

OPINION No. 43/2006 (UNITED STATES OF AMERICA)

Communication: addressed to the Government of the United States of America.

Concerning: Mr. Ali Saleh Kahlah Al-Marri.

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006.)
2. (Same text as paragraph 3 of Opinion No. 32/2006.)
3. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the allegations of the source. The reply of the Government was brought to the attention of the source, which made observations in reply.
4. According to the information received, Ali Saleh Kahlah Al-Marri, 37 years old, a Qatari national, was arrested on 12 December 2001 by Federal Bureau of Investigation (FBI) agents, at the direction of the Attorney's Office for the Southern District of New York. Mr. Al-Marri had entered the United States of America legally on 10 September 2001, with his wife and five children, to pursue postgraduate studies.
5. Mr. Al-Marri was held as a material witness in the investigation into the 11 September 2001 terrorist attacks on the Ministry of Defense and the World Trade Center.

On 28 January 2002, he was formally arrested and charged with “possessing unauthorized counterfeit access devices with intent to defraud”. Other charges of credit card fraud and making false statements to the FBI were subsequently added.

6. In June 2003, less than a month before he was due to stand trial, the President of the United States designated him as an “enemy combatant”. The criminal charges were dropped. Mr. Al-Marri was then transferred to military custody in the Naval Consolidated Brig in Charleston, South Carolina. There, he was repeatedly interrogated. On one occasion, interrogators threatened to send him to Egypt or Saudi Arabia where, they told him, he would be tortured and sodomized, and his wife would be raped in front of him. Interrogators are also said to have falsely told him that some of his brothers and his father were in jail because of him, and promised that they would be released if he cooperated. Interrogations continued until approximately autumn 2005, but during the year 2006 Mr. Al-Marri has not been interrogated.

7. Mr. Al-Marri is the first non-United States national to be held as an “enemy combatant” on United States soil. He was held incommunicado from June 2003 to August 2004, when he was allowed a first visit from the International Committee of the Red Cross (ICRC). He has now had three visits from delegates of ICRC.

8. Since 23 June 2003, Mr. Al-Marri has been held, shackled, in a cell measuring approximately three by two metres. His cell is often made extremely cold. The water supply is sometimes turned off, forcing Mr. Al-Marri to defecate on his food tray in order to ensure that the faeces do not remain for days in the cell. The small cell window is covered with plastic, so that he is not able to see the outside world. A portable industrial fan is left on 24 hours a day near the door of his cell, making it difficult for him to sleep. It is reportedly turned up high when he is deemed to be “non-compliant”. Sometimes when he is sleeping, guards wake him by shaking him, or by banging constantly on his cell door. Mr. Al-Marri is allowed only brief periods outside his cell for exercise.

9. As a direct result of his prolonged isolation and other inhumane treatment, Mr. Al-Marri has experienced a number of symptoms that demonstrate severe damage to his mental and emotional well-being, including hypersensitivity to external stimuli, manic behaviour, difficulty concentrating and thinking, obsessive thinking, difficulty with impulse control, difficulty sleeping, difficulty keeping track of time and agitation.

10. Moreover, the source notes that, as a result of these conditions of detention, he has developed a number of medical problems including sharp and debilitating tingling pains in his legs, vision problems, including seeing flickering lights and white spots, constant headaches, back pain, dizziness, uncontrollable tremors and ringing in his ears.

11. Mr. Al-Marri has not received adequate medical treatment for his declining mental and physical health. The prison doctors who have seen him have refused to deal adequately with his complaints. A medical doctor recommended that a special X-ray was needed to assess nerve damage, but his request was denied. Further medical recommendations that he be given a chair with a good cushion and a thicker mattress were also denied.

12. Finally, the source reports that Mr. Al-Marri has been denied a prayer rug and has not been given a clock, making it impossible for him to know when to pray. It is also reported that prison officers mistreated and disrespectfully handled his copy of the Koran, discouraging free religious practice.

13. In its reply dated 11 May 2006, the United States Government confirms that on 23 June 2003, Mr. Al-Marri was designated as an “enemy combatant” by President Bush and that he is currently being held in military custody in the Naval Consolidated Brig in Charleston, South Carolina. The Government also informs that it is involved in pending litigation concerning Mr. Al-Marri, and refers the Working Group to two briefs for the United States Government filed with the District Court of South Carolina and two recent judicial decisions concerning Mr. Al-Marri, which it encloses. According to the Government the documents referred to provide the background information requested by the Working Group.

14. On the basis of the four documents attached to the United States reply, the Government’s arguments before the domestic courts can be summarized as follows.

15. Mr. Al-Marri has been given the opportunity to contest the legality of his detention, as well as his conditions of detention. On 8 July 2003, his lawyer filed a petition for a writ of habeas corpus in the Central District of Illinois. On 1 August 2003, the Court dismissed the petition on the ground that the petition had been filed in an improper venue. On 8 July 2004, Mr. Al-Marri filed a habeas corpus action before the District Court of South Carolina raising five claims: that he is a civilian and not an enemy combatant; that he has the right to counsel; that his detention is illegal because military cannot detain an individual seized within the United States without charge; that he has not been allowed to contest the President’s decision designating him as an enemy combatant; and that his indefinite detention for the purpose of interrogation is unlawful under the Constitution and the laws of the United States.

16. On 9 September 2004 the Government filed an answer and attached the President’s order declaring the petitioner an enemy combatant, an unclassified declaration of Mr. Jeffrey N. Rapp, Director Joint Intelligence Task Force for Combating Terrorism, and a classified secret declaration of Mr. Rapp. The Government argued that Mr. Al-Marri is properly detained as an enemy combatant, because the President exercised his constitutionally and congressionally authorized war powers. The authority to capture and hold enemy combatants for the duration of the conflict without charges is part and parcel of those war powers, especially when they are aliens. According to the Government, this assertion is well established in several judicial precedents, including *Hamdi v. Rumsfeld* and other rulings regarding the detention of hundreds of thousands of aliens within the United States during the Second World War. Therefore, alien enemy combatants are afforded more limited process rights than citizens and the court’s factual review of the basis of the detention is very limited.

17. The Government also considered that Mr. Al-Marri is lawfully detained by the military, because his detention allows armed forces to gather military intelligence and prevents him from returning to the commission of hostile acts against the United States. Moreover, according to the Government’s answer, as stated in *Hamdi v. Rumsfeld*, the executive is best prepared to exercise the military judgement attending the capture of alleged combatants and the judiciary must not

interfere in military operations. Furthermore, the President's decision to designate Mr. Al-Marri as an enemy combatant rests on a strong intelligence foundation.³ The Government also considered that the fact that Mr. Al-Marri was taken into custody within the United States does not place him outside the scope of Congress's authorization to use force.

18. Finally, regarding petitions concerning aspects other than the legality of Mr. Al-Marri's detention, the Government considered that the military has granted him access to counsel, that he had the opportunity to contest the President's decision designating him as an enemy combatant through the habeas corpus action, and contested his request regarding the ceasing of all interrogation while this litigation is pending, since interrogation is permissible under the laws of war.

19. On 8 July 2005, the judge issued an order dismissing the petition insofar as it was related to the question whether the President of the United States is authorized to detain a non-citizen as an enemy combatant. The judge also stated that Mr. Al-Marri could not rely on a precedent (*Padilla v. Hanft*) in favour of a person detained as an enemy combatant on United States soil, because - as opposed to Mr. Padilla - he is not an American citizen. The District Court Judge found that, firstly, citizens and aliens do not have the same constitutional protections. Secondly, the authority to detain enemy aliens in times of war is not a novel concept. Thirdly, the Authorization to Use of Military Force (AUMF), which was enacted to allow the President to use all necessary and appropriate force to protect the United States, also encompasses alien Al-Qaida operatives who entered the country to commit hostile and warlike acts, as Mr. Al-Marri. Therefore, Mr. Al-Marri's detention was legal.

20. On 8 August 2005, Mr. Al-Marri filed a complaint alleging that he was being subjected to unlawful and unconstitutional conditions of confinement in the naval brig. The Government answered on 27 October 2005, arguing sovereign immunity. The Government stated that the Geneva Conventions of 12 August 1949, international treaties and other sources of international law referred to by Mr. Al-Marri in his petition did not create privately enforceable rights.

³ Director of the Joint Intelligence Task Force for combating terrorism dated 9 September 2004. According to the unclassified declaration of Mr. Rapp, Mr. Al-Marri is an Al-Qaida "sleeper" agent sent to the United States for the purpose of engaging in and facilitating terrorist activities subsequent to 11 September 2001, and exploring ways to hack into the computer systems of United States banks and otherwise disrupt the United States financial system. According to the same declaration, Mr. Al-Marri attended an Al-Qaida training camp and was trained in the use of poisons. The analysis of his laptop revealed files containing lectures by Bin Laden and his associates on the importance of Jihad and martyrdom, lists of websites related to Al-Qaida activities, coded messages in his e-mail, pictures of the 11 September attacks, an animated cartoon of an airplane flying into the World Trade Center and a map of Afghanistan. The declaration also states that his computer contained a list of approximately 36 credit card numbers with the names of holders and dates of expiration, which would be used to achieve fraudulent operations, including opening bank accounts under a false name. None of these credit cards was held by Mr. Al-Marri. Finally, according to the declaration Mr. Al-Marri allegedly tried to call several times an Al-Qaida financier, Mr. Mustafa Ahmed Al-Hawsawi, in the United Arab Emirates.

Regarding the conditions of the detention, the Government affirmed that conditions of detention by military had always been a matter left to the discretion of military and executive branch officials, subject only to international obligations which are not enforceable. The Government also asserted that Mr. Al-Marri failed to allege facts that could establish that the detention “substantially burdened” the practice of his religion. Regarding the complaints related to library materials and correspondence with family and others, the Government stated that captured enemy combatants, in particular alien enemy combatants, during wartime do not have broad First Amendment (freedom of speech) rights. Moreover, the Government considered that alien enemy combatants do not have the rights consecrated in the Fourth Amendment (to be free of monitoring or observation during the detention) and the Eighth Amendment (prohibition of cruel and unusual punishment). Finally, the Government stated that there has not been any violation of the rights to due process consecrated in the Fifth Amendment, because Mr. Al-Marri has had the opportunity to contest the alleged violations through the habeas corpus action.

21. On 8 May 2006, Mr. Al-Marri’s habeas corpus action filed on 8 July 2004 was rejected by the District Court of South Carolina. The Court found that, as stated in the Supreme Court’s decision in *Hamdi v. Rumsfeld*, the burden of proof at all times remains on the Government to show by clear and convincing evidence that the petitioner is an enemy combatant. The standard of review is thus limited to determining who is more persuasive on the issue of whether the petitioner falls outside the enemy combatant criteria, the Government or the petitioner. The Court found the Government to be more persuasive than the petitioner, because the petitioner only presented a general denial to the Government’s assertion of facts. The Court considered that Mr. Al-Marri’s refusal to assume the burden of proving his own innocence was in fact a refusal to present any evidence and participate in a meaningful way in the proceedings.

22. The Working Group forwarded the observations of the Government to the source. In its submission in reply of 17 August 2006, the source reaffirmed that Mr. Al-Marri continues to be held indefinitely in United States military custody without charge or trial, pursuant to the executive order designating him as an enemy combatant signed by President Bush in June 2003. The source alleges that Mr. Al-Marri is entitled to full protection under both United States and international human rights law, including his right to not be arbitrarily detained, which cannot be derogated even in time of war or national emergency.

23. According to the source, United States lower court rulings which determined that the detained person must receive a notification of the factual basis for the classification as enemy combatant and must have a meaningful opportunity to rebut the Government’s assertions before a neutral decision maker, are not sufficient to fulfil the State’s international obligation to protect the right to not be arbitrarily detained. The source considers that Mr. Al-Marri’s case can only be met by an adversarial proceeding through trial or preliminary hearing in the United States criminal courts, meeting all the guarantees of article 14 of ICCPR.

24. The source states that the habeas corpus proceeding, in which the burden was on Mr. Al-Marri to rebut the largely hearsay-based information presented by the Government, in no way satisfies the due process requirements under international law.

25. Furthermore, the source argues that Mr. Al-Marri’s right to equal protection consecrated by article 26 of ICCPR has been violated, because individuals accused of similar acts and detained within United States territory have been tried or have trials pending in United States criminal

courts. The source also notes that the Committee against Torture in its concluding observations on the United States affirmed that detaining people indefinitely without charge constitutes per se a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴

26. Regarding the conditions of detention, the source affirms that the Government's response arguing sovereign immunity and military discretion is not compatible with the State's international human rights obligations. The source states that it is preoccupied that the Government has sought to foreclose judicial review of Mr. Al-Marri's conditions of detention, stating that its international obligations are not judicially enforceable in United States courts. This is worsened by the fact that Mr. Al-Marri's mental and physical health has been seriously affected by the conditions of his detention.

27. At the outset, the Working Group would like to stress that, in its observations, the Government of the United States did not comment on the arguments of the source and limited itself to affirming that Mr. Al-Marri was designated by President Bush as an "enemy combatant" on 23 June 2003 and that since then he is being held in military custody. The Government further enclosed four documents to provide background information. These documents address the legality of Mr. Al-Marri's detention under domestic law, but do not speak to its compatibility with the United States' international obligations.

28. The Working Group notes that, in order not to be arbitrary, it is not sufficient that Mr. Al-Marri's detention is in accordance with United States domestic laws. Those laws and the way they are applied in the specific case must also be compatible with the international law binding for the United States.

29. The analysis of the documents provided by the Government confirms that Mr. Al-Marri, who legally entered the United States on 10 September 2001, was arrested by the FBI on 12 December 2001 in the investigation of the 9/11 terrorist attacks, and kept in detention until 28 January 2002 under a federal law permitting the arrest and brief detention of "material witnesses", i.e. persons who have important information about a crime, if they might otherwise flee to avoid testifying before a grand jury or in court. Although federal officials suspected Mr. Al-Marri of involvement in terrorism and were investigating him as a suspect of most serious crimes, they held him as a material witness, not as a criminal suspect. This was already an abuse of the law and a violation of the basic rights of a person suspected of involvement in a crime, i.e. the right to silence, the right to be assisted by a lawyer, the right to communicate with family and the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.

30. It is also undisputed that Mr Al-Marri was formally charged on 28 January 2002 with credit card fraud and later on with other similar charges. He entered a plea of not guilty and was about to be tried before a grand jury (a pretrial conference was set for 2 July 2003), when on 23 June 2003 the President designated him as an "enemy combatant" and directed that he be transferred to the control of the Defense Department for detention. The prosecution apparently

⁴ CAT/C/USA/CO/2, para. 17.

dropped the charges on which Mr. Al-Marri had been kept in pretrial detention for close to 15 months. As a result, Mr. Al-Marri was transferred from United States criminal jurisdiction to military custody in South Carolina, where he was held incommunicado. In August 2004, i.e. more than a year later, he was allowed a visit from the ICRC and in October 2004 he was for the first time authorized to meet with his lawyers.⁵ It is also not contested that as of to date he is not allowed any visits or telephone communication with his family and continues to be held under conditions that could amount to inhuman or degrading treatment.

31. As far as the term “enemy combatant” is concerned, the Working Group recalls that it does not constitute a category recognized and defined under international law and therefore does not provide a ground for deprivation of liberty.⁶ Concerning the case under consideration, the Working Group notes that Mr. Al-Marri, who is suspected of involvement in terrorist acts, was not captured on the battlefield of an armed conflict as defined by international humanitarian law. The Working Group considers that the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept.⁷ Therefore, the legal provision that could allow the United States to hold belligerents without charges for the duration of hostilities cannot be invoked to justify Mr. Al-Marri’s indefinite detention.

⁵ This would appear to be a consequence of the decision of the Supreme Court of the United States of 28 June 2004 that the persons being held in Guantánamo Bay as enemy combatants are entitled to legal counsel and to challenge the legality of their detention (United States (No. 03-343) 2004, *Rasul v. Bush* (No. 03-334) 2004).

⁶ See the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), paras 20 ff.

⁷ See the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), para. 21, and the Official Statement of the International Committee of the Red Cross (ICRC) dated 21 July 2005, regarding “The relevance of IHL in the context of terrorism” (available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705?OpenDocument>>): “International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within a State. When and where the ‘global war on terror’ manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. [...] The designation ‘global war on terror’ does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict.”

32. For these reasons, the Working Group considers that the detention of Mr. Al-Marri is governed by human rights law, specifically articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is party and which it did not derogate from in accordance with ICCPR article 4, paragraph 1.

33. Article 9, paragraph 1, ICCPR guarantees to everyone “the right to liberty and security of person”, prohibits “arbitrary arrest or detention” and states that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. The prohibition of arbitrariness mentioned in paragraph 1 serves to ensure that the law itself is not arbitrary, i.e. that the deprivation of liberty permitted by law is not “manifestly unproportional, unjust or unpredictable, and that the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case”.⁸

34. In paragraph 4 of its general comment No. 8 (1982) concerning article 9 (right to liberty and security of persons), the Human Rights Committee lays down the elements that must be tested in determining the legality of so-called “preventive detention” (which the Working Group generally refers to as administrative detention): “... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9, paragraphs 2 and 3, as well as article 14, must be granted”.

35. The Working Group recalls that Mr. Al-Marri was first deprived of his liberty as a material witness and in this capacity interrogated without the guarantees of a criminal defendant. Then he was charged and detained on remand for 15 months on charges which, though not light, are very minor in relation to the grounds on which the Government has been holding him since June 2004. When the moment for him to be able to challenge these charges was close, when his “day in court” was finally approaching after a year and a half, the President designated him as “enemy combatant” and the criminal charges were dropped. Thus Mr. Al-Marri, who had been

⁸ The Human Rights Committee has considered, in the framework of a temporary or pretrial detention of a judicial nature, that: “The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.” See: Decision of 23 July 1990, communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, para. 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also decisions of 5 November 1999, communication No. 631/1995, *Aage v. Norway*, para. 6.3 (CCPR/C/67/D/631/1995) of 21 July 1994; communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, para. 9 (8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, communication No. 560/1993, *A (name deleted) v. Australia*, United Nations document CCPR/C/59/D/560/1993, para. 9.2.

in custody of the United States Government on United States territory for a year and a half, was transformed by executive decree from criminal defendant into a person apprehended in the course of an armed conflict, and thus indefinitely deprived of the right to challenge his detention and defend himself against the accusations levelled against him. The Working Group concludes that this course of events strongly indicates that the Government intended (and in fact did) circumvent the guarantees afforded to Mr. Al-Marri in the criminal process, both under United States law and international law binding on the United States.

36. The Working Group stresses that under international human rights law deprivation of liberty is subject to certain conditions and, even if initially lawful, becomes arbitrary if it is not subject to periodic review. The Human Rights Committee has considered that the habeas corpus remedy has to be maintained at all times and in all circumstances, concerning any modality of deprivation of liberty, because it offers a protection against serious human rights violations such as torture.⁹ Indefinite and prolonged detention “beyond the period for which the State can provide appropriate justification are incompatible with article 9”¹⁰ of the International Covenant on Civil and Political Rights to which the United States is party.

37. Furthermore, the Working Group recalls that international human rights law provides for a number of rights specific to persons deprived of their liberty on the ground of suspicion that they were involved in an offence. These guarantees apply whether such suspicions have been formalized in criminal charges or not. The Working Group notes that according to the information provided by the Government, Mr. Al-Marri was involved in a range of activities which, if proven, would constitute serious criminal offences. While this information was presented as the basis for his detention, Mr. Al-Marri remains uncharged and therefore has no opportunity to contest or respond to these assertions in accordance with the international legal requirements of due process which would be available to him under the criminal law.

38. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Ali Saleh Kahlah Al-Marri is arbitrary, being in contravention of article 9 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

39. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to rectify the situation and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2006.

⁹ General comment No. 29 on article 4: Derogations during a state of emergency, para. 15.

¹⁰ *A.v. Australia*, op. cit., para. 9.4.