

10TH ANNIVERSARY OF DETENTIONS AT GUANTÁNAMO BAY

Illustrative cases

The following five case profiles – of four men still held in Guantánamo and one who has been released and continues to seek redress for his treatment in custody — illustrate why Guantánamo continues to symbolize the near-total disregard for human rights that has marked the USA's counter-terrorism measures following the attacks of 11 September 2001.

'ABD AL RAHIM HUSSAYN MUHAMMED AL NASHIRI -- Subjected to torture and enforced disappearance, now facing unfair trial by military commission, and possible execution

Saudi Arabian national 'Abd al Rahim Hussayn Muhammed al Nashiri has been in US custody for over nine years, over five of them in Guantánamo. He has been charged for trial by military commission and is facing a possible death sentence.

Arrested in Dubai, United Arab Emirates, by local security forces in October 2002, he was handed over to US agents a month later. Despite being named on an indictment in US federal court only months after his arrest in 2002, 'Abd al Nashiri was not brought to trial without undue delay, as provided for by international law, but held in secret custody at undisclosed locations by the Central Intelligence Agency (CIA) for almost four years.

During his time in CIA custody, he was subjected to enforced disappearance as well as torture, including by "water-boarding", where the process of drowning the detainee is begun. Information released into the public domain indicates 'Abd al Rahim al Nashiri was also subjected to shackling, hooding and nudity as well as being threatened with a handgun and an electric power drill.

On 4 September 2006, he was transferred to US military custody at Guantánamo, where he remains. He was charged for a death penalty trial by military commission under the Bush administration, but this trial had not happened by the time that administration left office. Under the Obama administration, on 20 April 2011, the Pentagon announced that 'Abd al Rahim al Nashiri had been charged under the Military Commissions Act of 2009 with, among other things, "murder in violation of the law of war", and "terrorism". He is accused of having had a leading role in the attack on the USS Cole in Yemen on 12 October 2000 in which 17 US sailors were killed and 40 others wounded, and in the attack on the French oil tanker MV Limburg in the Gulf of Aden on 6 October 2002, in which a crew member was killed.

The prosecution's recommendation that the death penalty be an option at the trial was approved on 28 September 2011 by the "convening authority" of the military commissions.

Amnesty International opposes the death penalty unconditionally. While international human rights law recognizes that some countries retain the death penalty, it prohibits any imposition and execution of a death sentence based on a trial that has not fully met international fair trial standards. Amnesty International considers that the US military commissions fail to meet international standards, and that any use of the death penalty after such trials would accordingly violate international law. The prosecution of 'Abd al Nashiri should take place in a fair trial before ordinary civilian courts without possibility of the death penalty.

No one has been brought to justice for the human rights violations, including the crimes under international law of torture and enforced disappearance, committed against 'Abd al-Nashiri.

ABU ZUBAYDAH – Subjected to enforced disappearance, torture and other ill-treatment, and now in indefinite military custody without charge or criminal trial

Zayn al-Abidin Muhammad Husayn, more commonly known as Abu Zubaydah, was arrested in late March 2002 in a house in Faisalbad, Pakistan. He was handed over to the USA and held in secret detention at various undisclosed locations by the CIA until 4 September 2006 when he was transferred to Guantánamo Bay.

In 2008, the CIA admitted that it had subjected Abu Zubaydah to “water-boarding”, a torture technique that begins the process of drowning the detainee. Since then it has emerged that he was subjected in August 2002 to at least 83 applications of waterboarding. In addition to this torture, Abu Zubaydah was allegedly subjected to a range of other interrogation techniques and detention conditions that, on their own or in combination, violated the international prohibition of torture and other ill-treatment. They included years of solitary confinement and incommunicado detention, stress positions, beatings, forced prolonged nudity, sleep deprivation, use of loud music, exposure to cold, prolonged use of shackles, threats, forced shaving, cruel conditions of transfer, and deprivation or restriction of food.

Today, Abu Zubaydah would appear to be one of the 48 Guantánamo detainees whom the Obama administration said in 2010 it intends to hold indefinitely without criminal trial, although it has not confirmed this. Three and a half years after the US Supreme Court ruled in *Boumediene v. Bush* that the Guantánamo detainees were entitled to a “prompt” hearing to challenge the lawfulness of their detention, he has still not had such a hearing and ruling.

It might be considered unlikely that Abu Zubaydah’s habeas corpus challenge, filed over three years ago, will ultimately be successful, given the detention authority claimed by the administration and endorsed by the courts in other cases. But even if his challenge were to be successful, it is not clear where would he go as he is a stateless Palestinian. The Obama administration has shown itself willing to continue indefinitely holding at Guantánamo individuals whose detention has been ruled unlawful by the courts but for whom no “diplomatic” arrangement for their release has been found. The Court of Appeals for the DC Circuit has ruled that in the case of a Guantánamo detainee who wins a ruling that his detention is unlawful, the District Court cannot compel the government to release him as long as it is making good faith “diplomatic attempts to find an appropriate country” willing to admit him. That country will never be the USA itself, given continuing US government policy – endorsed by the Court of Appeals – not to do what it asks other countries to, namely to receive released detainees.

No one has been brought to justice for the human rights violations, including crimes under international law, committed against Abu Zubaydah. In his memoirs, published in November 2010, former President George W. Bush stated that he had authorized the use of “enhanced interrogation techniques”, including waterboarding, against Abu Zubaydah. The CIA’s secret detention program was operated under presidential authority.

The US authorities have not confirmed where Abu Zubaydah was held in CIA custody, and details of his interrogations, detention conditions, and locations where he was held remain classified at the highest level of secrecy. It is reported that among the places where he was held in secret CIA custody were Thailand, Poland and Guantánamo Bay.

Over the years Abu Zubaydah has been accused by the USA of among other things being a leading member of al-Qa’ida. For the purposes of habeas corpus proceedings, however, the USA has not said that Abu Zubaydah was an actual member of al-Qa’ida or had any direct role in or advance knowledge of the 9/11 attacks. The precise nature of the current US accusations against him are not clear, as much remains classified. As for other detainees, if the USA has proper evidence to support formal charges of valid criminal offences against him for trial in the ordinary courts, it can seek to continue to detain him by pursuing those criminal charges in fair proceedings; otherwise, in line with the normal functioning of criminal justice systems, he should be released.

MUSA’AB OMAR AL MADHWANI -- No accountability despite judicial finding of abuse; held without charge or trial; unsuccessful habeas corpus petition. Seeking Supreme Court review

Yemeni national Musa'ab Omar Al Madhwani was 22 years old when he was arrested in an apartment in Karachi on 11 September 2002 by Pakistani authorities. Al Madhwani has stated that he was tied up, blindfolded, beaten with a rifle and threatened with death. He was held in Pakistani custody for approximately five days before being handed over to US forces and flown to Afghanistan. He says he was taken to the "Dark Prison", a secret US-operated facility in or near Kabul. Held for about 30 to 40 days in this facility, Al Madhwani says he suffered a litany of abuses. He has alleged that he was beaten and kicked, kept in total darkness, deprived of food and sleep, subjected to extreme cold. He also states that he was partially suspended by his left hand the whole time he was in prison, so that he could never sit and all his weight was forced on to one foot, causing permanent nerve damage. He was then transferred to the US air base at Bagram where he was held for another five days and suffered further abuse. He was finally moved to Guantánamo, where he remains, on 28 October 2002.

In a habeas corpus hearing in US District Court on 14 December 2009 – more than seven years after Al Madhwani was taken to Guantánamo – the judge noted that the US government had "made no attempt" to refute Al Madhwani's torture allegations, and that there was "no evidence in the record" that they were inaccurate. To the contrary, the judge added that the allegations were corroborated by "uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions." The judge emphasised that as described in Al Madhwani's "classified testimony about his conditions of confinement, which I find to be credible, the United States was involved in the prisons where he was held, and believed to have orchestrated the interrogation techniques, the harsh ones to which he was subject".

Musa'ab al Madhwani's habeas corpus petition was denied by the District Court in January 2010, although the judge said that he was "not convinced" that the detainee was a threat to US national security, given the absence of evidence that he had either "fired a weapon in battle" or "planned, participated in, or knew of any terrorist plots". Today, Musa'ab al Madhwani remains in Guantánamo under the US government's assertion of detention powers under its global "war" framework. The Court of Appeals affirmed the District Court's decision in May 2011. In October 2011, a petition was filed in the US Supreme Court asking it to take his case.

In the context of the habeas corpus proceedings, the US authorities have alleged that Musa'ab al Madhwani had travelled to Afghanistan in 2001 prior to his arrest in Pakistan in order to receive firearms training at an al-Qa'ida camp, and that he had associated with al-Qa'ida members. While he denied the allegations, the District Court decided that there was enough evidence to demonstrate that Musa'ab al Madhwani was a "part of" al-Qa'ida and therefore could be detained.

As for other detainees, if the USA has proper evidence to support formal charges of valid criminal offences against him for trial in the ordinary courts, it can seek to continue to detain him by pursuing those criminal charges in fair proceedings; otherwise, in line with the normal functioning of criminal justice systems, he should be released.

Mohamedou Ould Slahi – Subjected to torture or other ill-treatment in Guantánamo, indefinite detention without charge or trial, won habeas ruling, reversed on appeal

This Mauritanian national was arrested in Mauritania in November 2001. After a week he was subjected to rendition to Jordan, where he was held for eight months. He was then transferred to Afghanistan in July 2002, taken to Bagram and thereafter transferred to Guantánamo on 4 August 2002. In addition to being subjected to enforced disappearance, Mohamedou Slahi was allegedly subjected to torture or other cruel, inhuman or degrading treatment in Jordan, in Bagram, and in Guantánamo, as well as during his transfers.

In Guantánamo, during 2003, he was allegedly deprived of sleep for some 70 days straight, subjected to strobe lighting and continuous loud heavy metal music, threats against him and

his family, intimidation by dog, cold temperatures, dousing with cold water, physical assaults, and food deprivation.

In April 2010, a federal judge noted that there is “ample evidence” that Mohamedou Slahi was subjected to “extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003”. This was the period that this detainee had been labelled by his US military captors as having “Special Projects Status” and subjected to a 90-day “special interrogation plan” approved by various officials up to and including the Secretary of Defense. In his memoirs published in 2011, Donald Rumsfeld noted that he had “approved interrogation techniques beyond the traditional Army Field Manual” for use against Mohamedou Ould Slahi after he had “tenaciously resisted questioning”.

In April 2010, a US federal judge ordered the release of Mohamedou Ould Slahi. The detention was unlawful, the judge concluded, adding that “a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government’s prediction that he may do unlawful acts in the future...” The Obama administration disagreed and appealed.

Under the USA’s global war framework, the Obama administration argued that Mohamedou Slahi’s detention is lawful. There was no requirement, the US Department of Justice lawyers argued, that Slahi had to have “personally engaged in combat” and it was also of “no moment” that he was transferred to US custody “in a location other than Afghanistan”. The President’s detention authority, it continued, “is not limited to persons captured on a ‘battlefield’ in Afghanistan” and to argue otherwise would “cripple the President’s capability to effectively combat al-Qa’ida”. In November 2010, the Court of Appeals vacated the District Court ruling and sent the case back for further proceedings on the question of whether Mohamedou Slahi was “a part of” *al-Qa’ida* at the time he was taken into custody despite his claim to have by then severed all ties to the group. A new habeas corpus hearing may be held in District Court sometime in 2012. By then Mohamedou Slahi will have been in custody without charge or trial for over a decade.

According to the District Court, Mohamedou Ould Slahi was first arrested on suspicion that he had been involved in the failed “millennium plot” to bomb the Los Angeles International Airport. The government maintained that Slahi remained a “part of” al-Qa’ida, which the detainee denied. The judge wrote that “the government’s problem is that its proof that Slahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution.”

As for other detainees, if the USA has proper evidence to support formal charges of valid criminal offences against him for trial in the ordinary courts, it can seek to continue to detain him by pursuing those criminal charges in fair proceedings; otherwise, in line with the normal functioning of criminal justice systems, he should be released.

Binyam Mohamed – Released from US custody, still seeking redress for human rights violations

Born in Ethiopia, Binyam Mohamed came to Britain in 1994 seeking political asylum. He lived in the UK for seven years and was given leave to remain while his asylum claim was investigated.

Binyam Mohamed was arrested in Karachi, Pakistan, on 9 April 2002. Over two years later, on 19 September 2004, he was taken to Guantánamo. In between, he was allegedly subjected to rendition to Morocco where he was held for 18 months, transferred to the CIA-run “Dark Prison” in Kabul in Afghanistan, before being held in Bagram air base.

In late 2009, a US District Court judge outlined the evidence that had been presented to her of human rights violations committed against Binyam Mohamed, who in February of that year had been released from Guantánamo to the United Kingdom. He has claimed that he was subjected to torture and other ill-treatment in Pakistan, Morocco and the Dark Prison.

The judge noted that the US government “does not challenge or deny the accuracy of Binyam Mohamed’s story of brutal treatment”. She also concluded that his allegations bear “several indicia of reliability”, including its detail, its consistency, and the fact that Binyam Mohamed “has vigorously and very publicly pursued his claims in British courts subsequent to his release from Guantánamo Bay”. His persistence in telling his story”, the judge continued, “demonstrates his willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion”. She went on:

“Binyam Mohamed’s lengthy and brutal experience in detention weighs heavily with the Court... Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence”

“[E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to Special Agent [redacted], there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay...”

Even in the face of such judicial comment, the US authorities have failed in their obligation to investigate and bring to justice those responsible for these violations. In addition, the Obama administration has followed its predecessor by continuing to actively block remedy.

Binyam Mohamed was one of the five plaintiffs in a lawsuit – *Mohamed v. Jeppesen* -- brought in US federal court claiming they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment at the hands of US personnel and agents of other governments as part of the CIA’s rendition program. On 8 September 2010 a federal appeals court upheld, by six votes to five, the Obama administration’s invocation of the “state secrets privilege” and dismissed the lawsuit, possibly ending the pursuit of judicial remedy in the USA for these men.

The five dissenting judges warned that the state secrets doctrine “is so dangerous as a means of hiding governmental misbehaviour under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government’s essential secrets”. They accused the six judges in the majority of “gratuitously attaching ‘allegedly’ to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations.” The dissenting judges published an appendix summarizing some 1,800 pages of public materials submitted in support of the plaintiffs’ claims.

On 16 May 2011 the US Supreme Court refused to hear the *Mohamed v. Jeppesen* rendition case, leaving in place the Court of Appeals ruling. In November 2011, the men took their case to the Inter-American Commission on Human Rights. Their case is pending.