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Further information on UA 48/09 (AMR 51/022/2009, 18 February 2009) – Legal concern

USA

Ali Saleh Kahlah al-Marri (m), Qatari national, aged 43

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Ali al-Marri – who has been held in indefinite US military detention as a so-called “enemy combatant” for more than five and a half years – has been charged for trial in federal court and President Barack Obama has ordered his transfer from military to civilian custody. The US administration has asked the US Supreme Court to dismiss Ali al-Marri’s habeas corpus case as moot. The Court is due to consider the question of dismissal on 6 March, and is expected to make a decision on the same day or shortly thereafter.

On 26 February, a federal grand jury in Illinois returned a two-count indictment against Ali al-Marri, charging him with providing and conspiring to provide “material support and resources to a foreign terrorist organization”, namely *al-Qa’ida*. Announcing this development on 27 February, US Attorney General Eric Holder said that “This indictment shows our resolve to protect the American people and prosecute alleged terrorists to the full extent of the law.” A federal prosecutor said that al-Marri “will now face the US criminal justice system, where his guilt or innocence will be determined by a jury in open court”. Each count of the charges carries a possible 15-year prison sentence.

Ali al-Marri, a US resident, was arrested in Illinois in December 2001 and charged in federal court with credit card fraud, identity fraud, and making false statements. His trial never took place, because on 23 June 2003 he was designated as an “enemy combatant” by President George W. Bush, transferred to the custody of the US Department of Defense, and shut away in a military facility in Charleston, South Carolina. The transfer of Ali al-Marri from civilian to military custody appears to have been motivated by the Bush administration’s wish to interrogate him without respect for the fundamental rights and safeguards, including judicial supervision of his detention, provided for by the criminal justice system. During his first 16 months in military detention, he was held incommunicado and allegedly subjected to torture or other ill-treatment. Indeed, prolonged incommunicado detention of such length has been recognized, in itself, to constitute cruel, inhuman or degrading treatment or even torture.

Ali al-Marri challenged his indefinite military detention in court. After the US District Court dismissed his habeas corpus petition, the full Court of Appeals for the Fourth Circuit ruled on his case in a split decision (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>). By five votes to four, the court held that “if the Government’s allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant”. This referred to 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 authorizing 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”.

The US Supreme Court agreed to hear Ali al-Marri’s appeal against the Fourth Circuit’s ruling, to consider the question of whether the AUMF had authorized, and the US Constitution allowed, such a detention. The new administration was due to file its brief on 23 March 2009 and the Court was scheduled to hear oral arguments on 27 April. However, since the indictment was handed down in Illinois the Justice Department has asked the Supreme Court to dismiss the case on the basis that there was no “live controversy” left to resolve because the government had granted all that Ali al-Marri’s habeas corpus petition had sought.

The administration’s motion to dismiss the case cited the fact that President Obama had on 27 February ordered Ali al-Marri to be transferred to civilian custody to face criminal charges, which would end his military detention as an “enemy combatant”. President Obama’s memorandum to Secretary of Defense Robert Gates

stated that “upon Mr al-Marri’s transfer to the control of the Attorney General, the authority to detain Mr al-Marri provided to the Secretary of Defense in the June 23, 2003, order shall cease”.

At the same time, the administration has filed an application in the US Supreme Court seeking an order acknowledging Ali al-Marri’s release from military custody and his transfer to civilian custody, or, “to the extent that any judicial authorization is necessary”, an order from the Court “granting authorization to execute the transfer”. By the morning of 3 March, Ali al-Marri’s transfer to civilian custody had not yet taken place.

Lawyers for Ali al-Marri, while welcoming the decision to release him from military custody, are asking the Supreme Court not to dismiss the case as to do so would leave a fundamental question of constitutional law and executive power unanswered and would allow the Fourth Circuit’s 2008 decision to stand.

In its brief asking the Supreme Court to dismiss the al-Marri case, the new administration does not reject the Bush administration’s position that Ali al-Marri could be detained indefinitely as an “enemy combatant”. The Justice Department instead argues that if even there were a “theoretical possibility that [al-Marri] could be re-designated an enemy combatant sometime in the future”, any such threat of re-designation was not immediate due to his looming trial, and this “hypothetical contingency could not prevent this case from being moot”. Furthermore, even if Ali al-Marri were to be re-designated, the new administration argued, “it is very likely” that that re-designation “would occur in a much different posture, under different circumstances”. For instance, evidence adduced during Ali al-Marri’s trial “could affect the factual basis for any future detention”. The government has argued that under US law, “it is well settled that where a dispute might recur, if at all, under different circumstances, the Court should address any future dispute only if and when it arises.”

Amnesty International welcomes the administration’s decision to end Ali al-Marri’s indefinite military custody and to bring him to trial in an ordinary civilian court. The organization, which has campaigned since 2003 for Ali al-Marri to be brought to trial in federal court or released, considers that his indefinite military detention violated the international prohibition of arbitrary detention. It also considers that the AUMF was hastily passed, is open to dangerously expansive interpretation, and was exploited by the Bush administration which did not consider it needed congressional approval for its actions anyway. Amnesty International has previously called for revocation of the AUMF and will continue to call on the new administration to clarify that it will not interpret it as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law, to extend authority for detention under the law of war to individuals to whom the law of war would not otherwise apply, or as otherwise providing justification for such violations.

Amnesty International emphasizes that, presuming that Ali Al-Marri is soon transferred for trial in an ordinary civilian court, the trial must comply with international standards of fairness and due process, and that under international treaties to which the USA is a party, victims of torture or other ill-treatment have the right to redress including rehabilitation and compensation, and victims of unlawful detention have the right to compensation.

Amnesty International remains concerned that the US government has not yet rejected explicitly the global war framework developed and relied upon by the Bush administration under which the USA has systematically disregarded human rights law protections in the case of those designated as “enemy combatants”.

**No further appeals by the UA Network are requested. Many thanks to all who sent appeals.**