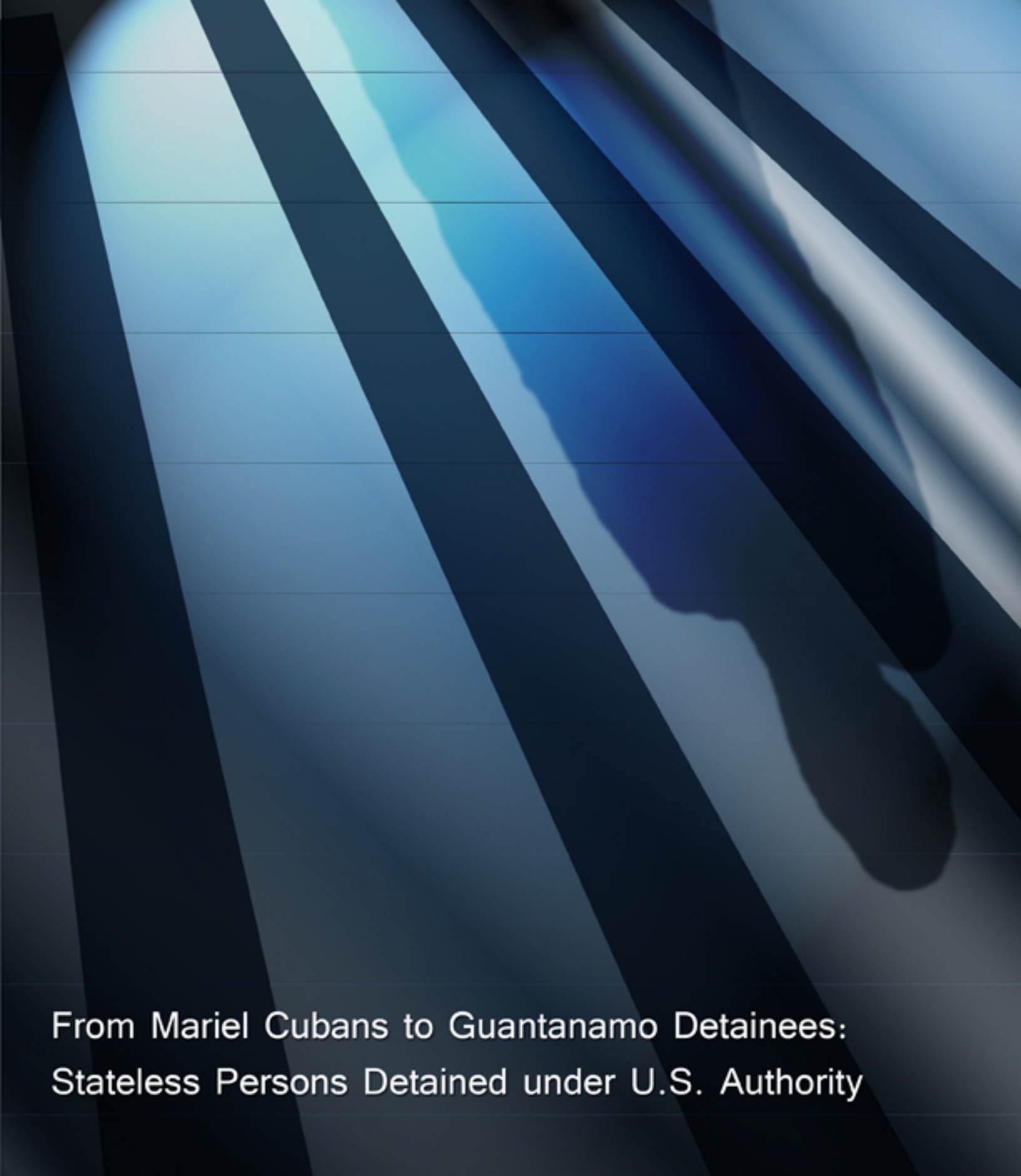

From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority

The Equal Rights Trust

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The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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Introduction: an Overview of Statelessness in the United States

1. As a general matter, while people in the United States understand the concept of statelessness, they are neither familiar with the legal definition, nor are they aware that stateless persons should be afforded special protections under the law. Furthermore, there is little awareness of statelessness within the USA.

2. This report is one of the outputs of a global research and advocacy project of the Equal Rights Trust (ERT) on stateless persons in detention. It draws attention to the plight of stateless persons in detention in the USA, focussing on immigration detention in **Part One**, and security detention practices in **Part Two** of the report. The research consisted of a comprehensive literature review, phone interviews with former detainees, organisations working on behalf of detainees and lawyers.

3. The report's findings indicate that the U.S. system, by not addressing the unique challenges posed by statelessness, has failed its international human rights obligations both in the context of immigration detention and security detention. The security detention regime, in particular, has been increasingly under the scrutiny of the international community, after President Obama's pledge to close down the Guantanamo Bay facility by January 2010 – a target which, he himself has admitted, cannot be met.[1] One of the primary reasons for this failure is that many of the remaining detainees who have been cleared for release are stateless and cannot be safely returned to their countries of habitual residence.

4. The United States is not party to either the 1954 Convention relating to the Status of Stateless Persons,[2] or the 1961 Convention on the Reduction of Statelessness.[3] However, while the United States is known for its relatively poor record of ratification of international human rights conventions, it is party to a number of instruments that are relevant to a discussion about

[1] "Obama admits delay on Guantanamo", BBC News, Nov. 18, 2009, available at: http://news.bbc.co.uk/1/hi/world/americas/8366376.stm; see also *The New York Times*, http://www.nytimes.com/2009/11/19/us/19gitmo.html

[2] Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954.

[3] Adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954.

statelessness in the United States. For example, the United States has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[4] and the 1967 Protocol to the Convention relating to the Status of Refugees, which incorporates all of the substantive provisions of the 1951 Convention (Refugee Convention).[5] However, U.S. federal courts have found that international treaties like these are non-self-executing and, therefore, do not give rise to legally enforceable rights.[6] Accordingly, obligations set forth in the Refugee Convention and CAT create legally enforceable rights in U.S. courts only because certain obligations articulated by those instruments have been implemented through acts of the U.S. Congress.[7] For this reason, the following discussion about statelessness in the United States will refer primarily to questions of citizenship and nationality as defined by the U.S. Constitution and domestic laws.

5. The Fourteenth Amendment to the U.S. Constitution provides that: *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."* While the purpose behind the "Citizenship Clause" of the Fourteenth Amendment was to provide citizenship to former slaves born in the United States, it has established the United States as a jurisdiction in which virtually anyone born in U.S. territory enjoys the right to U.S. citizenship.

6. As a matter of historical record, one notable exception to this rule of U.S. citizenship arose from an 1884 decision of the U.S. Supreme Court, which held that Native American Indians that were born

[4] "Status of Ratification of the Principal Human Rights Treaties", UNHCHR, *available at*: http://www2.ohchr.org/english/bodies/docs/status.pdf

[5] "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", UNHCR, *available at* http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf

[6] Self-executing treaties are those that "immediate[ly] creat[e] rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals". (Riesenfeld, S. A., "The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?", 74 Am. J. Int'l L. 892, 896-97 (1980)). Non-self-executing treaties "require implementing action by the political branches of government or ... are otherwise unsuitable for judicial application". (Damrosch, L. F., "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties", 67 Chi.-Kent L. Rev. 515, 516 (1991)).

[7] The Refugee Act of 1980, 8 U.S.C. §§ 1157-1159, INA §§ 207-209, implements certain obligations that arise as a result of ratification of the 1967 Protocol, and the Foreign Affairs Reform and Restructuring Act of 1998, Div. G., Pub. L. 105-277. 112 Stat. 2681, implements certain CAT obligations.

members of one of the tribes within the United States could only become citizens through a process of naturalisation because of the nature of the relationship between the U.S. government and the tribal governments.[8] However, in 1898, the Court emphasised that this was one of very few exceptions, when it found the children of immigrants born in the United States are citizens, and announced:

> *The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.*[9]

7. While the Supreme Court has never directly addressed whether there exists a distinction between the citizenship rights of the children of documented and undocumented migrants, it has indicated that *"no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful".*[10] Further, the Native American exception was abolished by the 1924 Indian Citizenship Act, which proclaimed: "*[T]hat all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States".*[11] As a result, it is possible to say that virtually everyone born in the United States has a right to U.S. citizenship under the U.S. Constitution.[12]

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[8] *Elk v. Wilkins*, 112 U.S. 94 (1884).

[9] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[10] *Plyler v. Doe*, 457 U.S. 202, 212 n. 10 (1982); see also *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (referencing the child of an undocumented migrant, "who, born in the United States, was a citizen of this country").

[11] Approved, June 2, 1924. June 2, 1924. [H. R. 6355.] [Public, No. 175.] SIXTY-EIGHTH CONGRESS. Sess. I. CHS. 233. 1924. See House Report No. 222, codified at 8 U.S.C. § 1401(a)(2).

[12] It is also true, however, that some populations have trouble exercising this right. Examples can be drawn from those communities that inhabit the border region between the United States and Mexico. Many people in these communities are born to midwives or in other circumstances where birth registration does not happen automatically upon birth, and complications can arise later during the process of late registration. Lisa Brodyaga, who runs the Refugio del Rio Grande in San Benito, Texas, advises many people in this

8. In addition to citizenship through birth in U.S. territory, a person born outside of the United States has a right to U.S. citizenship if one or both of his or her parents are U.S. citizens and meet a variety of residency requirements.[13] Further, a U.S. citizen also enjoys a guarantee that such citizenship will not be revoked. Indeed, while voluntary acquisition or exercise of a foreign citizenship was considered sufficient cause for revocation of U.S. citizenship for many years,[14] the Supreme Court held in 1967 that the Citizenship Clause of the Fourteenth Amendment bars Congress from revoking citizenship.[15] Under current law, loss of U.S. citizenship is possible only through voluntary relinquishment, which may be accomplished either through renunciation procedures specially established by the U.S. Department of State or through other actions that demonstrate intent to give up U.S. citizenship.[16]

9. Because, virtually without exception, birth in United States territory gives a person the right to U.S. citizenship, the children of U.S. citizen parents can claim U.S. citizenship, and renunciation of U.S. citizenship must be voluntary, it is accurate to say that stateless persons in the United States are almost exclusively migrants. That being the case, one might expect the Immigration and Nationality Act (INA) – the federal statute that governs all immigration matters – to contain some substantive reference to statelessness. However, the INA does little more than acknowledge that stateless

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situation and represents them in proceedings to establish their citizenship and to realise other civil or political rights. However, Ms. Brodyaga indicates that this is currently not a tremendous problem in the context of removal proceedings, where the government has the burden of showing by "clear and convincing evidence" that someone is not a U.S. citizen, and therefore subject to deportation. However, the government generally cannot meet this burden in cases where people are born in the United States, and such individuals are rarely deported or subjected to immigration detention during the pendency of such proceedings – Ms. Brodyaga could only recall one such case of detention. (The Equal Rights Trust Interview with Lisa Brodyaga, March 26, 2009.)

[13] 8 U.S.C.A. § 1401, "Nationals and citizens of United States at birth". This provision contains some insight into the subtle distinction between citizenship and nationality in the United States; however, to the extent such a distinction exists, it will not be emphasised in this report.

[14] *Perez v. Brownell*, 356 U.S. 44 (1958) (holding that section of Nationality Act of 1940 providing that a person who is a national of the United States shall lose his nationality by voting in a political election in a foreign state was a constitutional exercise of power of Congress to regulate foreign relations).

[15] *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

[16] *Vance v. Terrazas*, 444 U.S. 252 (1980).

people do exist,[17] and the regulations that direct immigration officials on the application of the INA generally do not differentiate between foreign nationals and stateless individuals, indicating that the "country of last habitual residence" should be considered the nation of any stateless individual.[18] On the face of the statute, then, it appears that stateless migrants receive similar treatment as those who are nationals of a foreign country.

10. However, those immigration proceedings that require communication with an immigrant's country of nationality, such as exclusion or deportation proceedings (known as "removal proceedings"), or procedures to transfer an immigrant to his or her country of nationality, will naturally be affected if that immigrant is stateless. Specifically, because detention often accompanies such proceedings, stateless migrants run the risk of languishing in long-term detention while U.S. authorities attempt to contact countries of last residence and arrange return. This paper discusses this problem in the context of regular immigration detention, as well as the more specialised area of national security detention, both of which have experienced increases over the past years in the United States, making this a problem of increasing urgency.

[17] INA § 281 (This is the only time the word "stateless" is used in the entire statute.).

[18] 8 C.F.R. § 1240.67(b)(3) ("Procedure for interview before an asylum officer"); 8 C.F.R. § 1208.31(c) ("Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the [INA] and aliens whose removal is reinstated under section 241(a)(5) of the [INA].").

Part One

Immigration Detention and Statelessness

11. In January 2009, the Associated Press (AP) took a "system snapshot" of immigration detention and found that there were exactly 32,000 individuals in immigration detention in the United States.[19] The data indicated that 18,690 of those immigrants had no criminal conviction, and more than 400 of those with no criminal record had been detained for at least a year, while a dozen had been held for three years or more, and one man from China had been held for 5 years.[20]

12. Immigration and Citizenship Enforcement (ICE) – the immigration enforcement arm of the Department of Homeland Security (DHS) – like its predecessor the Immigration and Naturalization Service (INS),[21] has always had the authority to detain immigrants. However, over the past decade, owing to certain amendments to the INA that made detention mandatory for some non-citizens during removal proceedings,[22] as well as other legal and policy developments emphasising immigration enforcement,[23] detention has increased as it has become an integral aspect of immigration regulation. Indeed, the AP reports that a system of immigration detention that housed 6,785 people in 1994 has nearly quintupled, and expanded into 260 facilities across the country, the majority of which are under contract with local governments or private companies.[24]

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[19] "Immigrants face long detention, few rights: Many detainees spend months or years in U.S. detention centers", Associated Press, March 15, 2009, *available at* http://www.msnbc.msn.com/id/29706177/

[20] *Ibid*.

[21] Effective March 1, 2003, the INS was abolished pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, codified at 6 U.S.C. § § 101, et seq., and its immigration functions were transferred to the DHS.

[22] In 1996, with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – the much criticised "1996 amendments", the detention of immigrants who are charged with being removable because they have been convicted of certain crimes became mandatory. (8 U.S.C.A. § 1226(c); see also *Demore v. Kim*, 538 U.S. 510 (2003)).

[23] Section 287(g) of the INA provides that ICE can effectively deputise local law enforcement agencies for the purpose of enforcing immigration laws, an arrangement which advocates argue has led to a variety of abuses, and an increase in immigration detention. (See "Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement", *Justice Strategies*, February 2009, *available at* http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf)

[24] *See* note 19 above.

13. The Government's authority to detain non-citizens of the United States in the removal context arises principally from two Sections of Title 8 of the United States Code.[25] Section 1226, titled "Apprehension and detention of aliens", provides that: "*On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.*"[26] Non-citizens are detained under this provision during their removal proceedings, but there is no indication that stateless persons receive disparate treatment under this provision.

14. After non-citizens are determined to be removable, meaning they have exhausted all of their avenues of appeal and received a final order of removal, the government's authority to detain them shifts to Section 1231. Post-removal order detention can be prolonged, and in some cases indefinite, for *de jure* and *de facto* stateless persons.

Statutory Framework for Post-Removal Order Detention

15. Pursuant to Section 1231 of Title 8 of the United States Code, when a non-citizen is ordered removed from the United States,[27] the DHS shall remove him or her within a period of 90 days (referred to as the "removal period").[28] The statute mandates that under no circumstance during

[25] In addition to the main statutory provisions described here, there also exist two statutes that authorise prolonged detention of "alien terrorists". The Alien Terrorist Removal Procedures, codified at 8 U.S.C. § 1537, provide that an "alien terrorist" shall remain in custody during removal proceedings, if found removable, shall continue in custody while removal is being effectuated, and if no country will issue travel documents, may remain in custody, with a right to custody review every 6 months. Similarly, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub.L. 107-56, § 412(a), 115 Stat. 272, 350, codified at 8 U.S.C. § 1226a, provides the authority to detain "terrorist aliens" pursuant to removal longer than 6 months under certain circumstances. However, research for this paper did not turn up any cases of detention under either of these provisions.

[26] 8 U.S.C.A. § 1226(a).

[27] In 1996, amendment to the INA renamed what were previously known as exclusion and deportation proceedings "removal proceedings". While these two types of proceedings have the same name, the distinction is still important because different rights attach depending upon whether a non-citizen is placed in removal proceedings at a port of entry to the United States or after gaining entry into the country.

[28] 8 U.S.C.A. § 1231(a)(1)(A).

the removal period shall the Secretary of Homeland Security (Secretary)[29] release an alien who has been determined to be removable because of certain criminal or terrorist activity.[30] The statute further provides that if the non-citizen is not removed within the removal period, the non-citizen be released subject to supervision under regulations proscribed by the Secretary pending removal.[31]

16. Section 1231(a)(6) of the statute, under the title 'inadmissible or criminal aliens', provides that a non-citizen may be detained beyond the removal period if the non-citizen: (1) was determined to be inadmissible;[32] (2) was found deportable because of a violation of his or her status or condition of entry, commission of certain criminal offences, or certain security concerns;[33] or (3) has been determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal.[34] Historically, the former INS interpreted this provision to permit the continued detention of these three categories of non-citizens while arrangements for their removal were being made.[35] This interpretation resulted, in some circumstances, in the indefinite detention of many *de jure* and *de facto* stateless persons. Two such non-citizens, Kestutis Zadvydas and Kim Ho Ma, contested their potentially indefinite detention through petitions for habeas corpus that were ultimately granted by the Supreme Court in its landmark *Zadvydas v. Davis* decision in 2001.

Interpreting the Statute: *Zadvydas v. Davis* and Progeny

17. Mr Zadvydas, best described as *de jure* stateless, was born to Lithuanian parents in a displaced persons camp in Germany in 1948. When he was eight years old, Zadvydas immigrated to the United States with his parents and other family members, and acquired residency. Zadvydas

[29] On March 1, 2003, the DHS and its Bureau of Border Security assumed from the INS responsibility for the removal program. Homeland Security Act of 2002, §§ 441(2), 442(a), 116 Stat. 2192-2194, 6 U.S.C. §§ 251(2), 252(a) (2000 ed., Supp. II). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. (See § 551(d)(2)).

[30] 8 U.S.C.A. § 1231(a)(2).

[31] 8 U.S.C.A. § 1231(a)(3).

[32] 8 U.S.C.A. § 1182, "Inadmissible Aliens".

[33] Specifically, found removable under 8 U.S.C.A. §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4).

[34] 8 U.S.C.A. § 1231(a)(6), "Inadmissible or criminal aliens".

[35] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citing Petitioner's brief).

became engaged in criminal activity, ranging from drug crimes, attempted robbery, attempted burglary, and theft. He was incarcerated as a result of his crimes, and when he was released from prison on parole, he was detained by the INS and ordered deported to Germany in 1994.[36] However, Germany told the INS that it would not accept Zadvydas because he was not a German citizen. Shortly thereafter, Lithuania refused to accept Zadvydas because he was neither a Lithuanian citizen nor a permanent resident. In 1996, the INS asked the Dominican Republic (Zadvydas' wife's country) to accept him, but this effort proved unsuccessful. In 1998, Lithuania rejected, as inadequately documented, Zadvydas' effort to obtain Lithuanian citizenship based on his parents' citizenship. The INS kept Zadvydas in detention beyond the removal period because no country would accept him. Zadvydas filed a petition for habeas corpus arguing that his continued detention was unlawful and the district court agreed and ordered him released under supervision. The U.S. Federal Court of Appeals for the Fifth Circuit (Fifth Circuit)[37] reversed the district court's decision in 1999, and Zadvydas appealed to the Supreme Court.[38]

18. Mr Ma, best described as *de facto* stateless, was born in Cambodia in 1977, but was forced at the age of two to flee with his family to refugee camps in Thailand and the Philippines. Eventually, he and his family arrived in the United States, where he acquired residency at the age of seven. In 1995, at age 17, Ma was involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months imprisonment. He served two years, after which he was released into INS custody. Because the INS concluded in light of his criminal history that he would pose a risk to the community if released, he was detained beyond the removal period. Ma filed a petition for habeas corpus in 1999 along with about 100 other similarly situated individuals, and after an evidentiary hearing, the federal district court determined that there was no realistic chance of removal given the lack of a repatriation agreement between the United States and Cambodia and ordered Ma released. The

[36] 8 U.S.C. § 1251(a)(2) (delineating crimes that make a non-citizen deportable).

[37] There are 11 federal circuit courts of appeals, and they are the last level of appeal before the Supreme Court. They have jurisdiction to hear appeals from federal district courts in established geographic regions and their decisions are binding precedent for those district courts. Circuit courts are particularly important in the immigration context because they also have jurisdiction over appeals from the highest immigration appeals court, the Board of Immigration Appeals (BIA), and their decisions are binding precedent for all immigration cases that arise in their jurisdiction. The Fifth Circuit has jurisdiction to hear appeals from, *inter alia*, the decisions of district courts and BIA orders that arise from appeals from the decisions of immigration courts in Texas, Louisiana, and Missouri.

[38] *Zadvydas*, 533 U.S. at 684-85.

government appealed that decision to the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit),[39] which affirmed the decision, and the government appealed to the Supreme Court.[40]

19. In *Zadvydas v. Davis*, the Supreme Court held that Section 1231(a)(6) of the statute authorises the Secretary to detain aliens similarly situated to Zadvydas and Ma, i.e. resident non-citizens detained beyond the removal period because of criminal convictions, only as long as "*reasonably necessary"* to remove them from the country.[41] Specifically, the Court held that the two justifications for the detention at issue, preventing flight and protecting the community, were inadequate to justify prolonged and indefinite detention.[42] With regard to preventing flight, the Court found this rationale to be "*weak or nonexistent where removal seems a remote possibility at best"*.[43] With regard to protecting the community, the Court held that this rationale should be reserved for "*specially dangerous individuals"*, and that clear and convincing evidence of requisite dangerousness, accompanied by strong procedural safeguards, as well as some other "*special circumstance, such as mental illness, that helps to create the danger"* would be required to justify prolonged and indefinite detention on that basis.[44]

20. Invoking the principle of constitutional avoidance, whereby federal courts interpret statutes to avoid resolving apparent constitutional concerns, the Court construed Section 1231(a)(6) to contain an implicit *"reasonable time"* limitation subject to federal judicial review, rather than to authorise indefinite detention.[45] In so doing, the Court established a presumptively reasonable period of six months after the date of the final order of removal during which the government may

[39] The Ninth Circuit is the largest circuit court in the United States with jurisdiction to hear appeals from, *inter alia*, the decisions of district courts and BIA orders that arise from appeals from the decisions of immigration courts in California, Nevada, Arizona, Idaho, Montana, Oregon, Washington, Alaska, Guam, Hawaii, and Mariana Islands.

[40] *Zadvydas*, 533 U.S. at 685-86.

[41] *Ibid*. at 689, 699.

[42] *Ibid*. at 690.

[43] *Ibid*.

[44] *Ibid*. at 691.

[45] *Ibid*. at 682.

detain an alien to effectuate removal.[46] After this six-month period, a detained non-citizen can file a habeas petition in federal court, and if he or she can "*provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing*".[47] The Court also indicated that, "*as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink*".[48] Accordingly, "*once removal is no longer reasonably foreseeable, continued detention is no longer authorized*".[49]

21. In *Zadvydas v. Davis*, the Supreme Court emphasised "[t]he distinction between an alien who has effected entry into the United States and one who has never entered," indicating that U.S. immigration law accorded immigrants seeking entry into the United States fewer rights, and that the Court's interpretation of Section 1231(a)(6) would likely not extend to them.[50]

22. However, just over three years after deciding *Zadvydas v. Davis*, the Supreme Court was forced to reconcile any distinction in the treatment of these two groups of immigrants under Section 1231(a)(6) when inadmissible non-citizens challenged their detention beyond the removal period in *Clark v. Martinez*.[51]

23. In that case, Sergio Suarez Martinez and Daniel Benitez, two Cuban nationals who had arrived in the United States in 1980 as part of the Mariel boatlift and later been deemed excludable (or inadmissible) because of criminal convictions, challenged their detention beyond the removal period under Section 1231(a)(6).

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[46] *Ibid*. at 699.

[47] *Ibid*. at 701.

[48] *Ibid*.

[49] *Ibid*. at 699.

[50] *Ibid*. at 693. Indeed, approximately 50 years prior, the Supreme Court had upheld the constitutionality of the indefinite detention of a man born in Gibraltar of Hungarian or Romanian parents who lived in the United States from 1923 to 1948, travelled to Romania to visit his ailing mother, and was denied admission upon attempted re-entry to the United States. (See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)). Mezei, who was refused travel documents by Hungary, France, Great Britain, and several Latin American countries, was forced to take up permanent residence in Elis Island. (*Ibid*. at 209.).

[51] *Clark v. Martinez*, 543 U.S. 371 (2005).

24. Martinez and Benitez had been paroled into the United States along with thousands of other Cuban nationals that arrived during the Mariel boatlift,[52] and were permitted under federal law to adjust their status to Lawful Permanent Resident (LPR) within one year.[53] However, Martinez and Benitez did not apply to adjust their status until 1991 and 1985 respectively, by which time each man had an extensive criminal record in the United States, and their applications were denied on that basis.[54] Accordingly, removal proceedings were initiated against them and each was found excludable, Martinez in 2000 and Benitez in 1993.[55] However, because the United States does not have diplomatic relations with Cuba, their removal did not occur, and both men were detained beyond the removal period.[56]

25. In *Clark v. Martinez*, the Supreme Court extended its holding in *Zadvydas v. Davis*, which specifically involved resident non-citizens found deportable, to non-resident non-citizens found inadmissible.[57] It reasoned that the authority to detain each of those groups arose from the same statutory provision, i.e. Section 1231(a)(6), and because that provision did not distinguish between the two groups, the Court could not apply distinct interpretations of the same statute to one or the other.[58]

26. Therefore, the practical effect of the Supreme Court's decisions in *Zadvydas v. Davis* and *Clark v. Martinez* is to guarantee that all non-citizens detained pursuant to Section 1231(a)(6), whether (1)

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[52] "In 1980, some 125,000 Cuban aliens arrived without visas in Florida aboard a flotilla of small boats. Cuban authorities had taken advantage of this exodus to give criminals the option to remain in prison or to leave for the United States. Immigration officers found that about 25,000 of the arriving aliens admitted some criminal history, but only about 2,000 were deemed to have backgrounds serious enough to warrant continued detention. Most of the other aliens were promptly paroled under provisions of the [INA], 8 U.S.C. § 1182(d)(5), after sponsors were found." (*Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982)).

[53] Cuban Refugee Adjustment Act, 80 Stat. 1161.

[54] Martinez had been convicted of assault with a deadly weapon, burglary, theft, and a sex crime. (See *Clark v. Martinez*, 543 U.S. at 374-5.) Benitez had been convicted of armed robbery, armed burglary, aggravated battery, grand theft, and numerous firearms-related crimes. (*Ibid*.).

[55] *Clark v. Martinez*, 543 U.S. at 375.

[56] *Ibid*. at 386, 376.

[57] *Ibid*. at 386-87.

[58] *Ibid*. at 382.

determined to be inadmissible upon arrival,[59] (2) deportable after gaining status,[60] or (3) determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal, have the right to release after six months of being deemed removable if they can demonstrate that there is "*no significant likelihood of removal in the reasonably foreseeable future".*[61]

27. The relevance of this rule to the rights of *de jure* and *de facto* stateless persons is manifest because their removal presents the biggest challenge. This raises an important question about how the United States makes the determination of whether an individual deemed removable can actually be removed.

Regulatory Framework Promulgated Post-*Zadvydas*

28. Regulations promulgated in November 2001 in response to the Supreme Court's decision in *Zadvydas v. Davis* govern the procedure by which the DHS reviews the detention of non-citizens deemed removable (the *Zadvydas* regulations).[62] The *Zadvydas* regulations provide the procedures to determine: (1) whether an individual detainee will be detained or released following the 90-day removal period;[63] (2) whether there is a significant likelihood of removal in the reasonably foreseeable future after 180 days in detention;[64] and (3) whether detention can be continued on account of "special circumstances" beyond 180 days, even where removal is not foreseeable.[65] Because each of these determinations depends on when the removal period begins, that is necessarily the first step in any analysis of whether post-removal order detention is justified.

[59] 8 U.S.C.A. § 1182, "Inadmissible Aliens".

[60] Specifically, found removable under 8 U.S.C.A. §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4).

[61] *Zadvydas*, 533 U.S. at 701.

[62] *"Continued Detention of Aliens Subject to Final Orders of Removal,"* 66 Federal Register 56967 (November 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14 (2005).

[63] 8 C.F.R. § 241.4.

[64] 8 C.F.R. § 241.13.

[65] 8 C.F.R. § 241.14.

29. The *Zadvydas* regulations establish that the removal period begins on the latest of the following dates: (1) the date the removal order becomes administratively final; (2) if a court has ordered a stay of removal, the date the removal order can be executed; or (3) if the non-citizen is detained in relation to a criminal offence, the date that detention ends.[66] This means that litigation to challenge a final order of removal before an immigration judge or the Board of Immigration Appeals (BIA), and any subsequent judicial challenge to an adverse agency determination will toll the removal period. Cases in which migrants exhaust all avenues of review can last years, and the 90- and 180-day periods only begin to toll when such a point of finality is reached.[67]

30. Further, the regulations also establish that the 90-day period can be tolled if the non-citizen does not apply in good faith for travel documents necessary for their removal, and that period will be tolled until the non-citizen has fulfilled his or her statutory obligation to assist in his or her removal.[68] Non-compliance is an extremely contentious issue that the DHS may use at many different stages of the removal process in order to justify continued detention, and it will be discussed in greater detail below. Finally, the availability of a travel document at any stage in the custody review process may preclude release unless immediate removal is not practicable or in the public interest.[69]

[66] 8 C.F.R. § 241.4(g)(1)(i).

[67] See ERT interview with the ACLU of Southern California, April 2009, and their cases *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) and *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008).

[68] 8 C.F.R. § 241.4(g)(1)(ii); see *Powell v. Ashcroft*, 194 F. Supp. 2d 209, 210 (E.D.N.Y. 2002) (tolling the removal period of a Jamaican man based on a series of inconsistent statements he made about his nationality, finding that he had '*demonstrably hampered the INS in carrying out his removal*'); see also *Cisse v. Chertoff*, 2008 WL 724339 (D.N.J.) (holding that the removal period of a man from the Ivory Coast apprehended almost five years after he failed to report for removal did not begin to run until he applied for travel documents six months after he was initially detained).

[69] 8 C.F.R. § 241.4 (g)(3).

90-Day Review

31. As an initial matter, the DHS Office of the Inspector General (OIG) has reported that approximately 80% of those non-citizens with a final order of removal are removed or released within 90 days.[70] The OIG produced this statistic by observing that of 8,690 non-citizens in detention with a final order of removal in March 2006 only 1,725 were still detained in June 2006.[71] Further, in order to better understand the circumstances of these detained, removable non-citizens, the OIG performed a study of the removal process based on a sample of 210 detainee files, selected to represent four categories of removable non-citizens: (1) those from countries that generally provide travel documents quickly, including El Salvador, Guatemala, Honduras, and Mexico; (2) those from countries that typically refuse or delay the issuance of travel documents, including Cambodia, China, Cuba, Haiti, India, Laos, Pakistan, and Vietnam; (3) those from countries for which obtaining travel documents is less routine simply because immigration to the United States is less common, including many European and African countries; and (4) those who had been in detention for an unusually long time, generally longer than 12 months.[72] This report will refer to this study as the "OIG Report", and utilise its statistical analysis to provide context for both discussions of the regulations as well as anecdotal accounts.

32. The regulations require that the local DHS office in the jurisdiction where the detainee is being held perform an initial 'records review' of each detainee, with limited exceptions,[73] prior to the expiration of the 90-day removal period.[74] The purpose of the initial custody review is to determine whether the non-citizen should be released while awaiting removal,[75] and includes consideration of

[70] DHS Office of Inspector General: ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States, OIG07-28, February 2007, p. 10; *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-28_Feb07.pdf

[71] *Ibid*. at 11.

[72] *Ibid*. at 8.

[73] Individuals granted withholding or deferral of removal on account of a fear of persecution or torture are exempt from these custody review procedures (see *ibid.* at (b)(3)), as is "any inadmissible Mariel Cuban," the release determination provisions for whom are established in a separate section: 8 C.F.R. § 212.12.

[74] 8 C.F.R. § 241.4(h)(1).

[75] See 8 C.F.R. § 241.4 (e): "Criteria for release. Before making any recommendation or decision to release a detainee, a majority of the Review Panel Members, or the Director of the HQPDU in the case of a record

multiple factors including, *inter alia*, the detainee's criminal history, prior immigration violations, and psychiatric reports.[76] There are certain procedural safeguards pertaining to this review set forth in the regulations, but they are not strictly observed by DHS. For example, detainees must receive 30 days written notice of the initial review,[77] but these notifications are not consistently provided in a timely manner, giving some detainees little or no time to prepare.[78] Significantly, the detainee should also receive a reasoned, written response stating whether DHS will continue detention and why.[79]

33. The OIG Report indicates that of the removable non-citizens still detained after 90 days, Africans were detained at a rate of 47%; those from Oceania were detained at a rate of 44%; Asians were detained at a rate of 42%; those from the Caribbean were detained at a rate of 32%; North Americans were detained at a rate of 13%; South Americans were detained at a rate of 11%; and Central Americans were detained at a rate of 7%.[80] The report further indicates that, after 90 days, only 5-10% percent of individuals from "cooperative countries" like Honduras, Mexico, El Salvador, and Guatemala were still detained (implying that the balance have been removed), and 15-25% of individuals from "non-cooperative countries" such as Vietnam, Laos, Cambodia, and Cuba were still detained (presumably the rest have been released), but that approximately 50% of detainees from India, Haiti, Pakistan, and China were still detained.[81]

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review, must conclude that: (1) travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest; (2) the detainee is presently a non-violent person; (3) the detainee is likely to remain non-violent if released; (4) the detainee is not likely to pose a threat to the community following release; (5) the detainee is not likely to violate the conditions of release; (6) the detainee does not pose a significant flight risk if released."

[76] 8 C.F.R. §§ 241.4(h)(3), 241.4(f).

[77] 8 C.F.R. § 241.4(h)(2).

[78] OIG Report at 10.

[79] 8 C.F.R. §§ 241.4 (h)(4), 241.4 (d).

[80] OIG Report at 11.

[81] *Ibid*. at 12.

34. As noted above, Section 1231(a)(6) provides that certain removable non-citizens must be detained during the removal period and may be detained beyond the removal period.[82] Because the DHS does not keep data on the reasons for detention in a readily accessible way, it is difficult to say exactly why these individuals are detained beyond the removal period.[83] Presumably it is some mix of their perceived dangerousness and the likelihood of removal; however, there are also those who are falling through the cracks of the system.[84] While there is not enough information to state definitively why certain individuals fall through the cracks, considering the critiques with regard to the system's oversight mechanisms and insufficient resources, it is possible that a certain number of people get lost in the bureaucratic maze of immigration detention.[85] Further, considering observations by some advocates that detention officers see post-removal order detention as punitive together with critiques relating to the lack of transparency of how standards are applied by detention officers, there is cause for concern that detention officers are making the decision not to expend resources to remove certain detainees based on pre-conceived notions of dangerousness and the difficulty of removal.[86] Concerns of this nature become more acute as detainees reach their 180-day review.

180-Day Review

35. If the local DHS office with jurisdiction over the detainee makes the decision to continue detention after the 90-day review, it may conduct subsequent custody determinations for up to three months after the expiration of the removal period.[87] After 180 days of detention, the authority over the

[82] *See* Para 16 above.

[83] ERT Interview with Michael Tan, Detention Fellow at the ACLU IRP, February 17, 2009, specifically discussing a Freedom of Information Act ("FOIA") request filed by the ACLU.

[84] See OIG Report at 14 (indicating that, of the 210 reports reviewed in more detail, 82 were eligible for a 90-day review, but 11 had not received it).

[85] *Ibid*. at 11-14.

[86] *Ibid*. at 31-33.

[87] 8 C.F.R. § 241.4(k)(1)(ii).

custody determination transfers to the DHS Headquarters Post-Order Detention Unit (HQPDU) in Washington, D.C.[88]

36. According to the regulations, the HQPDU 180-day review is essentially a three-step process to determine: (1) whether the detainee has cooperated with efforts to apply for and obtain travel documents;[89] (2) whether there is a significant likelihood of removal in the reasonably foreseeable future;[90] (3)(a) if not, whether the detainee can be released under conditions of supervision, or referred for a determination as to whether the individual's continued detention may be justified by "special circumstances";[91] and (3)(b) if so, an assessment of dangerousness and flight risk should take place and supervised release considered. The "system snapshot" provided by the AP indicated that, on January 25, 2009, there were 950 people who were being detained beyond 180 days.[92]

37. According to a 2005 report by Catholic Legal Immigration Network, Inc. (CLINIC), *"once detainees' files are transferred to Headquarters for review, detainees have little to no access to information about their status, and lack opportunities for advocacy in favor of release".*[93] Further, that report concluded that detainees rarely receive notification of HQPDU's determination with regard to their removability and the only viable option for them to contest their continued detention is a petition for habeas corpus filed in federal court.[94] Indeed, most advocates interviewed for this report felt that the only way to secure the release of detainees after six months was to file a habeas petition.

38. Many advocates believe that, in most cases the only way to secure release for a detainee after 6 months is to file a habeas petition, and that often, filing the petition alone results in release. In some jurisdictions, the Office of the Federal Public Defender (FPD) will aid immigrant detainees in filing

[88] 8 C.F.R. § 241.4(k)(2)(ii).

[89] 8 C.F.R. § 241.13(e)(2).

[90] 8 C.F.R. § 241.13(c).

[91] 8 C.F.R. § 241.13(c).

[92] *See* note 19 above.

[93] "Systematic Problems Persist in U.S. ICE Custody Reviews for 'Indefinite' Detainees", by Kathleen Glynn and Sarah Bronstein, CLINIC, 2005, p. 16.

[94] *Ibid*.

petitions for habeas corpus after they have been detained beyond 180 days. This should be considered a best practice, inasmuch as advocates from those jurisdictions report that excessive and abusive periods of detention are much less common than in other jurisdictions.[95]

Non-Cooperation

39. The first issue HPQDU will consider at the 180-day review is whether a detainee has cooperated with his or her removal. There is a lot of debate surrounding this determination because the DHS has a fair amount of discretion to decide what constitutes cooperation with removal, and many believe that it abuses that discretion. On the one hand, there are those cases in which courts have upheld non-cooperation determinations because the removable non-citizen refused to take steps to secure travel documents, either by failing to fill out necessary forms or providing false information,[96] or because the non-citizen physically resisted removal.[97] On the other hand, there are cases in which the court has overturned non-cooperation determinations because removable non-citizens have clearly done everything that the DHS had required them to do to secure travel documents,[98] where they initially resisted removal but then began to cooperate,[99] or where they

[95] ERT interview with the ACLU of Southern California, April 2009, which indicated that the San Diego FPD filed *Zadvydas* habeas petitions. See also ERT interview with Bob Pauw, an immigration attorney in Seattle, Washington, April 2009.

[96] See *Lema v. I.N.S.*, 341 F.3d 853, 856 (9th Cir. 2003) (approving the decision to continue detention of an Ethiopian man who was denied travel documents after he told the Ethiopian Consulate that he was Eritrean, a statement that was inconsistent with assertions he made in his removal proceedings, and ignored requests by the DHS that he clarify his situation with the Ethiopian embassy); see also *Pelich v. I.N.S.*, 329 F.3d 1057, 1058-61 (9th Cir. 2003) (finding that a Polish detainee's refusal to fill out a Polish passport application, together with the fact that he had provided conflicting information to the DHS regarding his name, birthplace, nationality, and his parents' names, birth places, and address, was sufficient to establish that he had the *"keys to his freedom"* and denying his petition for habeas corpus on that basis).

[97] See *Gamado v. Chertoff*, 2008 WL 2050842 (D.N.J.) (upholding the DHS's non-cooperation determination in a case in which the DHS would have successfully removed a South African man to Togo if he had not refused to board the plane on three different occasions); see also *Gordon v. Gonzales*, 2008 WL 248520 (M.D.Ga 2008) (upholding the non-cooperation determination where a man from Sierra Leone had refused to board the plane to Sierra Leone on one occasion, and was returned from Sierra Leone on another occasion after telling Sierra Leonean immigration officials that he was a citizen of Ghana).

[98] See *Tobon v. Gonzales*, 2008 WL 565105 (D. Ariz. 2008) (overturning a non-cooperation determination where a Guatemalan man had called his consulate three times, written the consulate a letter and submitted to a consular interview, and where *"[t]he government has made no formal finding concerning whether [the petitioner] has cooperated in good faith, and if not, what he must do now to facilitate his departure"*).

cooperated, but truthfully stated to consular officials that they intended to challenge their order of removal and did not want to return home.[100]

40. Between these two extremes, there is a vast grey area within which arbitrary non-cooperation determinations by the DHS reign. The 2005 CLINIC report highlights the following specific problems: (1) the DHS's *"failure to provide and utilize clear criteria for non-cooperation"*; (2) evidence to suggest *"that non-cooperation is used as a basis for continuing detention when there is no other reason to detain the individual, but [the DHS] is not ready to release"*; (3) accounts *"that non-cooperation allegations could arise from [the DHS's] ineffective mechanisms to keep track of the status of individual case"*; and (4) indications that the DHS sometimes *"conflate[s] a detainee's non-cooperation with its own inaction, or a lack of response from the detainee's consulate"*.[101]

41. An advocate who works in the detention centres in Florence, Arizona recalled that the DHS cited non-cooperation in roughly half of the cases she worked on in which custody was continued after the 180-day review. Further, she indicated that courts routinely approved continued detention where the DHS opposed release based on the government's arguments that the detainee had not done everything within their power to assist in their removal. A lawyer that works on immigration detention issues for the ACLU of Southern California confirmed a similar trend and opined that the DHS should be required to prove an allegation of non-cooperation before an immigration judge as opposed to making the determination itself, reasoning that all other procedurally important matters are reviewed with this level of scrutiny.

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[99] See *Clark v. Ashcroft*, 2003 WL 22351953 at *3-6 (E.D. Pa. Sept. 16, 2003) (overturning a non-cooperation decision where a British citizen who initially misrepresented that he was a citizen of Jamaica, but then spent nearly two years in detention after admitting he was a citizen of the UK and cooperating with DHS efforts to remove him there).

[100] See *Rajigah v. Conway*, 268 F. Supp. 2d 159, 165-66 (E.D.N.Y. 2003) (finding that a Guyanese man's statement to the ambassador of Guyana that he intended to file an action in U.S courts challenging his removal did not constitute a failure to cooperate, despite the Guyanese government's policy not to issue travel documents to its citizens that intended to challenge their removal); see also *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 51-53 (D.D.C. 2002) (finding that a purported Liberian citizen's truthful statement to Liberian officials that he did not wish to return to Liberia did not constitute a bad faith failure to cooperate).

[101] *See* CLINIC Report, note 93 above, pp. 24-25.

42. An attorney for the Center for Constitutional Rights (CCR) described one such case of abuse. Faruk Abdel-Muhti was a Palestinian born in the West Bank in 1947 when it was part of Mandate Palestine, ruled by Britain. Mr Abdel-Muhti was ordered removed to Palestine in 1975, but continued to remain in the country while evading deportation. In new proceedings in September 1995, Abdel-Muhti was ordered removed *in absentia* to either Jordan or Israel. However, it was not until April 2002 during the post-9/11 sweeps of Arab communities that he was taken into custody on his September 1995 removal order. In November 2002, HQPDU made the determination to continue detention because he had not provided sufficient evidence to establish his identity or nationality and he was ordered to contact his embassy and secure travel documents. In June 2003, Abdel-Muhti requested a custody review and presented evidence that he had been denied travel documents from both the Jordanian and Egyptian Governments and that the Palestinian National Authority also had refused to issue documents, as had Honduras, where Abdel-Muhti has resided for some time. The reviewing officer, however, determined that he had not established compliance with his obligation to cooperate with the process to acquire travel documents to effectuate his removal. The DHS did not conduct any further proceedings until January 2004, when the district court required the government to supplement the record, causing it to issue another notice of Abdel-Muhti's failure to comply with efforts to remove him, indicating that the Honduran Government had determined that his birth certificate was fraudulent in the course of its efforts to establish his identity. In April 2004, the district court finally ordered Abdel-Muhti's release, noting that the Government had failed to demonstrate that he was uncooperative. The CCR lawyer who represented Abdel-Muhti firmly believes that he was detained as punishment for being an outspoken supporter of Palestinian rights and a community activist. Sadly, Abdel-Muhti passed away only months after being released from detention.[102]

43. The ACLU of Massachusetts described the plight of a Liberian man named Charles who received a custody review after more than six months in post-removal order detention, and whose detention was continued because he had been "*convicted of a number of particularly serious crimes, including crimes of violence"* and the agency believed that he was "*a danger to the community and a severe flight risk"*.[103] The crime of violence to which the agency referred was a guilty plea to violating a

[102] ERT interview with Center for Constitutional Rights attorney Shayana Kadidal, April 2009.

[103] "Detention and Deportation in the Age of ICE: Immigration and Human Rights in Massachusetts", ACLU of Massachusetts, December 2008, pp. 33-34.

restraining order his girlfriend had placed on him, which she explained in a letter to ICE was "*because while we were dating I found out that [Charles] was seeing someone else. So I … got mad and jealous so to get him back I put a restraining order on him because my feelings were hurt, not because of violence"*. Charles called the Liberian Embassy, but they would not issue him travel documents because his name does not sound Liberian. However, his next three custody reviews stated that he was being kept in detention because he had not complied with his obligation to help ICE obtain travel documents from Liberia. Charles spent over two years in detention until he filed a habeas petition and was ordered released.

44. There is a statutory provision that gives the DHS the authority to prosecute cases of non-compliance criminally.[104] One lawyer who worked in the detention centres in Virginia for many years and who is currently doing policy work with the National Immigration Forum said that the DHS will use the threat of prosecution to scare detainees into action, but will rarely prosecute.[105] The DHS has indicated that some non-citizens have been convicted of criminal non-compliance, and while it was unable to provide an estimate of successful prosecutions, it purported to be in the process of establishing a reporting system.[106]

Likelihood of Removal

45. The second issue that the DHS analyses in determining whether post-removal order detention should be continued after 180 days is whether removal is reasonably likely in the foreseeable future. The DHS will consider various factors in making this determination, *"including, but not limited to, [1] the history of the alien's efforts to comply with the order of removal, [2] the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, [3] the reasonably foreseeable results of those efforts, and [4] the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question"*.[107]

[104] 8 U.S.C. § 1253(a).

[105] ERT interview with National Immigration Forum attorney Brittney Nystrom, April 2009.

[106] OIG Report at 5.

[107] 8 C.F.R. § 241.13 (f).

46. Attorneys interviewed for this project indicated that the DHS will often release Cubans, Vietnamese, Cambodians, and Laotians when called on to determine the reasonable likelihood of removal, acknowledging that citizens of these countries will not receive travel documents. A lawyer from the National Immigration Forum explained that this is because: (1) the United States does not maintain diplomatic relations with Cuba; (2) the United States does not have a repatriation agreement with Laos; (3) while the United States recently signed a repatriation agreement with Vietnam, it does not apply to Vietnamese citizens who arrived before 1995; and (4) while the United States does have a repatriation agreement with Cambodia, the terms are very limited and removal to that country rarely occurs.[108] DHS claims that it releases all of these nationals in 90 days unless they pose a threat to the public, in which case they are released after 180 days.[109] The OIG Report confirms this to some extent, noting that while 203 Cubans were detained in March 2006, all but 28 (14%) had been released by June 2006, 2 of whom had been in detention for more than a year.[110]

47. Nationals of countries to which removal is difficult generally spend much more time in detention. For example, the OIG Report indicated that of the 246 Chinese detained in March 2006, 156 (63%) were still detained in June 2006, and 32 of them had been in detention for more than 360 days. The Report also indicated that, as of June 2006, there were 428 total non-citizens with final orders of removal who had been in detention for more than 360 days.[111]

48. The OIG Report indicated that the likelihood of removal standard is not sufficiently documented and transparent and recommended that the DHS take the necessary steps to ensure that it is.[112] The report found that, while the *Zadvydas* regulations include a list of factors to consider when determining whether removal is reasonably foreseeable, they do not provide guidance on how to incorporate the Supreme Court's requirement that custody determinations receive greater scrutiny

[108] ERT interview with National Immigration Forum attorney Brittney Nystrom, April 2009.

[109] OIG Report at 13.

[110] *Ibid*.

[111] *Ibid*.

[112] *Ibid*. at 31.

over time.[113] Further, the report noted that the Travel Document Unit (TDU) within the HQCDU makes its recommendation on the likelihood of return considering five factors: (1) actions by the country of origin; (2) the country's level of interest in cooperating; (3) whether the documents are issued consistently, even if they are issued after 180 days; (4) whether repatriation requirements can be met; and (5) feedback from consulates. However, the Report indicated that the DHS does not collect statistics on return rates, so decisions in this regard remain largely ad hoc, in that they are based purely on the individual experience of the TDU official assigned to the case.[114]

49. Again, because of the largely discretionary nature of the DHS's determination as to the likelihood of removal, habeas petitions filed in district court are often the only way for detainees to meaningfully challenge their detention. One district court has explained that: *"courts generally find that there is no significant likelihood of removal in four circumstances: (1) no country will accept the detainee; (2) the detainee's country of origin refuses to issue a travel document for the detainee; (3) no removal agreement exists between the detainee's country of origin and the United States; and (4) after several months have passed, where there is no definitive answer from the target country as to whether it would issue travel papers for the detainee".*[115] While this statement is generally true, it demonstrates that judges have little more guidance than DHS officials have under the regulations, and this leads to a wide disparity in judicial findings on this matter.

50. For example, courts have found a likelihood of removal after nine months of detention based almost exclusively on a DHS official's assertion,[116] and after 21 months of detention based solely on the statement from a foreign government that it is investigating the matter, despite a DHS official's assertion that removal was unlikely.[117]

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[113] *Ibid*.

[114] *Ibid*.

[115] *McLauren v. Chertoff*, 2008 WL 2673378 (M.D.Pa.) (quoting *Nma v. Ridge*, 286 F.Supp.2d 469, 475 (E.D.Pa. 2003)) (internal quotations omitted).

[116] See *Osman v. Keisler*, 2008 WL 114916 (W.D.Wash) (upholding the 9-month detention of a man born in Sierra Leone to Lebanese parents based solely on the DHS's assertion that the process to request the man's travel documents was *"consistent with its prior successful travel document requests from the Lebanese consulate"* in other cases).

[117] See *Kassima v. DHS*, 553 F.Supp.2d 301, 304-7 (W.D.N.Y. 2007) (approving the 21-month detention of a Gambian man despite a statement by the DHS officer working on the case that he would not be *"removed any time in the foreseeable future"*, and based on a recent statement by the Gambian Consulate that it was

51. An interview with Artour Minasian, a stateless former detainee, reveals the myriad weaknesses in the current system of custody review. Mr Minasian was a citizen of the former Soviet Union, born in Georgia, who came to the United States in 1992 seeking asylum because he was persecuted by the Georgian authorities on account of his Armenian ethnicity. He was denied asylum because the conditions in Georgia had improved by 1997 when his application was decided, and an immigration judge granted him voluntary departure.[118] Minasian asserts that the Georgian authorities used his Soviet passport as an excuse not to grant him travel documents, masking their contempt for his Armenian ethnicity, and that he remained in the United States without authorisation.

52. Minasian was stopped by the police in January 2008 and they discovered his outstanding removal order. After the first two months of detention, the DHS asked him to request travel documents from the Armenian Embassy, but his request was denied because he had never been a citizen of Armenia. Minasian was then informed that his detention would be continued because he was a flight risk and a danger to the community. After seven months in detention, he received a letter stating that he was from the Republic of Georgia, and that his detention would be continued because his removal was foreseeable. After 10 months, his deportation officer asked Minasian to call the Georgian consulate. Minasian did so, and was told that they would likely not be able to issue him a passport. After 14 months in detention, the ACLU of Southern California helped him to file a habeas petition, and he was released a week later without any explanation.[119]

53. Ivan tells a similarly tragic story.[120] Ivan was a baby when his family fled the Russian invasion of Hungary, passed through Austria, and arrived in the United States in 1956 when he was one year

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investigating the request for travel documents); but see *Ekeh v. Gonzales*, 197 Fed.App. 637, 638 (9th Cir. 2006) (finding that a man born in Liberia to Nigerian parents had met his burden to establish that his removal was not reasonably foreseeable after a 30-month period of detention, noting that he had applied for travel documents from Liberia, Nigeria, Ethiopia, South Africa, France, Cote D'Ivoire, Italy, Sweden, the Netherlands, and Switzerland, and submitted to interviews with Liberian and Nigerian officials, and repeatedly pledged to sign any document presented to him to gain his removal).

[118] Voluntary departure permits an individual, who is otherwise removable, to depart from the country at his or her own expense within a designated amount of time in order to avoid a final order of removal and the immigration consequences of such an order, such as a bar on future admission. (See INA § 240B).

[119] ERT interview with Artour Minasian, March 23, 2009.

[120] "Ivan"'s true name has been withheld for security purposes. ERT would provide the real identity of the person if the interests of justice so require.

old. Ivan admits that he led a troubled life, and attributes his many minor property and drug crimes to the fact that he was sexually abused as a teenager, a claim that finds support in many psychological assessments leading up to his 1995 diagnosis of bipolar disorder. However, his first encounter with the immigration system did not occur until 1997, when he was pulled over on a traffic violation, taken into custody, and informed that a change in the law made him deportable for his past criminal offences.

54. Ivan failed to appear at his removal hearing and was ordered removed *in absentia*. He was arrested for a series of property crimes and served time in prison before he was transferred to a detention centre in Florence, Arizona, in October 2006, when he was told that he would be removed pursuant to the *in absentia* removal order. Ivan claims that, after a couple of days, a detention officer gave him a request for travel documents for Hungary, but that he could not read it because it was in Hungarian, so he did not fill it out. Later, a detention officer brought him an application for travel documents in English along with an application for Hungarian citizenship, both of which he filled out. However, because the Hungarian authorities could not find Ivan's name in the birth records, they concluded that he was not a Hungarian citizen, and refused to issue him travel documents.

55. Ivan claims that he received his 90-day review after 6 months, and that someone mentioned to him that he had a right to release. Ivan contacted UNHCR, which gave him the address of the American Bar Association commission on immigration, which sent him the information he needed to file a habeas petition on his own behalf. Ivan did so, and he claims that even though the Hungarian authorities had previously indicated that they would not issue him travel documents, the DHS continued to argue to the district court that his removal was reasonably foreseeable. Ultimately, he was released in July 2007, after being detained for 10 months.[121]

56. Artour Minasian's and Ivan's stories clearly demonstrate both the dysfunction of the current system, and the vulnerability of stateless persons within that system. They confirm that the *Zadvydas* regulations are not working and that for many detainees the only way to secure release is to file a habeas petition. Further, they confirm the need for increased accountability within the system, and the development of additional oversight mechanisms, as well as the strengthening of

[121] ERT interview with "Ivan", April 15, 2009.

mechanisms already in place, much of which was recognised by the government's own IOG Report.[122]

Special Circumstances

57. The third issue that the DHS considers in determining whether it will release a detainee after the 180 day review, assuming it has determined that there is no significant likelihood of removal in the reasonably foreseeable future, is whether continued detention is justified by some "special circumstances".[123] The regulations define 'special circumstances' as: (1) non-citizens with *"a highly contagious disease that is a threat to public safety"*; (2) non-citizens detained because of "*serious adverse foreign policy consequences of release"*; (3) non-citizens that pose *"security or terrorism concerns"*; and (4) non-citizens who are *"specially dangerous"*.[124]

58. The OIG Report indicates that, of the 428 non-citizens with removal orders who had been detained for more than 360 days as of June 2006, 36 were being held as *"specially dangerous"*.[125] At the time of the OIG study, no cases had been certified under the remaining three *"special circumstances"* categories.[126] Indeed, the ACLU Immigrant Rights Project (IRP), which is engaged in litigation on this issue on a national level, indicated that it is not aware of any cases under the remaining three categories.[127]

[122] OIG Report at 20-25, "Compliance Oversight is Limited," and 31-33, "Likelihood of Removal Standard Needs to be Documented and Transparent."

[123] 8 C.F.R. § 241.14.

[124] 8 C.F.R. § 241.14(b), (c), (d), (f). The regulations further establish that immigration courts only have jurisdiction to review determinations with respect to the fourth category. 8 C.F.R. § 241.14(a)(2).

[125] OIG Report at 14.

[126] *Ibid*.

[127] ERT interview with Michael Tan, note 83 above. But see *Osman v. Keisler*, 2008 WL 114916, *8 n.6 (W.D.Wash. Jan 09, 2008) (acknowledging the Government's request for leave to determine whether a non-citizen may be detained under the national security special circumstances if the district court finds that a non-citizen has met threshold burden under *Zadvydas*, but resolving the case on other grounds).

59. Not surprisingly, the DHS has detained non-citizens of the "specially dangerous" category who it has been unable to remove, and federal circuit courts have split over whether such potentially indefinite detention is permissible under the rule established in *Zadvydas v. Davis*.

60. In 2004, the U.S. Court of Appeals for the Ninth Circuit ruled in *Tuan Thai v. Ashcroft* that a determination that a removable non-citizen is "specially dangerous" under the *Zadvydas* regulations does not justify indefinite detention.[128] Tuan Thai, a citizen and national of Vietnam, entered the United States in 1996 and established a record as a violent criminal, accumulating convictions for assault, harassment and third degree rape, for which he was found removable.[129] The Vietnamese consulate did not respond to the request for travel documents, and the U.S. government did not dispute that Tuan Thai's removal was not reasonably foreseeable.[130] However, the government convened proceedings under the section of the *Zadvydas* regulations that permits the continued detention of non-citizens determined to be "specially dangerous", and an immigration judge concluded that the U.S. Government had established by clear and convincing evidence that Tuan Thai posed a special danger to the public because of his mental illness and violent history, and that his potentially indefinite detention was therefore justified.[131] On appeal, the Ninth Circuit concluded that whether Tuan Thai's dangerousness was caused by mental illness, such a circumstance was insufficient to create an exception to the Supreme Court's rationale in *Zadvydas v. Davis*, and that the regulations intended to ensure compliance with that ruling could not be interpreted to the contrary.[132]

61. In 2008, the U.S. Court of Appeals for the Fifth Circuit decided a similar case, *Tran v. Mukasey*, largely following the rationale of the Ninth Circuit in finding that *"in light of the unqualified holdings of both Zadvydas and Clark that § 1231(a)(6) does not permit continued detention where removal is not reasonably foreseeable, this Court cannot establish an exception where none exists".*[133]

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[128] *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

[129] *Ibid*. at 792.

[130] *Ibid*.

[131] *Ibid*. at 793; see also 8 C.F.R. § 241.14(f).

[132] *Ibid*. at 793-99.

[133] *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008).

62. Later that year, however, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) arrived at a different conclusion in *Hernandez-Carrera v. Carlson*.[134] Santos Hernandez-Carrera and Pablo Santiago Hernandez-Arenado, natives and citizens of Cuba, arrived in the United States as part of the Mariel boatlift in 1980, were deemed to be "inadmissible aliens", but granted parole into the United States.[135] Hernandez-Carrera was convicted of rape and bodily injury in 1988, and battery and indecent exposure in 1990, and released into immigration custody for removal in 1993.[136] He was diagnosed with schizophrenia, and based on a mental health evaluation, it was determined that he would need a high level of structure if released as it was "quite likely" he would engage in violence again if released, and his continued detention was authorised. Hernandez-Arenado was convicted of sexually assaulting a seven-year-old boy in 1984, after admitting at trial to have had "several hundred" paedophilic contacts with children in Cuba and the United States, and was placed in immigration detention upon his release from prison in 1987. Mental health evaluations concluded that *"he was unlikely to change his behavior or accept constraints upon his acting on his impulses and feelings"*, and the immigration judge upheld his continued detention after concluding that there were no conditions of release that could reasonably be expected to ensure the public safety.[137]

63. Both men filed habeas petitions in district court, which found their continued detention under the *Zadvydas* regulations was *"manifestly contrary to [§ 1231(a)(6)] as interpreted by the Supreme Court"*.[138] However, the Tenth Circuit disagreed, reasoning that the Supreme Court had determined § 1231(a)(6) to be ambiguous, and had interpreted it not to permit indefinite detention pursuant to the doctrine of constitutional avoidance, which operates to preclude interpretations of ambiguous

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[134] *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008). The Tenth Circuit has jurisdiction to hear appeals from, *inter alia*, the decisions of district courts and BIA orders that arise from appeals from the decisions of immigration courts in Utah, Wyoming, Colorado, New Mexico, Kansas, and Oklahoma.

[135] *Ibid*. at 1242.

[136] *Ibid*. at 1243.

[137] *Ibid*. at 1243-44.

[138] *Ibid*. at 1244.

statutes that raise substantial constitutional doubts.[139] The Tenth Circuit went on to find that the Supreme Court's decision in *Zadvydas v. Davis* barred any interpretation of § 1231(a)(6) that would permit the indefinite detention of all removable non-citizens, but that it did not preclude the more reasonable interpretation that would only permit the indefinite detention of certain removable non-citizens found to be "specially dangerous" on account of mental disability.[140]

64. It is not yet clear whether or when the Supreme Court will resolve this split in circuit court precedent that effectively permits the indefinite detention of removable non-citizens in some states while it remains prohibited in others; however, this is certainly an issue to watch.

Designation of a Country for Removal

65. Notably, nowhere in *Zadvydas v. Davis* and its progeny is the issue of statelessness directly addressed. While Zadvydas himself was legally stateless, the central question addressed by the Supreme Court, and the question that is central to the *Zadvydas* regulations themselves, is whether removal from the United States is reasonably foreseeable. As evidenced by the cases discussed above, neither *de jure* nor *de facto* stateless persons have any guarantee that authorities will determine that their removal is not reasonably foreseeable. This is largely because the regulatory framework grants immigration authorities broad discretion in designating countries for removal.

66. Section 1231(b) of Title 8 of the United States Code provides guidance to immigration authorities on selecting countries to which non-citizens may be removed.[141] The first part of that section provides the framework for the removal of arriving, inadmissible non-citizens, and indicates that such individuals should be removed to the country from which they arrived, unless they arrived from a contiguous territory, in which case they should be removed to the country from which they arrived to the contiguous territory.[142] However, if travel to the latter country is not permitted, then the statute instructs immigration authorities to remove the non-citizen to his or her country of

[139] *Ibid*. at 1245-47.

[140] *Ibid*. at 1249-54.

[141] 8 U.S.C.A. § 1231(b).

[142] 8 U.S.C.A. § 1231(b)(1)(A),(B).

nationality, where he or she was born, has residence, or to any other country that will accept him or her.[143]

67. The second part of the relevant section pertains to non-citizens determined to be deportable, i.e. those who have already entered the United States, and permits the non-citizen to designate his or her country of removal.[144] However, it also outlines circumstances in which immigration authorities may disregard such designation, and in those cases, provides a long list of countries to which immigration authorities may attempt removal in the alternative.[145] This list includes everything from the country from which the non-citizen entered the United States to *"another country whose government will accept [him or her] into that country"*.[146]

68. As the OIG Report indicates, immigration authorities generally accept that removal to countries like Cuba and Vietnam is impracticable and release the majority of nationals from those countries. The report also indicates that other countries may present challenges, either because of strained political relations with the United States, onerous requirements for attaining travel documents, or a variety of other reasons. These observations assume that travel documents are necessary to removal. However, on the same day that it decided *Clark v. Martinez*, the U.S. Supreme Court held in *Jama v. Immigration and Customs Enforcement* that a target country's permission was not always necessary to remove a non-citizen who had been deemed removable.[147]

69. That case concerned Keyse Jama, a native and citizen of Somalia, who had been granted refugee status by the United States along with his family in 1996.[148] In 1999 Mr Jama was convicted of felony assault, and in August 2000, after serving his prison term, an immigration judge determined that he was removable for commission of a *"crime of moral turpitude"*.[149] At that point, because

[143] 8 U.S.C.A. § 1231(b)(1)(C).

[144] 8 U.S.C.A. § 1231(b)(2).

[145] 8 U.S.C.A. § 1231(b)(2)(E)(i)-(vii).

[146] *Ibid*.

[147] *Jama v. Immigration and Customs Enforcement*, 543 US 335 (2005).

[148] *Jama v. INS*, 2002 WL 507046, *1 (D.Minn.).

[149] *Ibid*.

Jama had declined to designate a country of removal, the immigration judge ordered him removed to Somalia, and he was detained until May 2001, when the INS formally notified him that he would be removed.[150] Jama then filed a petition for habeas corpus, arguing that because Somalia had no functioning government, it could not consent to his removal, and the United States was therefore barred by statute from removing him there.[151]

70. In what can only be described as a strained textual analysis of the statute, the Supreme Court held that because the relevant provision of Section 1231(b) did not explicitly require that the target country consent to removal, no such consent was required.[152] The Supreme Court specifically noted that its interpretation of Section 1231(b) *"will often afford the Attorney General his last realistic option for removal"*, considering that under *Zadvydas v. Davis* and *Clark v. Martinez*, a non-citizen in Jama's situation *"must presumptively be released into American society after six months"*.[153]

71. In this way, *Jama v. Immigration and Customs Enforcement* provides ICE with the legal possibility of removing a non-citizen who is otherwise unremovable. However, this legal possibility does not necessarily translate into reality. Indeed, three months after the high court's decision, ICE flew Jama to a region of Somalia known as Puntland on a private jet, and hired private escorts to take him through the airport.[154] But because Jama did not have a passport he was denied entry into the country. ICE placed him back in detention upon his return to the United States, and ultimately, his lawyers were able to secure his conditional release while awaiting removal. A media report indicated that after six months of checking in with ICE twice a week, Jama fled to Canada to seek asylum. The media also reported that efforts to remove Jama cost upwards of $200,000.[155] One

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[150] *Ibid*.

[151] *Jama*, 543 US at 337-38.

[152] *Ibid*. at 341-51.

[153] *Ibid*. at 347-48.

[154] "U.S. Immigration spent $200K on Keyse Jama deportation," Minnesota Public Radio, June 23, 2006, *available at* http://minnesota.publicradio.org/display/web/2006/06/23/jamaflight/.

[155] *Ibid*.

expert speculated that ICE viewed Jama as a test case, considering the approximately 3,500 Somalis with removal orders at that time.

72. While the United States efforts to remove Jama failed, it is worth briefly reviewing the potential impact of the Supreme Court's decision in his case on the discussion of the rights of stateless persons detained under U.S. authority. In that case, the Court sanctioned the U.S. government's attempts to circumvent the stage of the removal process in which the United States gives the country designated for removal the opportunity to determine whether the individual has a right to admission. As evidenced by the dozens of cases discussed in this paper, that the U.S. courts have designated a country for removal by no means guarantees that such a country will recognise the removable individual's right to residence, much less the individual's nationality. Accordingly, *Jama v. Immigration and Customs Enforcement* represents an additional level of insecurity for *de jure* and *de facto* stateless persons determined to be removable from the United States, where U.S. law sanctions their removal to uncertain fates in countries that may not recognise their most fundamental legal rights.

Part Two

National Security Detention and Statelessness

73. As was mentioned previously, the INA also provides for the detention of non-citizens for national security purposes in the removal context.[156] However, the government does not currently exercise its authority to indefinitely detain "terrorist aliens" under The Alien Terrorist Removal Procedures,[157] or the USA PATRIOT Act,[158] nor does it exercise its authority to detain removable non-citizens for national security "special circumstances".[159] Rather, security detention today largely occurs within a post-9/11 framework designed by the executive branch.

74. In response to the terrorist attacks of September 11, 2001, the U.S. Congress passed the joint resolution Authorization for Use of Military Force (AUMF) authorising the U.S. President to use *"all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons"*.[160] Soon thereafter, former President George W. Bush ordered the U.S. military to invade Afghanistan, with a mission to subdue al-Qaeda and quell the Taliban regime that was known to support it.

75. In November 2001, the President signed an executive order entitled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", which defined a broad category of non-citizens that the Department of Defence is authorised to detain in "the war on terror".[161] The executive order grants the President exclusive authority to determine who should be detained, denies any such detainee the right to challenge any aspect of his detention, and authorises trial by

[156] *See* note 25 above.

[157] See 8 U.S.C. § 1537.

[158] See 8 U.S.C. § 1226a.

[159] 8 C.F.R. § 241.14(d).

[160] Authorization for Use of Military Force, Pub.L. 107-40, §§ 1-2, 115 Stat. 224.

[161] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FR 57833.

military commission for those detainees who would be charged.[162] Pursuant to the AUMF and this executive order, hundreds of individuals were captured around the world, detained as "enemy combatants" and interrogated in various locations. These locations have included military bases in the United States, Guantanamo Bay, Cuba, and Afghanistan, as well as an undetermined number of "black-sites" operated by the CIA.[163] In these already precarious situations of detention, stateless detainees have been the most vulnerable. One group that has raised a particular set of concerns in this regard are the Guantanamo Bay detainees.

National Security Detention at Guantanamo Bay

76. In January 2002, the first detainees were transported to the detention facility at Guantanamo Bay Naval Base, Cuba.[164] At its peak, the facility held more than 750 men from over 40 countries between the ages of 10 and 80.[165] The first habeas petition was filed on behalf of a Guantanamo detainee in February 2002, and the district court with which it was filed dismissed it for lack of jurisdiction. While the U.S. government selected Guantanamo to construct a detention facility specifically because it was considered beyond the reach of U.S. laws, in 2004 the Supreme Court held in its landmark decision in *Rasul v. Bush* that federal courts have statutory jurisdiction to consider the habeas petitions filed by foreign nationals detained as enemy combatants at Guantanamo.[166] However, the Supreme Court declined to provide any guidance on how federal courts should review the merits of those petitions.[167] In the wake of the Supreme Court's decision in *Rasul v. Bush*, more than 200 habeas petitions were filed on behalf of more than 300 detainees.

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[162] *Ibid*. at §§ 2(a), 7(b)(2).

[163] "CIA Holds Terror Suspects in Secret Prisons," by Dana Priest, *Washington Post*, Nov. 2, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html

[164] Guantanamo Bay Timeline, *Washington Post*, *available at*: http://projects.washingtonpost.com/guantanamo/timeline/

[165] "Guantanamo Bay Six Years Later," CCR, *available at*: http://ccrjustice.org/files/GuantanamoSixYearsLater.pdf

[166] *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004).

[167] *Ibid*. at 485.

77. The U.S. Government adopted the position that the Supreme Court's decision in *Rasul v. Bush* required a status determination, and established its own "enemy combatant" review process for Guantanamo detainees. Specifically, ten days after the Supreme Court issued that decision, the Deputy Secretary of Defense issued an order establishing Combatant Status Review Tribunals (CSRTs).[168] Three weeks later, the Secretary of the Navy, whom the order had designated to operate and oversee the CSRT process, issued a memorandum that established the standards and procedures for the CSRTs.[169] The Navy Memorandum describes the CSRTs as *"non-adversarial proceeding[s] to determine whether each detainee (at Guantanamo)… meets the criteria to be designated as an enemy combatant"*.[170] Both the order and the memorandum define an "enemy combatant" as: *"an individual who was part of or supporting Taliban or al-Qaida 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"*.[171]

78. The initial findings of the CSRTs provided evidence that the U.S. government's claim that it was only detaining "the worst of the worst" in Guantanamo was inaccurate. A February 2006 report analysing the records of 517 Guantanamo detainees' CSRT proceedings found that: (1) 55% of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies; (2) only 8% of the detainees were characterised as al-Qaeda fighters – and of the remaining detainees, 40% had no definitive connection with al-Qaeda at all and 18% had no definitive affiliation with either al-Qaeda or the Taliban; (3) many of the detentions were justified by detainee affiliations with groups that were not on the Department of Homeland Security terrorist watch-list, and only 8% were detained because they were deemed "fighters for" such organisations, while 30% were considered "members of", and 60% were detained merely because they were "associated with" a group or groups that the Government asserted were terrorist organisations; (4) only 5% of the detainees were captured by United States forces, while 86% of the

[168] Order Establishing Combatant Status Review Tribunal (July 7, 2004) (DOD Order), *available at*: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf

[169] Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004), *available at*: http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf

[170] *Ibid*. at E-1 § B.

[171] *Ibid*.; DOD Order at 1.

detainees were arrested by either Pakistani forces or the Northern Alliance and turned over to United States custody at a time when it offered large bounties for capture of suspected enemies; and (5) the population of persons deemed not to be enemy combatants were accused of more serious allegations than a great many persons deemed to be enemy combatants, raising questions about the consistency of the CSRT findings.[172]

79. In federal court, those representing the detainees in their habeas proceedings argued that the CSRTs did not offer sufficient process, while the Government argued that the detainees did not have any cognisable rights that could be vindicated in U.S. courts. The district courts hearing the cases issued contradictory decisions, with one judge holding that the Government was correct that the Guantanamo detainees did not have any rights that could be enforced in habeas proceedings,[173] and another judge holding that they were entitled to due process protections under the U.S. Constitution, and in some cases, protection under the Third Geneva Convention.[174]

80. In December 2005, before this conflict between the district courts could be resolved on appeal, the U.S. Congress passed the Detainee Treatment Act (DTA), which purported to strip federal courts of jurisdiction to hear habeas petitions filed on behalf of Guantanamo detainees, and established an alternative review process, granting the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) exclusive jurisdiction to hear appeals from CSRT determinations.[175] Significantly, the DTA limited the scope of the D.C. Circuit's review, authorising it only to determine whether a CSRT was carried out in accordance with the regulations issued by the Secretary of Defense.[176] However, in its June 2006 decision in *Hamdan v. Rumsfeld*, the Supreme Court held, *inter alia*, that the jurisdiction limiting provisions of the DTA only applied to habeas petitions filed after the effective

[172] "A Profile of 517 Detainees through Analysis of Department of Defense Data," Mark Denbeaux & Joshua Denbeaux, Seton Hall University School of Law, February 2006.

[173] *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

[174] *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

[175] Detainee Treatment Act of 2005 § 1005(e), 42 U.S.C.A. § 2000dd (2005).

[176] *Ibid*. at § 1005(e)(2).

date of the DTA, leaving federal court jurisdiction intact with regard to all of the petitions that had been filed before December 2005.[177]

81. In direct response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, the U.S. Congress passed the Military Commissions Act (MCA) in October 2006, unequivocally precluding federal courts from considering habeas petitions or "any other action" filed by any detainee captured after September 11, 2001, and held anywhere as an enemy combatant.[178] The MCA left the CSRT appeal procedure established by the DTA as the only avenue for Guantanamo detainees to access federal courts.[179]

82. In June 2008, in its watershed decision in *Boumediene v. Bush*, the Supreme Court held that the detainees at Guantanamo have a constitutional right to habeas review of their detention. While the Court declined to identify the exact contours of *"the privilege of habeas corpus'*, it found uncontroversial the notion that it *'entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law".*[180] The Court recounted some of the "myriad deficiencies" of the CSRTs, such as the limited opportunities to present evidence, the lack of a right to counsel, and limitations on the access of detainees to evidence presented against them and their ability to confront witnesses.[181] The Court found that CSRTs *"fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review"*, and as a consequence, held that the MCA was unconstitutional to the extent that was intended to strip federal courts of habeas jurisdiction and replace it with the process set forth in the DTA.[182] As a result, habeas petitions are now being litigated before Federal District courts, and in some cases, the petitions have been granted and the detainees released.

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[177] *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006). In *Hamdan*, the Supreme Court struck down the military commissions established by the 2001 military order "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

[178] Military Commissions Act, 10 U.S.C.A. § 7(a)(2) (2006).

[179] *Ibid*. at § 950g.

[180] *Boumediene v. Bush*, 128 S.Ct. 2229, 2241 (2008).

[181] *Ibid*. at 2269.

[182] *Ibid.* at 2260, 2274.

83. The context in which the detainees' lawyers were pressing their cause shifted significantly on January 22, 2009, when President Barack Obama, two days after entering office, signed an Executive Order requiring: (1) the closure of Detention facilities at Guantanamo; and (2) the immediate review of all Guantanamo detentions.[183] The Order provided the basis for the establishment of an Inter-Agency Review Team (IART) with a mandate to carry out the review process, which the order provided:

> *"shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible".*[184]

84. The Order recognised that more than 500 of the approximately 800 detainees held in the Guantanamo Bay detention facility have been transferred to their country of nationality or a third country, and that *"a number of the individuals currently detained at Guantanamo are eligible for such transfer or release"*.[185] Indeed, when the IART finished its first round of reviews in September 2009, it had cleared 75 of the 223 men still remaining in the prison.[186] Of the 75, six Chinese Uyghurs have been temporarily resettled in Palau. In December 2009, Defence Secretary Robert Gates informed the Senate that 116 men had been cleared for release, of which a Kuwaiti, six Yemeni's, four Afghans and two Somali's have been released at the time of writing.[187] The current population at

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[183] "Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," January 22, 2009, Sections 3, 4. *available at*: http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/

[184] *Ibid*. at Section 4(c)(2).

[185] *Ibid*. at Section 2(a).

[186] "Obama team clears 75 at Guantanamo for release," Reuters, Sept. 28, 2009; *available at:* http://www.reuters.com/article/topNews/idUSTRE58R4JV20090928?feedType=RSS&feedName=topNews.

[187] "116 Guantanamo prisoners cleared for release; 171 still in limbo," Worthington A, Dec. 07, 2009; *available at*: http://www.andyworthington.co.uk/2009/12/page/3/

Guantanamo Bay is accordingly 198 prisoners, of which 103 have been cleared for release, 40 are to be tried and 55 remain in a state of limbo and uncertainty. The "cleared" to be released prisoners include potentially stateless persons from China, Yemen, Tunisia, Algeria, Syria, Libya, Saudi Arabia, Uzbekistan, Egypt, the West Bank, Kuwait, Azerbaijan and Tajikistan.

85. By all accounts, many of these men cannot return to their country of nationality or last habitual residence, due to the likelihood of torture, a threat in many cases that arises from their branding as Guantanamo detainees. Many of these men are effectively stateless, but because the United States does not recognise them as a protected group, and they are treated as pariahs on the international stage, they continue to live in detention with no immediate hope of release.

***De Jure* Stateless Detainees**

86. The Supreme Court stated in *Boumediene v. Bush* that all of the detainees at Guantanamo *"are foreign nationals, but none is a citizen of a nation now at war with the United States"*.[188] While this statement indicates that official determinations were made with regard to the nationality and citizenship of each detainee, it would appear that a handful of detainees are legally stateless. Indeed, there is currently public information that three Palestinian men are detained in Guantanamo.

87. Perhaps the most compelling case is that of Maher El Falesteny (Maher Refaat Al-Khawary), who has been held at Guantanamo since June 2002.[189] El Falesteny was born in Gaza in 1965, moved with his parents to southern Lebanon as a young man, and moved to Jordan with his wife when he was in his twenties. In the summer of 2001, El Falesteny attempted to enter Pakistan through Afghanistan because he had heard he could obtain papers from the United Nations that would enable him to resettle his family in a European country. When the aerial bombing began in Afghanistan, villagers captured El Falesteny and sold him to the Northern Alliance for a bounty.

[188] *Boumediene v Bush*, 128 S.Ct. at 2241.

[189] "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance," Center for Constitutional Rights, November 2008, *available at*: http://ccrjustice.org/learn-more/reports/profiles-guantanamo-detainees-need-safe-haven?phpMyAdmin=563c49a5adf3t4ddbf89b

88. Maher El Falesteny was tortured by the Northern Alliance, who required him to sign a document in Farsi which he could not read, and then turned him over to American troops. In U.S. custody, El Falesteny was subject to interrogations and mistreatment, first in Bagram Air Force Base, then in the detention facility in Kandahar, and finally in Guantanamo Bay, where he has been ever since.

89. However, the record of El Falesteny's CSRT does not suggest that he engaged in combat, knows how to use a weapon, or has received weapons training. Indeed, El Falesteny had been cleared for more than two years before the IART was even devised under President Obama. The principal problem is that he does not have any legal documents from either Jordan or Israel – the two countries to which he has ties. The United States has allowed Jordanian, and possibly Israeli officials to access him, both of whom have threatened him with torture if he is returned to either of those countries.

90. In an October 2007 interview with El Falesteny's lawyers, Charles Carpenter and Stephen Truitt, Mr. Truitt said: *"We are still wondering where he will go, given that he has never had nationality papers in his life. He presents a challenge to find a place for him, as he'd likely be at risk if he went to some of the likeliest places he might be sent. We have hoped to find a place for him in Serbia, perhaps, which has a Muslim population, and where we have connections with a local lawyer versed in Serbian asylum law and the United Nations High Commission on Refugees practices".*[190]

91. Another similarly situated Palestinian man, Ayman Al Shurafa, has been in Guantanamo since 2002.[191] Mr Al Shurafa was born in 1975 in Jeddah, Saudi Arabia, and moved to Gaza to attend university. He returned to Saudi Arabia when the intifada broke out, realising that he had little chance of completing his schooling, but was denied educational opportunities because he is Palestinian, and his only identity document is a Palestinian passport. When a Saudi sheikh issued a *fatwa* that said he needed to be "prepared" to defend Muslim countries, Ayman Al Shurafa responded by travelling to Afghanistan in summer 2001. However, he never engaged in combat, and he fled the region after war broke out, got swept up, and finally landed in Guantanamo Bay.

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[190] Carpenter and Truitt: Talking Dog Blog Interview, October 14, 2007, *available at*: http://themoderatevoice.com/15596/interview-with-stephen-truitt-and-charles-carpenter/

[191] See information sheet prepared by Reprieve (on file with ERT); see also "Locked Up Alone - Detention Conditions and Mental Health at Guantanamo," Human Rights Watch, pp. 39-40, June 2008, *available at* http://www.hrw.org/en/reports/2008/06/09/locked-alone-0

92. Al Shurafa was cleared by an Administrative Review Board (ARB), another pre-IART process devised by the Department of Defense to review CSRT determinations, after which he was *"approved to leave Guantanamo Bay, subject to the process for making appropriate diplomatic arrangements for his departure".* However, no such arrangements have been made, because the U.S. government will not settle him in Gaza, and Saudi Arabia will not resettle him because he is not a Saudi citizen.

93. Finally, there is Abu Zubaydah, a Palestinian man who was arrested in Pakistan in March 2002, taken into CIA custody as a "high value detainee", and ultimately transferred to Guantanamo in September 2006.[192] Abu Zubaydah's situation was made public in a report by the ICRC in which it reviewed the treatment of fourteen such 'high value detainees'. Interrogators suffocated Zubaydah with water; placed a collar around his neck and used it to slam him into walls;[193] confined him in a tall narrow box that forced him to crouch down, causing him constant pain;[194] forced him to remain naked for weeks and months at a time;[195] deprived him of sleep for weeks while forcing him to sit in a chair and listen to loud music;[196] kept his cell excessively cold for the nine months he was held in Afghanistan;[197] forcibly shaved his beard before his transfer to Afghanistan;[198] deprived him of solid foods for the first two or three weeks of his detention, and deprived him of solid food again for one week during intense questioning.[199] While Abu Zubaydah was not the only detainee subject to these abuses, it is notable that of the detainees profiled in the ICRC report, he was the only one who had been subjected to all of these techniques.[200]

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[192] ICRC, "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody", February 2007, p. 5, *available at*: http://www.nybooks.com/icrc-report.pdf

[193] *Ibid*. at 11.

[194] *Ibid*. at 13.

[195] *Ibid*. at 14.

[196] *Ibid*. at 15.

[197] *Ibid*.

[198] *Ibid*. at 17.

[199] *Ibid*. at 18.

[200] *Ibid*. at 9.

94. While it is not possible to say at this point that these men have received more severe physical mistreatment because of their status as stateless Palestinians, it is clear in the cases of Maher El Falesteny and Ayman Al Shurafa that they continue to be in detention because of their status as stateless persons.

***De Facto* Stateless Detainees**

95. As was indicated above, most of the men who have been cleared for release at this point do have a nationality, and while in most cases the countries of nationality have expressed their willingness to receive the men, such willingness often relates to the countries' interest in interrogating and mistreating the former Guantanamo detainees. These detainees, while not legally stateless, have been rendered *de facto* stateless by their detention at Guantanamo Bay inasmuch as they cannot be returned to their country of nationality. Furthermore, in most cases, no third country has stepped forward to offer these men refuge. Ironically, these men are being detained in Guantanamo Bay under a purported regime of international protection, including the Convention Against Torture (CAT), but the protection of the Statelessness Conventions, which they need just as desperately, has never been a part of the conversation.

Chinese Uyghur Detainees

96. The situation of the Chinese Uyghurs detained at Guantanamo Bay is known to many. Cleared for release from the facility, but unable to return to their country of nationality because of a well-founded fear of torture, these men have become the voice of dozens of less known *de facto* stateless detainees at Guantanamo Bay who suffer in a similar situation.

97. Chinese Uyghurs are a Turkic Muslim minority whose members reside largely in the Xinjiang province of far-west China and suffer severe discrimination and persecution by the Chinese government. Twenty-two Uyghurs[201] were detained and transferred to Guantanamo in the wake of the U.S. invasion of Afghanistan.[202]

[201] The names of the 22 Uyghurs are: Ahmed Adil, Adil Abdulhehim, Haji Mohammed Ayub, Akhdar Qasem Basit, Abu Bakker Qassim (see "Guantanamo Bay Detainees Classified as 'No Longer Enemy Combatants,'" *Washington Post*, *available at*: http://projects.washingtonpost.com/guantanamo/nlec/); and Adel Noori, Ali

98. There are many similarities in the Guantanamo Uyghurs' tales of how they fled China and ended up in expatriate Uyghur communities in Afghanistan.[203] All of them fled a repressive situation after being subjected to varying degrees of mistreatment by the Chinese government and ended up in Afghanistan because of the rumour that expatriate Uyghurs settled there and thrived in their own communities.[204] In October 2001, U.S. forces bombed the area where these men were seeking refuge, and together they fled.[205] Initially, they escaped to the mountains for immediate protection, and then after a few days were able to escape to Pakistan, where they thought they had reached safety. However, they were turned over to the U.S. military by Pakistani villagers at a time when U.S. forces were offering a substantial bounty for terrorist fighters. These men were subsequently sent to Guantanamo and deemed enemy combatants by CSRTs based on allegations that they are members of the East Turkestan Islamic Movement (ETIM), and that the ETIM receives support from al-Qaeda.

99. In the case of one such detainee, a 2002 CSRT determined that he was not properly classified as an enemy combatant; however, after the Assistant Secretary of Defense for Detainee Affairs expressed concerns about the appearance of inconsistency of this finding, it was ordered that he undergo a second CSRT, which concluded that he was an enemy combatant.

100. Five Uyghurs - Ahmed Adil, Adil Abdulhehim, Haji Mohammed Ayub, Akhdar Qasem Basit, and Abu Bakker Qassim, who had been captured by bounty-hunters in Pakistan and sold to U.S. authorities

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Mohammed, Abdul Sabour, Bahityar Mahnut, Houzaifa Parhat, Abdulghappar Abdulrahman, Abdul Nassar, Jalal Jalaldin, Abdul Semet, Hammad Memet, Khalid Ali, Sabir Osman, Edham Mamet, Arkin Mahmud, Abdul Razakah, Ahmad Tourson, Thabid (s*ee* "Uighur Petitioners' Status Report," *In RE: Guantanamo Bay Detainee Litigation*, *available at*: http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008mc00442/131990/96/0.pdf). There is a large amount of confusion concerning the names of Guantanamo detainees, particularly those of the Uyghurs. While this is a reliable list of all 22 current and former Uyghur detainees, there are likely references to other names in the media.

[202] *Kiyemba v. Obama*, --- F.3d ---, 2009 WL 383618, *1 (D.C. Cir. 2009).

[203] Petitioner's Brief in *Kiyemba v. Obama*, 2009 WL 383618.

[204] See "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance," Center for Constitutional Rights, November 2008, Profiles of Adel Noori, Ali Mohammed, and Abdul Sabour, *available at*: http://ccrjustice.org/files/10%20Profiles%20of%20GTMOs%20abandoned%20detainees_FINAL_.pdf

[205] See "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance", *ibid*.

were determined by the CSRTs not to be enemy combatants and released to Albania in May 2006.[206] The government subsequently argued that their cases were moot and convinced a federal court to dismiss their habeas petitions,[207] a move that one of their lawyers claimed to be an attempt by U.S. authorities to *"avoid having to answer in court for keeping innocent men in jail"*.[208]

101. Representatives of the 17 Uyghurs that were not released to Albania insisted that there was nothing that substantially differentiated them from the five men who were transferred, yet they remained in detention.[209]

102. These men were moved to Camp 6, one of the more restrictive detention facilities in Guantanamo, in May 2007, after some reportedly threw faeces and urine at prison guards following a dispute about the Koran.[210] Human Rights Watch reported that these men were moved to their own wing of the Camp 6 facility after almost a year of restrictive conditions of detention, and that they were being granted additional recreation time and the possibility of spending that time with another detainee, working up to a time when they will be able to congregate in a common space during the day.[211] In December 2007, before being moved to the "Uyghur wing" of Camp 6, one detainee wrote to his attorneys describing the impact of months of isolation on his physical and mental state:

> *"Being away from family, away from our homeland, and also away from the outside world and losing any contact with anyone, also being forbidden from the natural sunlight, natural air, being surrounded with a metal box all around is not suitable for a human being. I was very healthy in the past. However, since I was brought to Camp 6, I got rheumatism and my joints started to hurt all the time and are getting worse. My kidney started to hurt for the past 10*

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[206] "Albania takes Guantanamo Uighurs", BBC News, 6 May 2006, *available at*: http://news.bbc.co.uk/2/hi/americas/4979466.stm; see also "Guantanamo Bay Detainees Classified as 'No Longer Enemy Combatants'", *Washington Post*.

[207] *Abu-Bakker Qassim, et al. v. Bush*, No. 50-5477, September Term, 2005, Order from D.C. Circuit, *available at*: http://www.scotusblog.com/movabletype/archives/8-14%20qassim%20order.pdf

[208] "Albania takes Guantanamo Uighurs," see note 206 above.

[209] "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance", see note 204 above.

[210] "Locked Up Alone", see note 191 above, p. 11.

[211] *Ibid*.

days. My countryman Abdulrazaq used to have rheumatism for a while and since he came to Camp 6, it got worse. Sometime in early August, the US army has told Abdulrazaq that he is cleared to be released and also issued the release arrival in writing to him. Hence, Abdulrazaq requested to move him to a better conditioned camp for his health reasons and when it was being ignored he started to go on hunger strike for over a month now. Currently, he is on punishment and his situation is worse and he is being shackled down to the chair and force fed twice a day by the guards, that wear glass shields on their faces, for the past 20 days. For someone who has not eaten for a long time, such treatment is not humane. Abdulrazaq would never want to go on hunger strike, however the circumstances here forced him to do so as he had no other choice. If the oppression was not unbearable, who would want to throw himself on a burning fire?"[212]

103. In July 2008, in the first case in which the D.C. Circuit followed the procedures established by the DTA to review the CSRT determination, that court overturned the enemy combatant classification of Houzaifa Parhat.[213] The Court indicated that the CSRT definition of enemy combatant required that the government demonstrate by a preponderance of the evidence that *"(1) the petitioner was part of or supporting 'forces'; (2) those forces were associated with al-Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners"*.[214] The court declined to determine whether Parhat was actually part of or supporting the ETIM (the first prong), instead overturning his enemy combatant classification because it found the U.S. government's allegation that ETIM has links with al-Qaeda (the second and third prongs) to be tenuous and unsubstantiated.[215] The Court in turn directed the U.S. government to release Parhat, to transfer him, or to expeditiously convene a new CSRT to make a determination in accordance with the rules of procedure, particularly with regard to the submission and consideration of evidence.[216]

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[212] *Ibid.*, p. 27; see also Center for Constitutional Rights profile of Abdulghappar Abdulrahman, *available at*: http://ccrjustice.org/files/Abdulghappar%20Abdulrahman%20-%202pages.pdf

[213] *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

[214] *Ibid*. at 843.

[215] *Ibid*. at 844-50.

[216] *Ibid*. at 851.

104. Following the D.C. Circuit's decision in *Parhat v. Gates*, the Uyghurs were transferred to Camp Iguana, which is the facility that held the minors detained at Guantanamo. Indeed, in February 2009, Reuters reported that the five Uyghurs in Albania had heard from the 17 Uyghurs left behind in Guantanamo, and that their conditions had improved.[217] However, lawyers for the 17 Uyghurs emphasised that Camp Iguana is a high-security prison: *"The men may not leave the camp, even under supervision. It is surrounded by fences and razor wire. Heavily armed military police guard the prison, patrol its perimeter, and monitor the men by camera twenty-four-hours a day. Huts take up much of the physical space at Camp Iguana, leaving a small area as the only outdoor space. On three sides, the fences are covered in opaque mesh. Guards refer to the men only by number. Recently, the Government refused their attorneys' request to meet face-to-face unless the detainees were chained to the floor"*.[218]

105. Following the D.C. Circuit's rejection of the CSRT's enemy combatant determination in Parhat's case, the U.S. government conceded that it will treat the remaining Uyghurs as non-enemy combatants.[219]

106. In October 2008, a federal district court judge presiding over the 17 remaining Uyghurs' habeas proceedings in a case that has come to be known as *Kiyemba v. Obama*, ordered that the U.S. government deliver the men from Guantanamo to his court room where he would release them into the care of supporters in the United States.[220] However, this order was quickly stayed and appealed to the D.C. Circuit, which overturned the decision of the district judge in February 2009.[221]

107. In *Kiyemba v. Obama*, the D.C. Circuit invoked Supreme Court precedent to uphold the *"exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United*

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[217] "Restarting life in Albania after Guantanamo Bay," Reuters, February 10, 2009, *available at*: http://blogs.reuters.com/global/2009/02/10/restarting-life-in-albania-after-guantanamo-bay/

[218] Petitioner's Brief in *Kiyemba v. Obama*, 2009 WL 383618.

[219] *Kiyemba v. Bush*, 2008 WL 4898963, *1 (D.C. Cir. 2008) (Judge Rogers dissenting from the decision to stay the district judge's order of release pending appeal).

[220] "Judge Orders 17 Detainees at Guantanamo Freed," *New York Times*, October 7, 2008, *available at*: http://www.nytimes.com/2008/10/08/washington/08detain.html

[221] *Kiyemba*, 2009 WL 383618, *1.

States and on what terms".[222] The court found that the Fifth Amendment of the Constitution, which guarantees substantive due process of the law, did not extend to Guantanamo[223]; recalled that indefinite detention had not been prohibited in all circumstances[224]; and specifically distinguished *Zadvydas v. Davis* and *Clark v. Martinez*, finding that those cases involved the interpretation of Section 1231 of Title 8 of the United States Code, which was not the basis for detention at Guantanamo.[225] Further, the court emphasised that it did not have the authority to release a non-citizen in the United States, contrary to the will of the executive and immigration laws, and as a rhetorical exercise, it explored all of the impossibilities for release under immigration law.[226]

108. Perhaps the most significant part of the court's analysis of immigration law in this case was its discussion of asylum eligibility. The court indicated that *"[t]o qualify as a refugee, an alien must (1) not be firmly resettled in a foreign country, (2) be of 'special humanitarian concern' to the United States, and (3) be admissible as an immigrant under the immigration laws"*, and that the one ground for inadmissibility that the government could not waive was the "terrorist activity" ground.[227] However, whether this ground for inadmissibility would apply is clearly an open question.[228]

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[222] *Ibid*. at *2 (citing, *inter alia*, *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *United States ex rel. Knauf v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Demore v. Kim*, 538 U.S. 510, 521-22 (2003)).

[223] *Ibid*. at *3 (citing, *inter alia*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 274-75 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 783-84 (1950)).

[224] *Ibid*. at *4 (citing, *inter alia*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 (1953) (finding that an excluded non-citizen detained at Ellis Island, New York, did not have a right to release, even though his detention was theoretically indefinite)).

[225] *Ibid*.

[226] *Ibid*.

[227] *Ibid*. at *6.

[228] The D.C. Circuit acknowledged that while the government suggests that they are ineligible for a visa to enter the United States because "they allegedly engaged in 'terrorist activity' within the meaning of 8 U.S.C. § 1182(a)(3)(B)(i)(I), which would mandate their removal under 8 U.S.C. § 1225(c)(1)", counsel for the detainees "object that the evidence is insufficient to back up the government's claim", and the court concluded that "[t]he dispute cannot be resolved at this stage". (*Ibid*. at note 14).

109. In June 2009, while a request for review of the D.C. Circuit's decision in *Kiyemba v. Obama* was pending before the Supreme Court, four of the Uyghurs subject to the District Court's overturned order of release were transferred to Bermuda.[229] In a demonstration to the world of the injustice of their years of detention, Khaleel Mamut, Salahidin Abdulahat, Ablakim Turahun, and Abdulla Abdulgadir quickly adapted to their surroundings and praised the Bermudian government for giving them an opportunity to make a new life for themselves.[230]

110. Soon thereafter, the Pacific Island nation of Palau made public its intention to resettle the remaining Uyghur detainees.[231] While such efforts stalled for many months, soon after the Supreme Court's October 2009 decision to hear *Kiyemba v. Obama*, the United States transferred six of the remaining Uyghurs to Palau. The six men released, Adham Mamat, Mohammed Ali, Dawut Abduruhim, Adel Noori, Abdulgahppar Abulrahman, and Ahmad Tourson, expressed their appreciation to the country that was willing to offer them refuge, albeit temporarily.[232]

111. It is unclear how the Supreme Court will choose to dispose of *Kiyemba v. Obama* in March 2010, if the Obama administration manages to transfer all of the Uyghurs before the high court has an opportunity to rule on the matter. If it is successful in resettling the Uyghurs, the U.S. government will likely take the position that the case is mooted by such resettlement, while the detainees' lawyers will likely urge the court to decide the matter arguing that there are other similarly situated detainees at Guantanamo that would benefit from a favourable ruling by the Court.

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[229] "Chinese Muslim detainees take case to Supreme Court," CNN, April 6, 2009, *available at*: http://edition.cnn.hu/2009/US/04/06/scotus.gitmo/index.html

[230] "Out of Guantánamo, Uighurs Bask in Bermuda," *New York Times*, June 14, 2009, *available at*: http://www.nytimes.com/2009/06/15/world/americas/15uighur.html?_r=1&pagewanted=2; see also "Life in paradise as Guantanamo Four take a dip, eat ice cream, and plan first Uighur restaurant in British territory of Bermuda," *Daily Mail*, June 15, 2009, *available at*: http://www.dailymail.co.uk/news/worldnews/article-1192872/Guantanamo-4-hit-shops-day-freedom.html#ixzz0WBNPIyNd

[231] "Palau to take Guantanamo Uighurs," BBC News, June 10 2009, *available at:* http://news.bbc.co.uk/1/hi/8092502.stm

[232] "Uighurs Leave Guantánamo for Palau," *New York Times*, Oct. 31, 2009, *available at:* http://www.nytimes.com/2009/11/01/world/asia/01uighurs.html

Non-Refoulement and *De Facto* Stateless Detainees

112. In addition to the Uyghurs, Guantanamo detainees who have expressed fear of returning to their countries of nationality come from Algeria, Azerbaijan, Egypt, Libya, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan.[233] Many, like the Uyghurs, were cleared for release even before the IART began its work under the Obama administration, but the U.S. government has either been unable to secure diplomatic assurances that the detainees will not be persecuted or tortured upon their return to their countries of nationality, or such diplomatic assurances have proven unreliable.

113. Abdul Ra'ouf Ammar Mohammad Abu Al Qassim is a Libyan who has been imprisoned by the U.S. government in Guantanamo Bay for more than six years.[234] Abdul Ra'ouf deserted the Libyan army and fled Libya and lived abroad as a refugee for the next ten years. When the United States began bombing Afghanistan in October 2001, Abdul Ra'ouf and his pregnant wife fled to Pakistan, where his wife gave birth to their daughter, and where the Pakistani police turned him over to the U.S. military authorities. Abdul Ra'ouf has been detained in Guantanamo for six years, even though he was officially "cleared for release" in 2006. The U.S. government has claimed that Abdul Ra'ouf is associated with the Libyan Islamic Fighting Group (LIFG), a group opposed to the Gaddafi regime. Abdul Ra'ouf's only link with the group is that some of the men in one of the boarding houses where he stayed in Pakistan were accused of being LIFG members, but the mere allegation of his association with LIFG together with the stigma of being detained at Guantanamo create a substantial likelihood that he will be persecuted if forcibly returned to Libya. In December 2006, and again in February 2007, the U.S. government publicly declared its intention to transfer Abdul Ra'ouf to Libya, notwithstanding his fears of persecution and torture.

114. Ahmed Belbacha is an Algerian who fled to Britain in 1999 after his life was threatened by Islamist extremists.[235] In December 2001, Belbacha, who claimed to be in Pakistan studying religion, was apprehended by villagers in northwest Pakistan, and sold to the United States for a bounty. Belbacha was transferred to Guantanamo in March 2002, and received official notice that he was

[233] "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance", see note 189 above.

[234] *Ibid*.

[235] "Locked Up Alone", see note 191 above, pp. 33-34.

"approved to leave" in February 2007. Due to his fear of return to Algeria, he has asked U.S. federal courts to block his return. In March 2008, the D.C. Circuit reversed the district court's refusal to do so, and remanded the case for further consideration.[236] In the meantime, Belbacha remains housed in Camp 6, where he has been since it opened in December 2006. In December 2007 Belbacha reportedly tried to commit suicide and was temporarily moved to the mental health unit, where he was held for two months. Put on suicide watch, he was stripped naked and given a green plastic rip-proof suicide smock and placed in an individual cell under constant monitoring. He says he was given absolutely nothing else in his cell: no toothbrush, soap, or books. In November 2009, Belbacha was sentenced *in absentia* by an Algiers court to twenty years in prison for belonging to an "overseas terrorist group".[237]

115. Umar Hamzayavich Abdulayev fled Tajikistan with his family in 1992, when a civil war erupted in that country after the collapse of the Soviet Union, and sought refuge in Afghanistan. In early 2001, Mr Abdulayev and his mother, younger brothers, and younger sister all moved from Afghanistan to Pakistan, where they lived in a government-sponsored camp principally for Afghan refugees in the vicinity of the city of Peshawar. However, in November 2001, Abdulayev was arrested by Pakistani police, handed over to what he understood to be Pakistani intelligence officials, who tortured him into writing damning statements, and ultimately transferred to the U.S. military prison camp in Kandahar, Afghanistan. In February 2002, after approximately a month in Kandahar, the United States sent Umar Abdulayev to Guantanamo where he has since been held without charge.

116. Polad Sarijov, a man from Azerbaijan, has been detained in Guantanamo since January 2002.[238] Mr Sarijov studied Turkish and English at Erciyes University in Kayseri, Turkey. In 1998, he returned to Azerbaijan to complete his mandatory military service, working as a clerk-typist, and never engaging in combat. In early 2001, Sarijov travelled to Afghanistan to study Arabic and practice the teachings of the Koran. He soon found himself in a zone of conflict, and in late November 2001, he and hundreds of others were swept up by forces loyal to a warlord in control of Afghanistan's Uzbek community. Sarijov was forced into a container where many others suffocated before they

[236] *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008).

[237] "Algiers court jails Guantanamo inmate who won't go home," AFP. Nov. 29, 2009; *available at:* http://www.google.com/hostednews/afp/article/ALeqM5hBRpCfZG_9FsNOKFUiF6-ymIdfXg

[238] Profile of Polad Sarijov, on file with ERT.

were all released the next day and taken to Shevergan prison. After a month in prison, Sarijov was taken into U.S. custody and transferred to Guantanamo, where he has been detained ever since. Sarijov would likely be subjected to detention and torture if returned to Azerbaijan, where he would be viewed by the government as a threat on account of his branding as a Guantanamo detainee.

117. Advocates have highlighted other countries of concern, where there is evidence about threats of delegations sent to interview detainees at Guantanamo as well as evidence of abuse when detainees have been returned. For example, Russian detainees at Guantanamo were reportedly threatened with coercive interrogations in Russian prisons,[239] and seven former Guantanamo prisoners released to Russia in 2004 were kept in detention and suffered torture and abuse at the hands of Russian authorities despite the country's prior assurances of humane treatment. Similarly, ten Tunisian detainees are currently being held in Guantanamo, eight of whom have been convicted *in absentia* and sentenced to 10 to 40 years in prison, and many of whom have been threatened during their time at Guantanamo, and they likely face torture if repatriated.

The Failed Promise of the Obama Administration

118. The Obama administration has significantly altered some aspects of the detention policy of the United States, as evidenced by his executive orders closing Guantanamo and CIA operated "black sites". However, many argue that the shift in the administration is one of form and not substance. For example, critiques point to the Obama administration announcement that it would no longer hold people as "enemy combatants", followed by its subsequent reaffirmation of its authority under the AUMF to detain people who have "substantially supported" Taliban or al-Qaeda "associated forces",[240] as effectively the same detention policy implemented under the Bush administration.[241]

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[239] See profile of Ravil Mingazov in "Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance", note 189 above.

[240] *In Re: Guantanamo Bay Litigation*, Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, p. 2, March 13, 2009, *available at*: http://www.justice.gov/opa/documents/memo-re-det-auth.pdf

[241] Statement by Elisa Massimino, CEO and Executive Director of Human Rights First, "Justice Department Errs in Detention Definition", March 13, 2009, *available at*: http://www.humanrightsfirst.org/media/usls/2009/alert/421/index.htm; see also Statement by Anthony Romero, Executive Director of the ACLU, "Justice Department Adheres To Key Elements Of Bush

Indeed, aside from the much-praised executive orders closing Guantanamo and repudiating secret detention and abusive interrogation techniques, the Obama administration has done nothing to significantly alter the manner in which the United States is conducting the "war on terror".

119. What this means for the *de jure* and *de facto* stateless detainees currently being held in Guantanamo, is unclear, but the hope that the administration may be able to inspire enough good faith in other countries so that they will collaborate in a solution has yet to become a reality. Nor does the release of certain detainees into the United States seem likely. Indeed, the U.S. Congress recently indicated as much in its appropriations bill for the DHS, in which it bars the use of funds "to release [a detainee] into the . . . United States," making fairly explicit its wish to keep all former Guantanamo detainees abroad.[242] Whether the release of Guantanamo detainees into the United States was ever part of the Obama administration's plan to close the facility, that option has quickly become a political impossibility. The only hope for U.S. resettlement at this point is that the Supreme Court will decide the appeal of *Kiyemba v. Obama* in favour of the Uyghurs and other similarly situated detainees, and that the court will join the *Rasul* and *Boumediene* judgments in finding that in certain areas related to fundamental rights, the judiciary can override executive power.[243]

120. For now, those individuals who have been determined not to pose a threat to the United States, but who cannot be safely transferred to any other country, continue to be held in Guantanamo, awaiting some development that will deliver them to freedom.

Administration Detention Policy", March 13, 2009 (indicating he is "deeply troubled" by the "overly broad definition"), *available at*: http://www.aclu.org/safefree/detention/39012prs20090313.html

[242] H.R. 2892, Title V, Sec. 552(a).

[243] The *Kiyemba* case is schedule to be heard by the U.S. Supreme Court on 23 March 2010.

Conclusions and Recommendations

121. This report has highlighted some of the key challenges faced by the U.S. Administration pertaining to the detention of stateless persons both in the context of immigration and national security.

122. Whilst being a positive development, the post *Zadvydas* immigration detention regime of the USA has not made a significant enough leap to accommodate the specific challenges of statelessness. The U.S. system has failed to identify, in the first instance, persons who would be unremovable or extremely difficult to remove due to them not having a nationality, the USA not maintaining diplomatic relations with their country, the principle of *non-refoulement*, etc. Consequently, many persons who are either *de jure* or *de facto* stateless remain in immigration detention for unjustifiable periods of time after having been "cleared", often in excess of six months.

123. The security detention dilemma has on the one hand caused statelessness and on the other, been exacerbated by statelessness. *S*tateless Palestinians, who have been wrongfully detained in facilities such as Guantanamo Bay, remain in detention despite being cleared for release, due to the impossibility of returning them to their countries of habitual residence. Others like the Uyghurs and Algerians face persecution if returned.

124. At present there are 198 detainees in Guantanamo Bay. As of this writing, more than half (103) have been cleared for release, but remain in detention – some for over eight years. The greatest barrier to their removal is their statelessness. Most, if not all of these persons are potentially stateless due to lack of effective nationality. As a result of the U.S. Government's dogged refusal to admit these victims onto U.S. territory, they depend on the generosity of third countries such as Palau, Hungary and Ireland, to secure their freedom. President Obama's pledge to close the Guantanamo Bay detention centre by January 2010 has failed because the USA continues to look to third countries for help to resolve the crisis they created, without taking on the burden of resettlement on their own territory.

125. A further 55 detainees in Guantanamo Bay are yet to be charged or cleared for release, despite spending many years in detention in the facility. The likelihood of many of them also being stateless is immense. Consequently, the U.S. Government is likely to face the same barriers to release in their

context, as it does now with regard to the 103 already cleared. The absence of a strong policy which reflects an acknowledgement of U.S. responsibility towards those whose lives have been so fundamentally disrupted is a serious failure of the Obama administration and compromises its commitment to human rights.

126. The inequalities faced by the stateless in contexts of immigration and security detention are stark. For example, all British citizens cleared of charges at Guantanamo Bay have been released. However, the stateless detainees who suffered the same plight and have been cleared of all charges remain in illegal detention, some for up to eight years, simply because no country, including the country which illegally detained them, will accept them and ensure their safety. The U.S. Government must treat stateless persons under its jurisdiction in an equal, non-discriminatory manner. This requires the state to take into consideration the unique challenges of statelessness, and to adapt their system accordingly.

127. Based on the research presented in this report, The Equal Rights Trust puts forward the following recommendations for consideration by the U.S. authorities:

<u>With regard to U.S. international obligations:</u>

128. The United States should take the necessary steps to ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and promulgate national legislation as required to give effect to the provisions of those conventions.

<u>With regard to immigration detention in the United States:</u>

129. Considering the inefficacy of the current system of post-removal order detention, U.S. immigration authorities should establish a period of six months as the maximum time limit for such detention, with limited exceptions for non-compliance with removal efforts. In this regard:

a. U.S. authorities should take the necessary steps to ensure that the 90- and 180-day reviews established in the current regulatory framework are strictly observed.

b. U.S. immigration authorities should promulgate regulations to clearly articulate what constitutes non-compliance with removal efforts, and once a determination of non-compliance has been made, what a detainee must do to come back into compliance.

c. The current regulations should be amended such that immigration judges have jurisdiction to review non-compliance determinations.

130. Special measures should be taken to address the situation of those removable non-citizens from countries that do not have diplomatic relations with the United States, considering that any period of post-removal detention is unjustified inasmuch as their removal is not reasonably foreseeable.

131. U.S. immigration authorities should systematize information about the prospects for removal to different countries and create guidelines for detention officers, institute mandatory trainings about the guidelines for detention officers, and establish an oversight mechanism to ensure that detention officers are following those guidelines.

132. U.S. immigration authorities should establish a process by which those individuals whose removal is not reasonably foreseeable may establish residency, and ultimately naturalize in the United States once they have been released.

133. As to those individuals whose removal is not reasonably foreseeable, the relevant federal authorities should provide them with work authorization, educational prospects, healthcare and social welfare as needed.

With regard to security detention in the United States:

134. The United States should strictly observe its obligations under the ICCPR, CAT, and the Refugee Convention not to return any persons to countries where they are likely to face persecution or torture.

135. The United States should resettle all *de jure* stateless detainees cleared to be released at Guantanamo Bay and any other security detention centres including CIA "black sites" in its national territory and offer them the possibility to regularise their situation legally under U.S. immigration laws.

136. The United States should resettle all cleared to be released detainees at Guantanamo Bay and any other security detention centres including CIA "black sites" who are *de facto* stateless because they

cannot be resettled in their country of nationality for whatever reason and offer them the possibility to regularise their situation legally under U.S. immigration laws.

137. The United States should expedite matters pertaining to the 55 detainees in Guantanamo Bay who remain in a state of limbo without having been charged or cleared for release. A clear policy for their release onto U.S. soil if cleared for release should be implemented, so as to ensure that they do not face the same plight as the 103 presently cleared for release.

138. Due compensation should be provided to all persons illegally held in detention in Guantanamo Bay without being charged.