

CORRESPONDENTS' REPORTS

UNITED STATES OF AMERICA¹

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Overview — United States Enforcement of International Humanitarian Law

In 2013 the United States military deployment in support of Operation Enduring Freedom in Afghanistan, now in its twelfth year, continued to decrease in size and scope. The year saw hundreds of US and NATO bases either closed or transferred to the Afghan government and security forces. This included, in March 2013, US transfer of control of the Parwan detention center, the last US run detention facility, to the Afghan government.

By the end of 2013 there were roughly 38,000 US service members in Afghanistan, a significant decrease from the 2011 peak troop strength of 111,000. 2013 also saw lengthy but not finalized discussions between the United States and the Government of Afghanistan over the

¹ This entry was prepared by Chris Jenks, Assistant Professor of Law and Criminal Justice Clinic Director, SMU Dedman School of Law. Prior to joining the faculty at SMU, Professor Jenks served in the US Army from 1992-2012, first as an infantry officer in Germany, Kuwait and Bosnia, and then as a Judge Advocate (military lawyer) in Korea and Iraq. In his last assignment he served in the Pentagon as the Chief of the International Law Branch for the US Army. Special thanks to Brandon Bellows and Cassie DuBay for their assistance.

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terms and conditions of a bilateral security agreement to begin applying in 2015, after the end of NATO's combat mission in Afghanistan.

In 2013, the application of the US' international humanitarian law obligations was primarily triggered by the armed conflict in Afghanistan, armed unmanned aerial system (UAS) or drone strikes there and in other places, and detention.

In January, the United Nations Special Rapporteur on Counter-Terrorism and Human Rights began examining allegations that the employment of armed UAS in extraterritorial lethal counter-terrorism operations had resulted in disproportionate civilian casualties. The investigation considered US UAS strikes in Afghanistan, Iraq, Libya, Pakistan, Somalia and Yemen, and by other countries in those same as well as other locations. In September, the Special Rapporteur issued an interim report² which noted the number of legal questions on the employment of armed UAS which lack international consensus. The report concluded that armed UAS are capable of reducing the risk of civilian casualties in armed conflict, while at the same time reminding countries of their responsibility to conduct fact-finding inquiries whenever civilians have been killed.

Targeted killings outside 'hot battlefields' remained controversial in 2013, with wide ranging disagreements on the number of civilians killed.³ The Bureau of Journalism claimed that in 2013 the number of US UAS strikes in Pakistan fell to the lowest level since President Obama took office in 2009, but increased in Yemen, and reported one US strike in Somalia.⁴ The US also conducted two ground commando style raids in 2013: a successful mission in Libya to capture a

² Ban Ki Moon, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Note by the Secretary General, UN Doc. A/68/389* (18 September 2013) <http://www.un.org/ga/search/view_doc.asp?symbol=A/68/389>.

³ Micah Zenko, 'Tracking U.S. Targeting Killings' (31 December 2013) Council on Foreign Relations <<http://blogs.cfr.org/zenko/2013/12/31/tracking-u-s-targeted-killings/>>.

⁴ Alice K Ross and Jack Serle, 'A Changing Drone Campaign: US Covert Actions in 2013' (6 January 2014) Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com/2014/01/06/a-changing-drone-campaign-us-covert-actions-in-2013/>>; see also Spencer Ackerman, 'Fewer Deaths From Drone Strikes in 2013 After Obama Policy Change', *The Guardian* (online) 1 January 2014 <<http://www.theguardian.com/world/2013/dec/31/deaths-drone-strikes-obama-policy-change>>.

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suspected al Qaeda leader purportedly responsible for bombing US embassies in Africa, and an apparently unsuccessful attempt to capture an al Shabab leader in Somalia.⁵

In February, a US news outlet obtained a copy of a document purporting to be a Department of Justice (DOJ) 'White Paper' on the lawfulness of lethal operations directed at a US citizen who is a senior operational leader of al Qaeda or an associated force.⁶ The document unfortunately conflates aspects of *jus ad bellum* and *jus in bello* in articulating factors to consider. The factors include: 1) whether an individual poses an imminent threat of violent attack against the US; 2) capture is not feasible; and 3) that any US lethal operation comply with the fundamental IHL principles of: necessity, distinction, proportionality and humanity.

In March, the US Senate approved the nomination of John Brennan to head the Central Intelligence Agency (CIA). In his statement to the Senate during the confirmation process, Brennan acknowledged a trust deficit between the US Congress and the CIA, and claimed to welcome a discussion of CIA activities present and past. He reiterated that the US fight against al Qaeda and associated forces sometimes involves the use of lethal force outside the battlefield in Afghanistan.⁷

In August, the US released its periodic report to the Committee Against Torture, which details how the US implements its obligations under the *Convention Against Torture and other Cruel Inhumane and Degrading Treatment or Punishment* (CAT).⁸ In its submission, the US acknowledged that 'a time of war does not suspend the operation of the Convention as to matters within its scope of application. Torture is clearly and categorically prohibited under an extensive body of both human rights law and the law of armed conflict.' The US has struggled to reconcile the CAT obligation to 'ensure in its legal system that the victim of an act of torture obtains

⁵ David Kirkpatrick, Nicholas Kulish and Eric Schmitt, 'U.S. Raids in Libya and Somalia Strike Terror Targets', *New York Times* (online), 5 October 2013 <<http://www.nytimes.com/2013/10/06/world/africa/Al-Qaeda-Suspect-Wanted-in-US-Said-to-Be-Taken-in-Libya.html>>.

⁶ 'Department of Justice White Paper', MSNBC (online) 4 February 2013 <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>; see also David Kaye, 'International Law Issues in the Department of Justice White Paper on Targeted Killing' ASIL (Washington D.C., US) February 14, 2013, <<http://www.asil.org/sites/default/files/insight130215.pdf>>.

⁷ 'Opening Statement John O. Brennan Senate Select Committee on Intelligence Nomination Hearing to be Director of the Central Intelligence Agency' (7 February 2013), <<http://www.intelligence.senate.gov/130207/brennan.pdf>>.

⁸ US Department of State, 'United Nations Committee Against Torture Periodic Report of the United States of America' (Washington DC, US) <<http://www.state.gov/documents/organization/213267.pdf>>.

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redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible' with instances where US government officials have acknowledged that the US treatment of a detainee constituted torture.⁹

In November, the International Criminal Court issued a report on preliminary examination activities.¹⁰ The report documented ongoing efforts by the Office of the Prosecutor (OTP) to document alleged crimes committed in Afghanistan by the Taliban and other anti-government groups as well as pro-government forces, which would include the US. Based on the information available to the OTP, 'there is no reasonable basis to believe that [pro-government forces] have committed crimes against humanity' in Afghanistan, or war crimes including killing of civilians through aerial bombardment, escalation of force incidents, or night raids. However the report did state that '[t]he information available suggests that the war crimes of torture, and outrages upon personal dignity, in particular humiliating and degrading treatment, have been committed by members of pro-government forces.'

Ongoing combat operations in Afghanistan accounted for the overwhelming number of instances where US service members were applying, and in at least the cases described below, violating, IHL in 2013. As a result, with one exception, the cases that follow are examples of the US military exercising court-martial jurisdiction over its service members as opposed to jurisdiction exercised by US Federal or State Courts. The cases are illustrative of how the US utilizes its military justice system during armed conflict in response to offenses by its service members against protected persons, most often Iraqi and Afghan nationals. Background information on the US military justice system is available in the 2012 report.

The UAS strikes and commando raids discussed above may provide additional examples, but the lack of publicly available information means they can only be reported anecdotally. As a result, what could potentially constitute examples of US compliance with IHL and the rule of law generally instead become (or continue to be) symbolic of lack of transparency and accountability.

⁹ Bob Woodward, 'Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials' *Washington Post* (online), 14 January 2009 <<http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>>.

¹⁰ Office of the Prosecutor, International Criminal Court, 'Report on Preliminary Examination Activities 2013' (2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF>.

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Given that US detention practice is predicated at least in part on IHL, beginning with 2013 this report will also include detainee legal challenges in US federal courts and the trial and appellate results from the military commissions held at Guantanamo Naval Base in Cuba (GTMO).

Cases — United States Federal Court

☛ *United States v Slough, et al* (D DC, No. CR-08-360, 2013)

<http://www.justice.gov/sites/default/files/usa-odc/legacy/2013/10/29/nisursquare_Superseding_Indictment_October%2917_2013.pdf>

In October, the DOJ filed a superseding indictment against four former Blackwater contractors stemming from the 2007 shooting deaths of fourteen Iraqi civilians in Nisour Square in Baghdad, Iraq. At the time of the shootings, a total of nineteen Blackwater security contractors were evacuating a US diplomat following a car bombing. A small number of the contractors claimed they were under attack and used force in self-defense, killing fourteen and wounding twenty more Iraqis. The case has considerable procedural history. A federal grand jury handed down indictments against five of the nineteen in 2008 for a host of manslaughter, attempted manslaughter and weapons violations charges.¹¹ Additionally, one Blackwater contractor, Jeremy Ridgeway, pled guilty to one count of manslaughter, attempt to commit murder and aiding and abetting and agreed to testify against his former colleagues.¹² The five challenged their indictments on the grounds that because they were government contractors, they were required to provide a statement about the shootings but that those statements could not be, but were, not only used against them but were also leaked to the media. In 2009, a US District Court judge agreed and dismissed the indictment.¹³ In 2011 an appellate court vacated that ruling and directed the District Court to consider the possibility of taint from the statements on an individual defendant

¹¹ *United States v Slough et al* (D DC, 'Grand Jury Indictment', 4 December 2008),

<[http://abcnews.go.com/images/Blotter/Indictment\(Nisur%20Square\).pdf](http://abcnews.go.com/images/Blotter/Indictment(Nisur%20Square).pdf)>.

¹² *United States v Ridgeway* (D DC, 'Factual Proffer in Support of Guilty Plea', 18 November 2008),

<<http://www.justice.gov/sites/default/files/opa/legacy/2008/12/08/us-v-ridgeway.pdf>>.

¹³ *United States v Slough et al* (D DC, 'Memorandum Opinion Granting the Defendants' Motion to Dismiss the Indictment; Denying as Moot the Government's Motion to Dismiss the Indictment Against Defendant Slatten Without Prejudice', 31 December 2009), <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cr0360-217>.

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basis.¹⁴ After reassessing the admissible evidence in light of the appellate decision, in 2013 the DOJ dropped the case against one contractor, Donald Ball, and brought new charges against the other four, Paul Slough, Nicholas Slatten, Evan Liberty and Dustin Heard. The new charges are nearly identical to the original charges and include 33 counts, including manslaughter, attempted manslaughter and using a firearm in a crime of violence.

One issue of note moving forward will be jurisdictional. The DOJ asserted jurisdiction over the Blackwater contractors for killing Iraqis in Iraq pursuant to the *Military Extraterritorial Jurisdiction Act* (MEJA).¹⁵ The MEJA provides US federal courts jurisdiction over contractors employed by the Department of Defense (DOD) overseas. Here the contractors were employed by the Department of State, not the DOD, but MEJA defines the term 'employed by the Armed Forces' to include civilian employees of 'any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.'¹⁶ Whether or not providing security for diplomats during an armed conflict is considered as supporting DOD remains to be determined. Attempts in the US legislature to pass 'CEJA', the *Civilian Extraterritorial Jurisdiction Act*, to more clearly articulate when and over which contractors US courts may permissibly exercise jurisdiction for overseas conduct have been unsuccessful.¹⁷

Cases — United States Military Courts – United States Navy

☛ *Release of Court-Martial Results* [2013] <<http://news.usni.org/2013/07/24/document-navy-court-martial-summaries-from-jan-to-june-2013>>

On 22 July, the United States Navy became the first US military service to systematically release service wide court-martial results.¹⁸ As part of a wider effort to be more transparent about

¹⁴ *United States v Slough* (DC Cir, No 10-3006 22 April 2011)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/A311ECA37BE9E9AE8525787A004E0A0B/\\$file/10-3006-1304592.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/A311ECA37BE9E9AE8525787A004E0A0B/$file/10-3006-1304592.pdf)>.

¹⁵ 18 USC Chapter 212, 'Military Extraterritorial Jurisdiction'.

¹⁶ 18 USC § 3267, 'Definitions'.

¹⁷ Charles Doyle, 'Civilian Extraterritorial Jurisdiction Act: Federal Contractor Criminal Liability Overseas' (15 February 2012) Congressional Research Service <<http://www.fas.org/sgp/crs/misc/R42358.pdf>>.

¹⁸ 'Document: Navy Court-Martial Summaries from Jan. to June 2013' (24 July 2013) USNI News

<<http://news.usni.org/2013/07/24/document-navy-court-martial-summaries-from-jan-to-june-2013>>. See also Yearbook of International Humanitarian Law — Volume 16, 2013, Correspondents' Reports © 2015 T.M.C. Asser Press and the author — www.asserpress.nl

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prosecuting service members through the military justice system, the Navy published the results of 135 special and general courts-martial that occurred between January and June 2013. For example, one entry reads as follows:

At a Special Court-Martial in Washington, D.C., an E-3 was tried for assault consummated by a battery. The panel of members returned a verdict of not guilty to assault consummated by a battery, but guilty to simple assault. The panel awarded a forfeiture of \$1,342 per month for 2 months, reduction in rank to E-1 and 40 days confinement.

This is a significant (albeit long overdue) step and one which the other US military services should emulate. Unfortunately it is of minimal utility in terms of demonstrating US compliance with its obligations under IHL to 'provide effective penal sanctions for persons committing, or ordering to be committed' a grave breach of any of the 1949 Geneva Conventions.¹⁹ This is because the US does not charge its service members who violate IHL as having committed a war crime, but instead charges the most analogous punitive article under the Uniform Code of Military Justice (UCMJ).²⁰ For example, where a US service member intentionally and wrongfully killed a number of civilians during an armed conflict, the US would charge that service member with murder. Examining the court-martial result listed above, it is not clear whether that case involved a violation of IHL or not. The report does detail that a court-martial panel acquitted a sailor of assault consummated by a battery and found the sailor guilty of simple assault. It's possible, though extremely unlikely, that the sailor's actions took place in Afghanistan and that the victim of the assault was a civilian, thus potentially involving IHL. How the military charges its service members generally, combined with how the Navy is reporting results, amounts to a missed opportunity to demonstrate not just transparency of the UCMJ process but how the US complies with its IHL obligations.

Cases — United States Military Courts – United States Army

<<http://archive.navytimes.com/article/20130722/NEWS06/307220033/Navy-releases-six-months-court-martial-results>>.

¹⁹ See eg, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146.

²⁰ See *Manual for Courts-Martial*, United States Rule for Court-Martial 201(d) (discussion) (2012).

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- ☛ *United States v Lorange* [2013] Fort Bragg, North Carolina (1 August 2013)
<<http://www.armytimes.com/article/20130801/NEWS06/308010044/>>

The US Army court-martialed Lorange, a commissioned officer (First Lieutenant), for the murder of two Afghan civilians and the attempted murder of a third in Kandahar Province in July 2012.²¹ The Army alleged that Lorange recklessly ordered subordinate soldiers to open fire – in violation of the Army's rules of engagement – on men riding motorcycles towards Lorange's unit.²² The soldiers fired on the motorcyclists killing two men. A third man escaped while being fired upon, again under Lorange's direction. Lorange defended his actions by claiming he was attempting to protect his troops.²³ Contrary to his pleas, on 1 August 2013, a panel found Lorange guilty of two specifications of murder and one specification of attempted murder. The panel found Lorange not guilty of making a false official statement. The panel sentenced Lorange to twenty years confinement, forfeiture of all pay and allowances, and dismissal from the Army.²⁴ Lorange is only the second officer the US Army has prosecuted for murder related to the wars in Iraq and Afghanistan.

- ☛ *United States v Bales* [2013] Joint Base Lewis-McChord, Washington (23 August 2013)
<<http://i2.cdn.turner.com/cnn/2012/images/03/23/bales.charge.pdf>>

The US Army court-martialed Bales, a non-commissioned officer, for the murder of 16 Afghan civilians in Kandahar's Panjwai District in March 2012. While deployed to Afghanistan, Bales left his combat outpost on the night of 11 March 2012 without authorization and walked to the village of Alkozai, where he killed four civilians. He returned to his outpost for more

²¹ 'Court-Martial Opens For O-2 on Murder Charges', *Army Times* (online) 31 July 2013

<<http://www.armytimes.com/article/20130731/NEWS06/307310026/>>.

²² 'Court-Martial Opens for Officer on Murder Charges' (31 July 2013) ABC11-WTVD-TV/DT

<<http://abclocal.go.com/wtvd/story?section=news/local&id=9189512>>.

²³ 'Officer Charged in Shooting of Afghans' (18 March 2013) Military.com <<http://www.military.com/daily-news/2013/03/18/officer-charged-in-shooting-of-afghans.html>>.

²⁴ '1st Lt. Found Guilty in Afghan Shootings; Gets 20-Year Sentence' *Army Times* (online), 1 August 2013

<<http://www.armytimes.com/article/20130801/NEWS06/308010044/1st-lt-found-guilty-Afghan-shootings-gets-20-year-sentence>>.

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ammunition and then walked to the village of Najiban, where he killed twelve more civilians. He then set fire to the bodies in Najiban.²⁵ The victims ranged in age from a two year old child to an elderly grandmother. Within two weeks of the crime the Army charged Bales with 16 specifications of murder, six specifications of attempted murder, seven specifications of assault and with violating Army regulations concerning alcohol and steroid use. Under the provisions of a pre-trial agreement with the convening authority, Bales pled guilty in 2013 to all charges in exchange for removing the death penalty as a sentencing option. During his guilty plea Bales admitted to the killings and that he lacked legal justification for the killings and stated that he could not explain his actions.²⁶ On 23 August 2013, a panel sentenced Bales to be confined for the duration of his natural life without the possibility of parole, dishonorable discharge, total forfeiture of all pay and allowances and reduction to the lowest enlisted grade (E-1). Bales arrived at Fort Leavenworth, Kansas to begin serving his sentence in late August 2013.²⁷ The investigation and case highlighted cultural differences between how Afghans and Americans process and recount information²⁸ and in conceptions of justice and accountability.²⁹

Cases — United States Military Courts – United States Marine Corps

- ☛ *United States v Hutchins*, 72 MJ 294 United States Court of Appeals for the Armed Forces (CAAF) (26 June 2013)
<<http://www.armfor.uscourts.gov/newcaaf/opinions/2012SepTerm/12-0408.pdf>>

²⁵ ‘Staff Sgt. Bales: ‘There’s Not a Good Reason in the World For the Horrible Things I Did’, *The News Tribune* (online), 5 June 2013 <<http://blog.thenewstribune.com/military/2013/06/05/staff-sgt-robert-bales-to-give-his-account-of-kandahar-massacre-today-at-jblm-at-plea-hearing/>>.

²⁶ ‘Robert Bales, U.S. Soldier, Pleads Guilty to Afghanistan Massacre’ *Huffington Post* (online), 5 June 2013 <http://www.huffingtonpost.com/2013/06/05/robert-bales-pleads-guilty-afghanistan-massacre_n_3390743.html>.

²⁷ ‘Bales Arrives at Leavenworth to Serve Life Sentence in Afghan Killings’ (28 August 2013) *Military Times* <<http://www.militarytimes.com/article/20130828/NEWS06/308280049>>.

²⁸ Kathy Gannon, ‘Robert Bales’ Killing Rampage Recounted by Afghans’, *Huffington Post* (online), 16 May 2013 <http://www.huffingtonpost.com/2013/05/16/robert-bales-killings-afghanistan_n_3288184.html>.

²⁹ ‘Afghanistan Massacre Survivors Testify Against Robert Bales at Sentencing’, *The Guardian* (online), 22 August 2013 <<http://www.theguardian.com/world/2013/aug/21/staff-sergeant-robert-bales-afghanistan-massacre>>.

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On 26 June, the CAAF set aside the findings and sentence against Hutchins, a non-commissioned officer (Sergeant), whom the United States Marine Corps (USMC) court-martialed and convicted in 2007. In 2006 Hutchins, then a squad leader serving near Al-Hamdaniyah, Iraq was ordered to conduct a patrol to deter emplacement of improvised explosive devices (IED). Instead, Hutchins and his squad decided to capture or kill the supposed insurgent leader responsible for planting the IEDs. Hutchins' squad ambushed and captured an unknown Iraqi man, radioed back to their headquarters that they had been attacked, shot the Iraqi man in the head, and staged the placement of his body to appear as if he had been emplacing IEDs. During a subsequent investigation into the incident, the Naval Criminal Investigation Service (NCIS) attempted to interrogate Hutchins, but halted when Hutchins requested counsel and placed him in confinement. One week later, having made no effort to honor Hutchins' request for counsel, NCIS resumed its interrogation, asking him to consent to a search of his belongings. Shortly thereafter Hutchins provided a written confession admitting to killing the Iraqi. Contrary to his pleas, a panel found Hutchins guilty of making a false official statement, unpremeditated murder, murder, larceny, conspiracy, and obstruction of justice. The panel sentenced him to be confined for fifteen years, reprimanded, dishonorably discharged, and reduced to the lowest enlisted grade (E-1). The convening authority approved the punishment except the reprimand. Hutchins' case has been the subject of several appeals. In this most recent appeal, the CAAF overturned Hutchins' conviction and sentence on the grounds that Hutchins was improperly barred from consulting with an attorney after requesting one. The court considered whether Hutchins' Fifth Amendment right against self-incrimination was violated when the NCIS returned to interrogate and search Hutchins without him having access to an attorney. The CAAF relied upon *Edwards v Arizona*, 451 US 477 (1981) and *Oregon v Bradshaw*, 462 US 1039 (1983) in holding that because counsel was not made available to Hutchins after requested, and because throughout trial government attorneys relied on Hutchins' statements made to NCIS – which likely contributed to the verdict against him – the error in admitting his statements was not a harmless error. The CAAF set aside the findings and sentence and returned the case to the Judge Advocate General of the Navy. The Marine Corps indicated it will refile charges against Hutchins and restart the court-martial process against him.

- ☛ *United States v Deptola* [2013] Camp Lejeune, North Carolina (16 January 2013)
< <http://www.foxnews.com/us/2013/01/16/marine-faces-court-martial-for-urinating-on-corpse-taliban-fighters-in/>>

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The USMC court-martialed Deptola, a non-commissioned officer (Staff Sergeant), for his role in urinating on and posing with the bodies of dead Taliban fighters in Afghanistan. This is the same incident reported in 2012. A total of eight Marines faced various forms and types of disciplinary action for their respective roles in the incident. In July 2011, then-Staff Sergeant Deptola was a member of a scout-sniper unit that killed several Taliban insurgents near Sandala, Afghanistan. Thereafter, several members of the unit, including Deptola, posed with and filmed themselves urinating on the dead bodies. The video was uploaded to YouTube in early 2012, went viral and drew widespread condemnation. On 16 January 2013, Deptola pleaded and was found guilty by a military judge of violating a general order by desecrating the remains by urinating on them, taking pictures of the corpses and failing to properly supervise junior Marines.³⁰ The military judge sentenced Deptola to be confined for six months, fined \$5000, reduced to the lowest enlisted grade (E-1) and receive a bad conduct discharge.³¹ However, under the terms of Deptola's pretrial agreement with the convening authority, his punishment was limited to reduction in rank to Sergeant.³²

☛ *United States v Richards* [2013] Camp Lejeune, North Carolina (7 August 2013)
<<http://www.marinecorpstimes.com/article/20130807/NEWS06/308190002/Scout-sniper-implicated-urination-video-pleads-guilty-salvages-medical-retirement>>

The USMC also court-martialed Richards, a noncommissioned officer (Sergeant), for his role in the previously described incident involving Marines urinating on and posing with the bodies of dead Taliban insurgents in Afghanistan.³³ Of note in Richards' case, the Marine Corps mistakenly discharged him in the midst of legal proceedings, necessitating recalling him to active

³⁰ 'Marine Pleads Guilty to Urinating on Corpses', *Fox News* (online), 16 January 2013

<<http://www.foxnews.com/us/2013/01/16/marine-faces-court-martial-for-urinating-on-corpses-taliban-fighters-in/>>.

³¹ 'Court-Martial Set For NCO in Urination Video', *The Army Times* (online), 12 January 2013

<<http://www.armytimes.com/article/20130112/NEWS/301120303/Court-martial-set-NCO-urination-video>>.

³² 'Marine Demoted For Urinating on Taliban Corpse' CBS News (online), 8 August 2013

<<http://www.cbsnews.com/news/marine-demoted-for-urinating-on-taliban-corpse/>>.

³³ 'Scout Sniper Implicated in Urination Video Pleads Guilty, Salvages Medical Retirement', *The Marine Corps Times* (online), 7 August 2013 <<http://www.marinecorpstimes.com/article/20130807/NEWS06/308190002/Scout-sniper-implicated-urination-video-pleads-guilty-salvages-medical-retirement>>.

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duty.³⁴ Richards pled guilty to failing to obey a lawful order regarding treatment of enemy dead and violating Article 134 of the UCMJ, a charge that requires conduct which is of a nature to bring discredit to the military or contrary to good order and discipline. In exchange for his agreeing to plead guilty, the Marine Corps referred the charges to a summary court-martial, the lowest level of court-martial. At a summary court-martial the accused has fewer rights, but the maximum punishment is significantly less. In the case of an NCO like Richards, the maximum punishment is restriction for up to two months, forfeiture of up to two-thirds pay for one month and to be reduced one grade. On 7 August 2013, the summary court officer, a line officer, reduced Richards one grade to Corporal.³⁵ Shortly thereafter the Marine Corps allowed Richards to (again) medically retire.

Overview — United States Detention Practice

2013 began with the United States detaining 166 individuals at GTMO and ended with 155 in detention. Of those 155, a small number are pending trial by military commission and others have been cleared for transfer. Most of those cleared for transfer have been eligible since the recommendation of a 2009 US Government Detention Policy Task Force (DPTF). Difficulties either with finding an appropriate and willing country to transfer the detainees to, and/or meeting Congressionally imposed certification requirements on the detainee's future dangerousness, have made detainee transfers much more challenging and time consuming. 2013 did however bring needed clarity to a third category of detainees, those individuals the United States is not prosecuting nor intending to transfer. The US released the names of 48 detainees in this third category, who are subject to indeterminate and/or indefinite IHL-based detention.³⁶ In April the UN High Commissioner for Human Rights claimed that the US detention regime at GTMO was

³⁴ 'Marines order sniper out of medical retirement after paperwork error', *The Marine Corps Times* (online), 6 May 2013 <<http://archive.marinecorpstimes.com/article/20130506/NEWS/305060043/>>.

³⁵ 'Marine Demoted For Urinating on Taliban Corpse', above n 32.

³⁶ Department of Justice, Freedom of Information Act Response, 'A list of the name of each detainee at Guantanamo Bay and their status as determined by the Guantanamo Detainee Task Force' (Department of Justice, Response to request under *Freedom of Information Act*, 17 June 2013), <<http://s3.documentcloud.org/documents/714599/savage-final-response.pdf>>.

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a 'clear breach of international law.'³⁷ That same month the US military confirmed that more than half of the detainees at GTMO were on a hunger strike and responded to allegations that force-feeding some of the hunger striking detainees constituted mistreatment.³⁸ In June President Obama appointed a Special Envoy for Guantanamo Closure.

☛ *GTMO Detainee Transfer Restrictions* [2013] (2 January 2013)

<<http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>>

On 2 January, President Obama signed into law the 2012 *National Defense Authorization Act*,³⁹ which specifies, in 680 pages, funding expenditures for and limitations on the Department of Defense. Of note, several sections place limits on the US government's actions regarding detainees, the US government's ability to transfer detainees to foreign countries and an outright restriction on the use of government funds to facilitate transfer of GTMO detainees to the United States. President Obama issued a signing statement⁴⁰ in which he indicated that:

The fact that I support this bill as a whole does not mean I agree with everything in it. In particular, I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.

GTMO Detainee Transfers [2013]

Notwithstanding the above-mentioned limitations, the US did transfer eleven detainees from GTMO to foreign countries in 2013. The transfers included:

³⁷ 'Pillay says Guantanamo detention regime is in "clear breach of international law" and should be closed' (5 April 2013) United Nations High Commissioner for Human Rights,

<<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13212&LangID=E>>.

³⁸ Letter from William K. Lietzau to Center for Constitutional Rights, 1 April 2013,

<<http://www.lawfareblog.com/wp-content/uploads/2013/04/2013-04-01-Office-of-the-Under-Secretary-of-Defense-Response-to-CCR-Hagel-Letter.pdf>>.

³⁹ *Public Law 112-81 National Defense Authorization Act for Fiscal Year 2012* (31 December 2011),

<<http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>>.

⁴⁰ White House, 'Statement by the President on H.R. 1540' (Press Release, 31 December 2011),

<<http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>>.

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- Yusef Abbas, Saidullah Khalik and Hajiakbar Abdulghupur to Slovakia on 31 December. All three are Chinese nationals whom the DPTF recommended for transfer in 2009.
- Ibrahim Othman Ibrahim Idris and Noor Uthman Muhammed to Sudan on 18 December. Both are Sudanese nationals. Idris was recommended by the DPTF for transfer in 2009. In 2011 Muhammed pleaded and was found guilty a military commission of providing material support to al Qaeda, conspiracy to provide material support to a terrorist organization and terrorism.⁴¹ He was sentenced to 14 years in confinement. In exchange for Mr Muhammed's guilty plea and promise to cooperate and testify, the convening authority agreed to suspend any period of confinement greater than 34 months, following which he was transferred to Sudan.
- Said Muhammad Husyan Oahtani and Hamoud Abdullah Hamoud Hassan al Wady to Saudi Arabia on 16 December. Both are Saudi nationals. Oahtani was recommended for transfer by the DPTF in 2009.
- Djamel Saiid Ali Ameziana and Bensayah Belkacem to Algeria on 5 December. Both are Algerian nationals and both were recommended by the DPTF for transfer in 2009.
- Nabil Hadjarab and Mutij Sadiz Ahmad Sayab to Algeria on 28 August. Both are Algerian nationals and both were recommended by the DPTF for transfer in 2010.

Cases — United States Detention Practice

In general, there are two kinds of litigation stemming from US detention practice: civil, where detainees challenge the legality of their detention in US federal court; and criminal, where the US prosecutes certain detainees for IHL violations through trial by military commission. This section provides background on the civil cases arising from detainee challenges, including reports of the relevant cases and then does the same for the military commissions cases.

The US Supreme Court clarified in *Boumediene v Bush*⁴² that detainees incarcerated at GTMO have a right derived from the US Constitution to petition a US federal court for a writ of habeas corpus challenging the lawfulness, location or length of their detention. The DC Circuit Court has construed the right to habeas corpus as encompassing challenges of proposed transfers

⁴¹ *United States v Noor Uthman Muhammed* (18 February 2011) US Military Commissions 'Result of Trial', <<http://www.mc.mil/Portals/0/pdfs/NoorUthman/Result%20of%20Trial.pdf>>.

⁴² *Boumediene v Bush*, 553 U.S. 723 (2008).

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to another country.⁴³ Thus far courts have not found conditions of detention at GTMO to be the proper subject of habeas relief. Often counsel for the detainee will argue about the nexus between the subject matter of their petition and the writ of habeas corpus, and thus that the court has jurisdiction. In contrast, the government will argue that the petition is more accurately characterized as concerning conditions of confinement, which the court lacks jurisdiction over under the *Military Commissions Act* of 2006 (MCA).

In terms of the conduct of habeas corpus proceedings, the government bears the burden of demonstrating by a preponderance of the evidence the lawfulness of the detention. The government may utilize hearsay evidence and is required to provide the detainee with reasonably available exculpatory evidence, along with any classified evidence relied on to the detainee's counsel. But the DC Circuit Court has held that habeas corpus proceedings involving wartime detention are not identical to application of the traditional writ under criminal law. One DC Circuit Court judge described the backdrop against which habeas review of wartime detention is conducted as 'national security interests are at their zenith and the rights of the alien petitioner [are] at their nadir.'

In such proceedings, a detainee would petition a US District Court, following which either the detainee and/or the US government could appeal to the applicable US Court of Appeals. Most, but not all, habeas corpus challenges and corresponding appeals occur within the federal court system in Washington DC.

Detainee Challenges — United States Courts of Appeals

☛ *Al Warafi v Obama* [2013] 716 F 3d (DC Cir, 24 May 2013)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/7D20723558D7132685257B75004E3CBE/\\$file/11-5276-1437798.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7D20723558D7132685257B75004E3CBE/$file/11-5276-1437798.pdf)>

On 26 August, the DC Circuit Court denied Al Warafi's request for *en banc* (full bench) rehearing of his challenge to the district court denying his habeas corpus petition. Al Warafi, a Yemini national detained by the US government since 2002, claimed in a 2010 habeas corpus petition that he was not a member of the Taliban but, in the alternative that even if he was a member of the Taliban, his service as a medic precluded his detention under the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First

⁴³ *Kiyemba v Obama*, 561 F 3d 509, 512-513 (DC Cir, 2009).

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Geneva Convention - GC I). The District Court denied his petition, finding that the US proved by a preponderance of the evidence that Al Warafi was a member of the Taliban at the time of his capture and that he may not invoke the Geneva Conventions as a source of a private right of action in a habeas corpus proceeding. Al Warafi appealed to the DC Circuit Court, which, in 2011, remanded the case to the District Court to consider whether Al Warafi was permanently and exclusively medical personnel within the meaning of the GC I. Later in 2011, the District Court ruled that Al Warafi's failure to possess identification reflecting status as permanent medical personal under GC I meant he was not entitled to the corresponding immunity from detention. In contrast, Al Warafi argued that the GC I required a functional assessment of whether he was exclusively engaged in medical activities. In disagreeing with Al Warafi, the District Court utilized the following hypothetical:

A soldier comes upon a uniformed individual who is attending to the wounded on the battlefield. Reliance on a functional evaluation would leave the soldier without the means of determining whether the uniformed individual is a permanent medic entitled to full immunity or an enemy combatant who is simply attending to the wounded at that time.

The Court concluded its opinion by noting that:

The Court understands the implication of its decision here - that where a warring party provides no identification to its medical personnel, such personnel cannot establish protected status under [the First Geneva Convention]. But this result, while unfortunate, is not absurd. The Convention requires proper identification precisely because Article 24 affords total immunity to qualifying personnel. Nothing prevents parties like the Taliban from providing medical personnel with the identification materials mandated by Article 40. But until they do so, their medical personnel will lack the means by which they can prove their entitlement to Article 24's protections.

Al Warafi appealed that decision to the DC Circuit Court, which on 24 May 2013, affirmed the District Court. Al Warafii then requested the DC Circuit Court to rehear his appeal *en banc*, but on 26 August 2013, the DC Circuit Court denied that request.

☛ *Hussain v Obama* [2013] 718 F 3d 964 (DC Cir, 18 June 2013)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/44E4BD6B382C2C5985257B8E004F70A6/\\$file/11-5344-1441731.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/44E4BD6B382C2C5985257B8E004F70A6/$file/11-5344-1441731.pdf)>

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On 18 June, the DC Circuit Court denied Hussain's appeal of the District Court's denial of his habeas corpus petition.⁴⁴ Hussain, a Yemeni national, was captured in Pakistan in early 2002 and transferred to US custody and then GTMO shortly thereafter. In 2011 the District Court denied Hussain's habeas corpus petition, finding that the government met its burden to prove by a preponderance of evidence that Hussain was a member of al Qaeda or the Taliban at the time of his capture. Hussain appealed and the DC Circuit Court affirmed the District Court's opinion. Most notable was the concurring opinion of one of the judges who wrote:

I am constrained by the law of the circuit to concur in the judgment of the court. The majority opinion is unassailable in holding that our precedent (which conflates the preponderance of the evidence and substantial evidence standards) supports the result reached. I have no authority to stray from precedent. However, when I review a record like the one presented in this case, 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 Guantanamo detainee cases.

☛ *Hatim v Obama* [2013] DC Cir Nos. 05-CV-01429; 06-CV-1766; 07-CV-02338; 12-MC-00398 (15 August 2013)

<https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012mc0398-47>

On 15 August, the DC Circuit Court granted the US government's motion to stay a District Court order which invalidated certain detainee security procedures at the Naval Station Guantanamo Bay.⁴⁵ On 11 July 2013, the District Court partially granted the request of several detainees that the government be enjoined from security screening procedures, notably intrusive body searches, which unlawfully deterred them from accessing legal counsel. While the detainees and the District Court styled the claim as an access to counsel issue, the government contended the Court was impermissibly intruding on matters of military discretion. The government argued that discovery of contraband among the detainees, including shanks and nails, as well as a detainee suicide, amply justified the security screening procedures. As a result

⁴⁴ *Hussain v Obama*, 718 F 3d 964 (DC Cir, 2013).

⁴⁵ *In Re Guantanamo Detainee Litigation* (D DC No. 12-MC-398, 11 July 2013) <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012mc0398-47>.

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of the DC Circuit Court's action, the District Court order is stayed pending the government's appeal.

☛ *Hentif v Obama* [2013] 733 F 3d 1243 (DC Cir, 5 November 2013)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/545C86FDBB0B451C85257C1A0052EEA2/\\$file/12-5314-1464634.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/545C86FDBB0B451C85257C1A0052EEA2/$file/12-5314-1464634.pdf)>

On 5 November, the DC Circuit Court dismissed the appeal of Fadhel Hussein Saleh Hentif as untimely filed. Hentif had appealed, or attempted to, a 2011 District Court denial of his motion to reconsider his habeas corpus petition claiming his detention was unlawful. Hentif, a Yemeni national, was seized by Pakistani authorities in 2001 and has been held in detention by the US at GTMO since 2002. Under the statutory provisions governing appellate practice in federal courts, Hentif was required to submit notice of appeal within sixty days of the district court's judgment.⁴⁶ Hentif submitted his notice seventy four days after the District Court filed a classified opinion and order denying his motion to reconsider but fifty-nine days after the court filed a redacted unclassified opinion. The DC Circuit Court held that the initial filing of the classified opinion triggered the start of the sixty days and thus dismissed Hentif's appeal.

☛ *Hamad v Gates* [2013] 732 F 3d 990 (9th Cir, 7 October 2013)

<<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/10/07/12-35395.pdf>>

☛ *Al-Nashiri v MacDonald* [2013] 741 F 3d 1002 (9th Cir, 20 December 2013)

<<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/12/20/12-35475.pdf>>

On 7 October in *Al-Nashiri*, and 20 December in *Hamad*, the US Court of Appeals for the Ninth Circuit affirmed, on similar grounds, the District Court dismissals of, and their respective challenges to, their detention.

Al-Nashiri, a Saudi national, was arrested in 2002 in Dubai for his alleged role in several terrorism plots, including the 2000 bombing of the USS Cole which killed seventeen US Navy sailors. Al-Nashiri was transferred to US control and in 2006 moved to GTMO, where he has remained. In 2011 the US District Court for the Western District of Washington dismissed his

⁴⁶ 28 USC § 2107.

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request for a declaratory judgment that the military commission lacks jurisdiction to try him,⁴⁷ which he appealed to Ninth Circuit.

Hamad, a Sudanese national, claims to have been detained in Pakistan in 2002 at the behest of the US, following which he was transferred to US military custody and eventually GTMO. In March 2005 the US held a Combatant Status Review Tribunal and determined Hamad to be an enemy belligerent, defined as 'an individual who was part of or supported Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.'⁴⁸ In November 2005 an Administrative Review Board determined that while Hamad continued to be a threat to the United States, he was eligible to be transferred to Sudan, which he was in 2007. In April 2010 Hamid filed suit against a host of US military and civilian officials seeking monetary damages. In April 2012 the US District Court for the Western District of Washington dismissed his case, which he appealed to the Ninth Circuit.⁴⁹

The Ninth Circuit's analysis to both appeals was similar. The issue was to how to construe the US Supreme Court's *Boumediene* decision, which found the section of the MCA which attempted to deprive federal jurisdiction over detainee habeas corpus petitions to be unconstitutional. The relevant section of the MCA is 28 USC § 2241(e), which contains two sub paragraphs:

- (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
- (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), 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, transfer, treatment, trial, 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.

⁴⁷ *Al-Nashiri v MacDonald* (WD Wash No. 11-5907, 10 May 2012) <<http://www.mc.mil/Portals/0/pdfs/Al-Nashiri%20v%20MacDonald%2011-5907%20WDWA%20%282012%29.pdf>>.

⁴⁸ Letter from Deputy Secretary of Defense to the Secretary of the Navy, 'Order Establishing Combatant Status Review Tribunal', 7 July 2004, <<http://www.defense.gov/news/Jul2004/d20040707review.pdf>>.

⁴⁹ *Hamad v Gates* (WD Wash, No. 10-591, 8 December 2011), LEXIS 141429.

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The Ninth Circuit concluded that *Boumediene* struck down § 2241(e)(1) but not necessarily § 2241(e)(2), and that (2) was severable and remained in effect. In both cases, the filed actions were not in the form of applications for a writ of habeas corpus, so they fell under (2). And under § 2241(e)(2), the Ninth Circuit determined that it did not have jurisdiction to hear or consider either action.

☛ *Maqaleh v Hagel* [2013] DC 738 F 3d 312 (DC Cir, 24 December 2013)

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/3A5A4EF5DF6C854C85257C4B0057703F/\\$file/12-5404-1472248.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3A5A4EF5DF6C854C85257C4B0057703F/$file/12-5404-1472248.pdf)>

On 24 December, the DC Circuit Court, in a consolidated case, dismissed the appeals of five belligerents whom the US government has detained at the Parwan detention facility at Bagram Airfield in Afghanistan.⁵⁰ The five detainees, Fadi Al Maqaleh, Amin Al-Bakri, Redha al-Najar, Hamidullah, and Amanatullah, had petitioned the District Court for a writ of habeas corpus, challenging the legality of their detention. Of note, none of them are from Afghanistan, and none were captured in Afghanistan. Rather they were captured in Pakistan, Thailand and Iraq between 2002 and 2008 and transferred to US control in Afghanistan. The District Court had dismissed their petition on the grounds that the Court lacked jurisdiction to consider habeas corpus claims by non-US citizens held in Afghanistan. The DC Circuit Court affirmed the District Court's action.

Thus belligerents detained at GTMO have the right to challenge the legality of their detention through habeas corpus while those detained in Afghanistan do not. This difference stems from the application of factors discussed in *Boumediene*: the nature of the US relationship with the host nation government and the proximity of the detention facility to a zone of armed conflict. On the first factor, the government of Afghanistan, while allowing the US to operate a detention facility in Afghanistan, retains overall control as compared to GTMO in Cuba, where the US has exclusive control. On the second factor, the Parwan detention facility in Afghanistan is in a zone of active combat operations while GTMO is not. The result is that US courts are more deferential to the executive branch and decisions it makes in Afghanistan (a combat zone where US control is limited) than at GTMO (not a combat zone and where the US has complete control) Interestingly the US seems to have been able to transport these detainees to Afghanistan

⁵⁰ *Al Maqaleh v Hagel*, 738 F 3d 312, 330 (DC Cir, 2013).

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and then rely on their being in Afghanistan as part of the rationale for why they should not be entitled to petition for a writ of habeas corpus.

Detainee Challenges — United States District Court

☛ *Abdullah v Bush* [2013] D DC 05-23 (9 Jan 2013)

<<http://www.lawfareblog.com/wp-content/uploads/2013/05/ISN-841-Ct-Order-denying-Mot-for-P-I-21-May-13-1.pdf>>

On 14 May, Abdullah filed a mandamus petition with the DC Circuit Court seeking to compel the District Court to decide a motion Abdullah had filed asking the Court to enjoin the US from holding him in violation of a 1946 executive agreement between Yemen and the US. Abdullah, a Yemeni national, was arrested by Pakistani authorities in 2002 and transferred shortly thereafter to US custody in Afghanistan and then GTMO. One week after Abdullah filed his petition with the DC Circuit Court, the District Court denied Abdullah's motion, which mooted his mandamus petition. In denying Abdullah's motion the District Court held that he did not meet the requisites for injunctive relief, specifically that he was likely to suffer irreparable injury in the absence of relief and that the balance of equities weighed in his favor. Abdullah's claim that the *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention) did not allow for indefinite detention was incorrect as a matter of law. More interesting was his claim that conditions of confinement at Guantanamo are not in accord with the Geneva Conventions, including that he is not permitted to purchase personal items, family and friends are not allowed to send him food or clothing, he is not able to choose a representative to air grievances and copies of the Geneva Conventions are not posted in prominent places. The DOD policy is to apply the Geneva Conventions to the non-international armed conflict the US is engaged with against al Qaeda and the Taliban as a matter of policy, yet the Department has never clarified which provisions the US is and is not applying.⁵¹

⁵¹ 'DOD Law of War Program' (Department of Defense Directive 2311.01E) ¶4.1.

<<http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>>.

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- ☛ *In Re Petition of Wali Mohammed* [2013] D DC No. 05-1124 (9 January 2013)
<https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1124-386>

On 9 January, the DC District Court ruled that when a detainee at GTMO files a petition for a writ of habeas corpus, the government may rely on top secret information for which there is no adequate substitute and which is not released to the detainee's counsel.

Pakistani forces captured Mohammed, an Afghan national, in January 2002 suspecting him of serving as a primary financier for the Taliban and al Qaeda. Pakistan transferred him to US control the following month and shortly thereafter he was sent to GTMO, where he has remained. In 2009 the DPTF recommended him for continued detention.

In 2005, Mohammed and a group of other detainees filed for a writ of habeas corpus. During the course of that litigation, a dispute arose over whether the government and subsequently the Court may rely on top secret information which is not made available to defense counsel who are only allowed access information classified at the secret level. In general, the government would submit top secret information to the court for *in camera* review as well as a proposed substitute of the information classified below top secret which would then be provided to defense counsel. This case dealt with the problem of the government relying on relevant and material evidence to which normally the defense would be entitled to review but cannot because the evidence is classified top secret and for which no adequate substitute exists. The Court identified three components to the habeas corpus proceeding: 1) Mohammed's ability to present affirmative evidence and to attack the government's evidence; 2) The government's ability to protect highly sensitive information; and 3) The Court's ability, as a neutral decision maker to seize 'the actual truth of a simple, binary question: is detention lawful?' While not discounting the first two components, the Court reiterated the view that both the DC District Court and US Supreme Court have articulated, that the third component is the most important. Following that, the Court ruled that the top secret information 'of the kind at issue here must be available to the neutral decision maker even if not disclosed to [defense] counsel.'

- ☛ *In Re Petition of Ameziane* [2013] D DC No. 05-CV-392 (5 June 2013)
<https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0392-300>

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On 5 June, the DC District Court granted in part and denied in part motions and cross motions concerning the government's ability to designate certain unclassified information as protected and thus not included in the public factual record.

In December 2001, Pakistani officials captured Ameziane, a purported member of al Qaeda. He was transferred to US control the next month and to GTMO shortly thereafter. In 2009, the DPTF recommended him for transfer. Over Ameziane's objection, as listed above the US transferred him to Algeria on 5 December 2013.

Ameziane is one of a number of detainees who have filed petitions for a writ of habeas corpus. This 2013 decision did not resolve whether their detention was permissible, but does illuminate an important aspect of detainee litigation, being that information not deemed classified may be considered protected and thus not included in the public record of the filings.

The Court held that:

Because the public ordinarily has the right to inspect and copy judicial records, the government must provide a valid basis for withhold non-classified information...Such a basis requires at a minimum, a specific, tailored, rationale.

This results in a two step process. First whether the information in question falls within six categories of information the DC District Court had previously specified for detainee litigation and then second, whether there is a rationale for protection specific to the information at issue in the case. Here the Court granted some but not all the government's request to designate information, certain words and phrases, as protected. The opinion highlights the challenges inherent in the balancing of shielding and releasing information.

☛ *Dhiab v Obama* [2013] D DC No. 05-1457 (8 July 2013)

< https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1457-183>

☛ *Amer, Hadjarab & Belbacha v Obama* [2013] D DC Nos. 04-2215; 05-1504; 05-2349 (16

July 2013) <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2349-255>

On 8 July in *Dhiab* and the 16th in *Amer et al*, the DC District Court denied on similar grounds a total of four GTMO detainee applications for preliminary injunction against the US government force-feeding them in response to their hunger strike.

Dhiab, a Syrian national and purported member of al Qaeda, was detained by Pakistani officials in Pakistan in 2002 and transferred to US custody and then GTMO. *Amer*, a Saudi Arabian national, and *Hadjarab* and *Belbacha*, both Algerian nationals, were all captured by the

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US in Afghanistan in late 2001 and transferred to GTMO in early 2002. In 2009 the DPTF recommended all four for transfer.

In 2013 the four detainees joined other GTMO detainees in a hunger strike to protest their continued detention. In response the GTMO medical personnel began force-feeding the four, which led Dhiab to file an individual petition and Amer, Hadjarab and Belbacha to file a joint petition seeking an injunction.

Medical officials designate a detainee as on a hunger strike based on their 'intent and behavior as well as weight loss to less than 85% of ideal body weight and/or missing nine consecutive meals.' Once a detainee is designated a hunger striker, GTMO medical personnel provide 'extensive counseling and detailed warnings that continued refusals to eat or drink could endanger [their] life or health.' If the refusal to consume food or nutrients voluntarily 'reaches the point at which the medical staff determines that his life or health may be threatened, the medical staff will obtain authorization to feed him through a nasogastric tube.'

Different judges within the DC District Court dismissed the petitions on the grounds that the Court lacked jurisdiction. As previously discussed, the MCA removes jurisdiction from any court to hear or consider any action relating to detainee treatment or conditions of confinement. The Court rejected the detainee's claims that their petition did not fall under the MCA's jurisdiction stripping provisions.

Of note, the judge ruling on Dhiab's petition added that:

Even though this Court is obligated to dismiss the Application for lack of jurisdiction, and therefore lacks any authority to rule on Petitioner's request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2012, President Barack Obama stated "Look at the current situation, where we are force feeding detainees who are holding a hunger strike...Is that who we are? Is that something that our founders foresaw? Is that the America we want to leave our children? Our sense of justice is stronger than that." Article II, Section 2 of the Constitution provides that "[t]he President shall be the Commander in Chief of the Army and Navy of the United States..." It would seem to follow, therefore, that the President of the United States, as Commander-in-Chief, has the authority – and power – to directly address the issue of force-feeding of the detainees at Guantanamo Bay.

US Military Commissions

According to the Office of Military Commissions

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Military commissions are a form of military tribunal convened to try individuals for unlawful conduct associated with war. Though sometimes controversial, they are rooted in US law and in the international laws of war.⁵²

Indeed the United States has convened military commissions since 1778. Readers are encouraged to review a one-page overview entitled 'How Military Commissions Work.'⁵³ Readers should also know that the rules and procedures governing the conduct of Military Commissions have changed over time. The *Military Commissions Act* of 2009 (MCA) provides the current framework for the commissions.⁵⁴

Any military commission which includes a finding of guilt is referred to the US Court of Military Commission Review [CMCR]. Once the CMCR has issued its opinion, either party (the unprivileged enemy belligerent or the US government) may then appeal to the DC Circuit Court. In 2013 the DC Circuit Court did not issue any opinions stemming from the conduct of military commissions. What follows are two notable stories and then decisions by the CMCR and the military commissions themselves. This report only includes cases with activity in 2013. Information for all military commissions⁵⁵ and all CMCR⁵⁶ cases are available at their respective websites.

☛ *Military Judge Orders Halt to Third Party Censorship* [2013] 31 January 2013
<<http://www.reuters.com/article/2013/01/31/us-usa-guantanamo-idUSBRE90U0Z720130131>>

A military judge presiding over the military commission of those allegedly responsible for the 9/11 attacks ordered that third party censoring of the public broadcast of the proceedings case cease. Unclassified portions of military commissions held at GTMO are open to the public, either via closed circuit viewing from Fort Meade, Maryland or in person for a small number of people who travel to GTMO, generally victims' families, media and NGO representatives. To

⁵² Office of Military Commissions, *Military Commissions History*, <<http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>>.

⁵³ Office of Military Commissions, *How Military Commissions Work*, <<http://www.mc.mil/ABOUTUS.aspx>>.

⁵⁴ *Military Commissions Act 2009* <<http://www.mc.mil/Portals/0/MCA20Pub20Law200920.pdf>>.

⁵⁵ Office of Military Commissions, *Cases*, <<http://www.mc.mil/CASES.aspx>>.

⁵⁶ Office of Military Commissions, Court of Military Commission Review, *Cases*, <<http://www.mc.mil/Cases.aspx?caseType=cmcr>>.

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accommodate security review, the audio of the proceedings is on a roughly 30 second delay. Only the military judge or a court security officer are supposed to have the means to trigger the blocking of the audio feed. Yet during military commission proceedings at the end of January 2013, the audio feed to the public was cut despite not having been triggered by either the military judge or the court security officer. The entity responsible for cutting the feed was not identified, though that the courtroom discussion moments before focused on purported secret CIA detention sites. In response the military judge indicated that the information was not classified and ordered the release of a transcript of the censored portion. The military judge also clarified that '[i]t is the judge that controls the courtroom...This is the last time.. any third party will be permitted to unilaterally decide that the broadcast should be suspended.'⁵⁷

☛ *Defense Lawyers Granted Access to Secret Detention Facility* [2013]

<<http://jurist.org/paperchase/2013/02/guantanamo-judge-gives-defense-lawyers-access-to-secret-detention-area.php>>

Later in February, the same military judge presiding over the same military commission allowed defense lawyers their first access to Camp 7, the detention facility the US uses for high value detainees. This story has been included as it underscores the challenges counsel on both sides, and the military judge, face in balancing competing interests of access to clients and security challenges surrounding the detention of those alleged to be responsible for the 9/11 attacks.

US Military Commission Cases — Court of Military Commission Review

⁵⁷ Jane Sutton, 'Judge Orders End to Secret Censorship of Guantanamo Court' Reuters (online), 31 January 2013 <<http://www.reuters.com/article/2013/01/31/us-usa-guantanamo-idUSBRE90U0Z720130131>>.

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☛ *United States v Ibrahim Ahmed Mahmoud al Qosi* [2013] CMCR No. 13-001 (4 January 2013) <http://www.mc.mil/Portals/0/pdfs/alQosi13-001/Brief%20Extraord%20Writ%20Jan%204%202013_PUBLIC.pdf>

In 2010 al Qosi pleaded and was found guilty of conspiracy to commit terrorism and to provide material support to terrorism, and providing material support to a terrorist organization, at a US military commission held at Guantanamo Bay Naval Station, Cuba. The military commission sentenced al Qosi to fourteen years confinement.⁵⁸

In 2011, the convening authority approved the sentence but suspended the sentence extending to confinement in excess of two years:

until such time as the United States Government determines that the accused has complied with the terms of the pretrial agreement of June 9 2010, or for a period of five (5) years from the date sentence was announced (August 11 2010), whichever is sooner.

The convening authority imposed conditions on the suspension, including that:

1. The accused must continue to abide by the terms of the pretrial agreement of June 9 2010;
2. The accused must not commit any further offense subject to chapter 47A of title 10, United States Code (the Military Commissions Act of 2009); and,
3. The accused must not engage in or materially support, directly or indirectly, hostilities against the United States or its coalition partners, or any other organization that he knows engages in hostilities against the United States or its coalition partners.⁵⁹

⁵⁸ *United States v Qosi* (US Military Commission, 'Result of Trial', 11 August 2011), <[http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20\(Result%20of%20Trial\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20(Result%20of%20Trial).pdf)>.

⁵⁹ *United States v Qosi* (US Military Commission, 'Final Action', 3 February 2011), <[http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20\(CA%20Final%20Action\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20(CA%20Final%20Action).pdf)>.

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In 2013, al Qosi first submitted a petition for extraordinary relief to the United States Court of Military Commission Review⁶⁰ and then petitioned the convening authority for a new trial.⁶¹ The convening authority denied the request for a new trial but per the request of al Qosi's counsel, forwarded the action to CMCR.

The petition to the CMCR argued that the convening authority was impermissibly serving as the expenditure approval authority for appellate defense counsel. The government responded⁶² and al Qosi submitted a reply brief.⁶³ Two other detainees, Mustafa Adam al Hawsawi⁶⁴ and Ramzi Bin Al Shihb,⁶⁵ requested to intervene, which the government opposed.⁶⁶ At the end of 2013 rulings on al Qosi's petition, and al Hawsawi and Bin Al Shihb's attempts to intervene were still pending.

☛ *American Civil Liberties Union v US* [2013] CMCR No. 13-003 (27 March 2013)
<<http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13->

⁶⁰ *Al Qosi v MacDonald* (CMCR, 'Brief in Support of Petition for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition', 4 January 2013), <http://www.mc.mil/Portals/0/pdfs/alQosi13-001/Brief%20Extraord%20Writ%20Jan%204%202013_PUBLIC.pdf>.

⁶¹ Convening Authority for Military Commissions, 'Memorandum for Clerk of Court, United States Court of Military Commission Review' (13 December 2013) <[http://www.mc.mil/Portals/0/pdfs/alQosi13-006/13-006%20A1%20Qosi%20-CA%20Referral%20to%20CMCR%20\(Dec%2017%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi13-006/13-006%20A1%20Qosi%20-CA%20Referral%20to%20CMCR%20(Dec%2017%202013).pdf)>.

⁶² *Al Qosi v MacDonald* (CMCR, 'Response of Behalf of Respondents', 17 January 2013), <[http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13-001%20Government%20Response%20and%20Motion%20to%20Writ%20\(Jan%2017,%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13-001%20Government%20Response%20and%20Motion%20to%20Writ%20(Jan%2017,%202013).pdf)>.

⁶³ *Al Qosi v MacDonald* (CMCR, 'Petitioner's Reply to Response on Behalf of Respondents', 22 January 2013) <[http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13001%20Qosi%20Reply%20brief%20\(Jan%2022%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13001%20Qosi%20Reply%20brief%20(Jan%2022%202013).pdf)>.

⁶⁴ *Al Qosi v MacDonald* (CMCR, 'Mustafa Ahmed Adam Al Hawsawi's Motion for Leave to Intervene', 15 April 2013) <[http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13001%20Motion%20to%20Intervene%20by%20Hawsawi%20\(Apr%2015%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi13-001/13001%20Motion%20to%20Intervene%20by%20Hawsawi%20(Apr%2015%202013).pdf)>.

⁶⁵ *Al Qosi v MacDonald* (CMCR, 'Respondent's Response to Mustafa Ahmed Adam Al Hawsawi's Motion for Leave to Intervene in Petitioner's Emergency Motion', 22 April 2013) <[http://www.mc.mil/Portals/0/pdfs/alQosi13-001/USCMCR%2013%20001%20Govt%20Resp%20Hawsawi%20Mot%20\(Apr%2022%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi13-001/USCMCR%2013%20001%20Govt%20Resp%20Hawsawi%20Mot%20(Apr%2022%202013).pdf)>.

⁶⁶ The governments' response to Bin Al Shihb, while listed on the CMCR website, was not available at the time of writing. Presumably that response is similar to the response to Al Hawsawi's motion.

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003%20ACLU%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf>

☛ *Miami Herald et al v US* [2013] CMCR No. 13-002 (27 March 2013)

<[http://www.mc.mil/Portals/0/pdfs/Media13-002/13-](http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf)

002%20Media%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf>

In separate but similar actions, the American Civil Liberties Union⁶⁷ and the Miami Herald⁶⁸ positioned the CMCR for a writ of mandamus concerning a protective order issued by the military judge presiding over the 9/11 military commissions. Specifically the military judge's order would exclude the public, including the media, from those portions of the military commission which involved the defendants testifying as to the circumstances of their detention while purportedly in the custody of the CIA. In each action, two other detainees, al Nashiri and al Baluchi, separately petitioned to intervene. The government responded to the ACLU⁶⁹ and the Miami Herald⁷⁰ and also opposed al Nashiri and al Baluchi's request to intervene. Ultimately the CMCR denied the petitions⁷¹ for a writ of mandamus on the grounds that the issue was not ripe for review. According to the CMCR, neither the ACLU nor the Miami Herald alleged 'a single

⁶⁷ *In Re ACLU v United States* (CMCR, 'Petition for a Writ of Mandamus', 21 February 2013)

<[http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20Writ%20Petition%20\(Feb%2021,%202013\)%20\(ACLU%20Writ\).pdf](http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20Writ%20Petition%20(Feb%2021,%202013)%20(ACLU%20Writ).pdf)>.

⁶⁸ *In Re Miami Herald et al v United States* (CMCR, 'Petition for a Writ of Mandamus', 14 February 2013)

<[http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Writ%20\(Media%20Petition\).pdf](http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Writ%20(Media%20Petition).pdf)>.

⁶⁹ *In Re ACLU v United States* (CMCR, 'Response on Behalf of Respondent', 7 March 2013)

<[http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20Govt%20Resp%20\(Mar%2027%202013\)%20\(26%20pages\)%20\(R\).pdf](http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20Govt%20Resp%20(Mar%2027%202013)%20(26%20pages)%20(R).pdf)>.

⁷⁰ *In Re Miami Herald et al v United States* (CMCR, 'Response on Behalf of Respondent', 7 March 2013), ,

<[http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Govt%20Resp%20\(Mar%2027%202013\)%20\(26%20pages\)\(R\).pdf](http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Govt%20Resp%20(Mar%2027%202013)%20(26%20pages)(R).pdf)>.

⁷¹ *ACLU v United States* (CMCR, 'Order', 27 March 2013) <[http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20ACLU%20Writ%20\(Ordering%20Dismissal\)%20\(J.%20Silliman%20Concur\)%20\(Mar%2027%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20ACLU%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf)>; *Miami Herald et al v United States* (CMCR, 'Order', 27 March 2013)

<[http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Writ%20\(Ordering%20Dismissal\)%20\(J.%20Silliman%20Concur\)%20\(Mar%2027%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf)>.

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instance where the Military Commission Judge has improperly applied Amended Protective Order #1 to deny Petitioners access to information, sufficient to warrant the sort of extraordinary relief petitioners seek.' The CMCR also denied the requests to intervene.

US Military Commission Cases

☛ *United States v Abd al Hadi al Iraqi* [2013] GTMO (September 4, 2013)

<<http://www.mc.mil/Portals/0/pdfs/alIraqi/ChargingDocumentAbdalHadialIraqiAug2013.pdf>>

In August, the US swore charges against al Iraqi for denying quarter, attacking protected property, treachery/perfidy, and attempted treachery/perfidy in and around Afghanistan and Pakistan between 2003 and 2004.⁷² Al Iraqi arrived at the detention facility at Guantanamo Bay in 2007. Prior to 2007 he was purportedly detained by the CIA at a different location.⁷³

☛ *United States v. Khalid Shaikh Mohammad et al* [2013] GTMO (6 November 2013)

<[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE108T\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE108T(KSM%20et%20al)).pdf)>

In 2008 the United States charged Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ali Abdul Aziz Ali, Ramzi Bin Al Shibh and Mustafa Adam al Hawsawi jointly for their alleged roles in the September 11 2001 attacks in the United States. They are charged with: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.⁷⁴ The US gained custody of the accused following their arrest in Pakistan at different times and places between

⁷² *United States v Abd al Hadi al Iraqi* (US Military Commission, 'Charge Sheet', August 2013)

<<http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiAug2013.pdf>>.

⁷³ 'US holds "senior al-Qaeda figure"', *BBC* (online), 27 April 2007 <<http://news.bbc.co.uk/2/hi/americas/6600751.stm>>.

⁷⁴ *United States v Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi* (US Military Commission, 'Charge Sheet', 9 May 2008),

<<http://www.defense.gov/news/d20080509Mohammed.pdf>>.

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2002 and 2003. The accused all claim to have been held, interrogated, and tortured by or at the behest of the CIA prior to their transfer to GTMO.

Pre-trial motions remained ongoing in 2013. Of note, in 2013 the military judge presiding over the military commission proceeding denied a series of motions relating to whether an evidentiary privilege exists regarding International Committee of the Red Cross (ICRC) documents. The defense had requested that the commission compel the prosecution to disclose roughly ten years of ICRC reports of their inspection of the detention facilities at GTMO. The prosecution objected and the ICRC successfully sought leave to intervene in opposition to the defense request. The commission ruled that there is no absolute privilege against any disclosure of ICRC documents and also that the documents are not properly considered classified.⁷⁵ The commission ordered the prosecution to deliver all correspondence between the ICRC and the US government pertaining to ICRC detention facility inspections to the commission after which the commission will conduct an *in camera* review. The commission ordered that the records will be held under seal.

☛ *United States v Ahmed Mohammed Haza al Darbi* [2013] GTMO (20 December 2013)
<<http://www.mc.mil/Portals/0/pdfs/alDarbi2/A1%20Darbi%20Charge%20Sheet%20dated%2016%20Dec%202013.pdf>>

In December, the US swore charges against al Darbi for attacking civilians and civilian objects, hazarding a vessel, terrorism, and related attempts stemming from his alleged attempts to ‘carry out terrorist attacks against shipping vessels in the State of Hormuz and off the coast of Yemen and a completed terrorist attack against the French oil tanker, MV Limberg.’ Al Darbi was initially detained in Azerbaijan in 2002 on counterfeiting charges and then transferred to US custody in Afghanistan. Al Darbi contends that while detained in Afghanistan he was subjected to torture, including waterboarding.

The US originally charged al Darbi in 2007.⁷⁶ Delays in proceeding resulted from al Darbi’s claims that incriminating statements he made to US military investigators were elicited by

⁷⁵ The ICRC discussed its reaction to the privilege ruling on the blog of its regional delegation to North America, Intercross. See Anna Nelson, ‘Why Confidentiality Matters’ (19 November 2013) Intercross
<<http://intercrossblog.icrc.org/blog/why-confidentiality-matters>>.

⁷⁶ ‘Guantanamo Detainee Charged’ (Department of Defense, News Release, 21 December 2007)
<<http://www.defense.gov/releases/release.aspx?releaseid=11583>>.

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torture. The US charged al Darbi again in 2012 before the 2013 charges. The difference in the charges is that the 2013 charges did not include conspiracy or aiding the enemy.⁷⁷ Given that the charges involve, at least in part, pre 9/11 conduct and a French flagged vessel, questions arise concerning the timing and scope of the armed conflict between the United States and al Qaeda.

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⁷⁷ Earlier in 2013 the chief prosecutor for the military commissions announced that given the substantial uncertainty concerning the permissibility of charging conspiracy as a stand-alone offense involving conduct occurring prior to the 2006 *Military Commissions Act*, he was recommending withdrawal and dismissal of that charge. Presumably that same logic applies to the aiding the enemy charge, and explains the absence of it and the conspiracy charges from the December 2013 charges.