



USA: Abduction in Libya violates human rights, undermines rule of law

US Special Forces seize al-Qa'ida suspect from street in Tripoli

The USA has again used its flawed “global war” theory to violate fundamental human rights principles, this time to carry out the abduction of Libyan national Nazih Abdul-Hamed al-Ruqai, also known as Abu Anas al-Libi, from Libya on 5 October 2013. The US government should immediately confirm his whereabouts and provide him access to legal counsel, medical care and family members.

If Abu Anas al-Libi is taken to the USA, where he was indicted in 1998 and 2000 for his alleged involvement with al-Qa'ida, including in the attacks on the US embassies in Kenya and Tanzania, the US government should not pursue the death penalty against him.

US Special Forces seized Abu Anas al-Libi on a street in Tripoli, Libya, on 5 October. Members of his family told Amnesty International that he was seized at about 6:30am as he was parking his car outside his home in Tripoli having returned from Fajr prayer at a nearby mosque. He was seized by approximately seven men, who had arrived at his home in two armoured vehicles, armed with handguns. A third armoured car was parked in the distance. According to the family members who witnessed the abduction, some of the men were masked and spoke the Libyan dialect. To date, the family has not been officially notified about Abu Anas al-Libi's detention and whereabouts either by the Libyan or US authorities. The family told Amnesty International that they found out that the abduction was carried out by US Special Forces from a news report.¹

In a news release on 6 October, the Pentagon asserted that the operation was conducted “under military authorities” in an operation “approved by President Obama”, and that Abu Anas al-Libi was now “lawfully detained under the law of war in a secure location outside of Libya.”² It has been reported that he is being held and interrogated aboard a ship, the *USS San Antonio*, in the Mediterranean.³

In a statement issued on 6 October Secretary of Defense Charles Hagel confirmed that Abu Anas al-Libi is “now in US custody” and recalled that he “was designated as a global terrorist by Executive Order, was a subject of the US Rewards for Justice Program, and is on the UN Al Qaeda sanctions list. He was also indicted for his alleged role in the 1998 US embassy bombings in Africa, and other plots to conduct attacks against US interests.”⁴ Secretary Hagel emphasised that the operation in Libya, and one conducted in Somalia around the same time, demonstrated the “global reach” of the US military, and that any such actions were undertaken “consistent with our laws and our values”. Secretary of State John Kerry stressed that “members of al-Qaeda and other terrorist organizations literally can run, but they can't hide. We will continue to try to bring people to justice in an appropriate way”.⁵

None of the official US statements made any mention of international human rights law and principles.

Meanwhile, in a statement issued on 6 October, the office of Libyan Prime Minister Ali Zeidan said it was seeking clarification from the US authorities concerning the abduction, stressing its willingness to prosecute Libyan citizens in Libya regardless of the charge, and emphasizing the presumption of innocence. While the Libyan government stressed it would follow up with the US authorities in accordance with applicable laws and human rights principles, it also highlighted the strategic relationship between the two countries in the area of security and defence.

The USA has long resorted to abduction to gain custody over certain suspects, and this practice predated the attacks of 11 September 2001, although the USA's response to those attacks including adapting this practice of rendition to send individuals to interrogation by agents of other countries.⁶

The USA has also pursued the death penalty against such individuals.

It has usually been other government agencies, such as the FBI or the CIA, leading the abduction. This time it was the US military, authorized by President Obama in his role as Commander in Chief of the Armed Forces.

The international legal prohibition of abduction is absolute, and cannot be derogated from, even in a time of emergency which threatens the life of the nation.⁷ Similarly, the prohibition of arbitrary deprivation of liberty and deviations from fundamental principles of fair trial, including the presumption of innocence, are non-derogable.⁸ Abductions of this nature, followed by interrogations during incommunicado detention, undermine the presumption of innocence. In this particular case, the abduction of Abu Anas al-Libi also undermines Libya's efforts to establish the rule of law at a time when the country is in need of international support to rebuild its institutions significantly weakened by the 2011 armed conflict.

Amnesty International is also concerned about Abu Anas al-Libi's treatment in US custody. Interrogation methods authorized for use in such cases under Appendix M of the Army Field Manual can include prolonged isolation and sleep deprivation. Prolonged incommunicado detention can itself amount to cruel, inhuman or degrading treatment.

The case of Somali national Ahmed Abdulkadir Warsame, who was detained by US forces in the Gulf of Aden on or about 19 April 2011 heightens such concerns. He was apparently held in secret detention for at least two weeks and incommunicado for at least six weeks before he was transferred to New York in early July 2011 and charged with terrorism-related offences. The US authorities responded to Amnesty International's concern about his pre-transfer treatment by saying that "the US Government has consistently asserted that it is at war with al Qaida and its associated forces, and that it may take all lawful measures, including detention, to defeat the enemy".⁹

Amnesty International has raised its concerns about the Warsame case, Appendix M, and the wider implications for human rights of the USA's "global war" paradigm with the UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights (ICCPR) to oversee implementation of that treaty, which the USA ratified in 1992. A US delegation will be questioned on the USA's Fourth Periodic Report to the Committee on 18 to 21 October 2013 in Geneva.¹⁰ It is possible that Abu Anas al-Libi will still be held incommunicado at the time the USA is appearing before this human rights body.

Abu Anas al-Libi was indicted in 1998 in the US District Court for the Southern District of New York (a superseding indictment was filed in 2000). He is charged among other things with involvement in the August 1998 bombings of two US embassies in Kenya and Tanzania in which 224 people were killed and many more injured. Amnesty International has long called for anyone responsible for this and other such attacks on civilians to be brought to justice, without resort to the death penalty, and for the USA to comply with international human rights principles in so doing.

The USA responded to the 9/11 attacks by invoking a "global war on terror" against al-Qa'ida and other groups in which international human rights law would not apply. Although the Obama administration dropped some of its predecessor's language – such as "war on terror" and "enemy combatant" – it broadly adopted the global war framework, which is indeed now largely accepted within all three branches of government. The USA has asserted the exclusive right to define the "war" and make up its rules.

The domestic legal underpinning for the USA's law of war framework remains the Authorization for Use of Military Force (AUMF), a broadly worded resolution passed by Congress after little substantive debate on 14 September 2001. The resolution authorized the President to decide who was connected to the 9/11 attacks, who might be implicated in future attacks, and what level of force could be used against them, without any geographical or temporal limits. Four days later, President Bush signed the resolution, which was then exploited to justify a range of human rights violations.¹¹

The USA's global war paradigm is an unacceptably unilateral and wholesale departure from the very concept of the international rule of law generally, and the limited scope of application of the law of armed conflict in particular. The USA should cease to invoke, and should publicly disavow, the "global war" doctrine, and fully recognize and affirm the applicability of international human rights obligations to all US counter-terrorism measures.

SOME BACKGROUND ON THE HISTORY OF US ABDUCTIONS¹²

For nearly seven decades, the United States has been the anchor of global security. This has meant doing more than forging international agreements – it has meant enforcing them. The burdens of leadership are often heavy, but the world is a better place because we have borne them... That's what makes America different. That's what makes us exceptional

President Barack Obama, 10 September 2013¹³

In June 1995, President Bill Clinton signed a Presidential Decision Directive which approved the return of "terrorists" from abroad "by force... without the cooperation of the host government", if "adequate cooperation" was not forthcoming and could not be brought about by "appropriate measures".¹⁴

Three years before that, the US Supreme Court had ruled that the US Government could forcibly abduct a criminal suspect from a foreign country and bring him or her to trial in the USA. The case involved Mexican national

Humberto Álvarez-Machain, a doctor who was wanted in the USA for his alleged involvement in the murder of an agent of the US Drug Enforcement Agency (DEA). He was abducted in 1990 from Mexico by agents paid by, and under the orders of, the DEA. Two federal courts ruled that he could not be tried in the USA because his abduction had violated the US/Mexico extradition treaty. However, the US Supreme Court disagreed, holding that the fact of the abduction did not affect the jurisdiction of the federal court (the majority accepted that the abduction might correctly be characterized as “shocking” and that it may have violated “general international law principles”).¹⁵ Three Justices dissented. Writing for this minority, Justice John Paul Stevens wrote: “I suspect most courts throughout the civilized world will be deeply disturbed by the monstrous decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.” Amnesty International expressed its concern about the implications of the judgment, including that it could open the way for forcible abductions of persons who could face the death penalty, a punishment from which they would otherwise be protected under extradition treaties.¹⁶ Today, the *Álvarez-Machain* ruling is still cited in the manual for federal prosecutors.¹⁷

In 1993, after examining the circumstances of Humberto Álvarez-Machain's abduction, the UN Working Group on Arbitrary Detention concluded that “no legal basis whatsoever can be found to justify the deprivation of liberty” and declared that the abduction had been an arbitrary detention as well as constituting illegitimate interference by one state in the sovereignty of another.¹⁸ In 2004, the US Supreme Court ruled that Humberto Álvarez-Machain was not entitled to a remedy under US law. Among other things, the Court held that while the ICCPR “does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts”.¹⁹

Pakistan national Mir Aimal Kasi was subject to “rendition to justice” in the USA and executed in 2002. Wanted for the murder in 1993 of two CIA employees shot outside CIA headquarters, he was seized in 1997 by FBI agents from a hotel in Karachi, hooded, gagged, shackled, and removed from Pakistan without judicial oversight, flown to Virginia and handed over to the state authorities, tried, sentenced to death, and executed in 2002. In upholding his death sentence in 1998, the Virginia Supreme Court had among other things cited the *Álvarez-Machain* precedent.

On 28 May 2001, the Constitutional Court of South Africa ruled that government officials had violated their constitutional and legal obligations by surrendering a Tanzanian national to the USA without first seeking assurances that he would not face the death penalty on return. Khalfan Khamis Mohamed had been arrested in Cape Town on an international warrant alleging his involvement in the 1998 bombing of the US embassy in Tanzania. He was interrogated without the presence of an attorney, held incommunicado and summarily deported. The Court expressed concern at evidence pointing to the “sinister inference that Mohamed was deliberately kept isolated and uninformed in order to facilitate his removal by the FBI agents”. The Court made it clear that the “procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition”. The Constitutional Court also took the highly unusual step of sending its judgment directly to the US federal judge presiding over Mohamed's capital murder trial. Mohamed was later convicted, but after three days of deliberation, the jury could not reach the requisite unanimity for a death sentence. As a result he was sentenced to life imprisonment without the possibility of parole.²⁰

The Constitutional Court of South Africa also recalled a warning issued by US Supreme Court Justice Louis Brandeis from 1928:

“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against this pernicious doctrine, this Court should resolutely set its face.”²¹

The South African court said that this warning “was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has particular relevance: we saw in the past what happens when the state bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully.”

ENDNOTES

¹ Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992) states: “Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention... Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.” The General Comment on article 10 of Working Group on Enforced or Involuntary Disappearance (UN Doc. E/CN.4/1997/34, 13 December 1996) states, *inter alia*, that “Article 10 of the Declaration is one of the most practical and valuable tools for ensuring compliance by States with their general commitment not to practice, permit or tolerate enforced disappearances (art. 2) and to take effective legislative, administrative and judicial measures to prevent and terminate such acts (art. 3).”

² Statement by Pentagon Press Secretary George Little on the Capture of Abu Anas al Libi, US Department of Defense, 6 October 2013 <http://www.defense.gov/releases/release.aspx?releaseid=16294>

³ US said to hold Qaeda suspect on Navy ship, New York Times, 6 October 2013.

⁴ Statement by Secretary Hagel on operations in Libya and Somalia, US Department of Defense, 6 October 2013, <http://www.defense.gov/releases/release.aspx?releaseid=16295>

⁵ Remarks at a visit to Benoa Port, US Secretary of State John Kerry, Bali, Indonesia, 6 October 2013, <http://www.state.gov/secretary/remarks/2013/10/215155.htm>

⁶ See for example, USA: Below the radar: Secret flights to torture and 'disappearance', April 2006, <http://www.amnesty.org/en/library/info/AMR51/051/2006/en>

⁷ UN Doc: CCPR/C/21/Rev. 1/Add. 11, Human Rights Committee General Comment 29, States of Emergency (Article 4), ¶13(b).

⁸ *Ibid.*, ¶ 11.

⁹ Letter from William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, 23 August 2011.

¹⁰ Amnesty International's main submission to the UN Human Rights Committee on the USA's Fourth Periodic Report is available at <http://www.amnesty.org/en/library/info/AMR51/061/2013/en>

¹¹ Doctrine of pervasive 'war' continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>. The USA backdated this “war” to having begun prior to 9/11. See §948d of the Military Commissions Act of 2009 (“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter..., or the law of war, whether such offense was committed before, on, or after September 11, 2001...”).

¹² For further information, see USA: No return to execution - the US death penalty as a barrier to extradition, November 2001, <http://www.amnesty.org/en/library/info/AMR51/171/2001/en>

¹³ Remarks by the President in Address to the Nation on Syria, 10 September 2013, <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>

¹⁴ PDD-39, on *US Policy on Counterterrorism*, was signed by President Clinton on 21 June 1995, and declassified in 1997.

¹⁵ *US v. Alvarez-Machain*, 504 U.S. 655 (1992).

¹⁶ USA: *Kidnapping of criminal suspects sanctioned by United States Supreme Court*, 12 August 1992, <http://www.amnesty.org/en/library/info/NWS11/032/1992/en>

¹⁷ “In *Alvarez-Machain*, the Supreme Court ruled that a court has jurisdiction to try a criminal defendant even if the defendant was abducted from a foreign country against his or her will by United States agents. Though this decision reaffirmed the long-standing proposition that personal jurisdiction is not affected by claims of abuse in the process by which the defendant is brought before the court, it sparked concerns about potential abuse of foreign sovereignty and territorial integrity. Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice.” US Attorneys Manual, 9-15.610: Deportations, Expulsions, or other Extraordinary Renditions.

¹⁸ UN Doc: E/CN.4/1994/27, Decision No. 48/1993 (USA).

¹⁹ *Sosa v Alvarez-Machain*, US Supreme Court, 29 June 2004. On the USA's reservations and understandings see Amnesty International submission to the UN Human Rights Committee, *op. cit.*

²⁰ The South African court pointed to the case of Mamdouh Mahmud Salim, who was indicted in the USA along with Mohamed as a co-conspirator in the US embassy bombings: “The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death.” *Mohamed and another v. President of Republic of South Africa and others*, CCT 17/01 (2001).

²¹ *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis, dissenting.