

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

UNITED STATES OF AMERICA¹

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Overview – United States Enforcement of International Humanitarian Law

At the start of 2015, roughly 10,600 US military personnel remained in Afghanistan, a significant decrease from 38,000 US troops the year before.² On 31 December 2014, the United States ended Operation Enduring Freedom and transitioned to Operation Freedom's Sentinel (OFS).³ 2015 and OFS reflect the end of the US combat mission in Afghanistan,⁴ though as discussed in this report, whether that meant the end of active hostilities or the end of the armed conflict was the subject of litigation on the permissibility of continuing to detain persons under the laws of war. On 1 January, the North Atlantic Treaty Organization (NATO) established a new NATO mission, Resolute Support, to train, advise, and assist the

¹ This entry was prepared by Chris Jenks, Associate Professor of Law and Criminal Justice Clinic Director, SMU Dedman School of Law. 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 International Law Branch for the US Army. Special thanks to Ken Haesly, JD Candidate, SMU Dedman School of Law.

² Heidi M Peters, Moshe Schwartz and Lawrence Kapp, 'Department of Defense Contractor and Troop Levels in Iraq and Afghanistan 2007-2017' (28 April 2017), Congressional Research Service <<https://fas.org/sgp/crs/natsec/R44116.pdf>> ('Troop Levels').

³ 'Operation Freedom's Sentinel', Defense Procurement and Acquisition Policy, <http://www.acq.osd.mil/dpap/pacc/cc/operation_freedom_sentinel.html>.

⁴ 'Obama, Hagel Mark End of Operation Enduring Freedom', DoD News, Defense Media Activity, 28 December 2014,

<<https://www.defense.gov/News/Article/Article/603860/obama-hagel-mark/>>.

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Afghan security forces and institutions.⁵ Resolute Support replaces the International Security Assistance Force.

At the same time, up to 3,500 US troops were deployed to Iraq to aid that country's efforts in a non-international armed conflict with ISIS.⁶ Throughout 2015, the US-led coalition against ISIS conducted military operations, including airstrikes, in Iraq and Syria. While the US and coalition operations conducted in Iraq were with the consent and at the behest of the Iraqi government, the legal basis for air strikes against ISIS within the borders of Syria remained controversial. In April, the General Counsel for the US Department of Defense (DoD) delivered a presentation on 'The Legal Framework for the United States' Use of Military Force Since 9/11' at the American Society of International Law's annual meeting.⁷

One focus of the air strikes was ISIS-controlled oil fields and trucks used to transport oil, which raised questions on the permissibility of targeting war-sustaining activities.⁸ The long-awaited release of DoD Law of War Manual⁹ clarified the US view on war-sustaining activities,¹⁰ while also fostering concern on how journalists factor into targeting analysis.¹¹

During 2015 there were a number of questions arising about jus ad bellum responsibility. These included alleged IHL violations caused by members of international coalitions in general and also using weapons and intelligence provided by other coalition members. In terms of general partner IHL violations, there was significant media attention in the US over reports that the US military ordered its service members in Afghanistan to ignore instances of Afghan security forces sexually assaulting young boys,¹² a claim the US Commander in Afghanistan denied.¹³

In Iraq, and discussed in this report, Iraqi military personnel allegedly committed a number of IHL violations against ISIS members, which were recorded and photographed and circulated on social media. Regarding the armed conflict in Yemen, the US continued to provide logistical and intelligence support to the Saudi led coalition.¹⁴ In December, the United Nations Commission for Human Rights reported to the Security Council that a disproportionate number of attacks on civilians appeared to be the result of airstrike carried

⁵ 'Resolute Support Mission (RSM): Key Facts and Figures', NATO,, 26 February 2015, <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2015_02/20150227_1502-RSM-Placemat.pdf>.

⁶ Troop Levels, above n 2.

⁷ Stephen W Preston, 'The Legal Framework for the United States' Use of Military Force Since 9/11', (Remarks Delivered at Annual Meeting of the American Society of International Law, 10 April 2015), <<https://www.defense.gov/News/Speeches/Speech-View/Article/606662/>>.

⁸ Michael R Gordon and Eric Schmitt, 'US Steps Up Its Attacks on ISIS Controlled Oil Fields in Syria', *The New York Times*, 12 November 2015, <<https://www.nytimes.com/2015/11/13/us/politics/us-steps-up-its-attacks-on-isis-controlled-oil-fields-in-syria.html>>.

⁹ US Department of Defense, 'Department of Defense Law of War Manual', June 2015, <<http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf>>.

¹⁰ Ryan Santicola, 'War-Sustaining Activities and Direct Participation in the DOD Law of War Manual', *Just Security*, 15 December 2015, <<https://www.justsecurity.org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/>>.

¹¹ Rowan Scarborough, 'New Pentagon Manual Declares Journalists Can Be Enemy Combatants', *Washington Times*, 21 June 2015, <<http://www.washingtontimes.com/news/2015/jun/21/military-manual-declares-war-on-spies-propagandist/>>.

¹² 'Ignoring Sexual Abuse in Afghanistan', *The New York Times*, 21 September 2015, <https://www.nytimes.com/2015/09/22/opinion/ignoring-sexual-abuse-in-afghanistan.html?_r=0>.

¹³ 'US general: No policy to ignore sexual abuse of Afghan boys', *Associated Press*, 22 September 2015, <<http://www.pbs.org/newshour/rundown/us-general-policy-ignore-sexual-abuse-afghan-boys/>>.

¹⁴ Samuel Oakford, 'This Was the Year Yemen Was Destroyed', *Vice News*, 30 December 2015, <<https://news.vice.com/article/this-was-the-year-yemen-was-destroyed>>. ("Yemen Destroyed").

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out by coalition forces.¹⁵ Nonetheless, over the course of 2015, the US proceeded with a \$1.6 billion weapons sale to Iraq¹⁶ and a \$1.29 billion weapons sale to Saudi Arabia.¹⁷

Whether coalition airstrikes had killed civilians in Iraq and Syria, and if so, how many, continued to be debated.¹⁸ The Council on Foreign Relations claimed that over the course of 2015, the US dropped or fired over 23,000 bombs in Afghanistan, Iraq, Pakistan, Syria and Yemen.¹⁹ Of significant note was the 3 October US airstrike in Konduz, Afghanistan of what was wrongly thought to be a Taliban occupied position but was in reality a Médecins Sans Frontières (MSF) trauma center, killing some 30 MSF staff and patients.

A relatively small number of appellate proceedings of courts-martial of US service-members who committed IHL violations remained ongoing in 2015. The majority of the examples of US enforcement of its IHL obligations were found in the conduct of detention operations: including: detainee challenges to the legitimacy of their detention; US efforts to review detention status; transfer some detainees; and prosecute others at US Military Commissions. Internationally, the US continued to explain and justify its war time detention policies and practices, providing its one year follow up response to the UN Human Rights Committee in March²⁰ and to the UN Committee Against Torture in November²¹.

Cases – United States Federal Court

☛ *Al Shimari v CACI et al* [2015] ED Va, No. 1:08-cv-00827-GBL-JFA

On 18 June, the US District Court for the Eastern District of Virginia again dismissed the civil tort claims of four Iraqi citizens who had alleged that the defendants, civilian contract interrogators working for the US military, aided and abetted US military soldiers who abused and tortured the plaintiffs during their 2003 detention at the Abu Ghraib prison in Iraq.²² Previously discussed in a 2014 entry, the case has what the District Court called ‘an intricate procedural history’ that began in 2008 and involved several different US federal courts, including being before the US Court of Appeals for the Fourth Circuit on three different occasions.

¹⁵ ‘With parties “deeply divided over path to peace,” Yemen faces Balkanization, Security Council warned’, *UN News Centre*, 22 December 2015, <<http://www.un.org/apps/news/story.asp?NewsID=52887#.WW-uetPyvV>>.

¹⁶ Phil Stewart and Matt Spetalnick, ‘US quietly starts channeling arms from \$1.6 billion fund to Iraq’, *Reuters*, 5 June 2015, <<http://www.reuters.com/article/us-mideast-crisis-iraq-usa-idUSKBN00L1N520150605>>.

¹⁷ Yemen Destroyed, above n 14.

¹⁸ ‘Reported civilian and “friendly fire” deaths from Coalition airstrikes 2015’, *Airwars*, <<https://airwars.org/civcas-2015/>>; but see Louis Jacobson, ‘John McCain says 75% of airstrike missions against ISIS return without firing a weapon’, *Politifact*, 28 May 2015, <http://www.politifact.com/truth-o-meter/statements/2015/may/28/john-mccain/john-mccain-says-75-airstrike-missions-against-isi/>. In that article it notes the US self-describing the air campaign as the most precise in history and that caution in avoiding civilian casualties results in 75% of combat aircraft not dropping ordnance.

¹⁹ Micah Zenko, ‘How Many Bombs Did the United States Drop in 2015?’, Council on Foreign Relations, 7 January 2016, <<https://www.cfr.org/blog-post/how-many-bombs-did-united-states-drop-2015>>.

²⁰ US Department of State, ‘One-Year Follow-up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights’ (31 March 2015) <<https://www.state.gov/documents/organization/242228.pdf>>.

²¹ US Department of State, ‘One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports’ (27 November 2015), <<https://www.state.gov/j/drl/rls/250342.htm>>.

²² *Suhail Najim Abdullah Al Shimari et al v CACI Premier Technology Inc*,

Case No 1:08-cv-00827-GBL-JFA (ED Va, 18 June 2015)

<<https://ccrjustice.org/sites/default/files/attach/2015/06/20150618%20PDQ%20decision.pdf>>.

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In this dismissal, the District Court determined that the US military controlled how the defendant contractors interrogated detainees at Abu Ghraib. Given that, the Court held that it lacked subject matter jurisdiction to hear the case as US national defense interests were so closely intertwined with the military decisions governing the defendants, that a decision on the merits would require the Court to question actual and sensitive judgments made by the military. Moreover, the Court held that it lacked any judicially manageable standards to adjudicate the merits of this case, as to do so would require the Court to apply Iraqi law and to determine whether plaintiffs were ‘innocent civilians.’

Cases – United States Military Courts – Court of Appeals for the Armed Forces (CAAF)

☛ *United States v Akbar*, 74 MJ 364 (CAAF 2015)

On 19 August, the CAAF affirmed the findings of guilt and death sentence for Akbar, a former non-commissioned officer (Sergeant) in the US Army.²³ In 2003, as US military units were staging in Kuwait preparing to invade Iraq, Akbar threw several grenades and shot at fellow US service members, wounding three and killing two. In 2005, contrary to his pleas, a military panel found Akbar guilty of three specifications of attempted murder and two specifications of murder and sentenced him to death.²⁴ In 2006, the General Court-Martial Convening Authority (GMCA) approved the findings and sentence. In 2012, the ACCA affirmed the findings and sentence as correct in law and fact.²⁵

The focus of Akbar’s appeal to the CAAF was that his trial defense counsel had been ineffective. The CAAF disagreed, and held that Akbar failed to demonstrate that (1) his trial defense counsel’s performance fell below an objective standard of reasonableness; and (2) the counsel’s deficient performance gave rise to a ‘reasonable probability’ that the trial result would have been different without counsel’s unprofessional errors.

☛ *United States v SSGT David Bram*, ARMY 20111032, 2014 WL 7227952 (Army Ct Crim App, 29 September 2014), *on reconsideration* 2014 WL 7236126 (Army Ct Crim App 20 November 2014), *rev denied*, 74 MJ 360 (CAAF 2015)

On 28 April, the CAAF denied Bram’s petition for review, declining to consider his appeal.²⁶ Bram, a former non-commissioned officer (Staff Sergeant) in the US Army, was the subject of entries in 2011 (court-martial) and again in 2014 (Army Court of Criminal Appeals (ACCA) decision). Bram was part of a US Army unit who informally established what came to be known as the ‘kill team’ during their 2010 deployment near Kandahar, Afghanistan. Members of the team murdered three unarmed Afghan civilians for sport and then planted weapons on or near the bodies in an effort to make the killings appear legitimate. They also removed body parts and took pictures of the corpses. Bram’s role included, among other crimes, soliciting fellow US Army soldiers to commit murder, obstructing justice, and assaulting a member of the unit who had exposed the kill teams’ actions.

Cases — United States Military Courts – United States Army

²³ *United States v Akbar*, 74 MJ 364 (CAAF 2015)

<<http://www.armfor.uscourts.gov/newcaaf/opinions/2014SepTerm/137001.pdf>> (*‘Akbar’*).

²⁴ ‘Sergeant Sentenced to Death for Killing Two Officers in Kuwait’, *Associated Press*, (29 April 2005), <<http://www.washingtonpost.com/wp-dyn/content/article/2005/04/28/AR2005042801666.html>>.

²⁵ *Akbar*, above n 23.

²⁶ ‘United States Court of Appeals for the Armed Forces Daily Journal’ (30 April 2015) <<http://www.armfor.uscourts.gov/newcaaf/journal/2015Jrnl/2015Apr.ht>>.

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☛ *US v Lorange* – Findings and Modified Sentence Approved [2015]

On 31 December 2014, the GCMCA and Commanding General of the 82 Airborne Division approved the findings and modified the sentence of Lorange, a commissioned officer (Lieutenant).²⁷ The Army court-martialed Lorange in 2013 for the murder of two Afghan civilians in Afghanistan in 2012. Lorange was the subject of a 2013 entry.

The court-martial panel had sentenced Lorange to twenty years confinement. Accounting for post-trial delays in processing the record of the trial, the GCMCA approved nineteen years of confinement. Following the GCMCA taking final action, Lorange's case transferred to the ACCA.

On 3 February, Lorange motioned the ACCA to return what Lorange labeled the incomplete record of trial to the GCMCA. On February 24, ACCA denied Lorange's motion. On 17 August, Lorange requested that the Commandant of the United States Disciplinary Barracks consider him early for clemency and/or parole. On 29 December, the Commandant denied Lorange's request. On 31 August, Lorange motioned ACCA for a new trial. As of the end of 2015, ACCA had not ruled on the motion.

Cases — United States Military Courts – United States Marine Corps

☛ *United States v Hutchins* [2015]

In June, the US Marine Corps again court-martialed Hutchins, a non-commissioned officer (Sergeant), for leading a squad of US Marines in kidnapping and murdering a retired policeman in 2006 in Hamdania, Iraq.²⁸ On 17 June, contrary to his pleas, a military panel found Hutchins guilty of unpremeditated murder, conspiracy and larceny but acquitted him of a charge of making a false official statement. On 18 June, the panel sentenced Hutchins to be receive a bad conduct discharge and that he be reduced to private. The panel did not sentence Hutchins to additional confinement beyond the 7 years and 2 months he had previously served.

The Marine Corps initially court-martialed Hutchins in 2007. In 2011, the Navy-Marine Court of Criminal Appeals (NMCCA) set aside the findings and sentence, which was the subject of a 2011 entry. In 2012, the CAAF reversed the NMCCA decision, which was the subject of a 2012 entry. In 2013, the NMCCA, upon further review, affirmed the findings and sentence. The CAAF then accepted Hutchins petition for review and set aside the findings and sentence, which was the subject of a 2013 entry.

At the retrial, despite offers of immunity protection, five witnesses (who were former squad members under Hutchins who had also been convicted in the killings) refused to testify against him.²⁹ No other defendants in the related cases served longer than 18 months for their

²⁷ Nicole Carr, 'Fort Bragg commander upholds soldier's murder conviction', *ABC News*, <<http://abc11.com/news/fort-bragg-commander-upholds-soldiers-murder-conviction/464108/>>.

²⁸ Julie Watson, 'Marine guilty of murder in retrial for 2006 Iraqi civilian killing', *Military Times*, 17 June 2015, <<http://www.militarytimes.com/story/military/crime/2015/06/17/prosecution-to-rest-case-against-marine-being-retried/28852959/>>.

²⁹ Tony Perry, 'Marines, corpsman refuse to testify against sergeant at retrial in Iraqi killing', *Los Angeles Times*, 14 June 2015, <<http://www.latimes.com/local/lanow/la-me-ln-marine-retrial-refusal-20150614-story.html>>.

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roles in the killing.³⁰ The Hutchins case has been aptly described as ‘one of the most complicated and long-running criminal cases from the Iraq war.’³¹

Issues — United States Department of Defense

☛ **US-Trained Iraqi Forces Investigated for War Crimes [2015]**

On 11 March, ABC News published a story claiming that the Iraqi government was investigating whether US trained and armed Iraqi military units fighting ISIS in Iraq had committed war crimes.³² The story cited both American and Iraqi officials and claimed that the investigation followed a number of photos and videos appearing on Iraqi social media beginning in the summer of 2014 that appeared to depict uniformed Iraqi military units massacring civilians, torturing and executing prisoners, and displaying severed heads. Although the US military is providing training for new Iraqi recruits, no US service members are shown in the pictures/videos nor have any been implicated in the atrocities. ABC News contended that within the US and Iraqi military, the Iraqi units under investigation are known as ‘dirty brigades.’ On 25 March, the UN High Commissioner for Human Rights released a report on Iraq that criticized security forces there for military operations that ‘may have amounted to war crimes.’³³

A US military official purportedly told ABC News that since August 2014, when the US began providing military assistance to Iraq in support of the armed conflict against ISIS, that the US had

withheld assistance from certain Iraqi units on the basis of credible information in the past. Due to the sensitive nature of our security assistance, we are unable to discuss specific units. As the ISF [Iraqi Security Forces] and militias reclaim territory, their behavior must be above reproach or they risk being painted with the same brush as ISIL [ISIS] fighters. If these allegations are confirmed, those found responsible must be held accountable.

If the investigation determines that there is credible evidence that Iraqi military units have committed a gross violation of human rights, under US law the US would be prohibited from providing those units any assistance, including training and weapons.³⁴

☛ **US Investigation of US Airstrike That Kills 19 at MSF Trauma Center in Afghanistan [2015]**

On 25 November, the Commanding General of US Forces in Afghanistan announced the results of a US military investigation of a 3 October US airstrike in Konduz, Afghanistan which significantly damaged a MSF trauma center and killed 30 civilians, including patients

³⁰ Ibid.

³¹ Watson, above n 28.

³² Ames Gordon Meek, Brian Ross, Rym Momtaz and Alex Hosenball, “‘Dirty Brigades’: US-Trained Iraqi Forces Investigated for War Crimes”, *ABC News*, 11 March 2015, <<http://abcnews.go.com/International/dirty-brigades-us-trained-iraqi-forces-investigated-war/story?id=29193253>>.

³³ ‘Human Rights Council discusses report on abuses in Iraq committed by the so-called Islamic State in Iraq and the Levant’, United Nations Human Rights Office of the High Commissioner, 25 March 2015, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15755&LangID=E>>.

³⁴ 10 USC § 362 Prohibition on use of funds for assistance to units of foreign security forces that have committed a gross violation of human rights.

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and MSF staff.³⁵ MSF and a number of humanitarian non-governmental organizations condemned the attack as a deliberate and blatant breach of international humanitarian law³⁶ and called for an independent investigation and a fact-finding commission as provided for in Additional Protocol I to the 1949 Geneva Conventions.³⁷

At the time of the air strike, US special forces members had been fighting continuously for several days in and around Konduz and coordinated with a US warplane to attack a building suspected of containing members of the Taliban who were believed to be engaging Afghan security forces. Although MSF had notified the US military of the existence and location of its trauma center in Konduz, the US military misidentified the MSF facility as the Taliban occupied structure. This was despite the Taliban occupied structure being 475 meters away from the MSF facility. The resulting air strike lasted approximately 30 minutes, and at least 17 minutes of which were after MSF contacted a US military operations center to report the strike.

On 25 November, US Army General John Campbell, the US military commander in Afghanistan, announced (but did not release) the findings of a US military investigation of the airstrike. Campbell began by offering condolences to the victims of what he referred to as a 'devastating event.' General Campbell contended that '[n]o nation does more to prevent civilian casualties than the United States, but we failed to meet our own high expectations on October 3.'

General Campbell explained that, 'US forces would never intentionally strike a hospital or other protected facilities' and that the investigation had concluded that the airstrike was a tragic mistake resulting from avoidable human error compounded by technical, mechanical, and procedural failures.³⁸ The report found that 'fatigue and high operation tempo contributed to the tragedy' and 'identified failures in systems and processes that, while not the cause of the strike on the MSF Trauma Center, contributed to the incident.' The system and process failures included 'the loss of electronic communication systems on aircraft, the nature of the planning and approval process employed during operations at Kunduz City and the lack of a single system to vet proposed targets against a no-strike list.' General Campbell claimed that the US had reviewed these failures and implemented corrections. In terms of accountability, General Campbell said that:

We have learned from this terrible incident. We'll also take appropriate administrative and disciplinary action through a process that is fair and thoroughly considers the available evidence. The cornerstone of our military justice system is the independence of decision-makers following a thorough investigation such as this one. We will study what went wrong and take the right steps to prevent it in the future. I won't discuss individual cases because our system requires fairness and the discretion of individual decision-makers. I can tell you that those individuals most closely associate with the incident have

³⁵ 'Department of Defense Press Briefing by General Campbell via teleconference from Afghanistan', DoD, 25 November 2015,

<<https://www.defense.gov/News/Transcripts/Transcript-View/Article/631359/departement-of-defense-press-briefing-by-general-campbell-via-teleconference-fro/>> ('Campbell').

³⁶ 'Médecins Sans Frontières (MSF) denounces blatant breach of International Humanitarian Law' (Statement by Joanne Liu, President MSF International, 6 October 2015),

<<http://www.msf.org/en/article/m%C3%A9decins-sans-fronti%C3%A8res-msf-denounces-blatant-breach-international-humanitarian-law>>.

³⁷ 'Afghanistan: Enough. Even war has rules', Medecins Sans Frontieres, 7 October 2015,

<<http://www.msf.org/en/article/afghanistan-enough-even-war-has-rules>>. While Additional Protocol I to the 1949 Geneva Conventions does provide for a fact-finding commission, the process has never been utilized.

³⁸ Campbell, above n 35; see also Rob Nordland, 'US General Says Kunduz Hospital Strike was "Avoidable"', *The New York Times*, 25 November 2015, <<http://www.nytimes.com/2015/11/26/world/asia/afghanistan-kunduz-hospital-airstrike.html>>.

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been suspended from their duties, pending consideration and disposition of administrative and disciplinary matters.

Issues — United States Army

- *Shepherd v Bundesrepublik Deutschland* [2015] European Court of Justice (Second Chamber) Request for a Preliminary Ruling from the Bayerischer Verwaltungsgerichtshof (26 February 2015)

The European Court of Justice (ECJ), ruled that Shepherd, an enlisted Soldier (Specialist) who had deserted from the US Army, must prove that there is a high likelihood that the US was committing war crimes in Iraq and that his duties would be indispensable to committing those crimes to qualify as a refugee in Germany.³⁹

In 2007, Shepherd was serving in the US Army as a helicopter mechanic and stationed in Germany. After learning that he would be deploying for the second time to the armed conflict in Iraq, Shepherd applied for and went on leave (vacation) from the Army, but never returned to duty. In 2008, he applied for political asylum in Germany claiming that the war in Iraq was illegal and that for him to redeploy to Iraq would require him to commit war crimes.⁴⁰ On 31 March 2011, Germany's federal interior ministry's office for migration and refugee ruled that he failed to satisfy the criteria for political asylum and that his disagreement with the US Army was not because of his political beliefs but because of his failure to fulfill his military obligations. The judge noted that the chance that Shepherd might be involved in a suspected war crime in Iraq was not sufficient for political asylum. Instead Shepherd would have to, but failed to, prove that he himself would take part in illegal acts.

Shepherd appealed the decision and in 2013, a German administrative court requested clarification on point of European Law from the ECJ, the decision on which forms the basis of this entry. The German Court asked for clarification on the application of the Qualification Directive, which establishes minimum standards and common criteria for European Union Member States to consider asylum petitions.

The ECJ provided the requested clarification, ruling that the Qualification Directive applied to all military personnel, including support personnel like Shepherd, but only concerned situations in which the applicant's military service would be reasonably likely to provide indispensable support to the preparation or commission of war crimes. The ECJ ruled that Shepherd would have to establish that is highly likely that the US would commit war crimes in the future. Significantly, the ECJ stated that Shepherd's refusal to perform military service must constitute the only means by which he could avoid participating in war crimes and that if he had not availed himself of the process to apply for conscientious objector status (and he had not) then he was not entitled to protection under the qualification directive unless he could prove that no such procedure would have been available to him. Finally, the ECJ ruled that if the German Administrative Court were to determine that Shepherd had not established that his service in the US Army would require him to commit war crimes, the fact that Shepherd faced punishment for desertion did not qualify him to claim asylum on ground of fear of imprisonment in, or persecution by, the US.

³⁹ *Shepherd v Bundesrepublik Deutschland*, European Court of Justice (Second Chamber) Request for a Preliminary Ruling from the Bayerischer Verwaltungsgerichtshof (26 February 2015), <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=162544&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=440909>>.

⁴⁰ Andreas Buerger, 'Army Deserter Seeks Asylum in Germany over Iraq', *Reuters*, 27 November 2008, <<http://www.reuters.com/article/us-germany-asylum-usa-idUSTRE4AQ73C20081127>>.

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The ECJ decision returns Shepherds' appeal to the German Administrative Court.

☛ Army re-opens investigation into killing of Afghanistan civilians [2015]

On 24 August, the US Army's Criminal Investigation Command (CID) confirmed that it had re-opened an investigation into the murder of at least 17 Afghan civilians between November 2012 and March 2013, which Afghan officials had blamed on a US Army Special Forces team.⁴¹

Beginning in November 2012, family members and local authorities in Wardak province began reporting that the last they had seen of approximately ten individuals was when they were detained by various combinations of US soldiers, Afghan interpreters, and Afghan National Army (ANA) soldiers. As a result, the President of Afghanistan, Hamid Karzai, established a series of fact finding delegations, though none were able to identify the perpetrators behind the disappearances.

In January 2013, the International Security Assistance Force (ISAF) issued a press release acknowledging the existence of a videotape depicting a detainee being assaulted but claiming that the detainee was in the sole custody of the ANA, that the individual assaulting the detainee was Zakaria Kandahari, an Afghan civilian interpreter, and that there were no coalition forces present or involved in the incident.⁴²

In late February 2013, President Karzai ordered the US Special Forces in Wardak to vacate the province within two weeks, claiming that they had harassed, annoyed, tortured and even murdered innocent civilians.⁴³ The following month Afghan and US officials agreed that the US Special Forces could return to Wardak in exchange for the Afghan government receiving full control of the Bagram prison facility.⁴⁴

Between April and June 2013, family members claimed to have found the bodies of the ten missing individuals near a base used by US Army Special Forces. On 7 July, Afghan officials arrested Kandahari and accused him of murder. On 11 July 2013, the commander of the ISAF requested that the Army's CID conduct an overarching investigation of all allegations against international military forces that arose in Wardak province between November 2012 and March 2013.⁴⁵ That investigation was subsequently closed but the findings were not made public.⁴⁶

On 11 August 2014, Amnesty International included the allegations in a report it published on failures of accountability for civilian casualties caused by western military operations in Afghanistan.⁴⁷ On 6 November, Rolling Stone Magazine published a story

⁴¹ Rod Nordland, 'US Army Reopens Criminal Inquiry Into Afghan Civilians Deaths', *The New York Times*, 24 August 2015, <http://www.nytimes.com/2015/08/25/world/asia/us-army-reopens-criminal-inquiry-into-afghan-civilians-deaths.html?_r=0>.

⁴² Nathan Hodge and Habib Khan Totakhil, 'Arrest of Abuse Suspect is Welcomed by Afghans', *The New York Times*, 9 July 2013, <<http://archive.is/qOZTh#selection-4039.0-4039.352>>.

⁴³ 'Karzai Expels US Forces From Afghan Province', *Al Jazeera*, 24 February 2013, <<http://www.aljazeera.com/news/asia/2013/02/2013224145944907284.html>>. President Karzai later reversed his decision and the expulsion order.

⁴⁴ Hamid Shalizi, 'Deal Likely to Keep US Elite Forces in Key Afghan Province – Official', *Reuters*, 17 March 2013, <<http://www.reuters.com/article/uk-usa-afghanistan-prisoners-idUKBRE92G04Y20130317>>; Mark Mazzetti, 'US and Afghans Reach Deal on Bagram Prison Transfer', *The New York Times*, 23 March 2013, <<http://www.nytimes.com/2013/03/24/world/asia/us-and-afghanistan-reach-deal-on-bagram-prison.html>>.

⁴⁵ 'Afghanistan Mid-Year Report 2013 Protection of Civilians in Armed Conflict', UN Assistance Mission Afghanistan, July 2013, <https://unama.unmissions.org/sites/default/files/2013_mid-year_report_eng.pdf>.

⁴⁶ Nordland, above n 41.

⁴⁷ 'Afghanistan: Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan', *Amnesty International*, 11 August 2014,

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implicating the US Army Special Forces Team for the Wardak deaths.⁴⁸ That same day Human Rights Watch issued a report calling on the US to investigate the deaths.⁴⁹ On 29 November 2013, three UN Special Rapporteurs sent a letter to the Deputy Chief of the US Mission to the United Nations requesting information on the allegations of Special Forces misconduct.⁵⁰

It's unclear what happened between 2013 and 2015 that prompted the US military to reopen the criminal inquiry, when it had done so, and when the new investigation might be completed. The New York Times claimed that a senior official speaking on condition of anonymity said the investigation had been reopened in the recent weeks before the 24 August 2015 acknowledgement by the US Army's CID. As part of that acknowledgment, a CID spokesman said that 'information and leads were identified that demand further investigation' and that CID was 'fully committed to investigating the allegations until we are confident that we have exhausted all leads and pertinent information before closing the investigation.' The spokesperson further explained that '[a]ll death investigations conducted by [CID] Agents are conducted to a thoroughness standard, not necessarily to a timetable' and that the '[re]investigation has yet to be finalized.'

• Delay in Involuntary Separation of US Army Soldier Reprimanded for Beating Suspected Child Rapist in Afghanistan [2015]

On 6 October, the US Army announced the postponement of the involuntary administrative separation of Martland, a non-commissioned officer (Sergeant First Class).⁵¹ Martland's separation followed a written reprimand he received several years earlier for his role in the beating of an Afghan police commander suspected of child rape.

In 2011, an Afghan mother brought her 12-year-old son to the combat outpost to which SFC Martland's Special Forces unit was assigned.⁵² During an examination by a Special Forces medic the boy claimed that he had been assaulted by Abdul Rahman, a local Afghan police commander. Learning of the mother's actions, Rahman purportedly beat her. This led SFC Martland and US Army Captain Daniel Quinn to question Rahman. According to SFC Martland and CPT Quinn, Rahman laughed at and admitted the accusation, so they proceeded to repeatedly beat, kick and 'body slam' the police commander while expelling him from the outpost. Rahman reported SFC Martland and CPT Quinn's actions, leading to both being relieved from their positions and receiving written reprimands.⁵³ SFC Martland

<<https://www.amnesty.org/en/documents/ASA11/006/2014/en/>>.

⁴⁸ Matthieu Aikins, 'The Kill Team', *Rolling Stone*, 6 November 2013, <<http://www.rollingstone.com/feature/a-team-killings-afghanistan-special-forces>>. Kandahari later blamed the US Army Special Forces Team for the Wardak deaths. Ultimately Afghanistan convicted Kandahari of treason, for which he received a 20-year prison sentence.

⁴⁹ 'US: Investigate Killings in Afghanistan', *Human Rights Watch*, 6 November 2013, <<https://www.hrw.org/news/2013/11/06/us-investigate-killings-afghanistan>>.

⁵⁰ 'Letter from the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the United States Mission to the United Nations' (29 November 2013), <https://spdb.ohchr.org/hrdb/24th/public_-_AL_USA_29.11.13_%2817.2013%29.pdf>.

⁵¹ Michele Tan, 'Army Secretary Delays Separation of Green Beret Who Beat Up Afghan Commander', *Army Times*, 6 October 2015, <<https://www.armytimes.com/story/military/2015/10/06/army-secretary-delays-separation-green-beret-who-beat-up-afghan-commander/73483506/>>.

⁵² Lucas Tomlinson, 'Army kicking out decorated Green Beret who stood up for Afghan rape victim', *Fox News*, 21 August 2015, <<http://www.foxnews.com/politics/2015/08/20/army-kicking-out-decorated-green-beret-who-stood-up-for-afghan-rape-victim.html>>.

⁵³ Quinn subsequently resigned his commission, ending his Army service.

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was eventually reassigned to the US Special Forces Underwater Operations School in the US, and was named runner up for the 2014 Special Warfare Training Group Instructor of the Year from a pool of 400 Special Forces Soldiers.

In February 2015, SFC Martland was subject to a 'Qualitative Management Program' review board, which considers whether Soldiers with derogatory information in their personnel file should continue to serve in the Army. The board determined that SFC Martland be involuntarily separated not later than 1 November 2015. On 14 September 2015, the US Army's Human Resources Command disapproved SFC Martland's request to appeal the board's determination.

A week later, The New York Times published a story claiming that for a number of years the US military had instructed US service members to ignore Afghan sexual assault of young boys.⁵⁴

The story only increased the already considerable support members of the US Congress expressed for SFC Martland.⁵⁵ After the Chairman of the House Armed Forces Committee both wrote and called the Secretary of the Army, the Secretary agreed that SFC Martland could remain on active duty until 1 January 2016, in order to pursue relief with the Army Board for the Correction of Military Records.

Issues —United States Navy

• Navy SEAL Cover-up of Afghanistan detainee killing [2015]

On 17 December, The New York Times published a lengthy investigative report on how the US Navy handled allegations that US Navy SEALs and Afghan police beat several detainees, one of whom later died, at a combat outpost in Afghanistan in 2012.⁵⁶

The report details how, on 21 May 2012, following an IED explosion at a checkpoint manned by an Afghan Local Police (ALP) unit in the Kalach region of Eastern Afghanistan, the ALP detained several suspects from a local village and took them to the US military outpost for questioning. Four US Army soldiers stationed at the outpost later told Navy Criminal Investigative Service (NCIS) investigators that they had observed three SEALs (then Petty Officer First Class David Swarts and Daniel D'Ambrosio and then Petty Officer Second Class Xavier Silva) and members of the Afghan police physically abusing the detainees, beating them with fists, rifle butts, dropping rocks on the detainee's crotches, standing on the detainee's heads and firing weapons near their heads. The detainees were released later that day, but one of them, Mr Hashem, purportedly collapsed and died while walking away from the outpost. The NCIS investigators also interviewed several Afghans and US Navy personnel, who, to varying degrees, also described some of the same abuses.

US Navy Commander Mike Hayes, in charge of the SEAL Team, when learning of the US Army Soldiers report, had called NCIS to investigate and also ordered the three SEALs accused of abuse, and their officer in charge, US Navy Lieutenant Junior Grade Jason Webb, to surrender their firearms. In June 2012, Commander Hayes ordered all four SEALs to

⁵⁴ Joseph Goldstein, 'US Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies', *The New York Times*, 20 September 2015, <<https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html>>. The story detailed a number of examples, including that involving Martland and Quinn.

⁵⁵ Prior to The New York Times story, a number of members of the US Congress had written to the Secretary of the Department of Defense questioning the review board's decision.

⁵⁶ Nicholas Kulish, Christopher Drew and Matthew Rosener, 'Navy SEALs, a Beating Death and Claims of a Cover-up', *The New York Times*, 17 December 2015, <http://www.nytimes.com/2015/12/17/world/asia/navy-seal-team-2-afghanistan-beating-death.html?_r=1>.

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return to the SEAL Team's home base in the United States for disciplinary proceedings. In the US, a US Navy military lawyer recommended to the SEAL commander there that the three enlisted SEALs be charged with assault and failure to report the abuse committed by the Afghans and that Lieutenant Webb be further investigated. The military lawyer also noted both logistical and evidentiary challenges in prosecuting a case in the US where the crime scene, victims, and some witnesses were in Afghanistan. US Navy Captain Robert Smith, the commander of all east coast-based SEALs elected to pursue Captains Mast, a disciplinary process utilized for minor infractions, and only for a charge of failing to report abuse committed by the Afghans.

Captains Mast is not open to the public and lawyers are not involved in the proceedings. Two of the four Army witness testified about what they observed. The other two Army witnesses were not called. Commander Hayes, the accused SEALs' commander in Afghanistan, submitted a letter to Captain Smith recommending that all four SEALs be removed from Naval Special Warfare. Captain Smith found the SEALs not guilty of the one charge of failing to report detainee abuse and issued them non-punitive letters of instruction which suggested that they could improve their leadership and decision making. Captain Smith also reassigned the four within Navy Special Warfare.⁵⁷

As of the end of 2015, the US Navy had not responded to or commented on The New York Times report. Of note, The New York Times also obtained a copy of the NCIS investigation, which is available online.⁵⁸

Issues — United States Marine Corps

• US Marine Corps Major Jason Brezler Separation Upheld [2015]

On 30 November, the acting Assistant Navy Secretary approved the administrative separation of Brezler, a commissioned officer (Major) in the reserves, stemming from his mishandling of classified information on an Afghan police chief suspected of collaboration with the Taliban and of pedophilia against local boys.⁵⁹ Major Brezler was the subject of a 2014 entry.

Overview – United States Detention Practice

US detention policy had a challenging start to 2015. In January, Mohamedou Ould Slahi's 466-page handwritten account of his experience as a detainee at Guantanamo, 'Guantanamo Diary' was published,⁶⁰ becoming a best seller in both the US and UK. Also in January, the Court of Military Commission Review (CMCR) set aside the findings and sentence of David Hicks, an Australian national who had pled guilty to providing material support to the

⁵⁷ Two of the enlisted SEALs and Lt Webb have since been promoted.

⁵⁸ 'Full NCIS Investigative Report', *The New York Times*, 17 December 2015, <<https://www.nytimes.com/interactive/2015/12/04/world/asia/document-full-ncis-report.html>>.

⁵⁹ Dan Lamothe, 'Decision to Force Out Marine Who Sent Warning of Insider Attack Upheld', *Washington Post*, 30 November 2015, <https://www.washingtonpost.com/news/checkpoint/wp/2015/11/30/decision-to-force-out-marine-who-sent-warning-ahead-of-insider-attack-upheld/?utm_term=.ba271e29b594>. Seventeen days after Brezler sent an email with a classified attachment from his civilian email account warning Marines in Afghanistan about the police chief, an Afghan aide to the police chief shot four US Marines, killing three of them. Afghanistan determined the aide was under the age of 18 and prosecuted him as a juvenile. In July 2014 he was convicted of murder and sentenced to 7 and a half years in confinement, the maximum allowed for a minor under Afghan law.

⁶⁰ Mark Danner, "'Guantanamo Diary' by Mohamedou Ould Slahi", *The New York Times*, 20 January 2015, <<https://www.nytimes.com/2015/02/15/books/review/guantanamo-diary-by-mohamedou-ould-slahi.html>>.

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al Qaeda terrorist network in 2007. This followed a 2014 decision by the Court of Appeals for the DC Circuit in *Bahlul*, vacating his convictions for providing material support to terrorism and solicitation.⁶¹

Nonetheless, on 22 February, the Chief Prosecutor at the Military Commissions expressed the view that both the *Hicks* and *Al Bahlul* decisions validated the legitimacy of the Military Commissions, stating that:

Although the US CMCR's ruling is one that some have dramatically suggested portends demise of military commissions, the decision instead affirms that they are a resilient part of our justice and counterterror institutions. They are capable of confronting charging theories pursued in 2007 (Hicks) and 2008 (Al Bahlul) that ultimately proved improvident and of correcting defects in the legal framework pursued by those who established original military commissions in November 2001 without congressional sanction (*Hamdan v Rumsfeld*, 548 U.S. 557 (2006)). Wednesday's decision reflects that our core legal principles of judicial independence, access to justice, and the rule of law endure in military commissions.⁶²

Three days after the Chief Prosecutor issued that statement, on 25 January, a Military Judge halted the commission against those alleged to have committed the 9/11 attacks because of what the Military Judge characterized as attempts by the Government to unlawfully influence the Military Commissions Judiciary.⁶³ Earlier in January, the DoD had issued an order based on a request from the Military Commissions Convening Authority that the Military Commissions Judge be required to permanently relocate to Guantanamo to accelerate the pace of litigation.

Although the DoD rescinded the Military Judge relocation order, on 4 March, a different Military Commissions judge ruled that the Convening Authority and several members of his staff needed to be replaced.⁶⁴ As that Military Judge explained:

The appearance of unlawful command influence is as devastating to the military as the actual manipulation of a given trial. Thus, the resolution of an issue involving unlawful command influence, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of unlawful command influence.

Detainee Challenges – United States District Court

☛ *Mohammed Jawad v Robert M Gates et al* [2015] (DDC Civil Action No 14-811)

On 8 July, the District Court for the District of Columbia (DDC) dismissed Mr Jawad's lawsuit, which alleged that the US subjected him to cruel, inhumane and degrading treatment

⁶¹ *Bahlul v United States*, 767 F 3D 1 (DC Cir, 2014).

⁶² 'Chief Prosecutor Mark Martins Remarks at Guantanamo Bay', *Just Security*, 22 February 2015, <<https://www.justsecurity.org/wp-content/uploads/2015/02/Statement-of-the-Chief-Prosecutor-22-February-2015-1-copy.pdf>>.

⁶³ *United States v Khalid Shaikh Mohammad et al* (AE 343 Order on Defense Motion to Dismiss Unlawful Influence on Trial Judiciary, 27 February 2015), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE343E\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE343E).pdf)>.

⁶⁴ *United States v Abd Al Rahim Hussayn Muhammad Al Nashiri*, (Military Commissions AE 332U Order (Corrected Copy) Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary, 4 March 2015), <[http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE332U\(ORDER\(Corrected%20Copy\)\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE332U(ORDER(Corrected%20Copy)).pdf)>.

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and torture while detaining him, initially in Afghanistan and later at Guantanamo.⁶⁵ Mr Jawad is an Afghan national who the US transferred to Guantanamo in February 2003.

The Court wrote that:

While this Court shares [Mr Jawad's] condemnation of the treatment and conditions that he was subjected to in Guantanamo and agrees that such conduct is contrary 'to fundamental American values of justice' [quoting from Mr Jawad's filing], it is simply not correct to argue that it is within this Court's power to create a remedy for what happened there. Both Congress and the DC Circuit, in a line of cases involving claims that mirror those of Mohammed Jawad, have squarely addressed plaintiff's claims and have made it clear that this Court, which is bound by the laws of Congress and DC Circuit precedent, must dismiss plaintiff's complaint with prejudice.

☛ *Mukhtar Yahia Naji Al Warafi v Barack H Obama et al* [2015] (DDC Civil Action No 09-2368)

On 30 July, the DDC denied Mr Warfari's habeas petition challenging his continued military detention at Guantanamo.⁶⁶ Mr Warfari is a Yemini national who the US transferred to Guantanamo in May 2002.

The petition presented an interesting question as to when law of armed conflict detention ends. Mr. Warfari argued that because he was detained as a member of the Taliban's armed forces and since the US and the Taliban were no longer in an armed conflict with each other, that his continued detention was impermissible. In support of his petition, Mr Warfari referenced December 2014 remarks by US President Barack Obama that 'this month, after more than 13 years, our combat mission in Afghanistan will be over' and 'this month America's war in Afghanistan will come to a responsible end.' The Court found that while the President's remarks were relevant, it was not the only evidence that mattered. The Court referenced the 2010 DC Circuit Court of Appeals decision in *Al-Bihani* for the proposition that the Geneva Conventions 'codify what common sense tells us must true: release is only required when the fighting stops.'⁶⁷ The Court found that the US government had offered 'convincing evidence that US involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped.'

☛ *Fayez Mohammed Ahmed Al Kandari v United States of America et al* [2015] (DDC Civil Action No 15-329)

On 31 August, the DDC dismissed Mr Kandari's petition for a writ of habeas corpus.⁶⁸ Mr. Kandari is a Kuwaiti national who the US transferred to Guantanamo in May 2002.

The basis for Mr Kandari's petition was similar to Mr Warfari, that the purported end of active hostilities in Afghanistan ended any basis of detention under the law of armed conflict. The Court responded to Mr Kandari in the same manner as it had to Mr Warfari, denying the petition. The Court found that the government had established the lawfulness of

⁶⁵ *Mohammed Jawad v Robert M Gates*, (Memorandum Opinion, DDC Civil Action No 14-811, 8 July 2015) <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0811-39>.

⁶⁶ *Mukhtar Yahia Naji Al Warafi v Barack H Obama et al*, (Memorandum Opinion, DDC Civil Action No 09-2368, 30 July 2015), <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv2368-95> ('*Al Warafi*').

⁶⁷ *Ibid* 9 citing *Al Bihani v Obama*, 590 F.3d 866 at 874 (DC Cir 2010).

⁶⁸ *Fayez Mohammed Ahmed Al Kandari v United States of America et al*, (Classified Memorandum Opinion, DDC Civil Action No 15-329, 31 August 2015), <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv0329-24>.

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Mr Kandari's detention because active hostilities against al-Qaeda, the Taliban and associated forces in Afghanistan remained ongoing.

- *Abu Wa'el (Jihad) Dhiab v Barack H Obama et al* [2015] (DDC Civil Action No 05-1457)

On 27 October, the DDC denied the US government's motion that the Court reconsider its 3 October 2014 order granting a motion to unseal classified video footage of the forcible cell extraction and force feeding of Mr Dhiab at Guantanamo.⁶⁹ Mr Dhiab is a Syrian national who the US transferred to Guantanamo in August 2002.

In 2013, Mr Dhiab applied for a preliminary injunction against the US government force feeding him in response to his hunger strike. Dhiab's lawsuit was the subject of a 2013 entry. In June 2014, various news organizations filed a motion that the Court unseal and release 32 videotapes of Dhiab being forcibly removed from his cell and then force fed.⁷⁰ On 3 October 2014, the DDC granted the motion, which the US government appealed. In December, the US transferred Mr Dhiab to Uruguay.⁷¹

On 29 May 2015, the DC Circuit ruled that it lacked jurisdiction to review the government's appeal and returned the case to the DDC to consider the government's supplemental declarations on the harm release of the tapes would cause. On 15 July 2015, the Government moved that the DDC reconsider its 3 October 2014 order. It was that motion that, on 27 October, the DDC denied, writing that:

Transparency about the actions of our government—including the judiciary—is one of the cornerstones of our democracy. This Court has found that the Government's justifications for barring the American public from seeing the videotapes are not sufficiently rational and plausible to justify barring release of the videotapes, which are part of the Court's official records, from the eyes and ears of the American public.

The US government is appealing the denial of its motion for reconsideration, thus returning the issue to DC Circuit.

- *Mohamedou Ould Salahi v Barack H Obama et al* [2015] (DDC Civil Action No 05-0569)

On 17 December, the DDC denied Mr Salahi's motion for an order to show cause.⁷² The US has detained Salahi, a Mauritanian national, at Guantanamo since 2002. Mr. Salahi had requested that the Court order the US DoD to (1) promptly provide him a hearing before a

⁶⁹ *Abu Wa'el Dhiab v Barack Obama et al*, (Memorandum Opinion, DDC Civil Action No 05-1457, 27 October 2015), <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1457-408>.

⁷⁰ The 2014 Report discusses a US military nurse refusing to force feed detainees, including Mr Dhiab - Correspondents Report – United States with commentary by Chris Jenks (2014) 17 *YIHL*.

⁷¹ Felicia Schwartz & Taos Turner, 'US Transfers Six Prisoners from Guantanamo Bay to Uruguay', *Wall Street Journal*, 7 December 2014,

<<https://www.wsj.com/articles/u-s-transfers-six-prisoners-from-guantanamo-bay-to-uruguay-1417949714>>.

The detainees' relocation to Uruguay has not been smooth. In February 2015, Mr Dhiab held a press conference in which he said he felt he had been transferred from one prison, Guantanamo, to another, Uruguay.

Controversy erupted in Uruguay later that month when the transferred detainees refused to take jobs the Government of Uruguay offered them. See, for example, 'For ex-Guánatánamo inmates freedom in Uruguay brings new challenges', *The Guardian*, 2 March 2015, <<https://www.theguardian.com/world/2015/mar/02/ex-guantanamo-inmates-freedom-uruguay-challenges>>.

⁷² *Mohamedou Ould Salahi v Barack H Obama*, (Memorandum Opinion, ED Va Civil Action No 05-0569, 17 December 2015),

<https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0569-478>.

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Periodic Review Board (2) cease interfering with his access to habeas review at DDC and (3) cease imposing arbitrary and severe restrictions on his conditions of confinement.

The threshold question was whether Salahi's claim that the government must fix a date for his PRB hearing sounds in habeas. The Court found that the claim did not sound in habeas, and thus that the Court did not have jurisdiction to substantively consider that, or Mr Salahi's other claims.

US Military Commission Appeals

Court of Appeals for the District of Columbia Circuit

• *In Re: Abd Al-Rahim Hussein Muhammed al-Nashiri* [2015] 91 F3d 71 (DC Cir 2015)

On 23 June a three-judge panel of the DC Circuit unanimously rejected a mandamus petition by Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri challenging the manner by which military judges are assigned to the CMCR.⁷³ Mr Al-Nashiri is a Yemeni national who the US transferred to Guantanamo in September 2006. The allegations against Mr Al-Nashiri are the subject of a 2014 entry. Significant in this ruling was that the Court acknowledged that it does have mandamus jurisdiction over the CMCR.

On 6 October, the Court issued an order consolidating two separate appeals by Mr al-Nashiri and directing the parties to propose a briefing schedule.⁷⁴

• *Al-Bahlul v United States* 792 F3d 1 (DC Cir 2015)

On 25 September, the DC Circuit vacated a 12 June decision by a three-judge panel of the same court and announced rehearing of Mr al-Bahlul's case *en banc*.⁷⁵ Mr Bahlul is a Yemeni national who the US transferred to Guantanamo in January 2002. A 2014 entry described how the DC Circuit had vacated Mr Bahlul's 2008 convictions for providing material support for terrorism and for soliciting others to commit war crimes but affirmed his conviction for conspiracy.

On 12 June, a three-judge panel of the DC Circuit had vacated Mr al Bahlul's conviction for inchoate conspiracy.⁷⁶ Following that, the US government had motioned that the Court rehear the case *en banc*. The Court agreed, and directed the parties to focus on two issues:

(1) The standard of appellate review of Bahlul's conviction for conspiracy to commit war crimes.

(2) Whether the Define and Punish Clause of Article I of the Constitution gives Congress power to define as an Offense against the Law of Nations – triable before a law-of-war military commission – a conspiracy to commit an Offense against the Law of Nations, to

⁷³ *In Re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, (DC Cir Civil Action No 14-1203, 23 June 2015), <[https://www.cadc.uscourts.gov/internet/opinions.nsf/C0C9707DD565400985257E6D00539C3E/\\$file/14-1203-1559094.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/C0C9707DD565400985257E6D00539C3E/$file/14-1203-1559094.pdf)>.

⁷⁴ *In Re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, (Order, DC Cir Civil Action Nos. 15-1023 and 15-5020, 6 October 2015), <<https://www.justsecurity.org/wp-content/uploads/2015/10/Nashiri-Order.pdf>>.

⁷⁵ *Ali Hamza Ahmad Suliman al Bahlul v United States of America*, (Order, DC Cir en banc Civil Action No 11-1324, 25 September 2015), <<https://www.justsecurity.org/wp-content/uploads/2015/09/Bahlul-en-banc-order-Sept2015.pdf>>.

⁷⁶ Zoe Bedell, 'An Overview of the DC Circuit's Opinion in *Al Bahlul v United States*', *Lawfare*, 16 June 2015, <<https://lawfareblog.com/overview-dc-circuits-opinion-al-bahlul-v-united-states>>.

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wit, a conspiracy to commit war crimes; and whether the exercise of such power transgresses Article III of the Constitution.

Oral argument was held on 1 December. A ruling was still pending by the end of 2015.

Court of Military Commission Review

☛ *Hicks v United States* [2015] (CMCR 13-004)

On 18 February, the CMCR set aside the findings and sentence of David Hicks, an Australian national who had pled guilty to providing material support to the al Qaeda terrorist network in 2007.⁷⁷

The primary issue on appeal was whether or not Mr Hicks pre-trial waiver of appellate review as was effective. On 26 March 2007, Mr Hicks, his defense counsel, and the convening authority each signed a pre-trial agreement. Mr Hicks offered to plead guilty to one specification of providing material support to a terrorist organization. In exchange, the convening authority agreed to dismiss with prejudice a second specification of providing material support to a terrorist organization, to not present evidence in aggravation during sentencing, to not approve a sentence of confinement greater than seven years, to suspend confinement in excess of nine months and to transfer Mr. Hicks to the custody and control of the Government of Australia not later than sixty days from the date upon which the sentence was announced. Mr Hicks also agreed to waive his rights to appeal:

In exchange for the undertakings made by the United States in entering this Pre-trial Agreement, I voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commission Act of 2006, or any other provision of the United States or Australian law.

On 30 March 2007, Mr Hicks pled and was found guilty of the one specification of material support. The military commission sentenced him to seven years confinement. Consistent with the pretrial agreement, on 1 May 2007, the Convening Authority suspended the confinement beyond 9 months. Mr. Hicks served his period of confinement and was returned to Australia.

On 5 November 2013, Mr Hicks appealed his conviction to the CMCR. Mr. Hicks argued that his waiver of appellate rights at trial was 'irrelevant as a matter of law' because the statute governing military commissions required that such waiver be filed not before trial but post-trial and within 10 days after the convening authority took final action. The CMCR agreed and also found that it had discretion to not apply the forfeiture doctrine to Mr Hick's several year delay in asserting his claim. Having resolved the jurisdictional issues, the CMCR resolved the substantive aspects in one paragraph. Applying the 2014 *en banc* decision from the DC Circuit in *Bahlul*, which found a plain ex post facto violation in the prosecution for the offense of providing material support to terrorism, the CMCR vacated Mr Hicks finding of guilty and the sentence.

⁷⁷ *David M Hicks v United States of America* (CMCR 13-0040, 18 February 2015), <[http://www.mc.mil/Portals/0/pdfs/hicks13-004/Hicks%20v.%20United%20States,%202013-004%20Decision%20\(Feb%2018%202015\).pdf](http://www.mc.mil/Portals/0/pdfs/hicks13-004/Hicks%20v.%20United%20States,%202013-004%20Decision%20(Feb%2018%202015).pdf)>.

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US Military Commissions Cases

- *United States v Khalid Shaikh Mohammad et al* [2015] (Mil Comm'n)
- <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE254JJ\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE254JJ).pdf)> [Interim order banning female guards from handling the 9/11 defendants]
- <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS19Oct2015\)-AM1.pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS19Oct2015)-AM1.pdf)> [Transcript of Mr. Walid bin Attash request to represent himself]
- <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013P\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013P).pdf)> [Protective order on handling of classified information]

On 7 January, a Military Judge issued an interim ban on female guards handling the 9/11 defendants.⁷⁸ The ban was in response to a request by one defendant, Mr Walid bin Attash, though the other defendants later joined the request. The defendants claimed that to allow female soldiers to touch them in moving the defendants to and from legal meetings, court, and the detention facility was culturally and religiously insensitive. The Government contended that a gender-based ban was sexism. By March, 15 US service members stationed at Guantanamo had filed equal opportunity (EO) discrimination claims based on the ban. Notice of the EO claims in turn led the Government to request that the Military Judge reconsider the interim order and the defense to request that the Military Judge not rule on the request. On 12 March, the Military Judge denied the government's request.⁷⁹

In October, just days before the Military Commission was scheduled to revisit the ban, the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff testified to Congress and criticized the order, with the Secretary calling it 'outrageous.'⁸⁰ This led the Defense to request that the Military Commission abate the proceedings, which the Military Judge denied, ruling that any issues raised by the comments would be addressed in the normal course of the proceedings..

The proceedings were not conducted in 2015. At the same time as the Military Commissions were to resolve the female guard issue, on 19 October, Mr Attash, a non-lawyer, indicated a desire to represent himself.⁸¹ The combination of the 9/11 cases being capital and the accused not having access to some legal materials or any classified evidence led some commentators to refer to pro se representation as opening Pandora's box. In response to Mr Attash's comments, the Military Judge issued written advice explaining the 'difficulties and dangers of self-representation.'⁸² The Military Judge told Mr Attash that he could either proceed with the status quo of lawyers representing him or, if Mr Attash wanted

⁷⁸ *United States v Khalid Shaikh Mohammad et al*, (US Military Commissions AE 254JJ, Interim Order, Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, 7 January 2015), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE254JJ\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE254JJ).pdf)>.

⁷⁹ <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE254NNN\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE254NNN).pdf)>.

⁸⁰ Carol Rosenberg, 'Senior Defense Dept Officials Decry Guantanamo Judge's Female Guard Ban', *Miami Herald*, 27 October 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article41615208.html>>.

⁸¹ *United States v Khalid Shaikh Mohammad et al*, (Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2), Hearing Dated, 19 October 2015 from 9:04 AM to 9:15 AM), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS19Oct2015\)-AM1.pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS19Oct2015)-AM1.pdf)>.

⁸² *United States v Khalid Shaikh Mohammad et al*, (US Military Commissions AE 380 Trial Conduct Order, 19 October 2015), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE380\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE380).pdf)>.

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to represent himself, that the Commission would appoint the current lawyers as standby counsel to explain courtroom protocol and the rules of evidence and procedure. The Military Judge stressed that Mr Attash did not have a right to a hybrid model through which he and a lawyer acted as co-counsel in the conduct of this defense.

On 22 October, following an ultimatum from the Military Judge, the last defense counsel signed a Memorandum of Understanding with the Government concerning the handling of classified material as part of discovery.⁸³ The issue had been litigated for three years. The Defense position was that the MOU would create a conflict issue in that the defense attorney would have knowledge of and access to information which could not be shared with their client. The Government's position was that the MOU was standard practice and modeled after the one used in US Federal Court. The Military Judge presented two options to the last defense team which had not signed the MOU: 1) sign the MOU or 2) explain to the Court how the defense could represent their client without having access to classified information. The Defense elected to sign the MOU, though two of the Defense teams submitted reservations.⁸⁴

GTMO Detainee Periodic Reviews [2015]

A 2014 entry explains the US Periodic Review Board (PRB), an administrative process through which detainees held at Guantanamo are considered for release or transfer. The proceedings are categorized as 'initial reviews', 'file reviews', and 'full reviews'.⁸⁵

• Initial Reviews [2015]

Initial Reviews consist of a hearing before a PRB. There were nine (9) initial reviews in 2015:

- Tariq Mahmoud Ahmed Al Sawah (ISN 535) is an Egyptian national who admitted to being an al-Qaeda explosives expert.⁸⁶ The US transferred Mr Al Sawah to Guantanamo in May 2002.⁸⁷ On 12 February, the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.⁸⁸

⁸³ *United States v Khalid Shaikh Mohammad et al*, (US Military Commissions AE 013P Protective Order 1, 6 December 2012), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013P\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013P).pdf)>.

⁸⁴ 'Mustafa al Hawsawi Defense Team Member Reservations to Memorandum of Understanding' (22 October 2015), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013VVVV\(MAH\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013VVVV(MAH)).pdf)>; 'Khalid Shaikh Mohammad Reservations' (22 October 2015), <[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013UUUU\(KSM\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013UUUU(KSM)).pdf)>.

⁸⁵ DoD Periodic Review Secretariat, 'Review Information', <<http://www.prs.mil/Review-Information/>>.

⁸⁶ 'Guantanamo Detainee Profile Tariq Mahmud Ahmad Muhammad al Sawah' (22 October 2014), <http://www.prs.mil/Portals/60/Documents/ISN535/141022_U_ISN535_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

⁸⁷ *Ibid*.

⁸⁸ DoD, 'Unclassified Summary of Final Determination', (Tariq Mahmud Ahmad Muhammad al Sawah Periodic Review Summary, 12 February 2015), <http://www.prs.mil/Portals/60/Documents/ISN535/150212_U_ISN535_FINAL_DETERMINATION_PUBLIC.pdf?ver=2015-02-25-092440-047>.

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- Saeed Ahmed Mohammed Abdulla Sarem Jarabh (ISN 235) is a Yemeni national and suspected al-Qaeda frontline fighter.⁸⁹ The US transferred Mr Jarabh to Guantanamo in February 2002. On 5 March, the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.⁹⁰
- Khalid Ahmed Qasim (ISN 242) is a Yemeni citizen and a suspected member of al-Qaeda and a possible former associate of Osama Bin Laden.⁹¹ The US transferred Mr Qasim to Guantanamo in May 2002. On 6 March, the PRB determined that his continued law of war detention was necessary to protect against a continuing significant threat to the security of the United States.⁹² In making their determination, the PRB noted Mr Qasim's 'high level of significant non-compliance while in detention', as well as his 'expression of extremist views and anti-American sentiments.'⁹³
- Mashur Abdullah Muqbil Ahmed Al-Sabri (ISN 324) is a Yemeni citizen and a suspected al-Qaeda and Taliban member.⁹⁴ The US transferred Mr Al-Sabri to Guantanamo in May 2002. On 17 April, the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.⁹⁵
- Abdul Shalabi (ISN 042) is a Saudi Arabian national suspected of being a former bodyguard to Osama Bin Laden and a close associate of Khalid Shaykh Mohammed.⁹⁶ The US transferred Mr Shalabi to Guantanamo in January 2002. On 15 June, the PRB determined that his continued law of war detention was no longer

⁸⁹ DoD, 'Guantanamo Detainee Profile', (Saeed Ahmed Mohammed Abdullah Sarem Jarabh Periodic Review Summary, 17 November 2014), <http://www.prs.mil/portals/60/documents/ISN235/20141117_U_ISN235_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

⁹⁰ DoD, 'Unclassified Summary of Final Determination', (Saeed Ahmed Mohammed Abdullah Sarem Jarabh Periodic Review Summary, 5 March 2015), <http://www.prs.mil/Portals/60/Documents/ISN235/150318_U_ISN235_FINAL_DETERMINATION_PUBLIC.pdf?ver=2015-03-18-103134-967>.

⁹¹ DoD, 'Guantanamo Detainee Profile', (Khalid Ahmed Qasim Periodic Review Summary, 18 June 2014), <http://www.prs.mil/portals/60/documents/ISN242/20140618_U_ISN242_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

⁹² DoD, 'Unclassified Summary of Final Determination', (Khalid Ahmed Qasim Periodic Review Summary, 6 March 2015), <http://www.prs.mil/Portals/60/Documents/ISN242/150318_U_ISN242_FINAL_DETERMINATION_PUBLIC.pdf?ver=2015-03-18-103215-463>.

⁹³ Ibid.

⁹⁴ DoD, 'Guantanamo Detainee Profile', (Mashur Abdullah Muqbil Ahmed al-Sabri Periodic Review Summary, 15 December 2014), <http://www.prs.mil/portals/60/documents/ISN324/141215_U_ISN324_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

⁹⁵ DoD, 'Unclassified Summary of Final Determination', (Mashur Abdullah Muqbil Ahmed al-Sabri Periodic Review Summary, 17 April 2015), <http://www.prs.mil/Portals/60/Documents/ISN324/150417_U_ISN324_FINAL_DETERMINATION_PUBLIC.pdf>.

⁹⁶ DoD, 'Guantanamo Detainee Profile', (Abdul Shalabi Periodic Review Summary, 27 January 2015), <http://www.prs.mil/Portals/60/Documents/ISN042/150127_U_ISN042_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

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necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.⁹⁷

- Omar Khalif Mohammed Abu Baker Mahjour Umar (ISN 695) is a Libyan national, a suspected senior member of the Libyan Islamic Fighting Group (LIFG), and is alleged to have been closely associated with al-Qaeda before his detention.⁹⁸ The US transferred Mr Umar to Guantanamo in August 2002. On 20 August, the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.⁹⁹
- Mohammed Kamin (ISN 1045) is an Afghan national accused of helping facilitate al-Qaeda operations against US forces in Afghanistan in 2003.¹⁰⁰ The US transferred Mr Kamin to Guantanamo in September 2004. On 28 September, the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.¹⁰¹
- Moath Hamza Ahmed Al-Alwi (ISN 028) is an ethnic Yemeni raised in Saudi Arabia and suspected al-Qaeda affiliated fighter.¹⁰² The US transferred Mr Al-Alwi to Guantanamo in January 2002. On 26 October the PRB determined that his continued law of war detention was necessary to protect against a continuing significant threat to the security of the United States.¹⁰³ In making their determination, the PRB noted Mr Al-Alwi's close ties with the Taliban and his praise for the Taliban during the hearing.¹⁰⁴

⁹⁷ DoD, 'Unclassified Summary of Final Determination', (Abdul Shalabi Periodic Review Summary, 15 June 2015), <http://www.prs.mil/Portals/60/Documents/ISN042/150615_U_ISN42_FINAL_DETERMINATION_PUBLIC.pdf>.

⁹⁸ DoD, 'Guantanamo Detainee Profile', (Omar Khalif Mohammed Abu Baker Mahjour Umar Periodic Review Summary, 18 February 2015), <http://www.prs.mil/Portals/60/Documents/ISN695/20150622_U_ISN695_Governments_UNCLASSIFIED_Public.pdf?ver=2015-06-22-122123-690>.

⁹⁹ DoD, 'Unclassified Summary of Final Determination', (Omar Khalif Mohammed Abu Baker Mahjour Umar Periodic Review Summary, 20 August 2015), <http://www.prs.mil/Portals/60/Documents/ISN695/150820_U_ISN695_FINAL_DETERMINATION_PUBLIC_v1.pdf>.

¹⁰⁰ DoD, 'Guantanamo Detainee Profile', (Muhammad Kamin Periodic Review Summary, 23 April 2015), <http://www.prs.mil/Portals/60/Documents/ISN1045/150423_U_ISN1045_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>.

¹⁰¹ DoD, 'Unclassified Summary of Final Determination', (Muhammad Kamin Periodic Review Summary, 28 September 2015), <http://www.prs.mil/Portals/60/Documents/ISN1045/20150928_U_ISN1045_FINAL_DETERMINATION_PUBLIC.pdf>.

¹⁰² DoD, 'Guantanamo Detainee Profile', (Moath Hamza Ahmed Al-Alwi Periodic Review Summary, July 2015), <http://www.prs.mil/Portals/60/Documents/ISN028/filereview1/20160301_U_ISN028_COMPENDIUM_PUBLIC.pdf>.

¹⁰³ DoD, 'Unclassified Summary of Final Determination', (Moath Hamza Ahmed Al-Alwi Periodic Review Summary, 26 October 2015), <http://www.prs.mil/Portals/60/Documents/ISN028/151026_U_ISN28_FINAL_DETERMINATION_PUBLIC.pdf>.

¹⁰⁴ Ibid.

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- Abdul Rahman Ahmed (ISN 441) is a Yemeni citizen and suspected low-level fighter possibly aligned with al-Qaeda.¹⁰⁵ The US transferred Mr Ahmed arrived to Guantanamo in February 2002, and was notified of his initial review in July of 2015. On 28 October the PRB determined that his continued law of war detention was no longer necessary to protect against a continuing significant threat to the security of the United States and recommended that he be transferred.¹⁰⁶

☛ File Reviews [2015]

File Reviews are conducted every six months in the intervening years between full reviews and focuses on 'any new information or changed circumstances' that the PRB should consider.¹⁰⁷ There were five file reviews in 2015.

- Muhammed Abd Al Rahman Awn Al-Shamrani (ISN 195) is Saudi Arabian national and a suspected al-Qaeda recruiter and fighter.¹⁰⁸ The US transferred Mr Al-Shamrani to Guantanamo in January 2002.¹⁰⁹ On 10 March, the PRB determined that a significant question had been raised as to whether Mr Al-Shamrani's continued detention was warranted and that an additional full review should be conducted.¹¹⁰
- Faez Mohammed Ahmed Al-Kandari (ISN 552) is a Kuwaiti national and suspected al-Qaeda recruiter and propagandist who is alleged to have served as Osama Bin Ladin's spiritual advisor.¹¹¹ The US transferred Mr Al-Kandari to Guantanamo in May 2002. On 14 April, the PRB determined that a significant question had been raised as to whether Mr Kandari's continued detention was warranted and that an additional full review should be conducted.¹¹²

¹⁰⁵ DoD, 'Guantanamo Detainee Profile', (Abdul Rahman Ahmed Periodic Review Summary, 24 July 2015), <http://www.prs.mil/Portals/60/Documents/ISN441/20150724_U_ISN441_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf>

¹⁰⁶ DoD, 'Unclassified Summary of Final Determination', (Abdul Rahman Ahmed Periodic Review Summary, 28 October 2015), <http://www.prs.mil/Portals/60/Documents/ISN441/20151028_U_ISN441_FINAL_DETERMINATION_PUBLIC.pdf>.

¹⁰⁷ DoD, 'File Review', Periodic Review Secretariat, <<http://www.prs.mil/Review-Information/File-Review/>>.

¹⁰⁸ DoD, 'Guantanamo Detainee File Review', (Muhammad Abd Al-Rahman Al-Shumrani Periodic Review Summary, 5 January 2015), <http://www.prs.mil/Portals/60/Documents/ISN195/195FileReview/150105_U_ISN195_Detainee_Summary_Aproved_For_Public_Release.pdf>.

¹⁰⁹ Ibid.

¹¹⁰ DoD, 'Memorandum for the Record', (Muhammad Abd Al-Rahman Al-Shumrani, Periodic Review Board, File Review, 10 March 2015), <http://www.prs.mil/Portals/60/Documents/ISN195/195FileReview/150310_U_ISN195_UNCLASSIFIED_SUMMARY_OF_FINAL_DETERMINATION_PUBLIC.pdf>.

¹¹¹ DoD, 'Guantanamo Detainee File Review', (Faez Mohammed Ahmed ai-Kandari Periodic Review Summary, 16 October 2014), <http://www.prs.mil/Portals/60/Documents/ISN552/141016_U_ISN552_Detainee_Summary_Aproved_For_Public_Release.pdf?ver=2015-05-07-124050-677>.

¹¹² DoD, 'Memorandum for the Record', (Faez Mohammed Ahmed al-Kandari, Periodic Review Board, File Review, 14 April 2015), <http://www.prs.mil/Portals/60/Documents/ISN552/150414_U_ISN552_UNCLASSIFIED_SUMMARY_OF_FINAL_DETERMINATION_PUBLIC.pdf?ver=2015-05-07-124111-693>.

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- Salem Ahmad Hadi Bin Kanad (ISN 131) is a Yemeni citizen suspected of fighting for the Taliban.¹¹³ The US transferred Mr Kanad to Guantanamo in January 2002. On 22 May, the PRB determined that no significant question had been raised as to whether Mr. Kanad's detention was warranted.¹¹⁴ On 15 December, the PRB conducted another file review and determined that a significant question had been raised as to whether Mr Kanad's continued detention was warranted and that an additional full review should be conducted.¹¹⁵
- After the PRB determined on 6 March through an initial review that continued detention of Khalid Ahmed Qasim (*mentioned supra*) remained necessary to protect against a continuing significant threat to the security of the United States, on 1 September the PRB conducted a file review. The PRB determined that no significant question had been raised as to whether Mr Qasim's continued detention was warranted.¹¹⁶

☛ Full Reviews [2015]

Full reviews occur if, during a file review, 'a significant question is raised as to whether the detainee's continued detention is warranted.'¹¹⁷ There were two full reviews conducted in 2015.

- On 8 September, the PRB conducted a full review board¹¹⁸ for Mr Al-Kandari, whose 14 April file review was discussed *supra*. The PRB determined that his continued detention was not necessary to protect against a continuing significant threat to the security of the United States because of the Kuwaiti government's commitment to require his participation in a rehabilitation program and to implement robust security measures such as monitoring and travel restrictions. The PRB recommended that Mr Al-Kandari be transferred to Kuwait with appropriate security assurances.

¹¹³ DoD, 'Guantanamo Detainee File Review', (Salem Ahmad Hadi Bin Kanad Periodic Review Summary, 6 March 2015), <http://www.prs.mil/Portals/60/Documents/ISN131/131FileReview2/150306_U_ISN131_Detainee_Summary_Approved_For_Public_Release.pdf>.

¹¹⁴ DoD, 'Memorandum for the Record', (Salem Ahmad Hadi Bin Kanad Periodic Review Board, File Review, 22 May 2015), <http://www.prs.mil/Portals/60/Documents/ISN131/131FileReview2/150709_U_ISN131_SUMMARY_OF_FINAL_DETERMINATION_PUBLIC.pdf>.

¹¹⁵ DoD, 'Memorandum for the Record', (Salem Ahmad Hadi Bin Kanad, Periodic Review Board, File Review, 15 December 2015), <http://www.prs.mil/Portals/60/Documents/ISN131/131FileReview3/20151215_U_ISN131_MFR_PUBREL.pdf>.

¹¹⁶ DoD, 'Memorandum for the Record', (Khalid Ahmed Qasim, Periodic Review Board, File Review, 1 September 2015), <http://www.prs.mil/Portals/60/Documents/ISN242/ISN242FileReview/151015_U_ISN242_MFR_PUBREL_v3.pdf>.

¹¹⁷ DoD, 'Full Review', Periodic Review Secretariat, <<http://www.prs.mil/Review-Information/Full-Review/>>.

¹¹⁸ DoD, 'Unclassified Summary of Final Determination Faez Mohammed Ahmed Al-Kandari' (8 September 2015), <http://www.prs.mil/Portals/60/Documents/ISN552/ISN552SubsequentFReview/20150908_U_ISN552_FINAL_DETERMINATION_PUBLIC.pdf>.

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- On 4 August, the PRB conducted a full review board¹¹⁹ for Mr Al-Shamrani, whose 14 April file review was discussed *supra*. On 11 September, the PRB determined that continued detention of Mr Al-Shamrani did not remain necessary to protect against a continuing significant threat to the security of the United States.¹²⁰ In making the determination, the PRB noted that his past terrorist-related threats and connections can be adequately mitigated by Saudi Arabia, where he has been recommended for transfer.¹²¹

• *GTMO Detainee Transfers* [2015]

The United States transferred 20 detainees from GTMO to foreign countries in 2015.¹²²

- al Khadr Abdallah Muhammed al Yafi, Abd al Rahman Abdullah Ali Muhammad, Fadil Husayn Salih Hintif, and Mohammed Ahmed Salam to Oman on 14 January. All four men are Yemeni nationals. The US transferred Mr al Yafi to Guantanamo in January 2002, Mr Muhammad in February 2002, Mr Hintif in April 2002 and Mr Salam in June 2002. The Guantanamo Review Task Force (GRTF) recommended all four for transfer in January 2010.
- Ahmed Abdul Qader to Estonia on 14 January. Mr Qader is a Yemeni national who the US transferred to Guantanamo in June 2002. The GRTF recommended him for transfer in January 2010.
- Idris Ahmed Abdu Qader Idris, Sharaf Ahmad Muhammed Masud, Jalal Salam Awad Awad, Saad Maasir Mukbl al Azani, Emad Abdalla Hassan, and Mohammed Ali Salem al Zarnuki to Oman on 13 June. All six men are Yemeni nationals who the US transferred to Guantanamo in June 2002. The GRTF recommended all six for transfer in January 2010.
- Yunis Abdurrahman Shokuri to Morocco on 16 September. The US transferred Mr Shokuri to Guantanamo in May 2002. The GRTF recommended him for transfer in January 2010.
- Abdul Rahman Shalabi to Saudi Arabia on 22 September. Mr Shalabi is a Saudi Arabian national who the US transferred to Guantanamo in January 2002. As discussed *supra*, his 15 June initial review determined that continued detention was no longer necessary and that he be transferred.
- Ahamed Abdel Aziz to Mauritania on 29 October. Mr Aziz is a native of Mauritania who the US transferred to Guantanamo in October 2002. The GRTF recommended him for transfer in January 2010.

¹¹⁹ DoD, 'Full Review Muhammed Abd Al Rahman Awn Al-Shamrani' (4 August 2015), <<http://www.prs.mil/Review-Information/Full-Review/>>.

¹²⁰ DoD, 'Unclassified Summary of Final Determination', (Muhammed Abd Al Rahman Awn Al-Shamrani Periodic Review Summary, 8 September 2015), <http://www.prs.mil/Portals/60/Documents/ISN195/150911_U_ISN195_FINAL_DETERMINATION.pdf>.

¹²¹ *Ibid.*

¹²² 'The Guantanamo Docket, "Timeline: 2015"', *The New York Times*, <<http://projects.nytimes.com/guantanamo/timeline/2015>>.

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- Shaker Aamer to the United Kingdom Britain on 30 October. Mr Aamer is a Saudi Arabian national but had resided in the United Kingdom previously. The US transferred Mr. Aamer to Guantanamo in February 2002. The GRTF recommended him for transfer in January 2010.

☛ *Former GTMO Detainee Deaths* [2015]

At least two previously released GTMO detainees died in 2015. On 12 April, Ibrahim Sulayman Muhammad Arbaysh was purportedly killed in Yemen as the result of a US drone strike.¹²³ Arbaysh was a citizen of Saudi Arabia who was transferred there from GTMO on 13 December 2006.¹²⁴ On 7 May, Asim Thahit Abdullah al Khalaqi died in Kazakhstan of kidney failure 129 days after being transferred there from GTMO, where he had been released six months prior.¹²⁵

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¹²³ Andrew Buncombe, 'Ibrahim Sulayman Muhammad al-Rubaish: Religious leader of al-Qaeda in the Arabian Peninsula killed in Yemen drone strike', *The Independent*, 14 April 2015, <<http://www.independent.co.uk/news/world/middle-east/ibrahim-sulayman-muhammad-al-rubaish-religious-leader-of-al-qaeda-in-the-arabian-peninsula-killed-in-10176603.html>>.

¹²⁴ 'The Guantanamo Docket, "Ibrahim Sulayman Muhammad Arbaysh"', *The New York Times*, <<http://projects.nytimes.com/guantanamo/detainees/192-ibrahim-sulayman-muhammad-arbaysh>>.

¹²⁵ 'The Guantanamo Docket, "Asim Thahit Abdullah al Khalaqi"', *The New York Times*, <<http://projects.nytimes.com/guantanamo/detainees/152-asim-thahit-abdullah-al-khalaqi>>; Diana Cariboni, Raya Jalabi and Jonathan Watts, 'Former Guantanamo detainee dies in Kazakhstan six months after release', *The Guardian*, 22 May 2015, <<https://www.theguardian.com/us-news/2015/may/22/guantanamo-detainee-asim-thabit-abdullah-al-khalaqi-dies-kazakhstan>>.