

His Excellency The Hon. Mwai Kibaki C.G.H., M.P.  
The President and Commander in Chief of the Armed Forces of  
the Republic of Kenya  
Office of the President  
Harambee House  
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Nairobi

21 July 2008

Dear President,

We, the undersigned human rights organisations, are writing to express our grave concern about the case of Mr. Mohamed Abdulmalik, a Kenyan citizen who has been detained without charge in U.S. military custody at Guantánamo Bay, Cuba, since March 2007. We respectfully call upon the Kenyan Government to meet its international obligations to investigate how Mr. Abdulmalik was transferred to Guantánamo Bay and to make diplomatic representations to the U.S. that Mr. Abdulmalik either be charged with a recognizable criminal offence and receive a fair trial in accordance with international standards in an ordinary civilian court, without the possibility of the death penalty, or be released and returned to Kenya.

#### Detention in Kenya and Transfer to Guantanamo Bay

Mr. Mohamed Abdulmalik<sup>1</sup> is a Kenyan citizen who was born in Kisumu in 1973 and attended the Tudor Day School in Mombasa together with his two siblings. He worked as a Quran teacher and petty trader in Mombasa before moving to Somalia where he met his wife with whom he has three children who are now between the ages of 1 and 4 years old.

On 13 February 2007, Mr. Abdulmalik was picked up by the Anti-Terrorism Police Unit in a café in Mombasa.<sup>2</sup> He was detained and held incommunicado in the Kilindini Port and Urban Police Stations in Mombasa before being transferred to the Hardy, Ongata Rongai and Spring Valley Police Stations in Nairobi. While detained in Kenya, Mr. Abdulmalik was not



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<sup>1</sup> He has variously been referred to as Malik; Abdulmalik Mohamed; Mohamed Abdulmalik Abdujabber; Abduljabar Ibrahim and Abdulmalik Rajab Mohamed by the Anti-Terrorism Police Unit and in the media.

<sup>2</sup> *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR, Replying Affidavit (29 October 2007) at para 3.

charged with any offence<sup>3</sup>; he was denied the right to challenge his detention by way of a *habeas corpus* application; he was denied access to a lawyer<sup>4</sup> and contact with family members<sup>5</sup>; he was never brought before a judge<sup>6</sup> and his detention was never subject to judicial review.<sup>7</sup> To the best of our organisations' knowledge, there were no judicial proceedings launched in Kenya which would justify a transfer to U.S. custody.

Nothing was heard of Mr. Abdulmalik until 26 March 2007, when the U.S. Department of Defense issued a press statement announcing Mr. Abdulmalik's detention at Guantánamo Bay.<sup>8</sup> The U.S. Ambassador to Kenya, Michael Ranneberger, reportedly confirmed that Mr. Abdulmalik was "moved to the Cuban camp with the full consent of the Kenyan government ... [as] part of collaboration between the two governments to fight Global terrorism".<sup>9</sup>

Although Mr. Abdulmalik has been held at Guantánamo Bay for more than one year, his U.S. lawyer was only allowed to meet with him for the first time in April 2008. As a non-U.S. national, Mr. Abdulmalik has to date not been able to exercise his right under international law to challenge the lawfulness of his detention in a U.S. court<sup>10</sup> and has not even received the less than adequate combatant status review<sup>11</sup> setting out any allegations against him.<sup>12</sup> While Mr. Abdulmalik's family brought a *habeas corpus* application on his behalf in Kenya, the High Court dismissed the action on the basis that Mr. Abdulmalik was no longer under the control of the Kenyan authorities and the Kenyan Commissioner for

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<sup>3</sup> Article 9(2) of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 23 March 1976 requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest and be promptly informed of any charges against him or her.

<sup>4</sup> Access to a lawyer must be provided within a few days of detention. See, for example, *International Pen and Others v. Nigeria*, African Commission on Human and People's Rights, ACHRP (1988) at para. 83.

<sup>5</sup> See, *Law Office of Ghazi Sulaiman v. Sudan*, African Commission on Human and People's Rights ACHPR (1994) at para. 44 (finding that "detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amount to inhuman treatment both of the detainee and their families.")

<sup>6</sup> See, Article 9(3) of the ICCPR, Article 2(c) of the African Commission's Resolution on the Right to Recourse and Fair Trial, and General Comment No. 8 of the U.N. Human Rights Committee which provides that, "[m]ore precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days."

<sup>7</sup> *A. v. Australia*, Human Rights Committee U.N. Doc. CCPR/C/59/D/560/1993 (1997) at para. 9.2.

<sup>8</sup> United States Department of Defence, Office of the Assistant Secretary of Defense (Public Affairs) "Terror Suspect Transferred to Guantanamo," Press Release No. 343-04 (26 March 2007) available at: <http://www.defenselink.mil/releases/release.aspx?releaseid=10662>

<sup>9</sup> George Munyori, "US Defends Transfer of Terror Suspect to Guantanamo Bay," CapitalFM.co.ke (29 March 2007).

<sup>10</sup> See, Article 9(4) of the ICCPR.

<sup>11</sup> The administrative proceedings held at Guantánamo Bay which set out the charges against detainees.

<sup>12</sup> See, s 7 of the Military Commissions Act 2006. While the United States Supreme Court held in *Boumediene et al. v. Bush* 553 U.S. \_ (12 June 2008) that detainees at Guantánamo have the right to bring *habeas corpus* applications, it indicated that courts may nevertheless delay hearing such claims until after there has been time for a combatant status review, and left open many questions about possible restrictions on such proceedings. It thus remains unclear when Mr. Abdulmalik will effectively be able to have an application heard, and whether its form will meet the requirements of international law.

Police could not therefore comply with a *habeas corpus* writ requiring his production in court.<sup>13</sup>

### **The Absolute Obligation of *Non-Refoulement* and the Duty to Investigate the Circumstances of Mr. Abdulmalik's Removal**

Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which Kenya ratified on 23 March 1997, as well as Article 7 of the International Covenant on Civil and Political Rights (which Kenya ratified on 23 March 1976) as interpreted and applied by the UN Human Rights Committee recognise the absolute obligation of *non-refoulement*. This prohibits Kenya from expelling, deporting, returning or otherwise transferring an individual to a place where there are substantial grounds to believe that he or she would be at risk of torture or other cruel, inhuman or degrading treatment ("other ill-treatment").<sup>14</sup> As an absolute obligation, the principle of *non-refoulement* allows no limitations, derogations or exceptions, even in the context of national security concerns,<sup>15</sup> and applies to all persons, however "undesirable or dangerous" their alleged conduct.<sup>16</sup>

In the event that an individual is subject to *refoulement*, the sending state is under a duty to provide a satisfactory remedy and full and adequate reparation and "to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party".<sup>17</sup>

By the time Mr. Abdulmalik was arbitrarily detained in Kenya in February 2007, information and documentation widely available in the public domain underscored the real risk that foreign "terror suspects" could be subjected to the practice of "extraordinary rendition" to third countries where they would be at risk of torture or other ill treatment, and/or transferred to detention sites such as Guantánamo Bay, Bagram Airbase in Afghanistan and/or "black sites" located outside of U.S. territory.<sup>18</sup> Indeed, a 2007 report of the U.K. Intelligence and Security Committee emphasised that by 2002, "the U.S. was willing to exercise these powers [of rendition] on individuals unconnected with the conflict in

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<sup>13</sup> *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR.

<sup>14</sup> See, Committee against Torture, "General Comment No. 2: Implementation of Article 2 by States Parties" U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007); Human Rights Committee, General Comment 20, para. 9; General Comment 31, para. 12; see also, *Modise v. Botswana*, African Commission on Human and People's Rights, ACHPR (2000) at paras. 90 – 91.

<sup>15</sup> *Agiza v. Sweden*, Committee against Torture, U.N. Doc. CAT/C/34/D/233/2003 (2005) at para. 13.8. See also, *Alzery v. Sweden*, Human Rights Committee, CCPR/C/88/D/1416/2005 (10 November 2006).

<sup>16</sup> *M.B.B. v. Sweden*, Committee against Torture, U.N. Doc. CAT/C/22/D/104/1998 (1999) at para. 6.4.

<sup>17</sup> *Mansour Ahani v. Canada*, Human Rights Committee, U.N. Doc. CCPR/C/80/D/1051/2002 (2004) at para 12.

<sup>18</sup> See for example, "Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee" Human Rights Committee U.N. Doc. CCPR/C/USA/CO/3 (2006); Council of Europe, Parliamentary Assembly Reports, "Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States," (12 June 2006) and "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe member states: second report," (11 June 2007); European Parliament, "Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners," (26 January 2007).

Afghanistan”<sup>19</sup> ... “[b]y mid-2003, following the case of Khaled Sheikh Mohamed and suspicions that the U.S. authorities were operating “black sites”, the Agencies appreciated the potential risk of renditions and possible mistreatment of detainees ...[a]fter April 2004 – following the revelations of mistreatment at the U.S. military-operated prison at Abu Ghraib – the UK intelligence and security Agencies and the Government were fully aware of the risk of mistreatment associated with any operations that may result in U.S. custody of detainees ...”<sup>20</sup> Given this context, any irregular transfer of a suspected terrorist to U.S. custody would involve a real, foreseeable and personal risk of torture or other ill-treatment in contravention of the absolute principle of *non-refoulement*.<sup>21</sup>

In the *habeas corpus* action brought in the Kenyan High Court after Mr. Abdulmalik’s detention at Guantánamo Bay was announced, Acent Kaloki, the Chief Inspector of Police for the Anti-Terrorism Police Unit, stated that Mr. Abdulmalik was released from police custody on 28 February 2007 and the “police did not follow up on his whereabouts”.<sup>22</sup> No independent evidence is available, however, to confirm the Chief Inspector’s claim that Mr. Abdulmalik was released rather than transferred to U.S. custody. Rather, the last time Mr. Abdulmalik was seen prior to the official announcement of his detention at Guantánamo Bay, he was under the full custody and control of the Kenyan police. Moreover, Mr. Ranneberger has reportedly confirmed that Mr. Abdulmalik was moved to Guantánamo Bay with the full consent of the Kenyan Government. This is sufficient to establish a *prima facie* case that Mr. Abdulmalik was removed from Kenyan territory in contravention of the principle of *non-refoulement*.

The absolute prohibition of torture and other ill-treatment imposes a range of positive obligations upon states including the duty to establish a legal and practical framework to prevent and protect all persons within its jurisdiction from torture and ill-treatment.<sup>23</sup> In particular, the principle of *non-refoulement* requires states to take effective measures to ensure that individuals are not exposed to a risk of torture and other ill-treatment elsewhere through removal from their territory. In order to fulfil these positive obligations, where a *prima facie* case is established that the principle of *non-refoulement* has been breached, the circumstances surrounding the removal must be investigated. Indeed, in its Concluding Observations on the United States, the Human Rights Committee found that:

The State should conduct a thorough and independent investigation into allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims.<sup>24</sup>

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<sup>19</sup> Intelligence and Security Committee, “Special Report on Rendition” (2007) available at: < [http://www.cabinetoffice.gov.uk/intelligence/special\\_reports.aspx](http://www.cabinetoffice.gov.uk/intelligence/special_reports.aspx)> at para. 59 onwards.

<sup>20</sup> *Id.* at paras. I – J.

<sup>21</sup> See, for example, *Motumbo v. Switzerland*, Committee against Torture, U.N. Doc. A/49/44 at 45 (1994).

<sup>22</sup> *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR., Replying Affidavit (29 October 2007) at paras. 5 – 6.

<sup>23</sup> See, for example, Article 2(1) of the Convention against Torture requires that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

<sup>24</sup> See, Concluding Observations of the Human Rights Committee *supra* note 19 at para. 16.

In Mr. Abdulmalik's case, such an investigation is necessary in order to fulfil Kenya's international legal obligations and to ensure public trust and confidence that those responsible for his detention and removal are held to account and any deficiencies in Kenyan law and practice are rectified in order to prevent similar situations in the future. Such investigations – in the form of parliamentary inquiries, public commissions, and actual prosecutions - have been conducted in other countries where renditions have been documented, including Canada, Germany, Italy, and Sweden, among others.

### **Diplomatic Representations to the U.S. on Mr. Abdulmalik's Behalf**

If it is shown that Kenya violated the principle of *non-refoulement*, it would be under a duty to provide Mr. Abdulmalik with a satisfactory remedy and full and adequate reparation. The Kenyan Government would also share responsibility for any subsequent acts of torture or other ill-treatment endured by Mr. Abdulmalik en route to and while in detention at Guantánamo Bay, and would be obliged to provide Mr. Abdulmalik with a satisfactory remedy and adequate and effective reparation for these acts also. Under the circumstances, this would include making representations on Mr. Abdulmalik's behalf to the U.S. Government.<sup>25</sup>

Mr. Abdulmalik was missing for approximately one month before his transfer to Guantánamo Bay was announced, a period of time during which he may have been held incommunicado in CIA or military detention. He is now being held at a detention site where the torture and other ill-treatment of detainees has been extensively documented, and where the detention without charge of close to 800 prisoners has been condemned by a broad array of United Nations' special mechanisms. As noted above, Mr. Abdulmalik has to date had no means available by which to challenge his detention without charge.<sup>26</sup>

In order to safeguard Mr. Abdulmalik from any torture or other ill-treatment at Guantánamo Bay, we urge the Kenyan Government to make representations to the U.S. as a matter of urgency, in order to prevent irreparable physical and psychological harm to him. These representations should be made at the highest level and should require that the U.S. either charge Mr. Abdulmalik with a recognisable criminal offence and provide him with a fair trial in an ordinary civilian court in strict compliance with international standards or release and return him to Kenya, should he so wish.

Representations of this nature have already been made by a number of states whose nationals and residents have been detained at Guantánamo Bay. For example, the U.K. made representations on behalf of the nine British nationals and five long-term residents held by the U.S. at the naval base.

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<sup>25</sup> See, e.g. UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation", Resolution A/RES/60/147 (21 March 2006) at para. 12(d); *Jimenez Vaca v. Colombia*, Human Rights Committee UN Doc. CCPR/C/74/D/859/1999 (2002) , at para. 9, *Dar v. Norway*, Committee against Torture UN Doc. CAT/C/38/D/249/2004 (2007) at para. 14.4.

<sup>26</sup> See discussion on *Boumediene v. Bush*, *supra* note 12.

In summary therefore, we urge the Kenyan Government to:

- Ensure a thorough, effective, independent and impartial investigation into the circumstances of Mr. Abdulmalik's detention in Kenya and transfer to Guantánamo Bay;
- Ensure that the results of any investigations lead to any perpetrators of human rights violations being held to account;
- Provide Mr. Abdulmalik with a satisfactory remedy and full and adequate reparation for any violations;
- As a matter of urgency, make diplomatic representations on his behalf to the U.S. Government for his release and return to Kenya, should he so wish or that he is charged with a recognisable criminal offence and provided with a fair trial compatible with international standards.

We look forward to hearing from you. For correspondence relating to this letter, please reply to the following address. The correspondence will then be forwarded to the signatories below.

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Sincerely,

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Cc:

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Major-General Mohamed H Ali, Commissioner of Police

Hon Abdikadir Hussein MP, Chairman, Parliamentary Committee on Legal Affairs and Administration of Justice

Mr. Maina Kiai, Chair, Kenya National Commission on Human Rights

Ms. Florence Simbiri-Jaoko, Commissioner, Kenya National Commission on Human Rights

Prof. Manfred Nowak, United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

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