



USA: RIGHT THE WRONG

DECISION TIME ON GUANTÁNAMO

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Cover photo: In this photo released 18 January 2002 by the Department of Defense, U.S. Army military police escort a detainee to his cell in Camp X-Ray at the US Naval Base at Guantánamo Bay, Cuba during in-processing to the temporary detention facility 11 January 2002. © Photo by -/DOD / US NAVY/AFP via Getty Images)

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GLOSSARY

AR 190-8	Army Regulation 190-8
AUMF	Authorization for Use of Military Force
CA	Convening Authority (for military commissions)
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	UN Committee for the Elimination of Racial Discrimination
CMRC	Court of Military Commission Review
CSRT	Combatant Status Review Tribunal
DC	District of Columbia
DTA	Detainee Treatment Act
GRTF	Guantánamo Review Task Force
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
MCA	Military Commissions Act
MON	Memorandum of notification
NDAA	National Defense Authorization Act
OCP	Office of the Chief Prosecutor (for military commissions)
ODNI	Office of the Director of National Intelligence
OLC	Office of Legal Counsel (at US Department of Justice)
PRB	Periodic Review Board
RMC	Rule for Military Commission
SSCI	Senate Select Committee on Intelligence

EXECUTIVE SUMMARY

This report returns to the detention facility at the US naval base in Guantánamo Bay as detentions there enter their 20th year and as a new President prepares to enter the White House and become its fourth incumbent during the lifetime of this prison. Each of his three predecessors stamped their policy preference on the issue. But even as administration policy changed from ‘locate a detention facility and fill it’, to ‘review the detentions and close the prison’, to ‘keep it open and prepare it to receive more detainees’, the ghost at the table has been international human rights law – ignored under a ‘law of war’ framework defended by each administration of the past 19 years.

Speaking at the Munich Security Conference in February 2009, then Vice President Joe Biden told the audience that “We will uphold the rights of those who we bring to justice. And we will close the detention facility at Guantánamo Bay”. He emphasized that the “treaties and international organizations we build must be credible and they must be effective”. A dozen years later, as he prepares to enter the White House as President, he has an opportunity to live up to those words. He should seize it.

A new urgency and energy are needed, accompanied by a genuine commitment to truth, accountability and remedy, and a recognition that this issue must not be allowed to drift any longer. Although reducing the number of detainees at Guantánamo, the Obama administration allowed the detentions to become mired in bureaucracy and bogged down in partisan politics. And although things had shifted since President Bush asserted that allegations of ill-treatment were made by people who “just don’t know what they’re talking about”¹, accountability for human rights violations was still put to one side under President Obama; effectively, “we tortured some folks” but we must move on.² Then that President, who ended his term in office saying that Guantánamo was a facility that “never should have been opened in the first place”³, handed it on to his successor who doubled down on the notion that “terrorists are not merely criminals; they are unlawful enemy combatants” and ordered it kept open.⁴ Even detainees already cleared for transfer out of the base before the transfer of power in the White House were stuck there.

Section 2.1 and 2.2 provide a recap of how the Guantánamo detentions began, out of the decision to frame the USA’s response to the 9/11 attacks as a “global war on terror”, bypassing human rights protections in the pursuit of intelligence gathering. Crimes under international law such as torture and enforced disappearance were committed against detainees deliberately held out of reach of judicial scrutiny at secret facilities operated by the Central Intelligence Agency (CIA) in other countries or in the US naval base in Cuba. More than half of the detainees at Guantánamo today were held in the CIA detention programme prior to being brought there, including four who were held at Guantánamo when the CIA operated a ‘black site’ there.

Section 2.3 recalls the response of the Bush administration after the Supreme Court in 2006 reversed the President’s decision not to apply Article 3 common to the four Geneva Conventions to the detentions, raising fear within the administration that officials involved in detentions and interrogations could be prosecuted for war crimes. The outcome – passage of the Military Commissions Act (MCA) of 2006 – was a legislative low point; the President publicly exploited the cases of demonized detainees subjected to torture and enforced

¹ The President’s News Conference with Chairman Hamid Karzai of the Afghan Interim Authority, White House, 28 January 2002.

² See ‘We tortured some folks’, 2 September 2014, <https://www.amnesty.org/en/documents/AMR51/046/2014/en/>

³ Letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, 19 January 2017.

⁴ President Donald Trump, State of the Union Address and Executive Order 13823, Protecting America Through Lawful Detention of Terrorists, 30 January 2018.

disappearance to persuade Congress to vote for the MCA if it wanted them tried and their captors protected from prosecution. The MCA bolstered impunity for human rights violations, aimed to keep judicial scrutiny off the detentions, authorized unfair trials by military commission, and rubber-stamped new enforced disappearances. The MCA remains a stain on congressional history and yet it is still one of the judicial reference points in 'law of war' detentions at Guantánamo.⁵

While the 2006 MCA was an abdication of the duty of legislators to uphold human rights, [Section 2.4](#) revisits an earlier congressional action, passed three days after the 9/11 attacks. This was the Authorization for Use of Military Force (AUMF), passed with minimal debate and used to justify a range of human rights violations and to underpin the Guantánamo detentions to this day. It was not until a decade later that Congress returned to the detention authority it had supposedly given the President on 14 September 2001, but in the National Defense Authorization Act of 2012, it reinforced the 'law of war' detentions rather than questioning them. In 2013, President Obama promised to work with Congress to repeal the AUMF and end the USA's "perpetual wartime footing" it promotes, but seven and a half years later the situation remains unchanged.

It was not until 2008 that the US Supreme Court ruled in *Boumediene v. Bush* that the Guantánamo detainees could challenge the lawfulness of their detentions in federal court. In reaching that decision, the Court had to overturn a 2007 ruling from the Court of Appeals for the District of Columbia Circuit that would have left the detainees unprotected. *Boumediene* said that the detainees were "entitled to a prompt habeas corpus hearing". Some are still waiting. [Section 3](#) looks at post-*Boumediene* decisions taken by the Court of Appeals – effectively the court of last resort for Guantánamo habeas challenges in the absence of US Supreme Court intervention (it has absented itself from Guantánamo since 2008). The Court of Appeals has acted as something of a barrier to successful challenges, particularly since 2010 when it issued a decision overturning the grant of a habeas corpus petition and apparently leading thereafter to a greater deference among District Court judges to evidence relied upon by the executive to justify detentions. The situation took a turn for the worse in August 2020 when, as described in [Section 3.1](#), the Court of Appeals ruled that the Due Process Clause of the US Constitution does not apply to the detainees, as foreign nationals held outside sovereign US territory, the same theory that led to the choice of Guantánamo as the location for detainees in the first place.

Health concerns are never far from the surface for a detainee population that has endured multiple human rights violations. These are detentions that are inescapably bound up with multiple layers of unlawful government conduct over the years – secret transfers, incommunicado interrogations, force feeding of hunger strikers, torture and enforced disappearance, unfair trial proceedings.⁶ [Section 4](#) highlights recent developments in the case of a detainee who has been held at Guantánamo for all but one month of its detention operations. Mohammed al-Qahtani is better known for the fact that he was subjected to torture and other cruel, inhuman or degrading treatment under a 2002 "special interrogation plan". This Saudi national was later charged for capital trial by military commission, but the charges were dismissed by the official overseeing the commissions because of this torture. No one who signed off on this crime under international law – including the former Secretary of Defense – has faced justice for it.

What is less well known about Mohammed al-Qahtani is that he had been diagnosed with psychological disabilities long before he was brought to Guantánamo. In addition, the torture and other ill-treatment has left him with a diagnosis of post-traumatic stress disorder and a deep distrust of medical personnel at the detention facility given the involvement of such personnel in his torture. In March 2020, a District Court judge granted a motion to compel examination of Mohammed al-Qahtani by a 'mixed medical commission', permitted under

⁵ See, e.g., *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 20 August 2020 ("Congress enacted the 2012 NDAA in light of standards developed by the judiciary and the Executive under several earlier statutes dealing with the War on Terror, including the AUMF, the Detainee Treatment Act of 2005, and the Military Commissions Act of 2006 and 2009").

⁶ For a case study of multiple violations of international law in relation to a Guantánamo detainee, see Inter-American Commission on Human Rights, Report No. 29/20, Case 12.865, Merits Report: Djamel Ameziane; United States of America. April 2020, <http://www.oas.org/en/iachr/decisions/2020/uspu12865en.pdf> and accompanying news release ("The case relates to the arbitrary detention of Mr Djamel Ameziane at Kandahar Airbase and Guantánamo Bay Detention Center throughout nearly 12 years, where he was subjected to torture, poor detention conditions, there was a lack of due process guarantees, and he was forcibly returned to Algeria. The IACHR established the existence of an officially sanctioned regime of cruel and inhuman treatment for the purposes of interrogation at Guantánamo that was applied to Mr Ameziane, during which he was subjected to a number of methods of physical and psychological torture. The IACHR thus concluded that the United States' international responsibility for violating the rights to life, integrity, and personal security; equality before the law; religious freedom and worship; freedom of expression; protection of honor, personal reputation, and private and family life; right to family and protection thereof; protection of health and well-being; fair trial; assembly; property; petition; protection from arbitrary detention; and due process enshrined in the American Declaration of the Rights and Duties of Man."), http://www.oas.org/en/iachr/media_center/PReleases/2020/143.asp

army regulations for determining cases of prisoners eligible for repatriation on health grounds. Her ruling has given a glimmer of hope for justice and remedy in Mohammed al-Qahtani's case.

Section 5 of the report examines another type of commission – the military commission, introduced into the mix by the Bush administration even before Guantánamo was chosen as the location for the detentions. This was to be the forum in which selected foreign nationals would be prosecuted without the normal rules of evidence that are applied in the ordinary federal courts, and with the power to hand down sentences. The report argues that, even with the various improvements to the military commissions – they are in their third incarnation since 2001 – they remain illegitimate tribunals under international law. Such tribunals lack the independence and impartiality necessary to deliver justice.

Amnesty International takes the view that military courts should not have jurisdiction to try civilians, owing to the nature of these courts and because of concerns about their independence and impartiality. The UN Human Rights Committee has held that trials of civilians by military or special tribunals must be strictly limited to exceptional cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”. That is not the case here. The ordinary courts were open, available and experienced in dealing with prosecutions in terrorism cases.

Moreover, military commissions are discriminatory – as has been the detention regime more broadly. The CIA programme of torture and enforced disappearance was reserved for foreign nationals, as is detention at Guantánamo, as are the military commission trials there. A US citizen, even if charged with precisely the same offences, could not be prosecuted in these tribunals. While not all differential treatment between citizens and non-citizens violates international law, it does if it comes, as here, at the expense of rights reflected in the Universal Declaration of Human Rights and enshrined in the International Covenant on Civil and Political Rights and other binding international instruments.

Section 5.1 argues that there is no getting away from the backdrop to the commissions – set up not because they were necessary in any legal sense, but as a forum for trials in which the defendants had been subjected to torture and enforced disappearance by their captors prior to being charged. **Sections 5.2 and 5.3** turn to the six detainees facing the death penalty in a system where any executions resulting from these trials would violate the international prohibition on the arbitrary deprivation of life. Amnesty International opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution. The organization considers the death penalty a violation of the right to life as recognized in the Universal Declaration of Human Rights and the ultimate cruel, inhuman and degrading punishment. The six detainees facing the death penalty have been in US custody for more than a decade and a half already, a fifth of it hidden away in secret CIA custody. While the COVID-19 pandemic became a new cause of delays to proceedings in 2020 – with no hearings from February until the end of the year – one capital trial had nearly four years of military judge rulings vacated because of the judge's appearance of bias, while proceedings against five detainees accused of leading involvement in the 9/11 attacks have seen six different military judges overseeing the case in the past two years. In late 2020 the prosecution objected to the judge who had been appointed on the grounds that he did not have the qualifications or experience for the job and said it would move for his recusal if he did not remove himself. It subsequently filed such a motion. At the end of the year, the judge was replaced.

Section 5.4 looks at the case of Mohammed Bin Lep, one of three southeast Asian nationals who for the past decade have been under threat of military commission trials, but against whom charges have not been referred for trial. In December 2020, a federal court, although noting the “compelling, and at times disconcerting, description of the ‘state of limbo’ [Bin Lep] continues to endure with no end in sight”, refused to issue an injunction stopping the government from taking any further steps towards trial on the claim that delay and discrimination have rendered any future prosecution unlawful. As in the 9/11 proceedings, the case also shows some human resources mayhem in the commission system. A key position, the Convening Authority, has faced substantial chop and change, with five individuals being appointed to it over the past year. Finally, **Section 5.5** outlines the case of the only detainee serving a prison sentence at Guantánamo after his 2008 conviction by military commission. Two of his three charges have been overturned on appeal, and his third is disputed. Despite this, his life sentence on the three charges remains intact. His lawyers have argued this leaves him effectively serving life without the possibility of parole because under the rules of the Periodic Review Board, he is not eligible for review. They have also claimed that he is being held in cruel isolation under a policy segregating convicted detainees from the other detainees.

Section 5.6 concerns the case of Majid Khan, who was subjected to torture and enforced disappearance in the CIA program before being transferred to Guantánamo in September 2006, becoming one of the detainees whose cases were exploited for the purpose of getting passage of the MCA. Majid Khan pled guilty in 2012 under the MCA pursuant to a deal in which sentencing was deferred while he cooperated with the government. In June 2020, a military judge granted a motion brought on Khan's behalf seeking remedy for the torture and other ill-treatment he said he endured in CIA custody and at Guantánamo before his plea deal. In a remarkable ruling – with a pages-long treatise on the absolute prohibition of torture, a far cry from the secret memos written between 2002 and 2007 at the US Department of Justice to give the green light to torture and enforced disappearance – the military judge found that if true, the treatment alleged “rises to the level of torture” and that he has the authority to grant a remedy in the form of sentencing credit. He will move to the next step of considering the credibility of the allegations at the sentencing hearing, currently scheduled for a two-week period in May 2021 in Guantánamo.

Section 6 is a reminder of the absence of accountability for the crimes under international law committed against these and other detainees. It highlights the case of Abu Zubaydah who has been held without charge or trial for nearly 19 years, four and a half of them subjected to enforced disappearance. Effectively experimented upon by the CIA in 2002 in its use of its then newly developed “enhanced interrogation techniques”, he remains in the classified conditions of Camp 7 of Guantánamo, with his habeas corpus petition, filed in District Court in 2008, not yet ruled upon over a dozen years later. His lawyers are currently seeking his medical records from his time in CIA custody – with the government having given a schedule for locating and redacting the classified records that would take at least six years for the lawyers to receive them.

Abu Zubaydah's name appears more than 1,000 times in the declassified summary of the report into the CIA detention and interrogation programme published by the Senate Select Committee on Intelligence (SSCI) in late 2014. The main SSCI report remains classified at the highest level of secrecy. It runs to more than 6,000 pages and contains details of the treatment of all the detainees known to have been held in the programme – including Abu Zubaydah and 23 other detainees held in Guantánamo and one other who to date is the only Guantánamo detainee to have been transferred to the USA for trial (where he was sentenced in 2010). This report should be declassified as a step towards the individual and collective right to truth about the human rights violations that were perpetrated in the CIA programme and towards the remedy and accountability that the USA is obliged under international law to ensure.

In its **Recommendations**, Amnesty International calls on the incoming administration to close the detention facility at Guantánamo Bay once and for all. All those still detained there must either be transferred out and released, or if there is sufficient admissible evidence under international law to prosecute internationally recognizable criminal offences then to do so through fair judicial resolution before a federal court without recourse to the death penalty. Detainees held at Guantánamo and elsewhere by the USA since 9/11 have been subjected to torture and enforced disappearance. The USA must investigate and bring suspected perpetrators of these crimes under international law to justice, whatever their current or former level of office.

After a period in the USA in which many pressing social, environmental and justice issues have been set back, the Biden administration's plate will undoubtedly be full. But not so full as to be unable to prioritize and resource closure of Guantánamo, to promptly begin to work for a lawful resolution of each detainee case, and to commit to a new and full respect by the USA for international human rights law. In the end, this is about more than the 40 people still held at Guantánamo. It is not only about the detentions today, but also about crimes under international law from yesterday and the lack of accountability and remedy for them. It is about the future too, of the approaching 20th anniversary of the crime against humanity committed on 11 September 2001 and moving beyond it with the USA striving for real and enduring justice and with a commitment to be a genuine exemplar of human rights.

METHODOLOGY

This report updates Amnesty International's research published over the past 19 years in relation to the detentions in Guantánamo, as well as on the CIA detention programme operated from 2002 to 2009. It builds on this significant body of work through extensive desk research using information from open sources, including relevant national law and international human rights standards, court judgments, defence and government briefs filed in federal court and military commissions, civil society organization reports, and domestic and international news media. Over the years, Amnesty International observers have attended military commission hearings at Guantánamo. On 18 December 2020, Amnesty International wrote to the US Department of Justice and the US Department of Defense setting out the findings in this report. At the time of publication, no response had been received.

INTRODUCTION

“America will not torture. We will uphold the rights of those who we bring to justice. And we will close the detention facility at Guantánamo Bay.... [W]e say to our friends that the alliances, treaties and international organizations we build must be credible and they must be effective. That requires a common commitment not only to listen and live by the rules, but to enforce the rules when they are, in fact, clearly violated”

US Vice President Joe Biden, February 2009⁷

As the 20th anniversary of the 11 September 2001 (9/11) attacks in the USA approaches, the haunting memories of that day will remain as strong as ever for many. In addition to the nearly 3,000 people killed in this crime against humanity, many thousands of responders and survivors are still suffering long-term health effects, both physical and mental.⁸

From the outset, President George W. Bush promised justice.⁹ As time went on, however, it became clear that whatever he had in mind when using that word, the USA's response to the 9/11 attacks involved widespread human rights violations in what it called the “global war on terror”.¹⁰ These included the crimes under international law of torture and enforced disappearance authorized at high levels of government. Commonly understood tenets of justice – humane treatment of those deprived of their liberty, detainee access to legal representation, and full and fair trials within a reasonable time in independent and impartial courts for those accused of internationally recognizable criminal offences – fell by the wayside as the pursuit of intelligence and a global war paradigm were used to justify secret detention, incommunicado interrogations, and prolonged

⁷ Remarks by Vice President Biden at 45th Munich Conference on Security Policy, 7 February 2009.

⁸ World Trade Center Health Program, Statement by Dr John Howard, https://www.cdc.gov/wtc/administrator_20200911.html; also, Covered Conditions, <https://www.cdc.gov/wtc/conditions.html>

⁹ “I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice”. Address to the Nation on the Terrorist Attacks, 11 September 2001; “Whether we bring our enemies to justice or bring justice to our enemies, justice will be done.” Address before Joint Session of Congress, 20 September 2001.

¹⁰ See also A reflection on justice, 16 May 2011, <https://www.amnesty.org/en/documents/AMR51/038/2011/en/> On the USA's “war” paradigm, see ‘A familiar path to torture’, Human Dignity Denied: Torture and accountability in the ‘war on terror’, Section 1, October 2004, www.amnesty.org/en/documents/amr51/145/2004/en

indefinite detention without charge. The absence of justice for the victims and survivors of 9/11 was mirrored by a lack of accountability for human rights violations committed by US personnel.

Among the iconic images of the response to 9/11 were photographs of newly arrived detainees in the US Naval Base at Guantánamo Bay, Cuba, kneeling before US soldiers, shackled, handcuffed, and blindfolded. Tellingly, the photographs were released by the Pentagon's public affairs office "to showcase the humane treatment of the detainees", according to the then Secretary of Defense,¹¹ who would himself soon be signing off on interrogation techniques for use at Guantánamo that violated the international ban on torture and other ill-treatment.

We have reached the 19th anniversary of the arrival of those first detainees. As the detentions have dropped from the headlines – not least as the COVID-19 pandemic and the climate change crisis have demanded attention alongside other pressing issues such as racial injustice and migrant rights – many people might assume that the Guantánamo prison camp is history. It is not. There are 40 detainees still in the base.

Perhaps people think that at least the programme of secret detention operated by the Central Intelligence Agency (CIA) after 9/11 has been safely consigned to the history books. Yet while that programme was ended in 2009, its live human ramifications continue, including at Guantánamo – itself once the location for a CIA "black site" and with 60 per cent of its current detainee population having been previously held in the secret programme. Much of the detail about their treatment and where they were held remains classified to this day, a violation of the individual and collective right to truth. The crimes committed in the programme have not only left physical and psychological damage but also continue to harm the prospect of fair trials for those who were hidden away and tortured rather than brought to trial in US courts.

People may have a distant memory of a system of military trials at Guantánamo and of detainees transferred there over a decade ago from secret CIA custody, accused of leading involvement in the 9/11 attacks. Yet almost 13 years after charges were first levelled against some of them, their trials by military commission – which in any event would fail to meet international fair trial standards – have not happened. The government intends to seek the death penalty against six of the seven detainees currently in pre-trial proceedings. Executions after unfair trials violate the international prohibition on the arbitrary deprivation of life.

Although the 40 men still held at Guantánamo can be subdivided by "status" – some have been charged, others have charges pending, a few have been approved for transfer, others remain branded with "continued law of war detention" – in reality all are in indefinite detention (see Appendix 1). Being slated for transfer has not brought certainty – three such individuals have been held for more than a decade since such approval was given. In the case of those facing trial there is no guarantee of release even in the event of an acquittal, as the USA reserves the right to return them to "law of war" detention if it deems its national security warrants it.

Guantánamo is a symbol of a government's failure to respect its international human rights obligations. The USA's use of torture and other cruel, inhuman and degrading treatment exploited the conditionality it attached to its ratification of human rights treaties in the 1990s. It has not withdrawn these conditions despite calls from UN treaty bodies, responsible for the oversight of the implementation of these treaties, for it to do so. Meanwhile, Guantánamo was chosen as a location where it was considered judicial scrutiny of detentions could be avoided. Today, a dozen years after the US Supreme Court ruled that the detainees could challenge their detentions in court, judicial deference to the political branches in the name of national security has left the quality of judicial scrutiny somewhat strained. In 2020, things took a turn for the worse when the Court of Appeals ruled that the Due Process Clause of the Constitution's Fifth Amendment – "no person shall be deprived of life, liberty, or property, without due process of law" – does not apply at Guantánamo.

Discrimination overlays this injustice. The CIA programme of torture and enforced disappearance was reserved for foreign nationals, as is detention at Guantánamo, as are the military commission trials there. A US citizen, even if charged with precisely the same offences, could not be prosecuted in these tribunals. While not all differential treatment between citizens and non-citizens violates international law, it does if it comes, as here, at the expense of rights reflected in the Universal Declaration of Human Rights (UDHR) and enshrined in the International Covenant on Civil and Political Rights (ICCPR) and other international instruments binding on the USA.

This report aims to be a reminder of the festering injustice of Guantánamo – from its inception to its present – and, as a new President prepares to take office, to renew Amnesty International's call for closure of the detention facility once and for all. The President-elect served as Vice President in an administration which came to office in 2009 promising to close the detention facility and left eight years later having failed to do so, handing the detentions to a President who ordered it kept open. It is time to kick start closure.

¹¹ Donald Rumsfeld, *Known and Unknown*; a memoir. Sentinel (2011), page 567.

GUANTÁNAMO, JANUARY 2021 – NUMBERS AT A GLANCE

- There are 40 detainees at Guantánamo today (see Appendix 1). They range in age from about 38 to 73 years old. There comprise 13 nationalities. Two of them may be stateless.
- Two of the current detainees have been held at Guantánamo since Day One of detention operations, 11 January 2002; 15 have been there since Year One, that is, for more than 18 years. All 40 detainees have been held at Guantánamo for more than 12 years.
- All were in US custody prior to being brought to Guantánamo. All 40 have been in US custody for over 13 years, 36 of them for over a decade and a half.
- The 40 detainees were originally taken into custody in 10 countries – Afghanistan, Djibouti, Egypt, Georgia, Iran, Kenya, Pakistan, Thailand, Turkey, and United Arab Emirates.
- At least 38 of the 40 were in the custody of another government before being handed over to the USA. In no case was there any known judicial oversight of the transfer.
- At least 24 of the 40 were held in secret CIA custody prior to their transfer to Guantánamo. Most, if not all, of these 24 were subject to enforced disappearance during this time. Enforced disappearance and torture are crimes under international law.
- The 24 were held in secret custody for periods ranging from a month to four and a half years. They were held in US custody in a range of countries, the identities of which remain classified, but which are believed to include Afghanistan, Poland, Romania, Thailand, Lithuania, and Morocco.
- Four of the 40 detainees were subjected to enforced disappearance at Guantánamo when the CIA operated a ‘black site’ there in 2003 and 2004.
- 26 of the 40 detainees have been determined by an executive review process (Periodic Review Board) to be in “continued law of war detention” (the USA considers all 40 are held under its “war” framework).
- After a multi-agency review completed in January 2010, 24 of the 40 were given the “final disposition” of “referred for prosecution”. Eleven years later, seven of the 24 are in pre-trial military commission proceedings.
- Of the seven detainees who have had charges referred on for trial before these flawed commissions, six are facing the death penalty. Any executions resulting from such trials would amount to an arbitrary deprivation of life, in violation of international law.
- One detainee has been convicted pursuant to a plea deal in 2012 and is due to be sentenced in May 2021. Three others had charges “sworn” against them in April 2019, but these charges had not been referred on for trial by the end of 2020.
- One of the 40 detainees has been convicted and sentenced by military commission. He is serving a life sentence at Guantánamo after his conviction in 2008.
- Six of the 40 detainees are approved for transfer by executive review processes. Three have been in this status since 2010, two since 2016, and one since 2020.
- The most recent detainee transfer out of Guantánamo occurred in March 2018 under a plea deal agreed in 2014 whereby the detainee pled guilty before a military commission.
- No one has been prosecuted for the crimes under international law of torture or enforced disappearance committed by US personnel against detainees.

1. EXECUTIVE DECISION, LEGISLATIVE FAILURE, JUDICIAL DEFERENCE

“The time has come for the President and Congress to give serious consideration to a different approach for the handling of the Guantánamo detainee cases”

US Circuit Judge, June 2013¹²

On the afternoon of 11 September 2001, President Bush opened a video teleconference with his principal advisors with the words “we’re at war”, and in a national address that evening he pointed to the global nature of this “war against terrorism”.¹³ A memorandum to CIA staff from the agency’s Director five days later was titled “We’re at war” and instructed that “all the rules have changed”; this war would be “worldwide” in nature, and not just targeted at al Qaeda.¹⁴ A presidential memorandum asserted that “the war against terrorism ushers in a new paradigm” which “requires new thinking in the law of war”.¹⁵

Many politicians turn to war metaphors when confronting big challenges. In addition to the multiplicity of war analogies that have been heard during the COVID-19 pandemic, for example, “think the war on poverty, on cancer, on illegal immigration, not to mention the war on drugs or on crime”.¹⁶ The “global war on terror”, however, has been far from a rhetorical device.

Yemeni national Moath al Alwi had already been held without charge at Guantánamo for four years when, in 2006, the UN Committee against Torture, the expert body established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to monitor its implementation, told the USA that “detaining persons indefinitely without charge constitutes *per se* a violation of the Convention”.¹⁷ The USA rejected this, stating it was “in an armed conflict with al-Qaida, the Taliban, and their supporters”, during which it “captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention, provides the applicable legal framework

¹² *Hussain v. Obama*, US Court of Appeals for the DC Circuit, 18 June 2013, Judge Edwards concurring.

¹³ Final Report of the National Commission on Terrorist Attacks Upon the United States, August 2004, Ch.10; and Address to the Nation on the Terrorist Attacks, 11 September 2001.

¹⁴ Memorandum from Director of Central Intelligence, We’re at War, 16 September 2001.

¹⁵ Humane treatment of al Qaeda and Taliban detainees, 7 February 2002.

¹⁶ Constanza Musu, War metaphors used for COVID-19 are compelling but also dangerous, April 2020, <https://theconversation.com/war-metaphors-used-for-covid-19-are-compelling-but-also-dangerous-135406>

¹⁷ UN Doc. CAT/C/USA/CO/2. Conclusions and recommendations on the USA, 25 July 2006, para. 22.

governing these detentions”.¹⁸ It said the same thing to the UN Human Rights Committee, the ICCPR’s treaty body, and reminded it that the USA considers the ICCPR not to apply extraterritorially. Not only was the law of war the applicable legal framework, but “because Guantánamo Bay is not within the territory of the United States, US obligations under the Covenant do not apply there”.¹⁹

In 2013, the Inter-American Commission on Human Rights, the UN Working Group on Arbitrary Detention, and three UN Special Rapporteurs – on Torture, on Health, and on Human Rights and Counter-Terrorism – stressed that “even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment.”²⁰ In 2015, Moath al Alwi’s lawyers argued in US District Court that his indefinite detention had gone on for so long that it violated the Convention Against Torture. In 2017, the judge rejected this claim – not only could the “mere length of his detention [over 16 years at that point] not “be characterized as torture”, but in any event he had “no judicially enforceable rights under the Geneva Conventions or the Convention Against Torture, whether he invokes them directly or indirectly, and his claims under them must therefore be rejected”.²¹ The judge upheld his “law of war” detention. The US Court of Appeals affirmed in 2018, saying that the government’s authority (under the AUMF and NDAA, see Section 2.5) had neither “unraveled” nor “expired” through the passage of time.²²

Brought to Guantánamo five days after the detention facility opened, Moath al Alwi remains there without charge today. It is now more than 19 years since he was “delivered into United States custody” by Pakistani forces in December 2001.²³ As in most cases, the USA was not the original detaining authority, and other governments have colluded in the USA’s detention regime at Guantánamo and elsewhere over the years.²⁴ Those still held in Guantánamo today were originally detained by authorities in Afghanistan, Djibouti, Egypt, Georgia, Kenya, Iran, Pakistan, Thailand, Turkey, and United Arab Emirates (UAE).²⁵ As far as Amnesty International is aware, none had access to any judicial oversight before being handed over to US custody.

Sanad Yislam Ali al Kazimi was held in UAE prior to being transferred to secret CIA custody in the “Dark Prison” in Afghanistan and thereafter to Guantánamo. In UAE, “his interrogators beat him; held him naked and shackled in a dark, cold cell; dropped him into cold water while his hands and legs were bound; and sexually abused him.”²⁶ Sanad al Kazimi remains in Guantánamo today. So does Sharqawi Abdu Ali Al-Hajj, who in early 2002 was taken into custody by Pakistan intelligence working “with US officials” and transferred to the custody of “a foreign government” (Jordan), where he was “regularly beaten and threatened with electrocution and molestation”²⁷. Nearly two years later, in January 2004, he was transferred into the CIA secret detention programme, and held in the CIA-run “Dark Prison” in Afghanistan, where he was “kept in complete darkness and was subject to continuous loud music”.²⁸ After four months, he was transferred to US

¹⁸ UN Doc. CAT/C/USA/CO/2/Add.1, 6 November 2007. Comments by the Government of the USA to the conclusions and recommendations of the Committee against Torture, para. 11.

¹⁹ UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, Comments by the Government of the USA on the concluding observations of the Human Rights Committee, para. 14 response. See UN Doc.: CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”

²⁰ IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis, 3 May 2013, http://www.oas.org/en/iachr/media_center/PReleases/2013/029.asp

²¹ *Al-Alwi v. Trump*, Memorandum opinion, US District Court for the District of Columbia (DC), 21 February 2017.

²² *Al-Alwi v. Trump*, US Court of Appeals for the DC Circuit, 7 August 2018.

²³ *Al-Alwi v. Trump*, Memorandum opinion, US District Court for DC, 21 February 2017.

²⁴ On the day Moath al Alwi arrived at Guantánamo, President Bush met with Turkey’s Prime Minister thanking him for his “support in the war against terror”. An 8 June 2006 US diplomatic cable later revealed that such support included allowing the USA “to use Incirlik [air force base] as a refueling stop for Operation FUNDAMENTAL JUSTICE detainee movement operations since 2002”, including to Guantánamo, www.theguardian.com/world/us-embassy-cables-documents/67175. Agents of some governments took part in abusive interrogations at Guantánamo, reportedly including agents of China and Libya. See USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, www.amnesty.org/en/library/info/AMR51/063/2005/en, page 23.

²⁵ See *Boumediene v. Bush*, US Supreme Court, 12 June 2008 (“Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States”).

²⁶ *Abdah v. Obama*, Unclassified memorandum opinion, US District Court for DC, 21 April 2010.

²⁷ *Ibid.*

²⁸ *Ibid.* The judge found that the torture allegations were credible, and that the government did not rebut them.

military custody in Afghanistan, and another four months after that, on 19 September 2004, to Guantánamo, where he remains. His “final disposition” as of 22 January 2010, was “referred for prosecution”. He has never been charged.

The world had been warned. Five days after the 9/11 attacks, Vice President Dick Cheney said that US personnel would need to work on “the dark side” of intelligence gathering. This would involve the USA having “on the payroll some very unsavoury characters”, and “we need to make certain that we have not tied the hands, if you will, of our intelligence communities”.²⁹ The following day, 17 September 2001, President Bush signed a “memorandum of notification” (MON) authorizing activities for the CIA.³⁰ The MON remains classified to this day. One of its sections is reportedly headed “Heavily Subsidize Arab Liaison Services”: the CIA would “buy” certain foreign intelligence services, which would act as surrogates for the USA.³¹

Sanad al Kazimi and Sharqawi Al-Hajj are two of at least 24 detainees still held at Guantánamo who were held in secret CIA custody at “black sites” located in other countries prior to being transferred to the base. The identities of these countries remain classified, but are believed to include Afghanistan, Lithuania, Morocco, Poland, Romania, and Thailand. Amnesty International has been involved in European Court of Human Rights cases that have found the governments of Poland and Lithuania liable for hosting CIA black sites.³² The CIA poured “millions of dollars in cash payments to foreign government officials” to encourage them to host secret facilities or to increase support for existing sites.³³ The CIA was paying governments to host crimes under international law.

1.1 POLITICAL CHOICES, NOT LEGAL NECESSITY

“The government acknowledges that it intentionally delayed the defendant’s prosecution because it concluded that he had valuable threat information that could be acquired only by placing him into the CIA Program and that it then delayed it further by the military commission prosecution”

US District Court Judge, July 2010³⁴

The CIA’s enforced disappearances programme was the result of “a choice that the United States made to hold these persons secretly.”³⁵ In the case of the only detainee so far transferred from Guantánamo to the USA for trial (five years after he was taken into custody), the US government acknowledged that there “was a deliberate decision to further intelligence-gathering efforts” by putting him into the CIA programme at the “expense of delaying the criminal prosecution”.³⁶ The federal judge before whom he was eventually brought acknowledged that his treatment “might give rise to civil claims or even criminal charges”.³⁷

The USA’s decision to frame its response to the 9/11 attacks as a global “war on terrorism” was and remains a political *choice*, not a matter *dictated* by any rule of law. The Office of Legal Counsel (OLC) at the US

²⁹ NBC, Meet the Press with Tim Russert, 16 September 2001.

³⁰According to the chief CIA lawyer involved in drawing it up: “Multiple pages in length, it was the most comprehensive, most ambitious, most aggressive, and most risky Finding or MON I was ever involved in. One short paragraph authorized the capture and detention of Al Qaeda terrorists, another authorized taking lethal action against them. The language was simple and stark”. John Rizzo, *Company Man: Thirty years of controversy and crisis in the CIA*. Scribner (2014), page 174.

³¹ Bob Woodward, *Bush at War*, Pocket Books (2003), pages 76-77. A case in point was that of Binyam Mohamed, taken into custody in Pakistan in 2002, subjected to rendition to Morocco where he was held for 18 months, transferred to the CIA-operated secret “Dark Prison” in Afghanistan, before being transferred to Bagram and then to Guantánamo. Noting that the US government did not challenge his allegations of torture, which bore “several indicia of reliability”, a US judge wrote: “[E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans), there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States”. *Farhi Saeed bin Mohammed v. Obama*, Memorandum opinion, US District Court for DC, 19 November 2009. Binyam Mohammed was released from Guantánamo in 2009.

³² *Abu Zubaydah v Lithuania*, European Court of Human Rights, (Application no. 46454/11), 8 October 2018; and *Al Nashiri v. Poland* (Application no. 28761/11), 16 February 2015.

³³ Senate Select Committee on Intelligence (SSCI). Study of the Central Intelligence Agency’s Detention and Interrogation Program. Declassified Executive Summary and Findings and Conclusions. [Hereinafter SSCI Summary], pages 16-17.

³⁴ *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

³⁵ Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

³⁶ *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

³⁷ But took the position that “this is not the time or place to pass judgment on whether those techniques, in and of themselves, were appropriate or legal”. *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

Department of Justice advised that “determining whether the laws of war apply in this context is a political question for the President to determine in his role as Commander in Chief”, and the courts should defer.³⁸

A key memorandum signed by President Bush betrayed a view of the humane treatment of detainees as discretionary. There were detainees, he said, who were not legally entitled to humane treatment.³⁹ The USA’s decision to turn to detention conditions and interrogation techniques that violated the prohibition of torture and other cruel, inhuman or degrading treatment was a political choice.

The military commissions established for the prosecution of “alien enemy combatants” are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice.⁴⁰ Likewise, the decision to use Guantánamo as a location for detainees was a choice. The OLC, which is an office of the US Department of Justice that provides legal advice to the President and US Government, advised that the federal courts would be highly unlikely to consider habeas corpus petitions filed on behalf of “enemy aliens” held at Guantánamo.⁴¹ As a former head of the OLC put it, because the base was “technically not a part of US sovereign soil, it seemed like a good bet to minimize judicial scrutiny”.⁴² The detainee population peaked in 2003 at around 680 detainees. Over the years nearly 800 individuals have been held there. Forty remain.

1.2 KEEPING THE JUDICIARY AWAY

“During this period [early 2005], the US solicitor general expressed concern that if CIA detainees were transferred back to Guantánamo Bay, Cuba, they might be entitled to file a habeas petition and have access to an attorney”

Senate Select Committee on Intelligence⁴³

Beginning in September 2003, unknown to the outside world, the CIA began using Guantánamo as a “black site” to hold detainees in secret custody (in at least two facilities there) – at a time when things were looking good for the administration in terms of why they chose the base in the first place. In July 2002, the US District Court for the District of Columbia (DC), had agreed with the government that because the base was located on Cuban sovereign territory, the Court lacked jurisdiction to hear habeas corpus appeals from detainees held as “enemy combatants” there. In March 2003, the Court of Appeals for the DC Circuit affirmed. Meanwhile the fact that the base was being used as a CIA “black site” was not a secret confined to the CIA – officials of the Department of Justice, the National Security Council and the White House knew and were asked for advice about the secret detentions at Guantánamo. Even the Solicitor General, responsible for supervising and conducting government litigation in the US Supreme Court, was consulted in February 2004.⁴⁴

On 10 November 2003, the Supreme Court agreed to take the case, *Rasul v. Bush*, to decide the jurisdiction issue. By early January 2004, there were five detainees held in secret CIA custody at Guantánamo, being subjected to the crime of enforced disappearance, with neither the International Committee of the Red Cross (ICRC) nor (presumably) the judiciary informed of their whereabouts. In March 2004, the government filed its *Rasul* brief in the Court. It asserted that the “military is currently detaining about 650 aliens at Guantánamo”, making no mention of detainees in secret CIA custody there. They were removed from the base sometime

³⁸ Legality of the use of military commissions to try terrorists. Memorandum opinion for the Counsel to the President. Patrick Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 6 November 2001.

³⁹ “[O]ur values as a Nation...call for us to treat detainees humanely, including those who are not legally entitled to such treatment”. Humane Treatment of al Qaeda and Taliban detainees, 7 February 2002.

⁴⁰ See, George W. Bush, *Decision Points*, Virgin Books (2010), page 167. (“As I made my decision on Geneva protection [that no detainees would qualify as prisoners of war, and Article 3 Common to the Geneva Conventions would not apply either], I also decided to create a legal system to determine the guilt or innocence of detainees... On November 13, 2001, I signed an executive order establishing military tribunals to try captured terrorists”). Also, Donald Rumsfeld, *Known and Unknown*; a memoir. Sentinel (2011), page 588 (“the President announced that trials for terrorist detainees would be held by specially designed military commissions – not ordinary civilian courts and not military tribunals under the Uniform Code of Military Justice. Terrorists were enemies in wartime, no longer domestic criminals”).

⁴¹ Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General, and John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 28 December 2001. Among other locations discussed were Alcatraz Island; the US army facility at Fort Leavenworth, Kansas; US island military bases in the Pacific and Indian Oceans and a ship permanently stationed in the Arabian Sea. Donald Rumsfeld, *Known and unknown* (2011), page 566.

⁴² Jack Goldsmith (Assistant Attorney General, Office of Legal Counsel, US Department of Justice 2003-2004), *The Terror Presidency: Law and Judgment inside the Bush administration*, W.W. Norton (2007), page 108.

⁴³ SSCI Summary, page 151.

⁴⁴ SSCI Summary, page 128.

between 10 and 30 April 2004 and taken “to other CIA detention facilities”.⁴⁵ Oral arguments in *Rasul* were held in the Supreme Court on 20 April 2004. On 28 June, the Court ruled that the federal courts had jurisdiction under statutory law to consider habeas corpus petitions from the Guantánamo detainees.

After the *Rasul* decision, although the administration had moved the secret detainees out of the base, there was no shift in its failure to meet its international human rights obligations. Instead, it pursued a strategy to drain the ruling of any real meaning, effectively that it should be interpreted as mandating no more than a procedural right – the detainees could file habeas corpus petitions, but only to have them dismissed. Anything else would be an “unprecedented judicial intervention into the conduct of war operations”.⁴⁶ It improvised the deeply flawed Combatant Status Review Tribunal (CSRT), an executive body that would review the “enemy combatant” status of Guantánamo detainees (and hence whether they would remain in detention or not).⁴⁷

Hundreds of habeas corpus petitions filed for Guantánamo detainees following *Rasul* were effectively suspended as broader litigation continued. However, the petition of Yemeni national Salim Ahmed Hamdan challenging the lawfulness of the military commission scheme set to try him in Guantánamo led the District Court to rule that unless and until a competent tribunal determined that Hamdan was not entitled to prisoner of war (POW) status under the Third Geneva Convention, he could only be tried by a court martial. In 2005, the DC Court of Appeals reversed this ruling, deciding that Congress authorized the military commission process when it passed the AUMF (see below); that the Geneva Conventions did not confer any rights upon Hamdan that he could enforce in court, that Common Article 3 to the Geneva Conventions did not apply; and that the military commission could serve as a “competent tribunal” in which Hamdan could assert his POW claim.

1.3 CONGRESSIONAL FAILURE: DTA AND MCA

“The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror... When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test”

President George W. Bush, October 2006⁴⁸

In December 2005, a month after the US Supreme Court agreed to hear the *Hamdan* case, the Detainee Treatment Act (DTA) was signed into law, containing *habeas corpus* stripping provisions for detainees held in Guantánamo, and providing for narrow judicial review by the DC Court of Appeals of CSRT decisions that detainees were “properly detained” as “enemy combatants”.

In June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA did not apply to habeas corpus petitions pending at the time the legislation was enacted; that the military commissions established by presidential order were unlawful as they had not been authorized by Congress, and that Article 3 common to the four Geneva Conventions was applicable in this context, reversing President Bush’s 2002 decision.⁴⁹ Common Article 3 prohibits torture, cruel, humiliating and degrading treatment, as well as unfair trials.

This should have been a turning point, when the executive acknowledged the errors of its ways, and the legislature recognized that it must ensure the country met its human rights obligations. Neither happened. In September 2006, in response to *Hamdan*, President Bush acknowledged for the first time that, “in addition to the terrorists held at Guantánamo”, the CIA had been operating a secret detention programme outside the USA. He revealed that 14 detainees held in the programme for up to four and a half years had just been transferred to Guantánamo. He did not reveal that four of the 14 had been previously held in secret CIA custody at Guantánamo – one or more of them for up to a year – or make any reference to the crime of enforced disappearance to which all 14 had been subjected.⁵⁰ He said that “as soon as” Congress passed the Military Commissions Act (MCA), the detainees could “face justice” before military commissions.

The Supreme Court’s decision that Common Article 3 applied “to our war with Al Qaeda”, President Bush said, meant that “our military and intelligence personnel involved in capturing and questioning terrorists could now

⁴⁵ SSCI Summary, page 141.

⁴⁶ *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss. In US District Court for DC, 4 October 2004. See USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, <http://www.amnesty.org/en/library/info/AMR51/063/2005/en>, pages 44-51.

⁴⁷ See USA: Guantánamo and beyond, pages 44-51.

⁴⁸ Remarks on signing the Military Commissions Act of 2006, 17 October 2006.

⁴⁹ Humane treatment of al Qaeda and Taliban Detainees, President George W. Bush, 7 February 2002.

⁵⁰ Two were ‘Abd al-Nashiri and Ramzi bin al-Shibh. The other two may have been Abu Zubaydah and Khalid Shaikh Mohammad. These four are among the 40 detainees still held at the base today.

be at risk of prosecution under the War Crimes Act, simply for doing their jobs”. This, he said, was “unacceptable.”⁵¹ In order to allow the CIA programme to continue (and to shore up impunity), the MCA would amend the War Crimes Act to protect US personnel from prosecution for war crimes. The MCA would also remove the jurisdiction of the federal courts to consider habeas corpus petitions for those held as “enemy combatants” at Guantánamo.

From an international human rights perspective, passage of the MCA was a low point in the congressional record, furthering a lack of accountability for US human rights violations, undermining judicial scrutiny, authorizing unfair trials, and rubber-stamping enforced disappearances committed under presidential authority. In October 2006, President Bush signing the MCA into law while making it clear that the main reason he was doing so was to allow the CIA to continue its detention programme. The following month Nashwan al-Ramer Abdulrazzaq (Abd al Hadi al-Iraqi) was taken into CIA custody to begin what would become six months of enforced disappearance in the CIA programme before being transferred in late April 2007 to Guantánamo where he remains nearly 14 years later, facing trial by military commission.

In June 2008, in *Boumediene v. Bush*, the US Supreme Court found that Section 7 of the MCA had unconstitutionally suspended habeas corpus. More than six years after the Guantánamo detentions had begun, the Court found that the detainees had the constitutional right to a “prompt hearing” to challenge the lawfulness of their detention in federal court. The notion of “prompt”, however, like the concept of “justice”, has been drained of its normal meaning when it comes to Guantánamo (see also Sections 3 and 6).

A habeas corpus petition was first filed for Khalid Ahmed Qassim in 2004, more than two years after he first arrived at Guantánamo. Over 16 years later it is still unresolved. While it was pending before the District Court, Congress passed the DTA, purporting to remove federal court jurisdiction over Guantánamo habeas cases. After *Hamdan* thwarted that, Congress then passed the MCA, again with a jurisdiction-stripping provision. *Boumediene* ruled this to be an unconstitutional suspension of habeas corpus. Because the ruling left it to the District Court in the first instance to develop procedures and determine the scope of the detention authority, the parties agreed to stay Qassim’s habeas petition while the procedures for litigating the Guantánamo habeas cases were developed. “And so Qassim waited. And waited. For eight years, his case remained in limbo.”⁵² There was eventually a decision on his petition in 2018 in District Court, but in 2019 the Court of Appeals sent the case back to the District Court on the grounds that certain issues needed to be litigated there first or it would be “premature” for the appeal court to consider the constitutional question raised (see Section 3). At the end of 2020, more than 16 years after his petition was first filed in District Court, it was still there. Khalid Qassim was 24 years old when he was first taken into custody. He is now 43 and still in Guantánamo.

1.4 EXECUTIVE REVIEW: FROM CSRT TO GRTF TO PRB

“[T]hat two of the Petitioners were previously approved for transfer does not render their continued detention unnecessary or unconstitutionally arbitrary”

Trump administration, February 2018⁵³

Even detainees who have had the prospect of release from Guantánamo dangled in front of them have continued to face indefinite detention. The Obama administration came to office in January 2009, with a policy to see the detention facility closed by 22 January 2010 at the latest. President Obama established the Guantánamo Review Task Force (GRTF) in January 2009 to determine the “appropriate disposition” of the detainees who were still in the facility. Having missed its closure deadline, and with the detentions becoming mired in domestic politics, the administration set up the Periodic Review Board (PRB) in 2011.⁵⁴ Unlike the CSRT, the PRB would initially be operated under an executive branch with a policy preference to run the detention numbers down.

The operation of a discretionary administrative review system, unlike an independent judiciary, can be moulded to the policy preferences of whichever executive is in office. On 30 January 2018, President Trump revoked his predecessor’s executive order of 22 January 2009 ordering closure of the facility and issued a new order making it clear that detention operations there would continue. The Trump order nevertheless kept the PRB system. In contrast to multiple transfers carried out under President Obama, no detainee had a favourable

⁵¹ Remarks on the War on Terror, 6 September 2006.

⁵² *Qassim v. Trump*, US Court of Appeals for the DC Circuit, 21 June 2019.

⁵³ *Al Bihani et al v. Trump et al*, Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus, 16 February 2018.

⁵⁴ The standard for “detention authorized by the Congress under the AUMF” is that “it is necessary to protect against a significant threat to the security of the United States”, Executive Order 13567, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, 7 March 2011.

decision from the PRB during the Trump presidency until nearly four years into it,⁵⁵ and no uncharged detainee was released, including those already approved for transfer.⁵⁶ Moreover, the judiciary has pointed to the PRB process when denying habeas corpus relief to detainees.⁵⁷ A Court of Appeals judge has even pointed to the establishment of the PRB as supporting his long and strongly projected – and now Court-endorsed – position that the Due Process Clause of the Fifth Amendment does not apply to the Guantánamo detainees (See Section 3.1).⁵⁸

By the end of the Obama presidency in January 2017, there were still three detainees held at Guantánamo whom the GRTF had by January 2010 approved for transfer out of the base, and two others who in 2016 had been approved by the PRB for transfer.⁵⁹ All five were still in Guantánamo in December 2020. One of the GRTF-approved transfer decisions was for Tunisian national Ridah Bin Saleh al Yazidi, who had been in Guantánamo since the first day of its operations, 11 January 2002. The second was for Muieen Adeen al Sattar, an “ethnic Rohingya Burmese who claims Pakistani citizenship” who was born in Dubai.⁶⁰ He has been in Guantánamo since 9 February 2002.

The third detainee with a favourable GRTF decision in January 2010 who was still in Guantánamo in December 2020 was Toffiq Nasir Awad al Bihani. This Yemeni national had been arrested by Iranian police in Zahedan, Iran, in late 2001 or early 2002, for “being in the country illegally”, apparently after entering from Pakistan. He was held in Iranian custody in various facilities until mid-March 2002, when he was flown to Afghanistan.⁶¹ He was transferred to Guantánamo on 6 February 2003 after nearly two months in secret CIA custody in Afghanistan in late 2002.⁶² He was held in a CIA facility where detainee operations began in September 2002, and where:

“detainees were kept in total darkness. The guards monitored detainees using headlamps and loud music was played constantly in the facility. While in their cells, detainees were shackled to the wall and given buckets for human waste. Four of the twenty cells at the facility included a bar across the top of the cell. Later reports describe detainees being shackled to the bar with their hands above their heads, forcing them to stand, and therefore not allowing the detainees to sleep”.⁶³

The chief of interrogations there described the facility as a “dungeon.” Another senior CIA officer said that the facility itself constituted an “enhanced interrogation technique.” At times, the detainees “were walked around naked or were shackled with their hands above their heads for extended periods of time.” Some detainees were subjected to what was described as a “rough takedown,” whereby about “five CIA officers would scream

⁵⁵ On 29 October 2020, the PRB determined that “continued law of war detention is no longer necessary” for Yemeni national Said Salih Said Nashir.

⁵⁶ Ahmed al Darbi was the only detainee who left the base during the Trump term. He had pled guilty in 2014. The US and Saudi governments had agreed to support his transfer if he complied with the plea deal. Sentencing was delayed for three and a half years while he cooperated with the authorities. He was transferred to Saudi Arabia in early March 2018.

⁵⁷ *Ali v. Trump*, US Court of Appeals for the DC Circuit, 15 May 2020 (“Ali has little ground to stand on in claiming that time has dissipated the threat he poses”. The PRB had “reviewed Ali’s detention no less than eight times... And each time the Periodic Review Board has recommended continued detention because of the threat his release would pose”).

⁵⁸ *Ibid.*, Senior Circuit Judge Randolph concurring in the judgment (“The executive branch has, since at least 2009, articulated the procedures to be used for the review and disposition of Guantánamo detainees. These Executive Orders appear to recognize that the Fifth Amendment does not apply to the non-resident aliens held at the naval station. See, e.g., Exec. Order 13567, 76 Fed. Reg. 13277 (establishing, “as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases”) (emphasis added)).

⁵⁹ The two who had been cleared for transfer by the PRB in 2016 but were still in Guantánamo in December 2020 were Moroccan national Abdul Latif Nasir and Algerian national Sufiyan Barhoumi who were brought to Guantánamo in May and June 2002 respectively. In the case of the former, the Trump administration said that the Moroccan authorities “responded affirmatively” on 28 December 2016 to the USA’s request for the necessary security assurances for any transfer. Because this was less than 30 days before Secretary Carter would leave office at the end of the Trump administration, he did not make a decision (pursuant to statutory requirements under the NDAA), and “elected to leave that decision to his successor. To date, no decision has been made as to whether to proceed with this transfer”. That was nearly three years ago. *Al Bihani et al v. Trump et al*, Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus, 16 February 2018.

⁶⁰ JTF-GTMO Detainee Assessment, 10 November 2008.

⁶¹ Details of arrest and transfer taken from *Al Bihani v. Obama*, Memorandum Opinion, US District Court for DC, 7 October 2010 and JTF-GTMO Detainee Assessment, 15 February 2008.

⁶² The JTF-GTMO Detainee Assessment asserts that Toffiq al Bihani “remained in Afghan custody until he was transferred to US custody” at Bagram air base in “approximately mid-December 2002”. However, according to the SSCI Summary, he was in custody at a CIA run facility (dubbed “Cobalt” in the SSCI summary) for the two months prior to his transfer to Bagram.

⁶³ SSCI Summary, page 49.

at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched.”⁶⁴

There is almost no detail in the SSCI Summary about Toffiq al Bihani’s treatment by the CIA, apart from identifying him as having been in CIA custody for between 50 and 59 days (the precise figure is redacted), and a footnote relating that he was subjected to 72 hours of sleep deprivation between his arrival at the secret facility and his interrogation on a redacted date in October 2002. Any further detail that might relate to him in the summary has been redacted, and the main report, Volume III of which contains further details of his and other detainees’ treatment, remains classified.

In the report of its decisions on the “final disposition” of the detainees, dated 22 January 2010, the GRTF determined that “at this time, given the security situation in Yemen” Toffiq al Bihani – who had already by then been in US custody for eight years – should be put in “conditional detention” under the AUMF. It said that “before the closure of Guantánamo” – which President Obama had said should be by 22 January 2010 at the latest – Toffiq al Bihani “may be transferred if the security situation in Yemen improves, [or] an appropriate rehabilitation program or third country resettlement option becomes available”.

In September 2010, the District Court upheld the lawfulness of Toffiq al Bihani’s detention under the AUMF. This was eight months *after* the GRTF had made its “final disposition” on the case. Despite that determination, the Obama administration had continued, and it and the Trump administration would continue, to oppose claims challenging the detention in federal court.

In January 2018, shortly before President Trump signed Executive Order 13823 overturning President Obama’s order to close the Guantánamo facility and replacing it with a policy to keep the facility open and ready for new detainees, lawyers for Toffiq al-Bihani and 10 other detainees, including some cleared for transfer, brought a new challenge to the lawfulness of their detention, seeking their release. The 11 “have all been detained at Guantánamo without charge or trial, many of them for nearly 15 years or more... Many are suffering the devastating psychological and physiological consequences of indefinite detention in a remote prison camp where they have endured conditions devised to break human beings, and where the aura of forever hangs heavier than ever”.⁶⁵

In February 2018, the Trump administration responded that the detainees “are not entitled to release simply because the conflict for which they were detained – the non-international armed conflict between the United States and its coalition partners against al Qaeda, the Taliban, and associated forces – has been lengthy.... That conflict has not resulted in detention of enemy combatants that is unconstitutionally indefinite; rather, [their] detention is subject to the cessation of active hostilities”.⁶⁶ It noted that Toffiq al Bihani had been designated by the GRTF for “conditional detention”, a designation which, it said, “subordinated any future transfer... to those of detainees who were designated eligible for transfer”. It added that PRB review for him was “not applicable”. The administration said that Toffiq al Bihani’s transfer, as with any transfer, would have to be approved by the Secretary of Defense. It stated that in January 2017, the Secretary of Defense in the outgoing Obama administration, Ash Carter, had decided that Toffiq al Bihani “should not be transferred based on a variety of substantive concerns relevant to [al Bihani’s] circumstances, including factors not related to [al Bihani] himself.”⁶⁷

The detention of detainees like Toffiq al Bihani, previously approved for transfer, “does not render their continued detention unnecessary or unconstitutionally arbitrary”, according to the Trump administration.⁶⁸ A designation for transfer “does not render continued detention unlawful”, it continued, pointing to what it characterized as a “disclaimer” by the GRTF on its determinations, namely that approval for transfer did not mean that the detainee posed “no threat”, but only that any threat could be mitigated by “feasible and appropriate security measures”. Toffiq al Bihani “remains eligible for transfer”, it said.⁶⁹ In August 2018, lawyers for the detainees argued that:

“the starkest evidence of the arbitrariness of Petitioners’ indefinite detention is the ongoing detention of Petitioners Toffiq al-Bihani and Abdul Latif Nasser [see footnote 52], among other cleared detainees who remain at Guantánamo, and the apparent lack of any steps over the past year and a half to effectuate the government’s own decision recommending their transfer, not to mention the dismantling of government offices [whose job was] to facilitate detainee transfers. *Al-Awi* [see Section

⁶⁴ SSCI Summary, page 4.

⁶⁵ *Al Bihani v. Trump*, Motion for order granting writ of habeas corpus. In the US District Court for DC, 18 January 2018.

⁶⁶ *Al Bihani v. Trump*, Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus, 16 February 2018.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

2 above] does not speak to the question whether the indefinite detention of these cleared Petitioners in particular serves a legitimate purpose under the AUMF [see Section 2.5], when the government has effectively conceded that there is no reason to continue to detain them”.⁷⁰

Another two and a half years have passed since then and Toffiq al-Bihani remains in Guantánamo, nearly 18 years after he was first taken there.

1.5 AUMF – WAR POWER WITHOUT TEMPORAL OR GEOGRAPHICAL LIMIT

“We are of course aware that this is a long war with no end in sight... But the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities”

US Court of Appeals, December 2013⁷¹

Since 2001, the DC Court of Appeals noted in 2020, “each President has relied on the AUMF...to detain captured terrorists at Guantánamo Bay”.⁷² The AUMF – Authorization for Use of Military Force – is a broadly-worded resolution passed by Congress on 14 September 2001, authorizing the President to “use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001”. The AUMF was hastily passed, with little substantive debate and no reference to detention, open to dangerously expansive interpretation, and over the years has been exploited to justify policies which violate international law.⁷³

When the US Supreme Court issued its 2008 *Boumediene* ruling that the Guantánamo detainees could challenge the lawfulness of their detention, it did not define the scope of the government’s detention authority under the AUMF or the procedures for habeas challenges. After judges on the District Court in DC adopted varying approaches on this question, the US Court of Appeals for the DC Circuit responded by attempting to “narrow the legal uncertainty that clouds military detention”.⁷⁴ Among other things, it ruled that any notion that “the war powers granted by the AUMF and other statutes are limited by the international laws of war” is “mistaken”. Moreover, “the international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for US courts”.⁷⁵

In late 2011, Congress affirmed the detention authority it had supposedly authorized a decade earlier. The National Defense Authorization Act (NDAA) for Fiscal Year 2012 stated that “the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority to detain individuals who were a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States” and that this authority included “detention under the law of war without trial until the end of hostilities authorized by the [AUMF]”.⁷⁶ It was a case of Congress returning to the hole it had dug on 14 September 2001, but instead of filling it in with human rights principles, it merely reinforced the sides of the pit into which detainees has been thrown. Judicial deference has let the problem fester.

President Obama promised to work with Congress on the AUMF “to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.” The AUMF should ultimately be repealed, he said, because, while efforts against terrorism must continue, “this war, like all wars, must end”.⁷⁷ Nearly eight years on, the situation remains the same. In a ruling in 2020, the Court of Appeals found that:

“The AUMF and the 2012 NDAA authorize the detention of persons who are ‘part of’ or ‘substantially supported’ Al Qaeda, the Taliban, or associated forces. In recognition of the global and diffuse nature of the conflict, this definition covers not only those who are part of covered terrorist organizations or

⁷⁰ *Al Bihani v. Trump*, Petitioners’ response to notice of supplemental authority, In the US District Court for DC, 13 August 2018.

⁷¹ *Ali v. Obama*, US Court of Appeals for the DC Circuit, 3 December 2013.

⁷² *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

⁷³ The AUMF was passed by 516 votes to 1 after little more than a series of patriotic statements and religious references by legislators, still absorbing the reality of the attacks three days earlier. The one legislator who voted against the AUMF, Representative Barbara Lee has continued to oppose it. See, 15 years of endless war – No end in sight, Congresswoman Barbara Lee, 14 September 2016 https://lee.house.gov/news/press-releases/15-years-of-endless-war_no-end-in-sight. Amnesty International first called for revocation of the AUMF in 2006.

⁷⁴ *Al-Bihani v. Obama*, US Court of Appeals for the DC Circuit, 5 January 2010.

⁷⁵ *Al-Bihani v. Obama*, US Court of Appeals for the DC Circuit, 5 January 2010.

⁷⁶ National Defense Authorization Act (NDAA) for Fiscal Year 2012.

⁷⁷ Remarks by the President at the National Defense University, 23 May 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

directly aid hostilities, but also those who substantially support the organizations by facilitating the logistics and planning that make their activities possible.”⁷⁸

The AUMF has neither geographic nor temporal limits. In this regard in 2019, a federal judge wrote:

“The AUMF is not geographically limited. The text of the AUMF does not impose any geographic limitation on the use of force... This lack of restrictive language implies that the AUMF authorizes the use of force wherever individuals and groups covered by the AUMF may be found... The armed conflict involving the US and al Qaeda, the Taliban, and associated forces is not limited to Afghanistan.”⁷⁹

This judge suggested that “the government’s detention authority is not indefinite”, because it only extends to the “end of hostilities”, reasoning which seems to ignore both the dictionary meaning of indefinite and what indefinite detention is to someone being subjected to it.⁸⁰ Upholding the District Court’s ruling, the Court of Appeals stamped its authority on the temporal question:

“[T]he AUMF and the 2012 NDAA impose no time limit on the President’s authority to detain enemy combatants. The government maintains that the War on Terror is an ongoing conflict involving combat operations by the United States and its allies abroad. Courts lack the authority or the competence to decide when hostilities have come to an end. The ‘termination’ of hostilities is ‘a political act’. So long as the record establishes the United States military is involved in combat against Al Qaeda, the Taliban, or associated forces, we have no warrant to second guess fundamental war and peace decisions by the political branches.”⁸¹

In communications with the UN Human Rights Committee, which has called for an end to the indefinite detentions without charge at Guantánamo, the USA rejected the Committee’s position that “prosecution or immediate release of detainees is required.” It reiterated that: “the United States continues to base its domestic legal authority to detain the individuals held at Guantánamo Bay on the 2001 AUMF, as informed by the laws of war.”⁸²

Judicial deference to the war powers of the political branches leaves a troubling gap in independent scrutiny. Passing references to torture or other ill-treatment have formed a kind of inconsequential backdrop to the litigation. A decision in the case of Saifullah Paracha in January 2020 is a case in point. The US government, the District Court opinion states, “first learned about Mr Paracha’s alleged support to Al-Qaeda from statements extracted from other detainees by torture”.⁸³ These detainees had been subjected to enforced disappearance and torture in the CIA secret detention programme and remain at Guantánamo today, where they are among those facing the death penalty.

Saifullah Paracha’s lawyers argued to the District Court that his continued detention was excessive in relation to any legitimate military necessity. This Pakistan national was seized by CIA agents in Bangkok international airport in Thailand in July 2003. He was transferred to Guantánamo on 19 September 2004. On 23 January 2020, the District Court upheld his detention. The judge noted:

“Congress has granted the President expansive legal authority to detain individuals associated with the Taliban and Al-Qaeda, even those who have not directly participated in hostilities against the United States... [The] United States Court of Appeals for the District of Columbia Circuit has held that the government bears a low burden of proof to establish its detention authority. Petitioner’s objections to the prevailing standards for detention authority and the burden of proof are noted and preserved for appeal. As the law stands, however, the Court concludes that respondents possess the legal authority to detain Mr Paracha because they have established by a preponderance of the evidence that he provided substantial support to the Taliban and Al-Qaeda”.⁸⁴

Saifullah Paracha has not been charged in the 17 years he has been in US custody. He is now 73 years old.

⁷⁸ *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

⁷⁹ *Al Hela v. Trump*, US District Court for DC, 28 January 2019.

⁸⁰ Indefinite: “Without fixed or exact limits or clearly marked outlines; uncertain; vague, imprecise”. Chambers 21st Century Dictionary, Revised Edition 1999. “Not knowing when they might depart Guantánamo (for home or elsewhere) has almost certainly increased tension and anxiety with the detainee population”. US Department of Defense, Review of Department compliance with President’s Executive Order on Detainee Conditions of Confinement (2009).

⁸¹ *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

⁸² UN Doc. CCPR/C/USA/CO/4/Add.1, 28 November 2017. Concluding observations on the fourth periodic report of the United States of America, addendum. Information received from the United States of America on follow-up to the concluding observations, para. 27.

⁸³ *Paracha v. Trump*, Memorandum opinion, US District Court for DC, 23 January 2020.

⁸⁴ *Paracha v. Trump*, Memorandum opinion, US District Court for DC, 23 January 2020.

2. THE COURT OF APPEALS AND GUANTÁNAMO

“Six years [since *Boumediene*] have become sixteen, and the prospect of relief remains largely illusory... [W]hen it comes to Guantánamo, this court has reversed each and every recent grant of habeas relief it has considered on the merits”

US Circuit Judge, August 2018⁸⁵

Between 2002 and 2008, the Court of Appeals for the DC Circuit was wrong on three key decisions relating to the Guantánamo detainees and their access to the courts and to constitutional protections, according to the US Supreme Court as it overturned each ruling.⁸⁶ The positions of the Court of Appeals had been as follows:

- 2003, *Rasul v. Bush*: “If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty”.
- 2005, *Hamdan v. Rumsfeld*: Congress authorized the military commission process set up under presidential order, by passing the AUMF; the Geneva Conventions did not confer any rights upon the charged detainee that he could enforce in court, and Common Article 3 did not apply.
- 2007, *Boumediene v. Bush*. The MCA constitutionally deprived the courts of jurisdiction to consider habeas corpus petitions from Guantánamo detainees. To accept the contrary “would be to defy the will of Congress”. The repeal “applied to ‘all cases, without exception’ relating to any aspect of detention. It is almost as if the proponents of those words were slamming their fists on the table shouting, ‘When we say ‘all’, we mean all – **without exception!**” [emphasis in original].

The US Supreme Court’s *Boumediene* ruling – that the MCA was an unconstitutional suspension of habeas corpus and the Guantánamo detainees could challenge the legality of their detentions – left it to the District Court in the first instance to resolve the various questions and procedures regarding this legality, meaning the Court of Appeals for the DC Circuit would be the final arbiter for the detainees in the absence of Supreme Court intervention. The Supreme Court has not intervened since 2008.

In July 2010, a three-judge panel of the Court of Appeals issued an opinion (authored by the judge who had written its 2003 *Rasul*, 2005 *Hamdan* and 2007 *Boumediene* rulings) that appeared to shift the habeas

⁸⁵ *Qassim v. Trump*, US Court of Appeals for the DC Circuit, 14 August 2018, Judge Tatel concurring.

⁸⁶ The reversals were *Rasul*: 6-3; *Hamdan*: 5-3 (Chief Justice Roberts did not take part, as he had been on the panel of the DC Circuit in its 2005 ruling); *Boumediene*: 5-4.

landscape. Mohammed al-Adahi had prevailed in District Court on his challenge. The District Court Judge had denied the government's request to "presume that the facts contained in the Government's exhibits are accurate".⁸⁷ It was clear, she wrote, that much of this material was "hotly contested for a host of different reasons ranging from the fact that it contains second-level hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said".⁸⁸ She noted that the government was in effect arguing for application of the "mosaic theory" for the evidence, applying what is a "mode of analysis in the intelligence community", a very different approach than applied in court.⁸⁹ In August 2009, she ruled that the government had not met its burden, and that the detention was unlawful.⁹⁰

The Obama administration appealed, and a year later, the Court of Appeals overturned the habeas decision:

"Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (e.g., whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist. This is precisely how the district court proceeded in this case... Having tossed aside the government's evidence, one piece at a time, the court came to the manifestly incorrect – indeed startling – evidence that 'there is no reliable evidence in the record that [al-Adahi] was a member of al-Qaida and/or the Taliban'. When the evidence is properly considered, it becomes clear that Al-Adahi was – at the very least – more likely than not a part of al-Qaida. And that is all the government had to show in order to meet the preponderance [of the evidence] standard".⁹¹

A study conducted by Seton Hall School of Law Center for Policy and Research concluded in 2012 that the *al-Adahi* decision marked a turning point. Guantánamo detainees prevailed in 59 per cent of the 34 habeas decisions in District Court before *al-Adahi* but lost 92 per cent of the 12 cases after it. The study went further:

"The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government's factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations. The effect of *Al-Adahi* on the habeas corpus litigation promised in *Boumediene* is clear. After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations."⁹²

Three months before the *al-Adahi* decision, a District Court judge ruled that Uthman Abdul Rahim Mohammed Uthman's detention was unlawful. Among other issues, the judge found that the government was relying for information against him upon statements made by two detainees after they had been subjected to prolonged torture. The detailed evidence of torture of the two men – including in CIA secret custody – was unrebutted by the government, and the judge said he could not ignore it. The Obama administration appealed. It was successful. In 2011, the Court of Appeals overturned the ruling, citing *inter alia al-Adahi*, but without reference to the torture. The judge who authored the panel opinion (who had joined the Court in May 2006 after five years as a lawyer in the White House and had been on the three-judge panel in *al-Adahi* in 2010) ridiculed the claim that Mohammed Uthman was not associated with terrorism – perhaps, he suggested, Mohammed Uthman was "a kind of Forrest Gump in the war against al Qaeda", who was "innocently going about his business and just happened to show up in a variety of extraordinary places", but the "damning circumstantial evidence" suggested he was part of al Qaeda. In 2018 that same judge was nominated and appointed to the US Supreme Court amidst concerns about his prior involvement as a White House lawyer in the Bush administration's post-9/11 detention policies.⁹³

⁸⁷ *Al-Adahi v. Obama*, Memorandum opinion, US District Court for DC, 17 August 2009.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* ("Even using the Government's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together").

⁹⁰ *Al-Adahi v. Obama*, Memorandum opinion, US District Court for DC, 17 August 2009. Mohammed al-Adahi was eventually released from Guantánamo as one of 15 transferred to UAE in August 2016.

⁹¹ *Al-Adahi v. Obama*, US Court of Appeals for the DC Circuit, 13 July 2010. See also *Hussain v. Obama*, 18 June 2013, Judge Edwards, concurring in the judgment ("The majority invokes the 'walks like a duck' test to conclude that the evidence 'at least invites – and may very well compel – the conclusion that [Hussain] was loyal to [enemy] forces.' This is not a proper application of the preponderance of the evidence test... And it is quite invidious because, arguably, any young, Muslim man traveling or temporarily residing in areas in which terrorists are known to operate would pass the 'duck test'.")

⁹² No hearing habeas: DC Circuit restricts meaningful review. Seton Hall School of Law Center for Policy and Research, May 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554.

⁹³ See Letter to Charles Grassley, Chairman of the Senate Committee on the Judiciary, from Senators Feinstein, Leahy and Durbin, 16 August 2018 ("[A]t least two documents that are publicly available... suggest that he was involved in issues related to torture and rendition after 9/11"). From 2001 to 2003, Brett Kavanaugh was Associate Counsel and then Senior

2.1 STRANGLING DUE PROCESS PROTECTION

“[N]either Congress nor the Supreme Court have suggested we should embellish further constitutional limits on the detention of terrorists abroad...[T]he Due Process Clause cannot be invoked by Guantánamo detainees, whether those due process rights are labelled ‘substantive’ or ‘procedural’”

US Court of Appeals, August 2020⁹⁴

In 2018 a new challenge was filed for Mohammed Uthman in District Court, arguing that his now 16-year detention at Guantánamo was excessive, punitive, and violated due process. In August 2020, the District Court rejected the challenge.⁹⁵ As Mohammed Uthman’s petition was pending, noted the judge, “the DC Circuit appeared to breathe some life into his due process claims”.⁹⁶ This referred to a decision on Khalid Ahmed Qassim, in whose case in 2019, a three-judge panel of the Court of Appeals returned to the issue of the constitutional rights of the Guantánamo detainees. After some back and forth within the DC Circuit, in 2020 another panel would seem to strangle the life out of future due process claims.

Lawyers for Khalid Qassim argued that the government’s use of undisclosed classified information as a basis for his detention violated due process. The District Court ruled that as a foreign national held at Guantánamo, Khalid Qassim had no rights under the Fifth Amendment’s Due Process Clause. A three-judge panel of the Court of Appeals ruled that the District Court had been wrong to be so categorical but added that its own resolution of this issue would be premature. It remanded the case to the District Court. There was a proposal for rehearing of the panel’s remand decision by the full court (*en banc*), but this was denied. Two judges dissented in strong terms from this denial: Supreme Court and Circuit precedent was clear, they said, the Due Process Clause did not apply to foreign nationals held outside the US sovereign territory.

The issue was raised again in the case of Abdul Razak Ali, an Algerian national taken into custody by Pakistani authorities during raids on guesthouses in Faisalabad on 28 March 2002 and transferred to Guantánamo on 19 June 2002. One of the 20 or so individuals taken into custody in the raids in Faisalabad on 28 March 2002 was Abu Zubaydah, who would be subjected to over four years of enforced disappearance in the CIA detention programme (see Section 6). Upholding Abdul Ali’s detention in 2011, the District Court concluded that it was “more likely than not” that he was a member of “Abu Zubaydah’s force” and could therefore be detained under the AUMF.⁹⁷ The Court of Appeals upheld this on 3 December 2013. In a concurring statement, a Senior Circuit Judge wrote:

“Nothing in the record indicates that Ali ‘planned, authorized, committed, or aided the terrorist attacks’ of September 11, 2001, or that he ‘harbored [terrorist] organizations or persons,’ or that he was ‘part of or substantially supported al-Qaeda, the Taliban, or associated forces,’ or that he ‘committed a belligerent act’ against the United States. Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF or the NDAA.

Ali’s principal sin is that he lived in a ‘guest house’ for ‘about 18 days.’ The majority attempts to overcome this disjunction between Ali’s alleged actions and the conduct prohibited by the AUMF and the NDAA by pointing to Ali’s ‘personal associations’ with Abu Zubaydah during Ali’s very brief stay in the guest house. ... [T]he ‘personal associations’ test is well beyond what the AUMF and the NDAA prescribe...

Our Nation’s ‘war on terror’ started twelve years ago, and it is likely to continue throughout Ali’s natural life. Thus, Ali may well remain in prison for the rest of his life. It seems bizarre, to say the least, that someone like Ali, who has never been charged with or found guilty of a criminal act and who has never ‘planned, authorized, committed, or aided [any] terrorist attacks,’ is now marked for a life sentence... The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.”⁹⁸

In January 2018, lawyers for Abdul Razak Ali filed a new petition, arguing that by now the *length of his detention* rendered it unlawful under the AUMF as well as violating the due process clause under the Fifth Amendment. The District Court rejected Ali’s petition. On the challenge under the Due Process Clause – that

Associate Counsel to President Bush. From 2003 to 2006, he was Assistant to the President and Staff Secretary for President Bush.

⁹⁴ *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

⁹⁵ Mohammed Uthman remains in Guantánamo. Aged 21 when transported to the base, he is now 40.

⁹⁶ *Uthman v. Trump*, Memorandum opinion, US District Court for DC, 28 August 2020.

⁹⁷ *Ali v. Obama*, Classified memorandum opinion, US District Court for DC, 28 February 2011.

⁹⁸ *Ali v. Obama*, US Court of Appeals for the DC Circuit, 3 December 2013, Judge Edwards, concurring in the judgment.

it categorically applies in full to Guantánamo detainees, and that his ongoing detention violates its procedural and substantive aspects – the judge said that the Court of Appeals had already ruled that the Clause “does not apply in Guantánamo”.⁹⁹

In 2020, a three-judge panel of the Court of Appeals stated that this categorical position was “misplaced”, and that in fact “Circuit precedent has not yet comprehensively resolved which constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions”.¹⁰⁰ The Senior Circuit Judge on the panel (who had authored the Court’s 2003 *Rasul*, 2005 *Hamdan* and 2007 *Boumediene* rulings, outlined above), took issue with the panel’s decision, stating that the due process question was not “open and unresolved”; rather, it was “well established that the protections of the Fifth Amendment’s Due Process Clause do not extend to aliens outside the territorial boundaries of the United States, including those held at Guantánamo Bay”.¹⁰¹

Three months later, a different three-judge panel – including the Senior Circuit Judge who had disagreed with the *Ali* majority – made a categorical finding on the Due Process Clause in relation to the Guantánamo detainees. The Clause, it said, “may not be invoked by aliens without property or presence in the sovereign territory of the United States”.¹⁰² So here we are back at the reason the Bush administration chose Guantánamo in the first place – it is technically based on Cuban sovereign territory so judicial review could be minimized. Yet the Supreme Court had written in the 2008 *Boumediene* opinion:

“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”¹⁰³

What was true on Day One of the Guantánamo detentions is true on Day 6,940 (11 January 2021), namely “the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.”¹⁰⁴ So, if the protections of the Due Process Clause apply to all “persons” within the USA, “citizens and noncitizens alike”,¹⁰⁵ surely the USA’s “*de facto* sovereignty” over the base means the detainees are protected by the Clause. Not so, said the Court of Appeals.

In the challenge brought before it, lawyers for Abdulsalam Al Hela separated his due process claim into two parts: a “substantive” challenge to his indefinite detention; and several “procedural” challenges to his habeas proceedings. The substantive component, they argued, prohibits indefinite detention without trial and that his continuing detention is excessive and thereby punitive. The Court dismissed this on the grounds that “longstanding precedent forecloses any argument that ‘substantive’ due process extends to Guantánamo Bay... Al Hela is an alien held outside the sovereign territory of the United States and therefore may not invoke the protections of the Due Process Clause to challenge his detention.”¹⁰⁶

On “procedural” due process, the lawyers argued that the district court had violated due process by crediting “anonymous, multi-layered hearsay in the intelligence reports offered by the government”.¹⁰⁷ The judge had deemed the evidence reliable after *ex parte*, *in camera* consideration of underlying sources and materials. In addition, Al Hela argued that the lower court had violated due process by denying him personal access to information being used against him. While his lawyer had received the government’s “factual return and supporting exhibits”, counsel could not discuss the information with his client under the protective order relating to classified information. The detainee received only a short summary of the material, depriving him of the ability to rebut the government’s case and undermining his lawyer’s ability to defend him.

⁹⁹ *Ali v. Trump*, District Court for DC, 10 August 2018.

¹⁰⁰ *Ali v. Trump*, US Court of Appeals for the DC Circuit, 15 May 2020. The Court upheld the detention of Abdul Razak Ali, an Algerian national who remains in Guantánamo today, more than 18 years after he was taken there.

¹⁰¹ *Ali v. Trump*, US Court of Appeals for the DC Circuit, 15 May 2020, Senior Circuit Judge Randolph concurring in judgment.

¹⁰² *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

¹⁰³ *Boumediene v. Bush*, US Supreme Court, 12 June 2008.

¹⁰⁴ *Boumediene v. Bush*, 12 June 2008. Also, “Guantánamo Bay is in every practical respect a United States territory... What matters is the unchallenged and indefinite control that the United States has long exercised over Guantánamo Bay”, (*Rasul v. Bush*, 2004, Justice Kennedy concurring in the judgment).

¹⁰⁵ *Mathews v. Diaz*, 426 U.S. 67 (1976).

¹⁰⁶ *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 28 August 2020.

¹⁰⁷ *Ibid.*

“Rather than embark on a journey to discover new judicial standards”, wrote the Court of Appeals, “we instead address the threshold question whether the ‘procedural’ component of the Due Process Clause applies to aliens detained abroad”¹⁰⁸. Whether labeled “substantive” or “procedural,” it concluded, the protections of the Clause “do not extend to aliens without property or presence in the sovereign territory of the United States”, adding:

“[J]udicial innovation in this sphere would have far reaching consequences for the government’s detention and national security policies in this and future wars. As the Supreme Court has explained, we must accord ‘proper deference ... to the political branches’ when assessing ‘detention to prevent acts of terrorism.’ Our court has carefully followed this command by declining to craft additional judicial standards to govern the War on Terror... Under longstanding precedents of this court and the Supreme Court, the Due Process Clause cannot be invoked by Guantánamo detainees, whether those due process rights are labeled ‘substantive’ or ‘procedural’... [A]s an alien detained outside the sovereign territory of the United States, [al Hela] may not invoke the protection of the Due Process Clause.”¹⁰⁹

This categorical position is particularly troubling given that “the vast majority of evidence introduced against Guantánamo detainees in these habeas cases consists of hearsay interrogation records and declarations, many of which are anonymously sourced. The Due Process Clause bars unreliable hearsay and requires that detainees be permitted to confront evidence where feasible.”¹¹⁰ Such is in keeping with the fair trial safeguards enshrined in international human rights law.¹¹¹ In the earlier *Ali* decision, the panel had specifically reserved judgment on whether detainees cleared for transfer out of the base – of whom there are currently five – can challenge the arbitrariness of their continuing detention under substantive due process.¹¹² If the *al Hela* decision is allowed to stand, their claims would shrivel under it.

Again, it is important to recall the human backstory as a court skips over it. Abdulsalam al Hela, the judges wrote as they began their ruling, “disappeared during a business trip to Egypt in 2002 under circumstances irrelevant to this appeal. US forces later obtained custody of Al Hela and have detained him at Guantánamo Bay since 2004.”¹¹³ With those two sentences, the panel glossed over the crimes under international law of torture and enforced disappearance committed against the detainee before his transfer to Guantánamo.

Abdulsalam al Hela was taken into custody by Egyptian authorities in Cairo in September 2002. About a week later he was handed over to US personnel at an airport in Egypt. There he was stripped naked, searched, garbed in overalls, blindfolded, handcuffed and shackled. He was bundled onto a small plane, hooded and gagged, and flown out of Egypt. He has described being held in US custody in four detention facilities in Afghanistan between September 2002 and September 2004. He later described three and a half months in the CIA’s “dark prison”, being regularly stripped naked, suspended from the ceiling for prolonged periods, handcuffed to the wall, subjection to loud “metallic rock music” 24 hours a day, and to constant darkness except for the use of strobe lights during interrogation. He said he was then taken to a more modern underground facility, followed by 14 months in an Afghan-controlled facility, where he was told he was being held at the behest of the USA, followed by a brief return to the underground facility, before being taken to US military detention in Bagram and, on 19 September 2004, to Guantánamo.¹¹⁴ He is still held there, without charge, more than 16 years later. Whatever detail on his treatment in secret custody the SSCI report into the CIA programme contains, remains classified. The only reference to him in its summary is confirmation that he was indeed held in the programme -- for between 590 and 599 days. Even the precise number within this range remains classified.¹¹⁵

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Al Hela v. Trump*, Brief of *Amicus Curiae*, The Center for Constitutional Rights in support of petition for rehearing *en banc*. In the US Court of Appeals for the DC Circuit, 27 October 2020, Citing *Morrissey v. Brewer*, US Supreme Court (1972). CCR currently represents six detainees still held at Guantánamo.

¹¹¹ See *inter alia* article 14 of the International Covenant on Civil and Political Rights to which the US is a party.

¹¹² *Ali v. Trump*, US Court of Appeals for the DC Circuit, 15 May 2020, note 4.

¹¹³ *Ibid.*

¹¹⁴ See USA: Who are the Guantánamo detainees? Case Sheet No. 15: Yemeni national: Abdulsalam al-Hela, 11 January 2006, <http://www.amnesty.org/en/library/info/AMR51/012/2006/en> This report also includes the following “Adulsalam al-Hela finds it difficult to talk about his time in Bagram. He told his lawyer that his ‘wounds are too many’ and that he ‘doesn’t want to reopen them’. He simply stated that the conditions were ‘very, very bad’.”

¹¹⁵ SSCI Summary, IX. Appendix 2. This timing would indicate that for around 100 days of his custody prior to being transferred to Guantánamo, the Committee considered that he was not in CIA custody, even if he was being held at the USA’s behest (in Bagram, he was presumably in US military custody).

3. A GLIMMER AT THE END OF THE TUNNEL FOR A TORTURE SURVIVOR

“Mr al-Qahtani’s early life was plagued with health and mental health issues, including a head injury due to a car accident as a child which caused severe behavioral dyscontrol and auditory hallucinations. He was diagnosed with schizophrenia, major depression, and a possible neurocognitive disorder due to the traumatic brain injury. Mr al-Qahtani’s mental health issues were evident to US government officials when he was first detained at Guantánamo Bay and have been exacerbated by the torture he initially suffered at the hands of the US government and the over 18 years he has spent in detention”

US District Court, August 2020¹¹⁶

Eight months after the Guantánamo detentions began, the assistant commander of the US Army Intelligence Center described the detention facility as “America’s Battle Lab” in the global “war on terror” and recommended the creation of an environment there that would be “conducive to extracting information by exploiting the detainees’ vulnerabilities”.¹¹⁷ Among the detainees targeted for this treatment was Mohammed

¹¹⁶ *Al-Qahtani v. Trump*, Memorandum Opinion and Order, US District Court for DC, 12 August 2020.

¹¹⁷ Colonel John Custer CJCS external review of Guantánamo Bay Intelligence Operations, cited in Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, US Senate, 20 November 2008, pages 42-3.

al-Qahtani. He was subjected to torture and other cruel, inhuman and degrading treatment in 2002 and 2003 under a “special interrogation plan”.¹¹⁸

It is now more than 12 years since it was put on the public record that Mohammed al-Qahtani was tortured. The official who spoke out was Susan Crawford, convening authority for the military commissions at Guantánamo. In May 2008, this former chief judge of the US Court of Appeals of the Armed Forces dismissed charges against Mohammed al-Qahtani, then facing a death penalty trial by military commission. She later explained: “We tortured Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case”.¹¹⁹ The officials who authorized or were otherwise involved in his torture – including the then Secretary of Defense – have not been brought to justice.¹²⁰

Mohammed al-Qahtani, a Saudi Arabian national, is still at Guantánamo nearly 19 years after he was brought there. In March 2020, a District Court judge granted a Motion to Compel Examination by a Mixed Medical Commission, filed by his lawyers in 2017. They had applied to the Department of Defense to convene such an evaluation for Mohammed al-Qahtani, but the authorities refused, so they turned to the courts.

The mixed medical commission is outlined in the publication Army Regulation 190-8 (AR 190-8), Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees (Section 3-12), and states

“The purpose of the Commission will be to determine cases eligible for repatriation. The Mixed Medical Commission will be composed of three members. Two of the members, appointed by the ICRC and approved by the parties to the conflict, will be from a neutral country. As far as possible, one of the neutral members will be a surgeon and the other a physician. The third member will be a medical officer of the US Army selected by HQDA [Headquarters of the Department of Army]. One of the members from the neutral country will act as chairman”.¹²¹

Mohammed al-Qahtani suffered from “a number of severe psychiatric disabilities” long before being taken into US custody, according to the independent medical expert who examined him in 2015 and 2017, interviewed his family, and reviewed records from his involuntary psychiatric hospitalization in Saudi Arabia in 2000.¹²² Prior to being taken into US custody, he had been diagnosed with schizophrenia, major depression, and possible neurocognitive disorder due to traumatic brain injury. In May 2000, he was hospitalized for an “acute psychotic break” while in Mecca, admitted to the men’s psychiatric unit and treated with antipsychotic and sedative medication.¹²³ The medical expert assessed the effect of Mohammed al-Qahtani’s pre-existing mental disabilities on his vulnerability in US custody, including during the period leading up to his interrogations in 2002 and 2003:

“Included among the conditions of confinement and interrogation to which Mr al-Qahtani was subjected were periods of solitary confinement, sleep deprivation, extreme temperature and noise exposure, stress positions including short-shackling, forced nudity, body cavity searches, sexual assault and humiliation, beatings, strangling, threats of rendition, and water-boarding. He was not allowed to use the toilet and was forced to urinate on himself repeatedly. Medical and mental health staff members were involved in his interrogations, for example, monitoring his vital signs, administering intravenous fluids, and influencing interrogation approach. This maltreatment took place in various locations, primarily when he was housed in the Brig.

Even in the absence of pre-existing psychiatric illness, exposure to severely cruel, degrading, humiliating, and inhumane treatment such as that experienced by Mr al-Qahtani is known to have profoundly disruptive and long-lasting effects on a person’s sense of identity, selfhood, dignity, perception of reality, mood, cognitive functioning, and physiology.

¹¹⁸ USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 19 May 2008, www.amnesty.org/en/library/info/AMR51/042/2008/en

¹¹⁹ Detainee tortured, says US official. Washington Post, 14 January 2009. See also *Al-Qahtani v. Trump*, Memorandum Opinion and Order, US District Court for DC, 12 August 2020 (“Susan Crawford, the then-convening authority of the Department of Defense Military Commissions, determined in 2009 that Mr al-Qahtani can never be tried by a military commission due to the torture he endured at the beginning of his detention”).

¹²⁰ Torture acknowledged, question of accountability remains, 14 January 2009, www.amnesty.org/en/library/info/AMR51/003/2009/en. Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 19 May 2008, www.amnesty.org/en/library/info/AMR51/042/2008/en; A case to answer: The torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 21 June 2006, www.amnesty.org/en/library/info/AMR51/093/2006/en

¹²¹ Army Regulation 190-8 is available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r190_8.pdf

¹²² Report of Emily A. Keram, MD, 5 June 2016.

¹²³ *Al-Qahtani v. Trump*, Motion to compel examination by a mixed medical commission, In the US District Court for DC, 8 August 2017.

Mr al-Qahtani's pre-existing psychotic, mood, and cognitive disorders made him particularly vulnerable to disruptions of his sense of self, place, and time due to the conditions of confinement and interrogation he experienced.¹²⁴

The expert concluded that as well as his pre-existing conditions, Mohammed al-Qahtani had developed post-traumatic stress disorder due to "the severely cruel, degrading, humiliating, and inhumane treatment he experienced during confinement while in US custody".¹²⁵ Among his symptoms were nightmares, fear, horror, shame, alienation, hypervigilance, and sleep disturbance. Appropriate treatment requires "a culturally-informed multi-disciplinary approach" and he "will likely require lifelong mental health care".¹²⁶ She said that in her opinion, he "cannot receive effective treatment for his current mental health conditions" as long as he remains at Guantánamo, not least because of his lack of trust due to "previous clinician involvement in interrogations".¹²⁷

The judge noted that the government did not contest the information about Mohammed al-Qahtani's torture at Guantánamo. The question before the Court was "whether Army Regulation 190-8 applies to Mr al-Qahtani, such that his physical and mental health require the United States to repatriate him immediately"¹²⁸.

The government had argued that the judge could not consider the motion because the MCA had deprived the court of jurisdiction to consider non-habeas claims of detainees at Guantánamo. She dismissed this, noting that the evaluation conducted by a mixed medical commission and the obligation to carry out its finding were not discretionary, placing it within the realm of habeas.¹²⁹ The judge wrote:

"A mixed medical commission relies on its professional expertise to decide facts concerning an applicant's health. Depending on those facts, release may be warranted and, if warranted, the applicant must be released. Habeas gives prisoners the ability to enforce just that type of nondiscretionary release mechanism".¹³⁰

The next question was, "is Mr al-Qahtani an 'Other Detainee' under Army Regulation 190-8?" The government argued that because he had been found to be an "enemy combatant", he could not be designated as an "Other Detainee". The judge disagreed, noting that "enemy combatant" is not defined in AR 190-8, or by the government in this case. As a person in US custody who has not been classified as an enemy prisoner of war, a retained person, or a civilian internee, the only other category under AR 190-8 is "other detainee".

The judge wrote that the purpose of the motion to compel examination is "so a record will exist to allow for meaningful [judicial] review of [the government's] failure to repatriate him".¹³¹ Because the Court lacked the "the necessary expertise" to evaluate the detainee's health to determine whether he qualifies for medical repatriation under AR 190-8, the government must conduct the necessary evaluation and provide the Court with the record to fully evaluate the detainee's habeas corpus petition. She granted the motion to compel examination by mixed medical commission.

The Trump administration sought a stay of the order pending appeal, but the entire appeal was dismissed by the Court of Appeals as premature. The administration sought to play the deference-to-the-executive-branch card. Staying the order would serve the public interest, it argued, by "allowing the Executive Branch, which is constitutionally vested with the authority to conduct foreign policy and military operations, such as detention of enemy combatants, to act without undue intrusion within its constitutional sphere of responsibility".¹³²

It was the lack of "intrusion" into Mohammed al-Qahtani's incommunicado detention – deliberate bypassing of judicial oversight – which facilitated his torture. It is long past time for the injustice to end.

¹²⁴ Report of Emily A. Keram, MD, 5 June 2016.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ "It is impossible for Mr al-Qahtani to form an effective doctor-patient relationship with clinician members of the Joint Medical Group (JMG). Mr al-Qahtani's chronic symptoms of PTSD are the result of his confinement and the torture he suffered during interrogations at Guantánamo. Detention and medical personnel were involved in his confinement and interrogations. It is not realistic to believe that Mr al-Qahtani would be able to benefit from treatment provided by clinicians whom he associates with the cause of his suffering." Supplemental Declaration of Emily A. Keram, MD, regarding Mohammed al-Qahtani, 12 July 2016.

¹²⁸ *Al-Qahtani v. Trump*, Memorandum opinion, US District Court for DC, 6 March 2020.

¹²⁹ Under AR 190-8, "The United States will carry out the decisions of the Mixed Medical Commission as soon as possible and within 3 months of the time after it receives due notice of the decisions".

¹³⁰ *Al-Qahtani v. Trump*, Memorandum opinion, US District Court for DC, 6 March 2020.

¹³¹ *Ibid.*

¹³² *Al-Qahtani v Trump*, Initial public redacted brief for respondents-appellants, In the US Court of Appeals for the DC Circuit, 28 September 2020.

4. MILITARY COMMISSIONS: ILLEGITIMATE AND DISCRIMINATORY

“[T]here are those who object to alleged terrorists, especially non-citizens, being afforded rights that are enjoyed by US citizens. Their anger at wanton terrorist attacks is understandable. Their conclusion, however, is unacceptable in a country that adheres to the rule of law”

US District Court Judge, July 2010¹³³

On 6 September 2006, asking Congress to ensure “speedy passage” of his administration’s draft Military Commissions Act so that detainees just transferred to Guantánamo from years of secret CIA custody could be prosecuted before military commissions, President Bush said:

“Five years after the mass murders of 9/ 11 it is time for the United States to begin to prosecute captured al Qaeda members for the serious crimes that many of them have committed against United States citizens and our allies abroad. As we provide terrorists the justice and due process that they denied their victims, we demonstrate that our Nation remains committed to the rule of law” .¹³⁴

Five years will soon be 20. The “justice” that President Bush said the families of those killed on 11 September 2001 “should have to wait no longer” for is nowhere to be seen,¹³⁵ and the notion of trial within a reasonable time at Guantánamo is holed below the waterline. The right under international law of an accused person to be tried without undue delay “is not only designed to avoid keeping persons too long in a state of uncertainty about their fate” but “also to serve the interests of justice” .¹³⁶ The uncertainty and injustice that infected the Guantánamo detention regime from the outset has riddled the system of prosecutions there too.

A fully functioning civilian judicial system, with the experience and procedures to deal with complex terrorism-related prosecutions, was available from day one. The government turned its back on that system, in favour of torture, enforced disappearance, and indefinite detentions. While a primary aim of locating a detention facility

¹³³ *Ghailani v. USA*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

¹³⁴ Message to the Congress transmitting draft legislation on military commissions, 6 September 2006.

¹³⁵ Remarks on the War on Terror, White House, 6 September 2006.

¹³⁶ UN Doc.: CCPR/C/GC/32, 23 August 2007, UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 35.

at Guantánamo was to avoid judicial scrutiny of the detentions there, linked to this would be the decision to prosecute selected detainees before military commissions – not independent and impartial courts. It was as if the UDHR and ensuing half century of international human rights law had never happened.

President Bush effectively went back in time to six years before the UDHR when he signed a military order on 13 November 2001 to authorize a system of military commission trials for non-US citizens in which “the principles of law and the rules of evidence generally recognized in the trial of criminal cases” in federal courts would not apply.¹³⁷ It was modelled on an order signed by President Franklin Roosevelt in July 1942 establishing a commission to prosecute eight German saboteurs captured in the USA a few days earlier. After a trial conducted in secret in the Department of Justice building in Washington DC, all eight defendants were convicted and sentenced to death on 1 August 1942.¹³⁸ Six were executed in the electric chair a week later.¹³⁹

Former US Attorney General William Barr – who with President Trump in six months in 2020 oversaw more federal executions than in the past 65 years combined – pointed the Bush administration to the idea of military commissions in the wake of the 9/11 attacks.¹⁴⁰ The OLC at the Department of Justice, which in the coming years would give the legal green light for torture and other ill-treatment, advised that “ample precedent establishes that military commissions may be used to try and punish (even with death) offenders under the law of war”.¹⁴¹ The discriminatory application of fair trial rights was emphasized when Vice President Cheney said that the commissions would be reserved for those who “don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.” He recalled approvingly how the German defendants of 1942 were “executed in relatively rapid order” under the Roosevelt tribunals.¹⁴²

The history of the use of military commissions by the USA, noted the US Supreme Court in 2006, was “the need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield”.¹⁴³ While now far from having dispensed “swift justice”, the government is still aiming to obtain death sentences against six foreign nationals who were subjected to enforced disappearance and torture carried out under presidential authority and OLC guidance. There is no getting away from this backstory, even if the commissions have been somewhat improved under legislation passed since that first version under the 2001 military order.

In June 2006, in *Hamdan v. Rumsfeld*, the US Supreme Court ruled that neither Congress nor the President’s constitutional powers had expressly authorized the Bush commissions. Four Justices wrote: “Nothing prevents the President from returning to Congress to seek the authority he believes necessary”.¹⁴⁴ President Bush did so and obtained congressional approval for the administration-drafted MCA describing it as “one of the most important pieces of legislation in the war on terror”.¹⁴⁵ As already noted, it was also an affront to human rights, rubber stamping enforced disappearances, bolstering impunity for human rights violations, aiming to withdraw habeas corpus for “enemy combatants”, and authorizing unfair trials by military commission. The MCA was revised in 2009 to make some changes to the commissions; a recent government brief noted that the MCA 2009 “substantially re-enacted the Military Commissions Act of 2006”.¹⁴⁶

¹³⁷ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001.

¹³⁸ See Donald Rumsfeld, *Known and Unknown: a memoir*. Sentinel (2011), page 588, recalling that President Roosevelt wrote to his Attorney General before the trial: “surely [the eight] are as guilty as it is possible to be and it seems to me that the death penalty is almost obligatory”. See also Louis Fisher, *Military Tribunals and Presidential Power*. University Press of Kansas (2005), p. 125 (“In civilian court, the maximum penalty would have been about three years. Roosevelt was determined to have the Germans put to death”).

¹³⁹ President Roosevelt commuted the death sentences of the other two because of their cooperation.

¹⁴⁰ Senior administration officials defend military tribunals for terrorist suspects, *The New York Times*, 15 November 2001. See also *Military justice for al Qaeda*. By William Barr and Andrew G. McBride. *The Washington Post*, 18 November 2001. William Barr was Attorney General (1991-1993) under President George H.W. Bush. When the Senate confirmed his nomination by President Trump in 2019, he became only the second person in US history to serve twice as Attorney General. In a letter to President Trump on 14 December 2020 the Attorney General said that his last day in office would be 23 December 2020. An aspect of this second term as Attorney General was that in the last six months of 2020 the US government carried out 10 executions. The three other federal executions in the post-1972 era of the death penalty in the USA took place under President George W. Bush, who came to office having overseen a record number of executions in Texas when governor there.

¹⁴¹ Legality of the use of military commissions to try terrorists, OLC, US Department of Justice, 6 November 2001.

¹⁴² Senior administration officials defend military tribunals for terrorist suspects, *The New York Times*, 15 November 2001.

¹⁴³ *Hamdan v. Rumsfeld*, 29 June 2006.

¹⁴⁴ *Hamdan v. Rumsfeld*, 29 June 2006, Justices Breyer, Kennedy, Souter and Ginsburg, concurring.

¹⁴⁵ Remarks on signing the Military Commissions Act of 2006, 17 October 2006.

¹⁴⁶ *Bin Lep v. Trump*, Respondents’ opposition to petitioner’s motion for preliminary injunction, In the US District Court for DC, 30 October 2020.

4.1 NO LAUNDERING THE COMMISSION BACKDROP

“Mr Khan and the other detainees were transferred to Guantánamo for the specific purposes of obtaining ‘clean’ confessions from them untainted by CIA torture, and trying them before a military commission”

Defense motion at military commission, May 2019¹⁴⁷

In 2016, President Obama said that “dealing with the current group of detainees” at Guantánamo was “a complex piece of business because of the manner in which they were originally apprehended and what happened”.¹⁴⁸ The manner in which they were apprehended in many cases was akin to abduction and “what happened” was secret rendition, enforced disappearance and torture.

The MCA was aimed at facilitating punishment for Guantánamo detainees up to and including execution, while shoring up impunity for their captors, including officials who authorized, developed, and operated the CIA secret detention system. The MCA amended the War Crimes Act to ensure, under the USA’s law of war framework, that those involved in the CIA programme and beyond would not be prosecuted for war crimes, while those against whom the crimes had been committed could themselves be prosecuted and potentially executed for “war crimes”. The use of classification would keep out of the public realm details about what had been done to the detainees in CIA custody and where they had been held.

After the MCA was passed, the Bush administration employed “clean teams” in Guantánamo to re-interrogate the ex-CIA detainees in a bid to obtain incriminating information using supposedly “non-coercive” methods. Amnesty International considers that applying interrogation techniques that may be considered non-coercive in other circumstances, to a detainee subjected to years of secret, incommunicado or indefinite detention and to torture or other ill-treatment, who remains without remedy, rehabilitation, access to adequate medical care, or redress for abuses, provides no assurance that any self-incriminating statements he may make are truly voluntary.¹⁴⁹

Majid Khan, one of the 14 detainees transferred from enforced disappearance in CIA custody to Guantánamo, repeatedly asked for access to his lawyer after his arrival at the base.

“[He] was told by US law enforcement and military officials – wrongly as a matter of law – that he was not entitled to counsel access because he had not yet been charged with any offenses. These officials denied him access to his counsel while attempting to elicit confessions from him to construct a military commission case against him that they hoped would be free of the taint of his CIA torture – a sustained effort that continued without success at least until the time that Mr Khan and his counsel approached federal prosecutors in New York about his willingness to plead guilty and cooperate as a way to atone for his own conduct.”¹⁵⁰

The 2009 version of the MCA only allows the admission of statements that were voluntarily given. In determining voluntariness, “the military judge shall consider the totality of the circumstances, including “the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.”¹⁵¹ This could allow the use of statements given by

¹⁴⁷ *USA v. Khan*, Defense motion for pretrial punishment credit and other related relief, 1 May 2019.

¹⁴⁸ Remarks by the President on plan to close the prison at Guantánamo Bay, 23 February 2016.

<https://obamawhitehouse.archives.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay>

¹⁴⁹ See Case of *Cabrera Garcia and Montiel Flores v. Mexico*, Inter-American Court of Human Rights, Judgment of 26 November 2010, paras. 173 and 174, https://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf (“In order to analyze the relationship between the three statements, the Court notes that the European Court on Human Rights, in the case of *Harutyunyan v. Armenia*, indicated that if there is reasonable evidence that a person has been tortured or subjected to cruel and inhuman treatment, the fact that this person ratifies his confession before a different authority other than the one responsible for the first confession, should not automatically lead to the conclusion that such confession is valid. This is so because a subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience. The Court shares the aforementioned view and reiterates that the situations of defenselessness and vulnerability felt by an individual when detained and subjected to cruel, inhuman and degrading treatment in order to wear down that individual’s psychological resistance and force him to incriminate himself, can produce feelings of fear, anguish and inferiority capable of humiliating and overwhelming an individual and possibly breaking his physical and moral resistance”).

¹⁵⁰ *USA v. Khan*, Defense motion for pretrial punishment credit and other related relief, 1 May 2019.

¹⁵¹ Military Commissions Act of 2009, Section 948r(d)(3). See also *Farhi Saeed bin Mohammed v. Obama*, Memorandum opinion, US District Court for DC, 19 November 2009 (“Torture and ‘enhanced interrogation techniques’ employed by the Government during the War on Terror have been shown to be ‘geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness’... From [the detainee’s] perspective, there was no legitimate reason to think that transfer to Guantánamo Bay foretold more humane treatment; it was, after all, the third time that he had been forced onto a plane and shuttled to a foreign country where he

detainees during re-interrogation by FBI “clean teams”, a concern that was raised at the UN Working Group on Arbitrary Detention in the case of Ammar al Baluchi, one of the Guantánamo detainees facing a capital military commission trial.¹⁵² He has also raised it in the US Court of Appeals.¹⁵³

The UN Human Rights Committee which oversees implementation of the ICCPR has called on the USA to ensure that any criminal cases against Guantánamo detainees are “dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.”¹⁵⁴ Article 14 enshrines the right to a fair trial. It applies at all times, including in situations of armed conflict.¹⁵⁵ The Committee has made clear that:

“The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights... Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”¹⁵⁶

“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military... While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned... [T]he trial of civilians by special or military courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.”¹⁵⁷

Amnesty International takes the view that military courts should not have jurisdiction to try civilians, owing to the nature of these courts and because of concerns about their independence and impartiality. The UN Human Rights Committee has held that trials of civilians by military or special tribunals must be strictly limited to exceptional cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.¹⁵⁸ That is not the case here. Applying the criteria set out by the Human Rights Committee, the military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice.¹⁵⁹ By their very nature, their application in cases such as these violates the right to fair trial. This has been shown when those charged for trial by military commission have subsequently been removed, or slated for removal, for trial in federal court.

would be held under United States authority. Further, throughout his detention, a constant barrage of physical and psychological abuse was employed in order to manipulate him and program him into telling investigators what they wanted to hear”).

¹⁵² UN Doc. A/HRC/WGAD/2017/89, 24 January 2018, Opinions adopted by the Working Group on Arbitrary Detention at its 80th session, 20–24 November 2017, Opinion No. 89/2017 concerning Ammar al Baluchi (USA), Annex, paras. 9-11.

¹⁵³ See *In re: Ammar al Baluchi*, US Court of Appeals for the DC Circuit, 13 March 2020 (“In defending against the capital charges, al Baluchi contends that his torture renders certain incriminating statements key to the government’s case inadmissible. According to al Baluchi, in order to make that defense, he needs evidence from one particular detention center, so-called ‘Site A,’ which the government plans to ‘decommission’ -- i.e., destroy -- in the near future. He therefore seeks a writ of mandamus, asking us to prevent the government from proceeding with the site’s destruction. The government, however, has produced digital and photographic representations of Site A and al Baluchi cannot show, as he must, that it is clear and indisputable that those representations are so insufficient as to warrant the extraordinary remedy of mandamus”).

¹⁵⁴ UN Doc. CCPR/C/USA/CO/4, 23 April 2014, Concluding observations on the fourth periodic report of the United States of America, para. 21.

¹⁵⁵ UN Doc.: CCPR/C/21/Rev.1/Add.13 (2004), General Comment No. 31, The nature of the general legal obligations imposed on state parties to the Covenant, para. 11. (“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”).

¹⁵⁶ UN Doc.: CCPR/C/GC/32, 23 August 2007, UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, paras 1 and 6.

¹⁵⁷ *Ibid*, para 22.

¹⁵⁸ *Ibid*, para 22.

¹⁵⁹ See, George W. Bush, *Decision Points*, Virgin Books (2010), page 167. (“As I made my decision on Geneva protection [that no detainees would qualify as prisoners of war, and Article 3 Common to the Geneva Conventions would not apply either], I also decided to create a legal system to determine the guilt or innocence of detainees... On November 13, 2001, I signed an executive order establishing military tribunals to try captured terrorists”). Also, Donald Rumsfeld, *Known and Unknown*; a memoir. Sentinel (2011), page 588 (“the President announced that trials for terrorist detainees would be held by specially designed military commissions – not ordinary civilian courts and not military tribunals under the Uniform Code of Military Justice. Terrorists were enemies in wartime, no longer domestic criminals”).

Ahmed Khalfan Ghailani, who was one of the 14 detainees transferred from secret detention to Guantánamo on 4 September and whom President Bush said in his public speech would be prosecuted before a military commission if Congress passed the MCA, was charged in 2008 under the MCA. In 2009, under President Obama, he was transferred out of the base, brought to trial in federal court in New York and convicted in 2010 of one count of conspiring to destroy US buildings and property in the bombings of the US embassies in Nairobi and Dar es Salaam in 1998. He is serving a life prison sentence in the USA.

The fact that the military commissions are not necessary was further illustrated in November 2009, when the Department of Justice announced that five Guantánamo detainees who, like Ghailani had been subjected to enforced disappearance and torture in CIA custody and had been charged for trial by military commission at Guantánamo, would also be transferred to New York and brought to trial in federal court on charges of leading involvement in the 9/11 attacks. The “alleged 9/11 conspirators”, said Attorney General Eric Holder, “will stand trial in our justice system before *an impartial jury under long-established rules and procedures*.”¹⁶⁰ In a Senate hearing in November 2009, he said:

“We can prosecute terrorists in our Federal courts safely and securely because we have been doing so for years. There are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons’ custody, including those responsible for the 1993 World Trade Center bombing and the attacks on our embassies in Africa. Our courts have a long history of handling these cases, and no district has a longer history than the Southern District of New York in Manhattan.”¹⁶¹

In April 2011, he announced a U-turn, citing congressional blocking. It was not law but politics that meant the five would now be prosecuted under essentially untested procedures before a military commission under the MCA. This outcome is clearly contrary, not only to the UN Human Rights Committee’s position reflected in its General Comment on the right to a fair trial, but to the UN Basic Principles on the Independence of the Judiciary which state: “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.¹⁶²

Contrary to international law, the USA does not consider the ICCPR applies to Guantánamo, leaving the detainees exposed to whatever deficiencies in domestic law protections there may be. The government considers that certain constitutional protections are not applicable to the detainees either. In relation to a military commission case currently before the federal courts, the government is already pointing to the August 2020 Court of Appeals ruling that the Fifth Amendment’s Due Process Clause does not apply to the detainees, and in the case of Mohammed Bin Lep (see Section 5.4) it has already formed part of a ruling against the detainee.¹⁶³ It has long considered that the Sixth Amendment right – “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” – does not apply to military commissions.¹⁶⁴

Ahmed Ghailani had “speedy trial” rights under the US Constitution recognized by virtue of being in an ordinary federal court. The rules for military commissions under the MCA expressly rule out speedy trial rights.¹⁶⁵ Compounding this, the Rules for Military Commissions (RMC) preclude a detainee’s time spent in detention being taken as credit toward any eventual sentence.¹⁶⁶ This, combined with the fact that the US government considers it can hold detainees regardless of whether it prosecutes them or not, gives prosecutors no incentive towards formalizing charges within a reasonable time.

Even if the Sixth Amendment was found to apply here, the government takes the position that the question of prosecutions is additional and separate to these “law of war” detainees, that is, that their detention and prosecution are uncoupled. In a brief filed in October 2020 in the US District Court, in the case of Mohammed Bin Lep, who has been slated for prosecution by military commission for more than a decade, and against whom charges were sworn nearly two years ago, but not referred for trial, the government argued:

¹⁶⁰ US Department of Justice press conference transcript, 13 November 2009.

¹⁶¹ Attorney General Eric Holder, Oversight of the US Department of Justice, Hearing before the Senate Committee on the Judiciary, 18 November 2009.

¹⁶² Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Para. 5.

¹⁶³ *Al Hela v Trump*, US Court of Appeals for the DC Circuit, 20 August 2020.

¹⁶⁴ *Ex parte Quirin*, US Supreme Court (1942). The full opinion was issued on 29 October 1942, nearly three months after six of the eight German nationals who were at the centre of the case had been executed.

¹⁶⁵ 10 U.S.C. § 948b(d) (expressly denying to accused in military commissions the statutory speedy trial right that otherwise exists at courts-martial).

¹⁶⁶ Rule 1001 (c) (g) “The physical custody of alien enemy belligerents captured during hostilities does not constitute pretrial confinement for purposes of sentencing and the military judge shall not grant credit for pretrial detention.”

“Petitioner remains properly detained under the AUMF regardless of whether he faces charges before a commission.... [C]harges have yet to be referred, thus he has not been formally charged, and Petitioner’s detention is not incident to him having to ‘answer a criminal charge,’ but is rather incident to him being an unprivileged enemy combatant whose detention is authorized under the AUMF as informed by the laws of war. Thus, any speedy trial clock under a Sixth Amendment rubric has yet to be triggered”.¹⁶⁷

It seems that the US government may yet consider that this is still the case even if these detainees were prosecuted in an ordinary federal court. In 2009, the Pentagon’s General Counsel, in response to a question from a Senator on what would happen in the event of an acquittal of a Guantánamo detainee transferred for trial to federal court, he responded that “as a matter of legal authority if you have the authority under the laws of war to detain someone... that is true irrespective of what happens on the prosecution side...”¹⁶⁸ The following year, the federal judge overseeing the trial of Ahmed Ghailani in New York wrote that the defendant “presumably will remain in US custody as long as hostilities with al Qaeda continue, regardless of the outcome of this case... Ghailani’s status as an enemy combatant always has made it uncertain whether he ever will be freed, regardless of the outcome of the criminal case”¹⁶⁹

By no stretch of the imagination can the past 19 years be considered a golden era of military commissions. There have been eight detainees convicted (see Appendix 2). Six of these convictions were the result of the detainee entering a plea of guilt, under agreements that would see them get out of Guantánamo. Three of these eight individuals had their convictions overturned on appeal. A fourth has had two of his three convictions overturned, and the third is on appeal (see Section 5.5).

In contrast, according to the National Security Division at the US Department of Justice, federal prosecutors obtained at least 586 international terrorism and terrorism-related convictions between 11 September 2001 and 31 December 2017 in the regular federal court system.¹⁷⁰

The fact that the violation of fair trial rights is being reserved for foreign nationals renders the system discriminatory, again in violation of international law.¹⁷¹ At least 147 individuals who were US citizens by birth, and 148 who were naturalized US citizens, were convicted of international terrorism-related charges in US federal courts between 11 September 2001 and 31 December 2016.¹⁷² They could not have been tried in military commissions under the MCA.

“Let’s say an American citizen has been arrested for aiding and abetting a terrorist, maybe even participating in a conspiracy, or maybe participating in an action that harmed or killed American citizens. That American citizen cannot be tried in the military commission. His co-conspirators could be tried in a military commission if they were an alien, but if that other co-conspirator is an American citizen, they will be prosecuted under title 18 of the first chapter of a Federal crime”.¹⁷³

The US Court of Appeals has given short shrift to the claim that the MCA violates equal protection principles. In 2016, it merely said “the Court rejects [this] challenge”, with three of the judges characterizing the claim as “frivolous”.¹⁷⁴ One of those three judges had two years earlier described the claim as “meritless”, pointing to Supreme Court jurisprudence holding that “federal laws drawing distinctions between US citizens and aliens – particularly in the context of war and national security – are generally permissible so long as they are rationally

¹⁶⁷ *Bin Lep v. Trump*, Respondents’ opposition to petitioner’s motion for preliminary injunction, In the US District Court for DC, 30 October 2020.

¹⁶⁸ Jeh Johnson, General Counsel, US Department of Defense. Legal issues regarding military commissions and the trial of detainees for violations of the law of war. Hearing before the Committee on Armed Services, 7 July 2009.

¹⁶⁹ *USA v. Ghailani*, Opinion. US District Court for the Southern District of New York, 13 July 2010.

¹⁷⁰ National Security Division’s Chart of public/unsealed international terrorism and terrorism-related convictions from 9/11/01 to 12/31/17 (updated 20 April 2019), <https://perma.cc/AX8N-REWJ>

¹⁷¹ UN Doc. Committee on the Elimination of Racial Discrimination (CERD). General recommendation No. 30 on discrimination against non-citizens, paras. 1 and 2. See also para 10, on the obligation on States parties to “ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, including on the grounds of national origin”. CERD is the body established under the Convention on the Elimination of All Forms of Racial Discrimination to monitor its implementation. The USA ratified the Convention in 1994.

¹⁷² Executive Order 13780: Protecting the National from Foreign Terrorist Entry into the United States. Initial Section 11 Report, US Department of Homeland Security and US Department of Justice, January 2018, <https://www.justice.gov/opa/press-release/file/1026436/download>, page 2.

¹⁷³ Military Commissions Act of 2006, Congressional Record Vol. 152, No. 125, House of Representatives, 29 September 2006. (Representative Buyer). Just three weeks before President Bush sent Congress his administration’s draft of the MCA, the Attorney General spoke of how “the threat of homegrown terrorist cells... may be as dangerous as groups like al Qaeda, if not more so.” Prepared remarks of Attorney General Alberto Gonzales at the World Affairs Council in Pittsburgh on stopping terrorists before they strike: The Justice Department’s power of prevention, 16 August 2006.

¹⁷⁴ *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, 20 October 2016.

related to a legitimate governmental interest.”¹⁷⁵ The MCA, however, was conceived in a bid for impunity for crimes under international law committed in the CIA programme and to keep detainees against who such crimes were committed as far from the ordinary courts as possible. That is not a legitimate governmental interest.

If any Guantánamo detainee slated for prosecution was a US national, he could not be tried by these military commissions: under US law he would have the right to a civilian jury trial in an ordinary federal court, not before a panel of US military officers operating under rules and procedures that provide a lesser standard of fairness. To discriminate in the quality of criminal justice in this manner is a clear breach of the USA’s human rights obligations. Article 2 of the ICCPR requires states to respect and to ensure “the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” [emphasis added]; article 26 further provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, including on grounds of national origin. In addition, among the rights provided for in the ICCPR, in article 14, are the right to “be equal before the courts and tribunals”, the “right to a fair and public hearing by a competent, independent and impartial tribunal established by law” and to various “minimum [fair trial] guarantees, in full equality”, which are all to be provided free from discrimination in accordance with Article 2. The same standard of fair trial should be applied to all, regardless of national origin: that is a fundamental principle of human rights and the rule of law.

4.2 FOUR YEARS LOST IN MILITARY COMMISSION FIASCO

“Al-Nashiri’s allegations regarding his treatment during his detention, while deeply troubling, do not provide any reason to fear that he will not be given a fair hearing in the military commission... To be clear, we are troubled by the estimate of Al-Nashiri’s counsel that appellate review in this court might not occur until 2024... We are not prepared at this juncture to forecast that any such delay will occur or be excessive as a matter of law”

US Court of Appeals, August 2016¹⁷⁶

Eighteen years ago, President Bush told an audience in Louisiana: “this war against terror... It’s a different kind of war”. “The other day”, he said, “we hauled in a guy named al-Nashiri. That’s not a household name here in America”. The audience laughed. “I can understand why some go blank when they hear his name... But you’ve got to know that in this war against terror, the doctrine stands that says, ‘Either you’re with us, or you’re with the terrorists.’ And a lot of nations have heard that message, and they’re with us.”¹⁷⁷

At the time President Bush was speaking, the detainee in question had already been in custody for six weeks. He had spent a month in UAE detention during which time he was subjected to sleep deprivation, and “regularly beaten, and hung by his hands”, before being transferred to secret US custody in a CIA facility in Afghanistan where standard operating procedures included “total light deprivation, loud continuous music, isolation, and dietary manipulation”.¹⁷⁸ As President Bush spoke, preparations were being made at a CIA facility in Thailand, to which the detainee had been transferred from Afghanistan and tortured by “waterboarding”, to move him to another “black site”. The following day he was moved to a secret CIA facility in Poland. There he would be subjected to further torture and other ill-treatment, including “standing stress position” with his “hands affixed over his head” for about two and a half days, threats with a handgun near his head and a cordless drill operated near his body, threats to his family, slapping, forced bath using a stiff brush, and improvised stress positions. From June 2003 until September 2006, the CIA transferred al-Nashiri to five different CIA “black sites”, believed to be Guantánamo, Morocco, Romania, and two more secret facilities in Afghanistan, before he was transferred to Guantánamo, this time his detention acknowledged. He remains at Guantánamo today, more than 19 years after he was transferred from UAE to US custody.

A doctor appointed by the Department of Defense to assess ‘Abd al-Nashiri’s condition concluded that he “suffers from complex posttraumatic stress disorder [PTSD] as a result of extreme physical, psychological, and sexual torture inflicted upon him by the United States” and was “one of the most severely traumatized individuals I have ever seen” in years of assessing torture survivors around the world:

¹⁷⁵ *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, 14 July 2014, opinion concurring in the judgment in part and dissenting in part filed by Circuit Judge Kavanaugh.

¹⁷⁶ *In Re: Abd al-Rahim Hussein Muhammed al-Nashiri*, US Court of Appeals for the DC Circuit, 30 August 2016.

¹⁷⁷ Remarks in Shreveport, Louisiana, 3 December 2002.

¹⁷⁸ SSCI Summary, footnote 338.

“Mr Al-Nashiri displays every symptom of complex PTSD. He suffers chronic nightmares, the content of which, while classified, in my opinion directly relate to the specific physical, emotional and sexual torture inflicted upon Mr Al-Nashiri while in US custody. He experiences flashbacks, which are triggered frequently by reminders of torture. The torture experienced by Mr Al-Nashiri has fractured his trust in humanity, which has damaged his ability to interact with all humans, including counsel, doctors, other detainees, and even family...

Although, even in the best of circumstances, the horrific and calculated nature of his torture would be expected to have long lasting effects, there are multiple factors that are unique to Guantánamo and the military proceedings against him that are further exacerbating his symptoms and suffering. A principal factor in Mr Al-Nashiri’s current condition is that Guantánamo itself was one of the ‘black sites’ in which Mr Al-Nashiri was held, during his period of secret detention...”¹⁷⁹

“In the realm of national security”, wrote the US Court of Appeals in 2016, “the expertise of the political branches is at its apogee”¹⁸⁰ When the courts were deliberately bypassed by the executive, ‘Abd al-Nashiri was subjected to crimes under international law. Now the executive branch, backed by the legislature, intends to execute him if it can get him to trial by military commission and convict him.

Eight years after he was named as an unindicted co-conspirator in federal court in New York, alleging that he was part of a terrorist group in Yemen that conspired to bomb ships, ‘Abd al-Nashiri was arraigned for capital trial by military commission on charges – based on those in the federal court indictment – relating to the attempted bombing of the *USS The Sullivans* in 2000, and the bombings of the *USS Cole* in 2000 and of the French supertanker the *Limburg* in 2002, all in Yemen (in 2014, the *Limburg* charges were dismissed).

The government has charged ‘Abd al-Nashiri for “war crimes” it says were committed in Yemen in a “war” it has now backdated to 2000 despite the then US President having expressly pointed out at the time that “America is not at war”.¹⁸¹ In a habeas corpus challenge, his lawyers argued that “crimes, such as those charged here, which were allegedly committed far from any battlefield – indeed before any hostilities existed – are not triable by the military”. Indeed, “the very charges at issue in this case have been the subject of a federal indictment since 2003” and the removal of the case to military commission “usurps the judicial power that the Constitution reserves to the courts of law, and it illegally attempts to apply the laws of war to a time and place in which the President and Congress collectively concluded that peace prevailed”.¹⁸²

In 2016, in a separate case, three judges on the Circuit Court of Appeals noted that in the al-Nashiri case, the government was taking the position that the USA’s “war with al Qaeda goes back ‘to at least 1998,’ and it appears to believe that the conflict may date as far back as 1992.”¹⁸³

The Obama administration argued that for a federal court to rule on ‘Abd al Nashiri’s habeas challenge would unduly interfere with the military commission proceedings and that any such review should be held in abeyance pending resolution of the trial and any subsequent appeals. The District Court agreed, and in August 2016, so did the DC Circuit Court of Appeals. The latter ruled that ‘Abd al-Nashiri – already held for a decade and a half – would have to wait: “Should an unreasonable delay materialize, Al-Nashiri may pursue available remedies at that time”.¹⁸⁴ The case is perhaps further from resolution than it was then. In 2019, nearly four years of military judge rulings and orders were vacated, as outlined below.

In June 2017, the Chief Defense Counsel for the military commissions, US Marine Corps Brigadier General John Baker, informed defence lawyers under his supervision that he had lost confidence in the confidentiality of the meeting spaces at Guantánamo and recommended against any more attorney/client meetings until it was known “with certainty that improper monitoring of such meetings is not occurring”. Al-Nashiri’s lawyers filed a motion with Air Force Colonel Vance Spath, the military judge presiding over the commission case since July 2014, seeking permission to tell their client of Brig. Gen. Baker’s warning and to compel discovery into the potential intrusions. While this was pending, the lawyers discovered a hidden microphone in their meeting room at Guantánamo. The government described it as a “legacy microphone”, one from earlier use, that was not currently functional.¹⁸⁵

¹⁷⁹ Dr Sondra S. Crosby, October 2015.

¹⁸⁰ In re: Abd al-Rahim Hussein Muhammed al-Nashiri, US Court of Appeals for the DC Circuit, 30 August 2016.

¹⁸¹ The President’s Radio Address, President Bill Clinton, 14 November 2000.

¹⁸² *Al Nashiri v. Obama*, Petitioner-Appellant’s brief, US Court of Appeals for the DC Circuit, 20 January 2016.

¹⁸³ *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, 20 October 2016, Judges Rogers, Tatel and Pillard dissenting.

¹⁸⁴ In re: *Al-Nashiri*, US Court of Appeals for the DC Circuit, 30 August 2016.

¹⁸⁵ In re: *Al Nashiri*, Brief of the United States in opposition, In the Court of Appeals for the DC Circuit, 13 November 2018.

Colonel Spath denied the motion, saying he had no reason to believe there had been an intrusion into attorney-client communications in the al-Nashiri case. Unable ethically to continue to represent their client, the three civilian lawyers (including the death penalty specialist) sought permission from Brig. Gen. Baker to withdraw from the case. Based on what he knew, both classified and unclassified, he granted their request.

The withdrawal of the three civilian lawyers left 'Abd al-Nashiri without a lawyer versed in death penalty defence (so-called "Learned Counsel" to which capital defendants at Guantánamo are entitled). Instead, he was left with a single military lawyer who stressed that he had only graduated from law school five years earlier, had never represented anyone charged with murder, let alone had any involvement in a capital case, and that he considered himself not competent to proceed in the absence of a specialized capital lawyer and that if he was required to proceed would be unable to provide effective assistance of counsel. He said that he, too, was labouring under the same ethical problems that had caused the three civilian lawyers to withdraw.

On 27 October 2017, Colonel Spath denied a motion to delay proceedings in the case pending appointment of new learned counsel and ordered the three civilian lawyers to attend a hearing on 31 October.¹⁸⁶ The three did not do so. Colonel Spath ordered Baker to testify, but he invoked his "right to refuse to be a witness in this case". Colonel Spath ordered him to rescind his permission for the three lawyers to withdraw from the case; Brig. Gen. Baker again refused. Colonel Spath said he would hold "a contempt hearing" the following day. He also told the military defence lawyer, a Lieutenant in the US Navy JAG Corps, that if he refused to proceed with the al-Nashiri case, "you too, at noon tomorrow, will be here for a contempt hearing". Colonel Spath said "we are going to move forward", even without learned counsel, and "if we need to come back and redo some things, we've got all the time in the world, as we've demonstrated for the last nine years".¹⁸⁷

At the session on 1 November, Brig. Gen. Baker sought to object to the proceedings. Colonel Spath ordered him to sit down and said: "I'm denying you the opportunity to be heard...It's a summary proceeding", threatening his removal if he continued to speak.¹⁸⁸ He then found Brig. Gen. Baker in contempt and sentenced him to 21 days of confinement and a \$1,000 fine. The confinement began immediately, but on 3 November, an hour before a District Court judge in Washington, DC had been due to rule on a habeas corpus petition seeking Baker's release, the Convening Authority deferred the remainder of the sentence. The District Court subsequently found that Judge Spath had acted unlawfully and vacated Baker's conviction.¹⁸⁹

Meanwhile, unbeknownst to al-Nashiri's defence team, in November 2015 Colonel Spath had applied for a job as an immigration judge. After a "lengthy interview and application process" with the Department of Justice he received an employment offer in March 2017. He asked that a proposed starting date in September 2017 be delayed until May 2018, including because of his assignment to the al-Nashiri case. While the negotiations over a starting date proceeded, the developments with the al-Nashiri defence team had arisen.

Colonel Spath ordered al-Nashiri's civilian lawyers to appear, and at his direction, the government served subpoenas on two of them. When they continued to refuse to appear, he directed the government to move for their arrest. At the same time, in February 2018, Colonel Spath had been contacted by human resources at the Justice Department informing him that he could start the job as an immigration judge on 8 July 2018. At a hearing in Guantánamo the day after receiving the news, he lambasted the defence: "Over the last five months – yes my frustration with the defense has been apparent... I believe it's demonstrated lawlessness on their side; they don't follow orders; they don't follow direction; they don't obey commission regulations, or rules, or subpoenas, as we saw." He then abated the proceedings in the al Nashiri case "indefinitely".¹⁹⁰

The government appealed against the abatement order. While that was pending before the Court of Military Commission Review (CMCR), Colonel Spath submitted his retirement paperwork to the Air Force. On 6 August 2018, US Air Force Colonel Shelly Schools was appointed as the military judge in the case.

The defence, which by now had a new attorney, received information that Colonel Spath had been pursuing employment as an immigration judge, and submitted a request for discovery. The government refused, describing the reports as "unsubstantiated assertions" with "no basis". Less than a week later, a photo came to light of Spath standing next to the Attorney General at a welcoming ceremony for new immigration judges.

On 11 October 2018, the CMCR overturned the abatement order and ordered proceedings in the case to resume. The Court of Appeals issued a stay on 7 November 2018 in the al Nashiri case in both the CMCR and

¹⁸⁶ *USA v. Al-Nashiri*, Ruling on Defense Motion to abate proceedings pending the detailing of Learned Counsel, 27 October 2017.

¹⁸⁷ Unofficial/Unauthenticated transcript of proceedings, 31 October 2017.

¹⁸⁸ Unofficial/Unauthenticated transcript of proceedings, 1 November 2017.

¹⁸⁹ "Judge Spath acted unlawfully when he unilaterally convicted General Baker of criminal contempt and sentenced him for that contempt. He usurped a power that belongs solely to the members of the commission, voting as a body". *Baker v. Spath*, Memorandum Opinion, US District Court for DC, 18 June 2018.

¹⁹⁰ Unofficial/Unauthenticated transcript of proceedings, 16 February 2017.

the military commission. On 16 April 2019, the Court of Appeals concluded that Colonel Spath’s “job application to the Justice Department created a disqualifying appearance of partiality” and it vacated all orders (numbering in the hundreds) issued by Judge Spath on or after 19 November 2015 (when he applied for the job) as well as all decisions issued by the CMCR reviewing such orders.¹⁹¹ The Court said:

“Although a principle so basic to our system of laws should go without saying, we nonetheless feel compelled to restate it plainly here: criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri’s defense counsel, all elements of the military commission system – from the prosecution team to the Justice Department to the CMCR to the judge himself – failed to live up to that responsibility. And we cannot dismiss Spath’s lapse as a one-time aberration, as Al-Nashiri’s is not the first meritorious request for recusal that our court has considered with respect to military commission proceedings.”¹⁹²

On 4 January 2019, the government’s attorneys in the al Nashiri case informed the Court that it had come to light that Colonel Schools was intending to retire from the military, and that she had “applied for and... accepted a post-retirement immigration judge position”. On 12 February 2019, US Army Colonel Lanny Acosta was appointed to replace her as the judge on the case.

On 15 January 2020, US Marine Corps Lt. Col. Libretto announced he was recusing himself from presiding as judge over the military commission case against Abd al Hadi al-Iraqi (Nashwan al-Ramer Abdulrazzaq) following the Spath ruling. He pointed to his anticipated “retirement from active duty in the summer of 2020” and his intention to apply to various federal agencies for employment, which could “create the appearance of a conflict of interest”.¹⁹³

The vacating of years of military judge orders, and the turnover in military judges as well in the post of Convening Authority as outlined in Sections 5.3 and 5.4 below – are further consequences of the decision to create and continue to pursue these military commissions rather than to turn to the existing and experienced federal courts, a long-standing system overseen by judges with life tenure.¹⁹⁴ Detainees at Guantánamo continue to bear “the costs of delay” inherent in this untested and unnecessary commission system, as well as in the broader detention regime.¹⁹⁵ Such delays cannot “serve the interests of justice”.¹⁹⁶

4.3 EXECUTIONS UNDER MCA WOULD VIOLATE INTERNATIONAL LAW

“The death penalty can only be carried out pursuant to a judgment of a competent court. Such a court must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial. It should be established before the commission of the offence. As a rule, civilians must not be tried for capital crimes before military tribunals”

UN Human Rights Committee, 2019¹⁹⁷

Six of the detainees currently held at Guantánamo are facing capital charges under the MCA. One is ‘Abd al-Nashiri who is being prosecuted in relation to the *USS Cole* bombing in 2000 in Yemen (see Section 5.2), while the other five are facing joint trial for charges relating to their alleged leading involvement in the attacks

¹⁹¹ *In Re: Abd al-Nashiri*, US Court of Appeals for the DC Circuit, 16 April 2019. (“[W]e cannot escape the conclusion that the average, informed observer would consider Spath to have presided over a case in which his potential employer appeared... In sum, the Attorney General was a participant in Al-Nashiri’s case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers, and he will play a role in defending any conviction on appeal... The fact of Spath’s employment application alone would thus be enough to require his disqualification. But Spath did yet more to undermine his apparent neutrality”).

¹⁹² *In Re: Abd al-Nashiri*, US Court of Appeals for the DC Circuit, 16 April 2019.

¹⁹³ Recusal from *US v. Abd Al Hadi Al-Iraqi*. Memorandum for Chief Trial Judge, Military Commissions, 15 January 2020.

¹⁹⁴ See UN Basic Principles on the Independence of the Judiciary (1985), paras. 11-14.

¹⁹⁵ “While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody”. *Boumediene v. Bush*, US Supreme Court, 12 June 2008.

¹⁹⁶ UN Doc.: CCPR/C/GC/32, 23 August 2007, UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 35 (right of the accused to be tried without undue delay “is not only designed to avoid keeping persons too long in a state of uncertainty about their fate” but “also to serve the interests of justice”).

¹⁹⁷ UN Doc. CCPR/C/GC/36, Human Rights Committee, General Comment No. 36, Right to Life: Article 6. 3 September 2019, para. 45.

of 11 September 2001. They have all been in custody for more than 17 years. All were subjected to enforced disappearance and torture by the USA rather than being brought to trial in ordinary court after arrest.

Charges were sworn against six detainees on 11 February 2008 for their alleged involvement in the 9/11 attacks – Khalid Shaikh Mohammad, Walid bin Attash, Ramzi bin al-Shibh, Ammar al Baluchi, Mustafa al Hawsawi, and Mohammed al Qahtani. The Convening Authority dismissed charges against the latter because, as she would later explain, “we tortured” him (see Section 4). The other five were subjected to enforced disappearance and torture.

On 13 November 2009, Attorney General Eric Holder announced that the five “9/11 defendants” would be transferred for prosecution in federal court in New York. An accompanying Justice Department press release stated that “the Attorney General and the Secretary of Defense understand and share the concern of the victims of terrorist attacks about the length of time it has taken to bring the perpetrators to justice. Justice has been delayed far too long.”¹⁹⁸ As noted above, the transfer to the USA never happened, and over 11 years later the detainees are still facing trial by military commission at Guantánamo.

Article 6(2) of the ICCPR states that, “in countries that have not abolished the death penalty...[t]his penalty can only be carried out pursuant to a final judgment rendered by a competent court.” Such a court, according to the UN Human Rights Committee, “must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial.”¹⁹⁹ In the USA, military commissions reside not within Article III of the Constitution (the judicial power), but within Article I (the legislative power).²⁰⁰ The Committee further states that the competent court “should be established before the commission of the offence.” This is not the case with the military commissions, the current version of which were established under legislation passed in 2009 to revise the 2006 version of the Military Commissions Act, which in turn replaced the military commissions established under executive order. Furthermore, “As a rule, civilians must not be tried for capital crimes before military tribunals”.²⁰¹ As noted above, this rule means that while military tribunals are not outlawed by the Committee in this respect, the government must show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”. That is not the case here. Amnesty International take the view that military courts should not have jurisdiction to try civilians, owing to the nature of these courts and because of concerns about their independence and impartiality.

Execution after a trial conducted in front of these military commissions would amount to an arbitrary deprivation of life, in violation of article 6 of the Covenant. In addition, trials under the MCA discriminate on the basis of nationality, no US national would be subject to them. The law itself is discriminatory.

In its authoritative interpretation of the obligations under the ICCPR in relation to the right to life, the UN Human Rights Committee holds that the death penalty “must not be imposed in a discriminatory manner” contrary to article 2(1) or article 26 of the ICCPR.²⁰² Again, death sentences and executions pursuant to the MCA would violate this obligation.

Article 14 of the ICCPR provides for fair trial guarantees. Violation of article 14 “in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant”²⁰³. Examples of violations could include lack of independence or impartiality of the trial or appeal court, and “excessive and unjustified delays in the trial”.²⁰⁴

The five were arraigned in 2012 under the MCA of 2009. At that point, the military judge presiding over the trial was US Army Colonel James Pohl. He stepped down in 2018. US Marine Corps Colonel Keith Parella was

¹⁹⁸ Departments of Justice and Defense announce forum decisions for ten Guantánamo detainees. Office of Public Affairs, US Department of Justice, 13 November 2009.

¹⁹⁹ UN Doc. CCPR/C/GC/36, Human Rights Committee, General Comment No. 36, Right to Life: Article 6. 3 September 2019, para. 45.

²⁰⁰ While the MCA incorporates Article III judicial review of military commission convictions, this does not fix the competence problem of the military commissions themselves. Moreover, it does nothing to remedy violations of the right to trial without undue delay. “Crucially, while the scheme Congress created in the MCA incorporates Article III review, it also delays it until a specific point. Before an Article III court may step in, a defendant must be tried and convicted in the military system, the convening authority must have approved the conviction, and the defendant must appeal the conviction to the CMCR or affirmatively waive his right to do so.” *In re: Abd al-Rahim Hussein Muhammed al-Nashiri*, US Court of Appeals for the DC Circuit, 30 August 2016.

²⁰¹ UN Doc. CCPR/C/GC/36, Human Rights Committee, General Comment No. 36, Right to Life: Article 6. 3 September 2019, para. 45.

²⁰² *Ibid.*, para. 44. (Also para. 61, “Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature”).

²⁰³ *Ibid.*, para. 41.

²⁰⁴ *Ibid.*

appointed to replace him. In 2014, he had served as a counterterrorism prosecutor in the Department of Justice's Counterterrorism Section (CTS). Lawyers for three of the five defendants challenged his impartiality, based on his work at the CTS and his social relationship with a member of the prosecution, and moved to have him recused, but Parella denied the motion. The CMCR also denied two petitions on the issue. However, in June 2019, Colonel Parella stepped down, on the grounds that he was leaving to take another job (supervising Marine security forces at US embassies).²⁰⁵

Colonel W. Shane Cohen was appointed on 3 June 2019 to be the presiding judge. Less than a year later, he announced his retirement from the US Air Force, and that his "last day of active-duty service as a military judge will be 24 April 2020"²⁰⁶. From 28 April 2020, the Chief Judge of the military commissions, US Army Colonel Douglas Watkins appointed himself to cover as presiding judge of the 9/11 proceedings during the restrictions imposed during the COVID-19 pandemic or until he appointed another military judge.

US Marine Corps Colonel Stephen F. Keane was appointed as the judge for the 9/11 case on 17 September 2020. Two weeks later, on 2 October 2020, he recused himself. In his recusal order, he said "Since being detailed to this case, I have had the opportunity to more closely review certain aspects of this case and analyze potential conflicts".²⁰⁷ He said that the "cumulative effects" of his prior work in counterterrorism, his personal connections to New York City and to multiple people who were directly affected by the 9/11 attacks, including a "newly discovered personal connection to 9/11", his continued presence as the military judge in the case "arguably creates an appearance of bias" and "my recusal is immediately required".

US Air Force Lt Colonel Matthew McCall was appointed as military judge on the case on 16 October 2020. On the same day, the prosecution filed a notice of the government's position on his appointment, namely that it did not consider he was qualified for the role. The notice pointed out that under the rules for military commission, the judge had to have at least two years of experience as a military judge, which Lt Col. McCall appeared not to have. The prosecution reserved its right "to file its own motion to recuse should Lt Col McCall not *sua sponte* recuse himself at the earliest opportunity".²⁰⁸ On 9 December 2020, the prosecution filed such a motion.²⁰⁹ Six days later, the chief judge, Colonel Watkins (above) issued a ruling stating that on 14 December, he had replaced Lieutenant McCall and was himself now the military judge presiding over the case.²¹⁰

In 2017, the US Court of Appeals for the DC Circuit ruled that one of the judges on the Court of Military Commission Review should be recused from the case and a decision in which he was involved vacated. The challenge to Judge Scott Silliman brought by Khalid Shaikh Mohammad, after he refused to recuse himself, was based on more than a dozen statements made prior to and during his service on the CMCR that indicated bias. The Court of Appeals was in no doubt that Judge Silliman had expressed opinions as to Khalid Shaikh Mohammad's guilt of the very crimes of which he had been charged.²¹¹

A contempt has been shown over the years for the presumption of innocence of those held in Guantánamo. In the key speech which apparently persuaded legislators to pass the MCA, authorizing military commissions, President Bush referred to detainees by name and labelled them "terrorists". Khalid Shaikh Mohammad "was the mastermind behind the 9/11 attacks". He described Ramzi bin al-Shibh as a "terrorist" and one of "KSM's accomplices in the 9/11 attacks". These and the "other terrorists in CIA custody", he said, could "face justice" as soon as "Congress acts to authorize the military commissions I have proposed".²¹²

The death penalty is a punishment that is particularly vulnerable to politicization. Asked in 2009 about the views of those offended by the prospect of the trial of KSM being conducted in federal court where the

²⁰⁵ On 10 April 2020, the US Court of Appeals for the DC Circuit ruled that it was "neither clear nor indisputable that Colonel Parella should have recused himself", and the Court declined to vacate Parella's orders.

²⁰⁶ Memorandum for Chief Trial Judge, Military Commissions. Subject: *USA v. Khalid Shaikh Mohammad et al.* 17 March 2020.

²⁰⁷ *USA v. Khalid Shaikh Mohammad et al.* Ruling; Recusal of Military Judge, 2 October 2020.

²⁰⁸ *USA v. Khalid Shaikh Mohammad et al.* Government notice of position on the qualifications of Lieutenant Colonel Matthew N. McCall to serve as a military commission judge, 16 October 2020.

²⁰⁹ *USA v. Khalid Shaikh Mohammad et al.* Government motion for Lieutenant Colonel Matthew N. McCall to recuse himself as military judge due to disqualification for non-compliance with manner of detailing specified lawful by regulation, 9 December 2020. On 18 December, a defence motion to stay his removal and to abate proceedings until the matter was resolved. At the time of writing neither of these motions had been declassified.

²¹⁰ *USA v. Khalid Shaikh Mohammad et al.*, Ruling, 15 December 2020.

²¹¹ See also *In Re: Omar Khadr*, US Court of Appeals for the DC Circuit, 20 May 2016 ("[W]e cannot deny that Khadr has raised some significant questions. We encourage Congress and the Executive Branch to promptly attend to those issues and to make clear, one way or the other, whether the civilians who serve as judges on the US Court of Military Commission Review may continue to engage in the part-time practice of law and, if so, the circumstances under which they may do so").

²¹² Remarks on the War on Terror, 6 September 2006.

constitutional protections afforded to US citizens would apply, President Obama responded: “I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him”.²¹³ This comment was disturbing, not least given that the President is the final clemency authority in federal and military capital cases, but also given that the prosecution is now in the military commission system, over which the President has ultimate constitutional authority as Commander in Chief of the Armed Forces.

Amnesty International opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution. It considers the death penalty a violation of the right to life as recognized in the Universal Declaration of Human Rights and the ultimate cruel, inhuman and degrading punishment.

4.4 VIOLATING THE RIGHT TO FAIR TRIAL WITHOUT UNDUE DELAY

“Bin Lep has spent well over a decade awaiting prosecution for war crimes that he allegedly committed from 1996 to 2003. And he offers a compelling, and at times disconcerting, description of the ‘state of limbo’ he continues to endure with no end in sight”

US District Court, December 2020²¹⁴

Mohammed Bin Lep, also known as Lillie, is a 44-year-old Malaysian national. On 11 August 2003, at the age of 26, he was arrested by authorities in Thailand. He has alleged that he was held naked for three or four days in detention in Thailand.²¹⁵ That same month he was taken to a CIA “black site” in Afghanistan and “almost immediately” upon arrival there, subjected to torture and other ill-treatment. He was “stripped of his clothing”, and “placed in a cell in the standing sleep deprivation position in darkness”²¹⁶. He has said that he was held for nine days naked and seven days in the prolonged stress standing position in the Afghanistan facility, during which time he was forced to defecate and urinate on himself.

Mohammed Bin Lep was one of three southeast Asian detainees – the other two being Riduan Bin Isomuddin (Hambali) and Mohammed Farik Bin Amin (Zubair) – arrested in Thailand in the summer of 2003 and put into the CIA programme for the next three years. All three were among the 14 detainees transferred to Guantánamo in September 2006, transfers used by President Bush to further impunity and injustice. As soon as Congress passed the MCA, he said, trials by military commission could be conducted at Guantánamo.

Fourteen years later, a habeas corpus petition filed in Mohammed Bin Lep’s case in November 2020 asserted:

“Congress may not arbitrarily target a suspect class for unequal treatment in criminal prosecutions. Yet, that is precisely what the MCA does. On its face, it segregates federal terrorism prosecutions on the basis of the accused’s nationality, such that citizens are rendered immune from prosecution before the military commissions, whereas non-citizens may be prosecuted before such tribunals and deprived of the myriad fair trial rights afforded to federal defendants. [Bin Lep’s] case illustrates the arbitrary and unequal justice such invidious discrimination invites, since it is inconceivable that any citizen would ever be held for nearly a generation without presentment, charge, or trial.”²¹⁷

The rules for military commissions under the MCA incorporate a two-step charging process. The first step is to “swear” the charges against the detainee. These charges are then forwarded to the Convening Authority (CA) – a designee of the Secretary of Defense – for them to decide whether the charges should be “referred” on for trial.²¹⁸ There is no time limit under the MCA on when this referral must be made.

The following chronology illustrates the delays, as well as how, despite not having any charges referred against him, the threat of them has inhibited his participation in the Periodic Review Board. In addition, it shows that there has been some chopping and changing in the office of the Convening Authority (CA) with five (5) different people in that position since 2018. Coupled with recent removals and retirements of military judges or vacating of their orders (see Section 5.2 and 5.3), this suggests a system in some disarray.

²¹³ See, for example, Obama on terror trials: KSM will die, Politico, 18 November 2009.

²¹⁴ *Bin Lep v. Trump*, Memorandum Opinion, US District Court for DC, 14 December 2020.

²¹⁵ ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, February 2017.

²¹⁶ SSCI Summary, n. 628. Also, ICRC report on the treatment of 14 ‘high value detainees’ in CIA custody, February 2007.

²¹⁷ *Bin Lep v. Trump*, Petition for a Writ of Habeas Corpus, In the US District Court for DC, 5 November 2020.

²¹⁸ The Office of the CA is “responsible for the overall management of the military commissions process, including logistics and personnel support. The Convening Authority is empowered to convene military commissions, refer charges to trial, negotiate pre-trial agreements, and review records of trial.” Office of Military Commissions, Organization Overview.

CHRONOLOGY

- 11 August 2003 – Bin Lep and Hambali are taken into custody in Thailand, three days after Zubair.
- September 2006 – The three are among 14 men transferred from the CIA programme to Guantánamo. President Bush says if Congress passes the MCA, the USA will prosecute the “suspected terrorist leaders and operatives who have now been transferred to Guantánamo”.
- 20 March 2007 – a CSRT determines Bin Lep, with no legal counsel, is an “enemy combatant”.
- 22 January 2010 – Bin Lep’s “final disposition” under the GRTF, led by Brig. Gen. Mark Martins, who in 2011 will become Chief Prosecutor for military commissions, is “referred for prosecution”.
- 15 September 2016 – PRB determines that “continued law of war detention” of Bin Lep is necessary. The PRB acknowledges “the detainee’s general candor regarding his past activities” and adds that it “looks forward to reviewing detainee’s file in six months and strongly encourages that efforts be made on his behalf to engage with his family and Malaysian government officials with regard to what would be in place if the detainee was transferred.”²¹⁹
- 24 February 2017 – The Chief Prosecutor writes to PRB (“I have no concerns about the lawfulness of [Bin Lep’s] detention under the laws of armed conflict... Our office is currently engaged in active case preparation, and under certain circumstances, it is possible that I would swear charges against [Bin Lep]. I recommend against the release or transfer of [Bin Lep]”).
- March 2017 – lawyer provides PRB with a letter from Bin Lep’s family saying they wish to be reunited with him, and can provide him with support, housing, and employment if repatriated. The lawyer tells the PRB that counsel met with Malaysian diplomats who “expressed their government’s strong interest in [Bin Lep’s] return home as well as their willingness to work with the US Government to develop a plan for his transfer to Malaysia.”
- 20 June 2017 – OCP swears charges against Hambali relating to his alleged leadership role in bombings in Indonesia, at a nightclub in Bali in 2002 and a Marriott Hotel in Jakarta in 2003.
- 7 December 2017 – OCP swears charges against Bin Lep, jointly with Hambali and Zubair, for “eight offences under the law of war”.²²⁰ Bin Lep accused of providing support to Hambali in Jakarta bombing. Charges are forwarded to CA1, stating that the prosecution is not seeking a capital referral in this case, and requesting dismissal of the 20 June 2017 charges sworn in Hambali case.
- 12 December 2017 – CA1 returns charges to OCP due to lack of accompanying materials.
- 15 December 2017 – OCP sends charges back to CA1 with materials.
- 22 December 2017 – CA1 returns charges to OCP pending a decision by the Office of the Director of National Intelligence (ODNI) that the trial would not harm national security.
- 27 December 2017 – Chief Prosecutor writes to PRB “I have no concerns about the lawfulness of [Bin Lep’s] detention under the laws of armed conflict.... I have sworn charges against [bin Lep]”.
- 3 February 2018 – Secretary of Defense rescinds CA1 designation as CA. Designates CA2.
- 30 March 2018 – ODNI determines that the trial will not harm national security.
- 28 June 2018 – Chief Prosecutor writes to PRB “I have no concerns about the lawfulness of [Bin Lep’s] detention under the laws of armed conflict.... I have sworn charges against [bin Lep]”.
- 27 July 2018 – “revised and simplified” charges transmitted to CA2.
- 9 August 2018 – Secretary of Defense rescinds CA2 designation as CA. Designates CA3.
- 10 September 2018 – OCP requests CA3 to initiate classified pre-referral proceedings.
- 8 March 2019 – CA3 issues an order granting prosecutor’s request. The defence submits various requests for discovery, declassification of information, and a delay in the timeline set by the CA3.
- 5 April 2019 – new charges sworn against Bin Lep, Hambali and Zubair. Bin Lep’s alleged offences are similar to those sworn in 2017, but there is a new charge of conspiracy encompassing any illegal activity triable by military commission from 1996 to 2003. Charges not immediately sent to CA3.
- 23 May 2019 – Secretary of Defense rescinds CA3 designation as CA. Designates CA4.
- June 2019 – Bin Lep does not participate in his PRB hearing, in view of the pending sworn charges.
- 25 July 2019 – PRB determines that “continued law of war detention” of Bin Lep “remains necessary”. The PRB points to its “inability to assess the detainee’s current threat level due to the

detainee's refusal to meet with his personal representative, the lack of submission of any new materials by the detainee and his representatives and the detainee's decision not to attend the hearing".

- 11 September 2019 – CA4 denies request to reconsider its March 2019 order.
- 18 September 2019 – a classified defence motion filed in District Court for injunction to stop the classified pre-referral proceedings because the severe resourcing and other “[government]-imposed” problems being faced by Bin Lep’s commission lawyers led them to believe they could not “participate competently in these pre-referral proceedings”.
- 23 September 2019 – District Court notes that “Bin Lep is challenging allegedly unlawful restrictions on his ability to access and use exculpatory evidence and exercise other procedural rights while in confinement... Neither the Convening Authority – nor government counsel – could articulate any reason [redacted] need to take place prior to any referral of charges to a military commission [emphasis in original]... [I]f Bin Lep is correct, and he is being unlawfully denied an opportunity to [redacted] or use crucial classified documents [redacted] then Bin Lep will likely not have an opportunity to do so in the future. At the hearing, the government seemed to agree: there will be only one bite at the apple.”²²¹ The District Court judge grants the injunction.
- 8 October 2019 – prosecution forwards the April 2019 charges to CA4, requesting that the charges be referred for a joint military commission and asks that the 7 December 2017 charges be withdrawn.
- 10 October 2019 – CA4 dismisses 7 December 2017 charges.
- 26 February 2020 – Last military commission proceedings in 2020 at Guantánamo before all subsequent scheduled proceedings cancelled due to the COVID-19 pandemic.
- 17 April 2020 – Secretary of Defense rescinds CA4 designation as CA. Designates CA5.
- 5 November 2020 – habeas corpus petition filed in US District Court challenging Bin Lep’s designation as an “enemy combatant” and the lawfulness of his detention. His lawyers also file a motion for a preliminary injunction stopping the government from taking any further steps to “unlawfully try him by military commission” on the grounds that the delays in bringing him to trial, as well as the discriminatory nature of the commission system, render any future prosecution unlawful.

The habeas corpus petition alleges that one of Bin Lep’s lawyers has information suggesting that the government has “intentionally delayed initiating proceedings” against Bin Lep “as part of a continuing effort to develop potentially inculpatory evidence against him and his alleged co-conspirators and to conceal classified evidence from [his] trial counsel that is potentially exculpatory.”²²² Because the charges have not been referred for trial, Bin Lep does not have “discovery” rights under the MCA so “the means by which” the government has operated have not been disclosed to his trial counsel. Were the latter aware of “the steps [the government has] taken since the swearing of charges to secure inculpatory evidence” they “could respond and endeavor to mitigate the potential risks to [Bin Lep’s] rights.” The lawyer “with knowledge of this information is presently subject to a protective order issued in a military commissions case in which the disclosure was made” and thus could not disclose the basis of this conclusion to other counsel, or even to Bin Lep himself, absent an order to do so from the Court.

While Bin Lep has been in US custody, his lawyers argue, exculpatory evidence relating to the charges has been lost. Numerous “key witnesses” have died, including three by execution in Indonesia in 2008.²²³ Three others were killed in raids by Indonesian police in 2005, 2009 and 2010, and another died of natural causes.

Bin Lep’s lawyers maintain that the sworn charges that are hanging over the detainee are necessarily inhibiting his willingness to participate openly in the PRB process for fear of saying anything which could be used against him in a future military commission. Furthermore, “repatriation discussions with the Malaysian government have effectively stalled, due in large part to the pending sworn charges”.²²⁴ It seems that, in any event, the Chief Prosecutor’s communications to the PRB have disqualified the detainee from the PRB process under its rules (detainees against whom there are “charges pending” do not receive review).

During the 17 years that Bin Lep has been in custody, “the Government has had access to foreign witnesses and resources to collect evidence against Mr Bin Lep. Conversely, Mr Bin Lep’s defense team has been left to

²¹⁹ Unclassified summary of final determination, 15 September 2016.

²²⁰ Unclassified declaration of Brigadier General Mark S. Martins, US Army, Chief Prosecutor, 30 October 2020, para. 5.

²²¹ *Bin Lep v. Trump*, Memorandum opinion & order, US District Court for DC, 23 September 2019.

²²² *Bin Lep v. Trump*, Petition for a writ of habeas corpus, In the US District Court for DC, 5 November 2020.

²²³ 3 executed by firing squad for Bali bombings, New York Times, 8 November 2008.

²²⁴ *Bin Lep v. Trump*, Petition for a writ of habeas corpus, In the US District Court for DC, 5 November 2020.

fend for themselves, with a skeleton staff of investigators and attorneys devoid of overseas resources.”²²⁵ But because the charges are not yet referred, the defence team’s requests for funding and travel have been denied on the grounds they are premature, as the CA has “not decided whether to refer the charges against Mr bin Lep to trial by military commission”²²⁶. The lawyers also sought their client’s medical records, not least because of the torture and other ill-treatment he endured in CIA custody. This too has been denied on the basis that “the prosecution is under no obligation to turn over discovery until after referral. Therefore the prosecution will not be disclosing your client’s medical record to the defense unless the case is referred”.²²⁷

In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of ‘equality of arms’ is an essential guarantee of the accused’s right to defend him or herself. It ensures that the defence has a genuine opportunity to prepare and present its case, and to contest the arguments and evidence put before the court, on a footing equal to that of the prosecution. The requirements of this principle include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information.

On 14 December 2020, the District Court judge denied Bin Lep’s motion for a preliminary injunction “at this time”. He rejected the government’s claim that the court should abstain to allow the military commission to work “free from premature interference by federal courts”. However, he ruled against Bin Lep on the merits of his claim. He noted that “a court typically considers an ‘oppressive’ pre-indictment delay under the due process rubric”, but “this type of claim is not currently available to Bin Lep, given the DC Circuit’s recent pronouncement in *Al Hela v. Trump* that Guantánamo detainees lack any due process rights” (see Section 3.1). The judge said that while he did “not doubt Bin Lep’s assertions that he would be better positioned to develop a factual record in his habeas case if he did not have to worry about the ramifications for his criminal prosecution”, those concerns “do not amount to an unlawful infringement of his habeas rights under *Boumediene*”. And “while it is true that the pendency of draft charges against Bin Lep may influence the PRB’s decision in his case..., that factor is not dispositive”.²²⁸

An “enemy combatant charged with a criminal offense in an American court enjoys the protection of the Speedy Trial Clause” of the Sixth Amendment of the US Constitution, noted the federal judge overseeing the trial of the only Guantánamo detainee transferred to the USA for trial.²²⁹ In Mohammed Bin Lep’s case, the District Court dismissed the speedy trial claim: “No court has extended the Sixth Amendment speedy trial right to a Guantánamo detainee tried before a military commission”, adding that Bin Lep had failed to demonstrate that the speedy trial right should be differentiated “from other long-standing constitutional guarantees, like rights to trial by jury or due process, that decidedly do not apply in military trials at Guantánamo”. On the claim that the military commission system under the MCA violates the right to equal protection, the judge held that “particularly in the context of national security, congressional policies regarding the treatment of non-citizens are entitled to considerable deference”. Here the judge added that the military commission system “serves national security interests because it allows for the protection of sensitive sources and methods of intelligence-gathering”.²³⁰

It bears repeating, that in Mohammed Bin Lep’s case, as in so many others, the approach taken to intelligence-gathering incorporated a green light for so-called “high value detainees” to be subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment in undisclosed locations. Those locations remain classified to this day, as do many of the details of what was done to these detainees when held there.

Bin Lep, the judge concluded, “has spent well over a decade awaiting prosecution” and “offers a compelling, and at times disconcerting, description of the ‘state of limbo’ he continues to endure with no clear end in sight”. However, because he had not shown a “sufficient likelihood of success on his unreasonable delay, speedy trial, or equal protection claims” to warrant an order stopping his potential prosecution, the judge refused to issue one.

²²⁵ *Ibid.* Exhibit 2.

²²⁶ *Ibid.* Exhibit 3.

²²⁷ *Bin Lep v. Trump*, Petition for a writ of habeas corpus, In the US District Court for DC, 5 November 2020. Exhibit 15.

²²⁸ *Bin Lep v. Trump*, Memorandum opinion, US District Court for DC, 14 December 2020.

²²⁹ *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

²³⁰ *Bin Lep v. Trump*, Memorandum opinion, US District Court for DC, 14 December 2020.

4.5 PUNISHED WITH ISOLATION FOR LIFE?

“No one at sentencing, not the prosecution, not the members, not [Convening Authority] Crawford, understood that they were imposing a sentence of death in solitary confinement... This arbitrary imposition of suffering violates the prohibition on cruel and unusual punishment as well as basic human dignity”

Brief for Petitioner, 8 July 2019²³¹

Ali Hamza al-Bahlul was taken into custody in Pakistan over 19 years ago, on 15 December 2001, and handed over to US forces in Afghanistan 11 days later. He was transferred to Guantánamo on 11 January 2002, the first day of detainee operations. He was charged in 2004 with conspiracy to commit war crimes, but proceedings ended in 2006 following the *Hamdan* case. In 2008, amended charges under the MCA were entered – conspiracy to commit war crimes, providing material support for terrorism and solicitation of others to commit war crimes. The commission convicted him of all three offences and sentenced him to life imprisonment. Two of these convictions have since been overturned and the third is disputed.

CHRONOLOGY: ALI HAMZA AL-BAHLUL

- 2008 – Ali Hamza al-Bahlul is convicted of conspiracy, material support for terrorism, and solicitation, and sentenced to life imprisonment.
- 2011 – CMCR affirms convictions on all charges and the life sentence.
- 2013 – Three-judge panel of the DC Circuit Court of Appeals vacates the convictions on all three charges, finding that the MCA does not apply retroactively to conduct predating 2006 when the offences charged were not war crimes under international law (as per *Hamdan v. United States*).
- 2014 – Full Court of Appeals decides the MCA applies retroactively, but that newly created crimes violate the *ex post facto* clause of the Constitution. The charges of material support for terrorism and solicitation are struck down. Conspiracy is upheld under the “plain error” standard – it was “not obvious” that conspiracy was not triable by military commission prior to MCA enactment.
- 2015 – Three-judge panel of the Court of Appeals vacates the conviction for conspiracy on grounds that it violates Article III of the Constitution (judicial power). The government has conceded that conspiracy is not a violation of the international law of war, so the question was whether a military commission may try the domestic offence of conspiracy “without intruding on the judicial power in Article III”. The panel concluded that there was such an intrusion.
- 2016 – Full Court of Appeals divides on the Article III requirements, but affirms the CMCR judgment upholding the conspiracy conviction, and remands to the CMCR for resentencing. Three judges dissented, arguing that to charge an individual in a military commission with conspiracy “infringes the judiciary’s power to preside over the trial of all crimes, as set forth in Article III.”
- 2019 - CMCR reaffirms the life sentence, stating “we are confident” that the commission would still have sentenced the defendant to life imprisonment even if only on the one charge, and that this life sentence is ‘an appropriate punishment for the sole remaining conviction’.
- 2020 – Three-judge panel of the Court of Appeals vacates the life sentence, finding that the CMCR had applied the wrong legal standard for assessing the effect on the sentence of the conviction on two charges being vacated, and remands to the CMCR for reconsideration under the standard of “harmless beyond a reasonable doubt”. The CMCR’s reconsideration is currently pending.
- 2020/2021 - On petition for rehearing by full Court of Appeals. Any rehearing is likely to be in early 2021 and limited to the question of whether conspiracy violates the *ex post facto* clause.

Ali al Bahlul is serving a life sentence passed after he was convicted on three charges. The conviction survives only on one charge, itself under question. The solicitation charge was central to the prosecution’s case, and solicitation (in the form of his role in producing video propaganda for al Qaeda) was also stressed at sentencing.

Moreover, the life sentence is effectively life without parole because there is no parole system. The only review system is the PRB, but the PRB is categorically barred from reviewing the cases of those “against whom charges are pending or a judgment of conviction has been entered”. If the conviction and sentence continue to be upheld, Ali al Bahlul has effectively been sentenced to die in prison.

²³¹ *Ali al-Bahlul v. USA*, Brief for Petitioner, In the US Court of Appeals for the DC Circuit, 8 July 2019.

Department of Defense policy provides that Guantánamo detainees who have been convicted by military commission should be housed separately from non-convicted detainees.²³² Since he was sentenced in 2008, only four other detainees have served any military commission sentences, all of which were for less than three years before they were transferred out of the base. For nearly 10 out of the past 12 years, Ali al-Bahlul has been the only detainee serving a military commission sentence at Guantánamo, and no other “low value detainees” are expected to be tried, in which case he may remain the only such prisoner.

The government has asserted that he has had “regular contact” with other detainees, but without providing any detail.²³³ Lawyers for Ali al-Bahlul have responded that, based upon numerous in-person meetings with the prisoner, the government’s claim is “overstated”.²³⁴ Asked about this claim made in its brief of mid-September 2019, Ali al-Bahlul advised that he only had the opportunity to meet with other detainees on four occasions since June for one-on-one evening prayer. This followed years of isolation broken only briefly, “for example when other detainees have served nominal military commission sentences or were otherwise put in a temporary disciplinary status.”²³⁵

In 2020, the Court of Appeals ruled it could not review the question – the prisoner would have to challenge his confinement conditions via “a different mechanism – likely a petition for a writ of habeas corpus”.²³⁶

4.6 FINALLY, SOME REMEDY FOR TORTURE?

“[T]hese military commissions were set up to ensure that former CIA detainees like Mr Khan were detained without meaningful access to the outside world, and, contrary to our obligations under international law, to protect and shield their torturers from accountability”

Defense motion, military commission, 2019²³⁷

Majid Khan has been in custody since 2003 and was one of the 14 detainees transferred in 2006 to Guantánamo from CIA custody, their cases exploited by President Bush to get legislative approval for military commissions trials. Majid Khan had been subjected to torture and other ill-treatment in the CIA programme as well as to the crime under international law of enforced disappearance. No one has been brought to justice for these crimes.²³⁸

On 29 February 2012 Majid Khan pled guilty to charges brought under the MCA pursuant to a plea agreement whereby sentencing would be deferred and he would cooperate with the government.²³⁹ The agreement provides for a maximum sentence of 19 years’ imprisonment with continued cooperation, with credit for time served between guilty plea and sentencing. The sentencing hearing is scheduled to take place in May 2021.

On 4 June 2020, the military judge issued a decision concerning Majid Khan’s treatment prior to his guilty plea. In 2019, his lawyers had filed a motion seeking meaningful relief for the “illegal pretrial punishment that he suffered for more than three years in CIA detention” and “for more than five years between the time he arrived at Guantánamo and his guilty plea in February 2012”.²⁴⁰ It requested sentencing credit “equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy for the war crimes of torture, anal rape, sexual assault, intentionally causing serious bodily injury, and other cruel, inhuman, and degrading treatment that Mr Khan suffered at the hands of US agents while in official detention resulting from the offenses for which he was subsequently charged and pled guilty”. The requested relief was to be in addition to the day-for-day confinement credit to which Khan is entitled from the date his guilty plea was entered in February 2012, and “notwithstanding any clemency determination by the Convening Authority”.

Majid Khan was arrested in Pakistan on 5 March 2003 and held in Pakistani custody before being transferred to the CIA. He was held in secret CIA detention at undisclosed locations for over three years. According to his lawyer, “After his abduction in Pakistan in March 2003, Majid was waterboarded twice, hung by his hands, naked and shackled, and submerged in tubs of ice water until he thought he would drown. He was sexually assaulted while hanging naked from the ceiling. Interrogators threatened to hammer his head and threatened

²³² *Al Bahlul v. USA*, Brief for the United States, In the US Court of Appeal for the DC Circuit, 13 September 2019.

²³³ *Ibid.*

²³⁴ *Al Bahlul v. USA*, Corrected Petitioner’s reply brief, In the US Court of Appeal for the DC Circuit, 15 October 2019.

²³⁵ *Ibid.*

²³⁶ *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, 4 August 2020.

²³⁷ *USA v. Khan*, Defense motion for pretrial punishment credit and other related relief, 1 May 2019.

²³⁸ USA: One-way accountability, 18 July 2012, www.amnesty.org/en/documents/AMR51/063/2012/en/

²³⁹ Conspiracy; Murder in Violation of the Law of War; Attempted Murder in Violation of the Law of War; Providing Material Support for Terrorism (PMST); Spying. Following *Al Bahlul v. US* (2014), PMST was dismissed.

²⁴⁰ *USA v. Khan*, Defense motion for pretrial punishment credit and other related relief, 1 May 2019.

to harm his young sister. Majid lived in total darkness for much of 2003, and in solitary confinement from 2004 to 2006.” He would later recall to his lawyer, “I lived in anxiety every moment of every single day about the fear and anticipation of the unknown. I wished they had killed me.”²⁴¹

The violations after he was transferred to Guantánamo in September 2006 included “abusive treatment, punitive conditions of confinement, and due process violations such as a denial of his requests for access to his counsel for an entire year”. This denial of access to counsel was allegedly so that law enforcement and military officials could try “to elicit confessions from him to construct a military commissions case against him that they hoped would be free from the taint of his CIA torture”.²⁴²

The military judge assumed the allegations were true for the purpose of the question before him. Taken as true, he said, “this mistreatment rises to the level of torture” and it “violated the jus cogens universal right to be free from torture under US and international law”. Compared to the stream of memorandums written in the US Department of Justice between 2002 and 2007, in which law was subordinated to policy²⁴³ and which gave the CIA the green light to employ interrogations and detention conditions which violated the international prohibition of torture and other cruel, inhuman in its secret detention programme, the military judge’s pages-long treatise on the prohibition of torture and other ill-treatment is something of a breath of fresh air.²⁴⁴

The military judge found that while the RMCs expressly prohibited him from granting credit for time spent in detention, they did not restrict the availability of credit for “pretrial punishment”. He decided that Majid Khan was being held for trial “no later” than his transfer from CIA custody to Guantánamo, not least given President Bush’s speech of 6 September 2006 calling on Congress to pass the MCA so that the transferees could be tried by military commission. Majid Khan was one of the detainees named in the President’s speech.

The military judge wrote: “Taking special factors into consideration, including the seriousness of the offenses to which the Accused pled guilty, as well as the shocking mistreatment to which the Commission has found he was subjected (for purposes of this initial ruling on this motion), the narrowly-tailored, meaningful, and available remedy of administrative sentencing credit seems necessary and appropriate”. Among other things the government argued that the alleged torture occurred “in the context of the accused’s interrogations for intelligence purposes and his detention as an enemy belligerent... [H]e cannot demonstrate that he was punished for these offenses (as opposed to being independently mistreated)”.²⁴⁵ The military judge dismissed this tendentious argument about Khan being “independently mistreated”, saying that even if he was lawfully in law of war detention, it “does not relieve the Government of its obligation to treat detainees humanely”.

The military judge concluded that he had “the inherent authority to grant a remedy in the form of administrative sentencing credit for abusive treatment amounting to illegal pretrial punishment, especially when no other remedy is available” and “broad discretion to fashion a remedy for illegal pretrial punishment – a violation of the universal right to be free of torture – by virtue of the *sua sponte* duty to ensure the fundamental fairness, as well as the appearance of fairness, of the tribunal”.²⁴⁶ The sentencing is scheduled for 17 to 28 May 2021.²⁴⁷ The government should desist from adopting any positions that would effectively seek to justify enforced disappearance, torture or other ill-treatment.²⁴⁸ There can be no such justification.

²⁴¹ The torture of Majid Khan. By Wells Dixon, www.aljazeera.com/opinions/2015/6/22/the-torture-of-majid-khan/

²⁴² In his ruling, the judge indicated that he might “consider evidence of other potentially unlawful pretrial punishment, such as degradation of the right to counsel as alleged by the Defense” (note 87).

²⁴³ “OLC attorneys were aware of the result desired by their client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor” – Investigation into the Office of Legal Counsel’s Memoranda concerning issues relating to the Central Intelligence Agency’s use of ‘enhanced interrogation techniques’ on suspected terrorists. Office of Professional Responsibility, US Department of Justice, 29 July 2009, pages 226-227.

²⁴⁴ E.g., “Torture is prohibited at all times and in all circumstances without exception; this prohibition is a jus cogens peremptory norm of international law”; “The UDHR is an authoritative statement of the international community and binding CIL [customary international law]”; “International human rights law (IHRL) focuses on a State’s obligation to protect the inherent dignity and inalienable rights of individual human beings”; “IHRL and the Law of Armed Conflict (LOAC) are widely viewed as complementary; accordingly, the LOAC does not displace IHRL during armed conflict”; “The CAT applies to all US activities worldwide, including military operations”. “The prohibition against torture is not only jus cogens, but it also holds an even higher rank than CIL or treaty law. No international action could ever legitimize the use of torture. Because CIL has the force of US law, jus cogens norms of fundamental human rights are binding on US forces during all overseas operations”; “The prohibition does not distinguish between treatment of aliens and citizens and applies to everyone, everywhere, and at all times, both in peace and in war.” *USA v. Khan*, Ruling, 4 June 2020.

²⁴⁵ *USA v. Khan*, Government response to defense motion for pretrial punishment credit, 15 May 2019.

²⁴⁶ *USA v. Khan*, Ruling on defense motion for pretrial punishment credit and other related relief, 4 June 2020.

²⁴⁷ An evidentiary hearing before the military judge will be held in the first week to address the question of sentencing credit. The sentencing hearing before the jury of military officers will be held in the second week.

²⁴⁸ “Prosecutors shall ... respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”. UN Guidelines on the Role of Prosecutors (1990), para. 12.

5. TRUTH AND ACCOUNTABILITY

“I thought my moral obligation to protect American lives outweighed the temporary discomfort of terrorists who had voluntarily taken up war against us... I was designing a program for Abu Zubaydah because I thought, through him, we could get to the others”

Dr James Mitchell, military commission hearing, Guantánamo Bay naval base, 21 January 2020²⁴⁹

In 2004, the then classified CIA Inspector General’s review of the secret detention programme recommended that the CIA conduct a study of the effectiveness of its interrogation techniques.²⁵⁰ The agency’s Office of Medical Services raised its concern that this would amount to “human experimentation”. The Inspector General responded that the idea was not to conduct “additional, guinea pig research on human beings”, but rather a “careful review” of the CIA’s “experience to date” with the various techniques.²⁵¹

The 2007 report of the ICRC of its interviews with the 14 detainees transferred in September 2006 to Guantánamo from secret CIA custody noted that Abu Zubaydah had recalled being told in mid-2002 that he was “one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people.”²⁵² He said he had been subjected to all the techniques, which included forced nudity, prolonged sleep deprivation, exposure to cold water and temperatures, slamming against walls, cramped confinement in a small box, and “water-boarding”, a form of mock execution by water torture that consists of interrupted drowning.²⁵³ The ICRC determined that all 14 had been subjected to enforced disappearance.²⁵⁴ Thirteen of them are still at Guantánamo and at least 16 others held there had spent time in the CIA detention program before their transfer to Cuba.

Zayn al Abidin Muhammad Husayn, better known as Abu Zubaydah, has been held without charge in US custody for almost 19 years. Arrested in Faisalabad, he was handed over by Pakistani personnel to US agents. On 29 March 2002, President Bush “approved moving forward with the plan to transfer Abu Zubaydah” to a

²⁴⁹ *USA v. Khalid Shaikh Mohammad et al*, Unofficial/Unauthenticated transcript of proceeding, 21 January 2020. For further information on Dr Mitchell, see USA: Crimes and impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under international law ensured, April 2015 (hereinafter, USA: Crimes and impunity), <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>, page 9.

²⁵⁰ SSCI Summary, page 124.

²⁵¹ SSCI Summary, page 126.

²⁵² ICRC Report on the treatment of fourteen ‘high value detainees’ in CIA custody. February 2007, op. cit., pages 29-30.

²⁵³ Memorandum for the Record. HPSCI Member briefing on interrogations, 13 July 2004, in H-405 Capitol. See also Member briefings on Enhanced Interrogation Techniques, http://ftp.fas.org/irp/congress/2009_cr/eit-briefings.pdf.

²⁵⁴ ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, February 2007. <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>

secret location, believed to have been in Thailand.²⁵⁵ It would begin four and a half years of enforced disappearance.²⁵⁶

Enforced disappearance has been recognized as a crime under international law since the judgment of the Nuremberg Tribunal in 1946.²⁵⁷ Torture, too, is a crime under international law. In its 2007 report, the ICRC found itself having to remind the US government that “international law absolutely prohibits CID [cruel, inhuman and degrading treatment] and torture”.²⁵⁸ So too, in 2020, did a military judge, presented with evidence of the CIA torture of another of the 2006 transferees still at Guantánamo: “No international action could ever legitimize the use of torture... *jus cogens* norms of fundamental human rights are binding on US forces during all overseas operations... The prohibition does not distinguish between treatment of aliens and citizens and applies to everyone, everywhere, and at all times, both in peace and in war.”²⁵⁹

In 2002, in the facility in Thailand, Abu Zubaydah was kept in a white halogen-lit cell with no natural light or windows. His captors wore black uniforms, boots, gloves, balaclavas and goggles, not only to preserve their anonymity but to heighten the detainee’s isolation. Loud music and noise generators were used to “enhance” his “sense of hopelessness”. He was “typically kept naked and sleep deprived”.²⁶⁰ From 18 June to 4 August 2002, he faced 47 days of isolation to keep him “off-balance” while his case was discussed at high levels of government.²⁶¹

“There then followed a period of about one month with no questioning. Then, about two and a half or three months after I arrived in this place, the interrogation began again, but with more intensity than before. Then the real torturing started. Two black wooden boxes were brought into the room outside my cell. One was tall, slightly higher than me and narrow. Measuring perhaps in area 1m x 0.75m and 2m in height. The other was shorter, perhaps only 1m in height. I was taken out of my cell and one of the interrogators wrapped a towel around my neck, they then used it to swing me around and smash me repeatedly against the hard walls of the room. I was also repeatedly slapped in the face. As I was still shackled, the pushing and pulling around meant that the shackles pulled painfully on my ankles.”²⁶²

A cable sent from the facility on 4 August said that Abu Zubaydah “was unhooded and the large confinement box was carried into the interrogation room and placed on the floor so as to appear as a coffin”.²⁶³

“Over the course of the entire 20-day ‘aggressive phase of interrogation,’ Abu Zubaydah spent a total of 266 hours (11 days, 2 hours) in the large (coffin size) confinement box and 29 hours in a small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet. The CIA interrogators told Abu Zubaydah that the only way he would leave the facility was in the coffin-shaped confinement box”.²⁶⁴

It is believed that at some point Abu Zubaydah became one of the detainees who was held in secret custody in Guantánamo in 2003 and/or 2004 when the CIA operated a “black site” there.

It was during 2002 that the FBI told the military authorities at Guantánamo that one of the detainees there, Mohamed al-Qahtani (see Section 4), might have high intelligence value. The US Attorney General and President were briefed. The answer came that there was “no interest in prosecuting Al-Qahtani in a US court” at this time.²⁶⁵

²⁵⁵ SSCI Summary, page 23.

²⁵⁶ For more information on this section and generally, see USA: Crimes and impunity, *op. cit.*

²⁵⁷ Field Marshal Wilhelm Keitel was convicted by the Nuremberg Tribunal for his role in implementing Adolf Hitler’s Nacht und Nebel Erlass (Night and Fog Decree) of 7 December 1941 requiring that persons “‘endangering German security’ who were not to be immediately executed” were to be made to “vanish without a trace into the unknown in Germany”. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), page 88.

²⁵⁸ ICRC Report on the treatment of fourteen ‘high value detainees’ in CIA custody. February 2007.

²⁵⁹ *USA v. Khan*, Ruling on Defense motion for pretrial punishment credit and other related relief, 4 June 2020.

²⁶⁰ SSCI Summary, page 29.

²⁶¹ SSCI Summary, page 30 and footnote 256. A June 2002 cable from Detention Site Green noted that Abu Zubaydah was “tense” which it said was “likely an anticipatory reaction given his recent unexpected rectal exam” the previous day. SSCI Summary, page 488.

²⁶² ICRC Report on the treatment of fourteen ‘high value detainees’ in CIA custody. February 2007, pages 29-30.

²⁶³ SSCI Summary, page 41.

²⁶⁴ SSCI Summary, page 42.

²⁶⁵ A review of the FBI’s involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, October 2009 (revised) (hereinafter FBI OIG Report, October 2009). pages 78-79.

On 8 August 2002, Mohamed al-Qahtani was moved to isolation in the Navy Brig at Guantánamo, a place he would later describe as the “worst” he was taken to. His cell window was covered, he could not tell what time of day it was, he never saw sunlight for the six months he was held there, the lights in his cell were lit 24 hours a day, his cell was very cold, he was allowed no recreation, and the guards covered their faces “to further isolate Al-Qahtani from human contact”²⁶⁶. In November 2002, “FBI agents observed Detainee #63 [Mohamed al Qahtani] after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).”²⁶⁷

In 2008, the Senate Armed Services Committee (SASC) disclosed the minutes of a 2 October 2002 meeting held at Guantánamo to discuss interrogation techniques, at which the case of Mohamed al-Qahtani was on the agenda. Among the meeting’s participants was Jonathan Fredman, the chief counsel to the CIA’s Counterterrorism Center (CTC), the office overseeing the secret detention programme. He made numerous interventions at the Guantánamo meeting.²⁶⁸ He was named in the SASC report, but if his name appears in the 2014 summary of the report into the CIA programme compiled by the Senate Select Committee on Intelligence (SSCI), it was redacted. As such it is not possible to confirm to whom the SSCI’s reference to an official from “CTC Legal” who visited the CIA facility in Thailand in 2002 “to observe the use of the CIA’s interrogation techniques against Abu Zubaydah” refers.²⁶⁹ If it was Jonathan Fredman, then the discussion of Mohamed al-Qahtani at the October 2002 meeting was attended by someone who had directly observed the torture or other ill-treatment of Abu Zubaydah.

Jonathan Fredman’s “visit” to Guantánamo in October 2002 “took place just a week after acting CIA General Counsel John Rizzo” visited the base.²⁷⁰ In his memoirs, Rizzo asserted that his own “fingerprints” were all over the CIA’s secret detention and interrogation programme from its outset.²⁷¹ After publication of the SSCI summary, a CIA memorandum for the record cited in the summary was made public which points to a memorandum from Secretary of Defense Donald Rumsfeld dated 11 October 2002 and received by the CIA on or about 26 November 2002 “regarding the transfer of an individual from the Department of Defense (DoD) control to the control of the CIA”.²⁷² The memorandum was addressed to CIA Director George Tenet and asked him to confirm that the detainee would be returned to DoD control “at an appropriate time”.²⁷³ The timing of the memorandum suggests that the detainee may have been Mohammed al Qahtani.²⁷⁴

As noted in Section 4, in 2009 the Convening Authority for military commissions dismissed the charges under the MCA levelled against Mohammed al-Qahtani and put on the public record that the reason she had done

²⁶⁶ FBI OIG Report, October 2009, page 81.

²⁶⁷ Re: suspected mistreatment of detainees. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.

²⁶⁸ Fredman advised that the Department of Justice has “provided much guidance” on this issue and noted that the “CIA is not held to the same rules as the military”. He advised that while torture was prohibited under the UN Convention against Torture, US domestic law implementing the treaty was “written vaguely”, with what constitutes physical torture “explained as poorly” as what constitutes mental torture. Physical torture, he claimed, would be conduct which causes “severe physical pain causing permanent damage to major organs or body parts” and mental torture would be anything that caused “permanent, profound damage to the senses or personality”. He noted that the USA “did not sign up to” the international prohibition of cruel, inhuman or degrading treatment, giving it “more license to use more controversial techniques”. He said that “if the detainee dies you’re doing it wrong”. He described waterboarding and suggested that it is “effective to identify phobias” such as claustrophobia and fear of insects and snakes and use them against the detainee. Death threats, he said, should be “handled on a case by case basis”. Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

²⁶⁹ SSCI Summary, footnote 751.

²⁷⁰ Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page 53-54.

²⁷¹ John Rizzo, *Company Man: Thirty years of controversy and crisis in the CIA*. Scribner (2014) Except for a period in 2002-2003 when Scott Muller was in post, Rizzo served as the CIA Acting General Counsel from late 2001 through 2009.

²⁷² Memorandum for the record. ‘Humane’ treatment of CIA detainees. Scott W. Muller, CIA General Counsel. 12 February 2003. SSCI Summary, footnote 685.

²⁷³ *Ibid.*

²⁷⁴ Among the interrogation plans for Mohamed al Qahtani developed in late 2002 had been to transfer him off Guantánamo, temporarily or permanently to “either Jordan, Egypt or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information”. Another proposal, advanced by “US government officials”, “involved subjecting Al-Qahtani to interrogation using the same [redacted] used on Zubaydah”, although due to redactions it is not clear whether this plan would have meant his transfer to the CIA secret detention programme. FBI OIG report, October 2009, pages 88 and 92.

so was that “we tortured Qahtani. His treatment met the legal definition of torture”²⁷⁵. The officials who authorized or were otherwise involved in his torture – including the then Secretary of Defense – have not been brought to justice.

Abu Zubaydah has never been charged, and no one has ever been brought to justice for the crimes committed against him. Four and a half years after his arrest, in September 2006 he was flown back to Guantánamo where he had been held in secret two or three years earlier. This time it suited the US administration to reveal his whereabouts, and to exploit public fears about him and others transferred with him to seek legislative backing and measures to facilitate impunity for and continuity of the CIA detention programme, military commission trials and withdrawal of habeas corpus for detainees held at the naval base.

Today, nearly two decades after he was first taken into custody, Abu Zubaydah’s right to the presumption of innocence lies in tatters, he has been thoroughly demonized and his name linked indelibly with terrorism in public statements by officials. His habeas lawyers have insisted he was “never a member or supporter of the Taliban or al Qaeda forces”, has “never taken up arms against the United States or its coalition allies”.²⁷⁶

For the past 14 years he has been held with little contact with the outside world in Camp 7 in Guantánamo, the conditions of which remain classified. On 27 November 2020, a motion was filed in District Court in his case, arguing that the government’s behaviour in the case was clear: “delay, delay and still more delay”.²⁷⁷

“Over twelve years ago, on August 6, 2008, counsel for Abu Zubaydah filed his Petition for a Writ of Habeas Corpus in this Court on account of the Supreme Court’s new mandate providing their client with prompt habeas review. But habeas review in Petitioner’s case has been the polar opposite of prompt”.²⁷⁸

The lawyers recalled how nearly seven years after the habeas corpus petition was filed, they had challenged the court’s “Protracted Failure to Rule on More than a Dozen Fully Briefed Motions filed by a Man Imprisoned without Charge for Nearly Thirteen Years”.²⁷⁹ Their November 2020 intervention noted how “even that [February 2015] motion was not ruled on for over a year”, at which point it was mooted when the case was reassigned to another judge. Today, “several of the fully briefed motions” filed during the previous judge’s tenure, “and several more” filed after the case was reassigned, “remain to be decided”.²⁸⁰

In June 2020, the court granted an emergency motion ordering the government to produce medical records of the time Abu Zubaydah was in CIA custody.²⁸¹ The judge directed the parties to propose a schedule. The government estimated it would take at least eight weeks to locate the records and review them for “necessary redactions prior to production”.²⁸² In August it said it had located some 6,000 pages of information and asked for three more months to “complete processing of the documents”.²⁸³ When this period expired on 5 November 2020, the detainee’s lawyers reported that they had not seen “a single document”.²⁸⁴

The government asserted that as of 30 October 2020, 106 pages of already redacted classified records had been disclosed to the lawyers at the Secure Facility.²⁸⁵ It estimated that it would be able to produce approximately 40 or more pages (not records) every two weeks. At that rate, Abu Zubayah’s lawyers pointed out, “it would require more than six years” before they received all the classified material.²⁸⁶ In addition to that would be however long it took to produce the unclassified documents. The lawyers asked the judge to recognize that the government was making a “mockery” of the process, and for him to impose “a reasonable deadline” on the government to produce both the classified and unclassified medical records.

It is long past time for accountability. Under international law, torture and other cruel, inhuman or degrading treatment are never legal. No president can render them lawful; no politician, legislator, judge, soldier, police

²⁷⁵ Detainee tortured, says US official. Washington Post, 14 January 2009. See also *Al-Qahtani v. Trump*, Memorandum Opinion and Order, US District Court for DC, 12 August 2020 (“Susan Crawford, the then-convening authority of the Department of Defense Military Commissions, determined in 2009 that Mr al-Qahtani can never be tried by a military commission due to the torture he endured at the beginning of his detention”).

²⁷⁶ *Husayn v. Gates*, Amended petition for writ of habeas corpus. In the US District Court for DC, 25 August 2008. An unclassified version of this petition was not publicly available for more than eight years, on 28 October 2016.

²⁷⁷ *Husayn v. Miller*, Petitioner’s motion for Status Conference. In the District Court for DC, 27 November 2020.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Husayn v. Esper*, Memorandum and Order, US District Court for DC, 6 June 2020.

²⁸² *Husayn v. Esper*, Joint Status Report, In the US District Court for DC, 22 June 2020.

²⁸³ *Husayn v. Esper*, Joint Status Report, In the US District Court for DC, 7 August 2020.

²⁸⁴ *Husayn v. Miller*, Petitioner’s motion for Status Conference. In the District Court for DC, 27 November 2020.

²⁸⁵ The lawyers characterized this as “deceptive” given that the COVID-19 pandemic meant they did not have access to the Secure Facility and might not have such access until months into 2021.

²⁸⁶ *Husayn v. Miller*, Petitioner’s motion for Status Conference. In the District Court for DC, 27 November 2020.

officer, prison guard, medical professional, interrogator or lawyer can override this prohibition. Even in a time of war or threat of war, even in a state of emergency which threatens the life of the nation, there can be no exemption from this prohibition. The same is true of enforced disappearance.

Governments are required by international law to thoroughly investigate such crimes, and to bring perpetrators to justice, no matter their level of office or former level of office.²⁸⁷ Victims of human rights violations have the right under international law to effective access to remedy and reparation. In addition, there is a collective and individual right to the truth about these crimes.²⁸⁸

Domestic political considerations, and a tendency among officials, in public statements and in litigation, effectively to excuse such human rights violations on the basis of their historical context has gone hand in hand with the USA's failure to take the necessary steps towards ending the current state of impunity. So deep is the problem that some individuals – who may be among those bearing personal criminal responsibility for their involvement in crimes under international law – have felt safe enough to publish highly unapologetic memoirs. Others have been promoted to senior judicial, law enforcement, intelligence community positions, or to positions in academia. Impunity has infected the body politic.²⁸⁹

Their sense of security may be deepened by the government's continuing resort to secrecy to conceal the operational details of the CIA programme. The SSCI report, running to more than 6,000 pages and 35,000 footnotes, approved by the Committee in December 2012 "includes details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated."²⁹⁰ Although a declassified summary was published in December 2014, the report itself remains classified top secret. The US authorities should declassify and publish as much of it as possible, and certainly all parts of it that provide any detail or shed any light on crimes under international law and other human rights violations.

Abu Zubaydah's name appears more than 1,000 times in the SSCI summary alone. In January 2017, the District Court granted a motion to compel the government to provide the court with a complete and unredacted copy of the full SSCI report.²⁹¹

²⁸⁷ For example, see UN Doc. CAT/C/GC/2 (24 January 2008), General Comment 2, Implementation of article 2 by States parties, para. 26. ("The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities").

²⁸⁸ See, inter alia, OHCHR 'Study on the right to the truth' UN Doc. E/CN.4/2006/91.

²⁸⁹ See for example, Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, 2011 <http://www.amnesty.org/en/library/info/AMR51/097/2011/en>; A case to answer: The torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 21 June 2006, www.amnesty.org/en/library/info/AMR51/093/2006/en; See 'Thanks for the memoirs, now for truth and justice', in USA: Time for truth and justice: Reflections and recommendations on truth, remedy and accountability as declassification of Senate Committee summary report on CIA secret detentions awaited, 23 June 2014, <http://www.amnesty.org/en/library/info/AMR51/035/2014/en>. USA: Truth be Told: Call for proper investigation and declassification of alleged role in secret detention program of nominee for CIA Director, 5 April 2018, <https://www.amnesty.org/en/documents/amr51/8146/2018/en/>; USA: Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General, 1 February 2005, <https://www.amnesty.org/en/documents/amr51/031/2005/en/>

²⁹⁰ Feinstein Statement on CIA Detention, Interrogation Report, 13 December 2012, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635>

²⁹¹ *Husayn v. Gates*, Minute Order. US District Court for DC, 23 January 2017.

6. CONCLUSION

“[W]e are committed to the principle that leadership in the field of human rights is by example... We look forward to engaging constructively with other States and civil society as we seek to improve and strengthen our longstanding commitment to individual and institutional accountability for human rights violations”

US Government, Report to the United Nations Human Rights Council, August 2020²⁹²

“History is of moral design,” said President Bush in a national radio address in March 2002, adding that “justice and cruelty have always been at war”. A day earlier, as part of his “war on terror”, he had authorized the secret transfer of Abu Zubaydah from one location to another to begin what would become four and a half years of enforced disappearance in undisclosed locations across four continents.²⁹³ Then, in September 2006, the President revealed that Abu Zubaydah had just been taken to Guantánamo. He is still there. He has been held in US detention without charge for almost 19 years.

What if in 2002 the President had paused and asked people to “imagine a future – 10 years from now or 20 years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not part of our country”?²⁹⁴ Someone surely might have responded that history would “cast a harsh judgment” on such an approach to “our fight against terrorism”.²⁹⁵

Shortly before a new President takes office, Guantánamo detentions will enter their 20th year. It could be said of their history from 11 January 2002 to today that “in the Executive Branch, there is a straight line from now to then”.²⁹⁶ Different policies and rhetoric, yes, but under three Presidents and during five presidential terms the USA has, in domestic litigation and communications to UN treaty bodies, defended its unilateral, distorting “law of war” framework to hold these detainees and bypass international human rights principles in so doing. Each President failed to move the USA closer to accountability for the crimes under international law

²⁹² UN Doc. A/HRC/WG.6/36/USA/1 (13 August 2020), National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, United States of America.

²⁹³ The President’s radio address, 30 March 2002.

²⁹⁴ Remarks by the President at the National Defense University, 23 May 2013,

<https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

²⁹⁵ *Ibid.*

²⁹⁶ See *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, July 2014, Circuit Judge Brett Kavanaugh concurring in the judgment in part and dissenting in part (“And in the Executive Branch, there is a straight line from now to then: In deciding that conspiracy is an offense that may be tried by military commission, President Barack Obama is the same as President George W. Bush is the same as President Harry Truman is the same as President Franklin Roosevelt is the same as President Andrew Johnson is the same as President Abraham Lincoln”).

committed against detainees. Each failed to heed the multiple calls from UN treaty bodies and other UN experts for the USA to meet its international obligations.

Treaty obligations are binding on the whole of government. A country's failure to meet these obligations cannot be excused or justified by reference to a situation where one branch assumes its decision-making power should be free of scrutiny and another branch defers to such a position, or where one branch blames another for the country's failure to meet its treaty requirements.²⁹⁷ In relation to the Guantánamo detentions, successive administrations have consistently urged judicial deference to executive war and national security powers, the "Supreme Court has declined further review" since 2008 and "Congress has similarly left the field" since it "last articulated standards for the review of detainee claims" in 2011.²⁹⁸

In his second term, President Bush blamed his administration's lack of progress towards closing Guantánamo on other countries' refusal to take their nationals back (even as he announced the transfer of more detainees to the base)²⁹⁹, while at the end of his eight years President Obama blamed "partisan politics" for blocking closure of the facility.³⁰⁰ What is beyond dispute is that the Guantánamo detentions are a "problem" entirely of the USA's own making (while all too often enabled by other governments). An improvised law of war framework, coupled with a failure to recognize or apply international human rights norms, has led it to dig a hole into which it has thrown detainees and its own reputation. Full extraction from this situation will not be achieved in a half-hearted way, but only in a manner that recognizes time, political will, and respect for human rights are of the essence.

A new urgency and energy are needed, accompanied by a genuine commitment to truth, accountability and remedy, and a recognition that this must not be allowed to drift any longer. Mistakes were made under the Obama administration, allowing the detentions to become mired in bureaucracy and bogged down in partisan politics. Accountability for crimes under international law was put to one side in a forward-leaning approach; "we tortured some folks" but let's move on, cannot be the route to justice.³⁰¹ And then the detainees were handed from a President who said this was a facility that "never should have been opened in the first place"³⁰² to one who doubled down on the notion that "terrorists are not merely criminals; they are unlawful enemy combatants", and signed an order to keep Guantánamo open and ready to receive more detainees.³⁰³

After a period in which many pressing social, environmental and justice issues have been set back, the Biden administration's plate will undoubtedly be full. But not so full as to be unable to prioritize and resource closure of the Guantánamo detention facility, to immediately begin to work for a lawful resolution of every single case, and to commit to a new and full respect by the USA for international human rights law. In the end, this is about even more than the 40 people still held at Guantánamo. It is not only about the detentions today, but also about crimes under international law of yesterday and the continuing lack of accountability and remedy for them. It is about the future too, of moving towards the 20th anniversary of 9/11 and beyond with the USA striving for real and enduring justice and with a commitment to being a genuine supporter of human rights.

²⁹⁷ UN Doc. CCPR/C/21/Rev.1/Add. 13 26 May 2004, Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 4. ("The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial) ... are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty').

²⁹⁸ *Al Hela v. Trump*, US Court of Appeals for the DC Circuit, 20 August 2020.

²⁹⁹ Remarks on the war on terror, 6 September 2006.

³⁰⁰ Letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, 19 January 2017.

³⁰¹ 'We tortured some folks', 2 September 2014, <https://www.amnesty.org/en/documents/AMR51/046/2014/en/>

³⁰² Letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, 19 January 2017.

³⁰³ State of the Union Address, and Executive Order 13823, Protecting America Through Lawful Detention of Terrorists, 30 January 2018.

RECOMMENDATIONS

The US authorities must recognize that the USA made choices to prioritize the pursuit of intelligence gathering over criminal justice, and that without the necessary political commitment to prevent enforced disappearance, torture and other cruel, inhuman or degrading treatment, these human rights violations occurred. One of the predictable consequences is that the necessary and admissible evidential basis to prosecute and render lawful justice for internationally recognizable crimes has been severely affected. This consequence lies at the door of the US government. The government, not the detainees, must accept the cost of its unlawful choices. It now must take all the necessary executive and other measures to right the wrong it is responsible for and to do so lawfully. It must also take all the necessary measures to ensure that a programme of state-sanctioned enforced disappearance, torture and other ill-treatment will never be perpetrated by the USA again.

TO THE INCOMING BIDEN ADMINISTRATION

- Issue an Executive Order immediately upon taking office committing to the closure of the Guantánamo detention facility without any further delay. This should revoke Executive Order 13823 of 30 January 2018, which mandates the continuation of detention operations at Guantánamo.
- Commit to the resolution of each detainee's case in full, through their transfer and release without further delay and in accordance with international law; or if there is sufficient admissible evidence under international law to prosecute internationally recognisable criminal offences then to do so through fair judicial resolution before a federal court without recourse to the death penalty.
- Ensure that any proceedings that do occur take into account the length of detention, torture or other ill-treatment, and other human rights violations to which the detainee in question has been subjected.
- Instruct the Justice Department to desist from taking any positions in litigation that preclude the provision of effective remedies or prevent accountability for the human rights violations committed in Guantánamo and other facilities or operations throughout the US detention programme, or to deny due process to detainees.
- Appoint an appropriately qualified high-level official to oversee closure of the detention facility and lawful resolution of the detentions.
- Reopen the US Department of State's Office of Special Envoy for Guantánamo Closure.
- Stop the pursuit of the death penalty against any detainee in all circumstances and make a broader effort to end the military and federal death penalty.
- Commit to the swift publication of the full report of the Senate Select Committee on Intelligence of its study into the CIA detention and interrogation programme, without redacting any information related to evidence of human rights violations, such as in Volume III of the report.
- Recognize that torture and enforced disappearance have long been crimes under international law, and that these crimes require investigation and prosecution, and do all necessary to bring suspected perpetrators of these crimes to justice, whatever their current or former level of office.
- Commit to an assessment of the USA's relationship to international law, and to accepting all outstanding recommendations made to it by the independent expert monitoring bodies established under human rights treaties to which the USA is party, including the UN Convention Against Torture,

the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

- As soon as is practicable, the USA must withdraw the reservations, understandings, and declarations filed with its ratifications to human rights treaties, as it has been called on to do by the UN treaty bodies.
- Ratify without reservation and implement the International Convention for the Protection of all Persons from Enforced Disappearance, the Optional Protocol to the Convention Against Torture and the Rome Statute of the International Criminal Court, as part of ensuring that the USA will never again instigate a programme of systemic torture and enforced disappearance.

TO CONGRESS

- Repeal the Authorization for Use of Military Force 2001 and subsections 1021–1022 of Title X, Subtitle D of National Defense Authorization Act (NDAA) for Fiscal Year 2012, which has been read to authorize indefinite detention.
- Repeal the legislative framework that allows for civilians to be to be prosecuted in military courts.
- Approve the financial measures to facilitate a swift closure of Guantánamo Bay and to fund appropriate rehabilitation of those who have been detained there, fully taking into account their physical and psychological medical needs.
- Lift current restrictions on transferring detainees from Guantánamo to the United States or to third countries where their rights will be protected.
- Implement a programme of domestic legislation, and international ratifications, in order to strengthen the USA's relationship with international human rights law.

TO THE DEPARTMENT OF JUSTICE

- Do not oppose petitions for habeas corpus brought by Guantánamo detainees who have not and will not be charged before a federal court with an internationally recognizable criminal offence for which there is sufficient admissible evidence according to international law.

TO THE DEPARTMENT OF DEFENSE

- Pending closure of the Guantánamo Bay detention facility, allow visits on their terms by UN special procedures, including the UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health.
- Allow the International Committee of the Red Cross to conduct interviews with detainees before their transfer.
- Facilitate transfers by providing detainees (through their counsel for those represented) and foreign officials with detainees' complete medical records, declassified if/where necessary, subject to detainees' consent.
- Involve counsel in the transfer negotiation process.
- Coordinate with the Department of State to work with resettling governments to ensure that resettled detainees are provided with a secure, recognized legal status.

APPENDIX 1: DETAINEES AT GUANTÁNAMO, JANUARY 2021

Name	Nationality	Total time in US custody	Date of transfer to Guantánamo	Time in CIA secret detention program ³⁰⁴	Disposition, according to US authorities
Uthman Abdul Mohammed Uthman	Yemeni	19 years	16 January 2002	N/A	Continued 'law of war' detention (PRB 2020)
Moath Hamza Ahmed al Alwi	Yemeni	19 years	16 January 2002	N/A	Continued 'law of war' detention (PRB 2020)
Ridah bin Saleh al Yazidi	Tunisian	19 years	11 January 2002	N/A	Approved for transfer (GRTF 2010)
Mohammed al-Qahtani	Saudi Arabian	19 years	13 February 2002	N/A	Continued 'law of war' detention (2018)
Ali Hamza Ahmad Suliman al-Bahlul	Yemeni	19 years	11 January 2002	N/A	Convicted by military commission (2008), sentenced to life
Khalid Ahmad Qassim	Yemeni	19 years	1 May 2002	N/A	Continued 'law of war' detention (2020)
Abdul Latif Nasir	Moroccan	19 years	3 May 2002	N/A	Approved for transfer (PRB 2016)
Muieen Adeen Abd al Sattar	Ethnic Rohingya	19 years	9 February 2002	N/A	Approved for transfer (GRTF 2010)
Toffiq Nassar Ahmed al Bihani	Yemeni	18 years	6 February 2002	50-59 days	'Conditional detention' (GRTF 2010)
Suhayl al Sharabi	Yemeni	18 years	5 May 2002	N/A	Continued 'law of war' detention (PRB 2019)
Ghassan Abdullah al Sharbi	Saudi Arabian	18 years	19 June 2002	N/A	Continued 'law of war' detention (PRB 2019)
Abdul Razak Ali Abdelrahman	Algerian	18 years	19 June 2002	N/A	Continued 'law of war' detention (PRB 2019)
Sufiyan Barhoumi	Algerian	18 years	18 June 2002	N/A	Approved for transfer (PRB 2016)
Abu Zubaydah (Zayn al Abidin Muhammad Husayn)	Palestinian	18 years	4 September 2006	1,610-1,690 days	Continued 'law of war' detention (PRB 2020)
Omar Mohammed Ali al Rammah (Zakaria)	Yemeni	18 years	9 May 2003	370-379 days	Continued 'law of war' detention (PRB 2020)
Ismael Ali Faraj al Bakush	Libyan	18 years	5 August 2002	N/A	Continued 'law of war' detention (PRB 2020)
Mohammed Ahmed Ghulam Rabbani (Abu Badr)	Pakistani	18 years	19 September 2004	550-559 days	Continued 'law of war' detention (PRB 2019)
Ramzi bin al Shibh	Yemeni	18 years	4 September 2006	1,300-1,309 days	Charged for capital trial by military commission

³⁰⁴ According to the SSCI Summary.

Sa'id Salih Sa'id Nashir	Yemeni	18 years	28 October 2002	30-39 days	Approved for transfer (PRB 2020)
Abd al Salam al Hela	Yemeni	18 years	19 September 2004	590-599 days	Continued 'law of war' detention (PRB 2018)
'Abd al Rahim al-Nashiri	Saudi Arabian	18 years	4 September 2006	1,390-1,399 days	Charged for capital trial by military commission
Sanad 'Ali Yislam al-Kazimi	Yemeni	17 years	19 September 2004	270-279 days	Continued 'law of war' detention (PRB 2018)
Hassan Mohammed Ali bin Attash	Yemeni	17 years	19 September 2004	120-129 days	Continued 'law of war' detention (PRB 2019)
Abdul Rahim Ghulam Rabbani	Pakistani	17 years	19 September 2004	550-559 days	Continued 'law of war' detention (PRB 2018)
Sharqawi Abdul Ali al-Hajj	Yemeni	17 years	19 September 2004	120-129 days	Continued 'law of war' detention (PRB 2019)
Khalid Shaikh Mohammad	Pakistani	17 years	4 September 2006	1,280-1289 days	Charged for capital trial by military commission
Mustafa Ahmad al-Hawsawi	Saudi Arabian	17 years	4 September 2006	1,280-1,289 days	Charged for capital trial by military commission
Majid Khan	Pakistani	17 years	4 September 2006	1,200-1209 days	Convicted by military commission (guilty plea), sentencing due May 2021
Ammar al Baluchi	Pakistani	17 years	4 September 2006	1,200-1209 days	Charged for capital trial by military commission
Khallad (Walid) bin Attash	Yemeni	17 years	4 September 2006	1,200-1209 days	Charged for capital trial by military commission
Mohammed Farik bin Amin (Zubair)	Malaysian	17 years	4 September 2006	1,170-1,179 days	Continued 'law of war' detention (PRB 2019)
Saifullah Paracha	Pakistani	17 years	19 September 2004	N/A	Continued 'law of war' detention (PRB 2018)
Mohammed Bashir bin Lep	Malaysian	17 years	4 September 2006	1,110-1,119 days	Continued 'law of war' detention (PRB 2019)
Riduan bin Isomuddin (Hambali)	Indonesian	17 years	4 September 2006	1,110-1,119 days	Continued 'law of war' detention (PRB 2019)
Hassan Guleed	Somalian	16 years	4 September 2006	900-909 days	Continued 'law of war' detention (PRB 2018)
Mustafa Faraj Muhammad Mas'ud al-Jadid al-Uzaybi (Abu Faraj al-Libi)	Libyan	15 years	4 September 2006	460-469 days	Continued 'law of war' detention (PRB 2019)
Nashwan al-Ramer Abdulrazzaq (Abd al Hadi al Iraqi)	Iraqi	14 years	27 April 2007	170-179 days	Charged for trial by military commission
Asadullah Haroon Gul (Haroon al-Afghani)	Afghan	13 years	22 June 2007	N/A	Continued 'law of war' detention (PRB 2020)
Mohammed Abdul Malik Bajabu	Kenyan	13 years	23 March 2007	N/A	Continued 'law of war' detention (PRB 2019)
Muhammad Rahim al-Afghani	Afghan	13 years	13 March 2008	240-249 days	Continued 'law of war' detention (PRB 2020)

APPENDIX 2: MILITARY COMMISSION CONVICTIONS

The following individuals were convicted by military commission at Guantánamo:

1. David Hicks, Australian. Convicted in 2007 after pleading guilty to 'material support for terrorism'. Transferred to Australia to serve nine months of a seven-year sentence. In 2015, the CMCRC overturned his conviction based on the 2014 Court of Appeals ruling in the al-Bahlul case below.³⁰⁵
2. Salim Ahmed Hamdan, Yemeni. Convicted in a 2008 trial of 'material support for terrorism', but acquitted of conspiracy to commit war crimes. Sentenced to 66 months' imprisonment with credit for some of the time he had been in detention. He was transferred to Yemen in November 2008. His conviction was overturned in 2012 by the US Court of Appeals for the DC Circuit. Noting that the relevant conduct of which he was accused took place between 1996 and 2001 and with the Court of Appeals "read[ing] the Military Commissions Act not to retroactively punish new crimes, then "because material support for terrorism was not a pre-existing war crime under [US law], Hamdan's conviction for material support for terrorism cannot stand."³⁰⁶
3. Ali Hamza Ahmad Suliman Al Bahlul, Yemeni. He was convicted in 2008 of conspiracy to commit war crimes, solicitation of others to commit war crimes, and providing 'material support for terrorism'. Sentenced to life imprisonment. The DC Circuit Court of Appeals vacated his convictions for material support and solicitation, in light of the *Hamdan* decision above, but has allowed his conspiracy conviction to stand (see Section 5.5).³⁰⁷
4. Ibrahim Al Qosi, Sudanese. Convicted in 2010 under a plea of guilty to conspiracy and providing 'material support for terrorism'. Transferred to Sudan after serving two- year sentence.
5. Omar Ahmed Khadr, Canadian. Taken into US custody in 2002 at the age of 15. He pled guilty in 2010 to murder and attempted murder in violation of the law of war, providing 'material support for terrorism', conspiracy, and spying. In 2012, he was transferred to Canada to serve the remainder of his eight-year sentence and released on bail in 2015. In 2019, his sentence was deemed to have expired and his bail conditions were lifted.
6. Noor Uthman Mohammed, Sudanese. Pled guilty to providing 'material support for terrorism' and conspiracy to provide such support. Was sentenced to 34 months' imprisonment under a plea agreement and transferred to Sudan in 2013. In January 2015, the Convening Authority for military commissions "set aside" the findings of guilty and "the sentence is disapproved", in light of the Court of Appeals rulings in the Hamdan and al Bahlul cases, "it appears that it was legal error" to try these offences before a military commission, he wrote.³⁰⁸
7. Ahmed Muhammed Haza al Darbi, Saudi Arabian. Pled guilty in 2014 to conspiracy, attacking civilian objects, hazarding a vessel, terrorism. Sentencing delayed for three years and six months. He was transferred to Saudi Arabia in early March 2018.

Convicted, awaiting sentencing

1. Majid Khan, Pakistani. Pled guilty in February 2012 to murder and attempted murder in violation of the law of war, providing material support for terrorism, spying, and conspiracy. Withdrew his guilty plea to providing material support, in light of the al-Bahlul decision above. Sentencing was deferred. Currently scheduled for May 2021 at Guantánamo (see Section 5.6).

³⁰⁵ *Hicks v. USA*, US Court of Military Commissions Review, 18 February 2015.

³⁰⁶ *Hamdan v. USA*, US Court of Appeals for the DC Circuit, 16 October 2012.

³⁰⁷ *Al Bahlul v. USA*, US Court of Appeals for the DC Circuit, 14 July 2014.

³⁰⁸ Action. Vaughn A. Ary, Convening Authority for Military Commissions, 9 January 2015.

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USA: RIGHT THE WRONG

DECISION TIME ON GUANTÁNAMO

This report returns to the detention facility at the US naval base in Guantánamo Bay as detentions there enter their 20th year and as a new President prepares to enter the White House and become its fourth incumbent during the lifetime of this prison.

The new administration's plate will undoubtedly be full. But not so full as to be unable to prioritize closure of Guantánamo. In the end, this is about more than the 40 people still held there. It is not only about the detentions today, but also the crimes under international law of yesterday and the continuing lack of accountability for them. It is about the future too, of moving towards the 20th anniversary of the 9/11 attacks and beyond with the USA striving for enduring justice and with a commitment to being a genuine supporter of human rights.

Speaking at the Munich Security Conference in 2009, Vice President, now President-elect, Joe Biden told his audience: "We will uphold the rights of those who we bring to justice. And we will close the detention facility at Guantánamo Bay". He emphasized that the "treaties and international organizations we build must be credible and they must be effective". A dozen years later, as he prepares to become President, he has an opportunity to live up to those words. He should seize it.