Bush administration for the Combatant Status Review Tribunal (CSRT) scheme at Guantánamo had been "blessed by Congress" when it passed the Military Commissions Act of 2006 (MCA), and that he would therefore apply this definition to the cases before him. Under this definition, 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 – global in reach, seemingly indefinite or permanent in duration, 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 illustrated 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, United Arab Emirates, Djibouti, Kenya, Gambia and Mauritania, as well as others arrested in houses and streets in Pakistan. Others were taken in Afghanistan, both in and

[2] On the day of the ruling, for example, DC District Judge Gladys Kessler ordered the parties in the habeas corpus case of Guantánamo detainee Suleiman Awadh bin Agil al-Nadhi to file supplemental briefing on the impact of the Court of Appeals ruling on the al-Nadhi case, in which a merits hearing had been held on 4 and 5 January 2010.

[3] Judge Leon, nominated to the District Court by President George W. Bush in 2002, was also the first judge to interpret the US Supreme Court's 2004 *Rasul v. Bush* ruling that the US District Courts had jurisdiction to consider habeas corpus petitions filed by Guantánamo detainees. In January 2005 Judge Leon ruled in favour of the Bush administration's view that the *Rasul* judgment provided no more than a meaningless procedural entitlement to the Guantánamo detainees. See page 51 of USA: Guantánamo and beyond: the continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en.

outside of situations of combat. In its definition, the scope and manner of its application, and its consequences under US law, the concept of "enemy combatant" and global "war" against non-state actors had little precedent or basis in international law.

Applying this definition, Judge Leon upheld the detention of Ghaleb Al Bihani in January 2009, a few days after President Obama took office. The case was appealed to the Court of Appeals for the DC Circuit. The Obama administration argued for Judge Leon's ruling to be upheld. On 5 January 2010 the Court of Appeals did so.

The Court of Appeals said that the case presented two "overarching questions" relating to the Guantánamo detentions: 1) which individuals can the President lawfully detain under laws passed by Congress; and 2) what habeas corpus procedures are the detainees entitled to. Stating that "we aim to narrow the legal uncertainty that clouds military detention", the panel began its analysis by asserting that the President's detention powers in this "war" context are not limited by international law:

> "The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for US courts… Therefore, we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic case law".[4]

This domestic law, the Court of Appeals said, centred on the Authorization for Use of Military Force (AUMF), a broad resolution passed by Congress in the immediate wake of the attacks of 11 September 2001, and included the Military Commissions Act of 2006 and the new version of the MCA passed in 2009. Under these legislative acts, the panel asserted, Ghaleb Al-Bihani was lawfully held whether the definition of a "detainable person" (i.e. what the Bush administration called an "enemy combatant") was that formulated by the previous administration and adopted by Judge Leon, or the very slightly modified definition that had been advanced by the Obama administration in March 2009.[5]

According to the record before the courts, Ghaleb Al-Bihani had worked as a cook for a paramilitary brigade allied to the Taleban (he had apparently never fired in combat the gun he carried during that time). The Court of Appeals upheld Judge Leon's decision that Ghaleb Al-Bihani's continued detention

[4] One of the three judges distanced himself from this part of the panel's decision, pointing out that "curiously", the majority was here going "well beyond what even the *government* has argued in this case", that is, that "the AUMF is informed by the [international] laws of war".

[5] In a memorandum filed in District Court in March 2009, the Justice Department revealed the new administration's view of its authority to detain those still held at Guantánamo: "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". In an accompanying press release, the Justice Department emphasized that it was dropping the "enemy combatant" label. The administration's underlying claim to authority to hold the detainees seemed to be substantially the same as its predecessor's, however, and did not jettison the overarching law of war framework or expressly recognize the applicability of international human rights law to these detentions. In April 2009, a federal judge noted that the Obama administration's definition is "broad" and one "under which mere 'support' of forces engaged in hostilities can justify an 'enemy combatant' designation." The administration said "a broad definition is necessary to provide the Executive with the kind of operational flexibility needed in the ongoing armed conflict." *Al Bakri v. Bush*, US District Court for DC, 2 April 2009 (Judge John Bates). See also USA: Different label, same policy? Administration drops 'enemy combatant' label in Guantánamo litigation, but retains law of war framework for detentions, 16 March 2009, http://www.amnesty.org/en/library/info/AMR51/038/2009/en.

was lawful, deeming that his involvement with a brigade that "fought alongside the Taliban while the Taliban was harbouring Al Qaeda… render him detainable" without charge under US law, even nearly eight years after he was taken into custody.[6]

Ghaleb Al-Bihani was captured by Northern Alliance forces and after a period of detention was handed over to the USA in June 2002, the month that the international armed conflict in Afghanistan ended (with the establishment of the Afghan Transitional Authority on 19 June 2002) and the conflict became non-international. The Court of Appeals noted that "it is not clear if Al-Bihani was captured in the conflict with the Taliban or with Al Qaeda", but said that in any event:

> "the determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war".

The Obama administration had argued to the Court that the "conflict in which al-Bihani was captured has not ended", and that "al-Bihani did not simply participate in a war between the United States and the country of Afghanistan", but in a conflict against "the joint forces of al-Qaida, the Taliban, and associated forces", a conflict in which it said hostilities continue.[7] This is what the Bush administration had called the "war on terror", a concept dropped by the Obama administration in name but not in substance.

The issue of war remained central to the Court's analysis of the second of the two questions before it, namely what procedures should apply to the habeas corpus proceedings in the Guantánamo cases. The Court dismissed Al-Bihani's arguments that, in a number of aspects, the habeas corpus procedures developed in the wake of the *Boumediene* ruling were inadequate. It stated that:

> "Habeas review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions…[W]e recognize that the Great Writ is not a static institution and it did not begin its life looking like it does today. Rather, like a tree extending its branches, habeas has grown over a long history to develop various procedures applicable to various circumstances of detention…
>
> Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance, and the appropriate habeas procedures cannot be conceived of as mere extension of an existing doctrine. Rather, those procedures are a whole new branch of the tree."

Amnesty International emphasises that the essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate that a clear basis in fact and law exists for their detention. If the government is unable to do so promptly (i.e. within a matter of days), the Court is to order the individual released. This is the bedrock guarantee against arbitrary detention; if it is not fully respected by the government and courts in a national legal system, the right to liberty is gravely undermined. Eighteen months after the *Boumediene* ruling, which itself came more than six years after detentions began at Guantánamo, a majority of those detainees who have challenged their detention in habeas corpus petitions have not yet had a hearing on

[6] The Court of Appeals said that while it believed Ghaleb Al-Bihani was lawfully detained because the record showed that he was "both part of and substantially supported enemy forces", the picture might be less clear in other cases "where facts may indicate only support, only membership, or neither". However, it said that it had no need at this point to "explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard."

[7] *Al Bihani v. Obama*. Brief for Appellees, In the US Court of Appeals for the DC Circuit, July 2009.

the merits of their challenge. Rather than recognising that the grounds invoked by the executive find no explicit basis in Congressional legislation or international law, the judiciary has allowed itself to become mired in a lengthy process of improvisation or divination, which the Obama administration has thus far seemed content to perpetuate by asserting that the vague terms of the AUMF as "informed" by analogy to the international law of armed conflict give it broad powers to detain individuals worldwide. This illustrates how far the global war paradigm has eroded US respect for human rights. Under the International Covenant on Civil and Political Rights (ICCPR), for example,

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".[8]

Further, the discriminatory application of due process rights has been a hallmark of the USA's counter-terrorism detention regime from the outset. Equal protection of the law without discrimination based on national origin is a human right.[9] Yet, in its *Al Bihani* decision, the Court of Appeals noted that "the procedures to which Americans are entitled are likely greater than the procedures to which non-citizens seized abroad during the war on terror are entitled". It emphasised the need for judicial deference to the executive in a time of war:

> "Al-Bihani is a non-citizen who was seized in a foreign country. Requiring highly protective procedures at the tail end of the detention process for detainees like Al-Bihani would have systemic effects on the military's entire approach to war. From the moment a shot is fired, to battlefield capture, up to a detainee's day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation".

This echoes arguments repeatedly made by the Bush administration – namely that the demands of due process would undermine the USA's "war" effort. This argument was a smokescreen. For the Bush administration, courts, defence lawyers, human rights law and the Geneva Conventions were obstacles to the sort of interrogation methods and detention conditions it wished to employ, including at Guantánamo, far in distance and time from any actual battlefield in which the USA was involved.

Moreover, it bears repeating that those still held in Guantánamo on "war" grounds include those taken into custody far from any international battleground as traditionally understood, and not in the territory of a state at war with the USA. Saudi Arabian national Ahmed al-Darbi, for example, was arrested by civilian authorities in Baku, Azerbaijan, in 2002 and transported to Guantánamo via Bagram in Afghanistan. He remains in Guantánamo more than seven years later, as does Musa'ab Al Madhwani, arrested in a flat in Karachi in September 2002. Ahmed al-Darbi, facing trial by military commission, has still not had a habeas corpus hearing. Al Madhwani's habeas corpus petition, on the other hand, was the subject of a decision released by the DC District Court on 6 January 2010.

[8] Article 9(1) and (4) of the 1966 International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992.
[9] See articles 14 and 26 of the ICCPR.

INDEFINITE DETENTION OF MUSA'AB AL MADHWANI UPHELD. NO REMEDY, NO ACCOUNTABILITY

The kinds of human rights violations to which countless detainees taken into US custody in what the USA had been calling the "war on terror" are by now familiar: prolonged incommunicado detention, secret transfer, enforced disappearance, torture and other ill-treatment, indefinite detention without charge. However familiar they may be, however, their stories must continue to be told, at least until the USA meets its international obligations, including in respect to accountability and remedy for the violations to which detainees have been subjected.

Musa'ab Omar Al Madhwani, then 22 years old, was arrested in an apartment in Karachi on 11 September 2002 by Pakistani authorities. He says that he did not resist arrest, and that he was told that after he was taken into custody there was a gun battle between Pakistani forces and occupants of another flat in the building.

In a declaration signed in 2008, Al Madhwani said that in Pakistani custody (translated from Arabic):

> "They tied me up, beat and threatened me, and hit me in the head with the butt of a rifle. They told me that if I did not admit to seeing weapons in the apartment, then I would be held responsible for the deaths that occurred in the firefight. The Pakistanis also threatened not to turn me over to Yemen or the United States, but rather to hold me secretly for the rest of my life or to kill me and cut my body into pieces."

At some point, he was blindfolded, hooded and interrogated by "an American with an Arabic interpreter". After about five days in Pakistan custody, Musa'ab Al Madhwani was handed over to US forces and flown to Afghanistan. He says he was taken to the "Dark Prison", a secret US-operated facility in or near Kabul, where he was held for about a month. In his declaration, he continues:

> "The cell remained in total darkness during that time. Raucous music blared continuously, except that screams of other prisoners could be heard when the tapes were changed. I was beaten, kicked, sprayed with cold water, deprived of food and sleep, and subjected to extreme cold, stress positions, and other forms of torture. I was partially suspended by the left hand for the entire time at the prison, so that I could not sit and was forced to rest all my weight on one leg. This resulted in permanent nerve damage to my leg… The Americans sprayed me with cold water and dumped water on my head until I got seizures and collapsed. The pain was so extreme that I would pass out repeatedly. Then I was freezing and sweating at the same time. An Arabic-speaking interrogator told me that I was in a place the bull flies cannot find. He said no one could find me in that place, not even the International Committee of the Red Cross [ICRC]…
>
> After a while I admitted to whatever the interrogators accused me of, just to stop the torture and abuse".

He was then transferred to the US air base at Bagram where he was held for another five days. There he has alleged that:

> "I was forced to stand the entire time until my feet swelled and I was exhausted. I was dragged by the neck to interrogation, where dogs would bark in my face."

He was transferred to Guantánamo in late October 2002. There he was held in isolation and subjected to further interrogations. In his declaration, he added:

> "The interrogators at Guantánamo knew that I had been imprisoned and tortured at Bagram and the Dark Prison. They would ask me, 'So, how did you like it at Bagram? How did you like the Dark Prison?'
>
> An interrogator at Guantánamo showed me photographs of some of the same people I had been asked to identify [in photographs] at the Dark Prison. I told the interrogator I did not really know these people, and I had only said I did before because I was tortured. The interrogator became very angry, threw the file, grabbed a chair, and began screaming in my face. Because I feared that the torture would resume, and because the interrogator threatened to send me back to Bagram or the Dark Prison, I falsely admitted that I did know the people in the photographs".

In a habeas corpus hearing in Washington DC on 14 December 2009 – more than seven years after Musa'ab Al Madhwani was taken to Guantánamo – Judge Thomas Hogan noted that the US government had "made no attempt" to refute Al Madhwani's torture allegations, and that there was "no evidence in the record" that they were inaccurate. To the contrary, Judge Hogan added, the allegations were corroborated by "uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions."

A medical record dated shortly before his transfer to Guantánamo indicates that Musa'ab Al Madhwani had lost about a third of his body weight, and was showing signs of possible severe dehydration. By the time he was transferred to Guantánamo he was suffering from severe mental health problems. According to the medical experts retained for the habeas corpus proceedings by both the government and the detainee's counsel, Musa'ab Al Madhwani was likely suffering from post-traumatic stress disorder (PTSD), a serious mental condition from which he continues to suffer, according to a doctor retained by Al Madhwani's US lawyers.

Amnesty International does not know what, if any, official investigation has taken place into the allegations of torture and ill-treatment of Musa'ab Al Madhwani in Pakistani and US custody. Under Article 12 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which the USA ratified in 1994,

> "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

The same obligation applies equally to acts amounting to other cruel, inhuman or degrading treatment or punishment (Article 16). Victims of such abuse are entitled to rehabilitation, compensation and other effective remedies.[10]

Judge Hogan emphasised that as described in Musa'ab Al Madhwani's "classified testimony about his conditions of confinement, which I find to be credible, the United States was involved in the prisons where he was held, and believed to have orchestrated the interrogation techniques, the harsh ones to which he was subject". Amnesty International believes that Judge Hogan should now expressly refer the allegations on to the appropriate US government authorities with a view to their investigation. Such investigations must include a determination of whether Musa'ab Al Madhwani was subjected to enforced disappearance at any time during his detention, specifically in the 'Dark Prison' in Kabul, where

[10] See Convention against Torture article 14; ICCPR article 2(3).

detainees did not have access to the ICRC. Like torture, enforced disappearance is a crime under international law. Those responsible must be brought to justice.

A year after President Obama took office, however, accountability and access to remedy for the human rights violations committed against detainees in the "war on terror" seem as remote as ever.[11] In the case of Musa'ab Al Madhwani, he continues to be without judicial or other effective remedy for the human rights violations he has endured, and indeed he remains in indefinite detention without charge at Guantánamo after Judge Hogan ruled that his detention was lawful under US law.

Defending his detention before Judge Hogan, the US administration had sought to rely not upon statements made by Al Madhwani during his custody in Afghanistan but upon 23 reports of interrogations of him conducted in Guantánamo between 3 March 2003 and 27 September 2004 and summaries of statements he made during these interrogations. The administration claimed that the detainee would by this time have recovered from any abuse he suffered in Afghanistan; that the conditions of detention at Guantánamo were not coercive; and that statements he made in the Naval Base were reliable. Judge Hogan, pointing out that Al Madhwani's PTSD "seemingly exacerbated the taint from any harsh treatment", disagreed:

> "It should come as no surprise that during Petitioner's first Guantánamo interrogation, which was conducted on the day Petitioner arrived at Guantánamo, he was gripped by the same fear that infected his Afghanistan confessions. His Guantánamo interrogators did little to assuage that fear. According to the reliable evidence in the record, multiple Guantánamo interrogators on multiple occasions threatened Petitioner when he attempted to retract statements he now claims were false confessions…
>
> The Court is particularly concerned that the interrogators at Guantánamo relied on, or had access to, Petitioner's coerced confessions from Afghanistan. The logical inference from the record is that the initial interrogators reviewed Petitioner's coerced confessions from Afghanistan with him and asked him to make identical confessions. Far from being insulated from his coerced confessions, his Guantánamo confessions were thus derived from them…
>
> Petitioner's confinement at Guantánamo did not occur in a vacuum. Before Guantánamo, he had endured forty days of solitary confinement, severe physical and mental abuse, malnourishment, sensory deprivation, anxiety and insomnia. The Government fails to establish that months of less-coercive circumstances provide sufficient insulation from forty days of extreme coercive conditions…
>
> That the Government continued to drink from the same poisoned well does not thereby make the water clean".

Judge Hogan ruled that all 23 interrogation reports and summaries were unreliable. However, he ruled that statements made by Musa'ab Al Madhwani to the Combatant Status Review Tribunal (CSRT) in September 2004 and to the Administrative Review Board (ARB) in December 2005 could be relied upon.[12]

[11] See also USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en.

[12] The USA's international human rights obligations prohibit in any event the use in proceedings of evidence obtained by torture or other cruel, inhuman or degrading treatment. See Convention against Torture, article 15; Human Rights Committee, General Comment no 20 (1992), para 12.

With no reliable direct evidence presented by the government in a case "largely dependent" on the detainee's statements, Judge Hogan said he was forced to base his decision "on a severely truncated body of evidence". In a decision he described as "a very close case", Judge Hogan said that the government had proved by a "preponderance of the evidence", based on Al Madhwani's statements to the CSRT and ARB, that the detainee had "trained, travelled, and associated with al-Qaida members" in Afghanistan and Pakistan in 2001 and 2002. As such, under existing US law, the government could continue to detain him on the grounds that he was "a part of" *al-Qa'ida*. It remains unclear whether the implication of such a finding under current US domestic law is that government can now under its sole discretion detain him without criminal trial until death.

Judge Hogan did not leave the matter there, however. He effectively questioned why Musa'ab Al Madhwani should not be released. In his ruling on 6 January, he wrote:

> "As a young, unemployed, undereducated Yemeni, Petitioner was particularly vulnerable to the demagoguery of religious fanatics. The record reflects that Petitioner was, at best, a low-level al-Qaida figure. It does not appear that he even finished his weapons training. There is no evidence that he fired a weapon in battle or was on the front lines. There is also no evidence that he planned, participated in, or even knew of any terrorist plots. Classified documents in the record confirm the Court's assessment. As does the fact that he appears to have been a model prisoner during his seven years of detention. The Court fails to see how, based on the record, Petitioner poses any greater threat than the dozens of detainees who recently have been transferred or cleared for transfer."

Amnesty International calls on the US government to immediately release Musa'ab Al Madhwani unless it promptly charges him with recognizably criminal offences and brings him to fair trial, in accordance with international human rights standards. He must have access to effective remedy for the human rights violations committed against him.

FAILURE TO CLOSE GUANTÁNAMO REFLECTS FAILURE TO ADDRESS IT AS A HUMAN RIGHTS ISSUE

In court in the Al Madhwani case on 14 December 2009, Judge Hogan expressed his concern at the post-*Boumediene* legal landscape. The District Court judges, he said, had worked "very hard and in good faith" to fill in the gaps left by the Supreme Court's ruling, but the slowness of the process was inevitable, unfair for the detainees, and legal inconsistencies had emerged that would need to be resolved. It was "unfortunate", Judge Hogan said, that the legislative and executive branches of government "have not moved more strongly to provide uniform, clear rules and laws for handling these cases". He recommended a "national legislative solution" and perhaps a "new court" to handle the detainees' cases.

While Amnesty International does not question the good faith efforts of the District Court to craft habeas corpus procedures for the detainees, it believes that the solution to the Guantánamo "problem" lies in all branches of the US government – executive, legislature and judiciary – treating it as a human rights issue. Instead the issue of Guantánamo, and "counter-terror detentions" more generally, has been treated principally as a domestic national security policy issue under a global "war" paradigm, a framework that has distorted basic notions of due process and opened the door to public fear-mongering by current and former politicians. The perspective urgently needs to change if the Guantánamo detentions are to be ended in a way that does not merely relocate the human rights violations elsewhere.

Regrettably, even some federal judges have adopted positions that can only undermine public confidence in the capacity of the ordinary criminal justice system to play its full role in the counter-terrorism

context.[13] In the *al-Bihani* decision, Circuit Judge Janice Rogers Brown, who authored the opinion, separately questioned whether "during a time of war", a "court-driven process is best suited to protecting both the rights of [detainees] and the safety of our nation". She continued:

> "War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort".

There are disturbing echoes here of President George W. Bush's call to his administration in early 2002, in a central policy memorandum on detentions in the "war on terror", to engage in "new thinking in the law of war", to take account of this "new paradigm".[14] This "new thinking" ignored the USA's international human rights obligations and bred old, familiar abuses. Diffidence was not the problem, but rather the overconfidence of officials who operated as if unfettered executive power was the guarantor of public safety from violent attack, and a supine Congress and judicial deference should be the order of the day. Systematic human rights violations were the result. The detainees held in Guantánamo and elsewhere, and their families, are still paying the price. There was (and remains) little recognition within any branch of government in the USA that a wide variety of states and peoples have throughout history faced grave threats of large-scale violent attack from non-state groups, and that far from being obsolete, the international human rights law frameworks enacted over the past several decades were developed in a context in which states were acutely sensitive to those threats.

On the international stage, the Obama administration has put a healthy distance between it and the Bush administration's view of provisions of the Geneva Conventions as too "quaint" or "vague and undefined" to be suitable for this "new war". For example, on the 60th anniversary of the Geneva Conventions, the US Permanent Representative to the United Nations, Ambassador Susan Rice, said:

> "In recent years, some have called the Geneva Conventions outdated as we face an enemy that is loyal to no state, that hides among civilians, and that routinely violates the law our own forces are obliged to uphold. However, for all the enormity of al-Qaeda's deadly ambitions, the challenge we face today has its own unfortunate tradition. The framers of the Conventions were perfectly familiar with terrorism, albeit of a different sort. If anything, the conflict we are waging today in Afghanistan, and the struggle against violent extremists and terrorists more broadly, make the Geneva Conventions even more relevant and important".[15]

On the other hand, as noted below, while the Obama administration has spoken of its commitment to international human rights and to meeting its treaty obligations, it has repeated its predecessor's failure to recognize that international human rights law, such as the ICCPR, applies in this context (and was *also*

[13] See also, for example, 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.
[14] Memorandum re: Humane treatment of al Qaeda and Taliban detainees. President George W. Bush, 7 February 2002.
[15] Statement by Ambassador Susan E. Rice, US Permanent Representative to the United Nations, on the 60th anniversary of the Geneva Conventions, New York, 3 December 2009: http://usun.state.gov/briefing/statements/2009/133122.htm

developed with an awareness of the long history of these types of threats).[16] Indeed, in litigation relating to Guantánamo, Bagram, the CIA's rendition, detention and interrogation program, and on remedy for former detainees, the Obama administration has all too often taken essentially the same position as its predecessor, leaving human rights principles disregarded.[17]

Even where international humanitarian law does apply (in situations of armed conflict as recognized by international law), it does not displace international human rights law. Rather, the two bodies of law complement each other. In a resolution adopted as long ago as 1970, the UN General Assembly affirmed the "basic principle" that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict". The International Court of Justice has stated that the protection of the ICCPR and other human rights conventions "does not cease in times of armed conflict, except through the effect of provisions for derogation". The USA has made no such derogation under article 4 of the ICCPR.[18]

In a key national security speech eight months ago, President Obama emphasised his view that "we are indeed at war with al Qaeda and its affiliates". Under this global war theory, he pointed to the possibility that the USA would develop an indefinite detention regime for those detainees who "cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States". "If and when we determine that the United States must hold individuals to keep them from carrying out an act of war", the President said, "we will do so within a system that involves judicial and congressional oversight". The administration would work with Congress to develop "an appropriate legal regime". There was no mention of human rights in his speech.[19]

The first home for this envisaged new legal regime may be a prison in Illinois. In a memorandum released on 15 December 2009, President Obama directed the US Attorney General to "acquire and activate" the Thompson Correctional Center (TCC), a maximum security facility in Thompson, Illinois. While the TCC would also be used to house certain other federal prisoners, the Attorney General is directed to leave "a sufficient portion" of the facility to the Department of Defense for the latter to hold detainees transferred from Guantánamo.[20] According to a briefing provided by the administration on 15 December, the detainees who would be relocated to TCC would be those charged for trial by military commission and those whom the administration decided it could neither to release nor prosecute.[21]

Far from this plan being the result of a human rights approach to ending the detentions at Guantánamo, the administration has, at a time of recession, been reduced to selling the Illinois proposal in terms of its domestic economic benefits. The plan would create some 3,000 new jobs in the region, according to the

[16] In April 2009, the US State Department issued a statement of "US human rights commitments and pledges" which, among other things, stated that the USA was "committed to meeting its UN treaty obligations". Available at http://www.state.gov/documents/organization/122476.pdf.
[17] See: Missing from the US 'human rights agenda': accountability and remedy for 'war on terror' abuses, 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/005/2010/en
[18] And indeed, not every obligation under the ICCPR is open to derogation, not every threat to a nation's security permits derogations to be made, and any derogations must meet tests of strict necessity. See Human Rights Committee General Comment no 29.
[19] USA: President Obama defends Guantánamo closure, but endorses 'war' paradigm and indefinite preventive detention, 22 May 2009, http://www.amnesty.org/en/library/info/AMR51/072/2009/en.
[20] Presidential Memorandum – Closure of detention facilities at the Guantánamo Bay Naval Base, 15 December 2009, http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base.
[21] Press background briefing by senior administration officials on decision to acquire Thompson Correctional Center. White House, 15 December 2009, available at http://www.scotusblog.com/wp-content/uploads/2009/12/Thomson-transfer-transcript.doc.

White House.[22] Moreover it says that the US taxpayer would save money – the Illinois prison would cost US$75 million a year to run compared to the US$150 million it costs the Pentagon to run the Guantánamo detention facility.[23] Undermining human rights principles at half the dollar cost does not lessen the damage done.

For the federal government to buy this Illinois prison and to refit it in the way it says is required to house former Guantánamo detainees will likely require funding and legislation approved by Congress. Some officials consider it unlikely that detainee transfers would occur until 2011 at the earliest, even if Congress does not block the plan, especially given the 2010 mid-term congressional elections. In any event, as far as Amnesty International is concerned, it is not only unacceptable that any detainee should continue to be held at Guantánamo in the absence of a proper criminal charge followed without further delay by a fair trial, it would be equally unacceptable for the USA to transfer to indefinite military custody without trial in the US mainland any detainee whom the administration intends neither to prosecute nor release.

The administration's need for "cooperation from Congress" – far from a *fait accompli* if the fear-mongering and politicking about the Guantánamo detentions seen over the past year is anything to go by – is the reason that President Obama gave for declining to put a new date on closure of the detention facility when he acknowledged in November 2009 that his 22 January 2010 deadline would not be met. From an international law perspective, however, the USA as a whole is responsible for ensuring compliance with its international law obligations. Officials cannot invoke internal laws or structures of government as an excuse for the country's failure to meet these obligations.

Congress, just like the administration, must ensure that the USA's detention policies comply with its international human rights obligations. It must take its share of the blame for its failure to rein in the Bush administration's unlawful detainee policies, including when they were being justified by reference to the AUMF, a dangerously overbroad congressional resolution passed with little genuine debate on 14 September 2001. The Military Commissions Act of 2006, as another example, was legislation incompatible with international human rights law, passed in the charged climate of the 2006 mid-term elections which was exploited by the Bush administration. Election politics trumped human rights then. Human rights must now be prioritized.

Alongside its congressional opponents, the Obama administration has faced criticism on its goal of closing the Guantánamo detention facility from former Bush administration officials seeking to promote the global "war" theory and to cast doubt on the adequacy of the criminal justice system in the counter-terrorism context. Since leaving office, for example, former Vice-President Cheney has continued to promote policies such as the use of secret detention and interrogation techniques that constitute torture under international law.

Most recently, two former Attorneys General from the Bush administration have taken issue with the Obama administration's decision to turn to the civilian federal courts to try certain Guantánamo detainees and others. According to former Attorney General John Ashcroft, those who advocate such trials in such cases "may simply be compromising national security and our ability to gain intelligence": "We need to take people and treat them as – for what they are, is enemy combatants, and they should be processed in a different way", he said.[24] As Attorney General, according to documents now in the public domain, John Ashcroft was involved in the approval of interrogation techniques that amounted to torture or other cruel,

[22] *Ibid.*
[23] Plan to move Guantánamo detainees faces a new delay. New York Times, 23 December 2009.
[24] Interview on Fox News, 12 January 2010, transcript available at http://www.foxnews.com/story/0,2933,582976,00.html.

inhuman or degrading treatment under international law against detainees held in secret detention (i.e. while they were victims of enforced disappearance).[25]

In similar vein former Attorney General Michael Mukasey condemned what he saw as the failure of the Obama administration to consider how Umar Farouk Abdulmutallab, the 23-year-old Nigerian national indicted in federal court in Michigan on 6 January for allegedly attempting to detonate a bomb on a Detroit-bound Northwest Airlines plane on 25 December 2009, "fits" into operations "(formerly known as the global war on terror) in which we are engaged". Mukasey argued that Umar Abdulmutallab should have been held in military custody, and criticized the administration for allowing the suspect access to a lawyer, and for its "failure to think of Abdulmutallab as a potential source of intelligence rather than simply as a criminal defendant".[26] Treating criminal suspects solely as potential intelligence sources contributed to systematic human rights violations under the Bush administration, including the crimes under international law of torture and enforced disappearance.[27]

While Amnesty International welcomes the fact that the Obama administration did not take the sort of approach against Umar Abdulmutallab argued by the former Attorneys General, and has welcomed its decision to turn to the ordinary federal courts for the trials of a number of Guantánamo detainees,[28] it regrets the administration's failure to take decisive action to end all use of military detentions and military trials for those who should be prosecuted in the ordinary criminal justice system or released.

The fallout from the Abdullmatallab case is now contributing to even further delays in resolving the Guantánamo detentions, because of the suspect's alleged links with militants in Yemen and allegations that the plot was initiated by two Saudi Arabian men released from Guantánamo in 2007. At a White House press briefing on 5 January 2010, in response to a question about how the attempted bombing of the Northwest Airlines flight "is affecting the administration's thinking about Guantánamo Bay and closing the facility", the White House spokesperson said that the decision had been taken to suspend transfers of detainees to Yemen. About half of the 198 detainees remaining at Guantánamo are Yemeni, including Musa'ab al Madhwani whose release Judge Hogan advocated the day after the White House announcement.

By continuing to focus exclusively on security questions to the exclusion of international human rights, certain members of Congress have contributed to a political climate in which the rights of detainees are disregarded. The senior Democrat on the Senate Select Committee on Intelligence, Senator Dianne Feinstein, and Senator Kit Bond, the senior Republican on the Committee, had written to President Obama calling on him to suspend detainee transfers to Yemen in the wake of the attempted attack. Senator Bond welcomed the White House's decision to stop the transfers as "a step in the right direction", but added that "since we now know that releasing or transferring these hardened terrorists

[25] For example, according to a Memorandum for the Record written by CIA General Counsel Scott Muller after a meeting on 29 July 2003, Attorney General Ashcroft confirmed that the Department of Justice approved of the expanded use of the techniques, including multiple applications of "waterboarding", simulated drowning. Special Review. Counterterrorism detention and interrogation activities (September 2001 – October 2003), CIA Office of Inspector General, 7 May 2004, para. 48. The Memorandum for the Record is dated 5 August 2003.
[26] What does the Detroit bomber know? By Michael B. Mukasey, Wall Street Journal, 7 January 2010.
[27] For example, when Khalid Sheikh Mohammed was arrested in Pakistan in March 2003, he was not brought to trial in US federal court (where he had previously been indicted), but instead put into secret CIA detention for the next three and a half years. Three days after his arrest, Attorney General John Ashcroft said that "Khalid Sheikh Mohammed's capture is first and foremost an intelligence opportunity". That same month, Khalid Sheikh Mohammed was subjected at least 183 times to the torture technique known as "waterboarding", according to documents now in the public realm.
[28] See, USA: Five more Guantánamo detainees to be tried in federal court, 15 November 2009, http://www.amnesty.org/en/library/info/AMR51/116/2009/en.

amounts to an all expenses paid trip back to the battlefield, the Administration should abandon its flawed and dangerous plan to close GTMO."[29] The following day, in a statement condemning the administration's decision to indict Umar Abdulmutallab in federal court Senator Bond said "We must treat these terrorists as what they are — not common criminals, but enemy combatants in a war."[30]

On 7 January 2010, two senior members of the US Senate Committee on Armed Services, Senator Lindsey Graham and Senator John McCain, wrote to President Obama urging him, in addition to stopping transfers to Yemen, "at a minimum" to halt detainee releases to a number of other countries, including Pakistan, Afghanistan, Sudan and Saudi Arabia. Referring to the ongoing post-*Boumediene* habeas corpus proceedings, the two Senators reiterated their "belief that the US court system, however capable, should not be developing the policies by which we prosecute this war". They also suggested the creation of "comprehensive legislation that will ensure the continued detention of those who pose a threat to our national security", including detainees ordered released on *habeas corpus*.[31] Amnesty International urges all officials in the administration and Congress not only to cease the current practice of seeking to rely on the AUMF and analogies to the international law of armed conflict to justify indefinite detention on national security grounds, but also to reject any other proposal that would serve to undermine the USA's long tradition of confidence in and reliance upon the criminal justice system to counter threats of violence against its population (as enactment of preventive security legislation as proposed by the Senators would entail). To do otherwise would represent a huge step backwards both in terms of the USA's own history of protection of constitutional rights and in terms of its promotion and advancement of human rights norms at the international level.

President Obama described the failure to pre-empt the attempted bombing on 25 December as "a mix of human and systemic failures that contributed to this potential catastrophic breach of security" and has outlined some immediate remedial measures in relation to intelligence and security.[32] However, the episode has also led to the 90 or so Yemenis still held in Guantánamo being publicly re-branded as a collective threat to national security rather than individuals whose human rights under law should be recognized and respected. Once again a failure to recognize the detentions as a human rights issue has diverted the USA from resolving the Guantánamo detentions and undermined principles to which the USA says it is committed.

As the USA took its seat on the UN Human Rights Council in September 2009, the administration maintained that the principles of the Universal Declaration of Human Rights are "as resonant today" as they were six decades ago, and that these human rights and fundamental freedoms, including "due process" and "equal rights for all", are, "in effect, a part of our national DNA". Among other things, it said, the USA was fully committed to universality: "We cannot pick and choose which of these rights we embrace nor select who among us are entitled to them."[33] The USA is, however, choosing to deny the Guantánamo detainees the rights to which they are entitled.

[29] Senator Kit Bond, news release, 5 January 2010, http://bond.senate.gov/public/index.cfm?FuseAction=PressRoom.NewsReleases&ContentRecord_id=00aa4745-fbf1-b044-934e-adf33b345647&Region_id=&Issue_id=.
[30] Senator Kit Bond, news release, 6 January 2010, http://bond.senate.gov/public/index.cfm?FuseAction=PressRoom.NewsReleases&ContentRecord_id=05d3f709-eb17-36b6-f9cb-ee4af62f8034&Region_id=&Issue_id=.
[31] Letter available at http://lgraham.senate.gov/public/_files/_pdfs/McCain%20Graham%20Detainee%20Letter.pdf
[32] See Presidential Memorandum regarding 12/25/2009 attempted terrorist attack, 7 January 2010, http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack.
[33] Remarks before the high-level session of the Human Rights Council, Esther Brimmer, Assistant Secretary, Bureau of International Organization Affairs, US Department of State, 14 September 2009.

A human rights approach to ending the Guantánamo detentions demands that any detainee not charged with a recognizable criminal offence for trial under fair procedures in an independent and impartial court – not a military commission with impoverished due process guarantees reserved for foreign nationals alone – should be immediately released, while ensuring that no-one is forcibly returned to a country where he would face human rights violations.[34] The US authorities should drop any intention to construct a system for indefinite "national security" detention of individuals in Illinois or elsewhere. To do so, on the premise of a global "war" without foreseeable end, in the name of countering the general threat of terrorism, would only entrench more firmly the mistakes made during the years of the Bush administration, putting the USA essentially into a permanent state of emergency which can only corrode respect for human rights in and by the USA, as well as undermining the confidence of its officials and population in the capacity of its own criminal justice system (in cooperation with the criminal justice systems of other states) as the bulwark of protection of the public from threats of violence. Amnesty International urges the USA to move more firmly to restore its time-tested systems of ordinary criminal justice to prominence in countering risks of violent attack against the population by individuals and non-state groups. This does not mean that it has to give up on intelligence gathering and other measures.

As we approach President Obama's original deadline for his administration to resolve the Guantánamo detentions and close the prison, it is worth recalling the words of his executive order of 22 January 2009:

> "In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo would further the national security and foreign policy interests of the United States and the interests of justice".[35]

A year later, the absence in the executive order of an express commitment to comply with international human rights law in ending the detentions has come home to roost. The issue has become mired in a domestic US political context in which over the short-term it seem less costly to invoke concepts such as "national security" or "global war" to justify deep departures from the USA's human rights commitments, than to confront and remedy the human rights violations of the past and present. So long as human rights remains largely missing from the analysis brought to bear by the administration, Congress, and the courts, an effective and permanent solution to the real challenges the USA faces will seem elusive.

The Guantánamo detentions were created out of a government's failure to respect human rights principles. The detentions can and must be ended within a framework of respect for universal human rights.

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[34] Amnesty International sent the administration detailed recommendations a year ago. 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.

[35] Executive order: Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities, 22 January 2009.