

## **Evidence from US experts to the House of Lords Select Committee on the Extradition Law**

1. We are academics, researchers and legal experts who have studied the US system for prosecuting terrorism-related crimes. Our academic and legal research on the US system has appeared in peer-reviewed journals, books and congressional and legal testimony.
2. We have become increasingly concerned in recent years at the human rights issues raised by the extradition of persons from the UK to the US to face terrorism-related charges. Moreover, we believe that the evidence already submitted to the committee on the nature of the US system conveys an inaccurate picture of how terrorism prosecutions in the US are conducted. In particular, we have deep concerns about the pattern of rights abuses in these cases and the conditions of imprisonment that terrorist suspects face in the US both before and after their trial or sentencing hearing.
3. Given the significant proportion of US extradition requests that involve federal terrorism-related charges and the particular concerns that exist in relation to these, we believe that specific attention to this category of extradition is warranted. In our submission, we have restricted our comments to terrorism-related cases and make no claims about cases involving other kinds of charges, although we believe much of our evidence would apply more widely.
4. We are familiar with a number of terrorism-related cases involving extradition requests to the US from the UK since 9/11: Babar Ahmad, Syed Talha Ahsan, Haroon Rashid Aswat, Adel Abdel Bari, Khaled Al-Fawwaz, Syed Fahad Hashmi, Mustafa Kamal Mustafa (commonly known as Abu Hamza) and Lotfi Raissi.
5. Our report outlines the general and legal context of terrorism prosecutions within US federal courts, including the material support ban and use of classified evidence. It offers the most detail on the conditions of confinement that terrorism suspects face pre-trial and post-conviction. These conditions violate European human rights protections but are generally unknown in the UK.

### *General Context*

6. It has generally been recognized that, after 9/11, the US government violated the rights of a number of British citizens and residents through its system of extraordinary rendition and the imprisonment of “enemy combatants” at Guantánamo. However, Guantánamo is not an aberration; terrorism suspects held within the US itself – including those extradited from the UK – face most of the same human rights issues. **There is a continuum between US military prisons abroad and territorial US civilian prisons.** Indeed, the ADX “supermax” prison in Florence, Colorado, where extradited men convicted of terrorism-related crimes are often held (see *Conditions of Post-Conviction Imprisonment* below), provided the blueprint for imprisonment at Guantánamo. Inhumane practices such as [force-feeding](#) of hunger strikers, prolonged and indefinite solitary confinement, sensory deprivation, permanent electronic monitoring,

systematic secrecy (including draconian restrictions on legal counsel) and the absence of independent monitoring are common to both military detention and US “supermax” prisons. Moreover, in relation to terrorism cases (and indeed other kinds of cases), the legal process in the US federal system is profoundly flawed for reasons we outline below. The appearance of due process and the public assurances of the US government serve to obscure these flaws and create the impression of an open, adversarial process, even though the reality is substantially different.

7. The 2001 case of **Lotfi Raissi** illustrates the dangers posed by relaxing the requirements that US prosecutors have to meet before an extradition from the UK can take place. Raissi was arrested at gunpoint in his Berkshire home ten days after the 9/11 attacks and accused of having given flight training to the 9/11 hijackers. An extradition request from US prosecutors relating to minor irregularities in his pilot licence was described as “[holding charges](#)” that would be added to as the investigation proceeded. A couple of months after he was arrested, intelligence sources told the [Washington Post](#) that “we put him in the category of maybe or maybe not, leaning towards probably not. Our goal is to get him back here and talk to him to find out more”. The motivation for the extradition appeared to be investigative and speculative – an inappropriate use of the process. Raissi was held for almost three more months at HM Prison Belmarsh even after this statement was made. After it became apparent to the court that there was insufficient evidence against him, he was released. The allegations against Raissi were false but, even so, he [lost](#) his career as an airline pilot and suffered damage to his health. Had the 2003 US-UK extradition treaty been in place at the time of his arrest, the prima face evidence test would not have prevented his extradition to the US, where he would likely have been placed in pre-trial solitary confinement, with its attendant mental health consequences (see *Conditions of Pre-Trial Imprisonment* below), and faced overwhelming pressure to agree a plea deal, irrespective of the lack of evidence against him.
8. [Human Rights Watch and the Columbia Law School Human Rights Institute](#) have produced the only major human rights analysis of terrorism-related cases prosecuted in US federal courts. Based on twenty-seven cases, their study, published in July 2014, found significant patterns of rights concerns: the US’s “overly broad” legislation on the “material support” of terrorism is used to punish behaviour that does not involve intent to support terrorism; the right to fair trial is in danger of being violated by reliance on secret evidence or it is foregone as a result of draconian sentences that pressure most defendants to plead guilty; and prolonged solitary confinement and severe restrictions on communicating in pre-trial detention are commonly applied (p4).

### *Jurisdiction*

9. The current ease of extradition to the US to face material support terrorism charges (see *US Federal Terrorism Prosecutions* below) gives rise to the possibility that British citizens living in the UK and engaged in lawful activities under UK law can nevertheless be transferred to the US for prosecution. For this to become a possibility, all that is needed is a tenuous connection to the US, such as the use of a web server hosted in the US. **This effectively means that the**

**US's more punitive terrorism legislation, especially the material support statute, can assume quasi-jurisdiction over the UK and begin to override the provisions of Britain's own legal framework.** This raises particular concerns over sovereignty in light of a recent [news report](#) that the FBI is conducting investigations within the UK into potential homegrown terrorism.

10. The dangers of granting extra-territorial jurisdiction of the US's more punitive system to the UK is illustrated in the case of **Babar Ahmad** and **Syed Talha Ahsan**, two British citizens from south London, who were extradited to the US in 2012 to face accusations of running an al Qaeda support operation. For both, it was their *first* time on US soil. The material support charges against them related to a website, Azzam.com; among the many servers used by the site was one hosted in Connecticut from 1999 to 2001. This was the only substantial connection to the US. The website itself covered events in Bosnia, Chechnya and Afghanistan. The Crown Prosecution Service stated on multiple occasions that there was insufficient evidence to charge the pair with any criminal offence under UK law. Upon their arrival in the US, the men were held for two years in solitary confinement at the Northern Correctional Institution, a Connecticut state facility that houses death row prisoners. Babar Ahmad described the fearsome conditions, including the "five pairs of socks and an empty shampoo bottle" that he had to carefully affix every night around his cell door and vent to block out the noise of screaming inmates. Under these conditions and facing potential life sentences, in December 2013, Ahmad and Ahsan each agreed to a US government plea bargain. The deal meant Ahmad faced a maximum sentence of twenty-five years and Ahsan fifteen.

However, at the sentencing hearing, Judge Janet C. Hall found the US government's case to be flawed in significant respects and stated that the pair were neither supporters of al Qaeda nor engaged in "operational planning or operations that could fall under the term 'terrorism'." She sentenced Ahmad to 150 months and deducted the time he had already served detained in Britain during the extradition process; he will be released in July 2015. Ahsan was sentenced to time served and transferred to the custody of immigration officers to be returned to the UK and released. In this case, a federal judge took the unprecedented step of rejecting much of the government's case, noting that what she was doing might cause "someone in New York to be unhappy with me". However, as the alleged activities had no substantial connection to the US, the extradition of Ahmad and Ahsan from Britain should never have proceeded. As we describe below (see *Conditions of Pre-Trial Imprisonment*), once the two defendants had been transferred to the US and placed in solitary confinement, it was likely difficult for them to resist the considerable pressure to accept a plea deal, irrespective of whether they were innocent of most of the US government's allegations.

#### *US Federal Terrorism Prosecutions*

11. Acquittal is extremely rare in US federal terrorism prosecutions. An August 2011 [investigation](#) through the Investigative Reporting Program at the University of California-Berkeley of the prosecution of 508 defendants in US terrorism cases found that 333 had pled guilty, 110 were found guilty at trial and 65 were still

awaiting trial. **Once terrorism defendants have been indicted, a conviction is almost certain.**

12. Very low acquittal rates are normally regarded (for example, in US State Department country reports) as evidence of a flawed justice system. Defenders of the US terrorism prosecution system argue that the absence of acquittals reflects decision-making by prosecutors to only proceed where there is overwhelming evidence against a defendant. Yet it is apparent from examining actual cases, including the ones described here involving extraditions from the UK, that this is not the case.
13. Moreover, it is important to note that the majority of cases end in plea deals rather than trials. It has been [estimated](#) that, between 9/11 and August 2011, **three quarters of the terrorism-related cases that had reached a verdict had ended in a plea deal** rather than a trial. Indeed, almost all federal cases in the US criminal justice system end in plea deals. The decision-making of defendants that leads to such a situation is discussed below (see, especially, *Conditions of Pre-Trial Imprisonment*). Legal watchdog groups in the US, such as the Brennan Center for Justice at the New York University School of Law and the Center for Constitutional Rights, have issued public statements warning of this.
14. Under the federal sentencing system, sentences are not limited to the conduct for which an individual is actually convicted but are based on a judge's determination of a defendant's "actual conduct". As a result, an individual's sentence can be lengthened dramatically based on allegations of conduct that a jury had not assessed. Even if a jury acquits on all but one charge, a federal judge can still issue the sentence that would have applied if the jury had found the defendant guilty on all counts. In addition, the sentencing guidelines use a complicated points system that leads to severely lengthened sentences for allegations of terrorism. This creates an all-or-nothing situation for the defendant, who has to be acquitted of all charges in a terrorism case to avoid the possibility of a sentence of twenty-five years to life. For prosecutors, a perverse incentive structure results in terrorism cases: it makes sense for them to bring multiple charges, often for the same action, and then secure lengthy sentences by making inflammatory allegations at the sentencing stage, even if a jury has acquitted the defendant of most of the charges. It also affects the decision-making of defendants considering a plea deal because they have to be confident of a jury acquitting them of all charges in order to think that going to trial would minimise their time in prison.
15. The [majority](#) of US terrorism prosecutions involve the **material support statute**. The statute was instituted in 1996 and thus allows for the criminalisation of conduct prior to 9/11. The statute bans the knowing provision of "any service, training, [or] expert advice or assistance" to a group designated by the federal government as a foreign terrorist organization or to an organization engaging in "terrorist activity". It has been called the "black box" of federal terrorism prosecutions because of its capacity to criminalise a wide range of conduct, ranging from weapons training to the translation of public texts – what the Department of Justice (DOJ) describes as "strategic over-inclusiveness". To win a conviction, there is no need to show evidence of a plot or even a desire to help terrorists. Material support charges often target small acts and religious and

political associations, which take on sinister meaning as ostensible manifestations of forthcoming terrorism. Moreover, each count of material support brought against a defendant carries a sentence of up to 15 years.

16. [Human Rights Watch and the Columbia Law School Human Rights Institute](#) state that the expansiveness of the material support statute “has led federal prosecutors to levy criminal charges for religious or political conduct itself, or as the primary evidence of criminal activity.” (p62) In other words, the material support statute may be resulting in the criminalisation of legitimate religious and political activism as distinct from any terrorist conduct.
17. The Classified Information Procedures Act was passed in 1980 to enable and protect the use of classified evidence in court. (The intention of the Act was to prevent “greymailing” by former US intelligence officers being prosecuted for espionage who threatened to expose state secrets in court.) Despite its original intentions, since 9/11, it is regularly used in terrorism prosecutions to classify parts of the prosecution’s evidence and prevent people being charged with terrorism from seeing portions of the evidence against them.
18. **The first person extradited under the US-UK 2003 law for terrorism-related charges was Syed Fahad Hashmi.** Hashmi was extradited from Britain in May 2007 to face charges of material support of al Qaeda. But prosecutors did not need to show that he was a member of al Qaeda, that he had any direct contact to al Qaeda, or that he was involved in any act by al Qaeda. The charges against Fahad Hashmi were instead based on the allegation that he allowed an acquaintance to use his mobile phone and to stay with him at his flat in London. According to the indictment, the acquaintance had in his luggage waterproof socks and rain ponchos (described by the government as “military gear”) and later delivered these to al Qaeda in Pakistan. For this, Hashmi faced four counts of material support and conspiracy, which carried a total possible sentence of seventy years. The Center for Constitutional Rights has noted that the case against Fahad Hashmi “raises many red flags related to the violation of his rights” and “prosecutorial overreach under the material support statute”.

#### *Conditions of Pre-Trial Imprisonment*

19. Those extradited to the US in terrorism cases are likely to be prosecuted in federal court in the Southern District of New York. Defendants facing charges there are held in the **Metropolitan Correctional Center (MCC)** in lower Manhattan. Terrorism defendants are often held in the highly restrictive “10 South” wing of the MCC or in a “Special Housing Unit” where detainees are also held in solitary confinement.
20. Based on information received from some detainees and their lawyers, suspects in 10 South spend twenty-three hours a day confined to their cells. Detainees shower inside their cells, so that they are alone almost all of the time. They are allowed one hour of recreation outside of their cells, which takes place in an indoor solitary recreation cage. Recreation is periodically denied: detainees can pass days without leaving their cells. No outdoor recreation is allowed for detainees in 10 South and cell windows are frosted. The only fresh air enters

through a window in the indoor recreation cage. The conditions at the MCC are dirty and decrepit; detainees and lawyers report that the temperature is not sufficiently regulated and varies between extreme cold and severe heat.

21. There is electronic surveillance inside and outside of the cells – every action, including using the toilet, showering and talking, is monitored. Detainees are strip-searched each time they go to court. These regular searches can be traumatising and degrading. To avoid these strip searches, defendants in some cases have [requested](#) not to attend their own court hearings.
22. Solitary confinement has serious **mental health consequences**, as documented by virtually every mental health study that has examined its effects. Dr. Craig Haney, a psychologist at the University of California-Santa Cruz, has studied the effects of solitary confinement for decades. He has conducted his own empirical research as well as an exhaustive review of the existing research – which demonstrate **deleterious effects are clear after sixty days**. His summary of the types of psychological harms suffered by prisoners held in long-term solitary confinement includes “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self- mutilations” as well as “cognitive dysfunction, ... hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior”.<sup>1</sup> Haney writes that “many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims”. He concludes: “There is not a single published study of solitary or supermax-like confinement ... that failed to result in negative psychological effects.”<sup>2</sup> Stuart Grassian, a former faculty member at Harvard Medical School, has also carried out extensive research with prisoners in solitary confinement. He has documented a specific psychiatric condition brought on by solitary confinement, even among people with no previous psychiatric issues. This includes hyper-responsivity to external stimuli, illusions and hallucinations, panic attacks, difficulty concentrating, intrusive obsessional and aggressive thoughts, paranoia and problems with impulse control.<sup>3</sup>
23. **On top of solitary confinement, some terrorism suspects face added isolation through the imposition of Special Administrative Measures (SAMs)**. SAMs are prisoner-specific confinement and communication rules, imposed by the Attorney General but carried out by the Bureau of Prisons (BOP). The Attorney General may authorise the Director of the BOP to implement SAMs only upon written notification “that there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons”. The SAMs “may include housing the inmate in administrative detention and/or limiting certain privileges, including but not limited to correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism”. The Attorney General does not have to publicly declare his reasons for the introduction of SAMs. The

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<sup>1</sup> Expert Report of Dr. Craig Haney, *Silverstein v. Bureau of Prisons*, 07-cv-2471-PAB-KMT (Apr. 13, 2009).

<sup>2</sup> Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement”, *Crime & Delinquency* 49 (1), 2003.

<sup>3</sup> Stuart Grassian, “Psychiatric Effects of Solitary Confinement”, *Journal of Law & Policy* (22, 2006).

government can impose SAMs for a year and renew annually without limit. SAMs layered on top of solitary confinement produce further isolation by circumscribing communication with the outside world.

24. Under SAMs, typically only the lawyer and immediate family (if cleared) can have contact with a detainee – no other letters, visits, calls or talking through walls are permitted. SAMs spell out in intricate detail the nature of the isolation to be imposed, down to how many pages of paper can be used in a letter or what part of the newspaper is allowed to be read and after what sort of delay. [Human Rights Watch and the Columbia Law School Human Rights Institute](#) have found that at least twenty prisoners under SAMs were barred from “making statements audible to other prisoners or sending notes” (p144).
25. The application of solitary confinement and SAMs is typically instituted at the beginning of pre-trial detention and appear to be related to the mere fact of the terrorism charges and not necessarily to behaviour in custody or a specifically demonstrated risk that communications from prison would cause violence. This is particularly pernicious: in the pre-trial period, a presumption of innocence ought to be in place. Solitary confinement generally lasts for the entire pre-trial period.
26. [Human Rights Watch and the Columbia Law School Human Rights Institute](#) have documented twenty-two cases of pre-trial solitary confinement in terrorism cases, for an average length of 22 months (p200). Mohammed Warsame, a defendant on federal terrorism charges, [was held](#) in pre-trial solitary confinement in a 100 square foot cell for five and a half years. The SAMs he was subjected to gave the government the ability to control who visited him, what he read and whom he talked to. His only allowed interaction with his wife and daughter was via closed circuit television.
27. Terrorism suspects in 10 South at the MCC who are subject to SAMs have been punished for speaking through the walls. One man was given a four-month punishment for saying “Asalaam Aleikum” to another detainee. Another was reprimanded for making the call to prayer. Detainees report going months without any talking with other inmates. In response to these harsh conditions, there have been hunger strikes at the MCC as well as force feeding (which is not permitted in UK prisons) but these have attracted little public attention because disclosure of information on the situation inside the MCC is itself prohibited by the SAMs.
28. Defence lawyers must agree in writing to comply with SAMs. They are then prevented from discussing certain subjects with their client (even including some of the evidence against him), with his family or with third parties including the media. In this way, the application of SAMs prior to trial distorts the adversarial balance in the courts because the government is able to control the flow of information at the expense of the defence. It has the effect generally of chilling zealous representation by the defence. Family members also have to agree to comply with SAMs and are then unable to share with others the content of conversations they have had with the defendant.
29. **The use of prolonged solitary confinement and SAMs during pre-trial detention raises substantial due process concerns.** Such conditions, and the

mental health issues they give rise to, compromise the ability of defendants to participate actively and effectively in their own defence, creating a landscape in which convictions are much easier to secure. Moreover, they undermine the presumption of innocence, as pre-trial solitary and SAMs – extreme conditions that are punitive in their effect – are imposed on defendants whose charges have not been proven.

30. The use of prolonged pre-trial isolation and SAMs can exert extraordinary pressure on a defendant to cooperate or take a plea bargain to escape these conditions, impairing judgment and undermining the voluntariness that is supposed to underpin plea deals and the legitimacy of the resulting convictions. Indeed, it appears that solitary confinement may be applied as a way to pressure defendants to accept a plea, rather than because of genuine security concerns. Often, the restrictions on a defendant are relaxed after conviction or after a plea deal is accepted. In theory, a conviction ought to increase the perceived likelihood that the prisoner represents a security risk; the government's decision to relax restrictions after a conviction is consistent with the assumption that solitary confinement is being used as leverage by the government in the pre-trial period. **Given the harm that solitary confinement inflicts on mental health, defendants have a strong incentive to preserve their sanity by accepting a plea deal that will relax the conditions of their imprisonment, irrespective of the merits of their case.**
31. The Brennan Center for Justice at New York University School of Law notes  

pretrial detention may, whether intentionally or inadvertently, have the practical effect of pressuring [a defendant] into accepting a plea-bargain to which he otherwise might not agree. SAMs are intended to address particularized safety-related concerns. It is highly inappropriate for SAMs to become, either intentionally or collaterally, a bargaining chip in plea negotiations because they provide the government with leverage unrelated to the scope of criminal liability that might be imposed at trial. Further, the SAMs may have the additional consequence of creating an incentive to plead guilty so as to secure a post-conviction imprisonment regime that does not include SAMs.
32. Fahad Hashmi was held in solitary confinement for over six years, three years at the MCC and over three years post-conviction at ADX, during which time he did not touch another human being or set foot on anything other than concrete. Juan E. Méndez, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has issued a public statement about the conditions of confinement of Fahad Hashmi at the MCC

I found no justification for the fact that he was kept in solitary confinement during his prolonged pre-trial detention (in the US although not in the UK during his pre-extradition detention), and that he was later placed under “special administrative measures” amounting to solitary confinement under another name, after a conviction based on a negotiated plea. The explanation I was given made no mention of Mr. Hashmi's behavior in custody as a reason for any disciplinary sanction; it appears that his harsh conditions of detention are related exclusively to the seriousness of the charges he faced. If that is so,



then solitary confinement with its oppressive consequences on the psyche of the detainee is no more than a punitive measure that is unworthy of the United States as a civilized democracy.

33. Amnesty International has [noted](#) that during pre-trial detention at the MCC “the combined effects of prolonged confinement to sparse cells with little natural light, no outdoor exercise and extreme social isolation amount to cruel, inhuman or degrading treatment.”

#### *Conditions of Post-Conviction Imprisonment*

34. Following conviction, the US Bureau of Prisons (BOP) says it places the “most dangerous” convicted terrorists at the **Administrative Maximum Facility (ADX)** in Florence, Colorado, the most restrictive prison in the US federal system. ADX houses approximately 400 prisoners, all of whom are held in solitary confinement.
35. In the “general population” unit of ADX, prisoners are in solitary confinement for twenty-two hours a day, five days a week and twenty-four hours a day for the other two days, in cells that measure 87 square feet. Each cell contains a poured concrete bed and desk as well as a steel sink, toilet and shower; a small window gives a view of the cement yard. ADX prisoners eat all meals alone inside their cells, within arm’s length of their toilet. Prisoners at ADX cannot see any nature – not the surrounding mountains or even a patch of grass. In a special unit known as “H Unit”, prisoners under SAMs are held with additional isolation and restrictions.
36. The only time prisoners are regularly allowed outside of their cells is for limited recreation, which occurs either in an indoor cell that is empty except for a pull-up bar, or in an outdoor solitary cage. The outside recreation cages are only slightly larger in size than the inside cells and are known as “dog runs” because they resemble animal kennels. The warden can cancel recreation for any reason he deems appropriate, including weather, shake-downs or lack of staff. Accordingly, ADX prisoners sometimes pass days without ever leaving their cells. Contact with others is rare. The prison was specifically designed to limit all communication among those it houses. The cells have thick concrete walls and two doors, one with bars and a second made of solid steel. The only “contact” ADX prisoners have with other inmates in the “general population” unit is attempted shouting through the thick cell walls, doors, toilets and vents. All visits are non-contact, meaning the prisoner and visitor are separated by a glass barrier. Prisoners at ADX under SAMs are held in a Special Security Unit in cells that measure 75.5 square feet.
37. According to the BOP’s own policies, prisoners with serious **mental illnesses** should not be assigned to ADX. In practice, the BOP regularly assigns prisoners with serious mental illnesses to ADX. The BOP also fails to monitor ADX prisoners for mental health problems that arise after they arrive at the facility and fails to provide mentally ill prisoners at ADX with adequate mental health care. Mental health checks are often conducted by talking through the prison door. Because of their untreated or poorly treated mental illness, some prisoners at

ADX mutilate themselves with razors, shards of glass, sharpened chicken bones, writing utensils or other objects. Many engage in prolonged episodes of screaming and ranting. Others converse aloud with the voices they hear in their heads. Still others spread faeces and other waste throughout their cells. Suicide attempts are common; some have been successful. There is no independent medical oversight at ADX and motions to allow evaluations by independent medical experts have generally been denied. The US government is currently defending a lawsuit asserting that many ADX prisoners are severely mentally ill and are held in extended confinement in isolating conditions that exacerbate their mental illness.

38. Human Rights Watch has [noted](#) prisoners at ADX can be subjected to “years of confinement in conditions of extreme social isolation, reduced sensory stimulation, and rigorous security control”. It has expressed concerns about the mental health degradation that results from such conditions and about reports of force feeding of inmates on hunger strikes. The inhumane conditions at MCC and ADX have also been [criticized](#) by Amnesty International. Erika Guevara-Rosas, Amnesty International’s Americas Director has stated: “You cannot overestimate the devastating impact long periods of solitary confinement can have on the mental and physical well-being of a prisoner. Such harsh treatment is happening as a daily practice in the US, and it is in breach of international law.”
39. In 2011, Juan E. Méndez, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, called on all countries to ban the solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible, with an absolute prohibition for people with mental disabilities.

#### *Legal Remedies and Oversight*

40. By placing such extreme restrictions on the flow of information, SAMs construct a **wall of secrecy around the conditions of imprisonment** and the potential human rights issues they give rise to. This severely restricts the possibility for legal remedies to the abuses faced by terrorism defendants. For example, when Fahad Hashmi was under SAMs during his pre-trial detention at the MCC and for a year after his conviction at ADX, no member of the public except for his attorneys and three family members – not a reporter, researcher, or United Nation expert – was able to communicate with him in any form, even by sending a letter. The few people allowed to communicate with him were also forbidden, under threat of criminal sanction, from speaking to the public about anything he told them. Testimony from prisoners on their treatment is thus almost completely restricted.
41. Arguably, prisoners held under SAMs are more restricted in their ability to communicate with the outside world than those at Guantánamo, where information received by lawyers from detainees is deemed presumptively classified but potentially releasable. By contrast, lawyers representing prisoners under SAMs are often unable to make public important details about conditions. In a legal challenge to the MCC’s strip-searching policy, for example, a psychiatrist’s report found that strip-searching triggered PTSD in one of the

defendants and left him unable to assist in his defence. The psychiatrist's notes, however, could not be made public due to the restrictions imposed by SAMs.

42. Amnesty International and journalists have requested to visit the MCC and ADX to interview detainees. These requests have all been denied, resulting in a lack of publicly available information about the nature of these conditions and their impact on detainees' health and rights.
43. Juan E. Méndez, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has made repeated requests to visit ADX and the MCC – to no avail. He has also raised with the US government the case of Ahmed Abu Ali who has been held under SAMs for nine years and is currently at ADX: “Due to the lack of information provided by the Government regarding allegations of torture and ill-treatment of Mr. Ali, the Special Rapporteur finds that the Government has violated the rights of Mr. Ali under international law regarding torture and cruel, inhuman or degrading treatment.”
44. **The possibility of legal remedies for the human rights abuses in the federal terrorism prosecution and imprisonment system is significantly weakened by a general culture of deference to the US government in national security cases.** Courts are easily intimidated by government claims of national security risks that would supposedly result were a court to rule against the government. This often impedes proper scrutiny of prosecutions and the possibility of legal remedies for rights violations in prisons. Even if pro bono legal representation is obtained for inmates, the DOJ can still refuse to give counsel the necessary security clearance – as happened to the Civil Rights Clinic at the University of Denver when it attempted to represent some inmates at ADX.
45. [Human Rights Watch and the Columbia Law School Human Rights Institute](#) state that, in general, there are a number of “serious fair trial concerns” in relation to terrorism prosecutions, including prolonged solitary confinement prior to a trial, the use of anonymous witness evidence (making it difficult for the defence to challenge its reliability), the use of evidence tainted by its being obtained coercively, and the use of classified evidence (which places limits on communication between the defence attorney and the defendant) (p76).

#### *Assurances*

46. In terrorism-related extradition cases, the US government often issues assurances that the defendant would not face the death penalty and would be prosecuted before a federal court and not a military commission. In some cases, more specific assurances are issued.
47. In April 2013, the European Court of Human Rights ruled that the extradition of **Haroon Aswat**, who has been diagnosed with paranoid schizophrenia, would violate Article 3 of the Convention (inhuman or degrading treatment or punishment) and stayed his extradition to the US. The Court [found](#) “there is a real risk that the applicant's extradition to a different country and to a different and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health.” The US Department of Justice

then issued an assurance that, if Haroon Aswat were held pre-trial at MCC, he would have access to mental health services. With this assurance, the British [high court](#) then gave the go ahead for Haroon Aswat to be extradited, despite admitting that “there are still detailed gaps about the precise circumstances in which the claimant would be detained in MCC”, including whether he would be housed in a single cell, if so, for how long in every 24 hours and what opportunities there would be for contact with others. In effect, the decision meant Haroon Aswat could be subjected to the mental health deterioration that will most likely result from solitary confinement and possibly SAMs at MCC, so long as he enjoys occasional access to a psychiatrist.

48. Haroon Aswat’s case points to the underlying weakness of assurances as a remedy for concerns about the treatment of terrorism suspects in US prisons. No mechanism is available for verifying the claims made in the assurances. Even accepting the validity of the assurances at face value, they offer inadequate remedies for the inhumane conditions within ADX and MCC. Unfortunately, the British and European courts have not fully recognised the severity of those conditions, the secrecy that surrounds them or the threats to mental health they present.

*Concerns Regarding the ECHR Decision in Babar Ahmad & Others v. the UK*

49. In April 2012, the European Court of Human Rights issued a [judgement](#) rejecting the claims of Babar Ahmad and others that prison conditions at ADX Florence were incompatible with Article 3 of the Convention and that therefore their extradition to the US should not proceed. During the proceedings, the US Department of Justice submitted a series of declarations about the conditions at ADX. Based on these declarations, the Court found that extradition to the US could proceed without risk of an Article 3 violation.
50. However, there were flaws with the process by which the Court reached its findings.
  - a. The Court only considered post-conviction conditions of imprisonment, not pre-trial, where there are serious Article 3 issues, as described above.
  - b. The US Department of Justice provided misleading data on the length of time that terrorism convicts are held in solitary confinement at ADX. The Court’s decision rested substantially on this question because it held that a prisoner who was “at real risk of being detained indefinitely at ADX” in solitary confinement would face conditions that potentially reached the minimum level of severity required for a violation of Article 3. The DOJ described the data it submitted as “a random sample of thirty inmates”. On the basis of that sample, the government claimed, an inmate was likely to spend 3 years at ADX before being admitted to a different institution. However, a sample of 30 from a prison that holds over 400 is not statistically significant. Additionally, none of those selected in the sample of 30 were from the SAMs “H Unit” at ADX. A more statistically significant sample of 110 ADX prisoners, drawn from legal research conducted in 2010 and 2011, found an average of 8.2 years in solitary confinement.

- c. Other US government claims are also called into question by this legal research. For example:
  - i. The government claimed there is significant communication between staff and prisoners at ADX. But such “interacting” only takes place through the solid steel door and/or the bars of the prisoner’s cell.
  - ii. The government claims that ADX prisoners are able to “talk in moderate tones to other inmates”. But evidence shows that prisoners must shout to communicate with each other between cells or put their faces in air vents and toilets in order to speak or hear one another
  - iii. The government claims that “seriously mentally ill prisoners are not housed at ADX”. Yet the BOP itself acknowledges that “a diagnosis of bipolar affective disorder, depression, schizophrenia, or post-traumatic stress disorder would not preclude a designation to the ADX”.
- d. Juan E. Méndez, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued a statement to the ECHR as part of the case: “I think there [are] very good arguments that solitary confinement and SAMs would constitute torture and prevent the UK from extraditing these men.”
- e. Twenty-five US-based human rights groups and 150 academics signed a letter of concern to the ECHR in 2012 expressing concerns that the US government had given the Court “insufficient and misleading” information on “the nature and duration of conditions” at ADX.
- f. Because the US government delayed its submission until right before the deadline, when the rebuttal evidence described above was submitted, it was disallowed by the Court and not considered, on the grounds that the deadline had passed.

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