USA

‘I AM FALLEN INTO DARKNESS’

THE CASE OF OBAIDULLAH, GUANTÁNAMO DETAINEE NOW IN HIS 12TH YEAR WITHOUT TRIAL

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1. INTO DARKNESS: A LACK OF COMMITMENT TO HUMAN RIGHTS

I am deeply disappointed that the US Government has not been able to close Guantánamo Bay, despite repeatedly committing itself to do so… [T]his systemic abuse of individuals' human rights continues year after year. We must be clear about this: the United States is in clear breach not just of its own commitments but also of international laws and standards that it is obliged to uphold

United Nations High Commissioner on Human Rights Navi Pillay, 5 April 2013[1]

In a speech before a joint session of Congress on 25 May 1961, President John F. Kennedy called for the USA to commit to "achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to earth". This goal was achieved eight years later.

It is now some eight years since the US administration first committed itself to closing the prison camp at its naval base at Guantánamo Bay in Cuba, according to the last two US Presidents. By early 2005, President George W. Bush had recognized that the detentions of foreign nationals at Guantánamo had become "a propaganda tool for our enemies and a distraction for our allies", so he worked to "find a way to close the prison".[2] By the time he left office, however, there were still some 245 detainees held there.

In January 2009, President Barack Obama came to office and described the Guantánamo detentions as "a misguided experiment", set up under "the misplaced notion that a prison there would be beyond the law".[3] By any measure, he said, "the costs of keeping it open far exceed the complications involved in closing it".[4] Four years later, however, the prison was still open. In a speech on 23 May 2013, four months into his second term, with at least 100 detainees on hunger strike, President Obama said that the Guantánamo detention facility had "become a symbol around the world for an America that flouts the rule of law" and reiterated that it should be shut down.[5] Two months has passed since then and no more detainees have been transferred or released from the base in that time.

"I believe we possess all the resources and all the talents necessary" to land a man on the moon and bring him back, President Kennedy said in his May 1961 speech. The USA surely has all the resources and talents necessary to close a prison. Absent here is the political will and a commitment to international human rights principles.

Beginning in January 2002, a total of 779 men, some of whom were teenagers at the time, have been brought to Guantánamo, secreted away in the initial years without access to counsel or court, and without any independent judicial review of their detention.[6] Today, 166 men are still at Guantánamo, most of them in indefinite detention without charge or criminal trial. The detainee population has remained at this level since 29 September 2012.[7]

One of the detainees is Obaidullah, an Afghan national who was about 19 years old when taken from his home in eastern Afghanistan in the middle of the night by US armed forces, and who entered his 12th year in US military custody on 21 July 2013. From his allegations of torture and other ill-treatment during interrogations to indefinite detention without criminal trial to hunger strikes protesting conditions of detention, Obaidullah's experience exemplifies the multiple violations of human rights perpetrated by a country that claims to be committed to the respect and promotion of international human rights principles.

Meanwhile the USA pursues its space travel plans. "By the mid-2030s," President Obama has said, "I believe we can send humans to orbit Mars and return them safely to Earth."[8] He has also called on the country to imagine a future 10 or 20 years from now with Guantánamo detainees still held without charge and how harsh history's judgment of that scenario would be and of "those of us who fail to end it".[9] But fair and lawful resolution of the detentions is already years overdue. So when will we see Obaidullah and the other detainees flown out of Guantánamo and their years of torment and injustice ended? The answer should be now.

2. CRUEL UNCERTAINTY: 'AND THAT'S KIND OF WHERE THINGS STAND'

A year-and-a-half into this administration and almost two years since the Government sought a stay in this case, they still hadn't decided, they still hadn't decided whether to try this case before a military commission or release this detainee and send him back to his home country. For reasons known only to the Government, what obviously must be an extremely difficult decision or one that's just been put off on a back-burner somewhere that no-one's paying attention, to this day, that decision hasn't been made

US District Judge Richard Leon, 30 September 2010[10]

For over a decade, Obaidullah has been incarcerated without trial some 8,000 miles (13,000 kilometres) from his home and family in Afghanistan. His daughter, born two days before he was taken into custody, is now 11 years old. He has never touched or held her, only making his first contact with her last year, over videophone from the detention facility at Guantánamo Bay.

Each day that passes without lawful resolution of this indefinite detention regime compounds the cruelty to detainees and their families. As the UN Special Rapporteur on torture said in May 2013:

> "At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment."[11]

Each day for more than four thousand days – hour after hour for approaching 100,000 hours[12] – Obaidullah has been waiting to find out what his US captors have in store for him. He is yet to get a definitive answer.

In June 2010, the following dialogue took place in federal court in Washington, DC, between US District Judge Richard Leon and a Department of Justice official, Terry Henry, in relation to Obaidullah, then approaching his eighth anniversary in military detention at Guantánamo:

> **Judge Leon**: *Mr Henry, come on up. As the senior man on the team, it seems only fair to ask you the question. Has the Department of Justice made a decision yet?*
>
> **Mr Henry**: *Regarding prosecution, your Honor, or--*
>
> **Judge Leon**: *This detainee.*
>
> **Mr Henry**: *Regarding the prosecution issue? Your Honor, as was reflected in the appellate filings in this case--*
>
> **Judge Leon**: *But those are old.*
>
> **Mr Henry**: *Right.*
>
> **Judge Leon**: *I want to know about today.*
>
> **Mr Henry**: *Today there has been no further action on the matter other than was reflected in our prior filings.*
>
> **Judge Leon**: *Which is?*
>
> **Mr Henry**: *That the Attorney General has determined pursuant to the processes worked out under the January 2009 executive order concerning review of Guantánamo detainees that Mr Obaidullah is appropriate for prosecution and that any such prosecution would take place in a military commission. Currently the matter is still pending. There haven't been charges referred to a military commission, that sort of thing, and that's kind of where things stand. I can't really provide any prediction as to when things might start moving on that front.*
>
> **Judge Leon**: *Well, would it be inherent in that decision that you just alluded to that*

> *the Government has decided so far anyway that he will not be transferred or released?*
>
> **Mr Henry**: *Until the issue of prosecution is resolved one way or the other, it is either completely pursued or some decision at some point made not to pursue it. I think that's accurate, your Honor. There is always the possibility for some, you know, diplomatic situation to arise so I can't discount that, but generally speaking, you are correct.*[13]

Judge Leon expressed incomprehension at the situation, saying that "the Justice Department for reasons that I not only do not understand but probably will never understand hasn't made a decision, can't make a decision" about prosecuting Obaidullah. He noted that "the man has been in prison eight years."

That was three years ago. No charges have been filed against him in that time. Obaidullah has now been in US military custody without trial for 11 years, a third of his life. He is unsure of his birth date but believes he was 19 years old when he was seized from his home in Khost province in Afghanistan during a night raid by US Special Forces on 21 July 2002. That would make him now about 30.

There have been three US presidential elections since Obaidullah was taken into custody. There have been two Presidents in office over four administrations during the time he has been in detention. Six US congressional elections have come and gone, and federal judges have retired and new ones been appointed. Detention and prosecution policies have been introduced, improvised, amended. Legislation has been passed, signed, revised. Executive orders have been issued, court rulings handed down. But while the make-up of the detaining government has altered over the years, essentially nothing has changed for Obaidullah.

According to Obaidullah's lawyer, his parting words at the end of a meeting they had at Guantánamo in March 2013 were "please tell the world of this unfairness", adding "Latif died here even with a clearance". Here Obaidullah was referring to Yemeni national Adnan Farhan Abdul Latif who had been among those "approved for transfer" by the executive authorities, and who had repeatedly expressed despair at his indefinite detention.[14] Indeed President Obama's Task Force approval in his case in 2009 was for "transfer to a country outside the United States that will implement appropriate security measures taking into account any necessary mental health treatment."[15] In September 2012, three months after the US Supreme Court refused to take his case, Adnan Latif was dead, as a result of suicide by overdose, according to the authorities.[16]

The US government has long been warned of the psychological distress caused by the indefinite detention regime at Guantánamo. In January 2004, the International Committee of the Red Cross (ICRC), describing itself as "uniquely placed to witness the impact this uncertainty has had on the internees", revealed that it had "observed a worrying deterioration in the psychological health of a large number of them".[17] That was nine and a half years ago.

Meanwhile, the death nearly a year ago of Adnan Latif, far from leading to a new sense of urgency in resolving the detentions, has been cited by the administration as justification for new detainee search procedures adopted at Guantánamo in April 2013. On 11 July, a federal judge found the procedures "excessive" and part of a pattern over the years of government interference with the detainees' right of access to legal counsel on this remote island base. He ordered the search procedures stopped. Obaidullah is one of the detainees whose attorney-client communication is reported to have been disrupted as a result of the new searches, even as he seeks to have the courts consider new evidence in his habeas corpus challenge (see sections 4.3 and 4.4 below). The Obama administration is appealing the judge's order on the search procedures and on 17 July 2013 a federal appeals court granted the administration's motion to stay the order pending consideration of the issue.

3. ELEVEN YEARS IN THE DARK – FROM AFGHANISTAN TO GUANTÁNAMO

But history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it. 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

President Barack Obama, 23 May 2013[18]

Undated photo of Obaidullah, pre-July 2002 arrest © Private (AI use)

Obaidullah was taken into US military custody in Khost province in Afghanistan in July 2002. He was initially held for about two days at a US forward operating base in Afghanistan, then for three months in the detention facility at the US air base in Bagram north of Kabul, and since October 2002 in Guantánamo. He has never been tried and does not have any charges pending against him. He remains in indefinite detention. Between February and July 2013 he was on hunger strike.

3.1 THE RAID ON THE FAMILY HOME

They put a hood over my head and forced me to sit for hours against a wall… I was terrified about what would happen to me
Obaidullah, 2010

US Special Forces, acting on a tip from an unknown source who claimed that Obaidullah was associated with an *al-Qa'ida* cell, raided his family's home in the middle of the night on 21 July 2002. Obaidullah and two of his cousins were taken into US military custody.

At the time of the raid, US forces found on Obaidullah's person a notebook containing notes and diagrams relating to explosive devices. They also found 23 anti-tank landmines buried on the family's property near the family home. Finally, they found a car on the compound with blood on the back seat.

In a sworn statement from 2010, made in support of his habeas corpus challenge to the legality of his detention, Obaidullah recalled the raid on his family's home:

> "The Americans came while my family and I were all sleeping in our home in the village of Milani, close to Khost City. At that time I was approximately 19 years old. On that night, I heard noises and the soldiers woke me up. I was very confused about what was going on, and why they were in my home, but I and my family cooperated with them. Even though I was not resisting, they tied my feet together and my hands together with plastic cuffs. Then they put a hood over my head and forced me to sit for hours against a wall. The plastic cut into my hands and it was painful to sit that way for so long. I was terrified about what would happen to me."[19]

That he was hooded and "flexi-cuffed" has been confirmed by a member of the Special Forces involved in the raid. Such treatment was "standard operating procedure," with the hooding said to be for "operational security."[20]

3.2 TWO DAYS AT CHAPMAN AIRFIELD

They told me that they would kill me if I didn't talk
Obaidullah, 2010

Bound hand and foot and hooded, Obaidullah was taken to nearby Forward Operating Base Chapman Airfield, a former Soviet airbase renamed by the US military after the first of its soldiers to be killed in combat in Afghanistan after the October 2001 invasion (see photo).[21] In his 2010 statement, Obaidullah said of his alleged treatment at Chapman airfield:

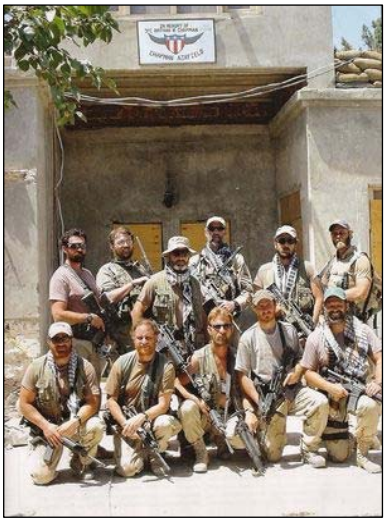
> "After I got to the military base, there were several soldiers who told me to put my hands up and then to hold them straight out to the front of me. I did what they told me to do. They then put two sandbags on my arms and made me walk around back and forth with them like that all night. They were extremely heavy, and if I dropped the bags, the soldiers put them back on my arms. They got so heavy that I had to kind of place them on my stomach as I moved. They did not let me sleep at all for the rest of that night but forced me to keep moving with bags on my arms. When they moved me from one location to another, the soldiers were extremely rough and shoved me around with their knees and elbows in a very painful and frightening way.
>
> In the morning before sunrise, I was taken into a room and interrogated by three or four soldiers. They told me that they would kill me if I didn't talk. After I told them I didn't know the answers to their questions, one of them knocked me to the floor. He took out a long knife and started sharpening it in front of me. I could hear the sounds of the knife being sharpened. He then lifted my hood and showed me the knife. He put it on the back of my head and said now start talking… I was terrified and fully believed that they might kill me.

> After I was interrogated for some time, I was taken back outside. There we were kept outside in the sun and it was very hot. While I was outside, one of the soldiers hit me on the head with the butt of his rifle for no reason. I was still hooded but I could feel the blood seeping down onto my shirt."[22]

Obaidullah is not sure if he was at Chapman Airfield for two days or more than that because he was kept hooded and "not allowed to sleep, eat, or drink while I was there."

At his Combatant Status Review Tribunal (CSRT) hearing in Guantánamo in 2004, Obaidullah said that at the Chapman base, "I was very young and had never seen such punishment, so whatever they said I said okay."

Official US documents also indicate that Obaidullah sustained a rifle-butt strike to the head while at Chapman. In late 2006 and early 2007, investigators with the Pentagon's Criminal Investigation Task Force (CITF), looking into the circumstances of Obaidullah's treatment, found a number of personnel who recalled an incident at Chapman Airfield in which one soldier wanted a picture of himself striking a detainee with his rifle, and that the detainee had required medical treatment for a wound to the head. The camera, it seems, was destroyed after the incident.[23] A sergeant with the US Army Third Special Forces Group who participated in the Milani raid said in a sworn statement in 2010 that it was his "recollection" that Obaidullah "was struck with a rifle muzzle by a member of 82nd Airborne", and that Obaidullah had required stitching to his head as a result.[24]



US soldiers at Chapman Airfield, 2002

A former NCIS intelligence officer seconded to Obaidullah's military commission defence went to Afghanistan in 2011 to investigate Obaidullah's case, and he stated that according to his own interviews with US personnel, "Obaidullah was subjected to sleep deprivation and was physically abused while at FOB Chapman", and one service member had been punished for having a fellow service member photograph him "as he struck Obaidullah in the head with a rifle".[25]

As for the knife incident, public reports confirm that military personnel at Chapman carried knives. Also, a former US Army personnel interviewed by CITF investigators recalled one individual who had used "questionable" interrogation methods, and added that he "wouldn't be surprised if the alleged incident with the knife in fact happened."[26] Another recalled that the individual in question had been some type of "paramilitary" operative" and "it was like he didn't exist" – "nobody knew who he was or what he did".[27]

3.3 THREE MONTHS AT BAGRAM AIR BASE

> *While at Bagram I was mistreated in ways I never imagined were possible and which still have a lasting effect on me to this day*
> Obaidullah, September 2010

On 24 or 25 July 2002, Obaidullah says he was "thrown", hooded and shackled, into a helicopter and flown from Chapman Airfield to Bagram air base, 65 kilometres north of Kabul. Detentions at Bagram air base had begun six months earlier, and in May 2002 Bagram had been designated as the US military's "primary collection and interrogation point" for detainees in Afghanistan.[28] Obaidullah was kept there until late October 2002.

According to a largely redacted 2 August 2002 "summary interrogation report" on the interrogation of Obaidullah and his two cousins who were arrested during the same raid:

> "All three detainees have been in-processed, screened and are undergoing interrogation. [Redacted] interrogators are aggressively pursuing any information detainees may be withholding. Detainees have been placed on an adjusted sleep schedule and are being subjected to an intense series of interrogations . . . ."[29]

This reference to an "adjusted sleep schedule" might bring to mind the minutes of a meeting at Guantánamo in October 2002 involving military and other lawyers and officials discussing the development of interrogation techniques for use at Guantánamo. At this meeting, one of the participants noted that there were "many reports from Bagram about sleep deprivation being used". In line with the official public relations message that all detainees in US custody were being treated "humanely", another of the participants responded with "True, but officially it (sleep deprivation) "is not happening".[30]

It is now well-documented that detainees at Bagram airbase were subjected to torture and other ill-treatment, particularly in the 2002 to 2005 period.[31] Early on, the "dedicated US [military] interrogation personnel" relied upon US Army Field Manual FM 34-52, "took so literally FM 34-52's suggestion to be creative that they strayed significantly from a plain-language reading of FM 34-52" and developed techniques that "went well beyond" those authorized in the manual.[32] For example, forced nudity was used by interrogators against detainees as a variation of the FM 34-52 technique of "ego down". It was also used as a "control" technique by military guards.[33] Other detainees held in Bagram in 2002 have similarly confirmed techniques such as shackling, sleep deprivation, forced kneeling, denial of water for prayer and ablution, forced silence, and repeated interrogations.[34]

Reports from a variety of sources, including official US documents, confirm the deliberate use of such techniques at Bagram, often in combination. For some detainees, these techniques resulted in death.[35]

Upon arrival at Bagram, Obaidullah, still hooded, had his clothes cut from him and he was given prison clothing.[36] For the first week or two, he did not see any other detainees as he was kept in an isolation cell measuring about one and a half by two metres.

> "The soldiers chained my hands above my head to the ceiling and would leave me like that for 45 minutes or an hour, then take me into an interrogation room, then take me back after the interrogation and chain my arms up again for another 45 minutes to two hours."

The cell had no toilet, and if there was no guard present or willing to take him to a toilet, Obaidullah was forced to defecate in the cell. He says that once, when chained to the ceiling, he had called to be taken to the toilet. The soldiers allegedly shouted at him to "stop yelling", and "pulled me into the door and my face slammed into the door so hard that it bloodied and broke my nose". Obaidullah says that he received no medical treatment for this incident. Obaidullah has alleged that during his time in isolation he was subjected to sleep deprivation, and taken for hours-long interrogations up to three times a day.

> "During these interrogations, they questioned me at times under very hot lights, while making me kneel and put my hands on my head for hours. Sometimes I was forced to stand on my knees. I was also forced to stand at times in a bent position while they questioned me. These positions were very painful… Usually my hood was on when they questioned me, but not always. The hood had a rope at the neck. They pulled this rope so tight that it choked me.
>
> Many times they tied my hands and then hooked them to the wall or ceiling over my head while they were questioning me. They also slapped me and spit in my mouth. They held me by the neck, shook me and screamed at me.

> The interrogators told me that if I didn't talk, I would be there for my whole life. They also told me that they would kill my family or bring them to Bagram if I did not cooperate and admit to what they were saying."

When being moved to interrogations or to the toilet, Obaidullah alleges that the guards "often punched me, pushed me, and threw me to the ground." On one occasion, with his hands and legs bound, guards allegedly picked him up and threw him to the ground feet first, causing him to feel like his heel had been broken.

After his period in isolation, he was taken to a general detention area where he was held in a small cage structure, about one and a half metres square, one of several small such cages connected to a large cell measuring about three by five metres. Obaidullah recalls that "it was nearly impossible to get any sleep in this cage", as it had "razor wire all around it so that I could never stretch out, because if I did I would cut myself on the razor wire". Also, he alleges, "the guards shackled my hands above me to the door at times so that when the soldiers opened the door and brought another prisoners through, my body was forced to swing with the door, pushing against the razor wire."

He says that he was frequently forbidden to talk to other detainees, and if he disobeyed, he would be forced to have his hands shackled above his head. He was subjected to further sleep deprivation, and to multiple beatings. He was forced to carry and clean the barrel-like containers that were used as detainee toilets and to clean a hall of about 40 metres by 15 metres, sometimes using only a toothbrush. Interrogators told him that if he did not cooperate with them, "these kinds of punishments would continue for my whole life."

Obaidullah alleges that there were "many other degrading and humiliating things that the guards did to us to make us feel less than human", including not being allowed to wash for more than a month, being given little food, called humiliating names, yelled at, pushed, and dragged. Meanwhile interrogations continued. In his 2010 statement, Obaidullah recalled a specific interrogation that took place a week to 10 days after he was brought to Bagram:

> "They took me for an interrogation. I had not energy to talk or think at that time since I was sleepless from many days, as many as seven or more. I think it was around 3am when they took me to the interrogation room and they kept me there until about 8 or 9pm, about 18 hours straight. There were about ten different people questioning me at different times, with different interrogators coming in shifts and taking over for the others. They asked me all sorts of things. I was falling asleep while they were asking me questions and they would scream at me and shove me to keep me awake. They told me that if I didn't talk and cooperate with them, they would force me into sexual activities to make me talk. I believed them when they said that they would do that to me, because I had heard from another Afghan prisoner that they had done that to someone else. In my culture, it is very shameful and a disgrace to be used sexually. I was very scared and very tired".

Obaidullah said that he told his interrogators what they wanted so that "they would leave me alone and I could finally sleep". He asserts that "I do not know even today what I told them".

According to the NCIS intelligence officer who investigated Obaidullah's case in late 2011,

> "Based on my interviews of Afghan witnesses with personal knowledge and my other investigative efforts, detainees at Bagram during this period in 2002, including Obaidullah, were subjected to extraordinarily coercive measures which cause me to question the reliability of resulting statements".[37]

Obaidullah's two cousins taken into custody with him during the raid on the family compound were subsequently released from Bagram. Obaidullah was not. One day in late October 2002, he and a number of other detainees at Bagram were taken to have their beards and hair shaved off, and told that they were being taken somewhere else. The night before they were

transported they were not allowed to sleep and were not given any food or water for "some time before we left". Taken one by one from their cages, they were put in shackles and goggles, put in a truck for two to three hours exposed to the winter cold. They were taken to a plane and loaded on board, "tied together and forced to stay seated for the entire journey". Obaidullah recalls that "it was extremely cold on the plane and we remained shackled and with goggles on the whole time." Eight years later, he would say that "even now, when I go to the bathroom, it is sometimes hard for me to urinate, and this problem all started with the plane flight to Guantánamo".[38]

3.4 MORE THAN A DECADE AT GUANTÁNAMO

I am losing all hope because I have been imprisoned at Guantánamo for almost eleven years now and still do not know my fate
Obaidullah, March 2013

Obaidullah was transferred to Guantánamo on 28 October 2002.[39] At the time, the US government refused to publicly state the names or numbers of persons transferred from Afghanistan or other places to Guantánamo.[40] One official US document from October 2002 advises that for detainees being transferred into Guantánamo: "We strongly suggested total isolation for as long as possible for these individuals... until all available information is obtained from them."[41]

Upon arrival at the naval base, Obaidullah was "stripped, showered and underwent another very humiliating physical exam", and he was put into isolation for the next 30 days.[42] The use of isolation as a coercive technique was particularly prevalent at Guantánamo, and the detention facility's Standard Operating Procedures around that time emphasised isolation as central to the so-called "Behaviour Management Plan" for each newly arrived detainee. The purpose of this plan was to "enhance and exploit" in the interrogation process their "disorientation and disorganization", and concentrated on "isolating the detainee and fostering dependence of the detainee on his interrogator". For at least the first 30 days, but longer if so determined by interrogators, the detainee would be held incommunicado in breach of international law, with no contact with the International Committee of the Red Cross, or the Chaplain or any lawyer, and no Koran, prayer mat, books or mail.[43] The "interrogator decides when to move the detainee to general population".[44]

FBI agents reported that prolonged isolation was used at the base "as part of an interrogation strategy to wear down a detainee's resistance" as well as for "disciplinary or security purposes".[45] Two FBI personnel deployed to Guantánamo in early 2003 reported that the use of isolation was common at the detention facility, and was "not considered abusive" (because it was officially authorized).[46] Isolation was described in a 2005 military report on Guantánamo as an "aggressive" technique.[47] It is more than abusive and aggressive: prolonged isolation is a breach of the prohibition on torture and other ill-treatment.[48]

According to a 2008 "detainee assessment", Obaidullah was transferred to Guantánamo to "provide information" on: "Al-Qa'ida recruiting; terrorism-related facilities; electronic devices; anti-tank land mines." Of his interrogations at Guantánamo, Obaidullah recalled:

> "When I was taken to an interrogation, they often put me in a freezing cold room with the air conditioning way up high. After the interrogation was over, they would leave me in there for another 3-4 hours by myself with the air conditioning up high.
>
> For a long time, maybe a year, after I got to Guantánamo, the interrogators controlled everything about our lives. If we wanted water or if we wanted to see a doctor, it all depended on whether the interrogators approved it or not.
>
> One time, about 2 or 3 months after I arrived in Guantánamo, I was very sick for many days. My throat was sore and I had a fever. Finally, they took me to the infirmary. A

doctor began to examine me. After a short time, an interrogator came to the door and signalled to the doctor. The doctor went outside and talked to the interrogator for a short time and then left. He did not return. I was taken back to my cell even though I was still sick and felt very bad."

3.41 HUNGER STRIKE

The latest actions in the camps have dehumanized me, so I have been moved to take action
Obaidullah, March 2013

In February 2013, over a decade after he first arrived at Guantánamo, Obaidullah went on hunger strike to protest, he said, dehumanizing cell searches. In a sworn statement signed on 27 March 2013, Obaidullah stated that his decision to join the hunger strike was sparked by what he described as "invasive" cell searches conducted in the week of 6 February 2013, during which he said his blanket, sheet, towel, family photos and other documents, mail from his attorneys and other items. The removal of such items, he said, was "especially distressing for me because I have nothing to provoke the authorities to take my belongings and comfort items that gave me a small sense of humanity". He also alleged mishandling and disrespect of Qu'rans by US soldiers during the search, and a deterioration of detention conditions against hunger strikers. He explained:

"I had not participated in hunger strikes, or organized protests in the past. I have been patiently challenging my imprisonment in US civil courts. But the latest actions in the camps have dehumanized me, so I have been moved to take action. Eleven years of my life have been taken from me, and now by the latest actions of the authorities, they have also taken my dignity…

Despite the difficulties in continuing the strike, and the health effects I am experiencing and witnessing, we plan to remain on strike until we are treated with dignity… I am losing all hope because I have been imprisoned at Guantánamo for almost eleven years now and still do not know my fate."

An order was issued in the early morning of 13 April 2013 by the commander of Joint Task Force Guantánamo (JTF-GTMO) to shift detainees from communal to single-cell living at Camp VI "to ensure the health and security of those detainees", an order that was carried out on that day. JTF-GTMO issued a news release reporting that:

"This action was taken in response to efforts by detainees to limit the guard force's ability to observe the detainees by covering surveillance cameras, windows, and glass partitions. Round-the-clock monitoring is necessary to ensure security, order, and safety.

In order to re-establish proper observation, the guards entered the Camp VI communal living spaces to transition detainees into single cells, remove obstructions to cameras, windows and partitions, and medical personnel conducted individual assessments of each detainee. The ongoing hunger strike necessitated these medical assessments. Some detainees resisted with improvised weapons, and in response, four less-than-lethal rounds were fired. There were no serious injuries to guards or detainees."[49]

Such moves must not be driven by or carried out with any punitive intent. In particular, detainees should never be punished for exercising their right to peaceful protest, including by going on hunger strike. Any use of force must be strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.[50]

In a sworn declaration signed on 22 May 2013, one of Obaidullah's lawyers relayed what Obaidullah had told her and co-counsel in a phone call on 25 April:

"In that call, Obaidullah told us that on approximately April 13, 2013, the guards came and moved all the detainees in Camp 6 into solitary cells. At the time of his move, he was not allowed to take any of his possessions with him except for a single Arabic

> Qu'ran. (His native language is Pashto, and he had another Qu'ran containing a Pashto translation, but that Pashto version was taken away from him). He was not allowed to wear his usual over-shirt and was stripped down to his t-shirt and pants. He was given nothing in that solitary cell until about midnight that night, when he was finally given a single mat and blanket. He was not allowed to have any soap, toothpaste and toothbrush, and he has still not been given those items as of the time of our phone call approximately two weeks later. Since the date that he was moved, he told us that he had remained in the solitary cell, like all of the other detainees.
>
> He told us that in the solitary cell, he was not able to sleep properly. The guards had been making too much noise throughout the night, and it was almost impossible to sleep. He also told us that it was very cold in the solitary cell.
>
> Obaidullah also told us during that phone call that the guards are providing the detainees with showers and recreation after the move, but if you go for a shower, you will regret it. This is because the guards have started implementing new search procedures when they go for showers and recreation. He told us that they gave him a 'hard time' with the searching, and that he gets shackled and searched on his way to the shower, or to the recreation, and on the way back. Even though he is in a solitary cell, they still search him to and from a shower or recreation. This is a change from the old policies. He said that after being in Guantánamo for nearly 11 years it is very unfair to be treated this way.
>
> The guards also make the schedule very difficult on the detainees. He told us that the guards sometimes offered him his shower or recreation time in the middle of the night, like 12 midnight, 2:00 or 4:00 in the morning. That meant that Obaidullah had to choose between sleeping or taking a shower or going for recreation. He told us that he is only getting one hour of recreation now, whereas before April 13, he had many more hours of access to recreation. He also said that he only sees one other detainee during his one hour of recreation, whereas before April 13 he lived in a communal cell block with approximately twenty men."[51]

The conditions in which Obaidullah and the other detainees are held should conform to the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment and other international human rights standards.[52] There appear to be no reasonable grounds that might justify the actions taken against this detainee, as described.

If the above allegations are true, it is difficult to interpret the behaviour described above as anything other than punitive and, given that the target of this search and seizure of personal possessions was a man on hunger strike, it appears to be punishment for his protest. Deprivation of personal and dental hygiene materials, of personal effects and measures to deprive prisoners of sleep would breach international prison standards[53] and the imposition of solitary confinement could constitute torture and other ill-treatment.[54] If solitary confinement is used, it should not be as a punitive measure and only for the shortest time possible, and it should be applied only in accordance with stringent due process requirements and regular, daily, access to adequate medical attention by a doctor must be granted.[55]

Between 10 and 20 July 2013, the number of detainees officially recognized as being on hunger strike dropped by about three dozen, from 106 to 70.[56] In a further apparent illustration of disrespect for the right of the detainees to peaceful protest and of another tactic to reduce the numbers on hunger strike, it seems that the Guantánamo authorities promised detainees who came off their protest a return to communal detention from their conditions of isolation.[57] At the time of writing, there were indications that Obaidullah came off his hunger strike during this period and had been returned to communal living.

4. INADEQUATE LEGAL PROCEDURES MIRED IN SECRECY AND DELAYS

They woke me up from my home and took me to Bagram, from Bagram they brought me here… I was a young boy got captured and brought here, my youth has been spent here in jail… I'm trying to be patient as I can, I've been patient
Obaidullah, Guantánamo, October 2007[58]

As legal challenges brought the courts closer to the Guantánamo detentions, the Bush administration improvised an administrative review process to review detainees' status as "enemy combatants". The operation of this scheme pointed to an administration manipulating individual detainee cases to seek to minimize judicial scrutiny of executive conduct.[59] Congress, meanwhile, failed to act to bring the detentions into line with US international human rights obligations, endorsed the shoddy administrative review process, and passed legislation that entrenched impunity, restricted judicial review, and perpetuated the use of military commissions. Such legislation included the Detainee Treatment Act (DTA) of 2005 and the Military Commissions Act (MCA) of 2006.[60]

Since the day he was picked up, the USA has justified Obaidullah's detention based on a flawed legal framework in what it then called the "global war on terror", pursuant to which the USA considers that it can hold Obaidullah and other detainees until the end of hostilities whenever, if ever, that may be deemed (by the USA) to have occurred. The Bush administration used the global war paradigm as part of a deeply flawed argument that in cases such as Obaidullah's, international human rights law was simply inapplicable.[61] The Obama administration has conceded at a very general level that some minimal role may exist for human rights in relation to its "global armed conflict" approach in its most recent report to the UN Human Rights Committee.[62] However, it has not fundamentally altered its approach to the Guantánamo detentions, and continues to invoke the Authorization for Use of Military Force (AUMF) as the legal underpinning for the detentions.

The AUMF was a broadly worded resolution passed after little substantive debate by Congress on 14 September 2001 and signed into law by President Bush four days later.[63] The AUMF authorized the US President to decide who was connected to the attacks of 11 September 2001, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any geographical limits.[64] Although President Obama has recently raised the prospect of the AUMF's possible repeal at some point in the future, it remains in force, despite the systematic human rights violations that have been justified by reference to it.[65]

The population of detainees at Guantánamo comprises some individuals who were originally detained in a situation of international armed conflict that has long ago ended (i.e. in the earlier state of the conflict in Afghanistan), others who were originally detained in a situation of non-international armed conflict (including post-June 2002 in Afghanistan) from which they have been removed by the USA to Cuba, and others who were not originally detained in the context of any armed conflict recognised by international law at all (e.g. individuals arrested in locations in Kenya, Azerbaijan, Thailand, Mauritania, United Arab Emirates and Georgia where no armed conflict was occurring)[66]. Regardless how these individuals came to be detained at Guantánamo, and despite claims to the contrary by the USA, all the Guantánamo detentions, including Obaidullah's, are subject to international human rights law[67].

As the UN Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR), has made clear, indefinite detention or continued detention without justification is not permitted under international law and amounts to a breach of Article 9 of the ICCPR.[68] The Human Rights Committee has specifically called upon the USA to "review its approach and interpret the ICCPR in good faith" and in particular to:

"acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as its applicability in time of war".[69] After 11 years of continued and indefinite detention far from any battlefield, Obaidullah should be released if he is not to be brought to fair trial in a civilian court.[70]

4.1 DELAYED AND SUPERFICIAL ADMINISTRATIVE REVIEW

In mid-2004, in response to rulings by the US Supreme Court, the US military provided an administrative review before military officers, called a Combatant Status Review Tribunal (CSRT), whose role was to affirm or reject the detainee's "enemy combatant" label. By then the Guantánamo detentions had already been running for two and a half years. From 2005 to 2007, the US military provided annual reviews known as Administrative Review Boards (ARBs). Neither the CSRT nor the ARB proceedings allowed Obaidullah to have access to a lawyer for that review process, which in any event was no substitute for independent judicial scrutiny.

At his CSRT and ARB proceedings, Obaidullah denied any connection with al-Qa'ida and sought to explain the landmines and notebook. He said that the notebook diagrams were from notes taken during a class that the Taleban had forced him to attend, and from which he had fled after two days.[71] He explained that the landmines were left over from the Soviet conflict in the 1980s and had been buried to avoid any problems with the Taleban government, and that he had no plans to use the mines whatsoever.[72]

The CSRT and ARB's approved his continued detention as an "enemy combatant". These military review proceedings deprived detainees like Obaidullah of the basic features of fair and impartial review, prompting condemnation by international human rights bodies.[73]

By the time the US Supreme Court ruled in June 2008 that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention, the Court noted that "The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."[74]

4.2 DELAYED AND LIMITED JUDICIAL REVIEW

Under international law, from the outset the Guantánamo detainees had the right to challenge the lawfulness of their detention in court.[75] When the US Supreme Court ruled more than six years after the detentions began that the Guantánamo detainees had this right under the US Constitution, despite Section 7.1 of the MCA which purported to strip the US courts of jurisdiction to consider such petitions from foreign nationals held as "enemy combatants", it left it up to the District Court in the first instance as to how to implement the ruling.[76] It expressly stated, however, that it expected the District Court to use its discretion to accommodate, "to the greatest extent possible", the government's "legitimate interest in protecting sources and methods of intelligence gathering".

Years of litigation have ensued and the US Court of Appeals for the District of Columbia (DC) Circuit has emerged for the time being as effectively the court of last resort for the detainees, with no habeas cases being reviewed at a higher level. As has occurred in a number of other cases, on 24 June 2013, the US Supreme Court refused to take Obaidullah's appeal against the DC Circuit Court's ruling.

Such refusals indicate a reluctance to review how the lower courts are interpreting its 2008 *Boumediene* ruling. Not all the judges on the Court of Appeals are content with the state of affairs. On 18 June 2013, one of them wrote of a Guantánamo detainee's habeas corpus petition being "doomed to fail because of the vagaries of the law". He said:

> "I am disquieted by our jurisprudence. I think we have strained to make sense of the

> applicable law, apply the applicable standards of review, and adhere to the commands of the Supreme Court. 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."[77]

Ordinarily in habeas corpus proceedings, government authorities are required to bring an individual physically before the court and show legal grounds for their detention. If the government is unable to do so without delay (i.e. within a matter of days), the individual is entitled to be released.[78] If it is not fully respected by the government and courts in a national legal system, the right to liberty is gravely undermined.

The *Boumediene* ruling found that the Guantánamo detainees – some of whom were by now in their seventh year in custody without any judicial review – had the right to a "prompt" habeas corpus hearing to determine the lawfulness of their detention.[79] Over five years later, some detainees have not yet had a ruling on the merits of their habeas corpus petition.

In Obaidullah's case, a ruling came three and a half years after his petition was filed in District Court seeking his release. That petition was filed on Obaidullah's behalf on 7 July 2008. Two months later, the Bush administration charged Obaidullah for trial by military commission at Guantánamo (see further below). Despite the Obama administration obtaining a suspension in all military commission proceedings after taking office on 20 January 2009 in order that it could review all the detainee cases with a view to meeting the president's promise to close Guantánamo by 22 January 2010 at the latest, from February 2009 to June 2010, that same administration used the MCA charges as a basis for delaying Obaidullah's habeas corpus case.

After the DC Circuit Court of Appeals ruled in June 2010 that Obaidullah's habeas case must go forward (by now it was nearly two years since his habeas corpus petition had been filed), the district court held hearings on his petition. In October 2010, eight years after Obaidullah arrived at Guantánamo, the district court found that he was lawfully held. It reaffirmed its ruling in March 2011.[80] Obaidullah appealed to the US Court of Appeals for the DC Circuit, which affirmed the lower court's ruling in August 2012 and again in November 2012.[81]

In Obaidullah's habeas case, the courts concluded that the landmines, the notebook, and the blood found as a result of the raid on his home in July 2002 corroborated the unknown source's allegation, making it more likely than not that Obaidullah was affiliated with al-Qa'ida. The district court also appeared to presume the accuracy of government intelligence reports containing unverified accusations. As one Court of Appeals judge noted in an earlier case, the presumption "comes perilously close to suggesting that whatever the government says must be treated as true". Intelligence reports are "produced in the fog of war by a clandestine method that we know almost nothing about", and may contain errors.[82]

The courts allowed the government to keep secret the identity and other information of the unknown accuser, blocking Obaidullah's lawyers from investigating and presenting evidence that could help support his habeas corpus challenge. At the time of the raid in 2002, the US government was paying rewards for information leading to the capture of alleged *al-Qa'ida* suspects, resulting in the pervasive spread of false information.[83] At his ARB hearing in 2005, Obaidullah alleged that two personal "enemies" who lived in his village had turned him in falsely.[84] In late 2011, a Navy intelligence officer investigating Obaidullah's case in Afghanistan said in a sworn statement that:

> "[I]ndividuals who had lived in Obaidullah's village identified two males who were not originally from the same village but had lived there for a period, and who were rumoured to have sold false information to Americans. It was stated that those two men later disappeared and it is not known whether they are alive".[85]

In February 2013, Obaidullah filed a petition in the US Supreme Court asking that court to

review the case.[86] On 24 June 2013, just under five years after Obaidullah's habeas corpus petition was first filed, the US Supreme Court said that it would not take his case.

4.3 NO HEARING ON NEWLY DISCOVERED EVIDENCE

Amnesty International considers that Obaidullah should be immediately released if he is not going to be charged without further delay and brought to fair trial in an independent civilian court within a reasonable time. Such decisions should have been made years ago. Meanwhile, the habeas corpus process has come late, been operated under a flawed legal framework underpinned by the AUMF, and been subject to lengthy delays. In these habeas proceedings, Obaidullah has been blocked from raising newly discovered evidence.

In February 2012, Obaidullah submitted to the District Court a sworn statement by a former Navy intelligence officer who was investigating his case in Afghanistan along with his military defense counsel. The statement noted new evidence that had been found, on the basis of which Obaidullah asked for another habeas hearing.

The investigator's statement explained why the evidence had not been discovered earlier, noting the "extraordinary difficulties in conducting investigations in an overseas combat area" as well as certain cultural challenges faced by investigators in such cases.[87]

First, the investigator found local witnesses who confirmed Obaidullah's explanation for the landmines on his family's property:

> "Afghan witnesses with personal knowledge stated that during the 1980s Soviet war [in Afghanistan] a communist official named Ali Jan used the Obaidullah family compound as his residence and used the nearby high school as his garrison headquarters. Obaidullah and most of his family were refugees in Pakistan during this time. Afghan witnesses with personal knowledge stated that Ali Jan is often referred to as a commander but he was actually a sub-governor, or a communist political official with direct military authority over the area. One non-family-member Afghan witness I interviewed stated that he continued to live in the area during the Soviet war and stated that he was in the Obaidullah family compound on occasion when it was used by Ali Jan. This witness stated that he personally witnessed landmines and other munitions present in the compound during this time. I showed him a photograph, obtained during our independent defense investigation, which US personnel had previously told us showed the landmines seized on the night Obaidullah was taken into custody… The witness positively identified one of the types of landmines from the photograph as being a type of landmine he recalls seeing in the compound when Ali Jan lived there. This statement is consistent with statements that the landmines were left over from the Soviet war and had been buried by the family when they returned to their home after that war".[88]

Second, the investigator found local non-family witnesses who corroborated Obaidullah's assertions that the explosives-related diagrams in his notebook were from notes taken in classes he had been forced to attend by the Taleban and from which he had run away after a few days.[89] Local witnesses stated that Obaidullah had been "forced to go to training at the location of the Khost Mechanical School." The investigator stated:

> "Family-member and non-family-member witnesses with personal knowledge stated that Obaidullah did not associate with al-Qa'ida or Taliban members except for the few days he was forcibly conscripted to attend a Taliban training school. Witnesses with personal knowledge stated that Obaidullah fled from that school and hid from the Taliban after attending only a few days."[90]

Third, the investigator found a US witness who cast doubt on the allegation, relied upon by the District Court, that Obaidullah had been seen in a car taking wounded bomb cell members to a hospital after they had been injured in an accidental explosion. The

investigator stated that he had reviewed the original classified report of the allegation that "persons were seen ferrying wounded individuals from an accidental IED explosion" and that a "key US witness with personal knowledge told me that he *made the inference* that Obaidullah may have been one of the people described in the earlier report after seeing the blood in the vehicle found at the compound." Without divulging classified information, the investigator concluded that no one had visually identified Obaidullah in any such "ferrying" incident, and that the intelligence had been "unintentionally mischaracterized by individuals and documents describing it to the District Court".[91]

Fourth, the investigator uncovered the reason for blood stains in the back of a car found on the family compound at the time of the raid. The US government had claimed to the court that the blood was further evidence of Obaidullah's involvement in an al-Qa'ida cell, even though it presented no photographic or physical evidence of the blood, and the car had long been out of US custody and its whereabouts unknown. But the investigator found otherwise:

> "Afghan witnesses with personal knowledge stated during interviews that the car containing blood stains was a Toyota Corolla hatchback borrowed, only days before Obaidullah's arrest, for the express purpose of taking Obaidullah's wife to the hospital for the birth of their first child, a daughter…
>
> Family members took Obaidullah's wife in the Toyota Corolla which had been borrowed for that purpose, and began the drive toward the hospital in the city of Khost, about six kilometres east. Obaidullah was not in the vehicle. According to family-member witnesses with personal knowledge, at this time in July 2002, militia checkpoints were prevalent on roads in this area. The family was required to stop at each checkpoint, wait for the cars in front of them to go through, and then explain their situation. Their progress driving Obaidullah's wife to the hospital was significantly impeded by the many militia checkpoints along the road. Eventually, their trip was taking so long that they had to pull off to the side of the road because the infant was being born. According to family-member witnesses, Obaidullah's wife gave birth in the back of the Toyota Corolla hatchback, with the seat folded down, off the side of the road near the city of Khost, Afghanistan in July 2002. Family members stated that the blood stains and residue resulted from the child's birth inside the Toyota Corolla… approximately two days before US forces took Obaidullah into custody and seized the car."[92]

According to the Navy officer, US personnel told him that the US forces gave the car to local Afghan militia forces and that the vehicle's current whereabouts were unknown. Obaidullah's family "eventually had to sell off part of their farm" to compensate the owner of the car for his loss.

Despite this new evidence, the District Court denied a new habeas hearing to Obaidullah. At the time of writing, Obaidullah was appealing that ruling to the Court of Appeals.

4.4 FROM NO ACCESS TO LAWYERS TO CONTINUED UNDERMINING OF ACCESS

Under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

> "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of this right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it".[93]

Because of its urgency as a safeguard against torture and other ill-treatment, Amnesty International and international law and standards hold that relatives, lawyers and independent doctors should have access to detainees without delay and regularly thereafter.[94] Governments should ensure that lawyers are able to carry out their activities "without intimidation, hindrance, harassment or improper interference" and "are able to travel and to

consult with their clients freely both within their own country and abroad".[95]

Initially, like other detainees, Obaidullah was held incommunicado, without contact with a lawyer, family or the outside world. He was not informed of the reasons for his detention, and he was not provided any review, judicial or administrative, of his detention.

For the first two years of his detention, he was held without access to a lawyer or to the courts, contravening international legal protections against arbitrary detention and other human rights violations.[96] The incommunicado and then virtual incommunicado detention[97] in which the detainees were kept for prolonged periods was motivated by the administration's intention to facilitate interrogations, free from independent judicial oversight or the intervention of counsel for the detainees.[98] Obaidullah did not get access to a lawyer until the second half of 2004 after the US Supreme Court ruled that the US federal courts had jurisdiction "to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay".[99]

While detainees held at Guantánamo were given access to legal counsel after the June 2004 *Rasul v. Bush* ruling, the logistical difficulties faced by lawyers accessing clients held in an offshore military base, as well as official machinations that by design or effect have compounded these difficulties, have made detainee representation extremely challenging.

The Bush administration had argued in post-*Rasul* litigation that while it would allow detainees to meet with lawyers, they had no right to counsel under US or international law. This notion of discretionary executive granting of access to lawyers was rejected by the courts. As a District Court judge wrote in October 2004:

> "They have been detained virtually incommunicado for nearly three years without being charged with any crime. To say that [the detainees'] ability to investigate the circumstances surrounding their capture and detention is 'seriously impaired' is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect [the detainees] to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. [They] face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system."[100]

Nine years later, the Chief Judge of the District Court for the District of Columbia (DC) found it necessary to refer back to this paragraph. In an opinion issued on 11 July 2013, Chief Judge Royce Lamberth was highly critical of the government's past and continuing approach to access to lawyers for the detainees. His ruling came in the case of a number of detainees seeking habeas corpus relief who were asserting that new search procedures adopted by the Guantánamo authorities in April 2013 was impairing access to their lawyers. A number of lawyers representing other detainees filed declarations in support of the petition. One such declaration was filed by a lawyer representing Obaidullah, citing the latter's experience of the search procedure and his response to it.[101]

Firstly, Judge Lamberth had to decide whether he had jurisdiction to consider the case. As outlined in section 5 below, the Bush and Obama administrations have successfully invoked Section 7.2 of the Military Commissions Act (MCA) of 2006 to deny judicial review of claims other than those deemed directly related to the habeas corpus challenges that the US Supreme Court in *Boumediene v. Bush* in 2008 ruled the detainees had the constitutional right to file and have reviewed on the merits, despite Section 7.1 of the MCA. The courts have agreed with the administrations that under Section 7.2 of the MCA the judiciary has no jurisdiction to consider lawsuits relating to "treatment" or "conditions of confinement", that is, challenges beyond straight lawfulness of detention. Here, however, Judge Lamberth ruled that the Court had jurisdiction because the issue was central to the right of detainees to challenge the lawfulness of their detention via habeas corpus petitions. Access to court

"means nothing without access to counsel", the Chief Judge emphasised.[102]

In his 11 July 2013 ruling, Judge Lamberth noted the "numerous government attempts to interfere with counsel access" in the Guantánamo context over the years, agreed that "the government is a recidivist when it comes to denying counsel access", and that it "seemingly at every turn, has acted to deny or to restrict Guantánamo detainees' access to counsel". He noted that the number of flights to Guantánamo had been "severely curtailed" and that lawyers representing detainees held there "must now wait in queue for at least two months before they meet with their clients".[103] He also noted that the government had on occasion withheld legal mail from detainees without notifying either the District Court or the men's lawyers.

Judge Lamberth was already familiar with this record as it had been he who had presided over litigation brought in 2012 after the Obama administration moved to remove the District Court from its role in protecting the right to counsel and to substitute the executive as the branch charged with determining counsel access to Guantánamo detainees who currently had no habeas corpus petition pending. He found that the administration's proposed "memorandum of understanding" by which it sought to control detainee access to legal counsel was "so one-sided" – giving the administration the power to unilaterally modify its provisions – that it rendered "any rights" provided by the document "meaningless and illusory". Judge Lamberth suggested that "if the separation-of-powers means anything, it is that this country is not one ruled by Executive fiat". rejected the administration's move in no uncertain terms:

> "The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantánamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme".[104]

During this litigation in 2012, Judge Lamberth had asked the Obama administration why the US Department of Navy Corrections Manual did not apply to the detainees at Guantánamo, given that they were held in military custody in a US naval base. For under this manual, prisoners have unconditional access to legal counsel.[105] The administration responded that Guantánamo was not a "corrections facility", but a "detention facility", and that the detainees were held not pursuant to the Uniform Code of Military Justice or the judgment of a military tribunal, but under the AUMF.[106] As noted above, the AUMF is what underpins the USA's global war framework and has been used to justify numerous human rights violations.

In his 2012 ruling, Judge Lamberth recalled how the District Court had been "forced to step in multiple times to ensure counsel-access" over the years. He provided examples of the government's prior attempts to interfere in detainees' access to their lawyers, including by exploiting the inability of a detainee to speak English, withholding medical records from a detainee who was allegedly suffering severe mental illness as a result of the conditions of detention, and in cases of detainees allegedly being mistreated during force-feeding. Such cases "legitimize the Court's scepticism of the Government's promises to provide adequate counsel-access", Judge Lamberth said. He was "unimpressed with the Government's 'trust us' argument" and "the Government's actions thus far demonstrate that it cannot be trusted with such power". This disturbing record could not be ignored now in 2013, in the context of the claims about the new search procedures, Judge Lamberth said, adding:

> "The government's repeated actions substantially increase the likelihood that its justification is mere pretext and that the new searches represent an 'exaggerated response' to its legitimate interest in security of the detention facility".

While acknowledging the deference federal courts are required to give executive conduct under US law in the running of prisons, Judge Lamberth added that "the courts need not give blind deference, however".

Under the new search procedures implemented by Colonel John V. Brogdan, who has been commander of the Joint Detention Group (JDG) at Guantánamo since June 2012, detainees wishing to consult with their lawyers are transported from their cell block in Camps 5 and 6 to Camp Delta (for telephone calls) or Camp Echo (for meetings). Any detainee being so transported is required to be searched both before and after the visit, and under the new protocol the search method was revised to include searches of the detainee's groin area and buttocks. During the litigation, Colonel Brogdan asserted that the searches are conducted twice – once before leaving the cell block and a second time upon return. According to the detainees, however, they had been searched four times – upon leaving their cells, upon arrival at the other facility, prior to leaving that facility and once more upon arrival back at the cell block. The transportation under the revised procedures is carried out in new vans which the detainees complained had lower ceilings than the vehicles previously used and which forced them, secured in a five point harness, to sit in painful positions during the ride.

Among the justifications given by the administration for this new policy was the death of Yemeni detainee Adnan Farhan Abd Latif, who was found dead in his cell in September 2012. The US authorities determined that his death was the result of suicide by overdosing on medication that he had hoarded, and suggested that he might have hidden such medications in his groin area.[107] The affidavit signed by Colonel Brogdan and filed by the administration in District Court did not say that Latif *actually* did so, Judge Lamberth noted.

In their petition, the detainees complained that what they considered degrading search and transport procedures was inhibiting their access to counsel. Indeed some detainees have chosen not to meet or speak by telephone with their lawyers in order to avoid being subjected to these procedures. According to Obaidullah's lawyers, he is one such detainee. In a sworn declaration signed on 22 May 2003, the lawyer stated:

> "On 6 May, 2013, I travelled to Guantánamo Bay to meet with Obaidullah. I had appointments to see him May 7-9 to discuss numerous issues regarding his case, including upcoming briefing in his habeas appeal. I also wanted to learn more about his health, since he has been on hunger strike for almost three months.
>
> I met with Obaidullah on May 7 and for part of May 8, but he refused to meet with me on the following day, May 9. He told me that the van he is driven in to come see me has no windows, and he has to hunch over nearly double. He said that the guards searched him four or five times when he goes for an attorney visit, very roughly, and that they hold you firmly to make you angry. He told me he had three searches on his way to see me that day, including 'between the legs where they should not search', which they had never done before last week. He also told me that many of the detainees did not want to meet with their counsel because of the searches… He told me if they did not change the search policy he did not want to see me again the next day. I did request from the Assistant Staff Judge Advocate (ASJA) that the search procedures for meeting with counsel be changed back to what they had been in the past. However, the next morning, I was told that my request had been denied. I was told by the ASJA on duty that it was Colonel Brogdan who had denied the request."[108]

In his ruling, Judge Lamberth found that, "since implementation of the new search procedure, multiple petitioners have foregone, some for the first time, phone calls or meetings with counsel". He continued:

> "[T]he Court finds that the new search procedures actively discourage [detainees] from taking phone calls or meeting with counsel… [T]he choice between submitting to a search procedure that is religiously and culturally abhorrent or foregoing counsel effectively presents no choice for devout Muslims… The relationship between the searches and [the detainees'] choices to refuse phone calls and counsel meetings is clear and predicable. Indeed, [detainees] also find searches of the Quran abhorrent, and many [detainees] have chosen to forego having a Quran in their cells rather than having their Qurans subject to search.
>
> That this relationship is so clear and predictable makes it easy for the government to exploit. Given that detainees are already shackled and under guard whenever they are moved, the added value of the new genital search procedure vis-à-vis the prior search procedure [which did not involve such contact] is reduced. In this context, the court finds searching the genitals of [the detainees] up to four times for every phone call or attorney-client meeting… to be excessive. Searching detainees up to four times in this manner for every movement, meeting, or phone call belies any legitimate interest in security given the clear and predictable effects of the new searches… The motivation for the searches is not to enhance security but to deter counsel access".

Judge Lamberth rejected the various justifications that the administration had given for the new search procedures, including the justifications based on the discovery of contraband on previous occasions and the death of Adnan Latif. Describing the connection between the new policy and the death of Latif as "so remote as to render the policy arbitrary or irrational", Judge Lamberth also noted that the new policy had been implemented some eight months after the detainee's death: "To the Court's view, Col. Brogdan's swiftness in implementing the new searches in May 2013 shows that linking the new searches to the death of Latif and the subsequent investigation was merely an afterthought". In Judge Lamberth's opinion, having heard all the evidence, "the government's attempts to justify the new procedure on the basis of Latif's suicide have the patina of pretext to them".

Judge Lamberth also pointed to another fact that could not be ignored – namely that scores of detainees were on hunger strike, and were, "expectedly, in a substantially weakened physical state". In such a state, detainees were both less able to move between camps and less of a security risk. In this context, the new search procedures seemed "less like a valid choice on the part of the JDG commander and more like an attempt to deny counsel access through alternative means".

In conclusion, Judge Lamberth reiterated that "access to the courts means nothing without access to counsel", and that the JDG's conduct "flagrantly disregards the need for a light touch on religious and cultural matters". He ruled that "this Court, whose duty is to call the jailer to account, will not countenance the jailer's interference with detainees' access to counsel".

Judge Lamberth ordered the government to amend the search procedures, returning to the method by which the waistband of the detainee's trousers is grasped and shaken to "dislodge any contraband". In addition, he ordered that any detainee who is in a weakened physical state from hunger striking or has "any medical condition that makes travel outside the housing camp difficult" shall be allowed to meet with legal counsel in the detainee's prison block. Finally he ordered that any transportation of detainees to meetings or phone calls with their lawyers be conducted in "a vehicle that allows the detainee to sit upright".

On 16 July 2013, the Obama administration filed a motion for an immediate stay of Judge Lamberth's order (and opposing a defence motion for emergency enforcement of the order). The administration argued that it was "substantially likely to prevail" on appeal on its contention that Section 7.2 of the MCA bars the District Court from reviewing the claim about the search protocols on the grounds that it is a conditions-of-confinement claim.[109]

The administration also included a sworn declaration signed by the Commander of US Southern Command, who stated that the revised procedures were to prevent smuggling of contraband that could "pose a significant danger to the guard force, to other detainees and, if the detainee desires to commit suicide, to himself". He again cited the death of Adnan Latif in September 2012. The procedures, General John Kelly said, were necessary for the "safety and security of the detainees, JTF-GTMO personnel, as well as any other personnel on the island (including attorneys visiting the detainees)", and he denied that there had been any intent on the part of the authorities to use the search procedures to limit detainees' access to legal counsel.[110] In a supplementary brief the administration protested that "a federal court, for the first time to the Government's knowledge, has restricted a military commander from implementing routine security procedures at a detention facility for enemy forces during an armed conflict".[111]

The next day, 17 July 2013, the administration filed notice of its intent to appeal his ruling to the Court of Appeals for the DC Circuit. Judge Lamberth's order was stayed by the Court of Appeals.[112]

4.5 SLATED FOR UNFAIR TRIAL, BEFORE RETURN TO INDEFINITE DETENTION

Under its law of war framework, the USA developed and has continued to operate a system of military commission trials. For a while, it indicated that it intended to prosecute Obaidullah by military commission – the Bush administration swore charges against him in 2008 under the MCA of 2006, but never referred those charges on for trial.

For the Guantánamo detainees, held for year after year without charge, the question of trials within a reasonable time has long been rendered inoperative to their plight, not least by the policy decision to make trials secondary to detention and (earlier) interrogations. By the time the Obama administration took office, trials were already years overdue. Further delays would be incompatible with international fair trial standards, as they were justified by reference to the time needed to fix a tribunal that was unnecessary.

Individuals were first charged for trial by commission nine years ago under a system which was unnecessary and deeply flawed – and found unlawful by judicial ruling, with its successor under the MCA of 2006 assessed as inadequate by executive determination.[113] Even if modifying the military commission procedures could make them less unfair, the fact that fully functioning federal civilian courts were already available, and had been for the entire period of the detentions (not to mention from long before), rendered any further delays contrary to the right under international law for criminal suspects to be brought to trial without undue delay.[114]

In January 2010, the Obama administration informed the US Court of Appeals that it had determined that "prosecution in a military commission is appropriate" in Obaidullah's case. In more than four years in office, however, the administration has not charged Obaidullah, and now appears unlikely to in the wake of a 2012 federal court ruling.

In May 2009, President Obama had criticized the military commissions developed under the Bush administration and the fact that only three detainees had been convicted under them. He promised reforms that would make the commissions "fair, legitimate, and effective". Later that year, President Obama signed into law revisions to the MCA. While improving the military commission system, the revisions have not brought it into line with international fair trial standards. The military commissions system still discriminates in the level of fair trial protections on the basis of nationality and lacks structural independence from the political branches of government.[115]

To reiterate, in his landmark May 2009 national security address, President Obama stated:

> "For over seven years, we have detained hundreds of people at Guantánamo. During that

> time, the system of military commissions that were in place at Guantánamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over seven years."[116]

More than four years later, there have been a grand total of four convictions under the MCA of 2009, all as a result of pre-trial arrangements under which the detainee pleaded guilty.[117]

As noted above, the Bush administration charged Obaidullah in September 2008 under the MCA of 2006. The charges, sworn more than six years after Obaidullah was first taken into custody and two months after his habeas corpus petition was lodged, consisted of "conspiracy" and "providing material support for terrorism".

Obaidullah was provided military defence counsel, but his case was never referred on for trial. After three years of no action in his case, and upon complaint by his military defence counsel that the US government was violating his rights under US law to speedy criminal trial, the sworn charges against him were dismissed in June 2011. The Convening Authority for the military commissions dismissed the charges "without prejudice", meaning that the government could re-charge him. This occurred about 10 weeks after Judge Leon had denied Obaidullah's motion to reconsider his ruling denying his habeas corpus petition.

On 22 January 2010, the date by which President Obama had committed his administration to resolving the Guantánamo detentions and closing the detention facility there, the Guantánamo Review Task Force he established as part of this process published its final report revealing that there were 36 detainees slated for possible trial in federal court or by military commission. The January 2010 report did not reveal the identities of the detainees. That information was finally made public in June 2013 pursuant to a Freedom of Information Act (FOIA) request. This confirmed that Obaidullah fell into the category of those detainees "referred for prosecution".[118]

However, since then, a federal court ruling has likely cut the number of detainees who will face prosecution by military commission (the administration to date has appeared unwilling or unable to overcome congressional opposition to trials in federal court). In October 2012, the Court of Appeals for the DC Circuit ruled that the MCA did not "retroactively punish new crimes" and "material support for terrorism was not a pre-existing war crime".[119] As noted above, the Bush administration had charged Obaidullah with "material support for terrorism" under the MCA. While the 2006 ruling of the US Supreme Court which overturned the first incarnation of the military commissions did not decide the issue of whether "conspiracy" is war crime prosecutable by military commission, four of the Justices believed that it was not.[120]

Following the Court of Appeals ruling, the Chief Prosecutor of the military commissions has suggested that, rather than 36 detainees being tried there may be a total of about 20, including those already convicted (seven) and those already charged (eight). This would leave around five more detainees to be charged.[121] It seems unlikely that Obaidullah will be one of them. In any event, Amnesty International considers that the military commissions do not meet international fair trial standards and should be abandoned altogether in favour of trials in ordinary federal court.

The US administration, in general supported in the case law of the federal judiciary, has justified Obaidullah's continuing and indefinite detention under the USA's unilaterally developed theory that it is engaged in a "global war" against *al-Qa'ida* and associated groups. Under this theory – largely accepted within all three branches of the US government – the USA considers that it can hold Obaidullah and other detainees until the end of hostilities whenever, if ever, that may be deemed (by the USA) to have occurred. At the same time, the government considers that even if it were to bring Obaidullah to trial and even if he were to be acquitted – or if convicted, after he had served any prison sentence – he could be returned to indefinite "law of war" detention under the "global war" framework.

The US Court of Appeals for the DC Circuit – as noted above, effectively the court of last resort on Guantánamo habeas cases – appears to have fully accepted this paradigm. For example, it asserted in late 2012 in the case of Yemeni national Salim Ahmed Hamdan, a Guantánamo detainee convicted in 2008 by military commission, that "when his sentence ended later in 2008, the war against al Qaeda had not ended. Therefore, the United States may have continued to detain Hamdan as an enemy combatant".[122]

Obaidullah should be immediately released if he is not going to be charged and brought to fair trial in an independent civilian court within a reasonable time. Every day that goes by without the USA proceeding down one or the other route – release or fair trial – compounds the affront to international human rights principles that has characterized much of the USA's approach to counter-terrorism detentions since 11 September 2001.

5. IMPUNITY AND ABSENCE OF REMEDY

Widespread disregard for the rule of law and official impunity for those who committed human rights abuses were serious problems. The government was either unwilling or unable to prosecute abuses by officials consistently and effectively
US Department of State human rights report, entry on Afghanistan, 2013[123]

Impunity is indeed a "serious problem", wherever it occurs. In late January 2002, the then White House Counsel and future Bush administration Attorney General, Alberto Gonzales, drafted a memorandum to President Bush suggesting that a determination that the Geneva Conventions did not apply to those captured or held in Afghanistan would free up US interrogators in their activities and make their future prosecution for war crimes under US law less likely.[124] A few days later, then Attorney General John Ashcroft wrote to President Bush that a presidential determination against applying Geneva Convention protections to detainees "would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees." The USA's War Crimes Act of 1996, he warned, criminalized in US law certain violations of the Geneva Conventions.[125]

On 7 February 2002, President Bush issued a directive that no-one taken into custody in Afghanistan would qualify for prisoner of war status and that Article 3 common to the four Geneva Conventions – prohibiting torture and other ill-treatment, among other things – would not apply to them either. This presidential determination remained the order of the day until June 2006 when the US Supreme Court ruled that Common Article 3 was applicable.[126] Two and a half years after that, the US Senate Committee on Armed Services concluded that the presidential decision "to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in US custody."[127]

In 2004, certain allegations made by Obaidullah that he had been subjected to torture and other ill-treatment in US custody in Afghanistan were referred to the Naval Criminal Investigative Service (NCIS). The officer making the referral stated in a memorandum to the NCIS that the allegations "contain questionable conduct that may be considered criminal conduct".[128] The conduct appeared to be "inconsistent" with the presidential memorandum of 7 February 2002 that detainees be treated humanely, even as it maintained they were not legally entitled to such treatment (this position is plainly inconsistent with international law, as torture and other ill-treatment are always prohibited[129]).

Today, the US administration has reduced to a footnote Obaidullah's allegations that he was subjected to torture and other cruel, inhuman or degrading treatment and punishment in US military custody in Afghanistan (despite such allegations, as detailed above, having been to

an extent corroborated by witnesses). In this footnote in a brief filed in federal court in late 2011 defending the lawfulness of Obaidullah's detention under the AUMF, the Obama administration wrote:

> "Obaydullah alleged that he was mistreated and held in harsh conditions while detained at Chapman and Bagram. Although the government does not concede the validity of those allegations, the issue does not have to be resolved in this case because the government expressly disclaimed reliance on any statements Obaydullah made at those locations".[130]

This statement, and the failure of the government to fully act on these allegations, is plainly in breach of the USA's international legal obligations. Although the Obama administration has sought to comply with one aspect of the UN Convention against Torture (CAT), the prohibition of evidence obtained by torture, they have failed to ensure a prompt, thorough, effective, independent and impartial investigation into all Obaidullah's allegations, as has been the case for so many detainees.[131] This failure is compounded by the government's blocking of access to a remedy for detainees for the abuses that they have suffered and to the truth about their treatment at the hands of their interrogators and others.[132]

President Obama has adopted a "forward-looking" orientation to the exclusion of ensuring full truth and accountability for human rights violations committed in the post-9/11 counter-terrorism context. In May 2009, he suggested that to do otherwise would "distract us from focusing our time, our efforts, and our politics on the challenges of the future". He said that he opposed the creation of an independent commission to investigate human rights violations committed in what his predecessor had dubbed the "war on terror", on the grounds of his belief that the USA's "institutions are strong enough to deliver accountability". Congress, he said, can "review abuses of our values", and the "Department of Justice and our courts can work through and punish any violations of our laws".[133] Domestic values and law, however, are being interpreted in ways that perpetuate impunity rather than deliver accountability.

The Obama administration, via the Department of Justice, has actively opposed lawsuits seeking remedy for human rights violations in this context, including the crimes under international law of torture and enforced disappearance. The courts have generally deferred to the administration's invocation of state secrecy in this context, and passed the accountability issue back to the legislature and the executive. Victims of human rights violations have a right to the truth and to a remedy for those violations.[134] As such, secrecy should never be invoked to block victims of human rights violations from finding out information about those violations or obtaining redress.[135] Congress has failed to take steps to ensure that the USA meets its international obligations on accountability and remedy, and the Department of Justice has shut down criminal investigations into the program most starkly characterized by impunity for crimes under international law, the CIA secret detention program operated under the authority of President George W. Bush.[136]

This runs wholly counter to the principle against impunity in international human rights law. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism underlined to the UN Human Rights Council in March 2013: "If faithfully implemented this cluster of rights and duties would by now have ensured accountability not only for those public officials who directly engaged in the secret detention, rendition and torture programme operated by the Bush-era CIA, but also for their superiors, and for any current or former high-ranking officials of State, who planned such strategies or who gave authorisation for subordinate public officials to participate in them."[137]

During habeas corpus proceedings on the Obaidullah case, the District Court judge made comments providing a glimpse into how US institutions and 'values', without the political will necessary to give them the impetus, cannot be trusted to deliver accountability.

In a hearing in August 2010, Judge Richard Leon warned Obaidullah's lawyers "to be

careful" before using the word "torture" in his courtroom "because that's a very loaded word". Judge Leon appears, like many of his colleagues in the federal judiciary, appears not only to have accepted the legitimacy of the USA's "global war" paradigm, but to have also accepted the Bush administration's line on torture when he said that "enhanced interrogation tactics are far less than torture". As more and more information came into the public realm about the USA's use of abusive interrogation and detention techniques, the Bush administration had decided to admit to its authorization and use of "water-boarding", an interrogation technique amounting to mock execution by interrupted drowning. It emphasized that the technique had been thoroughly examined, passed as lawful (that is, that it did not constitute torture), and used in controlled circumstances against only three detainees.[138]

Although irrelevant to Obaidullah's case, as he never alleged that he was subjected to "water-boarding", Judge Leon said that it was "an open question" as to whether even this technique constituted torture, a view entirely inconsistent with international law and even the express views of the current US Attorney General and President Obama himself.[139] Judge Leon continued that "I believe the evidence in the record is abundantly clear that since the United States started taking people into custody, only a handful of people have been subjected to water-boarding". He then went on to reiterate that "enhanced interrogation tactics are far lesser than torture, and can be as – and can be as common as sleep deprivation, standing in a position for lengthy hours, having to, you know, being deprived of heat or whatever, sleep, sleep deprivation, whatever, any kind of enhanced interrogation…". Judge Leon's comments clearly contradict international law. [140] Even the US Department of State has criticised other countries for similar techniques, which it has categorised as acts as torture.[141] Obaidullah's own assessment of sleep deprivation also contrasts sharply with Judge Leon's opinion:

> "I think of all the punishments and abuse I suffered, the most awful one was the lack of sleep. When they interrogated me in that condition, I was barely able to stay awake, I could barely stand. I felt as though my heart had been ripped from my body".

Amnesty International is concerned that Judge Leon failed in this and other cases (as have other US federal judges) to refer allegations of torture and other ill-treatment made in his court to the relevant authorities for criminal investigation.[142] Judge Leon did made clear to the government that it was under an absolute obligation to reveal if any "enhanced interrogation tactics" were used against Obaidullah or any of the detainee witnesses in the case because "statements that the product of enhanced interrogation tactics are inherently suspicious and inherently suspect".[143] While he was right to do so, his concern about the use of techniques amounting to torture or other ill-treatment seems to have stopped at the question of whether they result in unreliable statements, to the exclusion of their unlawfulness and the need for accountability and redress as required of the USA under international law.

At the hearing on 20 August 2010 in Judge Leon's court, the government said that it would be relying upon at least one statement made by Obaidullah during his detention at Bagram. However, the following month, in the face of the allegations of abuse made by Obaidullah, the government said that it would not be relying upon any statements he made at Chapman airfield or Bagram airbase.[144]

In proceedings before Judge Leon in Obaidullah's case, the US government asserted that it had "not shied away from any allegations of mistreatment". However, it has shied away from accountability and provision of access to remedy. Foregoing use of any statements obtained under torture or other ill-treatment, or judicial enforcement of this approach, is not only a crucial element of any effective remedy which a victim of human rights violations is owed, it is a specific international legal obligation by which the US government is bound.[145] Moreover, the authorities are required to fully investigate all such allegations and to bring anyone responsible to justice[146]. While there has been some investigation into some specific incidents involving Obaidullah, the aims, extent and results of such investigations are unclear

but apparently limited and accountability minimal.

Further inter-branch failure to grasp the accountability issue was indicated when at the hearing on 20 August 2010, the Justice Department official representing the Obama administration suggested to Judge Leon that many of Obaidullah's claims of abuse in detention "go to conditions of confinement". As such, the official argued, the judge did not have jurisdiction under Section 7.2 of the Military Commissions Act "to even consider conditions of confinement in a habeas case". Section 7 states:

> "No court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention,… treatment,… or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination".

The version of the MCA signed into law by President Obama on 28 October 2009 revised the military commission system but left untouched the above wording contained in Section 7.2 of the MCA passed in 2006. In February 2012, the US Court of Appeals for the DC Circuit ruled that the federal courts had no jurisdiction to consider a lawsuit for damages brought by relatives of two detainees who died in Guantánamo in June 2006. The Court of Appeals found that jurisdiction had been removed under Section 7.2 of the MCA.[147]

Judge Leon's view on whether the MCA had stripped the federal District Court of jurisdiction to hear complaints about confinement conditions of foreign nationals held in the counter-terrorism context came in December 2011 in the case of a former Guantánamo detainee, released from the base after a successful habeas corpus challenge (in front of Judge Leon),[148] but seeking damages for physical and psychological injuries allegedly suffered as a result of abuse in US custody.[149] Abdul Rahim Abdul Razak al Ginco (Abdul Rahim al Janko), a Syrian national of Kurdish origin who had been held in US military custody without charge or trial for nearly seven and a half years, alleged among other things that when in US custody in Afghanistan in 2002 he had been subjected to "abusive interrogation techniques", including "striking his forehead; threatening to remove his fingernails; sleep deprivation; exposure to very cold temperatures; humiliation; and rough treatment"; and in Guantánamo that he was tied, shackled, force-fed, had his Koran desecrated, was subjected to "extreme sleep deprivation" in solitary confinement, and to "severe beatings and threats against himself and his family". He alleged that as a result of the abuse, he attempted suicide 17 times. Judge Leon granted the government's motion to dismiss al Janko's lawsuit, citing section 7 of the MCA[150]. On appeal in this case to the US Court of Appeals for the DC Circuit, the Obama administration has asserted that "All of plaintiff's claims are jurisdictionally barred" by Section 7.2 of the MCA.[151]

During the ongoing hunger-strike at Guantánamo, the Obama administration has also turned to section 7.2 of the MCA to seek to have lawsuits brought by detainees in this context blocked. In response to a motion for emergency relief brought on behalf of a Yemeni detainee, the Department of Justice urged the District Court on 11 April 2013 to summarily dismiss the motion for lack of jurisdiction:

> "By statute, Congress has exercised its constitutional prerogative to withdraw from the federal courts jurisdiction … Here, through Section 7 of the Military Commissions Act of 2006 ("MCA"), Congress has exercised its jurisdictional prerogative, not to grant, but to withdraw from federal courts judisdiction to adjudicate conditions-of-confinement claims by detainees at Guantánamo Bay… As reflected in a number of floor statements, by withdrawing court jurisdiction over detainees' conditions-of-confinement claims, Congress intended to prevent the detainees from consuming resources and disrupting operations at the Guantánamo Bay Naval Base through litigation not related to the legality of their detention."[152]

On 15 April 2013, the administration got what it asked for when the US District Judge dismissed the emergency motion on grounds of lack of jurisdiction under MCA Section 7.2.

On 3 July 2013, in a case brought in District Court on behalf of four Guantánamo detainees seeking to end the administration's use of force-feeding against them,[153] the US administration again sought to have the lawsuit rejected:

> "The Court lacks jurisdiction to consider a conditions-of-confinement and treatment request to enjoin [the administration] from providing essential nutritional and medical case.... Here, through Section 7 of the Military Commissions Act of 2006, Congress has exercised its constitutional prerogative, not to grant, but to withdraw from federal courts judisdiction to adjudicate conditions-of-confinement claims by detainees at Guantánamo Bay".[154]

In a ruling on 16 July 2013, the District Court ruled that it was "without jurisdiction here". Section 7.2 of the MCA, she ruled, "expressly deprives federal courts of jurisdiction to consider actions regarding the treatment of Guantánamo detainees or their conditions of confinement".[155]

As noted above, the Obama administration will be arguing to have the US Court of Appeals agree that Section 7.2 should have barred Judge Lamberth's consideration of the question of the revised search procedures at Guantánamo.

The Obama administration's willingness to rely upon the MCA – legislation signed into law in 2006 that among other things allowed secret detention to continue, further facilitated impunity and absence of remedy for past violations, and resuscitated unfair trials by military commissions – should be set against the administration's repeated use of the excuse "Congress is blocking closure of Guantánamo" as a reason for the impasse on the detentions.

Under international law, the fact that one branch of government has passed legislation purporting to block another branch from ending an unlawful indefinite detention regime, or from ensuring remedy or accountability, is no justification for the failure of the state as a whole from meeting its treaty obligations.[156]

It is not only interrogation techniques that can violate the international prohibition of torture and other cruel, inhuman or degrading treatment. So too can conditions of detention and conditions of detainee transfers. Whatever the context, violations of this international prohibition must be fully investigated and anyone responsible for authorizing or committing such violations brought to justice and those subjected to the abuses provided genuine access to meaningful remedy.[157] Section 7 of the MCA, like Section 1004 of the Detainee Treatment Act of 2005 (see below) is incompatible with international law and in the counter-terrorism context the USA remains in serious breach of its legal obligations on accountability and remedy more generally.

6. UN EXPERT BODY CALLS FOR OBAIDULLAH'S RELEASE AS REMEDY

The deprivation of liberty of Mr Obaidullah is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights

UN Working Group on Arbitrary Detention, 2013

On 6 February 2013, the UN Working Group on Arbitrary Detention (WGAD) transmitted the allegations that had been submitted to it on Obaidullah's case to the US administration. Three months later, the Obama administration had not replied – despite having in 2009 pledged its commitment "to cooperating with the UN human rights mechanisms".[158] The Working Group, as allowed under its rules of operation, went ahead and rendered its opinion on the case.

In its opinion adopted on 3 May 2013 and relayed to Obaidullah's lawyers on 2 July, the WGAD made a number of findings, including affirming that the USA is bound by international human rights law in relation to its detention of Obaidullah. The Working Group considered the detention under three of the categories applicable to cases before it:

> Category I – When it is "clearly impossible to invoke any legal basis" justifying the deprivation of liberty";
>
> Category III – When the "total or partial non-observance of the international norms relating to the right to a fair trial… is of such gravity as to give the deprivation of liberty and arbitrary character";
>
> Category V – When the deprivation of liberty constitutes a violation of international law for reasons of discrimination and which "aims towards or can result in ignoring the equality of human rights".

The WGAD concluded that Obaidullah's case fell into all three categories. In relation to category 1, it said that the domestic law used by the USA to detain Obaidullah violates international human rights and humanitarian law because his detention is "prolonged and indefinite".[159] In relation to category III, it concluded that during his decade in detention Obaidullah's rights to fair trial and due process have been "repeatedly violated in breach of articles 9 and 14 of the ICCPR".[160] Finally, in relation to category V, the Working Group found that both his prolonged detention and the violations of his fair trial rights stemmed from his status as a foreign national.[161]

The Working Group concluded, therefore, that Obaidullah's detention is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.[162] It called on the US government to remedy Obaidullah's situation. It added that:

> "taking into account all the circumstances of the case, the adequate remedy would be to release Mr Obaidullah and accord him an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights".[163]

7. PRB? CORRODING THE ORDINARY SYSTEM OF CRIMINAL JUSTICE

The United States' failure to shut down the Guantánamo detention centre has been an example of the struggle against terrorism failing to uphold human rights, among them the right to a fair trial… I have repeatedly urged the Government of the United States of America to close Guantánamo Bay in compliance with its obligations under international human rights law

United Nations High Commissioner on Human Rights Navi Pillay, 27 May 2013[164]

On 21 July 2013, Obaidullah entered his 12th year in US military custody without trial. On the same day, the US Department of Defense announced that preparations were underway for holding "Periodic Review Board" (PRB) hearings for 71 of the 166 Guantánamo detainees to determine whether as a matter of executive determination they should continue to be held under the "law of war". This process is not aimed at determining lawfulness of detention, an issue which – albeit under the flawed AUMF framework – remains one for the federal courts to determine in habeas corpus proceedings brought in individual cases.

Obaidullah's habeas lawyers were among those attorneys who received an email notice from the Pentagon about the "commencement" of the PRB process. [165] The move comes more than two years after President Obama signed an executive order establishing the PRB.[166]

Under the terms of the executive order, this periodic review applies only to those detainees

held in Guantánamo as of 7 March 2011 and whom the Guantánamo Review Task Force had designated for continued "law of war detention" or referred for prosecution (except those against whom charges are pending or who have been convicted). This interagency review concluded that there were then 48 detainees who should neither be released nor tried by the USA. The review referred for prosecution 36 other detainees.[167] The figure of 71 is apparently made up of 46 of the 48 detainees slated by the Task Force for "law of war" detention under the AUMF (two have since died) and 25 who were listed as "referred for prosecution" and who have neither been convicted nor have charges currently pending against them. Obaidullah would currently appear to fall into this latter category.

Under the Pentagon's 2012 guidelines for the PRB, the detainee is not provided assigned counsel for this discretionary executive process, but a "personal representative" who is a US military officer (although private US lawyers operating at no expense to the government and with the necessary security clearance and who has agreed to "appropriate conditions" may assist personal representatives).[168] A decision (by consensus of the interagency PRB)[169] to recommend "transfer" of the detainee would not necessarily mean release, or immediate transfer out of US military custody.[170] It would only require the Secretaries of State and Defense to ensure "vigorous efforts are undertaken to identify a suitable transfer location for the detainee, outside of the United States".[171]

Regardless of whether the review process conducted under the executive order will prove in practice to operate any better than similar boards operated by the Bush administration (the CSRTs and ARBs), its establishment can only have yet further corrosive effect on the fundamental role the fairness protections of the criminal justice system play in upholding the right to liberty.

Indefinite detention without criminal trial was a policy developed after the 9/11 attacks as part of the USA's global war paradigm under which human rights principles have been relegated or disregarded. Nearly a dozen years later, these practices have been retained as a part of a continued sweeping invocation and application of a body of international law designed only for the exceptional context of international armed conflicts, to situations where it is the ordinary systems of criminal justice in a framework of international human rights that should apply.

In May 2013, President Obama raised the prospect of, at some time in the future, discussing with Congress the matter of "ultimately" repealing the already nearly 12-year-old AUMF – as he put it, so "we can continue to fight terrorism without keeping America on a perpetual wartime footing".[172] Meanwhile, the AUMF remains fully operational as far as the administration is concerned, both in terms of defending Guantánamo detentions in habeas corpus litigation, and also for framing the PRB process: "For the purpose of these implementing guidelines", the Pentagon's 2012 memorandum on this periodic review asserts, "law of war detention means detention authorized by the Congress under [the Authorization for Use of Military Force]".[173] This of course repeats what President Obama signed off on in his executive order of 7 March 2011.[174]

Under the guidelines implementing the executive order, "continued law of war detention is warranted for a detainee subject to periodic review if such detention is necessary to protect against a continuing significant threat to the security of the United States".[175] Such an assessment by the PRB may draw upon a long and open-ended list of possible criteria, including "the likelihood the detainee may be subject to trial by military commission" (that is, a trial that does not conform to international fair trial standards), evidence of "instability" in the "potential destination country for the detainee", "any other relevant factors bearing on the threat the individual's transfer or release may pose to the United States, its citizens, and/or its interests", and "any other relevant information bearing on the national security and foreign policy interests of the United States".[176]

President Obama's executive order established "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". Almost exactly seven years earlier, as part of the Bush administration's efforts to keep the Guantánamo detentions out of the reach of the courts, the Pentagon released its proposed administrative review procedures. The "global war on terror is ongoing", the Pentagon asserted, and the "law of war permits the detention of enemy combatants for the duration of the conflict". The Guantánamo detainees, it continued, were legally owed no review whatsoever, judicial or administrative, but as "a matter of policy" the Bush administration had decided to provide them an annual executive review of their detentions.[177]

The Bush administration eventually lost its pursuit of unfettered executive detentions at Guantánamo in 2008 when the US Supreme Court ruled that the detainees had the right to challenge the lawfulness of their detention in US federal court, for which executive review is no substitute. President Obama's executive order of 7 March 2011 recognized this "constitutional privilege" granted to the Guantánamo detainees, and emphasized that nothing in the order is meant to affect the jurisdiction of the federal courts to determine the legality of any Guantánamo detainee's detention. But the habeas courts have themselves essentially adopted and applied the "global war" theory as a matter of US domestic law, relying on the vague language of the AUMF passed with little substantive debate on 14 September 2001; the courts have themselves undermined their own authority to compel the government to give effect to judicial rulings that detentions are unlawful and to orders that detainees unlawfully held be immediately released.[178] Nothing in the 7 March 2011 executive order or the Pentagon's guidelines implementing it redress the continuing violations of the right to liberty and prohibition of arbitrary detention.

Obaidullah should be *immediately* released if he is not to be charged without further delay for trial within a reasonable time under proceedings that fully comply with international fair trial standards. The same applies to the other detainees. No more delays.

8. CONCLUSION: 'GIVE ME A HAND'

Give me a hand through my dream,
I am fallen into darkness.
Although I am alongside others' laughter,
I have been living ever in deep sorrows.
I am living on a great ocean's shore,
But always in shackles.
From 'Separation in the Real World', poem by Obaidullah, Guantánamo Bay, 2011[179]

Amnesty International has long been calling on the US government to end the Guantánamo detentions in a manner that fully complies with international human rights law and standards. Closing the Guantánamo detention facility should not come at the cost of transferring any detainee to further human rights violations. The detainees should be brought to fair trial in civilian courts or released. Amnesty International opposes the indefinite detention without charge or trial of these detainees, and any recourse to the death penalty.[180]

Among the detainees still held at Guantánamo are individuals who should be investigated on suspicion of responsibility for criminal acts that are fundamentally incompatible with respect for human rights, such as the crimes against humanity committed on 11 September 2001 or other crimes under international law, such as war crimes committed during Afghanistan's long civil war preceding the US intervention in 2001. Indeed anyone in respect of whom the USA has sufficient admissible evidence of responsibility for such crimes should have been charged and brought to trial in civilian courts, and without recourse to the death penalty,

years ago. The US civilian judicial system, with the experience, capacity and procedures to deal with complex prosecutions, was available from day one. The failure of the US authorities to turn to that system not only deprived detainees at Guantánamo of their fair trial rights, it has so far deprived the victims of such crimes of their rights to see those responsible brought to justice and the truth firmly established through prompt, proper and public trials.

In Obaidullah's case, his release from Guantánamo (if he is not now promptly charged and brought to fair trial) must not be a return to further indefinite detention in Afghanistan. He must not be returned to any system of administrative detention in his home country or anywhere else, nor must he be transferred to a risk of a flagrantly unfair trial or torture or other ill-treatment.

The US government controls Obaidullah's plight and is giving few clues about what it intends for him, apart from keeping him in detention until it decides. His situation and that of his fellow detainees have been greatly affected by domestic US politics, but not by international human rights law and principles. Indeed, from a Guantánamo detainee's perspective, it must seem as if the Universal Declaration of Human Rights and the international human rights law codified since 1948 had never happened.

As Obaidullah said at an Administrative Review Board hearing at Guantánamo in October 2007, "the way they are treating us is not justice".[181] It is certainly not justice as envisioned in the Universal Declaration. At the same time it asserts its "deep commitment" to "championing the human rights enshrined in the Universal Declaration of Human Rights" and to meeting its "international human rights obligations", the US fails to abide by those standards.[182] For decades, the USA has stated its commitment to human rights principles and promoted itself as a champion of such standards. The Guantánamo episode, and Obaidullah's story within it, belies those assertions.

When President Obama took office in January 2009, he held out the promise of a change in approach, but that promise has remained unfulfilled.[183] The Guantánamo prison remains in operation with scores of detainees held in indefinite military custody. The US has resumed the use of military commission proceedings that fall short of international fair trial standards. And truth, redress, and accountability for human rights violations committed over the past decade, particularly secret detentions, renditions, torture and other ill-treatment, remain apparently as remote as ever.

Obaidullah has spent a third of his life in US military custody. His story is one part of the larger story of torture, other ill-treatment and indefinite detention at Guantánamo and elsewhere. After 11 years of indefinite detention, Obaidullah should be immediately released if he is not brought to fair trial in a civilian court.

9. RECOMMENDATIONS

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
Senior Circuit Judge Harry Thomas Edwards, 18 June 2013[184]

Amnesty International urges the US government to:

- **Address the Guantánamo detentions as a human rights issue.** The detentions must be resolved and the detention facility closed in a way that full complies with international human rights law. Specifically:
  - Pending resolution of the detentions, and without delaying that goal in any way, there should be an immediate detailed review of conditions of detention and of policies implemented in response to the hunger strike, including

assessing cell-search, force-feeding and comfort item policies, facilitating full and continuing access for legal representatives to detainees, allowing full access to independent medical professionals, UN experts, and human rights organizations, and ensuring all policies comply with international human rights law and standards and medical ethics.

- Expedite safe detainee transfers: Dozens of the Guantánamo detainees have long been "approved for transfer" by the US authorities. Particularly now that President Obama has lifted the moratorium on repatriation of Yemeni nationals, the administration and Congress should bring about lawful and safe detainee transfers as a matter of priority. The USA should not place any conditions on transfers of detainees that would, if imposed by the receiving government, violate international human rights law and standards.
- Immediately release or charge and try in civilian courts: Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.

- **Immediately drop the "global war" framework**. The message sent by the USA's global war framework is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it. Under its global war framework, the USA has at times resorted to enforced disappearance, torture, secret detainee transfers, indefinite detention, and unfair trials, as well as a lethal force policy that plays fast and loose with the concept of "imminence" and appears to permit extrajudicial executions. At the same time, truth, accountability and remedy have been sacrificed. Congress and the administration should commit to a framework for US counter-terrorism strategy – from detentions to the use of force – that fully complies with and incorporates international human rights law and standards.
- **Ensure necessary investigations.** Ensure prompt, thorough, independent, effective and impartial investigations into all credible allegations of human rights violations, with the methodology and findings of such investigations made public.
- **Ensure full accountability.** Ensure that anyone responsible for crimes under international law, including torture and enforced disappearance, committed in the post-9/11 counter-terrorism context is brought to justice, regardless of their level of office or former level of office.
- **Guarantee access to remedy.** Ensure that all victims of US human rights violations are recognised, and have genuine access to meaningful remedy, as required under international law.
- **End any use of secrecy that obscures truth about human rights violations or blocks accountability or remedy for violations.** Any information that describes or details human rights violations for which the USA is responsible must be made public. Among other things, such information relating to the identity, detention, interrogation and transfers of those held in the now terminated CIA programmes of rendition and secret detention should be declassified and disclosed, including in the context of trial proceedings being conducted against detainees currently held at Guantánamo, and in relation to the report on the CIA detention programme finalized by the Senate Select Committee on Intelligence in December 2012. The USA must end any use of the state secrets doctrine that blocks remedy or accountability.

APPENDIX – A CHRONOLOGY

11 September 2001 – almost 3,000 people are killed when hijackers crash four airliners into the World Trade Center in New York, the Pentagon in Washington DC, and a field in Pennsylvania. Amnesty International considers the attacks a crime against humanity.

14 September 2001 – Congress passes the Authorization for Use of Military Force (AUMF), a broadly-worded resolution 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".

18 September 2001 – President Bush signs the AUMF into law.

7 October 2001 – The USA leads military action against the Taleban government and members of the *al-Qa'ida* network in Afghanistan.

13 November 2001 – President Bush signs a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, authorizing detention without trial of foreign nationals and trials by military commission

28 December 2001 – The Office of Legal Counsel (OLC) at the US Department of Justice advises the Pentagon that, although the question cannot be answered definitively, a US District Court would not have habeas corpus jurisdiction in relation to "enemy aliens" detained at the US Naval Base at Guantánamo Bay in Cuba, and therefore could not "properly entertain" an application for a writ of habeas corpus from such a detainee.[185]

January 2002 – Military detentions begin at the US airbase at Bagram in Afghanistan. At this time Bagram is a temporary "collection point" for detainees in US custody in Afghanistan, secondary to the detention centre operated at Kandahar airfield.

11 January 2002 – Detentions at the US Naval Base at Guantánamo Bay in Cuba begin with the arrival of the first planeload of 20 detainees.

18 January 2002 – Pursuant to OLC advice, President Bush determines that the Third Geneva Convention does not apply to the conflict with *al-Qa'ida* or the Taleban.[186]

25 January 2002 – White House Counsel Alberto Gonzales drafts a memorandum advising President Bush that a "positive" consequence of determining that Geneva Convention protections would not apply to detainees held in the "war against terrorism", a "new kind of war" which "places a high premium" on "the ability to quickly obtain information from captured terrorists and their sponsors", would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the War Crimes Act. The latter criminalizes as war crimes under US law conduct prohibited under Article 3 common to the four Geneva Conventions of 1949, including torture, cruel treatment, and "outrages upon personal dignity, in particular, humiliating and degrading treatment".[187]

1 February 2002 – Attorney General Ashcroft writes to President Bush that a presidential determination against applying Geneva Convention protections to detainees "would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".[188]

7 February 2002 – President Bush signs memorandum which states that al-Qa'ida and Taleban detainees do not qualify as prisoners of war and that Common Article 3 will not apply to them either. The memorandum suggests that humane treatment of detainees in the "new paradigm" of the "war against terrorism" is a policy choice not a legal requirement.

May 2002 – Bagram airbase is designated at the USA's "primary collection and interrogation point" for detainees in US custody in Afghanistan. Kandahar detention facility continues to run as a "short term detention facility".[189]

19 June 2002 – an interim Afghan government is established. From this point on, the conflict in Afghanistan is considered non-international under international humanitarian law (law of war)

21 July 2002 – During a night raid in Milani, Khost province, US forces take 19-year-old Afghan national Obaidullah, and two of his cousins, from their family home. The raid is conducted following a tip-off that Obaidullah is a member of an al-Qa'ida bomb cell and as a result of the raid mines are found buried near the home. Obaidullah is taken for interrogation at Chapman Airfield, a US forward operating base in Khost province. After about 36 hours he is transferred to Bagram.

28 October 2002 – Obaidullah is transferred from Bagram to Guantánamo

28 June 2004 – The US Supreme Court, in *Rasul v. Bush,* rules that the federal courts have jurisdiction to "consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo"

30 July 2004 – The Pentagon issues guidance for the implementation of the Combatant Status Review Tribunal (CSRT), panels of three military officers who will affirm or reject Guantánamo detainees' "enemy combatant" status. The detainees will have no legal representation for this administrative review

September 2004 – The CSRT affirms Obaidullah's status as an "enemy combatant"

30 December 2005 – President Bush signs Detainee Treatment Act into law.

June 2006 – Three detainees, two Saudi Arabian nationals, Mane'i bin Shaman al-'Otaybi and Yasser Talal al-Zahrani, and one Yemeni, Salah Ahmed al-Salami, die at Guantánamo, reportedly by suicide

29 June 2006 – The US Supreme Court, in *Hamdan v. Rumsfeld,* rules that the military commissions established under President Bush's military order of 13 November 2001 have not been authorized by Congress and its structure and procedures violate US military law and the Geneva Conventions. It also finds article 3 Common to the four Geneva Conventions applicable to the detentions in question

6 September 2006 – President Bush confirms publicly for the first time that the USA has been operating a secret detention and interrogation program operated by the Central Intelligence Agency.

17 October 2006 – President Bush signs the Military Commissions Act (MCA) 2006 into law.

March 2007 – Under a pre-trial arrangement, David Hicks pleads guilty under the MCA and is sentenced to seven years in prison, all but nine months suspended which is to be served in his native Australia

May 2007 – Saudi Arabian detainee Abdul Rahman Ma'ath Thafir al-Amri dies in Guantánamo, reportedly by suicide

December 2007 – Afghan detainee Abdul Razzak Hekmati dies in Guantánamo, reportedly of cancer

12 June 2008 – The US Supreme Court, *Boumediene v. Bush*, rules that the Guantánamo detainees have the constitutional right to challenge the lawfulness of their detention in habeas corpus petitions in federal court, in a "prompt" hearing, and that Section 7 of the MCA, purporting to withdraw jurisdiction from the courts to consider such challenges, is an unconstitutional suspension of habeas corpus

7 July 2008 – A habeas corpus petition is filed on behalf of Obaidullah in US District Court

August 2008 – Charged and tried under the MCA, Yemeni national Salim Ahmed Hamdan is sentenced to 66 months in prison, all but five of which are suspended. He is transferred from Guantánamo to Yemen in late 2008

9 September 2008 – Obaidullah is charged under the MCA for trial by military commission. Charges are "conspiracy" and "providing material support for terrorism"

November 2008 – At a military commission in Guantánamo, Yemeni national Ali Hamza al Bahlul sentenced to life imprisonment under MCA

12 November 2008 – The US administration moves to have Obaidullah's habeas corpus petition dismissed or stayed until after his military commission trial and any appeals

2 December 2008 – The District Court grants the government's motion and stays habeas corpus proceedings

22 January 2009 – On his second full day in office, President Barack Obama orders his administration to resolve the Guantánamo detention and to close the Guantánamo detention facility within a year. The administration obtains a

120-day stay of military commission cases, in order that it can review detentions and prosecutions.

24 February 2009 – Lawyers for Obaidullah move to have the habeas corpus stay lifted now that the military commission case will not go forward for the time being

13 March 2009 – The Obama administration opposes defence motion, arguing that "although military commission proceedings are currently not moving forward", the charges against Obaidullah "remain pending"

22 April 2009 – The District Court refuses to lift the stay in the habeas corpus case

15 May 2009 – President Obama announces that military commissions will be further delayed as his administration seeks to reform the military commission system

21 May 2009 – In a landmark speech on national security, President Obama restates his commitment to closing the Guantánamo detention facility, but endorses global war paradigm, military commissions and indefinite detention.

June 2009 – Yemeni detainee Mohammed Ahmed Abdullah Saleh al-Hanashi dies in Guantánamo, reportedly by suicide

9 July 2009 – Obaidullah's lawyers renew their motion to have the stay on habeas corpus proceedings lifted, and the administration opposes the motion

6 August 2009 – The District Court again refuses to lift the stay. The decision is appealed.

28 October 2009 – President Obama signs the revised MCA of 2009 into law, with revisions to the military commissions system

6 January 2010 – The Obama administration tells the US Court of Appeals for the DC Circuit that "the Attorney General has determined that prosecution in a military commission is appropriate" in Obaidullah's case

22 January 2010 – The final report of the Guantánamo Review Task Force is published. Among other things, the report concludes that there are 48 detainees who the USA can neither try nor release, but who will be held under the AUMF. It also reveals that 36 detainees are the subject of active prosecution or investigation with a view to bringing them to trial, either by military commission or in federal court.

18 June 2010 – The Court of Appeals rules that there is "no reason sufficient to justify denying Obaidullah the "prompt habeas corpus hearing" to which he is entitled under the Supreme Court's now two-year old *Boumediene* ruling

17 August 2010 – Obaidullah's lawyers file motion in District Court seeking government information on the source, credibility, and nature of the intelligence that led to the raid on Obaidullah's family home eight years earlier. The administration opposes the motion, and the District Court denies it

August 2010 – Sudanese national Ibrahim al Qosi sentenced to 14 years under MCA 2009. In exchange for his guilty plea entered in July, all but two years of his sentence suspended. He is transferred from Guantánamo to Sudan in July 2012 on completion of these two years

30 September/1 October 2010 – The District Court holds hearing on the merits of Obaidullah's habeas corpus challenge to the lawfulness of his detention, first filed over two years earlier

October 2010 – Under a pre-trial arrangement, Canadian national Omar Khadr is sentenced to 40 years in prison, limited to eight years, and possible return to Canada after a year. He was 15 when taken into custody in Afghanistan in 2002. He is repatriated to Canada on 29 September 2012.

November 2010 – Tanzanian national Ahmed Khalfan Ghailani, transferred from Guantánamo to New York in 2009, is convicted in federal court. He will be sentenced in 2011 to life imprisonment and by July 2013 will remain the only Guantánamo detainee transferred to the mainland for trial

30 November 2010 – The District Court rules that Obaidullah's detention is lawful under the AUMF. The judge rules that there was enough evidence to warrant a finding that "more likely than not" Obaidullah had been part of an *al-Qa'ida* bomb cell and therefore detainable under the AUMF

February 2011 – Afghan detainee Awal Gul dies, reportedly of natural causes

February 2011 – Sudanese detainee Noor Uthman Muhammed sentenced to 14 years in prison under the MCA 2009, all but 34 months suspended under the terms of a guilty plea and promise to cooperate in future proceedings

7 March 2011 – President Obama signs executive order establishing Periodic Review Board for administrative review of the detentions of those Guantánamo detainees designated for continued "law of war" detention or referred for prosecution, except those against whom charges are pending or who have been convicted

24 March 2011 – Judge Leon denies motion to reconsider his ruling denying Obaidullah's habeas corpus petition

17 May 2011 – Obaidullah's lawyers file notice of appeal against Judge Leon's decision to the US Court of Appeals for the DC Circuit

May 2011 – Afghan detainee Inayatollah dies, reportedly by suicide

7 June 2011 – The military commission charges sworn against Obaidullah by the Bush administration in 2008 are dismissed without prejudice by the Convening Authority for military commissions, having been withdrawn by the Obama administration

8 February 2012 – Obaidullah's lawyers file a motion in District Court asking Judge Leon to reconsider Obaidullah's case in light of new evidence obtained by an NCIS intelligence officer seconded to the military commission defence[190]

29 February 2012 – Pakistani national Majid Khan pleads guilty under the MCA. Under the terms of a pre-trial agreement he will be sentenced in four years time after having co-operated with the government in the interim

24 April 2012 – Oral argument on Obaidullah's case is held in the Court of Appeals. The hearing is largely closed to the public

21 July 2012 – Obaidullah has now spent 10 years in US military custody without trial

3 August 2012 – A three-judge panel of the Court of Appeals for the DC Circuit rules against Obaidullah, upholding the District Court's decision that his detention is lawful under the AUMF. A redacted version of the decision is released publicly on 8 August.

8 September 2012 – Yemeni detainee Adnan Latif dies in Guantánamo, reportedly as a result of suicide by overdose

17 September 2012 – Lawyers for Obaidullah petition the Court of Appeals to reconsider his case, either as a three-judge panel or as the whole court.

16 October 2012 – The Court of Appeals for the DC Circuit orders that Salim Hamdan's conviction by military commission for "material support for terrorism" be vacated, on the grounds that the MCA does not sanction retroactive punishment for new crimes and because material support for terrorism "was not a pre-existing war crime" under US law.

28 October 2012 – Obaidullah has been held for 10 years at Guantánamo

29 November 2012 – The Court of Appeals for the DC Circuit refuses to reconsider the Obaidullah decision, either as a three-judge panel or as the whole court.

26 February 2013 – Lawyers for Obaidullah appeal to the US Supreme Court to take the Obaidullah case

3 May 2013 – UN Working Group on Arbitrary Detention concludes that Obaidullah's detention is arbitrary and violates international human rights law and that an adequate remedy would be to release him with access to compensation

23 May 2013 – President Obama gives a key national security speech in which he recommits his administration to closing the Guantánamo detention facility

16 June 2013 – The Chief Prosecutor for military commissions indicating that the total number of Guantánamo detainees to be prosecuted by military commission likely to be around 20 in total, suggesting only around five more to be charged, in addition to the seven already convicted and the eight already charged.

24 June 2013 – US Supreme Court refuses to take the Obaidullah case to review the Court of Appeals decision.

21 July 2013 – Obaidullah has been in US military custody for 11 years.

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[2] George W. Bush. Decision Points, Virgin Books (2010), page 180.

[3] See 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.

[4] Remarks by the President on National Security at the National Archives, Washington, DC, USA, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[5] See USA: Words, war, and the rule of law, 31 May 2013, http://www.amnesty.org/en/library/info/AMR51/032/2013/en

[6] The 779 figure is the total given by the US government. It apparently does not include anyone who may have been held in exclusive CIA custody when, prior to June 2004, that agency is believed to have used Guantánamo as the location for a "black site" for the CIA's "high value detainee" secret detention programme. While some of those reported to have been held in Guantánamo by the CIA during that period were returned there in 2006, it is not known if there were others who were not among the 14 detainees transferred from CIA to military custody at Guantánamo on 4 September 2006.

[7] See Detainee Transfer Announced, US Department of Defense News Release, 29 September 2012, http://www.defense.gov/releases/release.aspx?releaseid=15592. The detainee whose repatriation to Canada was announced on that date was Omar Khadr, who had been in US military custody since July 2002 when he was 15, and is believed to have been on the same military flight from Afghanistan to Guantánamo as Obaidullah in October 2002.

[8] See 21st Century Space Exploration: 'The Next Chapter That We Can Write Together Here at NASA', 15 April 2010, http://www.whitehouse.gov/blog/2010/04/15/making-investments-groundbreaking-developments-21st-century-space-exploration; see also A New Astronaut Class Begins Its Journey, 17 June 2013 http://www.whitehouse.gov/blog/2013/06/17/new-astronaut-class-begins-its-journey

[9] Remarks by the President at the National Defense University, 23 May 2013, http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university

[10] *Obaydullah v. Obama*, Transcript of unclassified openings before the Honorable Richard J. Leon, United States District Judge, US District Court for the District of Columbia, 30 September 2010.

[11] Guantánamo / Human Rights: "Indefinite detention – will it ever end?", UN news item, 1 May 2013, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13279&LangID=E

[12] He would pass the 100,000 hour mark in December 2013 if still held.

[13] *Obaydullah v. Obama*, Transcript of status conference before the Honorable Richard J. Leon, United States District Judge, US District Court for the District of Columbia, 28 June 2010.

[14] Final report, Guantánamo Review Task Force, 22 January 2010, available at http://www.justice.gov/ag/guantanamo-review-final-report.pdf

[15] Guantanamo Review Dispositions, as of 22 January 2010. Declassified in 2013, http://media.miamiherald.com/smedia/2013/06/17/15/48/2VNpb.So.56.pdf

[16] See AR 15-6 investigation. Report on the facts and circumstances surrounding the 8 September 2012

death of detainee Adnan Farhan Abd Latif at Joint Task Force-Guantanamo (JTF-GTMO), 8 November 2012, declassified version available at http://www.documentcloud.org/documents/719195-latif-ar-15-6-investigation-final.html See also USA: Another detainee dies at Guantánamo, 11 September 2012, http://www.amnesty.org/en/library/info/AMR51/077/2012/en

[17] Guantanamo Bay: Overview of the ICRC's work for internees, 30 January 2004, Operational Update, http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm . In May 2013, the Inter-American Commission on Human Rights stated that "We have received specific information regarding the severe and prolonged physiological and psychological damage caused by the detainees' high degree of uncertainty over basic aspects of their lives, such as not knowing whether they will be tried or whether they will be released and when; or whether they will see their family members again", See Joint press release of the Inter-American Commission on Human Rights, UN Working Group on Arbitrary Detention, UN Special Rapporteur on Torture, UN Special Rapporteur on Human Rights and Counter-Terrorism, and UN Special Rapporteur on Health, *Guantánamo / Human Rights: 'Indefinite detention – will it ever end?'*, 1 May 2013, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13279&LangID=E.

[18] Remarks by the President at the National Defense University, 23 May 2013, http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university

[19] *Obaydullah v. Obama*, No. 11-5123 (D.C. Cir.), Doc. #1365630, at 33-44, Declaration of Obaidullah, signed on 1 September 2010 [hereinafter, Declaration of Obaidullah].

[20] *Obaidullah v. Obama*, Supplemental declaration of [redacted], In the US District Court for DC, 24 September 2010 (Obaidullah "was then detained, and as per the standard operating procedure, he was placed in flexi cuffs and a hood was placed over his head for operational security").

[21] US Army Sergeant Nathan Ross Chapman was shot dead near Khost on 4 January 2002. The photograph is of special forces ODB 960 attached to 19th Special Forces Group under the sign at Chapman airfield (which reads "in memory of SFC Nathan R. Chapman. Chapman Airfield". 2002 http://sfachapter68.org/cpg15x/displayimage.php?pid=444

[22] Declaration of Obaidullah, *op. cit.*

[23] Criminal Investigation Task Force, Report of Investigative Activity: 13 December 2006, Activity No: 06122609523009. 17 December 2006, Activity No: 07010516014043. 12 February 2007, Activity No: 07022708514275. See also *Obaydullah v. Obama*, No. 08-CV-1173 (RJL) (D.D.C.), Dkt. No. 138-1, Declaration of Richard Pandis, LCDR, USNR, 8 February 2012, para. 31 ("According to US personnel with personal knowledge,… the camera was destroyed by US personnel") [hereinafter, Declaration of Richard Pandis].

[24] *Obaidullah v. Obama*, Supplemental declaration of [redacted], In the US District Court for DC, 24 September 2010.

[25] Declaration of Richard Pandis, para. 31.

[26] Criminal Investigation Task Force, Report of Investigative Activity: 12 February 2007, Activity No: 07022708514275.

[27] Criminal Investigation Task Force, Report of Investigative Activity: 13 December 2006, Activity No: 06122609523009.

[28] Vice Adm. A.T. Church, III, Review of Department of Defense Operations and Detainee Interrogation Techniques 84-85 (2005) [hereinafter, Church Report], available at http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/OtherDetaineeRelatedDocuments.html

[29] Redacted copy of Summary Interrogation Report, 2 August 2002. The cousins were not transferred to Guantánamo and were subsequently released from Bagram.

[30] Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[31] See e.g., USA: Out of sight, out of mind, out of court*?:* The right of Bagram detainees to judicial review, February 2009, http://www.amnesty.org/en/library/info/AMR51/021/2009/en

[32] Church Report, *op. cit*. page 196.

[33] AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (2004), conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones , at page 88, available at http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf

[34] See USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue, August 2003, http://www.amnesty.org/en/library/info/AMR51/114/2003/e; see *Former Bagram detainees allege abuse while in US custody*, Amnesty Int'l, June 24, 2009, http://www.amnesty.org/en/news-and-updates/news/former-Bagram-detainees-allege-abuse-while-in-us-custody-20090624; Human Rights Center, University of California at Berkeley, *U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*, at 20 (Nov. 2008).

[35] Church report, *op. cit*. Pages 228 and 235. Dilawar, a taxi driver, was kept chained to the ceiling of his cell for much of a four-day period, hooded for most if not all of the time. At times, his pleas for water were denied. Under interrogation, unable to hold his handcuffed hands above his head as he was ordered, a soldier would hit them back up whenever they began to drop. He was physically assaulted during interrogation. He was estimated in one 24-hour period to have been struck over 100 times with blows to the side of the leg just above the knee. His legs, according to one coroner, "had basically been pulpified." The coroner who conducted the autopsy later stated that she had "seen similar injuries in an individual run over by a bus". See also, US detentions in Afghanistan: an aide-mémoire for continued action, June 2005, http://www.amnesty.org/en/library/info/AMR51/093/2005/en

[36] Unless otherwise stated, the allegations concerning his treatment in Bagram come from the Declaration of Obaidullah, *op. cit*.

[37] Declaration of Richard Pandis, *op. cit*., para. 32.

[38] Believed to be on the same plane to Guantánamo with Obaidullah was Canadian national Omar Khadr, whose recollection of the transfer procedures is consistent with that of Obaidullah. Omar Khadr has said that "for the two nights and one day before putting us on the plane, we were not given any food so that we would not have to use the bathroom on the plane. They shaved our heads and beards, and put medical-type masks over our mouths and noses, and goggles and earphones on us so that we could not see or hear anything. One time, a soldier kicked me in the leg when I was on the plane and tried to stretch my legs. On the plane, I was shackled to the floor for the whole trip. When I arrived at Guantánamo, I heard a military official say, 'Welcome to Israel'. They half-dragged half-carried us so quickly along the ground off the plane that everyone had cuts on their ankles from the shackles. They would smack you with a stick if you made any wrong moves".See *USA: In whose best interests? Omar Khadr, child "enemy combatant" facing military commission*, Amnesty International, April 16, 2008, http://www.amnesty.org/en/library/info/AMR51/028/2008/en; As noted above, Omar Khadr was repatriated to Canada on or around 29 September 2012.

[39] JTF-GTMO Detainee Assessment, 16 June 2008.

[40] US Department of Defense News Briefing, ASD Clarke and Rear Adm. Gove, 28 October 2002, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3799

[41] Email available at http://action.aclu.org/torturefoia/released/022306/1205.pdf. Not long before this, on 25 September 2002, senior administration lawyers visited Guantánamo. Among the stated purposes of their visit was to "receive briefings" on intelligence successes, challenges, techniques and future plans. They were William Haynes, General Counsel, Department of Defense; John Rizzo, Acting General

Counsel, CIA; David Addington, Counsel to Vice President Cheney; and Michael Chertoff, Assistant Attorney General, head of the Criminal Division, Department of Justice. Trip report, DoD General Counsel visit to GTMO, USSOUTHCOM (Office of the Staff Judge Advocate), 27 September 2002.

[42] Unless otherwise stated, the allegations concerning his treatment in Guantánamo come from the Declaration of Obaidullah, *op. cit*.

[43] Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force – Guantanamo, 28 March 2003, §4-20a.

[44] *Ibid*. §4-20b(4).

[45] A review of the FBI's involvement in and observations of detainee interrogations in Guantanamo Bay, Afghanistan and Iraq. Oversight and Review Division, Office of Inspector General, US Department of Justice, revised October 2009, page 186-187, http://www.justice.gov/oig/special/s0910.pdf.

[46] *Ibid*., page 187.

[47] Army Regulation 15-6: Final Report. Investigation into FBI allegations of detainee abuse at Guantánamo Bay, Cuba Detention Facility, 9 June 2005 unclassified version (hereinafter "Schmidt/Furlow Report").

[48] UN Human Rights Committee, *Concluding Observations: United States of America*, 18 December 2006, CCPR/C/USA/CO/3/Rev.1, para. 13.

[49] Media Release: Commander orders single-cell detention at Guantánamo Bay for continued detainee health and security, Joint Task Force Guantánamo Public Affairs, 13 April 2013, http://www.southcom.mil/newsroom/Pages/MEDIA-RELEASE-Commander-Orders-Single-Cell-Detention-at-Guantanamo-Bay-for-Continued-Detainee-Health-and-Security.aspx

[50] UN Basic Principles on the Use of Force and Firearms, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 15. Principle 16 also provides that "Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting" a grave threat to life.

[51] *In Re: Guantánamo Bay detainee continued access to counsel*. Emergency motion concerning access to counsel, In US District Court for DC, 22 May 2013, Exhibit G, Declaration of Anne Richardson.

[52] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, approved by the UN Economic and Social Council in resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (SMR); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly resolution 43/173 of 9 December 1988 (the Body of Principles).

[53] UN Standard Minimum Rules, op, cit., para 15.

[54] UN Human Rights Committee, General Comment No. 20: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Article 7), 10 March 1992, UN Doc.: HRI/GEN/1/Rev.1 at 30 (1994); Interim Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, UN Doc.: A/66/268.

[55] SMR, paras. 22 and 24; UN Body of Principles, Principle 24.

[56] The Miami Herald maintains a tracking chart, at http://www.miamiherald.com/static/media/projects/gitmo_chart/

[57] See Guantánamo: 25 captives quit hunger strike since Ramadan. Miami Herald, 14 July 2013,

http://www.miamiherald.com/2013/07/14/3499662/guantanamo-25-captives-quit-hunger.html

[58] Transcript of Administrative Review Board hearing, US naval base, Guantánamo Bay, Cuba, 18 October 2007. Obaidullah spoke through a translator.

[59] See, for example, 'CSRT: A façade of process to avoid judicial scrutiny', Section 4 of USA: No Substitute for habeas corpus: Six years without judicial review in Guantánamo, November 2007, http://www.amnesty.org/en/library/info/AMR51/163/2007/en

[60] See, e.g., USA: No substitute for habeas corpus. Six years without judicial review in Guantánamo, November 2007, http://www.amnesty.org/en/library/info/AMR51/163/2007/en, esp., pages 31-44.

[61] See for instance Additional Response of the United States to Request for Precautionary Measures-Detainees in Guantánamo Bay, Cuba, July 15, 2002, addressed to the Inter-American Commission on Human Rights http://www.ccr-ny.org/v2/legal/september_11th/docs/7-23-02GovtResponsetoObservations_andIACHR_Decision.pdf pp. 3-5; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, April 4, 2003 http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, p. 6.

[62] Fourth Periodic Report of the USA under the ICCPR (30 December 2011), http://www.state.gov/j/drl/rls/179781.htm, paras 506-507, states that the USA accepts that human rights protections do not cease to apply in time of war, but implies that the USA does not necessarily accept that human rights law applies to all or any of "a State's actions in the actual conduct of an armed conflict". Given that the USA now claims that many of the acts it takes in the name of countering terrorism are in fact part of "the actual conduct of an armed conflict" worldwide and within the USA against al-Qa'ida, the continuing failure positively to affirm the applicability of human rights obligations to such measures remains a matter of deep concern. The current position of the USA regarding whether it considers itself to have any obligation to respect the human rights of individuals outside of its ordinary territory, including for instance the right to life, also remains ambiguous (para 505) despite, as the Periodic Report acknowledges, clear affirmations by the International Court of Justice and others that states do indeed have such obligations.

[63] USA: Doctrine of pervasive 'war' continues to undermine human rights, 15 September 2010, http://www.amnesty.org/en/library/info/AMR51/085/2010/en

[64] The AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

[65] See USA: Words, war, and the rule of law: President Obama revisits counter-terrorism policy, but human rights still missing from legal framework, 31 May 2013, http://www.amnesty.org/en/library/info/AMR51/032/2013/en

[66] See pages 7-8 in USA: Guantánamo: A decade of damage to human rights and 10 anti-human rights messages Guantánamo still sends, December 2011, http://www.amnesty.org/en/library/info/AMR51/103/2011/en

[67] Even were international humanitarian law to apply to Obaidullah's situation international humanitarian law (the law of war) does not displace international human rights law. Rather, the two bodies of law complement each other (see for instance International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 8 July 1996, para 25 and Human Rights Committee General Comment 31, UN Doc: CCPR/C/21/Rev.1/Add.13, 26 May 2004).

[68] Human Rights Committee, *A v Australia*, Communication No 560/1993, paras 9.3 and 9.4; *C v Australia*. Communication No 900/1999, para 9.2. The UN Committee against Torture has echoed these

concerns in the counter-terrorism context, see Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN Doc. CAT/C/CR/33/3, paras 4(e) and 5(h)

[69] Human Rights Committee, Concluding Observations: United States of America, 28 July 2006, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006), para 10.

[70] Amnesty International opposes all systems of administrative detention on security grounds, in part because they are used by states throughout the world to circumvent the fair trial safeguards of criminal proceedings. The one exception is detention of a recognised prisoner of war in an international armed conflict for the duration of the conflict in accordance with the Geneva Conventions and Additional Protocols (as applicable).This basis for detention does not apply to Obaidullah or any of the other detainees still held at Guantánamo. As such, individuals should only be held on the basis of valid criminal charges for trial before ordinary courts; otherwise, they should be released. Amnesty International opposes the death penalty in all circumstances and all cases, unconditionally.

[71] Transcript Summaries for Combatant Status Review Tribunal (2004), at 2-4, 9-10; Administrative Review Board (2005), at 3, 5, 8-9; Administrative Review Board (2007), at 2-3, available at Office for the Administrative Review Board of Transcripts, *Obaidullah – The Guantanamo Docket*, N.Y. Times, Mar. 31, 2009, available at http://projects.nytimes.com/guantanamo/detainees/762-obaidullah/documents/2

[72] Transcript Summaries for Combatant Status Review Tribunal (2004), at 2-5, 7-8, 10; Administrative Review Board (2005), at 2-11; Administrative Review Board (2007), at 1-3, available at Combatant Status Review Tribunal, *Obaidullah – The Guantanamo Docket*, New York Times, 31 March 2009, at 3, http://projects.nytimes.com/guantanamo/detainees/762-obaidullah/documents/2; ARB Transcripts (2005) at 3.

[73] See Economic and Social Council, Situation of Detainees at Guantanamo Bay: Report of the Chairperson Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, U.N. Doc E/CN.4/2006/120, (Feb. 27, 2006) [hereinafter Situation of Detainees] paras. 23-24; see also Human Rights Committee, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; The Special Rapporteur on Torture and Other Cruel, inhuman or Degrading Treatment 01' Punishment, Manfi'ed Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and The Working Group on Enforced or involuntary Disappearances Represented by its Chair, Jeremy Sarkin, U.N. Doc. AIHRCI13/42 (2010) [hereinafter Joint Study] para. 23.

[74] *Boumediene v. Bush*, US Supreme Court, 12 June 2008.

[75] Article 9(4) ICCPR. The Human Rights Committee has underlined that these two key rights are among those which cannot be diminished even in times of public emergency that threatens the life of the nation. UN Human Rights Committee, General Comment no 29: States of Emergency (article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 16.

[76] *Boumediene v. Bush*, *op. cit*.

[77] *Hussain v. Obama*, US Court of Appeals for the DC Circuit, 18 June 2013, Senior Circuit Judge Edwards, concurring in the judgment.

[78] UN Human Rights Committee, General Comment no 29: States of Emergency (article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 16.

[79] *Boumediene v. Bush*, 553 U.S. 723 (2008).

[80] *Obaydullah v. Obama*, 744 F.Supp.2d 344 (D.D.C. 2010); 774 F.Supp.2d 34 (D.D.C. 2010); 2011 WL 1100492 (Mar. 24, 2011) (order denying reconsideration).

[81] *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012); *Obaydullah v. Obama*, No. 11-5123 (D.C. Cir.), Doc. #1407357, 29 November 2012 (order denying rehearing).

[82] *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012), cert. denied, 132 S.Ct. 2741 (2012). At a meeting with his lawyer in Guantánamo 11 days after the Court of Appeals ruling on his case, Adnan Abdul Latif said "I am a prisoner of death." He later died in custody. *See* Another Detainee Dies in Custody, 11 September 2012, http://www.amnestyusa.org/news/news-item/another-detainee-dies-at-guantanamo.

[83] A month after the US invasion of Afghanistan, the US Secretary of Defense said that "we have large rewards out, and our hope is that the incentive – the dual incentive of helping to free that country from a very repressive regime and to get the foreigners in the al-Qa'ida out of there, coupled with substantial monetary rewards, will incentivize… a large number of people to begin… looking for the bad folks… We have leaflets [advertising the rewards] that are dropping like snowflakes in December in Chicago." See USA: No Substitute for habeas corpus: Six years without judicial review in Guantánamo, November 2007, page 60, http://www.amnesty.org/en/library/info/AMR51/163/2007/en. In his memoirs, former Pakistan President Pervez Musharraf wrote that the USA's CIA had paid millions of dollars in "bounties" and "prize money" for 369 suspects handed over by Pakistan to the United States. See USA: Five years on 'the dark side': A look back at 'war on terror' detentions, 13 December 2006, http://www.amnesty.org/en/library/info/AMR51/195/2006/en

[84] Transcript Summaries for Administrative Review Board (2005), at 6-7, available at Office for the Administrative Review Board of Transcripts, *Obaidullah – The Guantanamo Docket*, New York Times, 31 March 2009, at 2, 8, available at http://projects.nytimes.com/guantanamo/detainees/762-obaidullah/documents/2

[85] Declaration of Richard Pandis, *op. cit.*, para. 11.

[86] Obaydullah's petition for writ of certiorari to the US Supreme Court is docketed under the case name of *Obaydullah v. Obama*, No. 12-8932.

[87] Declaration of Richard Pandis, *op. cit.*, para. 12.; Obaydullah v. Obama, No. 08-CV-1173 (RJL) (D.D.C.), Dkt. No. 138, Petitioner's Motion for Relief Pursuant to Rule 60(b)(2), 8 February 2012.

[88] Declaration of Richard Pandis, *op. cit.*, para. 28.

[89] Declaration of Richard Pandis, *op. cit.*, para. 24.

[90] Declaration of Richard Pandis, *op. cit.*, paras. 24-26

[91] Declaration of Richard Pandis, *op. cit.*, para. 14.

[92] Declaration of Richard Pandis, *op. cit.*, paras. 15-23.

[93] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 17(1). Adopted by UN General Assembly resolution 43/173 of 9 December 1988.

[94] See, for example, USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en, pages 90-91.

[95] UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990, para. 16; see also UN Human Rights Committee, General Comment no 32, *op. cit.*, para. 34.

[96] See e.g. Articles 9(3) and 14(3), ICCPR. This would apply even in a situation of armed conflict, where IHL requires that every person who is detained be registered, that they be given an effective opportunity

to immediately inform their family and a centralized information bureau of their detention and any subsequent transfer, and that they be permitted ongoing contact with family members and others outside the place of detention: See, e.g., Geneva Convention III (1949): Article 48, Article 70, Article 122. Geneva Convention IV (1949): Article 25, Article 26, Article 41, Article 78, Article 79, Article 106, Article 107, Article 116, 128, 136. The Commentary to Article 106 emphasizes that security internment "is not a measure of punishment and so the persons interned must not be held incommunicado."

[97] The International Committee of the Red Cross had access to the detainees, although some in military custody were denied such access during periods of interrogation. Before June 2004, when the US Supreme Court handed down its *Rasul v. Bush* ruling that the US District Court had jurisdiction to consider habeas corpus petitions filed on behalf of detainees held at the naval base, the CIA is believed to have held a number detainees in secret detention at Guantánamo.

[98] Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9 January 2003 (Jacoby Declaration). See also, USA: 'Congress has made no such decision': Three branches of government, zero remedy for counter-terrorism abuses, 6 February 2012, http://www.amnesty.org/en/library/info/AMR51/008/2012/en

[99] *Rasul v. Bush*, 2004.

[100] *Al Odah et al v. USA et al*, Memorandum Opinion, US District Court for DC, 20 October 2004.

[101] *In Re: Guantánamo Bay detainee continued access to counsel*. Emergency motion concerning access to counsel, In US District Court for DC, 22 May 2013, Exhibit G, Declaration of Anne Richardson.

[102] *In re: Guantánamo Bay detainee litigation. Hatim et al v. Obama et al*. Memorandum opinion, US District Court for DC, 11 July 2013.

[103] On appeal, the administration is telling the court that while the Department of the Navy had in March 2013 "temporarily rescinded" the landing permit granted to the commercial air service which to the baseflies twice a week, this has now been reinstated to the end of 2013, "subject to annual renewal". In Re Guantanamo Bay Detainee Litigation, Respondent's motion for a stay pending possible appeal and request for an administrative stay. In the District Court for DC, 16 July 2013. Exhibit 1. Declaration of General John F. Kelly, USMC, 16 July 2013.

[104] *In Re: Guantanamo Bay Detainee Continued Access to Counsel*. Memorandum Opinion, US District Court for DC, 6 September 2012.

[105] "Under no condition shall any prisoner be prevented from consulting or corresponding with counsel or the authorized representative of counsel". Naval Corrections Manual, 29 March 2011, Art 1640-080, Sec. 3, para. 2.c., http://www.public.navy.mil/bupers-npc/reference/instructions/BUPERSInstructions/Documents/1640.22.pdf

[106] Letter to Judge Lamberth. Robert Prince, US Department of Justice, Civil Division, 21 August 2012.

[107] See The death of Adnan Latif, by David Remes (who was Adnan Latif's habeas counsel), 20 July 2013, http://pubrecord.org/special-to-the-public-record/10900/the-death-of-adnan-latif/

[108] *In Re: Guantánamo Bay detainee continued access to counsel*. Emergency motion concerning access to counsel, In US District Court for DC, 22 May 2013, Exhibit G, Declaration of Anne Richardson.

[109] In Re Guantanamo Bay Detainee Litigation, Respondent's motion for a stay pending possible appeal and request for an administrative stay. In the District Court for DC, 16 July 2013.

[110] *Ibid*. Exhibit 1. Declaration of General John F. Kelly, USMC, 16 July 2013.

[111] *Al Mithali et al v. Obama et al*, Respondents' supplement to motion for a stay pending possible appeal and response to the motion of petitioner al-Mithali (ISN 840) for enforcement of the Court's order dated July 11, 2013 regarding detainee access to counsel. In the District Court for DC, 16 July 2013.

[112] *Hatim et al v. Obama et al*, Order. US Court of Appeals for the DC Circuit, 17 July 2013.

[113] See for example, USA: Trials in error: Third go at misconceived military commission experiment, July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en

[114] Under the ICCPR and other international instruments, persons who are detained pending trial on criminal charges must be tried within a reasonable time or released pending trial (Articles 9(3) of the ICCPR, article 7(5) of the American Convention, article 5(3) of the European Convention, article 60(4) of the ICC Statute). Furthermore, international law requires that proceedings in criminal cases be completed without undue delay (Article 14(3)(c) of the ICCPR, article 8(1) of the American Convention, article 6(1) of the European Convention, article 67(1)(c) of the ICC Statute). This extends not just to the trial itself, but also to periods of pre-trial detention.

[115] Article 14(1) ICCPR provides that "All persons shall be equal before the courts and tribunals", while Article 14(3) provides that a raft of fair trial rights must be guaranteed "in full equality". The Human Rights Committee has stated that the right to trial by an independent and impartial tribunal guaranteed by Article 14(1) of the ICCPR "is an absolute right that is not subject to any exception." Human Rights Committee, General Comment no 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, UN Doc. CCPR/C/GC/32, para. 18. See analysis of the latest incarnation of the US Military Commissions system at Guantánamo in, for example, USA: Wrong court, wrong place, wrong punishment: Five alleged '9/11 conspirators' to be arraigned for capital trial by military commission at Guantánamo, May 2012, http://www.amnesty.org/en/library/info/AMR51/032/2012/en; USA: Trials in error: Third go at misconceived military commission experiment, July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en

[116] Remarks by the President on national security, 21 May 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09

[117] In total, then, by July 2013, there had been seven convictions by military commission at Guantánamo in over 11 years of detentions there. All but two of these convictions came pursuant to pre-trial agreements under which detainees held for years in indefinite detention pleaded guilty in return for the chance that they would be returned to their home countries earlier than might otherwise have occurred.

[118] Guantanamo Review Dispositions, as of 22 January 2010. Declassified in 2013, http://media.miamiherald.com/smedia/2013/06/17/15/48/2VNpb.So.56.pdf

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

[120] *Hamdan v. Rumsfeld* (2006).

[121] Prosecutor: Court ruling cuts vision for Guantánamo war crimes trials, Miami Herald, 16 June 2013.

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

[123] US Department of State, Country Reports on Human Rights Practices for 2012: Afghanistan. Published 2013, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper

[124] Memorandum for the President from Alberto R. Gonzales. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Draft 25 January 2002.

[125] Letter to the President. John Ashcroft, Attorney General, US Department of Justice, 1 February 2002.

[126] *Hamdan v. Rumsfeld*, 2006.

[127] Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008.

[128] Referral of detainee abuse incident. Memorandum for Naval Criminal Investigative Service, 17 September 20004. The conduct considered possibly criminal was, at Chapman airbase, threatening

Obaidullah with a knife, and forcing him to carry sandbags; and at Bagram, forcing him to scrub floors and clean urine buckets (see below).

[129] See e.g., Articles 7 and 4 ICCPR; articles 2, 3 and 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Common Article 3, Geneva Conventions of 1949; *Prosecutor v. Furundzija*, Case No. ICTY IT-95-17/1-T, Judgment, P 144, paras 153-156 (10 December 1998).

[130] *Obaydullah v. Obama*, On appeal from the US District Court for DC, Brief for Respondents-Appellees, In the US Court of Appeals for the DC Circuit, December 2011.

[131] Articles 12 and 15, Convention against Torture.

[132] Article 2(3) ICCPR; Article 14 CAT; UN Committee against Torture, General Comment No 3: Implementation of article 14 by States parties, 13 December 2012, UN Doc. CAT/C/GC/3, paras 1 & 16-17. Se also article 9(5), International Covenant on Civil and Political Rights.

[133] Remarks by the President on National Security at the National Archives, Washington, DC, USA, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[134] Article 2(3), ICCPR; UN Human Rights Council, Resolution 9/11 on 'Right to the truth', UN Doc A/HRC/RES/9/11 (24 September 2008), Preamble. See also resolution 12/12, UN Doc A/HRC/RES/12/12 (1 October 2009); Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc A/HRC/21/46 (9 August 2012); UN Human Rights Council, Resolution 9/11 on 'Right to the truth', paragraph 1; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (16 December 2005), UN Doc A/RES/60/147 (21 March 2006), Principles 11, 22 & 24; Inter-American Court of Human Rights, *Gomes Lund et al. ("Guerrilha do Araguaia") v Brazil*, paras 200-202, and230.

[135] UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, para. 42; In *El-Masri v. The Former Yugoslav Republic of Macedonia* In European Court of Human Rights underlined that "the concept of 'State secrets' has often been invoked to obstruct the search for the truth" in relation to human rights violations committed by the USA in relation to its secret detention, rendition and interrogation programmes. European Court of Human Rights [GC], App. No. No. 39630/09, 13 December 2012, para. 191.

[136] On 2 January 2008, then US Attorney General Michael Mukasey appointed a federal prosecutor to supervise a criminal investigation into the CIA's destruction of videotapes made in 2002 of interrogations conducted against two detainees held in the CIA's secret program. On 9 November 2010, the Justice Department announced that no criminal charges would be pursued in relation to the destruction of the tapes. However, the federal prosecutor's mandate had been expanded in August 2009 by Attorney General Eric Holder to include a "preliminary review" into some aspects of some interrogations of some detainees held in the secret detention program. On 30 June 2011, Attorney General Holder announced that the Department of Justice was closing investigations into all cases relating to the CIA program since 2001, except into the deaths of two detainees in CIA custody. On 30 August 2012, he announced the closure of the investigations into the two deaths and that no criminal charges would be filed.

[137] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives, 1 March 2013, UN Doc. A/HRC/22/52, para 35. See also paras 35-37.

[138] But see 'US: Torture and Rendition to Gaddafi's Libya', Human Rights Watch news release, 6 September 2012, http://www.hrw.org/news/2012/09/05/us-torture-and-rendition-gaddafi-s-libya (HRW

report contains detailed allegations from a Libyan national that he was subjected to water-boarding in CIA custody – while his case is not one of the three individuals whom the US authorities have confirmed were subjected in US custody to this technique).

[139] Such techniques, as documented by, for example, the ICRC, clearly breach the definition of torture in Article 1, CAT. ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. February 2007.

[140] The type of treatment that Obaidullah alleged he was subjected to has been condemned as a violation of the ICCPR by the Human Rights Committee, which expressed concern in 2006 "with the fact that the State party has authorized for some time the use of enhanced interrogation techniques, such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20-hour interrogations, removal of clothing and deprivation of all comfort and religious items, forced grooming, and exploitation of detainees' individual phobias." See UN Human Rights Committee, *Concluding Observations: United States of America*, 18 December 2006, CCPR/C/USA/CO/3/Rev.1, para. 13; see also UN Committee against Torture, *Conclusions and Recommendations: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para 26; Report to the UN Economic and Social Council regarding the situation of detainees at Guantánamo Bay of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, 27 February 2006, UN Doc. E/CN.4/2006/120, paras 49-52.

[141] Dept of State 1999 Country Reports on Human Rights Practices: Jordan (2000); Iran (2000); Libya (1999); Tunisia (1999); Egypt (2006).

[142] USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, 3 February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en

[143] *Obaydullah v. Obama*. Sealed hearing on discovery motion. US District Court for DC, 20 August 2010.

[144] "Obaydullah's allegations of abuse led the government to withdraw reliance on any statements he made at those airbases". *Obaydullah v. Obama*, US Court of Appeals for the DC Circuit, 3 August 2012.

[145] UN Convention against Torture, article 15; Human Rights Committee, General Comment no. 20 (1992), para. 12, finding the same obligation to arise under article 7 of the International Covenant on Civil and Political Rights. See USA: Judge refuses to dismiss charges against former secret detainee, says remedy for torture or other abuses must be sought elsewhere, 13 May 2010, http://www.amnesty.org/en/library/info/AMR51/040/2010/en.

[146] Article 12, CAT.

[147] *Al-Zahrani v. Rodriguez*, US Court of Appeals for the DC Circuit, 21 February 2012. The Court of Appeals decided that the US Supreme Court's *Boumediene v. Bush* ruling had only found the first part of MCA § 7 – purporting to strip habeas corpus jurisdiction – unconstitutional, saying "We…presume that the Supreme Court used a scalpel and not a bludgeon in dissecting §7 of the MCA, and we uphold the continuing applicability of the bar to our jurisdiction over 'treatment' case".

[148] See USA: Judge orders Guantánamo detainee released after seven and a half years in detention without charge, 24 June 2009, http://www.amnesty.org/en/library/info/AMR51/080/2009/en

[149] *Al Janko v. Gates et al*, Complaint for damages; jury trial demanded, US District Court for DC, 5 October 2010. Also See no evil, *op. cit.* http://www.amnesty.org/en/library/info/AMR51/005/2011/en

[150] *al Janko v. Gates et al*, Memorandum Opinion, US District Court for the District of Columbia, 11 December 2011 (Judge Richard Leon). At the time of writing, Judge Leon's decision was being appealed to the US Court of Appeals for the DC Circuit.

[151] *Al Janko v. Gates et al*. Brief for Defendants-Appellees, US Court of Appeals for the DC Circuit, 1 March 2013.

[152] *Hadjarab et al v Obama et al*, Respondents' opposition to petitioners' motion for preliminary injunction to stop involuntary feeding, In the US District Court for DC, 3 July 2013.

[153] As of 22 July 2013, 46 of the 70 detainees recognized by the Guantánamo authorities as being on hunger-strike were being "tube-fed". For further information re force-feeding see USA: Re Guantánamo: A human rights appeal to the US administration and Congress, 17 May 2013, http://www.amnesty.org/en/library/info/AMR51/030/2013/en

[154] *Hadjarab et al v. Obama et al*. Respondents' opposition to petitioners' motion for preliminary injunction to stop involuntary feeding. In the US District Court for DC, 3 July 2013.

[155] Shaker Aamer et al v. Barack H. Obama et al, Opinion. US District Court for DC, 16 July 2013. Judge Rosemary Collyer additionally said in this case that even if she did have jurisdiction to consider the motion for an injunction, it would be unlikely to succeed as "the public interest and balance of harms weighs in favour of the Government", and the US Constitution "does not include a right to commit suicide and a right to assistance in doing so". For further information on international standards relating to hunger strikes, see USA: Re Guantánamo: A human rights appeal to the US administration and Congress, 17 May 2013, http://www.amnesty.org/en/library/info/AMR51/030/2013/en

[156] Article 27, Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

[157] Article 2(3) ICCPR; Article 12, CAT.

[158] US human rights commitments and pledges. Bureau of International Organization Affairs, US Department of State, 16 April 2009, http://www.state.gov/j/drl/rls/fs/2009/121764.htm

[159] UN Doc: A/HRC/WGAD/2013/10. Opinions adopted by the Working Group on Arbitrary Detention at its sixty-sixth session, 29 April – 3 May 2013. Dated 12 June 2013, para. 37.

[160] *Ibid.* para. 39.

[161] *Ibid.*, para. 42.

[162] *Ibid.*, para. 44.

[163] *Ibid.*, para. 46.

[164] Opening Statement by UN High Commissioner for Human Rights Navi Pillay at the 23rd session of the Human Rights Council, Geneva, 27 May 2013, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13358&LangID=E

[165] Email from Retired Rear Admiral Norton C. Joerg, sent: 19 July 2013, 9:12pm. Subject: General Notice to Habeas Counsel Regarding Commencement of the Periodic Review Board Process. The notice reads: "Habeas Counsel: As required by Executive Order 13567 and the National Defense Authorization Act FY2012, a new Periodic Review Board (PRB) process will review the continued detention of certain detainees to assess whether continued law of war detention is necessary to protect against a continuing significant threat to the security of the United States. The process does not address the legality of any detainee's law of war detention, but rather makes discretionary determinations about the individual's threat and the necessity of continued law of war detention. The review process will include a hearing before a PRB composed of senior level officials from various U.S. Government agencies. Detainees receiving hearings will be notified by a Personal Representative assigned to assist them in the process.

Counsel who have a prior relationship with detainees who will receive a hearing will be contacted in advance of the notification to the detainees."

[166] 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, http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava ; Fact Sheet: New Actions on Guantánamo and Detainee Policy, 7 March 2011, http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy

[167] Guantánamo Review Task Force, 22 January 2010, http://www.justice.gov/ag/guantanamo-review-final-report.pdf

[168] DTM 12-005, 2012, *op. cit*, attachment 3, §5(f-g).

[169] The PRB would consist of senior officials from the Departments of Defense, Homeland Security, Justice, and State, and the Offices of the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence. DTM 12-005, 2012, *op. cit*, attachment 3, §5.

[170] DTM 12-005, 2012, *op. cit*, attachment 3, §6k(4).

[171] DTM 12,005, 2012, op. cit., attachment 3, §6m(3).

[172] Remarks by the President at the National Defense University, 23 May 2013, http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university

[173] DTM 12-005, 2012, *op. cit.*, glossary part II, and attachment 1 (b).

[174] Executive Order 13567, *op. cit.*, Sec. 9. Definitions. (a) 'Law of War Detention' means: detention authorized by the Congress under the AUMF, as informed by the laws of war.

[175] Directive-Type memorandum (DTM) 12-005, 'Implementing guidelines for periodic review of detainees held at Guantánamo Bay per Executive Order 13567'. 9 May 2012, incorporating change 1, 31 October 2012 [hereinafter DTM 12-005, 2012], http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf, attachment 3, §3.

[176] DTM 12-005, 2012, *op. cit*, attachment 3, §3.

[177] DoD announces draft detainee review policy, 3 March 2004, http://www.defense.gov/releases/release.aspx?releaseid=7103

[178] E.g., *Kiyemba v. Obama*, US Court of Appeals for the District of Columbia Circuit, 28 May 2010 ("It is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement"; it is "within the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms").

[179] Translated into English by Abdul Bari Jahani, poet and author of the national anthem of Afghanistan.

[180] Amnesty International opposes all systems of administrative detention on security grounds, in part because they are used by states throughout the world to circumvent the fair trial safeguards of criminal proceedings. The one exception is detention of a recognized prisoner of war in an international armed conflict for the duration of the conflict in accordance with the Geneva Conventions and Additional Protocols (as applicable).This basis for detention does not apply to Obaidullah or any of the other detainees still held at Guantánamo. As such, individuals should only be held on the basis of valid criminal charges for trial before ordinary courts; otherwise, they should be released.

[181] Administrative Review Board hearing, 18 October 2007.

[182] US Human Rights Commitments and Pledges. Fact Sheet, Bureau of Democracy, Human Rights, and Labor, US Department of State, Washington, DC, USA, 16 April 2009,

http://www.state.gov/j/drl/rls/fs/2009/121764.htm

[183] See USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

[184] *Hussain v. Obama*, US Court of Appeals for the DC Circuit, 18 June 2013, Senior Circuit Judge Edwards, concurring in the judgment.

[185] 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.

[186] Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. Memorandum for the President, From Alberto R. Gonzales, 25 January 2002, Draft, 3.30 pm.

[187] *Ibid*.

[188] Letter to the President from Attorney General John Ashcroft, 1 February 2002.

[189] Review of Department of Defeense Detainee Operations and Detainee Interrogation Techniques. Conducted by US Navy Vice Admiral A.T. Church III. Submitted to Secretary of Defense, 7 March 2005, pages 185-6.

[190] *Obaydullah v. Obama*, Petitioner's motion for relief pursuant to Rule 60(b)(2), In the US District Court for DC, 8 February 2012. Including the *Pandis Declaration*, *op. cit*.