



ARBITRARY DETENTION AT GUANTÁNAMO

NGO Shadow Report by the Center for Constitutional Rights before the United Nations Human Rights Committee for its Review of the United States of America

109th Session, Geneva, 14 October – 1 November 2013

I. Reporting Organization

This submission is by the Center for Constitutional Rights (CCR), a non-governmental organization based in the United States that is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR has been at the forefront of defending the rights of men detained at Guantánamo since the beginning of the prison's operation. We were counsel in *Rasul v. Bush*, 542 U.S. 466 (U.S. 2004), which first established the right of detainees to challenge the legality of their detentions in U.S. courts, and have coordinated the legal representation of detainees by hundreds of pro bono counsel for over a decade. We have also directly represented over a dozen current and former detainees in all aspects of their efforts for release, humane treatment during detention, and reintegration and rehabilitation after release.

II. Summary of the Issue

This coming January will mark the beginning of the twelfth year of the operation of Guantánamo, the closure of which has been urged by international human rights authorities, and promised by the United States, for years. Yet today, 164 men remain imprisoned. Most have never been charged and will never be charged. More than half – 84 – were unanimously approved for transfer over three years ago.

In February of this year, detainees staged a prison-wide hunger strike to protest their treatment and detention – the largest and longest in Guantánamo's history. Over the course of the strike, our clients dropped over 30 and 40 pounds, fell dangerously ill, and were subjected to brutal force-feedings. Our clients described other men who were “skeletal” and “barely moving,” who had coughed up blood and lost consciousness. They were compelled to do this, our clients told us, after years of being largely ignored by the United States and invisible to the international community – and ultimately out of an abiding hope for their release.

They were heard. The hunger strike prompted new calls for closure by the United Nations and regional human rights bodies and authorities, and a new promise by President Obama. In a speech on May 23, 2013, in describing the United States'

continued detention of men without charge, over 30 of whom were being force-fed at the time, he asked forcefully, “Is this who we are?”¹

Yet nearly four months after that impassioned question, and over four years after President Obama’s clear promise to close Guantánamo, the United States’ plan finally to shutter the prison remains elusive. The government’s reply to the Committee’s questions about that plan does not provide clarification. The government merely defends the legality of its continuing 11-year custody of men at Guantánamo, denies the indefinite nature of these detentions, and makes vague statements about its efforts to move men approved for transfer and to implement an administrative review process for other detainees. These responses cannot be acceptable given the gravity and duration of the problem, and prevent meaningful review of the United States’ compliance with its international obligations under the Covenant. We strongly urge the Committee to continue to press the government delegation for adequate answers to questions about how and when the United States will finally close Guantánamo.

III. Relevant Question in List of Issues

In issue 17, the Committee asked for clarification, *inter alia*, of whether the United States will end “the system of administrative detention without charge or trial” at Guantánamo; how many detainees have been approved for transfer but remain detained, and what steps the government is taking “to ensure their immediate release;” and why there has not yet been any periodic review of detainees who have not been charged, convicted or yet approved for transfer.²

IV. U.S. Response

In its reply, the government begins by defending the legality of the detentions at Guantánamo and disputing their characterization as “indefinite.”³ It asserts that the United States is “engaged in an armed conflict against al-Qaida, the Taliban, and their associated forces” and thus has authority under the laws of war to hold detainees without charge “until the end of hostilities.”⁴ The government’s stated efforts to release detainees before that indeterminate date are because it has “elected” to hold these individuals “no longer than is absolutely necessary.”⁵

¹ Text of President Obama’s May 23 speech on national security (full transcript), Washington Post, May 23, 2013, http://articles.washingtonpost.com/2013-05-23/politics/39467399_1_war-and-peace-cold-war-civil-war.

² Human Rights Committee, List of issues to be taken up in connection with the consideration of the fourth periodic report of the United States of America (CCPR/C/USA/4), adopted by the committee at its 107th session, 11 – 28 March 2013, ¶ 17.

³ Replies of the United States to the list of issues, List of issues in relation to the fourth report of United States of America, adopted by the Committee at its 107th session (11 - 28 March 2013), ¶ 89.

⁴ *Id.* ¶¶ 86, 89

⁵ *Id.* ¶ 89.

With respect to the 84 men remaining at Guantánamo whom the Guantánamo Review Task Force approved for transfer in 2009-10, the government states only that it is “continu[ing] to assess transfer options” for these individuals.⁶

With respect to men who have not been charged, convicted or yet approved for transfer, the government states that the periodic review process “has not been fully implemented,” but will be “as soon as practicable.”⁷ The reviews will determine “whether continued law of war detention . . . is necessary to protect against a significant threat to the United States.”⁸ If continued detention is no longer warranted, the relevant authorities are to make “vigorous efforts” to transfer the individual.⁹

The government also refers to President Obama’s most recent statement on Guantánamo on May 23, 2013, during which he announced an end to the moratorium he imposed in January 2010 on transfers to Yemen; stated that he would appoint a senior envoy in the State Department to negotiate transfers to third countries – a position that had been vacant since January 2013¹⁰ – and appoint a new counterpart in the Defense Department; and called on the U.S. Congress to lift existing restrictions on detainee transfers.¹¹ He did not outline a plan or timetable for the transfer of approved detainees or for the ultimate closure of Guantánamo, stating only that the government would effect transfers “to the greatest extent possible.”¹²

While conditions at Guantánamo were not specifically addressed in the Committee’s list of issues or the United States’ reply, the government’s report in 2011 states that Executive Order 13492 specifically requires detentions at Guantánamo to comply with Common Article 3 of the Geneva Conventions, and that the United States has “continued to ensure that [Guantánamo] comports with Common Article 3 and all other applicable laws.”¹³

V. Assessment of U.S. Compliance

The vast majority of the 164 men who remain at Guantánamo have been detained for eleven and a half years without charge. As stated above, 84 were approved for transfer over three years ago. The global “armed conflict against al-Qaida” pursuant to which these men continue to be held is the longest-running “war”

⁶ *Id.* ¶ 91.

⁷ *Id.* ¶ 89.

⁸ *Id.*

⁹ *Id.*

¹⁰ Charlie Savage, Office Working to Close Guantánamo Is Shuttered, *New York Times*, Jan. 28, 2013, http://www.nytimes.com/2013/01/29/us/politics/state-dept-closes-office-working-on-closing-Guantánamo-prison.html?_r=0.

¹¹ Text of President Obama’s May 23 speech on national security (full transcript), *Washington Post*, May 23, 2013.

¹² *Id.*

¹³ Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Fourth periodic report of the United States of America, Dec. 30, 2011, CCPR/C/USA/4, ¶ 519.

in the history of the United States, with an aspirational but still elusive end.¹⁴ The government’s defense of the legality and finite nature of these detentions flies in the face of reality and the law.

While the government claims authority to continue holding detainees “until the end of hostilities,” the laws of war do not support the detention of all men at Guantánamo. For some detainees, the specific armed conflict in which they were captured was the international armed conflict between the United States and the former Taliban government of Afghanistan,¹⁵ which was over by the end of 2001. Others were captured outside the area of active hostilities.¹⁶ To the extent the conflict against the Taliban government transitioned, after the fall of that regime, into a conflict against Al Qaeda, a non-state actor, it is a non-international armed conflict. In such conflicts, civilians can only be held if they are “directly participating in hostilities” and continued detention is “necessary” for “imperative reasons of security.”¹⁷ Otherwise, detainees must be charged or released. These requirements are not elective.

With respect to the 84 men who have been approved for transfer, the Guantánamo Review Task Force, which included “all relevant agency viewpoints – military, intelligence, homeland security, diplomatic, and law enforcement”¹⁸ – reached “unanimous agreement” that these men could be transferred or released “consistent with the national security and foreign policy interests of the United States.”¹⁹ As the U.N. High Commissioner has recognized, the continuing detention of these men “is the most flagrant breach of individual rights, contravening the

¹⁴ See Text of President Obama’s May 23 speech on national security (full transcript), Washington Post, May 23, 2013 (stating that he would “engag[e] Congress and the American people in efforts to refine and ultimately repeal the AUMF’s mandate,” and that “this war, like all wars, must end,” but reasserting that at present, “[u]nder domestic law and international law, the United States is at war with al-Qaida, the Taliban, and their associated forces”).

¹⁵ For example, CCR client Ghaleb Al-Bihani was alleged to be an assistant cook in the 55th Arab Brigade, a group allied with the Taliban and that surrendered to the Northern Alliance in late 2001. The particular conflict in which Mr. Al-Bihani was captured was the international armed conflict between the United States and the Taliban government of Afghanistan, which officially ended with the fall of that government. An appellate court dismissed this argument in reviewing the legality of his detention by initially finding that the laws of war do not limit the government’s detention authority. See *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), rehearing en banc denied by, *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

¹⁶ See, e.g., *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010) (involving a detainee whose capture and relevant activities took place in Bosnia), *Salahi v. Obama*, 625 F.3d 745, 748-49 (D.C. Cir. 2010) (involving a detainee captured in Mauritania whose most relevant activities occurred there and in Canada), and *Almerfedi v. Obama*, 654 F.3d 1, 2-3 (D.C. Cir. 2011) (involving a detainee whose capture and relevant activities took place in Iran).

¹⁷ See Chatham House & ICRC, Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, 5, Sept. 22-23, 2008, <http://www.icrc.org/eng/resources/documents/report/security-detention-report-091209.htm>.

¹⁸ Guantánamo Review Task Force, Final Report, 4, Jan. 22, 2010.

¹⁹ *Id.* at 5-6.

International Covenant on Civil and Political Rights.”²⁰ While the U.S. Congress has passed burdensome restrictions on detainee transfers annually since 2011 under the National Defense Authorization Act (NDAA), the Executive Branch retains – but until recently wholly failed to exercise – authority to effect transfers. Members of Congress have themselves urged President Obama to exercise that authority, emphasizing in particular that the “national security waiver” of the NDAA provides a “clear route” for transfers and was specifically meant to ensure that the certification requirements under the Act would not effectively bar all transfers.²¹ On August 29, 2013, the Executive Branch finally and successfully exercised that authority in repatriating two Algerian detainees.²² The release from Guantánamo of men approved for transfer is not only mandated by international law, but possible under domestic law: the recent releases demonstrate that executive authority to effect transfers indeed exists under the current NDAA, contrary to the government’s protestations since 2011.²³

CCR clients Djamel Ameziane of Algeria, and Mohammed Al Hamiri, Fahd Ghazy, and Tariq Ba Odah of Yemen are among the 84 men who remain detained but were approved for transfer years ago. Mr. Ameziane, whom the government over four years ago conceded it had no “military rationales” to continue to detain,²⁴ fears

²⁰ United Nations Office of the High Commissioner for Human Rights, Pillay says Guantánamo detention regime is in “clear breach of international law” and should be closed, April 5, 2013, <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13212&LangID=E>. The Inter-American Commission on Human Rights, the U.N. Working Group on Arbitrary Detention, and the U.N. Rapporteurs on Torture, Human Rights and Counterterrorism, and Health have also stated that “the continuing and indefinite detention of individuals without the right to due process is arbitrary and constitutes a clear violation of international law and that “this situation is particularly clear with respect to those prisoners ... who have been cleared for transfer by the Government ...” Organization of American States, Press Release, IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013, https://www.oas.org/en/iachr/media_center/PReleases/2013/029.asp.

²¹ Letter of Carl Levin, U.S. Senator from Michigan, to Kathryn Ruemmler, Assistant to the President and Counsel to the President, May 6, 2013, http://www.levin.senate.gov/newsroom/press/release/levin-urges-white-house-to-appoint-official_to-oversee-transfer-of-gitmo-detainees.

²² U.S. Dep’t Defense, News Release, Detainee Transfer Announced, Aug. 29, 2013, <http://www.defense.gov/releases/release.aspx?releaseid=16235>.

²³ While CCR welcomes these long overdue releases, unless the rate of detainee transfers increases dramatically, President Obama will again fall hopelessly short of his stated policy of closing Guantánamo.

²⁴ Mr. Ameziane was approved for transfer by the Bush administration in 2008 and the Obama administration in 2009. During a hearing in his habeas case in 2009, government lawyers acknowledged that there are no “military rationales” for Mr. Ameziane’s continued detention and stated that “steps [were being] taken to arrange for the end of such custody,” <http://ccrjustice.org/files/2009-08-06%20Ameziane%20Appellants%27%20Appendix%20%28Unsealed%29.pdf>. Despite repeated promises by the United States to release Mr. Ameziane, he remains in detention at Guantánamo without foreseeable end. See <http://www.ccrjustice.org/ameziane> for more information about Mr. Ameziane.

persecution if returned to his home country, but has reason to believe that there are allied countries that would be receptive to resettling him. With respect to men from Yemen – 56 of whom the government has approved for transfer – many want to return home. Beyond President Obama’s decision to lift the moratorium on transfers to that country – a ban that remained in place for over three years and was described by international human rights authorities as “a clear violation of the principle of non-discrimination”²⁵ – the government has not indicated whether or when transfers will resume.²⁶ U.S. officials have made only vague reference to a plan with Yemen to develop a rehabilitation center to receive detainees in the future,²⁷ the initial financing for which has reportedly not even been secured.²⁸

With respect to men who have not been charged, convicted or yet approved for transfer, “continued law of war detention” is permissible only to the extent a detainee is being held because of direct participation in an ongoing armed conflict – the particular one in which he was captured – and continued detention is “necessary” for “imperative reasons of security.” The “significant threat” standard of the periodic review process suggests a lower threshold than the laws of war allow. Further, the procedures impose significant restrictions on the participation of detainees and their private counsel;²⁹ it remains to be seen how the rules will be implemented in practice and whether they will allow for meaningful review. To date, CCR is aware of only four detainees for whom the process has been initiated.

It bears noting that even the minimal movement on Guantánamo over recent months was effectively compelled by the hunger strike that began in February 2013. During the course of the strike, the military used various tactics, large and small, to end the protest, including: holding men in 22- to 24-hour isolation for several months,

²⁵ Organization of American States, Press Release, IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013.

²⁶ In advance of a meeting between President Obama and President Hadi of Yemen on August 1, 2013, the White House cautioned that the meeting would not produce “any announcements ... on whether, when or under what circumstances Yemeni detainees may be repatriated” – and, indeed, it did not – and underscored that President Obama’s lifting of the moratorium on transfers to Yemen would not produce “a mass exodus.” The White House, Office of the Press Secretary, Press Briefing by Press Secretary Jay Carney, 8/1/2013, Aug. 1, 2013, <http://www.whitehouse.gov/the-press-office/2013/08/01/press-briefing-press-secretary-jay-carney-812013>.

²⁷ U.S. Dep’t State, Remarks with President of Yemen Abdo Rabbo Mansour Hadi Before Their Meeting, July 29, 2013, <http://www.state.gov/secretary/remarks/2013/07/212533.htm> (“[W]e are working with the Yemenis to develop a rehabilitation and re-education initiative in the country that will assist us in the effort to try to transfer some of the Yemenis.”).

²⁸ See Mohammed Ghobari, Yemen appeals for funds for Guantánamo prisoners rehab center, Reuters, May 29, 2013, <http://www.reuters.com/article/2013/05/29/us-yemen-usa-Guantánamo -idUSBRE94S0VP20130529>.

²⁹ See Human Rights Watch, Joint letter to Secretary Hagel and Secretary Kerry on Periodic Review Boards, July 23, 2013, <http://www.hrw.org/news/2013/07/22/joint-letter-secretary-hagel-and-secretary-kerry-periodic-review-boards>.

after years of holding them communally without incident;³⁰ conducting invasive genital searches before legal appointments and family calls;³¹ subjecting men to stress positions in transporting them to such appointments;³² withholding clean drinking water;³³ and manipulating temperatures and creating noise in the cell blocks, including during sleep and prayer times. The strike itself was triggered by widespread searches of the men's Qurans. While the government noted in its 2011 report that a prior review of conditions at Guantánamo found that they were compliant with Common Article 3, the prison administration's practices during the hunger strike ran directly counter to the recommendations of that review,³⁴ and call the government's compliance with Common Article 3 during that period into serious question.

While the number of men on hunger strike has dropped in recent months, the military currently reports that 19 men remain on strike and that 18 are being force-fed, including CCR clients Mohammed Al Hamiri and Tariq Ba Odah. The policy at Guantánamo of force-feeding using restraint chairs continues to date, despite being widely condemned as a violation of medical ethical standards and humane treatment by international authorities.³⁵

³⁰ Carol Rosenberg, Life under lockdown at America's hunger-striking prison camps, Miami Herald, Apr. 27, 2013, <http://www.miamiherald.com/2013/04/27/3368658/life-under-lockdown-at-americas.html>; see also Ben Fox, US: Prisoners Ending Hunger Strike at Guantánamo, Associated Press, July 12, 2013, <http://bigstory.ap.org/article/us-prisoners-ending-hunger-strike-guantanamo> (reporting that "prison officials recently allowed dozens of the men to return to communal living under certain new restrictions, including that they refrain from hunger striking").

³¹ See Jason Leopold, Guantánamo genital searches to continue, Al Jazeera, July 19, 2013, <http://www.aljazeera.com/humanrights/2013/07/201371893153946602.html>.

³² Charlie Savage, Judge Halts Groin Searches at Guantánamo, Calling Them Abhorrent to Muslims, New York Times, July 11, 2013, <http://www.nytimes.com/2013/07/12/us/judge-halts-groin-searches-at-guantanamo-calling-them-abhorrent-to-muslims.html> (reporting the use of new transport vans "that have low roofs that detainees had said required them to be painfully crouched while shackled").

³³ Matt Williams, Guantánamo hunger-strike inmates forced to drink dirty water, court hears," The Guardian, Apr. 15, 2013, <http://www.theguardian.com/world/2013/apr/15/Guantanamo-bay-hunger-strike-dirty-water>; see also Center for Constitutional Rights, Retaliation for Guantánamo Hunger Strike Grows, Apr. 15, 2013, <http://ccrjustice.org/newsroom/press-releases/retaliation-guantanamo-hunger-strike-grows> (reporting retaliation for client who spoke out against conditions).

³⁴ Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement, 5 (2009), http://media.miamiherald.com/smedia/2009/02/23/17/FINALReport1.source.prod_affiliate.56.pdf (finding that "further socialization would be essential to maintaining humane treatment over time," the key aspects of which would include more human-to-human contact, recreation with several detainees together, intellectual stimulation, and group prayer).

³⁵ See, e.g. United Nations Office of the High Commissioner for Human Rights, Pillay says Guantánamo detention regime is in "clear breach of international law" and should be closed, April 5, 2013; Organization of American States, Press Release, IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to

VI. Recommended Questions

- 1) Does the United States have a specific plan and timetable for the closure of Guantánamo? What is that plan and timetable?
- 2) Does the United States expect or intend, before the end of this year, to exercise its authority under the 2013 NDAA to transfer Mohammed Al Hamiri, Fahd Ghazy, Tariq Ba Odah, or any other Yemeni detainees who are also approved for transfer?
- 3) What efforts has the United States made or is it making to resettle Djamel Ameziane?
- 4) Is the Periodic Review Board limited to making recommendations for transfer, or can it provide any concrete relief to Guantánamo detainees?
- 5) Does the United States intend to “expand program content for intellectual stimulation, and provide for wider detainee access; maximize interaction between detainees, communal living and recreation interaction; approve and implement family visits; and consider inviting non-governmental organizations and appropriate international organizations to send representatives to visit Guantánamo,” as recommended by the government’s review of conditions at Guantánamo in 2009?

VII. Suggested Recommendations

- 1) Exercise authority under the 2013 NDAA to effect additional transfers without further delay.
- 2) Close Guantánamo by transferring all men whom the government does not plan to charge to their home or resettlement countries.

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