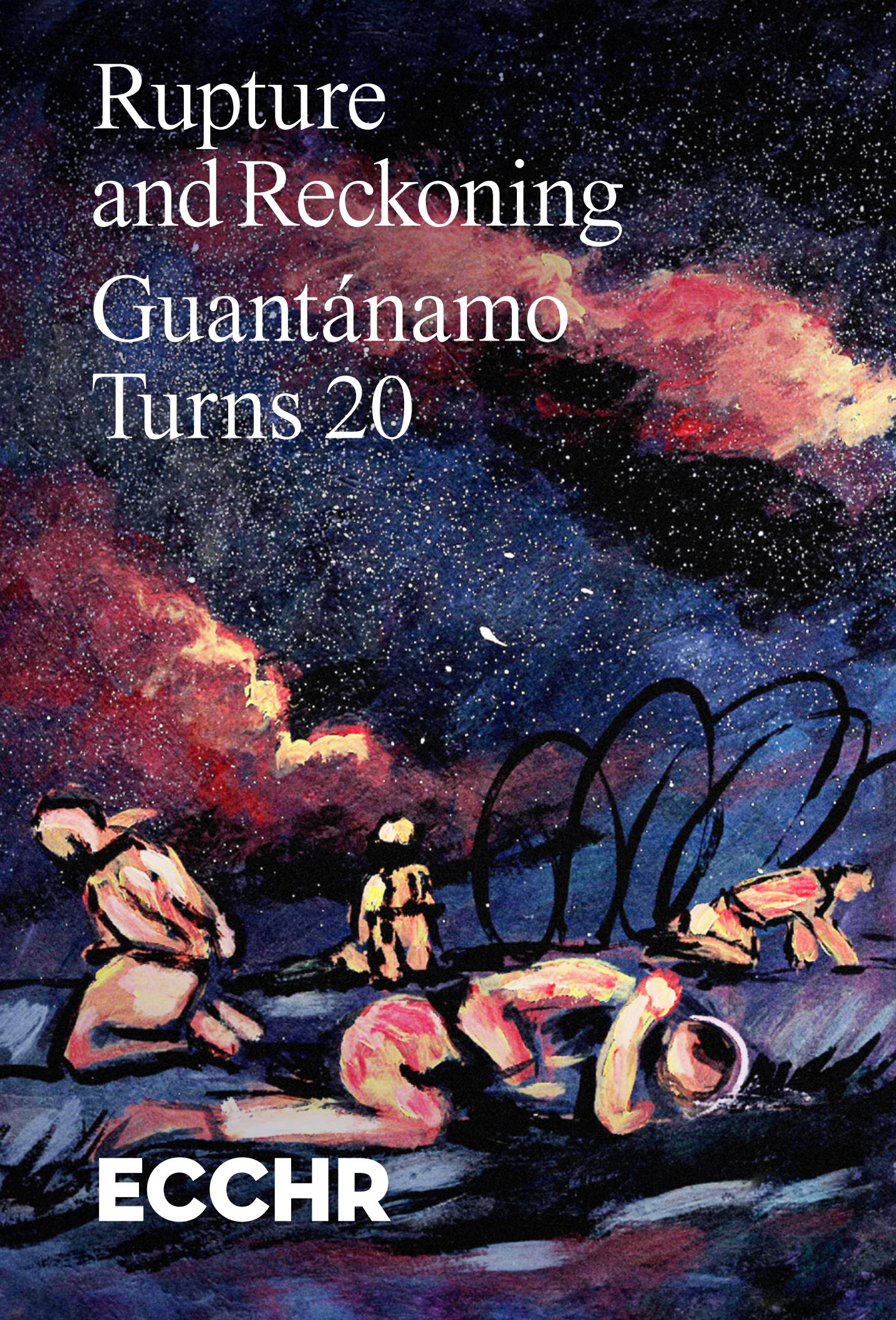
Rupture and Reckoning
Guantánamo Turns 20



ECCHR

Rupture and Reckoning

Guantánamo Turns 20

Reflecting on the Legacy of the Notorious Detention Camp and US Counter-Terrorism Policy Two Decades After 9/11

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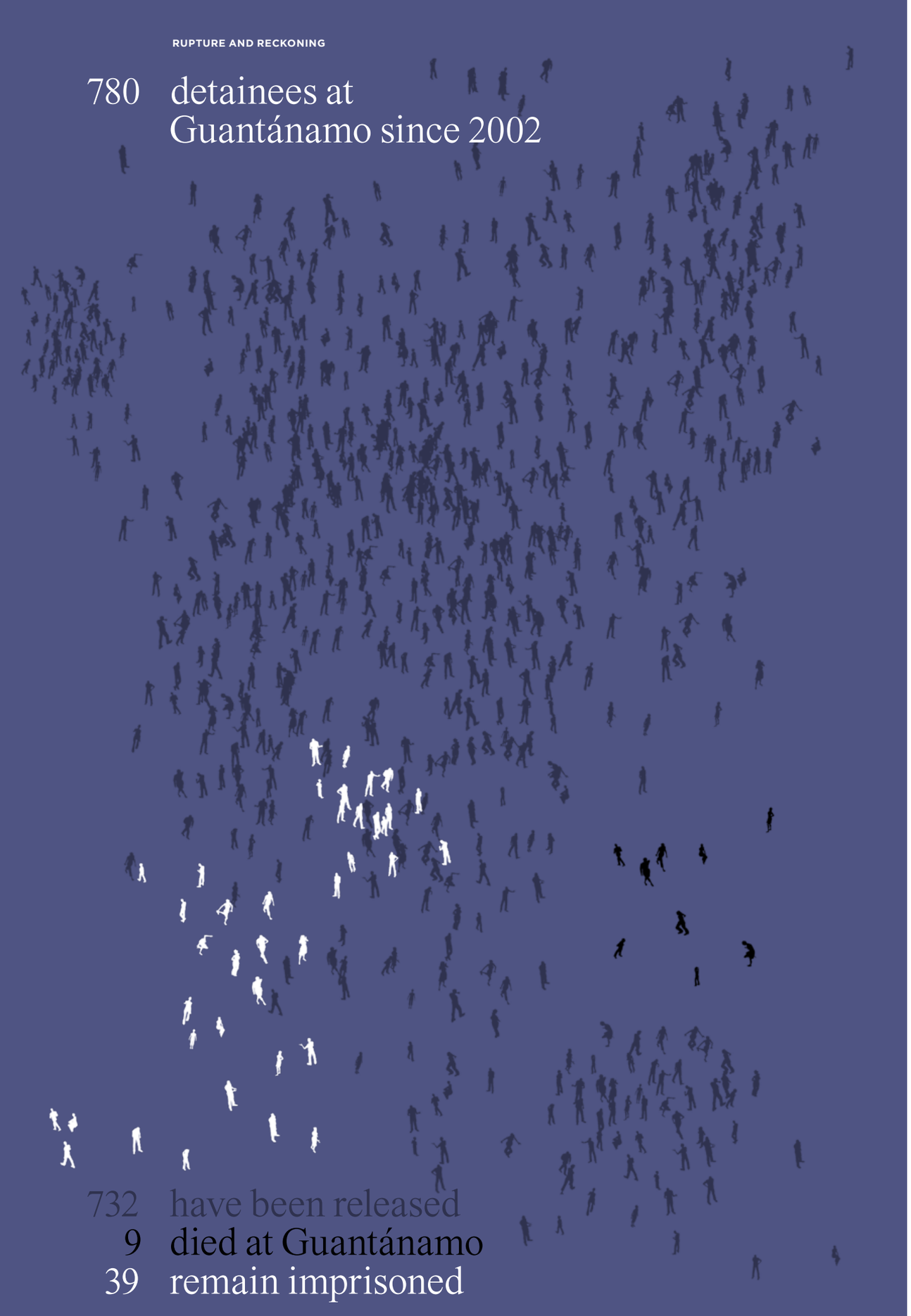

Not in our Name

WOLFGANG KALECK

Guantánamo Bay "was and is a place of lawlessness, arbitrariness and torture" in the words of former detainee Murat Kurnaz. The use and public justification of torture and the concomitant exclusion of a large and only vaguely defined category of minimum humanitarian standards at Guantánamo and US black sites around the globe following the attacks of 11 September 2001 stand out as one of the great sins of the West in the past two decades.

Why do we actually emphasize this sin as a radical break, as a *fall of man* so to say? Is not the recent history of the West also a history of torture and other war crimes? Arguably this is the case, even looking only at the period after the Nuremberg Trials and the Universal Declaration of Human Rights. This was at the same time the period of contested decolonization, hard fought by people yearning for independence against the asymmetric violence of European colonial states.

One could argue similarly when looking at the history of the torture dictatorships of Latin and Central America—from the torture "School of the Americas" (in Fort Benning, Georgia, USA) to secret service cooperation, such as in Operation Condor, with Pinochet and Videla, the bloody rulers of Chile and Argentina, to direct participation in international crimes in the aforementioned states.

In view of this world history, Guantánamo Bay is downright mockery: located on the island of Cuba, its mere existence is an expression of post-colonial land theft and breach of treaty by the US, while it also stands for the shameful passivity of the self-professed anti-imperialist and socialist Republic of Cuba, given the continuing violation of the law on its own territory.

Antonio Negri and Michael Hardt were not wrong when they criticized the left and its attitude towards the Iraq War and Guantánamo in their 2009 book *Commonwealth*. They considered the focus on a supposedly overwhelming transcendent authority and power to be dangerous because it obscures the truly dominant forms of repressive power: the systemic and structural forms as they are reified in property and capital and embodied in law. This begs the rhetorical question of whether the norm of property and wealth transfer from the poor to the rich over the last two decades, and the growth in inequality it has triggered, do not outweigh the violation of the rights of individual prisoners in Guantánamo. Should reflection on 20 years of Guantánamo be high on our agenda today given the prevailing global crises of inequality, brutal male violence, the pandemic and the climate catastrophe?

In the face of such complex, multiple global crises, it is necessary to think intersectionally and systemically, not to play off political and civil rights against economic, social and cultural rights. We must stand up against concrete injustices in individual cases as well as point out their systemic and structural underpinnings. Above all, we must stand up for the rights and human dignity of all people everywhere.

Many courageous colleagues, some of whom write here in this anthology, are to be thanked for reflecting these contradictions. They not only stand up for the individual fate of Guantánamo prisoners in the tradition of militant advocacy, but they also stand up against special anti-terrorism legislation as a whole, the development of a particular "criminal law for enemies" (Feindstrafrecht), and the use and abuse of non-law. In this way, they also stand up for the absolute legal principles that must be defended beyond all possible dispute. Thanks to colleagues at the Center for Constitutional Rights (CCR), the American Civil Liberties Union, Reprieve, and countless individual lawyers from North America, Europe, and elsewhere, Guantánamo's story is also a story of resistance, and legal resistance at that. Guantánamo and CIA prisoners have not had many advocates in Europe or North America, nor in the countries of origin of most prisoners, many of which maintain friendly ties and close economic and military relationships with Western powers.

The legal narratives presented in this anthology and elsewhere, such as in Michael Ratner's posthumous autobiography *Moving the Bar*, recount habeas corpus proceedings in the US, lawsuits in the states of origin, and transnational litigation aimed at obtaining reparations and prosecutions against the states and individuals responsible for the myriad abuses at Guantánamo. A differentiated picture of these legal efforts is emerging before our eyes. In his book on strategic human rights litigation, former CCR President Jules Lobel spoke of success without victory, i.e. political successes despite legal defeats—an approach to which countless Guantánamo proceedings bear witness. However, as many of the contributions in this anthology also recount, some serve as examples of victory without success, i.e. political defeats despite legal victories.

This ambivalent finding also applies to my own work together with CCR in the so-called Rumsfeld cases of 2004–2007, as well as to the work of our organization, the European Center for Constitutional and Human Rights (ECCHR), which started in 2007. Although an immediate, resounding legal success remains elusive, the legal proceedings against Guantánamo and the US torture program in Germany, France, Spain and elsewhere, which we conducted together with our partner lawyers and organizations, were successful in establishing an important narrative: there must be no double standards in international criminal law, but rather equality before the law for all, even and especially for powerful Western actors. At the same time, the trials were a strong legal statement and a discursive support of the absolute prohibition of torture.

Mind you, I write this from the perspective of a transnational lawyer and NGO based in Berlin. From a Berlin perspective, the work of all those writing in this book and the many others has, in principle, been successful. This is not to gloss over the manifold suffering of prisoners killed by torture, torture survivors, and their families. Their experiences remain a tragic chapter in the indeed rich history of Western injustice.

But at the same time, the legal principles devised to justify Guantánamo—or as Mansoor Adayfi put it, "the idea of Guantánamo"—have not prevailed. The highest North American and European courts have rejected the doctrine according to which states can dispense with their human rights obligations by outsourcing them extraterritorially. This is, by the way, a highly relevant and indeed once again contested terrain, as refugees and migrants all over the world continue to fight for their right to have rights at various internal and external borders and, in doing so, remind governments that they are always bound by human rights obligations in the exercise of their state authority.

We must stand up against concrete injustices in individual cases as well as point out their systemic and structural underpinnings.

Last but not least, Antony Anghie was right in his seminal book in which he described the history of international law as one of the legitimization of imperialism and colonialism. Yet, neither he nor his fellow postcolonial critics deny that the standard of human rights protection has risen since 1945. Normative standards and legal fora have simultaneously been created. These have recently been used transnationally and internationally by victims and their supporters, as shown not least by Pinochet's 1998 arrest in the UK on torture charges and subsequent cases based on the precept of universal jurisdiction that have taken place around the world, but also by the submissions of non-governmental actors to the International Criminal Court. The fact that many things need to be improved and that double standards still prevail is unquestionable.

Nevertheless, on the one hand, it is clear that political struggles must also be fought in the legal field—the Guantánamo cases and many other torture proceedings stand for this. On the other hand, the erosion of international legal standards must be stopped. In the words of Alka Pradhan in this volume, "This program being open for as long as it has been has taken away the ability of the US and our allies … to say, look, there are these standards we all need to do our best to follow." China, Russia, and Turkey, to name a few of the usual suspects, have been able to easily point out the West's sinful past in recent decades. From the illegal invasion of Iraq to the mass use of torture against "terrorist" prisoners, they smilingly point out that the West recognizes international law only as long as it serves its own perceived interests and disregards the law when military, political, or economic advantages supposedly demand it.

This cynical criticism by notorious lawbreakers must clearly be challenged. The fight against the legal vacuum in Guantánamo and for the dignity and rights of Guantánamo prisoners is an outstanding example against such cynical attempts. For these struggles have also revealed the strengths of open, Western societies with existing and strong investigative journalism and civil society actors, who have brought secret documents and facts to the public and sued on behalf of the prisoners for their rights in all possible legal and political fora. At the same time, the cracks in the seemingly homogeneous state apparatus are also strong evidence that it is worth arguing for the absolute ban on torture and compliance with minimum standards under international law, even in the face of otherwise not always sympathetic and pleasant actors, such as the FBI or the US military. For from their ranks come substantial voices against torture, like that of Mark Fallon in this anthology, as well as important testimonies that have enabled us to draw a relatively clear picture of the Guantánamo and CIA torture hierarchies over the past two decades.

Finally, it goes without saying that the Biden administration must close Guantánamo and should erect a memorial against torture at the same location. As Christophe Marchand further states here: "Legally, there is no time limitation on seeking accountability for these kinds of gross violations." Here's to Mohamedou Ould Slahi being right: "In 100 years, we will look back at this era the way we now look at slavery."

As pointed out before, all of these struggles are interconnected. There are many parallels to be drawn between the fight for the right to have rights by and for Guantánamo detainees and that of migrants and refugees on the move across borders and all of us as we face the emerging environmental and climate catastrophe. The rights and dignity of all human beings everywhere must be defended, especially the rights of those in the Global South who often pay the heaviest price while having contributed the least to today's many intersectional crises.

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1 Wolfgang Kaleck, Double Standards: International Criminal Law and the West (2014).

Rupture and Reckoning: Guantánamo Turns 20

ALLISON WEST

Twenty years after the first "war on terror" prisoners were forcibly transferred to the US military base at Guantánamo Bay, the infamous detention camp still remains in operation. Thirty-nine men continue to be indefinitely detained there with few prospects for accountability or justice in sight. While the gruesome torture and lack of due process endured by those imprisoned at Guantánamo once dominated headlines and global public debate, it has since slipped out of the spotlight. Many are surprised to learn the detention camp is still open; still fewer know that prisoners remain. The "war on terror"—along with its erosion of human rights over the last twenty years—has melded into the mainstream, now normalized as a part of everyday life.

If history is written by the victors, as the saying goes, then who will write the story of the detention camp at Guantánamo? How can we grapple with the legacy of injustices that persist not only in Guantánamo's continued operation, but also in its myriad contemporary manifestations: from mass surveillance to fortressed borders, drone warfare to domestic terrorism frameworks, crackdowns on protestors by heavily militarized police to enduring double standards of accountability for powerful Western actors?

In response to such questions, this anthology represents a conscious effort to remember, reflect and reckon with Guantánamo and two decades of US counter-terrorism policy by those who have fought against, worked within, or been held captive at the notorious detention camp. It is not meant to provide academic analyses, dissect caselaw or offer up policy prescriptions, which already abound. Rather, it offers a mix of insider accounts—expressed in writing, interviews and artistic visual mediums—that reflect personal engagement with Guantánamo and the so-called "war on terror" over the last twenty years.

The anthology aspires to present a specific part of the human history—preserved for both present and future generations—of what we see as the *real story* of Guantánamo. We hope that it will help to shape the memory and conversation surrounding the detention camp in the years to come, and that it will serve as a record when history finally comes to bear on the US for its crimes

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On art at Guantánamo and in this anthology

The story of art from Guantánamo is part and parcel of the two decades through which former and current detainees have fought to retain their individuality in the face of sweeping dehumanization, their humanity despite myriad forms of torture, and their freedom within and outside a place that has labeled them "the worst of the worst." Between the sections of this anthology are mini-exhibitions featuring artwork by four men imprisoned at Guantánamo. Three of them, Djamel Ameziane, Sabry Al-Qurashi and Ghaleb Al-Bihani, have been cleared and released. Khaled Qassim still remains in detention at Guantánamo today.

When Barack Obama was elected US president in 2008, many people expected and hoped, based on his campaign promises, that Guantánamo would soon close. Needless to say, this did not come to pass. After he took office, however, his administration reacted to Guantánamo detainees' tireless resistance, protests and negotiations by relaxing some of the harshest conditions at the prison. In response to detainees' demands, and purportedly as a way to keep them busy, the military organized a number of classes for the men, among them, an art class. To attend, the men first had to pass through a checkpoint, undergo an invasive body search, and be shackled to the floor for the duration of the class. Knowing that art depicting their abuse would simply get destroyed, many spent their time in class drawing or painting nature scenes or innocuous objects, often inspired by images in magazines available in the prison library, such as National Geographic. However, the men also drew and painted things they missed from their lives before Guantánamo, scenes from their memories or imaginations, and scenes reflecting their emotions, anxieties, as well as hopes for the future.

> Displaying the artwork is a way to show people that we are people who have feelings, who are creative, that we are human beings. We are normal people and not monsters.

All artwork created at Guantánamo goes through a rigorous system of review and clearance by the US military. In the past, some works of art were cleared for release to lawyers or family members of detainees, with many bearing the stamps of their military scrutiny and clearance as a visible scar. The detainee artwork was first displayed by the US military within the base, used to show visitors and journalists the ostensibly improved conditions for those detained. In October 2017, the very first public exhibition of Guantánamo prisoners' art, titled "Ode to the Sea: Art from Guantánamo Bay," took place at John Jay College of Criminal Justice in New York, curated by Erin Thompson,

Charles Shields and Paige Laino. The exhibition garnered significant public attention and, in response, the US Department of Defense issued a statement on 15 November 2017 asserting that the art was government property. Since then, the US military has stopped allowing art to leave the prison, with veteran Guantánamo reporter Carol Rosenberg writing in the Miami Herald on 20 November 2017 that the military planned to burn what was left.

Exhibiting the art of men imprisoned at Guantánamo in this anthology and beyond represents a repudiation of the US military's cruel policy designed to further strip the prisoners of their agency, and serves as an explicit rejection of the attempt to sever this unique and powerful means of communication between the prisoners and the public. As Djamel Ameziane emphasizes, "Displaying the artwork is a way to show people that we are people who have feelings, who are creative, that we are human beings. We are normal people and not monsters."[1] As you view the artwork displayed in this anthology, we hope you will pause to reflect on the men who created these images, on the horrendous ordeal they have been through, and on the humanity that shines through each line, hue and brushstroke.

1 R. Deutsche, 'Staking Claim', *Art Forum*, September 2020.

SEE A VIDEO WITH MANSOOR ADAYFI ON THE TOPIC OF DETAINEE ART AS PART OF ECCHR'S ONLINE EXHIBITION "GUANTÁNAMO IMAGES AND IMAGINARIES"

Life at and after Guantánamo

I.

Voices of current and former detainees

Roughly 780 men have passed through the gates of the US detention facility in Guantánamo Bay, Cuba. Anonymized and stripped of their individuality, the US government and military have portrayed them as monsters, "the worst of the worst." However, beneath this official narrative is the reality that most of the men brought to Guantánamo were seized on unsubstantiated grounds, in many cases through bounties offered by the US government in exchange for suspected terrorists. From 11 January 2002 to the present, the prisoners held at Guantánamo have included an array of people from all walks of life, ranging from shepherds to schoolteachers, journalists to artists.

In addition to having their lives completely overturned, the men detained and tortured at Guantánamo have been systematically denied access to adequate legal recourse to challenge the conditions and continuation of their detention, to seek justice for the violations of their most basic rights, and to live in peace even after release. Through collective resistance, Guantánamo detainees have risen to challenge one of the world's strongest military powers, wielding their own stories to fight for humanity against the forces of xenophobia, Islamophobia and racism that have seized the world since 9/11. Through reflections, interviews and poetry, the contributors in this section offer a glimpse into what Guantánamo has meant for those who have endured the challenges of living within—and later beyond—the walls of one of the most notorious prisons in history.

Moazzam Begg

Guantánamo: 20 Years of a Legal Black Hole

No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.

These words are enshrined in the Magna Carta, the ancient English writ which forms the basis for habeas corpus—the requirement that an arrested person is presented to the court before being detained or imprisoned. It is found in the constitutions of many former British colonies and, when I was taken by Pakistani intelligence from my home in Islamabad in January 2002, my family issued habeas proceedings against the Pakistani government. Unfortunately, by that time I'd already been handed over to the US.

When I first arrived at the US facility in Kandahar, Afghanistan, built to hold Taliban or Al-Qaeda suspects, the other detainees had all been issued Enemy Prisoner of War (EPW) identity cards, seemingly in accordance with US military regulations on the treatment of prisoners. This clearly meant that the US understood its obligations towards us under the Geneva Conventions. Realizing their mistake, given the rights it would afford us, the cards were promptly taken away. From then on, the US referred to us as "unlawful belligerents" and "enemy combatants." By introducing these terms, the US government lawyers carefully reinterpreted laws to argue that we were not entitled to any protections under the Geneva Conventions, intending to avoid scrutiny while violating our basic human rights.[1] However, the International Committee of the Red Cross (ICRC) says these terms are not defined in any international agreements and have "no legal meaning outside armed conflict."[2]

Guantánamo was selected as a prison for the purpose of impunity. Bush's legal advisers argued that US laws would not apply to detainees because it was technically outside US legal jurisdiction. With its close proximity to the US mainland, Guantánamo served as the best place to hold captives while ensuring they could not access US laws. One US official even described it as the "legal equivalent of outer space."

The omnipresent iguanas at Guantánamo, protected under the Endangered Species Act (1973), enjoyed more rights than the prisoners. One prison camp was even named after them; Camp Iguana was used to hold several of the 22 minors in Guantánamo, including 15-year-old Canadian, Omar Khadr, and 12-year-old Afghan, Mohammed Jawad. Later, despite being designated "no longer enemy combatants," Guantánamo's Uyghurs were also held there. Despite winning a series of Supreme Court rulings against the US government's denial of habeas rights, no one has been freed from Guantánamo directly as a result.

Instead of accepting these rulings as a mandate to follow due process, several US administrations have gone to extraordinary lengths to ensure that no one could meaningfully challenge their imprisonment. What these cases have shown is just how often the US has been willing to violate its own sacred constitution.

The only court that exists for prisoners at Guantánamo was borne out of the attempt to deny them rights in the first place. The Military Commissions Act allowed "trial by military commission for violations of the law of war" against "enemy combatants." The impotence of the military commissions becomes clear with statistics. Out of 779 prisoners held at Guantánamo, a total of eight have been convicted. Some resulted from plea bargains, while other convictions were annulled upon release. The US has only charged seven others with crimes. These cases remain entangled in protracted pre-trial hearings. The majority of the prisoners still in Guantánamo have been dubbed "forever prisoners" following review assessments: men considered too innocent to charge but "too dangerous to release."

The only court that exists for prisoners at Guantánamo was borne out of the attempt to deny them rights in the first place.

Among them is Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks. After almost 20 years of torture, interrogations and legal proceedings, the military commissions are no closer to securing a conviction against him. The inability to successfully prosecute Mohammed lies in the fact that he was subjected to waterboarding (a medieval drowning technique) and denied basic due process. Evidence obtained under torture is not admissible in US courts.

I was one of the very first prisoners designated for a military trial in Guantánamo. The fact that juryless US military tribunals were being prepared—where evidence through duress and hearsay was admissible and where prosecutors could seek the death penalty—placed enough pressure, alongside a high-profile campaign mounted by my father, for the British government to intervene. Senior British judges described the idea of Guantánamo trials as a "kangaroo court."[3] That's essentially how I came home. Since that time, I have been campaigning against Guantánamo and other "war on terror" policies with my organization, CAGE.

The CIA torture program, euphemistically called Enhanced Interrogation Techniques (EIT), was primarily designed for Zayn Al-Abidin Muhammad Husayn (aka Abu Zubaydah). US intelligence believed Abu Zubaydah was a high-ranking member of Al-Qaeda and knew about future attacks. After his capture, Abu Zubaydah was taken to CIA "black sites" around the world where he was subjected to a series of torture techniques designed by US psychologists and authorised by US government lawyers who argued that if it didn't cause "death, organ failure or serious impairment of body functions," it wasn't torture.[4] He was subjected to nudity, sleep deprivation, confinement in small dark boxes, deprivation of solid food, stress positions and physical assaults.

In 2002, CIA operative Gina Haspel was dispatched to direct a CIA site in Thailand, code-named Cat's Eye.[5] Here, Abu Zubaydah was kept in coffin-sized boxes and waterboarded over 83 times. Abu Zubaydah was eventually sent to Guantánamo; he would later win damages against Poland, Romania and Lithuania in the European Court of Human Rights for complicity in this treatment. US allegations against Abu Zubaydah also began to crumble after details of his own diaries evidenced that he was neither part of Al-Qaeda nor involved in plots against the USA.[6] Two decades later, Abu Zubaydah has yet to be charged with a crime.

In 2002, General Geoffrey Miller was tasked with running Guantánamo. With EITs at his disposal, Miller ensured that torture and Guantánamo would become synonymous in the eyes of the world. Documented experiences include sensory and sleep deprivation, physical and sexual assault, and isolation. In 2003, Miller went to Iraq and began "GTMO-izing" prisoner interrogations at Abu Ghraib. Shortly afterwards, shocking details of prisoner abuse rocked the world. The link between EITs and the US's Iraq War, however, went much deeper.

After the invasion of Afghanistan, the US had been desperate to prove that Saddam Hussain possessed weapons of mass destruction (WMDs) and was supplying them to Al-Qaeda. What the US didn't declare was that it had actually provided Iraq with chemical weapons during its eight-year long Iran-Iraq War, which left over 1 million dead.[7] However, Iraq had destroyed its chemical weapons stockpile long before the US invasion in 2003.[8] The evidence the US was looking for came from a close associate of Abu Zubaydah. When he was captured by the US, just like Abu Zubaydah, Ibn Al-Sheikh Al-Libi was touted as one of the highest-ranking members of Al-Qaeda.

Like Abu Zubaydah, Al-Libi was also sent on a torturous world tour. In Egypt, Al-Libi gave the confession the US had been looking for: that Saddam Hussain was supplying Al-Qaeda with WMDs. This information was passed back to the US Secretary of State, Colin Powell, who presented it as "credible" evidence. It became one of the key justifications to invade Iraq. The only problem was that Al-Libi's confession was made under duress and was completely untrue. Thereafter, he was sent to Libya and turned up dead in his cell in 2009 in the infamous Abu Salim prison.[9] As for his confession, it became evident that not only were there no WMDs in Iraq, Al-Qaeda had no connection to Saddam Hussain or presence in Iraq. That only happened after and because of the US invasion.

Two decades later, Abu Zubaydah has yet to be charged with a crime.

Miller was in charge of Camp Bucca in Iraq, the prison that became the birthplace of Islamic State (IS).[10] In a cruel twist of fate, IS captives accused of torturing US citizens are currently facing trial in the US. Among other things, they stand accused of waterboarding their victims and dressing them in Guantánamo-style orange jumpsuits before executing them.[11]

Many Guantánamo prisoners were first held at the Bagram Theater Internment Facility before being sent to Guantánamo. I was there for almost a year and witnessed the murder of two Afghan prisoners by US soldiers.[12] In 2014, five senior Taliban members imprisoned at Guantánamo were freed and resettled in Qatar as part of a historic prisoner exchange between the US and the Taliban. The five helped set up the Political Office for the Islamic Emirate of Afghanistan and played a key role in negotiating the US withdrawal from Afghanistan with US leaders.[13] Several of these former Guantánamo prisoners now hold ministerial positions in the Afghan government. By July 2021, US troops quietly abandoned the Bagram Air Base by slipping away in the middle of the night without telling the new Afghan commander. It was a fitting end.

> Guantánamo was selected as a prison for the purpose of impunity.

Most of the Guantánamo prisoners had never been to America, but America came to them. They hailed from over forty different countries and saw something no one else has. While nine prisoners didn't make it out of Guantánamo alive and 39 remain imprisoned, the rest of us have and will continue to tell the world what we saw, in order to make sure the world's most infamous prison is never forgotten. As the current US administration announces its intention to close Guantánamo, yet again, it is inevitable that future generations will look back and grapple with the ideals the USA espouses and the dark legacy of the imprisonment and torture that took place at Guantánamo Bay.

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Mohamedou Ould Slahi

"We will look back at this era the way we now look at slavery."

INTERVIEW

What would you like others to know about your experience during or after the 14 years you were detained at Guantánamo?

I cannot express in words the extent to which I am happy that I am not in Guantánamo anymore. I remember when I was first brought to Guantánamo, I thought, great, I love America. When I was young, I used to watch shows like Law and Order and I believed that in America they respect the law. I thought I'd tell them I didn't do anything wrong and that would be it, end of story. But when I arrived there, they started asking me very nasty questions. At first, I told them everything I knew, but I later said, "No, I'm not telling you anything anymore. I know my rights. I know I haven't been charged with a crime." They told me, "You're not going home, the rules have changed." That's when I was put through "enhanced interrogation techniques," which is just a euphemism for torture. I was subjected to horrific things. To this day, I am no longer the same person.

The US had labeled me "un-releasable," but thanks to Allah, thanks to my book, thanks to the campaigns organized by people around the world—these all helped build momentum and I finally got out. Even after I was released, the US didn't want me to be free though. I was banned from having travel documents for the rest of my life. Luckily, the new president of Mauritania, who was moving the country towards greater democratization, disagreed with these restrictions and granted me a passport. Even after that, emails leaked to *Der Spiegel* detailed how the US government told other countries not to allow me in to seek medical treatment. I have health problems, attacks of abdominal pain that make it difficult for me to breathe when I sit, for which I'm still unable to get proper treatment.

Since your release, you have been very active in speaking publicly about Guantánamo and the US torture program. What messages do you hope to convey through your advocacy?

My neighbors, nephews, nieces, friends—they want to be treated with dignity. And they want to enjoy the same rights that you enjoy in the US or in Germany. The fact that people were born in Africa or the Middle East can't mean that they don't deserve to be treated in accordance with the rule of law. It's horrific. In 100 years, we will look back at this era the way we now look at slavery. After the tragic events of 9/11, the United States of America had this very powerful fascist tendency. If I had been born in the US, I wouldn't have been treated the way I was. The thing I couldn't understand is why, in their eyes, people who were not American didn't deserve the rule of law. Other major countries like Germany, France and the United Kingdom applauded the actions of the United States after 9/11.

> The fact that people were born in Africa or the Middle East can't mean that they don't deserve to be treated in accordance with the rule of law.

We need to ban the crime of terrorism. Terrorism should not be a crime in a democracy. Number one, no one agrees on a definition. In Turkey, the "terrorists" are not the same as in Germany, and in Iran they are not the same as in the United Kingdom. The good thing about the crime of murder is that it's the same everywhere, whether in Saudi Arabia or in the US; it's something you can prove.

If a government claims someone is a terrorist though, they don't need to prove anything. It's a magic wand they can just wave and use to punish people, kill them, maim them, put them in prison. And this is a godsend for dictators all over the world.

> If the US says they are helping human rights everywhere, they should start with themselves.

I'm not trying to undermine the very real victims of these demented people who call themselves ambassadors of God and kill innocent people. I'm not at all saying that. But giving such people the status of "terrorists" makes them too important, makes them people with a cause instead of putting them on trial as criminals, as mass murderers. I'm in contact with some of the victims of 9/11 to this day. No one I'm aware of has ever been successfully convicted for the heinous crime of killing 3,000 people on 9/11. No one. Twenty years on. Where is justice?

You wrote your memoir, *Guantánamo Diary*, while you were detained at Guantánamo. Can you tell us about your motivation for writing it and what you were hoping it would achieve?

In writing it, I just wanted to say, especially to my family and the people who love me, that I didn't do the things I was accused of. This narrative that was woven about and around me, that I was a mass murderer—I didn't do this, but I was not allowed to contest any of what they said about me. I was not arraigned; I was not asked to plead guilty or innocent. There were no charges and no evidence. There was only one thing: the US narrative.

I wanted to write, but was not allowed to have a pen or paper. So, I used to steal them and started to write in secret. I wrote in Arabic, French, German and English; I mixed everything up and just wrote whatever came to my mind. I would write and write, then hide the pages. But when I entered the torture program, they took everything from me.

I had decided I would not write anything anymore, but then when my lawyers came in mid-2005, I saw a window and I started to write again.

I wrote really small and my lawyer was very frustrated with me and asked me why. I laughed because I barely had any paper and I also made it so small so it wouldn't attract attention. I wrote the whole book in three months, but I was told I couldn't publish it and it was held for 7.5 years. We had to fight until they gave me this very damaged good in the end.

You've also been involved in telling your story through two movies that came out in 2021, the feature film *The Mauritanian* and the documentary *In Search of Monsters*. What was your motivation for telling your story through this medium?

It's very painful to talk about my experiences at Guantánamo, but I do it because this needs to stop. This kind of humiliation—just because you were born in Mauritania or Saudi Arabia or Egypt—needs to stop. We cannot accept this anymore. The people in the West are not helping human rights or the rule of law, but instead they are encouraging and empowering dictatorships.

> It's very painful to talk about my experiences at Guantánamo, but I do it because this needs to stop.

Do you think that the conversation around Guantánamo has changed in the last 20 years?

Yes. I was invited to speak to Congress after the release of the movie, and I wrote to Biden to close Guantánamo. This is unprecedented. This narrative about "evil people," the "other," and "terrorists"—it has to be challenged. We need our own narrative that is universal, about human rights and equality, with all countries signed up to these ideas.

While I was detained at Guantánamo, the Chinese dissident and human rights activist Ai Weiwei was put in prison in China. Intervention from the US and other countries made it possible for him to travel to the US, and he was received by none other than Hillary Rodham Clinton. I was happy for him because I felt his pain as someone who was also imprisoned. Clinton stood there, boasting, showing herself at the airport receiving him in person. She's very eloquent and she said, "China needs to respect the rule of law!" I was in my cell at Guantánamo listening, thinking oh my god, is she for real? Please, look at me! You have the power to save me and I don't even need you to receive me at the airport! It's almost ugly to use human rights as a political tool like that, because it was all so fake. It was not for human rights, it was to show China in a very bad light. If China was doing the bidding of the US, nobody in the US would be talking about human rights in China.

As we approach the 20-year anniversary of Guantánamo's opening, what are your thoughts on this grim milestone and what do you hope for the future?

I hope Guantánamo is closed before the 20th anniversary. Guantánamo does not belong in a democracy, it belongs in a dictatorial repressive regime. The people from the US that I have the privilege to know, to talk with, to share food with, to share ideas with—they don't deserve Guantánamo. They deserve better than that. The US, as the leader of the free world, should be an example; if they say they are helping human rights everywhere, they should start with themselves. I love the quote: "What you do speaks so loudly I can't hear what you are saying."

MOHAMEDOU OULD SLAHI IS A WRITER AND PRODUCER WHO WAS DETAINED AT GUANTÁNAMO FOR 14 YEARS WITHOUT CHARGE. HIS RENOWNED MEMOIR "GUANTÁNAMO DIARY," WRITTEN WHILE HE WAS IN CAPTIVITY, WAS PUBLISHED IN 2015 AND HAS SINCE BEEN ADAPTED INTO THE 2021 FEATURE FILM THE MAURITANIAN. HE NOW RESIDES IN MAURITANIA AND ENGAGES WIDELY REGARDING HIS WORK AND EXPERIENCES.

Murat Kurnaz

"Guantánamo is a place of lawlessness and torture."

INTERVIEW

Can you describe how you came to be detained at Guantánamo and how you were ultimately able to leave?

I was sold by the Pakistani police as a "suspected terrorist" to the US army in Afghanistan. I was tortured in Kandahar and was then later flown to Guantánamo. For a long time, I had no idea where I had been taken. I was always subjected to the same questions and accusations and was tortured again and again, as my answers were never satisfactory to them. But I didn't want to make false confessions. Only years later, during the visit of the US attorney Baher Azmy, did I learn that my lawyer Bernhard Docke and mother had already been fighting for years for my release, including within US courts. My release was not announced to me in advance, and suddenly, I was supposed to put on jeans and a t-shirt and could go home. As a condition of my release, however, I had to sign a statement beforehand affirming that I would never again fight against the USA, that I had been treated well, and that I would not make any legal claims against the USA. Despite being threatened with having to stay in Guantánamo if I didn't sign, I refused to do so. I was nonetheless released.

What is the most important thing about your time at Guantánamo that you want the public to know about?

Guantánamo was and is a place of lawlessness, arbitrariness and torture. After my release, I found out that my release could have easily been possible four years earlier; everyone was convinced that I was not guilty. Germany's initial refusal to take me back affected me deeply.

You published a book in 2007 titled *Five Years of My Life: An Innocent Man in Guantánamo*. What were your hopes when you wrote the book and how have others reacted to your story?

With the book and the film, my goal was for people to learn the truth about Guantánamo. I had hoped that Guantánamo and other black sites would be closed. Many people have read my interviews and the book, as well as seen the film. Unfortunately, not that much has changed.

What has your life looked like since leaving Guantánamo?

I live in Bremen with my wife and our three children. In addition to my family and my work, I exercise a lot. For many years, together with Bernard Docke, I have given lectures on the importance of human rights. Most people regard me with respect and compassion. There are, however, people who continue to maintain old prejudices and rumors, who react to me with mistrust and fear. I have experienced this, among other things, while searching for an apartment, for instance.

As we approach the 20-year anniversary of Guantánamo's opening, what are your thoughts on this grim milestone? What would justice for Guantánamo look like to you?

It is tragic that those responsible for the torture have not all been prosecuted. Torture is always and everywhere forbidden; it is a crime. What happened has happened, and it cannot be undone. However, it would have brought some degree of justice if the perpetrators had been punished and the victims compensated. I have not yet even received an apology.

MURAT KURNAZ, A TURKISH CITIZEN BORN AND RAISED IN GERMANY, WAS ONLY 19 WHEN HE WAS ARRESTED WITHOUT EXPLANATION IN PAKISTAN AND HANDED OVER TO US FORCES. HE WAS DETAINED AND TORTURED AT GUANTÁNAMO FOR 1,600 DAYS BEFORE BEING RELEASED WITHOUT EXPLANATION OR APOLOGY IN AUGUST 2006. HE CURRENTLY LIVES AND WORKS IN GERMANY, WHERE HE HAS SUPPORTED REFUGEES WITH INTEGRATION AS AN OFFICIAL CULTURAL AND LINGUISTIC MEDIATOR.

Nizar Sassi

"We were told that we would be detained indefinitely."

INTERVIEW

Can you please describe how you came to be detained at Guantánamo?

I was captured in Pakistan by the Pakistani security forces, who imprisoned me for about 10 days. I was then sold to the American security forces who transferred me to the Kandahar camp in Afghanistan where I was held for about 15 days. The conditions of detention there were terrible. I was transferred to Guantánamo by a direct flight, still in terrible and inhuman conditions. The reception at Guantánamo was worthy of a horror movie: I was locked in a cage with a mat, one bucket for my needs and another for drinking. I was interrogated all day, with my hands and feet handcuffed. Without any prospect of judicial review or a trial, we were told that we would be detained indefinitely. That information ended up finishing us off, leading to suicide attempts and suicides daily. We were subjected to beatings, insults, death threats with weapons or other means, humiliation, desecration of the Qur'an, sexual abuse, rape, medical experiments—we were used as guinea pigs, with no rest and no sleep. I remained at Guantánamo for 30 months before I was handed over to the French security forces, without any charge having been brought against me by the US government. When I arrived in France, I was incarcerated for another 18 months for participation in criminal association relating to a terrorist enterprise, a rather vague notion in French law that allows you to be incarcerated for quite a long time without formally having any proof of a plan for criminal action. All of this was on the basis of material collected by the French intelligence services at Guantánamo during interrogations that are not only illegal under French law, but also European law and the Geneva Conventions.

What is the most important thing about your time at Guantánamo that you want the public to know about?

There are so many things that I would like to make known to the public about Guantánamo, even writing a book would not be enough. I will remember the capacity of human beings to lose all their principles when they are destabilized, as the Americans were with the September 11 attacks. This led them to build the world's biggest machinery for, or school of, anti-American hatred, by flouting all the principles of respect for human dignity and dehumanizing these prisoners and exposing them to the rest of the world, and in particular to the Muslim world. This was the biggest recruitment campaign of future anti-American terrorists, even while these responses were designed to fight against just that.

It's not fair,
but that's how it is.

In 2006, you published a book called *Prisoner 325, Camp Delta* about your time in Guantánamo. What motivated you to write this book and how was the public reception?

The hope I had in writing this book, as well as in my different forms of intervention in public debate, has been to make known to the global public, and especially the American public, the reality of what was really happening in this prison and the abuses resulting from the fight against terrorism. It was in some way therapeutic for me to share my experiences. I really wish I could have engaged more directly with the American public on these issues.

What has your life looked like since leaving Guantánamo? What challenges have you faced re-integrating after your convictions were overturned and you were released?

Since being released I got married and now have four children, one of whom is disabled. My marriage was initially complicated by my poor psychological state, but my wife and family have supported me a lot. I have done different jobs and trainings, but I can't stay with the same job for too long because of my depressive state and my health, which is deteriorating because of the consequences of my time in Guantánamo. I am also forbidden from traveling without the authorization of a prosecutor. I have to report every month or I face imprisonment.

> This was the biggest recruitment campaign of future anti-American terrorists.

In 2012, you and two other French detainees filed a criminal complaint in Paris against US officials for use of torture at Guantánamo Bay. The Court of Appeal nevertheless decided to close the investigations in December 2019. What did this decision mean for you and your family?

We went to the ends of what was possible with our lawyers to be able to prosecute the US officials behind the Guantánamo camp, but the French justice system said it lacked jurisdiction and that there would be no investigation, no trial, no conviction, no recognition of responsibility and no moral or financial compensation. It's not fair, but that's how it is.

As we approach the 20-year anniversary of Guantánamo's opening, what are your thoughts on this grim milestone?

This painful ordeal has helped me grow because it has made me know the most cruel and abominable sides of man. At the same time, it has affirmed my hope in man and strengthened my commitment to become a respectful and loving person for others rather than resentful or vengeful. I wish I could have reached mutual forgiveness with US officials.

NIZAR SASSI WAS BORN IN THE SUBURBS OF LYON, FRANCE. HE WAS CAPTURED BY THE AMERICAN MILITARY DURING A TRIP TO AFGHANISTAN IN 2002 AND DETAINED AT GUANTÁNAMO FOR OVER TWO YEARS. CURRENTLY RESIDING IN FRANCE, HE CONTINUES TO ADVOCATE FOR GUANTÁNAMO'S CLOSURE.

Mansoor Adayfi

"At Guantánamo I was fighting for my freedom, now I'm fighting for my life."

INTERVIEW

In 2021, you published a book titled *Don't Forget Us Here: Lost and Found at Guantánamo* about the 14 years you spent unjustly detained there. You are now working on another book about life after Guantánamo, what you refer to as Guantánamo 2.0. Can you tell us more about this?

Let's talk in general about Guantánamo 2.0. This book is not just about me, it's about everything. It's about all our lives. Imagine there is a gap in your life—10, 15, 20 years. Physically, you grow up, but psychologically, you move backward. There is a lot that has changed in the world.

In my research on life after Guantánamo, I found that a lot depends on where the brothers were resettled. The first category of people managed to reintegrate into their lives, become productive members of their societies, have kids—they moved on. For them, Guantánamo has passed. They don't want to recall or remember anything. Many of these people were settled in places like Germany, Qatar, England and Oman. There are still problems for some, but I'm speaking generally.

Then, there is the second category of people, who still have difficulties. Some of us still don't have legal status and we continue to live with the stigma of Guantánamo. Especially in countries like Kazakhstan, Albania, Serbia, and Senegal, people are treated like terrorists. In some cases, these countries don't have the infrastructure for rehabilitation or reintegration. These words don't exist in their politics, in their system—they just don't care. They only care about money. Many of us were sold to the CIA, and then the governments that received us when we were released also received millions of dollars to take us. What matters is money. It's not about you. Two brothers died because of medical negligence. In Kazakhstan, one of the brothers died in 2015 because the government refused to take him to the hospital. The other brother, Lutfi, died last year. He needed heart surgery. He was relocated from Kazakhstan to Mauritania, but Mauritania doesn't have a health care system that could perform the surgery. He needed a travel document, but his government, Tunisia, refused to give him one. The doctor told him he had six months, but they didn't care—he died.

Then you have the brothers resettled to Senegal. After two years, they were sent to Libya, where they were imprisoned and tortured. One of them lost his eye and one of them doesn't have any ID. They were arrested and tortured again because they had been in Guantánamo. It's that simple. Brothers resettled in the UAE in 2015–16 are still in jail to this day, without access to lawyers or visits from NGOs. They only have five minutes every few months to call their families. They have been abused, tortured and mistreated. I have recommended to the US State Department that nobody should be resettled in those countries—we don't want other brothers to go through what we have been through.

> Some of us still don't have legal status and we continue to live with the stigma of Guantánamo.

In my case, when I arrived in Serbia, I was told: "We have nothing for you. You're going to be deported in two years." That wasn't the truth, because we were promised by the US State Department that we were going to be treated like Serbians. But when

I arrived here, I was denied education. The first time I applied to college, I got accepted, but was then expelled, just because I had been in Guantánamo. In 2018, the government came to me and said I had two months before I would be evicted from the apartment I had been given.

> Many of us were sold to the CIA, and then the governments that received us when we were released also received millions of dollars to take us. What matters is money. It's not about you.

I used to go to a mall that has a small library on the first floor. They have tables and internet, so I thought it would be good to have a change of scenery and work or study there. I had to give the information desk my ID to enter the library. When they ran my ID through the system they panicked. Later, when I went to pray on the balcony, the guards came and I was detained. The police were called and counterterrorism forces came. I was really scared. I thought, are they going to shoot me? I was interrogated and asked to leave.

I recently graduated from college and on my graduation day, the faculty dean attended my graduation because I have no friends or people to attend. It was sad. He took me to his office after and told me: "When you came to the faculty the first time, we were afraid that you would detonate yourself and kill us." Everyone was panicked, wondering if they would have a terrorist in the faculty. After working with them for four years now, they know me and my life—they had just been misled by the government.

The conditions I was given were that I would not be able to travel for two years. Now, Serbia has said I can travel, but in reality, I'm not allowed to have travel documents. I have been asking for the last four years to get documents from Serbia or my own government.

I've contacted the Yemeni embassies in the US, UK, Germany, Italy, Bulgaria, Turkey, Saudi Arabia, Yemen—they refuse to provide me with a passport. Simply because I was in Guantánamo. I tried to get married. I found a really lovely woman who accepted my proposal and her family also accepted me. It was one of the best moments of my life, to find someone who loves me. I just needed a travel document. The woman waited for me, but nobody can wait forever. People have to live their lives.

Welcome to our lives. Again, we try to survive. I try to help my brothers and to help myself. At Guantánamo I was fighting for my freedom, now I'm fighting for my life.

You've talked publicly before about using Guantánamo to fight the idea of Guantánamo. What does this mean for you?

First, let's buckle up and fly to Guantánamo. What is Guantánamo? Why was it chosen in the first place? The Bush administration was smart. Consultants told them to find a place "outside the law" and they chose Guantánamo. Before they constructed the reality, they constructed the language. After 9/11, George W. Bush misused and abused 9/11. They started the "war on terror," which was really a war on Muslims, and they invaded Iraq and Afghanistan. They called us "detainees" instead of prisoners—I couldn't be called a prisoner of war because I never held a gun. I wasn't fighting. I never even had an intention to fight. They brought people from different parts of the world, people that weren't even on the battlefield. They called it "rendition," but it was really kidnapping. They constructed Guantánamo outside of the law because they didn't want to give us any kind of rights. They didn't want to apply any kind of law there—not American law, Cuban law, international law, the Geneva Conventions—nothing.

Guantánamo now is a symbol of injustice, lawlessness, abuse of power, oppression and indefinite detention. It is a death sentence for the people still there. Guantánamo is an idea that gives a kind of legitimacy or power to tyrants around the world. Look at China now, they have their own Guantánamo. Egypt, Saudi Arabia, Yemen, UAE—they have their own Guantánamos too. They just label it counterterrorism and then put you in jail, torture you, detain you indefinitely. It came from Guantánamo. Those tyrants think if the US does it, why not us too?

We are now using Guantánamo to fight the idea of Guantánamo. We are using what happened there, because it is one of the major human rights violations of the 21st century, to fight the idea of Guantánamo. Tomorrow, it will be happening in the heart of the US. If they can do it overseas, why not inside the country?

> We are now using Guantánamo to fight the idea of Guantánamo.

When we look at the "war on terror," we call it the "war of terror." Look how many casualties there have been. What has it achieved? If people look back honestly and sincerely, it's one big mistake. 9/11 was used to invade countries for military expansion and it was used to serve the interests of megacorporations and contractors. They also use what they called the "war on terror" to legalize arresting minorities, especially Muslim minorities. 9/11 didn't change the world, the way the US chose to react to it is what changed the world.

> 9/11 didn't change the world, the way the US chose to react to it is what changed the world.

As the 20-year anniversary of Guantánamo's opening approaches, what do you hope for?

I would like to call on all people to join us in asking President Biden to close Guantánamo once and for all, and to end the "war on terror" because it is a "war of terror." I pray for peace for us all, and peace can only be achieved through justice.

AT THE AGE OF 18, MANSOOR ADAYFI LEFT HIS HOME IN YEMEN FOR A CULTURAL MISSION TO AFGHANISTAN. HE NEVER RETURNED. KIDNAPPED BY WARLORDS AND THEN SOLD TO THE US AFTER 9/11, HE WAS DISAPPEARED TO GUANTÁNAMO BAY, WHERE HE SPENT THE NEXT 14 YEARS AS DETAINEE #441. HE NOW LIVES IN BELGRADE, SERBIA WHERE HE WRITES, CREATES ARTWORK, AND ADVOCATES FOR PRISONER AND DETAINEE RIGHTS.

Majid Khan
Poetry from Prison

When he was just 23 years old, Majid Khan was captured, forcibly disappeared and tortured by US officials at overseas CIA "black sites." He has been detained in Guantánamo since 2006. Having pled guilty in February 2012 to various offenses before a military commission in Guantánamo, Majid will conclude his military commission sentence in February 2022 and be transferred from Guantánamo Bay. In his sentencing hearing on 28 October 2021, Majid read from a 39-page statement detailing the brutality of the "enhanced interrogation techniques" that had been used against him—making him the first former prisoner of US black sites to describe the use of torture by government agents in open court—which the jury in his case called a "stain on the moral fiber of America" and a "source of shame for the US government." Majid has written several poems over the course of his imprisonment, reflecting on his life, his wife and daughter, and his torture and time in detention. The following poems have been cleared for public release.

Soul

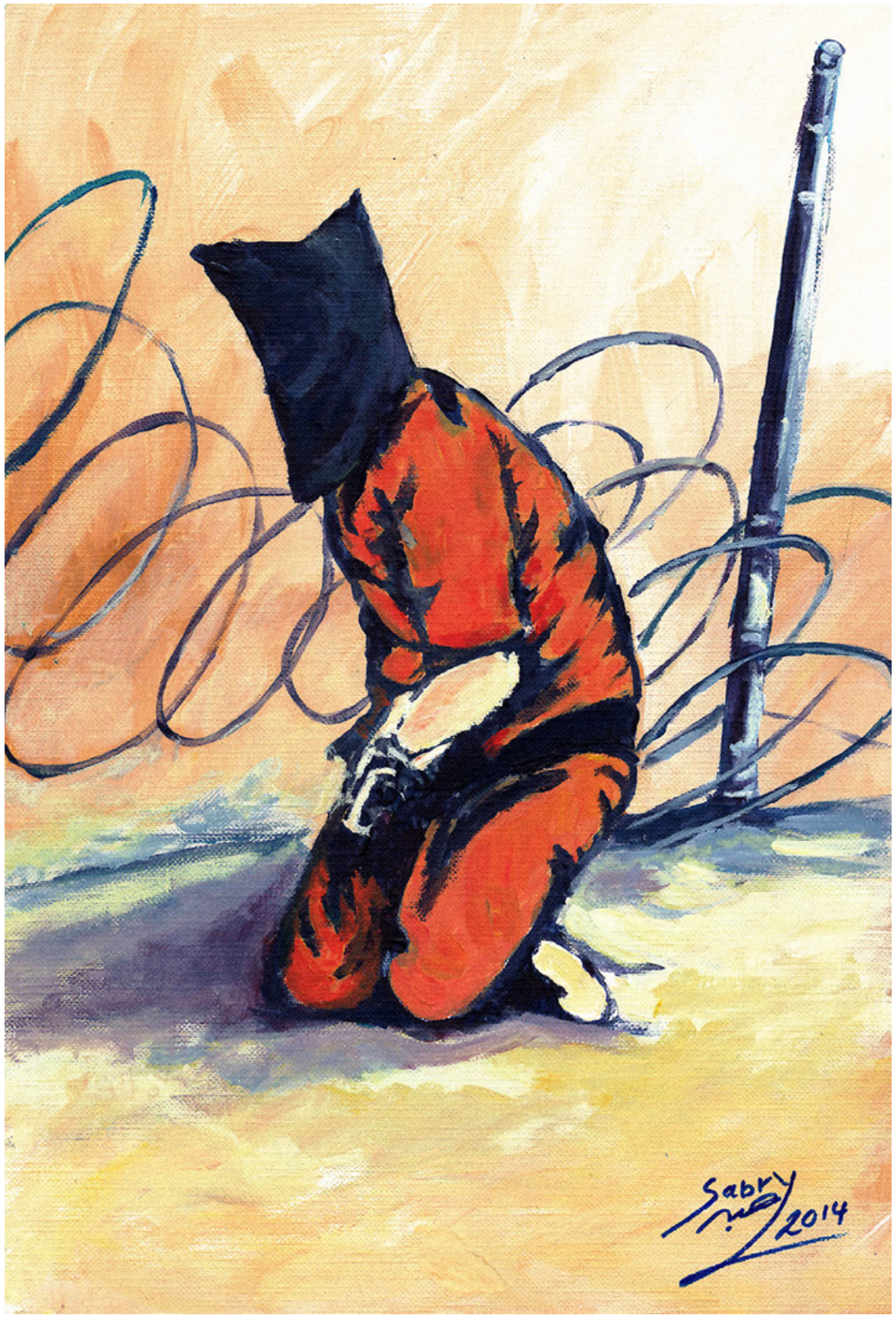
It feels like a body without a soul
To my daughter I wish I could call
Precious years of her life from me they stole
She never got to see me playing a father's role
Her very first steps and watching her fall
Her playing with dolls, I missed it all
These things may seem little and small
To us, this is it, and that is all
God willing, in dignity, I'll walk tall
In summer, winter, autumn and in fall
Years of life passed away without feeling
Wounded heart bleeding without healing
Precious times of my life have been stolen
My own people have become foreign
I used to be happy and I used to smile
To my daughter I wish I could dial
I love her. I wish I could see my wife
If not here then it will be in hereafter life
I lost the war before I even fought
Cast away in the sea I float
Drop by drop can drive one nuts
Death by thousand paper cuts

Drama

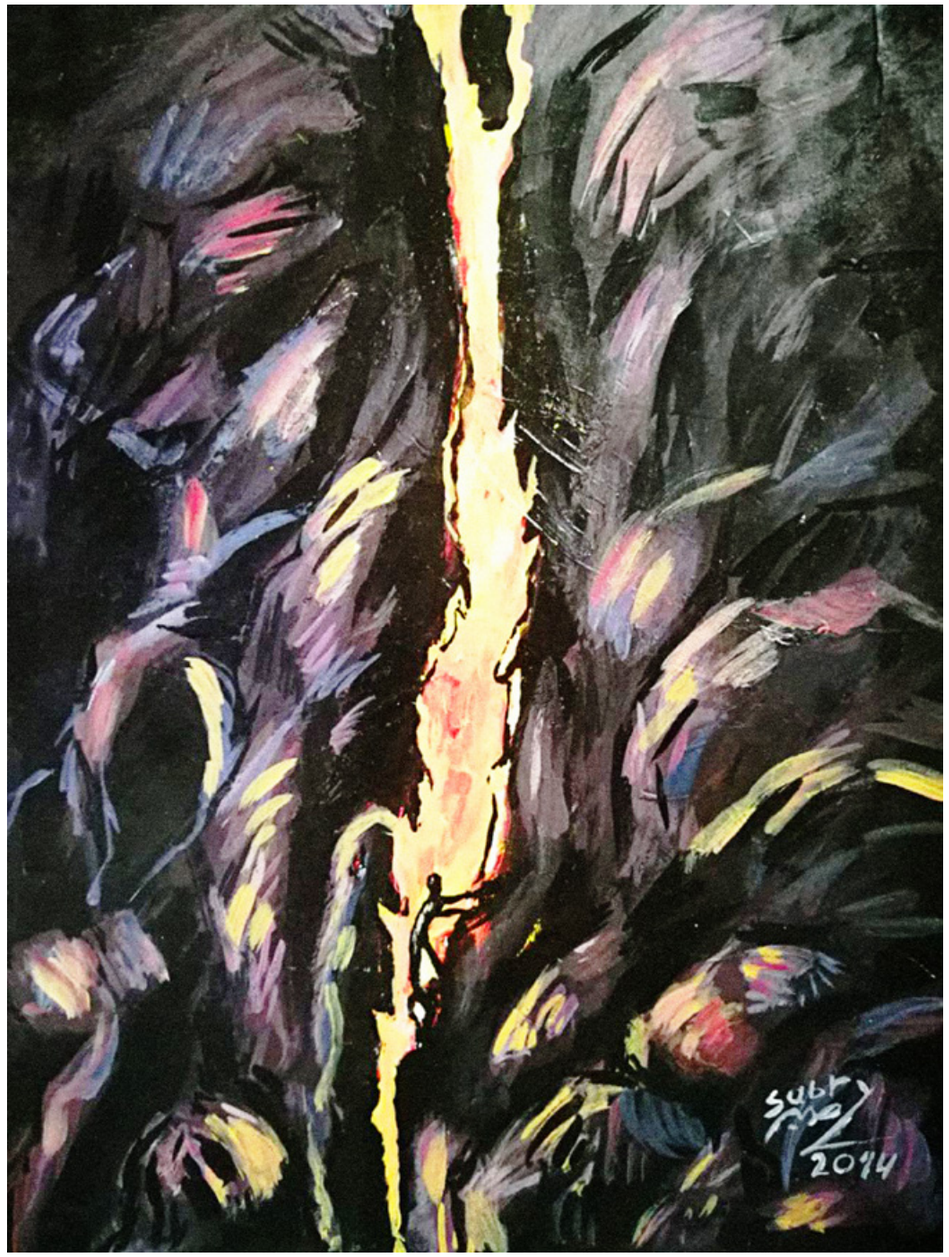
World is like a drama, every one doing its part
Some are left behind, some got a head start
To survive, it takes some skills and art
A man is only free, when he's free in his heart
I know, to the will of Allah I surrender
Easier said than done, especially what I've been under
Past, present and future, it's all getting blunder
What, where, why and how, boy do I wonder
Sometimes it feels like it will be over soon
Because after every dark night comes a noon
Years are passing by watching crescent moon
Crossing over dates in cold December, in hot June
Clouds touching the stars, stars don't mind
It feels warm, it feels like kiss of kind
I got that feeling for you that blows my mind
Like a word in a dictionary you can't find
God willing! Soon! It's just a matter of time
Away from you, feels like a sin and crime
Your love is my song, your touch is my rhyme
Remember me in your prayer at all times

EXHIBITION OF FORMER GUANTÁNAMO DETAINEE

Sabry Al-Qurashi




Sabry
2014


Sabry
2014

SABRY AL-QURASHI, A CITIZEN OF YEMEN, SPENT 14 YEARS AT GUANTÁNAMO BEFORE BEING TRANSFERRED TO KAZAKHSTAN. HIS FELLOW DETAINEES CONSIDER HIM TO BE ONE OF THE MOST TALENTED ARTISTS TO HAVE BEEN HELD AT THE FACILITY. WHEN HE WAS FINALLY RELEASED, SABRY BECAME ONE OF THE FEW PRISONERS PERMITTED TO TAKE ALL OF HIS ARTWORK WITH HIM. FAR FROM FRIENDS AND FAMILY, HE HAS CONTINUED TO PAINT AND HOPES TO EVENTUALLY DISPLAY HIS WORK IN A SOLO EXHIBITION.

Defending Guantánamo Detainees

II.

Practicing law where law is meant to be absent

It was only through a concerted legal campaign that the US Supreme Court came to acknowledge its jurisdiction over the prison at Guantánamo Bay and the right of those detained there to habeas corpus review. When the prison first opened, the US government blocked all information on how many people were held there and who they were. Slowly, litigation began to reveal the extent of the detention system at the offshore camp and to shine a light on the identities of those obscured within it.

Despite very limited public support and extremely steep odds, the community of lawyers building a domestic litigation strategy against Guantánamo in the US continued to grow, eventually comprising hundreds of attorneys who came to self-identify as the "Guantánamo Bay Bar Association." They organized their work—and helped to build a movement—around the core principle embodied in the US constitution that no president in a constitutional republic can hold individuals without charge and beyond the protection of the law.

Legal efforts before US national courts to secure due process rights were accompanied by tireless direct representational work to pursue the actualization of those rights before quasi-legal Military Commissions at Guantánamo. Despite facing opaque procedures, extensive censorship, limited access to their clients, and the weight of the US national security apparatus, the lawyers in this section reflect upon their experiences fighting for the rights of their clients at a site designed to exist beyond the reach of the law.

Baher Azmy

Lawyering in a Lawless Space: Reflections on 20 Years of Guantánamo Litigation

Guantánamo today stands as an iconic symbol of lawlessness, akin to Robben Island in its representation of authoritarian excess. But for most Americans it didn't start that way. When the Bush administration selected the US Naval base to house so-called "enemy combatants" and situated it intentionally in a place it thought outside the jurisdiction of US courts and therefore any legal constraint, it sought to project muscularity, authority and comfort to an American public shattered by the Bush administration's own failure to detect or prevent the 9/11 attacks. The Bush cohort aggressively promoted a narrative—buffeted by leaked pictures of prostrate, chained men in jump suits sitting near their prison pens—which distilled that of the broader proto-religious "global war on terror": an undifferentiated, conspiratorial terrorist, ineffably evil and willful, such that they had to be caged, and beaten and demeaned. The narrative fed an existential American need, much like the racialized internment and debasement of Japanese Americans in World War II, and for that matter, the mass incarceration of Black Americans, to render humans as "other" and to punish.

For Michael Ratner and the other political lawyers at the Center for Constitutional Rights (CCR), choosing to represent Guantánamo detainees—when no other organization would—was not an obvious choice. As practicing "movement lawyers," CCR typically only represents entities with fully aligned politics; at the time, CCR knew nothing about the men sent to Guantánamo other than that Defense Secretary Rumsfeld called them the "worst of the worst." Still, Ratner and the CCR team understood that any time the government seeks to divine reasons to put people outside the circle of human concern and deny them any recognition, danger and damage lurk; when that justification carries with it claims of military necessity, authoritarianism follows. How could a small group of radical lawyers with nominal resources and zero public support challenge and change the Bush administration's story in the midst of arguably the most jingoistic and militarized age in modern American history?

It started in 2002 with a conviction and a document. The conviction was a principle: no president in a constitutional republic could hold people without charge outside the protections of law. The document was a writ: habeas corpus was an ancient legal device meant to check the abuses of the king, and now the president, by requiring the jailer to show sufficient legal and factual cause for his claimed authority to imprison.

The conviction and the document worked like a double helix—inextricably braided together and foundational for any legitimate system of governance. Together, they stood for the rule of law over the rule of the authoritarian.

Initially, the courts didn't see it the same way, quickly dismissing habeas corpus petitions CCR brought on behalf of British and Australian detainees. The public barely noticed, other than those considerate enough to write Michael hundreds of death threats. In 2004, an appeal to the Supreme Court seemed far-fetched, but here too the legal strategy met the political moment. Politically, the Bush administration's arrogance in war and elsewhere was exposing its incompetence. Strategically, for better or worse (better then, worse today) the legal team stuck to a narrative centered on the premise that Guantánamo is exceptional—a betrayal of American values. It was supported by a coalition of *amicus* briefs including retired generals, former POWs and Fred Korematsu, an iconic figure embodying the danger of judicial acquiescence to "military necessity" during Japanese internment. And, then-for-the better, it worked. In *Rasul v. Bush* (2004), the Supreme Court ruled that the statutory protections of habeas corpus extended to Guantánamo, and that detainees would have the right to challenge the legality of their detentions and the corresponding right to lawyers.

> These men had rights, in theory; as a practical matter, that meant only a right to be denied relief.

Following this court victory, CCR found 13 sets of lawyers for 65 detainees whose identities were known. As a youngish law professor, I was assigned to represent Murat Kurnaz, a Turkish national who was born and raised in Bremen, Germany—and we would later learn, apprehended on a civilian bus in Pakistan and turned over to the United States for a bounty and tortured. I was the third civilian lawyer to visit Guantánamo, and naturally, Murat—who had been held incommunicado for three years—did not believe I was a real lawyer. I brought him a handwritten Turkish note from his mother that lovingly assured him he could trust me. I could see his swelling reaction to his first taste of humanity in years, like a shipwrecked Robinson Crusoe's first taste of bread. I explained that I had filed a case on his behalf against the President and that I would do everything I could to help him. He said in a German-accented English, "You have sued President Bush? This is goot."

After our first meeting, I spent three long days with him, developing trust. He spoke about his family, his childhood, his obsession with exercise, clean air and healthy food. He had a rooted faith in Islam that helped him manage the brutality, solitude and air of forever that hung over the prison. He was also hilariously funny—so much so that my friends eagerly awaited the government censors' review of my notes so I could share his jokes.

Soon after I returned home, the government filed with the court the unclassified reasons for his detention, which rested on a preposterous accusation. Because there was no actual evidence of violence or wrongdoing, the government claimed that Murat's hometown friend, Selcuk Bilgin, committed a suicide bombing in Istanbul in the fall of 2003. Setting aside the absurdity of the government's legal claim—that they could indefinitely detain someone because of the unknown act of a friend, carried out *while* Murat was incommunicado in Guantánamo—this was factually absurd as well. Selcuk was alive and well. Murat's case remains emblematic of the lies and distortions undergirding almost all the detentions there. We also exposed that the US government tried to keep secret the fact that they *knew* he had no connections to terrorism as early as 2002 yet continued to detain him until public pressure by my German co-counsel and I caused the Merkel government to reverse the position of the former Schroeder government and negotiate his release in 2006.

> Any time the government seeks to divine reasons to put people outside the circle of human concern and deny them any recognition, danger and damage lurk; when that justification carries with it claims of military necessity, authoritarianism follows.

In the months following the *Rasul* decision, CCR would democratize the Guantánamo resistance, an intentional strategy. It recruited hundreds of lawyers—from all parts of the country and all kinds of legal practice—to represent all 779 detainees. It was, as one commentator noted, "the greatest mass defense effort in US history."

In the following years, the litigation would proceed on two tracks. One track pursued a legal strategy directed at the Supreme Court to strike down Congress' restrictions on habeas corpus. I call this the Wholesale Strategy—an attempt to secure constitutional *rights* for all detainees. While court cases were stalled, there also emerged what I call a Retail Strategy—pursued by hundreds of lawyers whose recognized efforts would over time lend them the moniker, The Guantánamo Bay Bar Association. Case by case, client by client, the Retail lawyers slowly picked away at the government's political and totalizing narrative defense of Guantánamo. They told their clients' stories—of their humanity, their torture, their innocence and government incompetence.

The continuing interactivity of the Wholesale Strategy and the dynamic Retail Strategy represented one of the most important collective legal efforts in memory. Consider this shift. In 2002, CCR could not find any partner organization to join its legal effort. By 2008, however, we achieved a political and legal consensus that Guantánamo was illegitimate. Politically, both presidential candidates—McCain and Obama—pledged to close Guantánamo. Legally, we won another historic judgment in the Supreme Court in *Boumediene v. Bush*, holding that Guantánamo detainees possessed *constitutional rights* that

Congress could not take away. But what do rights mean for a vilified class of person? Despite his pledge to close Guantánamo in the first year of his presidency, Obama was cowed by political blowback from national security hawks. Meanwhile, our expectation that detainees would have meaningful court hearings was slowly quelled by a highly conservative DC appellate court that denied every detainee case that came before it—on the most arrogant and dubious grounds conjurable. These men had rights, in theory; as a practical matter, that meant only a right to be denied relief. For lawyers steeped in the narratives of the progress of law, rights mean everything; in theory they promote recognition and guarantee human dignity. Political scientists and political lawyers, however, recognize rights are contingent on politics, not the other way around. For disfavored persons cast out of community, there is, as Arendt explains, "no right to have rights."

The story of American racism and power is as old as our Republic; today, the story of 20 years of resistance to its barbarous manifestation in Guantánamo is the one I choose to focus on.

Entering its 20th year, Guantánamo is no longer a historical blip. Given the US's multiple lawless wars, the militarized border, drone strikes, systemic torture, rampant solitary confinement, racialized use of the death penalty, mass incarceration and systemic police violence against Blacks, we must now reckon with the earlier strategic assertion that Guantánamo is exceptional. In reality, Guantánamo is everywhere.

But my reflections are not meant to evoke regret. The lawyer-led struggle against Guantánamo was a courageous and principled response to a genuine human rights crisis. It exposed incompetence, cruelty, torture and deeply misguided executive policies; it narrated the experiences of humans who would otherwise have remained voiceless and demonized; it captured the attention of the highest decision-makers in the land—and the world—and it led to the release of 732 men from the brutality and indignity of indefinite detention. Personally, it was the most meaningful, morally engaged and challenging work I have ever done and probably ever will, made so because it was in coordination with a marvelous coalition of committed lawyers, activists and clients. The story of American racism and power is as old as our Republic; today, the story of 20 years of resistance to its barbarous manifestation in Guantánamo is the one I choose to focus on.

BAHER AZMY IS LEGAL DIRECTOR AT THE CENTER FOR CONSTITUTIONAL RIGHTS IN NEW YORK.

Alka Pradhan

"The extent of the illegality is not only the torture, but the coverup that continues to this day."

INTERVIEW

In your 2020 article titled *Kafka's Court: Seeking Law and Justice at Guantánamo Bay*, you write that practicing law at Guantánamo often seems oxymoronic given that the facility was created for the specific purpose of existing outside the law. Can you elaborate on what you mean by that?

Practicing law at Guantánamo is such a constant contradiction because you are told that you're there to uphold the rule of law. The Military Commissions Defense Organization's motto includes defending the rule of law. You go down there and you're told, "No, we didn't mean all the law. We just meant this one specific statute that we wrote specifically to govern this court. We're going to fly the US flag over the courtroom. When the national anthem plays in the courtroom, you will stand and face the flag. But the Constitution doesn't apply, federal law doesn't apply, Supreme Court precedent doesn't apply." Operating in that illegal space is really difficult as a lawyer. To be told, on one hand, that you're representing the US, that you are safeguarding elements of US law, but then also that you may not apply the US law you were trained in, is deeply disorienting and really, constantly frustrating.

Even for security-cleared counsel, they're constantly changing the rules for what we can or cannot talk about. That the government can change the definition of what is classified based on what they want to hide is contrary to the meaning of classification. The fact that Guantánamo is offshore allows the government to get away with so much.

Can you share more about your efforts to counter the government narrative about Guantánamo?

Everybody has a slightly different approach to press and advocacy, given our security clearances. I think it is really important to walk right up to the line of what we can say publicly. I believe that a lot of information is improperly classified. I can't change that, and I won't violate the law, but to the extent that I can de-code what is unclassified for the public, I think it's important to do that because of the illegality of the torture program. The extent of the illegality is not only the torture, but the coverup that continues to this day. This becomes particularly important when we talk about the ongoing effects of torture for these guys and advocate for medical care for them.

To be told, on one hand, that you're representing the US, that you are safeguarding elements of US law, but then also that you may not apply the US law you were trained in, is deeply disorienting and really, constantly frustrating.

What more do you think needs to happen to change the story that the American public has been told about Guantánamo, and the war on terror more broadly?

The single biggest problem is what the Obama administration did not do on Guantánamo. The one thing they could have done and they never did, and indeed continued to undermine, was educating the public about who these detainees are and why it is wrong to be holding them there.

All they said were vague statements like "this is against our values" and "we don't hold people longer than we need to"—the implication being that we had needed to hold them at some point. The Obama administration and all of his counsel, all of his friends in Congress, knew at the time that wasn't the case. To some extent this is non-recoverable, because it made Guantánamo a fully bipartisan issue. I knew it was going to be an enormous lift for someone like Joe Biden to close the prison after being in an administration that basically rubber-stamped it before. What should have been done was never done, and in those intervening 20 years we had a deeply entrenched propaganda campaign by the CIA and Department of Defense to keep Guantánamo open.

> We're down here at Guantánamo trying to ensure that human rights are being enforced on an individual level, and we're failing because people don't like who those individuals are.

What impact has Guantánamo had on the legitimacy of international legal frameworks?

Nobody thought the Convention Against Torture (CAT) was going to stop countries from torturing. What CAT did was at least made it necessary to hide it. That's not enough, but it's better than saying we can do whatever we want to anyone at any time with impunity. As someone who really believes in international law, its role is not always clear and is often frustrating given the lack of enforcement, but what it does at a minimum is force states to at least take a second look at what they're doing. This program being open for as long as it has been has taken away the ability of the US and our allies—who just sit by and watch us do it—to say, look, there are these standards we all need to do our best to follow. When you consider Guantánamo as a microcosm of torture and indefinite, arbitrary detention—all things that violate the basic tenets of international law—it has become so much harder. We're not hiding it anymore. It's right there and held up by some Americans as a source of pride.

Would you say that one of the legacies of this era is that there has been a backsliding with regards to norms around torture?

It's interesting timing with 9/11, because it coincided with the crystallization of the International Criminal Court and international criminal law as its own entity. It's kind of a hydra. We wanted to be tough on terror and international crimes for states, and then 9/11 introduced non-state actors. It was couched very much as we need to be proactive on terrorism and prosecute crimes no matter who they're committed by. In the zeal to be tough on terror and prosecute these international crimes, this framework has rolled back international protection for the human being. I hear a lot of prosecutors talk about themselves as human rights lawyers because they're prosecuting mass atrocities like 9/11, and that's true to a certain extent. For them, human rights exist on a broad-based, macro level, and meanwhile, we're down here at Guantánamo trying to ensure that human rights are being enforced on an individual level, and we're failing because people don't like who those individuals are. That is antithetical to human rights at its core.

You've written and talked before about additional challenges you have faced as a woman of color in the predominantly white, male-dominated environment of the Guantánamo Military Commissions. Could you share a bit more about that experience?

Until very recently the entire right side of the courtroom at Guantánamo was white and male except for one female attorney. And they're older white men, some with a very specific idea of who Muslims are and who women are and what women and people of color should be doing with their lives. There have been times where I've been snorted at. I talk about the torture of these guys, which is an undisputed fact, and I hear them snickering. And then later they'll get up and respond to my oral argument with "Ms. Pradhan is once again hysterical."

I'm also a woman of color and I wear a hijab in the courtroom, so a lot of people think I'm Muslim. I've heard observers saying, "What is a Muslim doing defending these guys? Has she been investigated? Why does she have a security clearance?" Part of the reason they feel like they can behave that way and ask those questions is because they see and hear how some members of the prosecution treat us, and me specifically. They are told by the prosecution that we're in it for the money, the fame, the book deals, and that we are terrorist sympathizers, which further feeds the narrative that a woman of color must automatically be a threat.

> I would love to see some kind of truth commission on the torture program, which could be done by anyone with the political courage to do it.

What does justice and accountability mean for what has taken place—and is continuing to take place—at Guantánamo?

Different lawyers will tell you different things based on who their clients are, but certainly closure. It's not like we can't negotiate transfers, either to be released or—for the guys the government claims are still a threat—bring the evidence and negotiate a transfer to somewhere they can get medical care. Regardless of whether you think they're a threat, they're still entitled to medical care, and we can figure out from there whether and for how long they need to be detained. For my client Ammar Al-Baluchi, all he wants is medical care. He's only 44, and is deteriorating from his traumatic brain injury. He wants therapy, physical and psychological, for what he's going through. He wants to be able to sleep a full night again, which he hasn't done in 17 years.

Yes, he would like to be able to see his family, because even people on death row can see their families. That is really what he's looking for, which is not even most people's idea of accountability, it's just basic rights. Apart from that, I would love to see some kind of truth commission on the torture program, which could be done by anyone with the political courage to do it.

Do you have any final comments you'd like to share?

I would appeal to people to visit Guantánamo if possible. My team has spent a lot of time trying to get people registered as observers. Anybody interested is welcome to contact us.

ALKA PRADHAN IS CURRENTLY HUMAN RIGHTS COUNSEL AT THE GUANTÁNAMO BAY MILITARY COMMISSIONS, REPRESENTING AMMAR AL-BALUCHI IN THE CAPITAL CASE OF UNITED STATES V. KHALID SHEIKH MOHAMMAD. SHE WAS PREVIOUSLY COUNTER-TERRORISM COUNSEL AT REPRIEVE US, WHERE SHE REPRESENTED A NUMBER OF GUANTÁNAMO BAY DETAINEES IN LITIGATION INVOLVING HABEAS CORPUS CLAIMS AND CONDITIONS OF DETENTION.

Doug Cassel

Guantánamo at 20: A Reminiscence—And a Hope

When I first joined the legal team against Guantánamo in the summer of 2002, I had difficulty believing that the US government could advocate the position it took. The George W. Bush administration asserted the right, on the basis of secret and often flawed "intelligence" information, to label anyone in the world a "terrorist," to capture him anywhere, to put him on a clandestine flight to Guantánamo—where he had no right to be charged with any crime, no right to a lawyer, no right to come before a judge, and no right to present evidence in his defense—and to keep him there until the "war on terror" ends (whenever that may be).

As if Guantánamo's legal vacuum were not bad enough, along the way, the person might be taken to a CIA "black site," kept incommunicado, and tortured. Later, once at Guantánamo, the person might eventually face trial before a military commission, with procedures so unfair that an acquittal was highly unlikely. Moreover, a not-guilty verdict could in any event be devoid of practical effect since the acquitted person could still be kept at Guantánamo as an "unlawful enemy combatant."

I was frankly shocked. As a lawyer specializing in international human rights law, with extensive experience in Latin American countries where law governed only the poor, not the rich—and certainly not the military or the death squads—I had come to appreciate the practical value of the rule of law. For me, it was not simply a phrase learned in law school or a civics lesson. Without the rule of law, experience had taught me, people who know too much or think too much are at risk of death, disappearance and degradation.

I knew that the United States had propped up and colluded with corrupt and bloody regimes. Yet, we were still the world's oldest continuous democracy, with a Bill of Rights and a largely independent judiciary. It was a blow to see my own country, driven by fear and hate, descend into the depths of lawlessness.

I was happy, then, to be recruited into the small band of US lawyers who brought the first federal court cases against Guantánamo—the cases eventually known as *Rasul v. Bush*. I recall Michael Ratner, Joe Margulies and colleagues from the Center for Constitution Rights; Tom Wilner, Neil Koslowe and Kristine Huskey from the law firm of Shearman & Sterling; law professors Tony Amsterdam (a Supreme Court guru), Eric Freedman (an expert on habeas corpus), and myself (an international human rights law specialist); and, somewhat later, retired federal judge John Gibbons and his associate Jonathan Hafetz. My apologies to anyone not named.

At first, we were small out of necessity. When Guantánamo opened, lawyers were under tremendous pressure not to buck the overwhelming public hostility to the alleged "terrorists"—which translated readily into a refusal to recognize their rights. Large law firms feared that commercial clients would not approve of their defending the so-called "worst of the worst." Tom Wilner, I understand, had to threaten to resign from his powerful position at Shearman & Sterling before the firm would allow him to take on Guantánamo.

At first, for similar reasons, we were clobbered in the courts. Never mind what we had been taught in law school about due process of law. As long as the litigation was framed as "the terrorists v. the US government," the government was going to win. And in the federal trial and appellate courts in Washington DC, the government won handily.

> Without the rule of law, experience had taught me, people who know too much or think too much are at risk of death, disappearance and degradation.

To have any hope for success in the US Supreme Court, we realized that we had to change the lens though which the case was viewed. It could no longer be framed as "the terrorists v. the US government." It had to be "the rule of law v. the government." The prisoners detained at Guantánamo—the alleged "terrorists"—could no longer be the main protagonists. We had to recruit *amici curiae* whom no one could accuse of terrorist sympathies, but whose rule of law credentials would be seen as impeccable.

And so it was that we recruited former US federal judges, former US government officials, former US diplomats, former US prisoners of war, former World War II Japanese-American internee Fred Korematsu, 175 members of the British Parliament, the Commonwealth Lawyers Association, the International Bar Association—and others—to argue before the Supreme Court that US courts did indeed have jurisdiction to review the legality of detentions at Guantánamo.

In other words, our *amici* would argue that Guantánamo was not a "law free zone." To reinforce the point, exalting strategy over ego, our little team of lawyers agreed that the main oral argument before the Supreme Court would be presented by Judge Gibbons—whom no one could remotely accuse of harboring terrorist sympathies.

The strategy, I believe, worked. In 2004 the Supreme Court ruled in our favor by a 6–3 vote. Yes, it helped that public panic over the terrorist attacks of 2001 had by then subsided considerably. It also helped that photos of US guards mistreating and degrading prisoners at the Abu Ghraib prison in Iraq surfaced shortly before the Supreme Court ruled.

The government had opposed judicial review of detentions at Guantánamo by arguing to the courts, in effect, "Trust us." Abu Ghraib provided graphic evidence that the Executive Branch could not be trusted to safeguard rights of unpopular persons. As Justice John Paul Stevens wrote for the Court, quoting a half-century old dissent by Justice Robert Jackson, "Executive imprisonment has been considered oppressive and lawless since [King] John, at Runnymede [eight centuries ago], pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."

If Abu Ghraib was the antithesis of the rule of law, the Supreme Court's 2004 ruling in *Rasul v. Bush* was a landmark vindication of the Magna Carta and of the value of courts independent of government.

> Abu Ghraib provided graphic evidence that the Executive Branch could not be trusted to safeguard rights of unpopular persons.

Since 2004, too much legal and policy water has flowed to recount in this brief space. From a high of hundreds of prisoners, Guantánamo's population is now fewer than forty. CIA back sites have been closed. A law and an executive order ban torture. But courts reviewing Guantánamo detentions have mostly deferred to the government. The legal reforms could be undone by the stroke of a pen in the White House or by a vote of Congress. And after the near miss attempted by Donald Trump, even American democracy is no longer as secure as it once seemed.

Even so, a note of hope arose on the eve of Guantánamo's 20th anniversary. In October 2021, in the first military commission trial in which a prisoner recounted the realities of his torture, seven reportedly senior military officers (out of eight on the jury) signed a letter urging clemency. Prisoner Majid Khan, they wrote, "was subjected to physical and psychological abuse well beyond approved enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history." This abuse was of "no practical value in terms of intelligence, or any other tangible benefit to US interests." More importantly, it was a "stain on the moral fiber of America; the treatment of Mr. Khan in the hands of US personnel should be a source of shame for the US government."

I applaud their statement but would take it even further. Not only torture, but Guantánamo in all of its dimensions, is a "stain on the moral fiber" of any nation that aspires to the rule of law. Guantánamo itself should be a "source of shame" for the US government—and a source of pride for all those who have been privileged to stand against it.

DOUG CASSELL IS EMERITUS PROFESSOR OF LAW AT NOTRE DAME LAW SCHOOL, USA.

Nancy Hollander

"We have to fight every step of the way."

INTERVIEW

Many have referred to Guantánamo as being designed to exist beyond or outside of the law. What were some of the main challenges that you faced trying to represent clients in that context?

One challenge was that it was hard to get to Guantánamo—it's expensive and takes a week, no matter how you do it. So that was hard. I've been involved in other national security cases before, and they're always cumbersome, but they don't usually require you to fly somewhere to read on the classified material. It was also hard because at the beginning there was no discovery. It turned out Mohamedou already had three habeas cases that we had to get combined. The government was not required to respond to any habeas petitions in 2005, so we filed a Freedom of Information Act request for relevant documents and that's how we got his medical records and learned that what he had told us about the torture was true. Also, right around then the first Senate Armed Services Committee report came out with information about Mohamedou's torture. Additionally, an FBI Inspector General report came out and found that some members of the military had pretended to be FBI so that the FBI would get in trouble for what they were doing. This all gave us information about Mohamedou. And then we just kept trying to figure out what to do.

You were really instrumental in getting Mohamedou Slahi's memoir, *Guantánamo Diary*, published and later turned into the 2021 feature film The Mauritanian. What did you hope this would achieve?

We hoped it would help him get out of detention. I signed the contract for the movie right around the time the book came out. We hoped the movie would come out soon, too. I think that the book did help him get released and I did a lot of publicity around it, but the movie languished for a long time. Then Mohamedou got out anyway in 2016 and I didn't really care whether the movie ever happened. I focused on helping Mohamedou with challenges, such as mental and physical issues, and getting him settled. Then all of a sudden, Kevin McDonald and Jodie Foster attached, and then the movie was going again. And now, what Mohamedou and I have both wanted from the movie is to start the conversation about Guantánamo again and get the other guys out.

In prior interviews, you've talked about your work defending Guantánamo detainees as also defending the integrity of the US Constitution and the rule of law. Reflecting on your work, do you view your efforts as successful?

I don't know how you describe success; certainly, getting Mohamedou out is success. But I'm a criminal defense lawyer and defense lawyers lose a lot of cases. Sometimes you have to find some way in which they're successful, just to feel like it's not all a waste of time. I do believe there is a robustness to the US criminal justice system when it works, though it doesn't always work. However, Guantánamo has nothing to do with the US criminal justice system at all. The military commissions are not what I would call US courts. They don't have the same rules. It's not clear the Constitution applies at all, so I consider it just a made-up kangaroo court that we have to fight every step of the way. With Mohamedou, certainly the success is obvious: he got out.

I'd also like to note that it remains a struggle to maintain the integrity of the Constitution and rule of law in US courts. We pled a case in New Mexico that both my clients and I were afraid of trying because they're Palestinians. It involved jewelry, nothing to do with terrorism or material support, and in the end, when we had the sentencing, nobody went to jail. But there were a lot of people who hadn't been charged in the first

place—the ones who weren't Palestinian. At the end, the judge asked, "Ms. Hollander, why do you think your clients were targeted?" I took a deep breath and stood up and said, "Your Honor, it's because they're Muslim." The prosecutor went through the ceiling, but my clients were really happy that we finally got it out in the open. But it's always a struggle. It's been a struggle since day one of the United States for the rule of law to apply to everyone. It wasn't intended to apply to everyone. When people say that the US was founded as a Christian nation, they're right. That is what it was: white, property-owning, Christian men. Broadening that has been the responsibility of lawmakers and people fighting for civil rights and the rule of law since the beginning of this country, and we're still doing it.

What can lawyers do, if anything, to challenge some of the obstacles facing former Guantánamo detainees as they work to rehabilitate and reintegrate back into their lives and society after release?

Well, number one, we have to stay involved with their lives. I think all the lawyers, to the extent they can, have done that. We don't realize the challenges of getting out of prison, and that people need psychological help. I've learned this lesson from prior experience working with clients, and for Mohamedou, I made sure he had psychological support coming out. I would do it now for anyone else who comes out after a long prison term. Even if they say they don't need it, they do need it. It's a lot to learn, a lot to have to deal with. Mohamedou didn't recognize his city when he got out. He didn't know how to relate to people. With Guantánamo, these challenges are heightened because detainees had very little if any relationship with family—except in more recent years the phone calls through the ICRC—and that's not true for everyone. So, we have to stay with them, to make sure they're okay.

What were some of the most memorable moments for you in your Guantánamo-related work?

One was getting the book *Guantánamo Diary* published. Larry Siems and I were in London doing publicity on the book, speaking on various outlets like BBC, CNN, the Guardian. I said, we need to call RT. Our agents told us they don't usually schedule them, but I said Mohamedou will see RT. Just at that moment, I get a text from RT. I told Larry for this one we should give it everything we've got. And sure enough, Mohamedou was sitting in his cell and all of a sudden, there it was, because RT is like CNN, they repeat everything over and over. He saw it and the guards saw it. But it was bittersweet for him because we were doing all this publicity and he was still locked up.

I understand memorable moments to be both good and bad. One really horrible moment was when Mohamedou's mother died and we had to tell him. Another very good moment though was the day I got to Mauritania, the day after Mohamedou was released. I'd never been before to this place called the Islamic Republic of Mauritania, so I was wearing a long dress and long sleeves and when the plane landed, I put a scarf on, like a hijab. I walked out and as soon as Mohamedou saw me, his first words were, "Nancy, there is no dress code here!" And I said, "How about hello, thank you, I'm free?" He just laughed. Typical Mohamedou.

As we approach the 20th anniversary of Guantánamo's opening, what are your hopes going forward?

My hope is to close it. If Biden is willing to expend the political capital, which so far he has not been willing to do, it could be closed. Those currently detained without charge should be sent home or somewhere they're safe. But that takes time and effort, and it takes someone in the State Department who's willing to help figure all of it out, because some of them can't go home and some of them don't have homes to go to. As for those who have been charged, including my client Abd Al-Rahim Al-Nashiri, their cases need to be resolved in ways that are fair to them and provide due process, something we're not sure they'll ever have at Guantánamo.

NANCY HOLLANDER IS AN INTERNATIONALLY RECOGNIZED CRIMINAL DEFENSE LAWYER WHOSE PRACTICE HAS LARGELY BEEN DEVOTED TO REPRESENTING INDIVIDUALS AND ORGANIZATIONS ACCUSED OF CRIMES IN TRIAL AND ON APPEAL, INCLUDING TWO OF THE PRISONERS IN GUANTÁNAMO.

Bernhard Docke

Defending Murat Kurnaz: A Kafkaesque Roller-coaster Ride

On 27 May 2002, Rabiye Kurnaz entered my office and tasked me with bringing her son Murat back from Guantánamo as quickly as possible. Murat was arrested in November 2002 by the Pakistani police without suspicion of any wrongdoing, and was subsequently sold as a suspected terrorist to the US army in Afghanistan in exchange for a bounty.

Getting Murat out of Guantánamo turned out to be a difficult task in the extreme; it was a Kafkaesque roller-coaster ride. The terrorist attacks of 9/11 were a true test of the maturity of the US constitutional state. But instead of responding with the instruments of criminal justice at their disposal, which would have been the appropriate—as well as the only legal—governmental reaction, the Bush administration escalated the "war on terror" politically, militarily and judicially. As "enemy combatants," suspected terrorists were not supposed to enjoy the protections of the rule of law. They were proclaimed to be outlaws and, as such, were deprived of what should have been their self-evident procedural rights such that they could now be subjected to torture.

How should (or could) a lawyer like myself proceed without contact with the client, without knowledge of the accusations, and without a file, a prosecutor or a judge? And also without political and diplomatic support? The German government declared itself to be without jurisdiction in this case, in light of Murat's Turkish citizenship, though he had been born and raised in Bremen and still held legal residency there. Allegedly, the US would not even allow Germany to come to the negotiating table in this matter.

The only solution was to file a lawsuit in US courts to establish, contrary to the Supreme Court precedent the US government had invoked to justify Guantánamo's legal architecture (*Johnson v. Eisenträger*), that US courts did have some jurisdictional authority, and that the detainees held in Guantánamo were not completely without rights.

In close cooperation with US attorneys and civil rights organizations, most notably the Center for Constitutional Rights (CCR) in New York, we defeated President Bush in the Supreme Court in June 2004. Although the *Rasul v. Bush* decision remained half-heartedly implemented, it provided us with access to our client, gave us insight for the first time into the ludicrous and baseless allegations against Murat, and led to an important shift in media and public opinion in support of our position.

Further successes in US courts were, however, neutralized by the Bush administration through new laws designed to retroactively strip the federal courts of jurisdiction. Murat was finally released in 2006, in part through the initiative of the newly elected Chancellor Merkel.

The following were particularly bitter aspects of my experience defending Murat:

- The realization of how easily a constitutional state in crisis mode crosses red lines and does not shy away even from torture. In other words, how the varnish of "civilization" can be so thin.
- Conveying the circumstances of Murat's torture to his mother and family.
- Being deceived and lied to by one's own government: instead of effective assistance, the German government colluded with the US and, even worse, refused to accept a US offer for Murat's release in the fall of 2002. US intelligence services, such as the Central Intelligence Agency and Federal Bureau of Investigation, believed Murat to be innocent and harmless, but policymakers in Germany said "no" and revoked both Murat's residence permit and his right to return.
- The fact that the architects of this dispossession of rights did not have to face any criminal responsibility, including the torturers. The fact that political decision-makers in Germany never apologized and, instead, built their careers by capitalizing on these circumstances.

Meanwhile, these are my positive reflections from the experience of defending Murat:

- The assistance and effective support of civil rights organizations, above all CCR and its lawyers Michael Ratner and Baher Azmy, as well as the London-based Guantánamo Human Rights Commission co-founded by the British actors and siblings Corin and Vanessa Redgrave.
- The fact that US courts asserted their independence against immense political pressure and that the Administrative Court of Bremen declared the revocation of Murat's permanent visa to be illegal.
- Contrary to my fears, Murat Kurnaz was not broken in Guantánamo. Today, he lives in Bremen with his wife and three small children and gives sports lessons to young people. In the context of countless events and interviews, in his book Five Years of My Life: An Innocent Man in *Guantánamo*, as well as in documentaries and feature films, we have denounced these violations of fundamental human rights in the hope that such excesses will not be repeated. However, there are still 39 prisoners left in Guantánamo.

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Joshua Colangelo-Bryan

See You Later, Alligator

I first met Jumah Al-Dossari in October 2004, several months after my law firm, Dorsey & Whitney, agreed to represent him and five other Guantánamo detainees. As I walked into the cramped room where our first interview was to take place, I was more than a little nervous. The US claimed the detainees were "among the most dangerous," and that Jumah was an Al-Qaeda fighter. While I certainly didn't believe everything the government said about the men at Guantánamo, it was hard not to wonder whether Jumah might be hostile or even violent. As I learned later, Jumah suspected I was a government interrogator, posing as an attorney.

Despite all that, we somehow found ourselves in an enjoyable conversation almost immediately. Through an interpreter, whom I arranged, we talked about everything from American movies (*Jumanji* was his favorite) to his young daughter and Egyptian cuisine. At one point, Jumah asked if I was Jewish, based on my first name. I told him no, and he looked disappointed, saying, "I heard the best lawyers were Jewish." Quickly, and obviously for my benefit, he added, "But I'm sure you're good too." As I left that first meeting, Jumah grinned and said, in English, "See you later, alligator."

Over the next year, I returned to Guantánamo every few months to see Jumah and other clients. During those visits, Jumah and I became friends in the most basic sense of the word. We talked about family and romantic relationships. He teased that I would never get married because I did not want to "buy the cow" when I could "get the free milk" (Jumah learned much of his English from young American guards). We developed a list of inside jokes. After an interrogator threatened him, "You can't punk me, motherfucker, I'm from Brooklyn," we co-opted the line, using it to express mock indignation with each other. Jumah, from listening to guards, had unwittingly developed a command of racial epithets, and we had critical discussions of words like "cracker" and "wetback," although he made me promise not to tell his mother he used such bad words.

Beyond any normal friendship, though, ours was marked by the desperation Guantánamo bred in Jumah. We spent hours discussing appalling, often corroborated, abuses Jumah had suffered, including being beaten unconscious and having an interrogator smear what she told him was menstrual blood on his face. While those experiences were horrific, the most painful thing for Jumah actually was being held in solitary confinement, which had started 18 months before we met. As a truly social person, the isolation was slowly driving him crazy.

On 15 October 2005, while I was at Guantánamo for my fourth visit, Jumah's normal energy and humor were absent. He said he had been at the hospital because of participating in a hunger strike and then, contrary to a doctor's promise, was returned to solitary confinement.

After an hour, Jumah asked to use the bathroom. "Give me 10 minutes," he said. For Jumah to use the bathroom, guards had to move him to a tiny cell with a toilet that was next to our meeting area. The cell was separated from the meeting area by a steel mesh wall that, although very solid, had gaps you could see through. Once Jumah was moved, the guards and I went outside. I started feeling vaguely anxious after several minutes, not sure why. I cracked the door, hoping just to hear Jumah say he needed more time.

Instead, I saw a dark puddle on the white floor. It took me a second to realize it was blood. Looking up, I saw something hanging from the cell side of the steel mesh wall. Taking two steps through the blood, I was at the wall and saw that this hanging thing was Jumah, who scarcely looked human. His eyes were rolled back and his lips and tongue were swollen. He bled from a gash in his arm. These images will never leave me.

I knew Jumah had tried to kill himself because of isolation.

The door to Jumah's cell was locked, keeping me from getting in. I yelled for the guards who ran in and opened the door. One started hacking at the noose around Jumah's neck. They cut Jumah down, but he didn't seem to be breathing. As the guards attended to him, I was ordered out. I didn't want to leave, but arguing wasn't going to help.

At 10:00 pm, a military lawyer called, saying Jumah was stable after surgery, but I would not be able to see him again on that trip.

I knew Jumah had tried to kill himself because of isolation. A physical sensation of pressure began to build in me as I thought about how to try to get him some relief. Back in my office, I wrote to authorities at Guantánamo with requests for changes to Jumah's conditions, including that he be moved to general population and be allowed more exercise. Figuring the military might view those moves as radical, I also asked that Jumah be permitted to have books beyond the Qur'an, the only title approved for him. Jumah had said once that he would love children's books in English and Arabic to help him learn English. I had sent *Cinderella*, *Puss n' Boots*, and *Jack and the Beanstalk* to Guantánamo, asking that they be delivered. Months later, the books were returned with a post-it note: "Items not approved for delivery to detainee." Now, I asked again to send him children's books as well as Arabic-language novels.

The military flatly denied the requests. Unsurprised, we made a motion, asking the court to ease Jumah's isolation. Even for a jaded Guantánamo lawyer, the government's opposition was something to behold. The government said Jumah actually wasn't isolated at all. He saw guards who brought him his food and corpsmen who handed out aspirin. And, they said, Jumah and his interrogators played checkers, ate

pizza and engaged in other "informal social interaction." The judge in our case scheduled an argument, and a squad of government lawyers showed up in court at the appointed time. Despite being outnumbered, we did fairly well at the argument. The judge, not known for being liberal, said he would issue a decision soon and was sympathetic to our concerns.

Unfortunately, Congress was not. Shortly after the argument, the Detainee Treatment Act became law. It barred Guantánamo detainees from initiating court cases, but, by its plain terms, did not apply to cases already filed, like Jumah's. Nonetheless, our judge took the easy way out, denying our motion because he said he was uncertain whether he had jurisdiction anymore. That decision only underscored what we had long thought: there was no realistic chance the court would provide any relief to our clients, let alone order them released. Instead, being released was a political process. In fact, all detainees who were citizens of European countries had gone home through diplomatic deals.

Our clients were from Bahrain (Jumah had Bahraini and Saudi Arabian citizenship), but Bahrain was an ally of the US, so we saw no reason that the same result could not be obtained. Given this, from early in our representation, we had sought to pressure Bahrain to reach its own agreement with the US. We supplied information about our clients to the Bahraini press to ensure public awareness of their conditions. We worked with human rights groups and members of parliament in Bahrain who advocated for our clients. And we met with high-level Bahraini officials who promised to intervene with the US. Our first indication that the strategy would work came shortly after Jumah's suicide attempt, when three of our six clients went home.

In my meetings with Jumah on trips after the suicide attempt, I pointed to our efforts and these transfers as reasons to believe he could go home too. Jumah still was plagued by desperation and there were many times I feared he would find a way to succeed in killing himself. But, for stretches, he was able to find a little hope in my long descriptions of the work we were doing outside the court process and in the simple fact of our spending time together.

Ultimately, it was just enough. In July 2007, Jumah left Guantánamo as the result of a diplomatic agreement. He and I stayed in touch. A couple years later, I managed to wrangle a visa to Saudi Arabia where Jumah was living. I met his mother who did not wear a veil because, she said, she considered me family—her son. I met Jumah's then-newborn baby. I sat on the floor with Jumah, his brother and other relatives for dinner. Amidst a loud conversation, Jumah reminded me of the times I had promised we would eat his mother's cooking together so long as he managed to stay alive. I never knew for certain if I could make good on that promise. To do so was a revelation.

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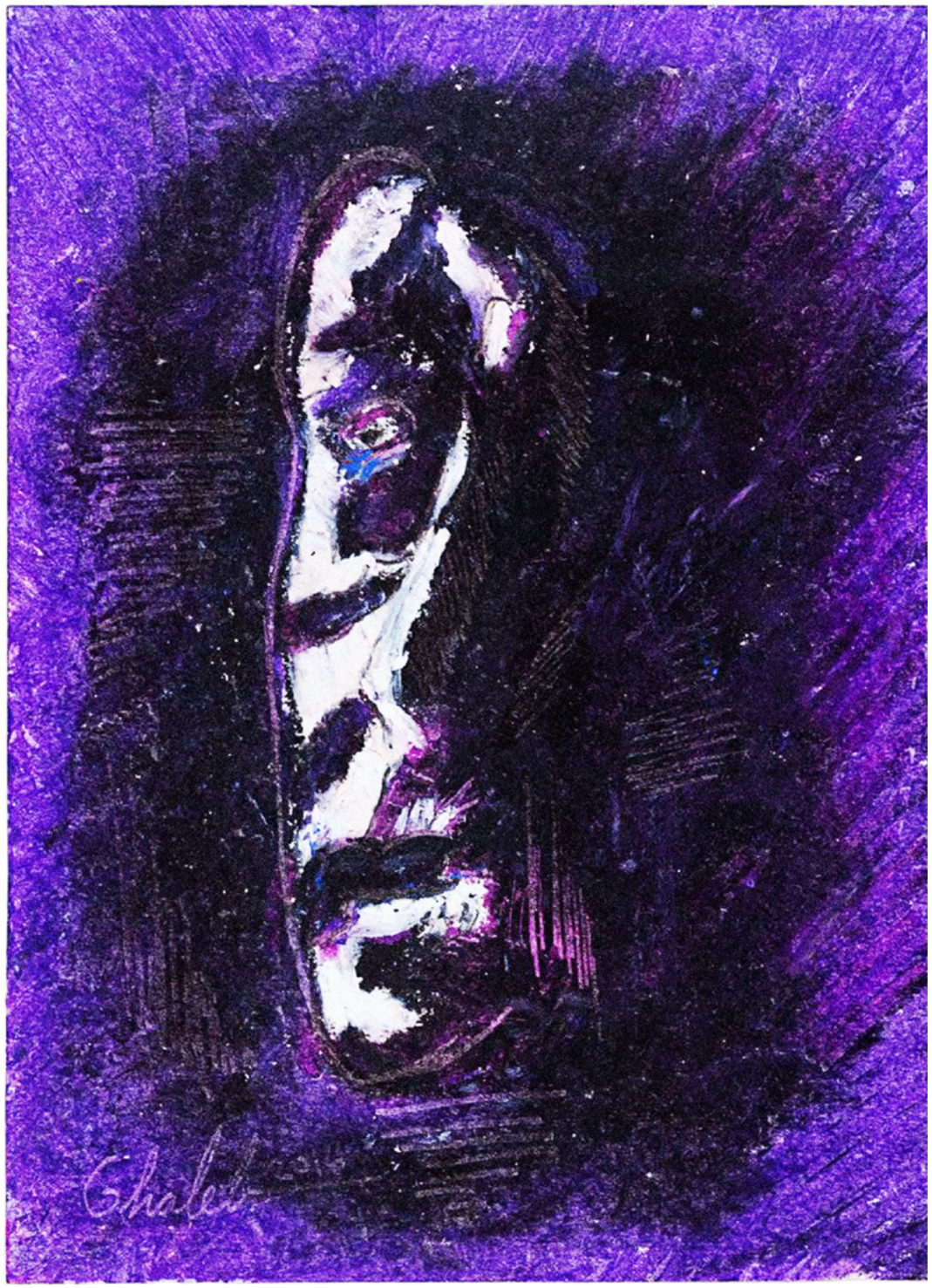
EXHIBITION OF FORMER GUANTÁNAMO DETAINEE

Ghaleb Al-Bihani


2015


2015
غالب



GHALEB AL-BIHANI, A YEMENI CITIZEN, WAS DETAINED AT GUANTÁNAMO FOR NEARLY 15 YEARS BEFORE BEING RELEASED TO OMAN IN JANUARY 2017. HE PREVIOUSLY WROTE, "PAINTING MAKES ME FEEL AS IF I AM EMBRACING THE UNIVERSE … I ALSO SEE THINGS AROUND ME AS IF THEY WERE PAINTINGS, WHICH GIVES ME THE SENSE OF A BEAUTIFUL LIFE." HE HAS AN INCREDIBLE COLLECTION OF OVER ONE HUNDRED PAINTINGS AND DRAWINGS, MOST OF WHICH WERE CREATED AFTER HE WAS CLEARED FOR RELEASE IN 2014 BUT STILL REMAINED DETAINED.

Transnational legal action against Guantánamo

III.

Contesting impunity and injustice across borders

Transnational legal action challenging Guantánamo is rooted not only in the irrefutable evidence of flagrant violations of fundamental international norms by the United States, but also in the complicity of many other countries in these violations. A notable number of European states facilitated or directly participated in the US rendition program through which men were abducted, abused and interrogated before their transport to Guantánamo, with some also hosting covert black sites on their territory. Numerous European state officials and intelligence agency members were aware of the grave abuses taking place at Guantánamo; some actively engaged in them through visits and participation in interrogations at the camp.

For there to exist a truly meaningful international legal system capable of delivering accountability for gross human rights violations and international crimes without double standards for powerful Western actors like the US and European states, these actors must also be held to account. The following reflections detail legal action in a variety of fora beyond the US, including European national courts, the European Court of Human Rights, the UN Committee Against Torture, and various mandates within the Special Procedures of the UN Human Rights Council. This section explores the potential and limitations of legal avenues outside the US to structurally criticize, seek accountability for, and prevent future manifestations of the injustices wrought by the "war on terror" at Guantánamo and beyond.

Helen Duffy

Abu Zubaydah: Contesting Guantánamo Through Human Rights Litigation

Guantánamo Bay prison is an ignominious symbol of the "war on terror" and a gruesome reality for the 39 men still held there today. One of them is Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah), who I have had the deep honor and enormous frustration to represent in international legal proceedings for over a decade.

Abu Zubaydah's case is notorious. Detained without judicial review, charge or trial since 2002, brutally tortured by the Central Intelligence Agency (CIA) at "black sites" around the globe, a victim of lies and misinformation purporting to justify his detention, yet banned from telling his own story, he embodies the worst of the arbitrariness and dehumanization of the "war on terror." Today, he is one of the so-called "forever prisoners" for whom there is no commitment to try, and no prospect of release. His case has spurred prolific litigation, including human rights cases before regional and international courts and bodies. I have now represented him for more than 10 years, but we are not allowed to meet. He could not testify in any of the proceedings brought on his behalf. I wish he was writing this entry, to tell his own story, but he cannot, given the "presumptive classification" of his statements.

> Today, Abu Zubaydah is one of the so-called "forever prisoners" for whom there is no commitment to try, and no prospect of release.

In our client's case, like others, the backdrop for the active role of international courts and bodies was the stark failure of political solutions, and sadly of American justice. My first engagement with Guantánamo, back in 2004, was as an amicus intervener in the *Al Odah* case—an early part of the epic habeas litigation that would ultimately culminate in the US Supreme Court finding that Guantánamo detainees had the right to judicial review of the lawfulness of their detention.[1] Those were important principles, but empty promises, as Abu Zubaydah's 14-year wait for a habeas determination within a defunct system illustrates. Undoubtedly, that litigation did have an impact, albeit indirectly, as it enabled prisoners to access lawyers, and through them the world outside Guantánamo. But ultimately, the US legal system failed to secure effective habeas proceedings. It blocked civil claims through broad-reaching "state secrecy" and immunities, and it failed to secure any individual accountability or meaningful reckoning.

In this context, transnational legal action to seek alternative routes to a measure of justice, and external pressure for change, assumed greater significance.

International human rights litigation was also a natural response given the multiplicity of international actors that formed the "global spider's web" of CIA secret detention and torture that persists in modified form in Guantánamo today.[2] Before the European, Inter-American, and African human rights systems, and before a range of UN bodies exercising multiple functions, Guantánamo-related violations have been challenged and denounced as violations of the most basic human rights. Examples from Abu Zubaydah's case illustrate some of the litigation employed and its evolution, strengths and limitations.

The first tranche was a series of cases before the European Court of Human Rights (ECtHR) against Poland and Lithuania, which were among the European states that hosted secret CIA black sites on their territories. Unsurprisingly, obstacles were rife in this litigation, including excessive state secrecy, "investigative secrecy" and national security claims. Access to evidence was challenging and clandestine detention and cover-up was intended to ensure we could never bring these legal cases. However, through determined efforts from public enquiries, journalists and others, abundant evidence in the public domain provided a basis from which the Court drew conclusive findings. The ECtHR called the states' bluff, holding unprecedented closed hearings and exploring other ways to ensure genuine national security information could be safely received, while refusing to derail proceedings.

The ECtHR hearings were the first time our client had his case heard by a court, 12 years after his detention began. The strident and unusually detailed judgments confirmed and condemned the egregious violations of his rights.[3] The Court established "beyond reasonable doubt" the role of states, dismissing lack of knowledge of wrongdoing as "inconceivable." While focused on the CIA black sites, Guantánamo emerged as a powerful part of the narrative in these cases. The ECtHR condemned the on-going "flagrant denial of justice" that the applicant's detention at Guantánamo represents, found that transferring him to Guantánamo was itself a violation, and made clear that European states must not cooperate with Guantánamo processes. The reparation ordered was also symbolically significant: unusually high awards of damages, criminal investigations and unprecedented representations to the US to seek to bring the violations to an end.

Various litigation offshoots followed the ECtHR cases, each with their own role. In the course of the implementation process, European states have committed to investigating and pursuing accountability, to ensuring reform that would preclude repetition in the future, and have purportedly explained (often unconvincingly) how they are meeting these obligations. In boomerang-effect litigation, the Polish investigation, catalyzed by the ECtHR case, then provided the basis for US counsel to petition US courts, seeking subpoena of the psychologists that designed and oversaw the torturous "enhanced interrogation techniques" used against Abu Zubaydah.

That case came before the US Supreme Court in 2021, bringing heightened attention to the issue and leading one justice to ask the question on most of our minds: "Why is he there?"[4]

The purpose of much international human rights litigation is to catalyze national justice. The second tranche of legal action has therefore involved challenges in domestic courts. Efforts are ongoing to compel investigation or prosecution, to resist investigations closing (Poland), to secure international cooperation (US) or to secure civil damages (the UK government is being sued[5] for supplying questions to be posed to Abu Zubaydah during US interrogation, despite "direct awareness" of his torture).[6] These sit alongside universal jurisdiction claims described by others in this anthology.

Before the European, Inter-American, and African human rights systems, and before a range of UN bodies exercising multiple functions, Guantánamo-related violations have been challenged and denounced as violations of the most basic human rights.

Finally, a third tranche of legal action at the UN level has shifted the focus from European to global actors, and from the past to the present. One unusual "quasi-legal" action resulted in the delisting of Abu Zubaydah from the UN Al-Qaeda Sanctions list, with symbolic as well as practical impact. The Ombudsperson's decision to delist him on the basis that he is not a member of Al-Qaeda threw into sharp relief the exorbitant claims upon his detention that he was the organization's "number 3." In 2021, a complaint on his behalf to the UN Working Group on Arbitrary Detention was the first of its kind to collectively challenge all states that share responsibility for his arbitrary detention and torture—the US, UK, Thailand, Poland, Morocco, Lithuania and Afghanistan—and underscore their shared responsibility to bring them to an end. The complaint provided an opportunity to reframe the indefinite detention at Guantánamo today as, e.g., *per se* torture, a violation of the right to a life with dignity, and discrimination. Immediate release by the US is now an essential element of "reparation" required by international law, while the other states must take all measures in their power—including offers of relocation and rehabilitation—to facilitate this without delay.

It would be folly to claim that this international litigation will secure Abu Zubaydah's release, still less close Guantánamo, which regrettably no international legal avenue can do. International litigation is an imperfect tool to push back against such injustice. It has not struck at its core, but nibbled at its edges.

It has been an agitator and irritant that has helped victims' visibility, illuminated facts, reframed discussions with states, put the responsibility of cooperating states beyond plausible deniability, and helped shape the historical narrative around Guantánamo and the human beings caught within it, in the face of rampant misinformation. The way cases are framed, argued, decided, and implemented tells a story. Media attention to filings, hearings and judgments has brought those realities to a broader audience. Judgments, in turn, validate those stories, and the humanity of claimants. Litigation has prompted states to repudiate Guantánamo and withhold cooperation, further isolating the US, and to engage with the need to provide redress and take legal, institutional and policy steps to prevent repetition. It has raised the cost of violations and unlawful cooperation.

After years of litigation, I am as convinced as ever that all this matters. But this impact is woefully insufficient while violations continue. The arbitrary detention and unusual cruelty of Guantánamo must come to an end, primarily for the sakes of those held there, and for all of our sakes. It undermines their and our humanity to hold "forever prisoners." As the ECtHR has noted, Guantánamo is "anathema to the rule of law" upon which we all depend, and it undermines the credibility of the international system with every passing year.

Lawyers, like others, need to make our contribution—without maintaining any illusions that by "winning" the legal fight we will end the problem, or privileging legal tools over other forms of resistance and engagement. We must value the role of law, while appreciating its limitations, which the Guantánamo debacle and its toxic political gridlock lay bare. Strategic litigation can form part of, and contribute tools to, the political struggle to end the arbitrariness and inhumanity of Guantánamo. Whatever the frustrations, injustice and apparent inadequacy of the tools at our disposal, at a minimum we need to keep reminding states there is law, reminding the public there are human beings languishing in Guantánamo, and reminding them that they are not forgotten.

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1 *Boumediene v. Bush* 553 U.S. 723, 779 (2008).
2 D. Marty, 'Allied Secret Detentions and Unlawful Inter-State transfers of Detainees Involving Council of Europe Member States' [Report], Doc. 10957, Council of Europe Parliamentary Assembly, 12 June 2006.
3 *Abu Zubaydah v. Poland*, Decision of 24 July 2014, ECHR; *Abu Zubaydah v. Lithuania*, Decision of 31 May 2018, ECHR.
4 Transcript of Oral Argument, *US v. Zubaydah*, (20-827), Oyez.
5 *Zubaydah v. The Foreign and Commonwealth Office and al.*, Judgment in Preliminary Issue [2021] EWHC 331 (QB), para 89.
6 UK Parliamentary Report, 1-3 and para 85.

Reed Brody

Guantánamo, Michael Ratner and Double-Standards

In 1998, when the British House of Lords ruled that former Chilean dictator Augusto Pinochet did not enjoy immunity from arrest and extradition despite his status as a former head of state, it was a wake-up call for the human rights movement as we realized that we had a new tool—in the principle of "universal jurisdiction"—to hold to account tyrants and torturers who seemed beyond the reach of justice.

I soon began to teach a class with Michael Ratner at Columbia Law School on accountability for atrocity crimes. I had spent six months in London coordinating Human Rights Watch's intervention in the Pinochet hearings and Michael's Yale law students were my back-up team in the United States. We wrote a book together about the Pinochet case and, in our class and together with many other NGOs, we began exploring how to expand on the Pinochet precedent and searching for the "next Pinochet."

Michael and I disagreed on how to pursue the new precedent. I had been influenced by one of my own Columbia professoars, Jack Greenberg, who had worked to end racial segregation in the American South as director of the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, where I also interned as a law student. Go after the easiest cases first, had been the Fund's strategy, and build up incrementally from there alongside public campaigning. That's how the Fund achieved the landmark school desegregation decision in *Brown v. Board of Education*. I felt we needed a case everyone could agree on, a case we could win. I didn't think we should pursue cases, at that early stage, that were hyper-political. I wanted to nurture the precedent a little before putting it on the chopping block. When I was approached by activists from Chad who asked me to help victims of their exiled US-backed despot Hissène Habré, I accepted. Habré was living in Senegal, in the Global South. We thought that if we could persuade Senegal to exercise universal jurisdiction, we would really universalize the principle of universal jurisdiction.

Michael wasn't a gradualist. He wasn't interested in "making law," he was interested in upsetting power relations. "You don't take cases because they are winners," he'd say. "You take them because you can use them to critique US policy and promote transformation." He agreed with my helping the victims go after Habré, of course, but insisted that I also use the case to shine a light on American Cold-War support for the former dictator.

After the terrorist attacks of September 11, both Michael and I found new urgency in our human rights work. Michael, of course, became the most prominent American lawyer defending the detainees at Guantánamo, and the rule of law generally in the face of the "war on terror." At HRW, I wrote reports on abuses by the Bush administration against Muslim prisoners at Guantánamo, Abu Ghraib[1] and in the archipelago of secret CIA prisons around the world.[2]

> "You don't take cases because they are winners," he'd say. "You take them because you can use them to critique US policy and promote transformation."

In April 2005, the Bush administration had still refused to investigate the responsibility of the leaders who approved the torture of detainees. How could Human Rights Watch (HRW) call for the prosecution of third-world despots like Hissène Habré and not American leaders who engaged in criminal activity? I wrote the report "Getting Away with Torture?"[3] which denounced the "wall of impunity" surrounding the architects of the abusive policies. We presented evidence that high-ranking US leaders—including Secretary of Defense Donald Rumsfeld and former CIA Director George Tenet—issued policies that led to serious crimes. Rumsfeld's role, for instance, in approving the use of illegal interrogation techniques such as the terrorizing of detainees with guard dogs was by then no longer in doubt. We put pictures of the men on the cover of the report and asked that a criminal investigation be opened. None was.

With no hope of justice in the United States, Michael and his Center for Constitutional Rights (CCR), together with Wolfgang Kaleck, prior to his founding of the European Center for Constitutional and Human Rights (ECCHR), filed a complaint in 2004 in Germany against Rumsfeld and other US policy makers for alleged war crimes and torture. I went to Berlin to give HRW's support to the case. Back in 2001, when I was pursuing a "gradualist" strategy on universal jurisdiction, I disagreed with Michael about going after highly political targets. But it was clear that the Germany case was the right move. Germany had a universal jurisdiction law. The global landscape for universal jurisdiction at the time was bleak. There was no reason not to use the laws to challenge the powerful as well as the weak.

On the eve of a scheduled visit by Rumsfeld to Germany in 2005, however, a German prosecutor threw out the case on the ground that the United States was adequately investigating the acts at issue. But as time passed with all ranking US officials involved in detainee mistreatment getting off scot-free, that claim could no longer withstand scrutiny, and Michael and Wolfgang filed a new suit in 2006. This time a German prosecutor dismissed the case because he said there was no realistic likelihood of convicting the accused in Germany.

Other cases in Europe against US officials fared no better. France blocked a case against Rumsfeld on the questionable ground that Rumsfeld enjoyed immunity. Germany, faced with the US's refusal, dropped a request to the US to extradite 13 suspected CIA agents accused of abducting a German citizen and sending him to be tortured in a secret jail in Afghanistan. Similarly, the Italian government rebuffed the request of an Italian judge to seek extradition of 26 CIA agents in connection with the Milan kidnapping of a Muslim cleric who was sent to Egypt and tortured.

Indeed, as we might have feared, filings against US officials produced a backlash. The world's two broadest universal jurisdiction laws were simply repealed. After a case was brought in Belgium (where our Habré case was then pending after a first dismissal in Senegal) against US officials over the bombing of a civilian air raid shelter in Baghdad in the first Gulf War, Rumsfeld warned that NATO headquarters could be moved out of the country if the law was not repealed, which it quickly was. Spain's law had been used in the Pinochet case and in trials of Argentine and Salvadorean officials, but when cases were filed against officials from the US, China and Israel, that law was cut back too. Baltasar Garzón, the Spanish judge who had ordered Pinochet's arrest, became a target even for the Obama administration, which pressed for his removal from a case in which he accused the US of mistreating Spanish nationals at Guantánamo.

Evidence later showed that Bush himself authorized the program of CIA "renditions" of people to countries like Egypt and Syria, where he knew or should have known they would be tortured; approved the CIA's secret detention program, which effectively "disappeared" people; and signed off on the "waterboarding" of alleged Al-Qaeda leaders. My 2011 update for HRW of "Getting Away with Torture" called on President Obama to open an investigation into Bush's conduct, but the Obama administration made clear it had no intention of revisiting the past.[4] Nor was any other country willing to take up an investigation.

In 2016, after 17 years, we were finally able to get Habré convicted in a court in Senegal. Michael had died two months earlier and did not get to see the victory, but in keeping with his injunction, we never stopped documenting and exposing the role of the US (and France) in supporting Habré, even as he turned his country into a crime scene. Habré was the first head of state ever convicted under universal jurisdiction, which has seen a comeback worldwide over the last five years, especially in Europe. But will we ever be able to create the political conditions for US and other Western leaders to be tried under this principle? That is our challenge.

REED BRODY IS A COMMISSIONER OF THE INTERNATIONAL COMMISSION OF JURISTS AND A MEMBER OF ECCHR'S ADVISORY BOARD.

1 'The Road to Abu Ghraib', *Human Rights Watch*, June 2004.
2 'The United States' "Disappeared" The CIA's Long-Term "Ghost Detainees"', *Human Rights Watch*, October 2004.
3 'Getting Away with Torture?: Command Responsibility for the US Abuse of Detainees', *Human Rights Watch*, April 2005.
4 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees', *Human Rights Watch*, July 2011.

Christophe Marchand & Walter van Steenbrugge

"Touching on the heart of power."

INTERVIEW

You both represented Belgian citizen and former Guantánamo detainee Musa Zemmouri in seeking reparation and accountability for his torture. With regards to Mr. Zemmouri, what was your strategy and how do you think it went?

WALTER I was in contact with a colleague who was Musa Zemmouri's lawyer before me. During the time Musa was imprisoned in Guantánamo, his lawyer had tried to gain information about his situation, but never got access to the files. His requests to visit Guantánamo were also refused. When Musa was brought back to Belgium, he was brought before the Belgian investigating judge, who was preparing a warrant against him. After four years of investigation in Belgium, he was released without any blame or fault. That's when I came onto the case.

CHRISTOPHE Musa, Walter and I met with a group of international criminal lawyers including Wolfgang Kaleck, Michael Ratner, Reed Brody and Gonzalo Boye to discuss what it would be possible to do in terms of accountability. The idea was to get a judicial decision somewhere describing what happened at Guantánamo in legal terms as a crime against humanity and a systematic policy of torture. We needed to assess the situation carefully because it was still ongoing at the time. We decided to file a criminal complaint in Belgium against the police officers that went to Guantánamo to interview Musa.

For me, this case was very strange, in the sense that it was a case that showed state crimes, not only by the United States, but by several states—Morocco and Belgium were also part of this criminal organization committing crimes of arbitrary detention and torture. And these crimes were organized and executed at the highest levels. We filed the complaint for war crimes on the basis that the detainees were either prisoners of war or civilians—the US government's classification of Guantánamo detainees as "enemy combatants" is a category that does not exist anywhere in international law. I learned from this case that if you file a complaint for state crimes, it is important to be aware that you will most likely face the challenge of "privilege of jurisdiction." In Belgium, the General Prosecutor is tasked with investigating state crimes, but in our case the new General Prosecutor was the same former federal prosecutor who we were filing a complaint against. The complaint we filed moved very slowly, and when it got to the General Prosecutor, he concluded that nothing wrong had happened. We found very heavy resistance inside the institutions because we were touching on the heart of power.

WALTER I then filed a civil complaint in Belgian courts seeking condemnation of Belgian complicity in Musa's continued detention, which is still pending. Already in March 2002, when Musa was brought to Guantánamo from Pakistan, Belgian authorities knew about what was happening. Instead of helping him, the prosecutor's office tried to give American authorities incriminating but unproven information to keep him in detention longer. The fact that we were never able to prove this awful conduct through a formal investigation is a sign of the very special times we are living in. I presented a lot of documents to the Belgian court before the prosecutor asked the judge to stop the investigation on the grounds that the judge lacked competence to investigate the state.

The consequence of this was that it was the Belgian prosecutor who was deemed most competent to investigate himself, and from that moment, the case was finished.

CHRISTOPHE We also decided to turn to international mechanisms. We brought a complaint under Articles 3 and 13 of the European Convention on Human Rights, which are, respectfully, the prohibition of torture and the right to an effective remedy. But the case was dismissed. We have done a lot of litigation before the European Court of Human Rights, but something has changed in recent years. It's gotten worse in the sense that the Court has become much less friendly towards core violations of human rights and much more political. Guantánamo is the most political case I have been confronted with. We also went before the UN Committee Against Torture, and the case didn't go through there either because it is so political. We are really confronted with a wall. Twenty years later and there is still no justice for Guantánamo.

> In Belgium, the General Prosecutor is tasked with investigating state crimes, but in our case the new General Prosecutor was the same former federal prosecutor who we were filing a complaint against.

In addition to representing Musa, I also worked on a case with REDRESS representing two Tunisian nationals detained at Guantánamo, who were being convicted in absentia in Belgium. We appealed the decision, asking the Belgian prosecutor to request extradition of the detainees to Belgium so they could defend themselves. We felt that this was especially important when we learned that the Military Commissions in Guantánamo were referencing the Belgian decision in their "enemy combatant" status assessments. In the end, it did not succeed. We did, however, gain access to a lot of information. We learned that a special envoy from Obama was key in order to have the persons sent to Belgium, but we never got a decision from the Belgian courts obliging the Belgian state to receive them.

What do you think these losses mean for the legitimacy of international law and norms, when political priorities can so easily block avenues for accountability?

WALTER Well, for me, I'm disappointed about the situation of the European Court of Human Rights in Strasbourg. After the Second World War, it was the place to go to avoid these kinds of situations, but now the proceedings are too slow and national judges don't take its decisions into account anymore. It is disappointing that there is no higher institution where we can bring our claims to help victims of very bad proceedings, especially now that, more and more, Strasbourg no longer respects the rule of law and seems to take political priorities into consideration.

CHRISTOPHE I agree with Walter, but I think I'm a very optimistic lawyer. In the 21st century now we have so many possibilities for litigation. We can litigate before criminal courts, civil courts or the Constitutional Court in Belgium. We can also litigate before European courts, like in Strasbourg or Luxembourg, and at the UN, such as before the Committee Against Torture and the Human Rights Committee. If Strasbourg isn't working anymore, we will go to Luxembourg, or back before national courts. We can go from one forum to another. Pursuing accountability is a marathon and we will never stop.

As you continue in this pursuit, what do you think accountability for Guantánamo would ideally look like?

CHRISTOPHE As lawyers for victims of international crimes, when we litigate we always seek four things: investigation, punishment, reparation and the guarantee of non-repetition. In our Guantánamo litigation, investigation was a failure and there has been no punishment at all for anybody responsible.

Reparation for Musa is ongoing through pending civil litigation, but any sort of guarantee of non-repetition is very far off. We need judicial precedent in order for civil servants to understand that what they did was very bad and that they cannot do it again.

> Somebody was tortured without doing anything wrong, without any due process, and with the help of the Belgian judicial authorities, and there was no press attention, no indignation, nothing at all.

WALTER Another issue that was very disappointing in Musa's case was that the Belgian media had very little interest in it. In the beginning, a TV program interviewed Musa, but afterwards there was no follow-up. That was incredibly surprising; somebody was tortured without doing anything wrong, without any due process, and with the help of the Belgian judicial authorities, and there was no press attention, no indignation, nothing at all. To this day, the people in the prosecutor's office are still holding the same positions with no sanctions. For me, that is beyond inappropriate.

Are there any final thoughts you would like to share?

WALTER The fact that I have not succeeded in helping Musa to obtain reparations in Belgium, a state with a good judicial reputation, is for me very disappointing. That those responsible have not been brought to justice is unacceptable and very hard to live with. This has been one of the biggest disappointments in my 30-year career as a criminal lawyer. It is a shame for Belgium, a big shame.

CHRISTOPHE I share the same feeling. It's very disappointing that there is no justice in the US, but we are not in the US, we are in Belgium. This is a small country that could be a model state and it is a big shame that nothing has happened and that our system is not solid enough to handle this situation. It's a big disappointment. As I said though, we will continue our work. Legally, there is no time limitation on seeking accountability for these kinds of gross violations, so there is always room to reopen.

WALTER Yes, we will never give up.

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WALTER VAN STEENBRUGGE IS A CRIMINAL DEFENSE LAWYER WHO HAS SPENT THE LAST THREE DECADES WORKING AS A PIONEER IN HUMAN RIGHTS LITIGATION BEFORE THE HIGHEST BELGIAN, EUROPEAN AND SEVERAL INTERNATIONAL COURTS.

Clive Stafford Smith

Defending Guantánamo Detainees: How We Practice Law Where There Is None

As they hurriedly prepared for the US-Afghan War in the wake of 9/11, the Bush administration put a great deal of thought into where to set up a law-free zone to hold their captives—much more thought, perhaps, than they put into what to do once they had conquered the country. The US has roughly 750 military bases in countries around the world, so Defense Secretary Donald Rumsfeld was spoiled for choice.

Guantánamo was chosen for its legal pedigree: In *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the government had claimed it *carte blanche* when preventing an influx of Haitian refugees. Guantánamo was not technically US territory because it had been leased, starting with one imposed in 1903 in the wake of the Spanish-American War for a derisory $4,085 a year, in perpetuity, to rent an area twice the size of Manhattan. *Sale* indicated that the protections of the US Bill of Rights would not protect foreign citizens in Guantánamo. The government legal eagles behind the grand Guantánamo experiment were sure they could keep lawyers far away from the terrorists who might end up there.

Rumsfeld announced the opening of the Gitmo Gulag on 11 January 2002. At the time, I was director of a small charity in New Orleans, the Louisiana Capital Assistance Center (LCAC), that represented prisoners in death penalty cases. Capital punishment has long been one of the "Big Lies" of US jurisprudence, where the government assures the electorate that the ritual sacrifice of a few African American men in the electric chair is the solution to rampant crime. As such, I found it fairly easy to recognize the "New Big Lie": that locking up a number of bearded Muslims without due process was an effective way to fight a "war on terror" that was advertised as a defense of democracy and the rule of law. I immediately wanted to sue and assumed that my friends in the death penalty defense community would flock to the banner.

I misjudged the American mood. I grew up in Europe, where mayhem had descended every few years for millennia. The US had the War of 1812, 7 December 1941 (Pearl Harbor), and 11 September 2001; we can name the precise day of two-out-of-three invasions of US territory. All Americans, including my most liberal friends, were shocked into temporary silence by the implosion of the Twin Towers. In the end, I located two allies: Michael Ratner, chair of the Center for Constitutional Rights (CCR), and Joe Margulies, a capital-lawyer-turned-law-professor. Joe coined the mantra that would drive our work: because Guantánamo was a diversion, he said, "if we open it up, they will close it down." The truth would expose the lie.

Nevertheless, in February 2002, we all expected there to be a modicum of truth to Rumsfeld's claim that the prison housed the "worst of the worst" terrorists in the world.[1] Obviously, they would make a few mistakes—they always do—but our battle was based on principle: everyone deserves a fair trial. We gave the government far too much credit.

Lawyers tend to think that "The Law" is everything. If there is one lesson that Guantánamo should teach the world, it is that the law is only one arrow in a packed quiver. Our task is ultimately to bring power to the powerless, and the law is just one tool. Few people could be more powerless than the men who were tortured, rendered halfway round the globe, and secretly locked away in Cuba. This secrecy meant that the Rumsfeld mirage held for many months. Everything about Guantánamo remained classified, except photo opportunities carefully choreographed by the US military. Even the list of who was in the prison would remain under wraps for four years. The only truths to escape during the initial period came from prisoners who were released, along with a few leaks from conscientious people within the system.

> This is an astounding 96.5 percent error rate – incompetence surely unmatched in any human endeavor.

We brought *Rasul v. Bush* on 19 February 2002, and made little headway for the first 24 months, losing resoundingly in the District Court and the DC Circuit Court of Appeals. Before filing our original petition for a writ of habeas corpus, we debated whether we could allege that our client was innocent of any crime and had been tortured. We had only heard rumors to date, but we felt it was reasonable to put the burden of proof on the government, so we did. While there would undoubtedly be a few bad apples in the CIA, I found it hard to believe that the US would systematically renege on the hard-won UN Convention Against Torture. Again, how wrong I was.

In the end, we won *Rasul v. Bush*, 542 U.S. 466 (2004), in the Supreme Court in June 2004. The decision handed us the keys to the prison, with six members of the court finding that the US constitutional right to habeas corpus did apply to the detainees. Yet, this decision was dictated as much by the media as it was by the law. One week after the *Rasul* oral argument, *CBS Sixty Minutes II* ran a shocking piece including the now-notorious pictures of soldiers taunting naked prisoners at Abu Ghraib. This, as much as anything, led the justices to the conclusion that the Executive had lost its way and had to be reined in.

Rasul was vitally important, since access to the clients was the first hurdle we had to surmount. Beyond this, though, the law has contributed remarkably little to dismantling the Guantánamo experiment. Strategically, after *Rasul*, we brought the most sympathetic cases to the DC District Court, and we initially convinced the judges that people like Mohammed El Gharani had been illegally held from day one. He was a 15-year-old who had never got closer to Kabul than Karachi, a thousand

kilometers away. We were beginning to learn why so many "nobodies" had been rendered halfway around the world: the US had been offering bounties for bearded Muslims, ranging from $5,000 up to $20 million.

Like many others, Mohammed had been sold, but the "assertions" against him only arose in his early interrogations. The Americans did not speak Arabic, so they had to hire hundreds of unqualified interpreters at a moment's notice. The man who translated for Mohammed was from Yemen, where the word *zalat* meant "money"; in Saudi Arabia, where Mohammed had been born and raised, *zalat* meant "salad." In what must have seemed like a Monty Python skit, the interrogators demanded to know where Mohammed was able to get *zalat* in Karachi. He listed a number of vegetable stalls, and they duly wrote this down. We won his habeas, but the DC Circuit soon clamped down. They placed a near-impossible legal burden of proof on us, holding that while a court could find detention to be illegal, it was powerless to order a prisoner's release.

Twenty years on, 741 detainees have either died (9) or gone home (732), and a further 12 are cleared for release, though they remain detained. This meant that six US intelligence agencies agree, by consensus, that they are no threat to the US or its coalition allies. Thus, the US essentially concedes that at least 753 of the 780 people Rumsfeld labelled the "worst of the worst" were no such thing. This is an astounding 96.5 percent error rate—incompetence surely unmatched in any human endeavor. In all this, the courts did not order these men released—not a single one. While statistics do not tell the whole story, there is nothing as emphatic as zero. They were all freed by the truth. We opened the prison up to public inspection, and this was so embarrassing that the US government sent them home.

It might seem a great victory for common sense, but all of this has come at an enormous cost to the US as well as to our clients. On 22 January 2009, we heaved a collective sigh of relief when newly-inaugurated President Barack Obama signed Executive Order 13492, promising to close Guantánamo Bay within a year. However, Obama not only failed to achieve this goal in eight years, but he replaced torture and detention without trial with a new policy of assassination. When Osama Bin Laden was killed in Abbattabad, among his papers was a list of the members of Al-Qaeda around the time of 9/11. There were 170 names; a number that might fit onto one page. Here we are, two decades later, and a list of the adherents of Al-Qaeda, ISIS, and similar deranged groups, would dwarf the length of *War and Peace* (with little emphasis on peace).

How can we have created such hatred in such a short time? So, we have, for the most part, won the battle of Guantánamo Bay, with scant help from the court of law. But the war for hearts and minds continues to be an American catastrophe.

CLIVE STAFFORD SMITH IS A HUMAN RIGHTS LAWYER KNOWN FOR HIS WORK ON BEHALF OF PRISONERS ON DEATH ROW IN THE UNITED STATES AND HELD IN GUANTANAMO BAY. HE PREVIOUSLY FOUNDED AND DIRECTED THE UK NGO REPRIEVE. HE NOW WORKS FULL-TIME AS LEAD MENTOR AND DIRECTOR AT THE UK CHARITY 3DC.

1 K. Ballen and P. Bergen, 'The Worst of the Worst', *Foreign Policy*, 20 October 2008.

William Bourdon

"We have to fight against the idea that the goals of democracy can justify all means."

INTERVIEW

How did you get involved with the issue of Guantánamo? Please briefly describe the work that you did in this area?

In 2003, I was contacted by a lawyer from Lyon, Jacques Debre. He was a friend who tragically passed a few years ago. He was appointed by the families of Nizar Sassi and Mourad Benchellali, who were both detained at Guantánamo at the time. Jacques Debre was wonderful and I want to pay tribute to his memory. We were never provided with details of their detention conditions, but at some point we received confirmation that they would soon be released and transferred to France. Upon their arrival, Nizar and Mourad were indicted for association and conspiracy in order to commit an act of terrorism and sent to jail. They were of course relieved to be in France and to be able to receive visits from their families, but could not understand and were in shock by the fact that they were again in prison. We tried to demonstrate their innocence, that they never traveled to Afghanistan to join Al-Qaeda, but the courts did not believe they could not have known the purpose of the journey, and since they received training at an Al-Qaeda camp, they considered it was sufficient to convict them.

I was very impressed by these nice young men. One of Mourad's brothers had been involved in terrorism and manipulated his younger brother to travel to the camps in Afghanistan. Mourad got mixed up in a fascination to travel without knowing exactly what was at stake and what they would be doing there. We must remember that before the 9/11 attacks, even Condoleezza Rice herself admitted that she didn't know exactly what Al-Qaeda meant. If she didn't know, how could they?

We asked for an additional inquiry based on the information disclosed by French media that demonstrated they had been interrogated in Guantánamo by French officials who claimed they were visiting them in the context of a humanitarian diplomatic mission, to enquire about their well-being. Naively, Mourad and Nizar provided these men with all the information possible, without knowing that they were actually speaking to secret services. The secret services, in an extremely unfair and dishonest way, were working in collaboration with the investigative judge, who permitted the introduction of all this evidence in the judicial proceedings, through the declarations of an anonymous witness.

> The secret services, in an extremely unfair and dishonest way, were working in collaboration with the investigative judge.

We engaged in a strong legal battle to demonstrate that the proceeding should be considered invalid given this immense dishonesty. Despite having convinced one Court of Appeal in 2009, which annulled the whole proceedings, we ultimately lost this battle; the Supreme Court quashed the prior decision and sent the case to another Court of Appeal which considered the proceedings valid and convicted Mourad and Nizar. We appealed the decision to the Supreme Court, but our recourse was rejected. Famous law professor Olivier Cahn commented on this judgment, arguing that the 2009 appeals court decision to annul the proceedings was the only reasoning that was "legally founded and coherent with the contemporary evolution of case law and legislation."[1]

We filed the case before the European Court of Human Rights (ECtHR) in early 2015 and received a decision on 25 November 2021. The ECtHR judged that France did not violate Article 6 § 1, relating to the right to fair trial. We are stupefied by this decision and will request referral of the case to the Grand Chamber of the ECtHR. Notably, however, psychiatric evaluation during these trials confirmed that Mourad and Nizar have indeed endured psychological damage as a result of the torture they underwent in US custody.

We also filed a criminal complaint for abuse and arbitrary detention, which was extended to torture. At first, the Court of Appeal rejected the complaint on jurisdictional grounds, but we later won before the Supreme Court. The investigative judges launched inquiries, but the case was ultimately dismissed based on an archaic application of the principle of immunity of foreign agents, even though all international law tends to consider that the immunity of foreign agents must yield when it comes to the most serious crimes, such as torture. This is a major battle of principle. We knew the US administration would never cooperate with the French judges to demonstrate the existence of torture and identify those responsible. We notably called for the interrogation of General Miller and Rumsfeld, with great support from law professors. In the end, the Supreme Court considered that there was no reason to pursue investigations since the US agents responsible for the crimes supposedly benefited from immunity. Our requests for compensation for Mourad and Nizar's torture have also been rejected. We are once again bringing this challenge before the ECtHR, but it may take several years to obtain a decision.

Reflecting on this work, every judgement we lost before the courts was based on the critical point of the victims' misconduct, as it was their choice to leave France for the camp, implying their responsibility for the damage they endured. We consider this very disputable, but the worsening of terrorism threats in France has meant new jurisprudence has become more flexible with regards to the burden of proof.

Many lawyers, not only in France but across many countries, must fight against such mitigation of the application of fair trial principles and victims' rights when linked to terrorism cases.

What was the importance for you to have launched this challenge within the French legal system? Would you consider your efforts to have been successful?

It is a matter of principle. As lawyers, we have to fight against the idea that the goals of democracy can justify all means. Mourad and Nizar were nice, young men and they very much regret going to Afghanistan. We wanted to help them overcome the narrative of their faults and re-integrate into French society so they could go back to a life as normal as possible, and identify those responsible for their torture. We know other attempts were made in Germany and elsewhere that unfortunately also failed.

> More democratic freedoms will be sacrificed unless we have the tools and instruments to compel governments to respect them and to prepare for a sustainable future.

We at least obtained some crucial and courageous decisions. In addition to the aforementioned decision by a Court of Appeal to annul the proceedings brought against Mourad and Nizar, the French Supreme Court admitted French jurisdiction to investigate what the men had endured based on their French citizenship. Investigative judges also heard witnesses and interviewed the plaintiffs to understand what they endured. It was already something that France recognized what Mourad and Nizar underwent, though ultimately that procedure was also unsuccessful, as mentioned above.

What are some of the most memorable moments for you in your in your legal work challenging Guantánamo?

Certainly, a memorable moment in my career was my first exchange with Mourad and Nizar when they arrived in France. It was extremely moving. For the first time, they felt that they were being treated with a level of respect, and they finally had access to lawyers who were extremely dedicated to them. They were extremely kind and very upset to be treated as terrorists. Of course, what they did was absolutely stupid, and there were some family, psychological, and sociological reasons that can help explain their actions. At no moment did they approve of or endorse Al-Qaeda ideology or any form of violence. Both of them have become friends, and Mourad now dedicates his time to visiting suspects of terrorism in French jails, assists people getting out of jail, and shares his experience with the youth to prevent radicalization. Both of them published very moving and sincere books. Of course, we regret failing in our attempts to have them acquitted, to obtain prosecution of the people responsible for the way they were treated, and to secure compensation for the torture they endured.

What are your reflections on this grim 20-year milestone, and what do you hope for moving forward?

It's a very tough battle, because the majority of mainstream media cannot be relied upon to change the narrative. Second, the public opinion battle is being lost because there is a sense of resignation. The majority of citizens consider themselves ready to sacrifice part of their freedom in exchange for the promise of better security. This is, of course, a completely hypocritical social contract, recalling Benjamin Franklin's aphorism: "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety." What I think we can still help to do is to send a kind of wakeup call to the youth, to the new generation, to understand that in order to deal with major threats—not only terrorism, but also global warming, migration, etc.—we can't give a blank check to governments. More democratic freedoms will be sacrificed unless we have the tools and instruments to compel governments to respect them and to prepare for a sustainable future. The ability of governments to take courageous measures against challenges—from terrorism to global warming—will become less and less possible if we enter a semi-authoritarian regime.

They may have been partners in their own tragedy, but this can in no way justify the torture they suffered.

Regarding compensation, we consider that the Court of Appeal gave a really bad decision based on the reasoning that it was their mistake, their fault, to have gone to the camp in the first place. At a minimum, the judge could have partially indemnified them for the damage they endured. They may have been partners in their own tragedy, but this can in no way justify the torture they suffered.

WILLIAM BOURDON IS A FRENCH LAWYER WHO PRACTICES CRIMINAL LAW, PARTICULARLY SPECIALIZING IN DEFENDING THE VICTIMS OF GLOBALIZATION AND CRIMES AGAINST HUMANITY.

1 O. Cahn, 'Procès équitable : la chambre criminelle tend à nouveau les verges à la cour européenne des droits de l'homme', (December 2014) *AJ Pénal*, 577.

Crofton Black

Reflections on Case Building: Black Sites and Open Source Investigation

These days people talk a lot about OSINT, "open source intelligence." What was once an obscure military acronym has become a hashtag, a conference topic, and a job description in civil society and media industries. When I started working on the CIA secret detention network, while at the NGO Reprieve, the term was never used. But we knew we were doing an "open source" investigation. There was a specific legal reason for this. Our objective was redress for people who had been held and tortured in black sites; some of these people were—and even now, over a decade later, still are—held at the Guantánamo Bay detention center in Cuba. The US administration said that the previous experiences of prisoners at Guantánamo Bay, when elsewhere in US custody, were secret, "classified."

In practice, what this meant is that a former black site prisoner at Guantánamo could meet his lawyer in a cell in Cuba, and tell the lawyer—who would hold a US security clearance—everything that happened to him: how he was captured, shackled, hooded and put on a plane, how he was transported in the back of a truck to a small room, how he was chained to the walls with his arms above his head, wearing a diaper, for two or three days, how it was always cold, how it was always dark. The lawyer could write it all down, and file it away in a SCIF—a "Sensitive Compartmented Information Facility"—from where it would not emerge. No one else on the legal team, whether investigators like me or lawyers working on the case in other countries, and no one in the public domain—whether journalist, medical professional, politician, family member or just plain interested citizen—could ever read or hear any of it.

This presented unusual challenges. The first was that since anything the former black site prisoner said was hermetically sealed and unavailable, we had to proceed without his testimony. The second was that if in the course of our investigation we discovered something, the security-cleared lawyer who already knew much, if not everything, from his or her client, could not tell us that we were correct, or indeed that we were not, because this would mean confirming or denying classified information.

The use of so-called "open source" material was therefore a necessity, because we were prohibited from using any material derived from our clients and we had to be able to show that the information we did have did not come from them. Nor could we visit the prisons, the torture sites. In some cases, their precise locations were unknown to us.

In other cases, they were known but their interiors were inaccessible: a warehouse in the woods outside a Lithuanian village; a building on a Polish military base.

At the heart of the story, therefore, was "this certain emptiness"—something which we could not access. This feeling wasn't limited to us, the investigators coming years after the event. The phrase is from an inhabitant of the Lithuanian village. He had watched the prison being built on the site of a former riding stable in 2005: "We thought they were going to build hotels, develop a business, but they sold all the horses and then this certain emptiness started."

Since the essential interior experiences of the prisons eluded us, we were constrained to building structures of things that were visible and accessible. This entailed a multiplicity of different kinds of sources which had to be combined and collated so that, eventually, they might reveal traces of the prisons' operations.

At the heart of the story, therefore, was "this certain emptiness"—something which we could not access.

Among source material, we had declassified government documents, usually obtained only after long freedom of information battles by the American Civil Liberties Union or other such organizations; accounts from other former black site prisoners who had been released rather than being sent to Guantánamo and whose testimony was therefore potentially more accessible; records of flights, derived from cross-correlating access to information requests in numerous places and sourced with the help of many partner organisations; and the paper trail of the logistics network, the invoices, contracts and other documents we obtained surrounding the planes that carried out the rendition missions.

The government documents were heavily redacted, page after page of black boxes, with the most important information struck out. The former prisoners were disorientated—deliberately—by the detention regime, but could still frequently recall names of those they had been held alongside and the chronologies of their detentions. Often, however, these names were vague or did not match the names by which other records referred to these people. Flight records were dependent on the geographical scope of the data sources, with planes disappearing from one source and turning up days later, or perhaps, if we were lucky, turning up on the same day in another source. The archive of logistics paperwork comprised thousands of disorganized pages which had to be interpreted, tagged and resolved into a series of missions, identifiable by internal numbering schemes, dates, plane registration numbers and other indicators. The documents were not machine readable: they were indexed by hand, laboriously, by a group of researchers over a period of many weeks.

Obviously, what we ended up with was a lot of fragmented narratives, and a lot of data that wasn't, in itself, narrative at all, but had to be interpreted to understand where it fitted into the narrative. And in doing so, we ended up working rather at the limits of normal language. One key, but by no means unique, piece of evidence began like this:

ZCZC XMA2610 212303
FF EPWWZQZX
212303 LFPYZMFP
(FPL–N313P–IG
–B737/M–SDGHIRUWY/S
–OAKB1300

There were pages of this kind of stuff. At other times, we were deriving more information from gaps in data than from data itself. We looked for breaks in the chronology of flight records to find anomalies which might indicate something unusual. We saw indications of a movement between sites in a sudden gap in a sequence of communications from a location, corresponding to a day that a plane flew from that location to another one. We found that we could match a given event with a redacted date, in one source, to a redacted event with a given date in another source.

Back when I started this research, it was still customary for governments to maintain that nothing had necessarily happened. The head of Lithuania's parliamentary inquiry, for example, who had accumulated a lot of information about the mysterious warehouse outside Vilnius, articulated the following position: "I have to say that I did not hold any of the terrorists by the hand. So how can I have a definite answer?"

Now this was quite a radical philosophical position for him to take, because presumably he also could not definitely answer whether Napoleon, or Julius Caesar, or his own great-great-grandfather, also existed. And perhaps aware that he was saying something quite radical, he changed tack in his subsequent comments. His committee had questioned witnesses, members of the intelligence agency. Nonetheless, he said: "Regardless of the fact that we all heard the same replies, we each have our own opinion as to their interpretation. Some see it one way, the others see it another."

The fashion for pretending that all this did not occur is past.

Whether or not there was a prison, he opined, remained "a matter of judgement." "Some will feel that there must be a positive answer, some that there must be a negative one, others that there should be more uncertainties, or something else."

In the end, each interpreter would make his own decision, and "as we will make a decision, so it will be." This rhetorical sleight of hand proposed that rather than having no answer at all, the question has several different answers simultaneously. All individuals who think about it can decide for themselves, and this decision creates its own truth: "so it will be"—*for them*. But all of these truths are sealed off from one another, and there is no contradiction between them.

Over the last 10 years, these and other such statements—such as the contention that the Lithuanian site was used for "holding valuables"—have come to be seen for what they are: interpretative strategies designed to allow governments room to manoeuvre, plausible deniability. And over time, all of them have become increasingly discredited. The fashion for pretending that all this did not occur is past. Vestiges of the idea that it is all still secret remain, however. In the recent Supreme Court hearing for the case *US v. Abu Zubaydah*, the Biden administration asked the justices to accept that if the government said it was secret that something happened in Poland, public knowledge that it had happened there was irrelevant: secret this fact should remain, and that was the government's privilege. One justice responded, "At a certain point it becomes a little bit farcical … I mean, maybe we should rename it or something. It's not a state secrets privilege anymore."

Ultimately, the justices asked the government to explain why Abu Zubaydah couldn't give evidence himself; the question we were asking ourselves 10 years ago. Ten years later, the government didn't have an answer.

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Gonzalo Boye

There Can Be No Such Thing as a Legal Limbo

Twenty years after the establishment of Guantánamo as a detention and torture facility, now is a good time to review what we have or have not been able to do as jurists to try to prevent these things from ever happening again and, to an extent, mitigate the suffering of the many thousands of human beings who have been victims of a systematic plan by high-level US officials—acting for a state that presents itself as the leading Western democracy—to detain and torture suspected terrorists around the globe.

In these past 20 years, many of us lawyers have participated in different judicial initiatives centered on the aims of seeking truth, justice and reparation. And, at least as far as the Spanish judicial system is concerned, it is evident that we have to a large extent failed to achieve these aims. However, where we have been successful is in generating a clear attitude of rejection towards the types of practices embodied by Guantánamo.

The Spanish judicial system, since the change in nature of jurisdiction rules pertaining to the principle of universal jurisdiction, has lost many great opportunities to vindicate itself as a democratic system and defender of human rights. In the case of Guantánamo, it has been no different, despite the clear existence of evident jurisdictional links to Spain. The complaint we filed back in the day was divided into two different sets of legal proceedings: the first was dedicated to the jurists who created the legal framework intended to provide pseudo-coverage to everything carried out at Guantánamo, while the second was dedicated to investigating the specific acts of torture committed, in this case, against Spanish citizens and non-nationals with direct ties to Spain.

The proceedings against the "jurists" were transferred to the Central Court 6 of the National High Court, where the presiding Judge, Eloy Velasco, was in a great hurry to close the case, alleging the lack of jurisdiction without clearly seeing that the "jurists" indeed had a direct responsibility for the abuses that took place at Guantánamo. We appealed against his rulings and went all the way to the Constitutional Court, where the decision was the same: to turn a blind eye and deny the effective judicial protection that the direct victims themselves and we—society as a whole—deserved.

The other proceedings, which were meant to investigate the specific acts of torture at Guantánamo against Spanish citizens and non-nationals with direct ties to Spain, were left in the hands of the Central Court 5 of the National High Court under the charge of Judge Baltasar Garzón who, until he was disbarred in a process that will go down in the annals of Spanish judicial history for its lack of guarantees and impartiality, continued to investigate the facts that he too understood to be serious and falling within the jurisdiction of Spanish courts.

Following Judge Garzón's removal, his successor hastened to close the proceedings, arguing that there were insufficient jurisdictional links to Spain. Nothing could have been further from the truth. As mentioned, some of the victims were Spanish and others were non-nationals directly linked to Spain. Crucially, however, this was not the entire legal basis on which we argued that Spain had jurisdiction and, indeed, a responsibility to investigate these acts of torture. Years before starting these proceedings, two Spanish policemen and a Spanish diplomat had travelled to Guantánamo to interrogate various Spanish citizens and non-nationals detained there, whom the policemen linked to Spain.

Hence, the connection with regard to jurisdictional purposes could not be clearer. But the arguments to close the investigation were very explicit: there was no record that the Spanish police and the diplomat who went to Guantánamo had any knowledge of what was happening there. In other words, these three people were the only ones in the entire world who were unaware that Guantánamo was a detention and torture facility. Based on that fallacious and untrue argument, the proceedings were closed. The criterion of Judge De la Mata, the successor of Judge Garzón, was supported both by the Appeals Chamber of the National High Court, with a single dissenting vote, and by the Supreme Court of Spain itself. They all decided it wasn't necessary to investigate anything because, in their assessment, it was evident that the Spanish authorities who had visited Guantánamo, a notorious detention and torture facility, to interrogate detainees, could not have known that it was actually a detention and torture facility. Clearly, we were facing excuses to justify an absolute lack of effective investigation, contrary both to the criteria established by the European Court of Human Rights and, recently, by the Spanish Constitutional Court itself in other cases. To this day, there has never been an attempt to carry out an investigation, despite ample evidence that there were interrogators and torturers of many nationalities there.

> If anything, the Spanish legal case has served one of the functions that the law and strategic litigation should have: to generate a general awareness about what isn't right and what shouldn't happen.

If anything, the Spanish legal case has served one of the functions that the law and strategic litigation should have: to generate a general awareness about what isn't right and what shouldn't happen. Evidence gathered in Guantánamo by those Spanish policemen did not ultimately serve to convict anyone in Spain. This was because the Supreme Court of Spain erroneously interpreted that such evidence had not been obtained validly, given that Guantánamo was a so-called "legal limbo."

I disagree with this concept in law, and especially from the perspective of international humanitarian law; there can be no such thing as a "legal limbo." The men who have been detained and tortured at Guantánamo have been subject to those acts in violation of all the rights that democracies consider to be fundamental rights, which are rights even recognized in cases of so-called "enemies."

> Today, when we look back on the 20 years of Guantánamo, we must take a moment to reflect on how the lives of all those who suffered there changed as a result of that experience.

While remembering these 20 years of Guantánamo, I can't fail to mention the direct victims of what has happened there, to whom we continue to owe a debt as a society. As far as the Spanish judicial system is concerned: to date, none of them have received reparations, none of them have been recognized as victims of a torture system, and none of them have received help to overcome a trauma that would leave any human being with scars for the rest of their life. In this regard, I would particularly like to remember the experience of Lahcen Ikassrien. Certain state apparatuses never forgave him for his double-sided courage: for both surviving Guantánamo and denouncing what happened there. After being released and transferred to Spain, he was sentenced to 10 years in prison, but the Supreme Court overturned that sentence because the evidence against him had been obtained in "legal limbo." Just when it seemed like his life was getting back to normal, when he had managed to rebuild his family life and found a job, he was once again arrested, detained and then sentenced to a harsh prison sentence in a process which I've always believed to be some sort of vendetta against him for his healthy attitude to life after leaving Guantánamo.

Today, when we look back on the 20 years of Guantánamo, we must take a moment to reflect on how the lives of all those who suffered there changed as a result of that experience. Lahcen's life is only one of many that were transformed by Guantánamo, but one that I have witnessed up close. I will always wonder what would have happened to this young man from Morocco and his family if he had not passed through Guantánamo. What might his life have looked like? I don't have a straightforward answer, but I do have an answer that is valid for everyone: to prevent these things from happening, there must never be a Guantánamo, or anything resembling it, ever again.

GONZALO BOYE IS A SPANISH LAWYER, KNOWN FOR HIS WORK ATTEMPTING TO CHARGE MEMBERS OF THE GEORGE W. BUSH ADMINISTRATION FOR WAR CRIMES COMMITTED AGAINST SPANISH CITIZENS, AND REPRESENTATION OF FORMER CATALAN PRESIDENT CARLES PUIGDEMONT.

Katherine Gallagher

The Challenges of Accountability, Cost of Impunity and Ongoing Pursuit of Redress

THE TORTURE

"I was subjected to water torture that induced the feeling of drowning several times… With a hood wrapped around my face and water pouring down my throat, I coughed, gagged, screamed and couldn't breathe. I felt like I was going to die."

MAJID KHAN, VICTIM OF US TORTURE AT CIA BLACK SITES AND CURRENTLY IMPRISONED AT GUANTÁNAMO

"Damn right."

US PRESIDENT GEORGE W. BUSH, ON ADMITTING TO AUTHORIZING TORTURE, INCLUDING WATERBOARDING

Waterboarding. Walling. Hanging detainees, naked, from hooks on the ceiling. Exposure to freezing temperatures and forced nudity. Absolute darkness or constant bright lights. Sensory deprivation. Mock executions. Sexual assault, including rape. Extraordinary rendition. These are among the so-called "enhanced interrogations techniques"—the torture—deployed by CIA officials, contractors, members of the US military and their foreign proxies upon a still unknown number of victims in the aftermath of the 9/11 attacks, in black sites, CIA and Department of Defense-run facilities, and of course, Guantánamo.

These sadistic and brutal acts were inflicted on Muslim men and boys with the approval of senior US officials up to and including the former president of the United States at locations around the world with the participation or assistance of more than 50 countries—the vast majority of which, like the United States, are signatories to the Convention Against Torture (CAT). US government attorneys purported to provide legal cover for acts of torture through a series of memos that first narrowly redefined the crime of torture, then sought to provide preemptive immunity from prosecution. The techniques applied by US citizens and their foreign proxies caused severe physical pain and lasting mental harm, both incidentally and by design. As no less than the former president of the US acknowledged: "We tortured some folks." In so doing, the United States dangerously put torture in play as a policy choice—not just for itself, but also, in brazenly breaching this *jus cogens* norm, for autocrats and dictators around the world. Torture is not a policy choice. It is a crime. Those who ordered, furthered and committed it must be held to account, and those who were tortured granted redress.

SEEKING JUSTICE, ACCOUNTABILITY AND REDRESS

"Even now I still think about it, I have nightmares where I'm falling into a hole, where I have a bag over my head. It never really left me."

SALAH AL-EJAILI, ABU GHRAIB TORTURE SURVIVOR

"I don't believe that anybody is above the law. On the other hand, I also have a belief that we need to look forward as opposed to looking backwards."

US PRESIDENT BARACK OBAMA, ON APPOINTING A SPECIAL PROSECUTOR TO INVESTIGATE BUSH-ERA TORTURE

Almost since the first prisoners arrived in Guantánamo and the first reports of torture began to emerge, the Center for Constitutional Rights (CCR) has been supporting US torture victims in their efforts to achieve accountability. The work began in US courts, with former Guantánamo detainees Shafiq Rasul, Asif Iqbal, and Ruhal Ahmed—"the Tipton Three—bringing a case under the US Constitution and Religious Freedom Restoration Act against Donald Rumsfeld; extraordinary rendition victim Maher Arar bringing claims under the Torture Victim Protection Act against the former US Attorney General for sending him to Syria to be tortured; and the families of men who died in Guantánamo bringing a case under the Alien Tort Statute against Rumsfeld.

All of these cases were dismissed, under various immunities or defenses invoking "national security" concerns. To date, no case involving US torture has gone to trial, and the two cases that settled (CCR's Abu Ghraib case *Al Quiraishi v. Nakhla and L-3* and the ACLU's *Salim v. Mitchell and Jessen*) were brought against government contractors. Indeed, to date, no victim has even received an apology from the US executive branch. With no prospect of accountability coming through civil actions and certainly none from the US Department of Justice, CCR looked to foreign courts and international bodies for some measure of justice. The *raison d'etre* of the CAT is to eradicate torture. To achieve this, the drafters of the Convention—led by the United States—created a jurisdictional regime which requires each ratifying state to investigate suspected torturers present in the country and prosecute if the evidence supports a charge. The goal was to allow no safe haven for torturers and to ensure that immunity in home courts didn't result in impunity.

Working on behalf of torture survivors with non-US lawyers (often with ECCHR), CCR has sought to hold US officials accountable for torture in Germany, France, Switzerland and Canada. While some investigations have been opened, to date there have been no arrest warrants issued or prosecutions. And in clear breach of obligations under CAT, Canada has repeatedly allowed George W. Bush to travel there, ignoring dossiers that lay out his criminal liability and closing victims' cases before they even got started. Politics seem to trump law and fact when it comes to putting universal jurisdiction to the test against US officials.

A new prospect for accountability opened up in 2017: the International Criminal Court (ICC). For years, advocates had been urging the Prosecutor to look at crimes at US-run detention centers or black sites in ICC States Parties, namely Afghanistan, Poland, Romania and Lithuania. In November 2017, Fatou Bensouda sought leave to investigate crimes in the "Situation of Afghanistan" that included not only crimes by the Taliban and Afghan national forces, but US torture on the territory of ICC member states. CCR represents two Guantánamo detainees before the ICC, Guled Duran and Sharqawi Al Hajj. As their legal representative, I argued before the Appeals Chamber that the investigation is in the interests of justice, as the previous 15 years of failed accountability efforts have proven the ICC is truly a court of last resort. While we were successful and the Appeals

Chamber opened the investigation in March 2020, once again politics appear to be blocking justice. First, in response to the opening of the investigation, Donald Trump issued an Executive Order that provided for the sanctioning of those supporting the investigation, and then placed Prosecutor Bensouda on the sanctions list. Although President Biden rescinded that Order, the investigation remains stalled. And now, the new ICC Prosecutor, Karim Khan, has indicated that he will "deprioritize" the US crimes if and when the investigation restarts—effectively shelving the case. Hence, impunity continues to reign.

THE PRICE OF IMPUNITY

"I am here today because I believe it is my moral duty as a human being to help prevent what happened to me from happening to others."

MAHER ARAR, TESTIFYING VIA VIDEO LINK TO US HOUSE COMMITTEES ON HIS EXTRAORDINARY RENDITION TO SYRIA

"I would bring back waterboarding and I'd bring back a hell of a lot worse than waterboarding."

DONALD TRUMP, DURING THE REPUBLICAN DEBATE IN NEW HAMPSHIRE PRIOR TO THE 2016 US PRESIDENTIAL ELECTION

The immunity that the Obama administration supported for US officials—as the Bush administration did before it—contributed to a culture of impunity that left open the possibility that such egregious conduct could happen again. Into that space came Donald Trump. Rather than investigate torture, Trump appointed a black site station chief who oversaw torture sessions as head of the CIA and pardoned war criminals. As we saw over the last four years—and indeed, in less stark or obvious ways, throughout the twenty years since the legal black hole of Guantánamo opened—the US openly flouts its international law obligations because it knows it can. The Muslim ban. Drone strikes that kill families celebrating a wedding. Supporting the bombing of civilians in Yemen and Palestine. Torture baked into US policies like family separation and immigrant detention. This is the price of impunity.

But victims continue to seek truth, justice, accountability and redress. They seek to break the cycle of impunity in an effort to ensure that these crimes don't happen to anyone else. The US Supreme Court is currently reviewing a request for former CIA contractors who helped design the torture program to provide testimony in a criminal investigation in Poland, the site of a CIA black site where Abu Zubaydah was tortured; US torture survivors including Maher Arar and former Guantánamo detainees filed an *amicus* brief urging the Court to allow the testimony. At the ICC, we are supporting efforts to restart the investigation and challenging the decision to "deprioritize" it. And discussion of a Peoples Tribunals or a truth commission is gaining steam.

While thus far no high-level US official or private contractor has been prosecuted for war crimes and crimes against humanity arising out of the torture program, and few victims have received any form of redress, the work continues. The high cost of impunity demands that it does.

KATHERINE GALLAGHER IS A SENIOR STAFF ATTORNEY AT THE CENTER FOR CONSTITUTIONAL RIGHTS IN NEW YORK.

EXHIBITION OF CURRENT GUANTÁNAMO DETAINEE

Khaled Qassim


KHALED. JA
242. GTMO
2017


KHALED. JA'
242. GTMO
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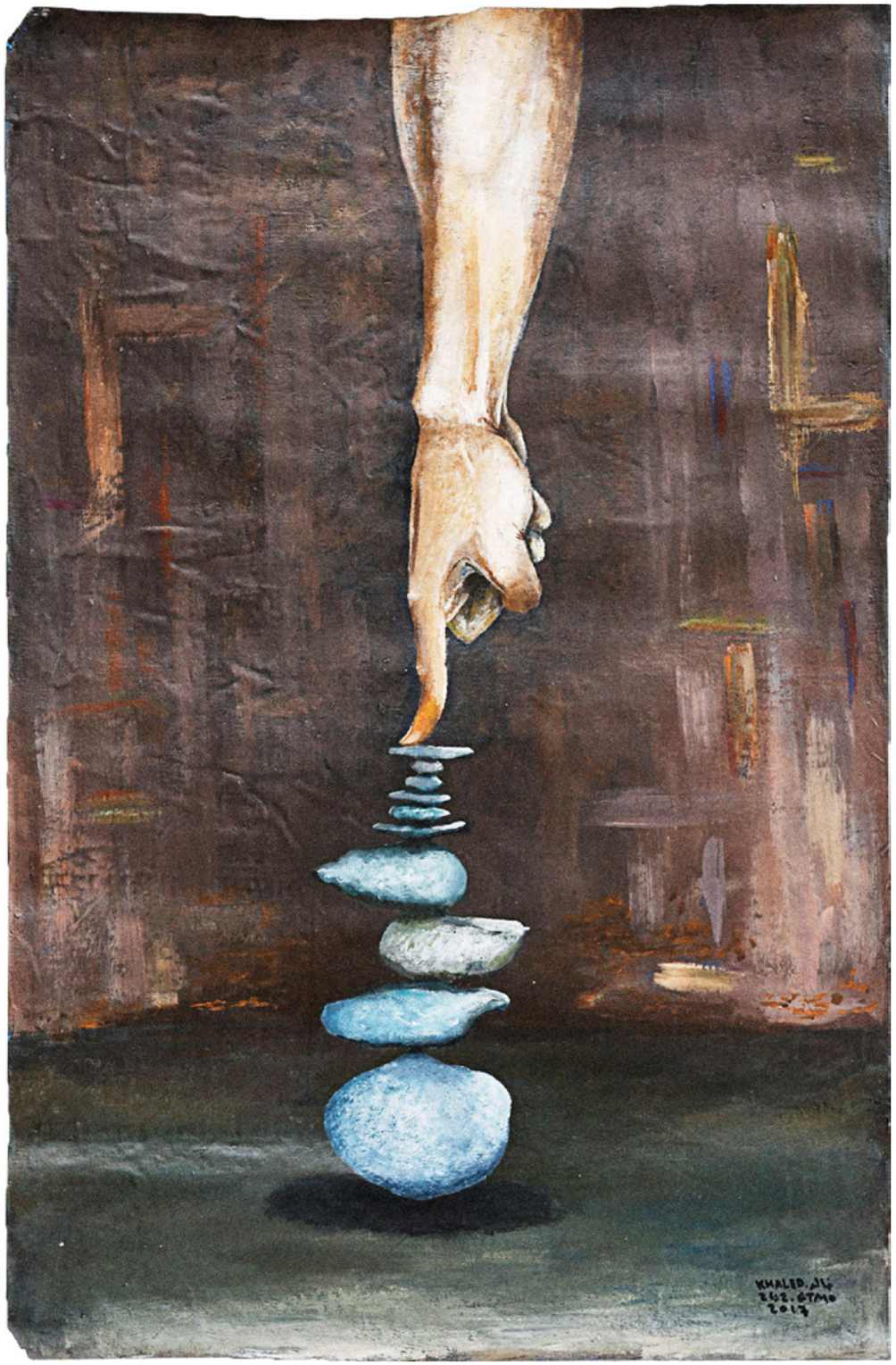

KHALED QASSIM, ORIGINALLY FROM YEMEN, HAS BEEN DETAINED AT GUANTÁNAMO SINCE 2002 WITHOUT CHARGE OR TRIAL. HE FREQUENTLY EXPERIMENTS WITH THE LIMITED RANGE OF ARTISTIC MATERIALS GUANTÁNAMO AFFORDS; HE HAS PAINTED IN COFFEE AND ON SAND AND GRAVEL GATHERED FROM THE PRISONERS' EXERCISE YARD, AND HAS CREATED SCULPTURES FROM VARIOUS DISCARDED MATERIALS, INCLUDING MRE BOXES. KHALED SIGNS HIS WORKS WITH HIS PRISONER NUMBER, 242.

Guantánamo's living legacies

IV.

Enduring impacts in the here and now

Guantánamo's legacy is not limited to the vast numbers of lives that have been changed within its walls. Rather, this notorious prison also constitutes a symbol of the ways in which the world has changed in the post-9/11 era. In this period, human rights norms and core principles of international law have been blatantly violated, disregarded, manipulated, diminished and attacked by state policies and practices issued under the guise of preserving national security. In the shift to a world of perpetual warfare, in which there is no clear point at which these changes might be reflected upon as an historical episode, we must remain vigilant with regard to the normalization of state practices once labeled as extraordinary.

The authors in this section understand the legacies of Guantánamo as encompassing changes to the very ways in which wars are fought, claiming that the global "war on terror" has transformed into a "war of terror." Contributors share how the law has not only been evaded but also wielded to legitimize unspeakable practices, not only at Guantánamo, but also in a spider web of black sites around the world. Many international institutions have been rendered inept in the face of flagrant impunity and restructured in ways that prioritize civil-rights-light and civil-society-absent spaces. The following reflections underscore the urgency of recognizing and reckoning with these changes if we are to stand a chance at challenging them and shifting course.

Andreas Schüller

From Guantánamo to Drones Strikes: How the US's Global *War on Terror* Became a Global *War of Terror* Spread From the Skies

Twenty years have passed since Guantánamo Bay saw its first wave of detainees arrive in response to the US decision to "take the gloves off," as a high-level official described it, in search of those responsible for the terrible 9/11 attacks. "Taking the gloves off" meant to put the law aside in order to develop and exercise practices that the US would otherwise criticize if done by other states in response to terrorist attacks and threats—namely renditions, extrajudicial killings, indefinite detention and torture.

That the US chose to interpret international law and human rights expediently in relation to its global strategies and policies at the time is nothing new. Indeed, US history is littered with examples of just that: from the proxy wars it fought and supported during the Cold War to decades of CIA-backed regime change, and myriad different forms of cooperation with dictators around the world. Declaring people outside of the law, as attempted at Guantánamo through the introduction of the notion of "enemy combatants" and calling torture "enhanced interrogation techniques" to keep up appearances of legality, were just some of the new attacks on international law waged by the US post 9/11.

Another attack on international law developed by the US in service of its global "war on terror" has come in the form of its drone program. Since 2009, the US has not only built but also systematically operationalized its capacities for unmanned aerial surveillance and lethal drone strikes, marking a shift in its "war on terror" to a "war of terror" spread from the skies and affecting entire populations. Nowhere is out of striking distance. While the US may perceive this as meaning there is no longer anywhere for "terrorists" to hide, for civilians around the globe it now means that nowhere is safe. For local populations "living under drones" in places like Yemen, Pakistan, Somalia and Libya, among others, ever-present drones spread constant terror, as no one can foresee when and where the next drone attack will happen, who will be targeted or why. This insecurity leads to extreme consequences, ranging from psychological harm of entire populations to drastic changes in daily behavior and heightened risk of people turning to extremism as the only perceived way to resist their constant surveillance and imposed vulnerability.

The US fights terror with terror, out of the reach of courts. Unlike drones, acts of rendition and torture can more easily be attributed to the individuals involved. Donald Rumsfeld signed the memos approving the use of torture techniques. George Tenet directed the CIA to

start its program of black sites, extraordinary rendition and torture. Geoffrey Miller, the first Guantánamo commander, later advised troops in Iraq on how to "Gitmotize" prisons and detention there. And so on. Criminal complaints against these practices had clear targets and clear bases in international law: torture is unlawful internationally under any circumstances. Full stop. While a full reckoning with and accountability for these practices still remains elusive, international legal actions have managed to have some modest but meaningful effects, such as stopping members of the Bush administration from travelling abroad due to fear of being summoned for questioning and the possibility of arrest.

When it comes to drones, however, the US has developed a more perfidious global system that is far more difficult to track and combat through existing legal frameworks, although it is blatantly unlawful in many regards. Drone strikes always involve multiple sides and people, making it much more difficult to say who bears which level of individual responsibility. Further, the entire drone program is "classified" according to US law, which means the relevant information needed to assess strikes is withheld from the public, and anyone with knowledge of strike details who may want to speak out faces the threat of draconian penalties. Under the extremely weak laws regulating aerial warfare, the legality of and responsibility for drone strikes is often far more ambiguous than, for instance, cases of torture.

> While the US may perceive this as meaning there is no longer anywhere for "terrorists" to hide, for civilians around the globe it now means that nowhere is safe.

Thus, we must focus less on individual criminal responsibility in addressing killings by drone strikes than on state responsibility for the drone program as such, and its unlawful policies under what is now four US administrations. We must fight back against the notion of a global non-international armed conflict that the US attempts to claim and perpetuate. There is no such thing recognized in international law. Every conflict must be examined separately. This means drone attacks in Yemen, Pakistan, Somalia and Libya cannot all be conceived of as part of the same worldwide armed conflict against Al-Qaeda and whomever the US decides to label as their associates. To qualify a distinct situation as a non-international armed conflict, a protracted exchange of violence between two or more parties is necessary—whereas drone strikes are nearly always one-sided, without direct armed response from the ground. This makes it quite difficult to maintain the notion of an armed conflict between two parties. As a consequence, only human rights law would apply, meaning almost all deadly strikes from the air would qualify as murder.

Even if a particular situation were to qualify as a non-international armed conflict, it is still prohibited to target people from the air without distinguishing between civilians and people taking part in hostilities. The level of information available to those making decisions about

drone strikes is usually far too insufficient to make this distinction in any meaningful way. The hundreds if not thousands of dead civilians in areas of drone strikes over the last 12 years are the grisly testimony of such intelligence failures. For evidence that no improvements have been made over the years in this regard, one need only look at the recent US drone strike in Kabul on 29 August 2021 that killed 10 civilians, among them seven children, which the US military, after assessing, still considers as having been lawful. In armed conflict, the civilian population must be protected, spared from harm and attacks. These are basic principles of international humanitarian law. Instilling constant fear from above—uncertainty against whom, why and when the next deadly strike will be conducted—is the opposite of what the law requires when conducting military operations.

While many completely innocent people ended up detained at Guantánamo based on false information, even more equally innocent people have since lost their lives in areas under drones. Determining where the legal violations and with whom ultimate responsibility lies for drone strikes is less obvious and far more complicated than in cases of rendition and torture. This makes it difficult to get clear court decisions or state positions on lethal drone strikes. Courts in the US typically refuse to look into the matter as such, while the secrecy of the drone program and the remoteness of the areas in which most strikes occur make it difficult to prove facts of specific cases before courts.

Yet, the policies guiding the US drone program, its lethal consequences over many years, and the views and stories of people living under the threat of drones are well-known today. There have even been several positive court decisions based on such knowledge, like the 2019 ruling of a Higher Regional Court in Germany in a case brought by the Bin Ali Jaber family from Yemen against the German government, which declared the US drone program to be, by and large, unlawful.[1] As a result, it found that the German government must change its position of support for the program by no longer allowing the US military to use German territory to facilitate drone strikes through remote stations and a distributed ground system at Ramstein Air Base. It was, however, not too difficult for the appeals court at the federal level to overturn such a positive development on procedural grounds. It is now up to Germany's Federal Constitutional Court to rule on the legality of the drone program and the permanent risks it poses to life and limb for the Bin Ali Jaber family.

Legal cases like the one in Germany show that it is possible for a court or state to find different, more critical ways to address the US drone program's inherent unlawfulness. It is high time that other courts and states follow suit and stop the US's continuous breach and erosion of international law. From Guantánamo to its global drone program, the US must end its unlawful strategy of fighting terror through spreading terror—which is an impossible fight to win.

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1 'Ramstein at Court: Germany's Role in US Drone Strikes in Yemen', *ECCHR*.

Vince Warren

Guantánamo Has Created Both a Regime of State Violence and the Advocates Who Intend To Abolish It

Recently, the New York Times published a major work observing the 400th anniversary of the arrival to the United States of kidnapped and transported Africans who were enslaved. The series of essays examined US history since 1619 and chronicled how every part of the society has been touched by this crime against humanity. One essay posited that despite subjugation, Black and Indigenous people were not merely passive beneficiaries of eventual American democracy, but rather they were key to forming it, by challenging the nation's legally-sanctioned cruelty through resistance and advocacy. Although the methods of resistance to such state violence might have varied widely, what they were fighting did not. Theirs was the first call for the "abolition" of the institutions of state violence to which they were subject; a call that would be taken up nearly four centuries later by human rights lawyers, including those at the Center for Constitutional Rights (CCR), and clients at Guantánamo, as well as by Black, Indigenous, and brown communities with respect to the current regime of systematic racism and discrimination that the legacy of Guantánamo reinforces and perpetuates.

On 11 January 2002, the United States brought the first 20 men from where they had been detained in Bagram Prison in Afghanistan to Guantánamo Bay Naval Station in Cuba. This would be followed in the next several years by 759 more men, many of whom were kidnapped, tortured, beaten, humiliated and de-humanized—not despite the law, but because of it. These men were imported into a regime of state criminality supported by the same drivers that perpetuated slavery: the amalgamated state and corporate power necessary to deprive people of their basic rights; the white supremacist mythology which casts black and brown people as subhuman, terrorists, and criminals; and, of course, the sanction of the law.

Reflecting on the current legacy of the Guantánamo prison, it's important to recognize first that it, like the institution of slavery, is both an instrumentality of state violence as well as a monument to America's enduring punitive reflex with respect to Indigenous, Black and other people of color. Although the number of men sent to the prison numbered less than 800, its implications impact millions—particularly communities of color and immigrant communities—along a continuum of federal, state and local policy.

The Bush administration created the "war on terror" paradigm not to protect us from future attack, although that was what they claimed, but rather to put in place a radical expansion of power that sought to place the president outside domestic and international law. According to a leaked Justice Department memo from December 2001, Guantánamo

Bay was specifically chosen for the purpose of detaining the prisoners of the US military because the Bush administration believed it would be beyond the reach of US courts. Existing outside the law and in complete secrecy, it was an ideal place to torture, abuse and humiliate people as a means of conducting interrogations in isolation from all outside human contact, including the press, aid organizations and human rights attorneys who would most certainly have exposed it once they had known. Its selection demonstrates that, from the very beginning, the United States planned to engage in activities that are illegal under domestic and international law.

The "wartime" paradigm—the notion that the state is in a constant state of war with an enemy that has no face, no country, does not share "American values," and will destroy us unless we destroy them first—has created hysterical, nonsensical and chilling policy results domestically and internationally. Traditional lines differentiating domestic and foreign intelligence, surveillance, and military functions were erased and fused with local law enforcement and immigration functions, resulting in an amalgamation of state violence that could be wielded against Al-Qaeda, Black Lives Matter protesters and immigrant communities at will. The traditional rule of law was considered, at worst, a dangerous obstacle to national security interests or, at best, an antiquated notion whose time to be cast aside had come.

Over the last 20 years, "wartime" hysteria has become the guiding star for American foreign policy and militarism, certainly, but it has also assimilated itself into domestic policy as well, permeating the American psyche from the highest administration officials to the local street corner. Post-9/11 policies created what is now one of the largest federal agencies in the US, the Department of Homeland Security (DHS), which has solidified a corporate-security state by facilitating profiteering for private military contractors, surveillance companies, and private detention centers in order to outsource state illegality. Only a few years after Guantánamo was opened, lavish amounts of federal money began flowing to local law enforcement. This funding was, among other things, used to spy on Muslim communities, escalate "Stop and Frisk" and other racial profiling programs, maximize immigrant detentions and deportations, and equip local enforcement with military grade weapons to crack down violently on protests.

One can't have a war without an enemy. Thus, following the lead of the military policy that deemed almost every Muslim in Afghanistan in 2001 to be a potential Al-Qaeda agent, federal immigration and local law enforcement found that the well-worn mythologies of the "criminal alien" in the immigration context, the "criminal gang" in the policing context, and the "terrorist activist" had newfound resonance in the post-9/11 era. Applying these mythologies, the US fashioned selected communities into a series of new and "more dangerous" domestic enemies than they had been pre-9/11. As a result, the government engaged in collective punishment of Muslim, Arab, and South Asian immigrants by systematically conducting mass roundups, secret detentions and surveillance. It created mass registration programs based solely on one's religion and country of origin. As the years went on, deporting "criminal aliens" became a hallmark of the Obama administration, which deported more

people than any previous one. Obama's aggressive immigration policies were then super-charged by the Trump administration, which took the position that basically any non-white person attempting to cross the southern border was a criminal.

Beyond targeting Muslims, Arabs and South Asians, DHS and the US Immigration and Customs Enforcement (ICE) agencies conducted a years-long systemic campaign to criminalize immigration activists. For example, ICE targeted a group of migrant dairy workers in Vermont called Migrant Justice by surveilling, infiltrating and detaining the group's undocumented leaders and members. Using the same tactics the Federal Bureau of Investigation (FBI) used to invade and destabilize white progressive organizations, Dr. Martin Luther King, and the Black Panther Party in the 1960s, ICE spread false information that Migrant Justice staff were collaborating with ICE to locate and detain immigrant community members. It also enlisted the Vermont Department of Motor Vehicles (a state agency that gives out drivers' licenses) to provide ICE with personal and sensitive information about Migrant Justice members in violation of its own policies.

The Movement for Black Lives was targeted as well, facing increased surveillance and monitoring of their protests. After suing the FBI and DHS pursuant to a public records request, CCR confirmed that local and federal law enforcement worked together to surveil Black leaders and protests through social media accounts, and that the FBI had considered Black activists who were lawfully protesting to be extremists and potentially violent threats. CCR's review also revealed the identification of concerning documents, including a DHS report entitled "Growing Frequency of Race-Related Domestic Terrorist Violence," known internally as the "Race Paper." Moreover, a leak exposed that the FBI's counterterrorism division had invented a new domestic terrorism category called "Black Identity Extremism."

The legacy of Guantánamo and US counterterrorism policy is perhaps best summed up by a man who is in his 14th year of detention without charge at the prison. Writing in support of Black Lives Matter protests of police killings, Asadullah Haroon Gul's perspective is that "[t]he US has become desensitized to state violence, provided it happens out of sight and is done to brown-skinned people." If there is a positive effect to the dreadful legacy of the prison, it may be that both marginalized communities and detainees at Guantánamo are resisting and advocating against state violence. Like Indigenous and enslaved Africans 400 years ago, the methods of resistance to such state violence might vary, but what they are fighting does not, and the call for abolition of domestic prisons and prisons like Guantánamo are, at this point, mutually dependent. As Mr. Gul says, "I can't breathe" resonates here, as on countless occasions half a dozen soldiers have pinned me down, grinding my face into the concrete, and it was all I could say. What the officers did to George Floyd has shocked the conscience of America, but it is painfully familiar to me."

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Ian Seiderman

From Crime Scene to Crime Scene

In April 2008, I came to be sitting in what I will charitably call a courtroom, situated in a US military facility in Guantánamo Bay, Cuba. I was there representing Amnesty International, one of an exceedingly limited number of civil society organizations that had been granted permission by the military authorities to observe the much-discredited Military Commissions proceedings established to try so-called "unlawful enemy combatants."

A year earlier, we had published an extensive report detailing the numerous deficiencies in the Military Commissions, in what was effectively version 2.0 of the scheme adopted under the Congressional Military Commissions Act.[1] The initial star chamber version of the Commission that had been imposed by executive fiat[2] in the immediate aftermath of the attacks of 11 September 2001 was an abomination that was a bridge too far even for the US Supreme Court, which in 2006 struck down the scheme in the case of *Hamdan v. Rumsfeld*, in which the Court held, among other things, that the scheme did not comply with the requirements of Article 3 of the Geneva Conventions as being a "regularly constituted court."[3] This new version of Military Commissions, while certainly an improvement on the earlier scheme, has of course also turned out also to be fatally flawed in both design and operation, and wholly incapable of fairly administering justice.[4]

> We were informed, almost matter-of-factly: "You know, you are sitting in the place of a crime scene."

As it happened, the proceedings I was to witness in those days concerned Salim Ahmed Hamdan, a Yemeni national and the very person whose case had made it to the US Supreme Court two years earlier. Hamdan had been accused on such charges as conspiracy and "material support for terrorism" in his alleged role as being a low-level laborer in Osama bin Laden's Al-Qaeda camp, performing such tasks as chauffeuring duties for Bin Laden, but he had had no role in planning or carrying out the attacks of 11 September. By the time of the hearing, he had already been held in torturous conditions in various places of detention for more than six years, including in prolonged incommunicado detention.

As we entered the facility, we learned that there would be delays in the proceedings, because a fed up Hamdan was refusing to leave the detention camp to go to the hearing building, in protest at his plight and conditions, including being held in prolonged solitary confinement. Eventually he did appear, but in a restive state.

"I want to speak," Hamdan demanded. The military judge granted him his audience. "Where is the law? I want justice," exclaimed Hamdan. "Here [in this court] there is no justice."—"But Mr. Hamdan, you have justice, you have your lawyers, you have a trial," responded the judge.—"No," protested Hamdan, "I mean regular justice. You know, the kind Americans get, a real court."—"But Mr. Hamdan you've had more justice than nearly anyone. You took the President of the United States all the way up to the Supreme Court and beat him!"[5]

There was a muted but audible sound—half-laughter and half-jeer—that arose among me and my four or five colleagues observing the trial. So that was it: the omnipotent George W. Bush, defeated in judicial combat, yet continuing to fill the Guantánamo camps with fresh prisoners, while his vanquisher, the mighty Hamdan, lay languishing in solitary confinement in those camps. The metaphors may be clichéd, but this really was the stuff of Kafka ("The trial has to be kept going round and round in the little circle to which it is restricted."), or perhaps Lewis Carroll ("Sentence first, verdict afterwards!").

> The entire system was tainted as a result of political masters trying to manipulate and browbeat military prosecutors into achieving quick convictions, including to influence US elections.

But perhaps the most dramatic—and the most revealing—words we heard during that day came in the afternoon showdown between the Commissions' Chief Prosecutor, Colonel Lawrence Morris, who found himself face-to-face cross-examining his predecessor, the former Chief Prosecutor of the Military Commissions, Colonel Morris Davis. Colonel Davis had resigned his position a year earlier and became a whistleblower against the entire Military Commissions system. (He would not be the last military prosecutor to turn against the system.)[6] In another twist, Colonel Davis had actually participated in drawing up charges against Hamdan, and was now actually testifying as a witness on his behalf. He was now saying that the entire system was tainted as a result of political masters trying to manipulate and browbeat military prosecutors into achieving quick convictions, including to influence US elections.[7] There was certainly a grim satisfaction in the fact that an ultimate insider was confirming what human rights advocates had long been alleging, and Colonel Davis performed an invaluable duty, but ultimately his influence on efforts to end the Guantánamo regime were to prove limited.

A year later, in 2009, I found myself representing another organization, the International Commission of Jurists (ICJ), in a wholly different setting, namely the White House in Washington DC, then home to a wholly different US president. The ICJ had just released the report of a monumental and damning three-year study on the effects of the "war on terror" on the erosion of the rule of law and human rights around world, and we were there on an advocacy mission.[8]

It was a fortuitous time, because Barack Obama had just taken office and was only a few weeks into his presidency. On his second day in office, he had signed a series of executive orders ordering the end of secret detention and the closure of the Guantánamo detention facility within a year. (Spoiler alert: nearly 13 years later, Guantánamo remains open.)

> The Obama regime had effectively also adopted Bush's "war paradigm," conflating the objectives of law enforcement against terrorism, into war, where niceties like professional investigations, due process, habeas corpus, fair trials, and representation by legal counsel were all expendable.

We were sitting right in the office of the White House Legal Counsel. We were informed, almost matter-of-factly: "You know, you are sitting in the place of a crime scene." A crime scene? He was referring of course, to the place where a predecessor White House Counsel, Alberto Gonazales, had involved himself in the concoction of a number of notorious "legal" memos providing pseudo-legal cover for some of the worst "war on terror" abuses, including torture and denial of fair hearings. In one memo from Jay Bybee (now holding a lifetime judicial appointment on the US Ninth Circuit Court of Appeals) and John Yoo (now holding a prestigious chair at University of California, Berkley), Gonzales was effectively advised that nothing is torture unless it's severe enough to kill. We were greatly heartened, taking this reference to a "crime scene" as a clear sign that the new administration was prepared to take things seriously, treating the cynical manipulation of the law to commit human rights atrocities as a crime, much as Nuremberg-era courts had. At the very least, we expected some accountability for the Yoos and Bybees of the world, and other architects and principals of programs of torture, enforced disappearances into secret "black site" prisons, trans-global renditions to torture, indefinite detention under fictitious legal classifications, and kangaroo military courts.

> The policy of "looking forward, not back" extinguished the promises of truth and justice.

Of course, there were to be no prosecutions, no trials, no reparation for many hundreds of victims, and little accounting of any kind. Not even an official truth commission. The policy of "looking forward, not back" extinguished the promises of truth and justice. What's worse, the Obama administration was soon to piggyback on the contrived legal edifice erected by his predecessor and his lawyers to initiate a whole new category of human rights atrocities, the "targeted killing" regime launched in Pakistan, Afghanistan, Somalia and other

places, oftentimes by unmanned aerial aircraft (drones).[9] While in principle it was aimed at "enemy combatants," typically outside of any real armed conflict involving the United States, in practice it appears to have killed mostly civilians.[10] The Obama regime had effectively also adopted Bush's "war paradigm," conflating the objectives of law enforcement against terrorism, into war, where niceties like professional investigations, due process, habeas corpus, fair trials, and representation by legal counsel were all expendable.

And so it remains today, with 39 people still languishing in Guantánamo—some cleared for release but trapped indefinitely; some not charged but deemed "forever" prisoners; and yet others mired in endless proceedings before the Commissions, fighting to get evidence of their torture admitted to the proceedings. In many ways, the once exceptional has become the ordinary, and the Overton window has shifted a pane or two to the previously unconscionable. Although it is difficult to draw any straight lines, it is fair to conjecture that the trashing of the rule of law and longstanding human rights norms by the Bush administration in its contrived "war on terror" paved the path for the wave of authoritarian "populists" that have emerged in all parts of the world—the Orbáns, the Dutertes, the Bolsonaros, and the Trumps.

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5 The dialogue recounted here may not be entirely precise quotations, but are approximations from my notes.
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Fionnuala Ní Aoláin

"Guantánamo is an exemplar of due process exceptionalism."

INTERVIEW

From your perspective, what have been some of the major milestones in counter-terrorism law and policy since 9/11 and what impacts have they had on human rights?

The major milestone right after 9/11 was the creation of a global counter-terrorism architecture spawned by UN Security Council Resolution 1373, which established a UN Counter-terrorism Committee and a Counter-terrorism Executive Directorate. The second big architectural piece was the establishment in the General Assembly of a coordination mechanism which has now evolved to become the UN Office of Counter-Terrorism. That enormous entity started with an institutional footprint of eight positions and in a very short period has grown to 147. These are human-rights-light and civil-society-absent spaces. They are closed boxes and do not have mechanisms in place for those most affected by counter-terrorism measures to have input on the policies shaping their lives. Then, outside of the UN system, we've seen the development of other multilateral spaces of counter-terrorism regulation, from the Financial Action Task Force to the Global Counterterrorism Forum established in 2011 by the US and Turkey, to the Shanghai Framework, to all the regional entities—whether in the EU, the Organization of American States, the African Union—all developing massive counter-terrorism spaces in their regulatory frameworks. I think the effects of those architectural and normative developments have really been profoundly negative for human rights and the rule of law.

What has the establishment and persistence of Guantánamo meant for the trend of "due process exceptionalism" that you outline in your book *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective*?

With regards to due process exceptionalism, it involves harnessing the law to manage a complex political problem: shaping and reshaping the law for it to be applied to exceptional regulation. In the counter-terrorism space, trials have enormous importance for the state, in showing how it can manage and contain particular kinds of threats. For this political purpose, the state often has to reframe the trial and all the processes that lead up to it. The trial is then a moment of reckoning, it has a visual and dramatic dimension. A lot plays out in this space which is not purely legal. Frequently, due process exceptionalism occurs first in relation to detention, often going hand in hand with torture and inhuman and degrading treatment, to extract evidence that can be used in those trial processes. The next step often involves targeting lawyers and limiting the right of access to lawyers because the state is actually trying to constrain what will come into the trial space. The trial also includes a focus on managing the rules of evidence. And then we see the trial space itself, where the rules of evidence and procedure are different, where the appointment of judges can be different. Particularly in military trials, the appointment process is often designed to squeeze out the civilian, to squeeze out the regular rule of law. That due process exceptionalism is essential, particularly to democratic states managing conflict or terrorism, and it's a conveyor belt starting from the very point of detention right through to the drama of the trial itself.

Guantánamo is an exemplar of due process exceptionalism and is a stain on the conscience of humanity. It is inconsistent with the values of a democratic state to maintain a place of detention in which such a large number of people were never charged with any crime and were held indefinitely and arbitrarily without trial. It is also a stain on the conscience of a democratic state to have large numbers of people tortured persistently and to have no accountability for the torture that took place under the imprimatur of law. It is deeply distressing that many of those who were engaged in enabling, authorizing, facilitating, and actually carrying out the torture have been essentially subject to a de facto amnesty by the US government. Guantánamo also functions as a lever for radicalization around the globe. It is not by accident, when we look at the horrific images of persons being slaughtered in Syria by ISIL fighters, that some of them were wearing orange jumpsuits. State refusal to see the connection between the abject violation of human rights without cause in Guantánamo and the cycles of violence which produce and continue to produce extreme violence in other parts of the world, is misguided, short-sighted and likely to continue to perpetuate the cycles of violence we have seen to date. We have almost 40 individuals who continue to be held in current—not past—conditions at Guantánamo Bay that, in my view and the view of the UN Special Rapporteur on torture, meet the threshold for torture or inhuman and degrading treatment under international law.

What have such blatant violations of international norms, particularly with regards to torture, done for the legitimacy of those norms and institutions?

The idea that these systemic, structured, authorized and legalized forms of disappearance, rendition and torture would be carried out by a democratic state—and with no accountability—has created a zone of permissibility for other states. When leading democratic states do this, they create permission for others to do it. The value of the norms is really hard to maintain when we have such outrageous abuse of the norms. The hubris with which the norms continue to be violated sends a clear message.

And it's not by accident that we have 60,000 women and children from Western countries being held in northeast Syria in detention camps without any form of trial. States have understood that they may not need to do anything, because the costs are not high for no action. There is a direct line between practices of contemporary detention in armed conflicts and what Guantánamo has spawned.

State refusal to see the connection between the abject violation of human rights without cause in Guantánamo and the cycles of violence which produce and continue to produce extreme violence in other parts of the world, is misguided, short-sighted and likely to continue to perpetuate the cycles of violence we have seen to date.

Why do you think it's been so hard to close Guantánamo?

First, I recognize that the Obama administration made a bona fide effort to ensure that large numbers of people would no longer be held there; we shouldn't understate the importance of that political commitment to return people to their countries of origin. But the costs are high to the continued operation of the detention site. The United States can't lecture anybody on human rights these days—it falls on deaf ears, it rings hollow, it lacks moral force, it undermines credibility.

The second issue is the barrier to criminal trials. There may be individuals who did commit serious crimes, but the problem now is that they have been tortured to the point where trials are illegitimate and unlikely to be successful based on the complete spoiling of evidence through torture.

You have to make some unpleasant decisions around that, and I think there hasn't been the political will or an understanding of the costs of avoiding the hard consequences of torture adduced evidence.

I also think people have forgotten about Guantánamo. I see this in my work. It is a fight for those NGOs engaged in this work to continue to make this an issue because it looks like an issue you can't win. And one of the challenges for many, and this is true of human rights and counter-terrorism work generally, is that you look like you're on the wrong side when you're making arguments that require upholding the rule of law in contexts where individuals and the public at large believe the persons concerned don't deserve the support of the law. It's an enormous struggle to continue and that's why it's still there: because there's no political will, it's politically convenient, the costs haven't been high enough, and those whose voices have continued to speak out against it are weak, under-supported and struggle in a space where people simply want to forget, they would rather it just went away.

What would future accountability look like to you for the crimes that took place at Guantánamo?

At a minimum, we need accountability. Torture is a crime, and as we learned from the precedent involving General Pinochet, consequences are long-term and accountability doesn't go away, even if we wait a long time. So, the short- and long-term view is that we need criminal accountability for persons who committed or engaged in torture. And we need rehabilitation and reparation for those who experienced torture. We also need broader forms of truth-telling. Given the scale of this kind of institutionalized and legalized torture by the United States, we're not likely to get criminal accountability, or not for more than a handful if it were to happen, perhaps if they were to stumble into the wrong country with universal jurisdiction by accident sometime down the line.

But for example, there was a very interesting little truth commission held by a North Carolina community through which some of the rendition planes went out, which I see as a really positive measure of what a small community could do to hold themselves and those who passed through their community accountable. There are both formal and then these other informal spaces that can be extremely powerful.

The United States can't lecture anybody on human rights these days—it falls on deaf ears, it rings hollow, it lacks moral force, it undermines credibility.

Any final thoughts to share on the significance of this grim 20-year anniversary?

We have to think of the lives of people who have suffered in a situation of undulating torture and inhuman and degrading treatment. And we have to think about the cost to their families of not seeing fathers, brothers, sons, cousins. Human rights are long, long fights, and I think where my hope lies is that these fights don't go away. Some things, no matter how hard you scrub them, the stain is still there. And the stain on the conscience and the global standing of the United States shines bright 20 years later.

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Joshua Castellino

Islamophobia and Othering: A Lasting Legacy of Guantánamo That Drives Our Broken Present

Experts warned that responses by democratic societies[1] to real or perceived threats of terrorism could contribute to their own unravelling, but these warnings were ignored. Flushed with the triumphalism of the supposed "victory" of democracy over all other systems—as judged by its own partisan sources[2]—the most powerful actors on the UN Security Council at the time felt justified in bringing their military might to bear on what they self-labelled the "war on terror." History will paint a stark picture of the measures taken, emphasizing how they eroded the rule of law and human rights. In looking back, I make a further assertion: the measures taken at that time resulted in the persecution of a specific religious minority that fragmented societies, made a mockery of democratic values, and hampered the legitimacy of the states responsible for the measures, signaling the end of their global leadership.

> The use of state powers, including the military abroad, and the creation of new powers at home, lit a torch-paper bringing Islamophobia to the surface, ultimately generating identity-based politics whose legacy reverberates in contemporary polarized politics.

Islamophobia, especially in Europe, has a long legacy tracing back to the Crusades. It was constrained to an extent as human rights law created standards protecting the inherent dignity and worth of *every* individual. While tensions towards Muslims in Europe existed, these were contained to incidents and episodes that rarely broke the surface of national consciousness. In places like India, with one of the world's largest Muslim populations, guarantees enshrined in law prevented systemic erosion of rights.[3] A tacit understanding of the need to maintain "communal" harmony meant that overt use of religion in the public square was frowned upon. Chinese Muslims in Xinjiang, while relatively disadvantaged, sheltered under strong ideas in Chinese thought about the need to create a "family of nations" that respected *minzu*—minority nationalities.[4]

The labelling of the growing menace of terrorism as "Islamic" in the aftermath of the attacks on the World Trade Center in 2001 changed much. The use of state powers, including the military abroad, and the creation of new powers at home, lit a torch-paper bringing

Islamophobia to the surface, ultimately generating identity-based politics whose legacy reverberates in contemporary polarized politics.

Recognizing terrorists' self-claims to "acting in the name of Islam" was a severe misjudgment: they reflected "Muslim values" as much as thieves reflect values concerning the redistribution of wealth. Yet, the use and reiteration of "Muslim" or "Islamic" with "terrorist" began systematic persecution of vast peace-loving communities—especially where they were minorities, generating identity politics in Europe, India, China and elsewhere.

> The erosion of rights at "home" was two-fold: it led to the persecution of blameless individuals targeted solely on the basis of their religion; it also fueled latent forces seeking political control to emerge, using identity as a rapier to channel angry politics towards populism.

History tells us that these measures did not eliminate terrorism but may have fueled it. Military adventures abroad destroyed entire societies in Iraq and Afghanistan with major knock-on effects in places like Syria and Pakistan. These generated significant displacement and refugee flows.

The erosion of rights at "home" was two-fold: it led to the persecution of blameless individuals targeted solely on the basis of their religion; it also fueled latent forces seeking political control to emerge, using identity as a rapier to channel angry politics towards populism. On the grounds they were "saying things people were feeling," common xenophobia, ignorant of histories' cause and effect, generated artificial majorities, uniting mobs on the basis of commonly accepted scapegoats. Democracy became a game of numbers, not values, unleashing the most mediocre of politicians, who were then found desperately wanting in addressing the real threats to society: climate change, the pandemic and the need to transform our extraction-based economic model.

> The legacy of the actions of Western states lies in the erosion of their moral authority.

The legacy of the actions of Western states lies in the erosion of their moral authority. While this may be of limited concern, it has also paved the way for new global leadership. The G7 became the G8, which has now become the G20, and the changing guard of global politics has meant that other forms of government—authoritarian and not overtly hindered by standards of human rights—have come to the fore.

Polarizing identity politics have become the norm at a time when urgent action is needed to find ways to retreat from the brink of planetary boundaries. Islamophobia has become a cornerstone of many societies where Muslims are in a minority, but the politics of "othering" has made scapegoating normal, generating other kinds of hate[5] and misogyny.[6] The failure to punish the perpetrators who started this chain of events is stark: they remain unscathed and unbowed, with one particular prophet of gloom[7] even generating himself untold wealth.[8]

> The failure to punish the perpetrators who started this chain of events is stark: they remain unscathed and unbowed.

Understanding how we got to our broken present is merely a first necessary step towards changing the trajectory of our societies. The protection of minorities predates the creation of human rights law itself in the history of international law. It is about more than the failure to uphold contemporary human rights. It is instead about safeguarding human empathy, uniting diverse human communities at times of crisis and protecting collective humanity. Recognizing failures, admitting culpabilities and upholding truths are key to winning the future and relegating this legacy from our contemporary reality to mere pages of history.

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Manfred Nowak

Guantánamo Bay Is a Global Symbol of Lawlessness

Without knowing it at the time, I was first confronted with the existence of Guantánamo Bay in October 2001 in my function as judge at the Human Rights Chamber for Bosnia and Herzegovina (BiH). The Chamber, which had its seat in Sarajevo, had been established in early 1996 in accordance with Annex 6 of the Dayton Peace Agreement and tasked with deciding on individual complaints alleging that the State of BiH, the Croat-Bosniak Federation of BiH, or the Republika Srpska had violated any of the human rights listed in the European Convention on Human Rights (ECHR) or had discriminated in ensuring the enjoyment of human rights listed in a broad variety of UN and European human rights treaties.

In October 2001, only one month after the 9/11 terrorist attacks, the US government informed the Bosnian authorities that they had reliable information that a group of Bosnian citizens of Algerian origin were planning a terrorist attack against the US and British Embassies in Sarajevo. Upon request by the US, the Bosnian authorities arrested six persons on suspicion of having planned a criminal offense, put them into pre-trial detention, and started proceedings to strip them of their Bosnian citizenship. When the authorities requested that the US government provide evidence, they were told that this information had been compiled by the CIA and could not be shared for national security reasons.

In January 2002, four persons—Hadz Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar—filed a complaint to the Human Rights Chamber in which they alleged various violations of the ECHR, above all, their right to personal liberty and habeas corpus in accordance with Article 5, as well as their right not to be tortured and subjected to the death penalty if expelled to the US. On 17 January 2002, The Chamber issued a legally binding order for provisional measures to prevent the applicants from being taken out of the territory of BiH by force. On the same day, the investigating judge of the Supreme Court issued a decision terminating the applicants' pre-trial detention on the ground that the US had not provided any evidence which might justify their further detention. They were released on the same day by the Bosnian authorities, but immediately arrested again by US forces who were stationed in BiH as part of the NATO-led military Stabilisation Force.

This led to a major diplomatic incident, as various EU Ambassadors and the High Representative for BiH strongly urged the US government to respect the binding interim order of the Chamber.

Nevertheless, the US government ignored the order and transported these Bosnian citizens within the next days, in one of the earliest "extraordinary rendition" flights via the Eagle Base in Tuzla and the US base in Incirlik (Turkey), to Camp X-Ray at the US Navy detention facility at Guantánamo Bay. To my knowledge, these Bosnian citizens were among the first Guantánamo Bay detainees and remained there for many years without any charges.

In October 2002, the Chamber decided the case on the merits and found various violations of the ECHR by the State and the Federation of BiH—it could not decide against the US government as this was outside its mandate—including violations of the right to personal liberty and the right not to be arbitrarily expelled. As reparation, the Chamber ordered the Bosnian authorities to provide monetary compensation to the Bosnian wives of the victims, to provide diplomatic protection to the applicants while in US custody, and to use all diplomatic channels to prevent the death penalty. To my knowledge, Bosnian diplomats twice visited these detainees in Guantánamo Bay without, however, securing their release, even after it was clear that there had never been any attempt or plan to carry out a terrorist attack against the US or any other embassy in Sarajevo.

When I was appointed UN Special Rapporteur on Torture in October 2004, my predecessor, Theo van Boven, had already started, together with four further special procedures of the then UN Human Rights Commission, an investigation into the human rights situation in Guantánamo Bay. I quickly took up this investigation, and we requested that the US government provide us with information and grant us access to the detention facilities at Guantánamo Bay to carry out confidential interviews with all detainees.

> We concluded that the very existence of this detention facility violated binding US obligations under international law and, therefore, needed to be closed immediately.

At the beginning, the US government denied any cooperation and questioned our mandate to carry out such an investigation. Later, however, they provided us with some information and, in 2005, we held various high-level meetings with representatives of the US government at the UN Headquarters in New York, which I chaired. They finally even invited three of us to visit Guantánamo Bay in December 2005. After lengthy negotiations, we finally declined the offer, as Secretary of Defense Donald Rumsfeld refused permission for any confidential interviews with detainees. At that time, we had already conducted various interviews with former Guantánamo detainees in London, Paris and Madrid, and had compiled our report, in which we found not only convincing evidence of torture, but also of violations of various other human rights.

Most importantly, we found that the International Covenant on Civil and Political Rights was applicable at Guantánamo Bay and that the US government had seriously violated the rights of all detainees to personal liberty, freedom of religion, the prohibition of torture, legal assistance, and a fair trial. We concluded that the very existence of this detention facility violated binding US obligations under international law and, therefore, needed to be closed immediately.

We submitted our joint report in February 2006 to the newly created UN Human Rights Council, with strong reactions by the media and the international community. President Bush even offered to close the facility if other states, especially European states, would be willing to receive Guantánamo detainees. In fact, I negotiated with many European governments and some of them did eventually receive certain Guantánamo detainees. When President Obama took office in 2009, he immediately issued an Executive Order to close Guantánamo Bay within one year. Unfortunately, neither he nor his successors have been able or willing to close down this notorious detention facility to date.

> The purpose of using this detention facility was simply to create a space where, in the opinion of George W. Bush, Donald Rumsfeld and their ill-informed advisors, no type of law would apply.

In 2010, I published another joint report with three other special procedures of the UN Human Rights Council, detailing our investigation into the use of secret detention in the fight against terrorism. We identified a total of 66 states that had resorted to these practices. Most notorious were the CIA practices of torture in so-called "black sites" in various countries, including in Europe (Poland, Romania and Lithuania), which were later also confirmed by the US Senate Intelligence Investigation Report. In compiling this report, we again interviewed many individuals who were subjected to "extraordinary rendition flights" between black sites, Guantánamo Bay and other detention facilities.

The various camps in Guantánamo Bay are certainly not the worst detention facilities that the US has used during its so-called "war on terror." Some torture methods used in the black sites were certainly much more brutal than those practiced at Guantánamo Bay. Nevertheless, Guantánamo Bay became the most visible and notorious symbol of the US's so-called "war on terror." The purpose of using this detention facility was simply to create a space where, in the opinion of George W. Bush, Donald Rumsfeld and their ill-informed advisors, no type of law would apply: neither the US Constitution, nor international humanitarian law or international human rights law. That this assumption is simply wrong has been repeatedly affirmed by the US Supreme Court and many international human rights monitoring and investigating bodies, including the UN Human Rights Committee,

the Committee against Torture, the Inter-American Human Rights Commission, the ICRC and special procedures of the UN Human Rights Council. Today, most Guantánamo detainees have been released, but many still live with the stigma of their detention and have never received any reparation for the harm suffered during their ordeal.

> When President Obama took office in 2009, he immediately issued an Executive Order to close Guantánamo Bay within one year. Unfortunately, neither he nor his successors have been able or willing to close down this notorious detention facility to date.

One of the Bosnians of Algerian origin who was detained in Guantánamo Bay for some 10 years and heavily tortured is Mustafa Ait Idir. When I teach about torture in the European Regional Master's Programme in Democracy and Human Rights in South East Europe (ERMA) in Sarajevo, I usually invite Mustafa to discuss with my students what he experienced, how he was treated, and how difficult it has been to start a normal life with his family again as a former Guantánamo detainee. When I was on an official fact-finding mission in Jordan in 2006, the Speaker of the Parliament openly asked me why Jordanians would not be allowed to detain and torture their terrorist suspects if the United States, where democracy and human rights were invented more than 200 years ago, are keeping terrorist suspects for many years under inhuman prison conditions and torture practices without any criminal charge. And this situation continues until the present day. Guantánamo Bay is a global symbol of lawlessness and has significantly damaged the reputation of the US as a democratic state based on the rule of law and human rights.

MANFRED NOWAK HAS SERVED IN VARIOUS EXPERT FUNCTIONS, SUCH AS UN EXPERT ON ENFORCED DISAPPEARANCES, UN SPECIAL RAPPORTEUR ON TORTURE, JUDGE AT THE HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA AND VICE CHAIRPERSON OF THE EU FUNDAMENTAL RIGHTS AGENCY. HE HAS AUTHORED OVER 600 PUBLICATIONS IN THE FIELDS OF PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS, AND IS A MEMBER OF ECCHR'S ADVISORY BOARD.

Mark Fallon
The End of Innocence

On 28 October 2002, I sat in my office in a highly secure compound on a military facility just outside Washington, DC, anxiously waiting to meet MajGen Geoffrey Miller. I was a career special agent with the Naval Criminal Investigative Service (NCIS), detailed to the Army Criminal Investigation Command, and reporting to the Office of General Counsel (OGC) of the Secretary of Defense (SecDef). I was appointed Special Agent in Charge (SAC) and Deputy Commander of the Pentagon's Criminal Investigation Task Force (CITF). I was the US government's chief investigator charged with bringing suspected terrorists to justice before Military Commissions in accordance with a military order from President George W. Bush.[1]

The year prior, I had served as the NCIS Chief of Counterintelligence for the Europe, Africa and Middle East, and the commander of the USS Cole task force. I was overseeing the investigation of the 12 October 2000 attack on the US Navy destroyer that killed 17 sailors and nearly sunk the ship. As a homicide investigator, I knew that my job was to give voice to victims who could no longer be heard. I had vowed not to rest until those responsible for the deaths of those unsuspecting sailors were brought to justice. With the appointment to lead the CITF investigations, the number of victims I represented grew to around 3,000.

The months preceding my first encounter with Miller had been a summer of discontent at the Guantánamo Bay offshore prison encampment, part of a gulag archipelago of black sites and dark prisons, providing cover for nefarious activities. The CITF had fought policy battles with MajGen Michael Dunlavey over his insistence to apply a family of interrogational abuses at Guantánamo, just as the CIA was engaged in at black sites. At the time, I wasn't supposed to know, or at least tell anyone, that Naval Station GTMO was the home of one of those black sites.

Dunlavey was the Commander of JTF-170, responsible for intelligence exploitation of detainees. He became increasingly frustrated that JTF-170 was producing little of any value. Rather than considering that the prisoners might not possess the intelligence he so wished they had, or that JTF-170 military interrogators were poorly trained and lacked the necessary and meaningful experience, he insisted that the JTF-160 Commander(s), who were responsible for detention operations, and the CITF, who was responsible for criminal investigations, were impeding his ability to obtain intelligence from prisoners. Dunlavey turned to the same instructors who had trained the CIA to provide instruction to JTF-170 personnel. These were military personnel assigned to the US military Joint Personnel Recovery Agency (JPRA) and instructing at a course known as Survival Evasion Resistance and Escape (SERE).[2]

The CIA claimed that their "learned helplessness" and application of SERE tactics approach of secret "interrogations" was highly successful. The first victim of their human experimentation was a black site

prisoner called Abu Zubaydah, whose real name is Zayn Al-Abidin Muhammad Husayn. The CIA purported Zubaydah was in the top leadership echelon of Al-Qaeda and claimed that the application of SERE torture was safe, necessary, and effective. This was either an outright fabrication, or cover for both status and action, as evidenced by the Senate Intelligence Committee Report on Torture executive summary.[3] As reflected in the Torture Report: "the CIA later concluded that Abu Zubaydah was not a member of Al-Qaeda." However, in 2002, that was shrouded in secrecy and all Dunlavey, Miller and SecDef Donald Rumsfeld heard was the self-congratulatory claims from the CIA of how successful they were, and the pressure mounted for the military to produce results.

The absurdity is that while full time intelligence community career operational psychologists, including the CIA, were assisting the CITF to train investigators in relationship-building and rapport-based interrogation methodologies, the CIA outsourced what they called their "enhanced interrogation techniques"—EITs for short—to contract psychologists. The EIT program was just an excuse to inflict torture, and these contract psychologists—James Mitchell and Elmer Bruce Jessen—with no prior terrorism or interrogation experience, made millions as torture profiteers.[4]

In Dunlavey's view, the CITF and JTF-160 were treating prisoners too humanely, and even requested an official investigation of the other generals for giving aid and comfort to the enemy. Those charges were never filed and Dunlavey found himself dismissed from command at Guantánamo. However, aiding and abetting the migration of SERE torture from the CIA to the military is Dunlavey's legacy. The JTF-160 and JTF-170 were merged into one unified task force called HF-Guantánamo—as a battle lab—with Miller in charge, as the US military global focal point for "interrogation."

> I sat in my office in a state of disbelief. The United States military was about to engage in premeditated war crimes, and I was going to be a witness to history.

The 28 October meeting with Miller was the turning point that bent, twisted, and mangled the arc of history toward injustice, cruelty, and human subjugation. Miller made it clear that he had his orders from Rumsfeld and that neither I nor the CITF would stand in his way. It was clear to me that torture was going to be instituted as a matter of official policy, that our actions would be seen as international war crimes and would serve as a catalyst for the proliferation of global violent extremism.

I sat in my office in a state of disbelief. The United States military was about to engage in premeditated war crimes, and I was going to be a witness to history. It was an untenable position for a career federal agent, and one who cherished the oath of office to protect, preserve and defend the Constitution.

To add insult to this injury, the combatant commander over the military's Guantánamo operations, the US Southern Command, forwarded approval of Dunlavey's request to torture Mohamad Al-Qahtani, the military's first battle lab experiment in SERE EIT torture. The lawyers failed to safeguard against these crimes, and in my mind, the outcomes were as inevitable as they were horrific.

There's a saying in the military when confronting issues that leaders must weigh: "Is this the hill I'm willing to die on?" While figurative in nature, this hill was mine. This issue was bigger than me and more important than my career. I took my stand as a leader, and I did what investigators are trained to do—preserve the evidence. I pulled the record I had of a meeting weeks earlier [redacted] With my own comments memorialized for the record, of what I was sure would result in Congressional hearings, I disseminated it widely. It remains, in my view, the most consequential report I have ever written. Senator Carl Levin read from this memo when he opened the Senate Armed Services Committee Detainee Treatment hearings.

As Amended: delete
Reason: Security

We need to ensure seniors at OGC are aware of the 170 strategies and how it might impact CITF and Commissions. This looks like the kinds of stuff Congressional hearings are made of. Quotes from LTC Beaver regarding things that are not being reported give the appearance of impropriety. Other comments like "It is basically subject to perception. If a detainee dies you're doing it wrong" and "Any of the techniques that lie on the harshest end of the spectrum must be performed by a highly trained individual. Medical personnel should be present to treat any possible accidents." Seem to stretch beyond the bounds of legal propriety. Talk of "wet towel treatment" which result in the lymphatic gland reacting as if you are suffocating, would in my opinion; shock the conscience of any legal body looking at using the results of the interrogations or possibly even the interrogators. Someone needs to be considering how history will look back at this.

> While President Bush sanctioned torture, President Obama gave it sanctuary with his "look forward, not backwards" policy of impunity. While President Trump celebrated torture, President Biden ignores it.

By November 2002, Gul Rahman was found dead, chained to a wall, naked from the waist down, in a cold dark CIA chamber of horrors, in the gulag archipelago of human suffering. Like a contagion of cruelty, SERE-derived methodologies metastasized and became standard operating procedures in both Afghanistan and Iraq. In August 2003, Miller was sent to Abu Ghraib to "Gitmotize" the operations there. That is Miller's legacy. The release of the photographic evidence of those atrocities in April 2004 shocked the conscience of the world, and Mitchell and Jessen's CIA contract was terminated.

In May 2004, I left the CITF, having failed to bring terrorists to justice. That is my legacy. However, I did my job. While there is a legal maxim that justice delayed is justice denied—for the victims of the 9/11 and USS Cole (DDG-67) attacks, this is justice deceived.

The CIA and US military didn't invent anything new with their SERE EIT programs. All they did was restore capabilities that had become dormant from past atrocities, that were the kinds of stuff Congressional hearings were made of. Programs like MKUltra, Project X, KUBARK Counterintelligence Manual, Human Resource Exploitation (HRE) and a family of interrogational abuses that replicated the methods the North Koreans and Communists had used to produce false confessions from US service members.

The foundational underpinnings of this illicit practice dates to Cold War methodologies, such as the CIA's "Brainwashing from A Psychological Viewpoint" (written in 1956 and declassified and approved for release in 1999).[5] Mitchell and Jessen didn't invent anything new; they were just contract cutouts paid millions to maintain an illusion of efficacy—a modern day mixture of brainwashing and money laundering for these torture profiteers, and for their torture overlords.[6]

While President Bush sanctioned torture, President Obama gave it sanctuary with his "look forward, not backwards" policy of impunity. While President Trump celebrated torture, President Biden ignores it. The US government continues to shroud any information that would lead to accountability for torture under a cloak of invisibility. Witnesses and victims are among the human remains clinging to whatever lives they have left at the Guantánamo gulag. That 28 October meeting was the end of innocence, along with the presumption of innocence under the rule of law. Somebody needs to be considering how history will look back at this.

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THIS REFLECTION PIECE WAS SUBJECTED TO REVIEW AND CENSORSHIP BY THE UNITED STATES GOVERNMENT IN A PROCESS KNOWN AS "PREPUBLICATION REVIEW." MARK FALLON IS CHALLENGING THE REDACTIONS AND IS THE PLAINTIFF IN AN EXISTING LAWSUIT CHALLENGING THE ABRIDGMENT OF HIS RIGHT TO FREE EXPRESSION; HOWEVER, IN THE INTEREST OF PUBLICATION DEADLINES, WE ARE PUBLISHING THE PIECE WITH THE REDACTED MATERIAL BLACKED OUT. THE US PREPUBLICATION REVIEW PROCESS IS NOT GOVERNED BY A SINGLE AGENCY AND THE AUTHOR WAS NOT PRIVY TO WHAT INDIVIDUALS OR AGENCIES REVIEWED HIS WORK PRODUCT. AGENCIES IMPOSE LIFETIME PREPUBLICATION REVIEW OBLIGATIONS THROUGH A TANGLE OF REGULATIONS AND POLICIES, WITH VAGUE AND CONFUSING REQUIREMENTS. AGENCIES' CENSORIAL DECISIONS, SUCH AS IN THIS CASE, ARE OFTEN ARBITRARY, UNEXPLAINED, AND CAN HAVE A CHILLING EFFECT ON FREE SPEECH.

1 Office of the Press Secretary, *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* [Press Release], (13 November 2001). .
2 Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in US Custody* [Report], (30 November 2008).
3 Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* [Report], (9 December 2014).
4 M. Fallon, *Unjustifiable Means: The Inside Story of how the CIA, Pentagon, and US Government Conspired to Torture* (2017).
5 S. Barela et al., *Interrogation and Torture* (2020).
6 Central Intelligence Agency, *Hostile Interrogations: Legal Considerations for CIA Officers* (26 November 2001).

Martina Burtscher

Lessons from *Life After Guantánamo*

Reprieve is a legal action charity based in the United Kingdom. Reprieve's lawyers have represented individuals in Guantánamo since 2004, when the US Supreme Court recognized the right to legal representation in the detention camp. Since then, Reprieve's lawyers have represented 80 of the 780 men detained in Guantánamo over the years. Currently, Reprieve represents six of the 39 men who remain in detention there.

Reprieve's Life After Guantánamo (LAG) project was established in 2009, when President Barack Obama stated his intention to close Guantánamo. Reprieve saw the need to assist individuals after their transfer to ensure that they are supported as they reintegrate into society. The LAG project was set up with support from the UN Voluntary Fund for Victims of Torture (UNVFVT) with the recognition that that release from Guantánamo is not the end of the story.

As of writing this in November 2021, 732 of the 780 men detained in Guantánamo since 2002 have been released. Of these, 150 men[1] have not been allowed to return to their home countries and, instead, have been transferred to a large variety of third countries, numbering 29 in total.[2] Most of these resettlements were negotiated under the Obama administration, through the US Special Envoy for Guantánamo Closure. To date, Reprieve's LAG project has worked with 73 men in resettlement and repatriation cases in a total of 28 countries.

> The Trump administration closed the office of the Special Envoy, removing the primary office dedicated to the protection of former Guantánamo detainees.

In our work, we have found that the foundation of any successful resettlement is ensuring that the former detainee has a permanent and secure legal status within the country of resettlement. However, the United States policy of disengagement in recent years has increasingly undermined this critical safeguard alongside other important protections. For example, the Trump administration closed the office of the Special Envoy, removing the primary office dedicated to the protection of former Guantánamo detainees. In addition, US Embassies have disengaged from their responsibility to follow up on the well-being of the resettled men.

This policy of disengagement has led to the erosion of protections of men formerly detained in Guantánamo, as countries believe that the US no longer cares about the status of the men.[3] As a result, they have suffered continued detention without charge or trial, forced repatriation, repeated harassment, a lack of basic services, and severe health problems leading to death. The following illustrative examples show the extent of the ongoing harms that the men face.

Two individuals formerly detained in Guantánamo were resettled to a nation in West Africa in mid-2016. They were never provided identification, legal status or other papers to prove their identity, and they were heavily monitored during their entire stay. Government officials were candid regarding the status of the men, saying that they would be sent back to Guantánamo, the US, or elsewhere after two years. The government notified the men of their forceable repatriation only days before it occurred. Both men disappeared upon their forced repatriation to a nation in North Africa in 2018. Despite numerous attempts to locate their whereabouts, their exact detention could not be verified. It took over two years for the men to be released from this detention.

Several years ago, an Asian nation accepted individuals formerly detained in Guantánamo on the promise of long-term resettlement, a solid legal status, and family reunification. Unfortunately, once the men arrived, the government reneged on these promises. Two years into their resettlement, the government announced that the men were staying illegally. The nation transferred some of the men to another nation where they were again not given legal status or health care; one of the men died from severe medical complications. The men who remained still live without legal status, resulting in regular police harassment, risk of disappearance, and risk of further detention.

Despite assurances that they would be released, the men remained in indefinite and at times solitary detention, uncontactable by NGOs and their Guantánamo lawyers.

At the end of the Obama administration, several individuals formerly detained in Guantánamo were resettled to a nation on the Arabian Peninsula. All of the men were immediately detained upon arrival in an unknown location. Despite assurances that they would be released, the men remained in indefinite and at times solitary detention, uncontactable by NGOs and their Guantánamo lawyers. Even the families of the men received only short, sporadic, and heavily monitored phone calls.

The Biden administration has thus far successfully repatriated one Moroccan national, who the US cleared for release in July 2016. Several individuals have already been cleared for transfer by the US and the State Department is actively negotiating their transfer.

For the individuals who will be resettled, we recommend that the US follow these guidelines:

- Resettlements are only feasible when the individual has a secure legal status.
- Resettlement deals need to be transparent with the men and their lawyers.
- Rehabilitation is only possible if resettlements are permanent.
- Rehabilitation is only possible when family visits and family reunification are allowed.
- Medical records from Guantánamo need to be shared with the host countries, and the host countries need to guarantee adequate physical, mental and psychological health care post release. Access to a local torture rehabilitation center is vital for the men.
- Rehabilitation can only be successful if there are services available which include language, cultural, and vocational training, as well as education and employment support.
- Rehabilitation needs time, and funding should cover housing and living expenses for at least five years.

MARTINA BURTSCHER JOINED REPRIEVE'S LIFE AFTER GUANTÁNAMO TEAM IN NOVEMBER 2016. FROM 2011 TO 2015 SHE WORKED AS A DELEGATE FOR THE INTERNATIONAL COMMITTEE OF THE RED CROSS IN LIBYA, JORDAN AND IRAQ.

1 G. Rietveld, J. van Wijk and M. Bolhuis, 'Who Wants "The Worst of the Worst"? Rationales for and Consequences of Third Country Resettlement of Guantánamo Bay Detainees', (2021) 76 *Crime Law Soc Change* 35.
2 'The Guantánamo Docket', *New York Times*, 14 October 2021.
3 C. Savage, 'Deported to Libya, Ex-Gitmo Detainees Vanish. Will Others Meet a Similar Fate?', *New York Times*, 23 April 2018.

EXHIBITION OF FORMER GUANTÁNAMO DETAINEE

Djamel Ameziane


Jamel 2011

DJAMEL AMEZIANE WAS BORN IN ALGERIA BUT FLED DURING THE CIVIL WAR, EVENTUALLY APPLYING FOR POLITICAL ASYLUM IN CANADA AND MOVING TO AFGHANISTAN WHEN IT WAS DENIED. WHEN THE US INVADED AFGHANISTAN IN 2001 HE TRIED TO CROSS THE BORDER TO PAKISTAN TO ESCAPE THE FIGHTING BEFORE BEING CAPTURED BY A LOCAL TRIBE AND HANDED TO PAKISTANI AUTHORITIES, WHO TRANSFERRED HIM TO US FORCES. HE WAS TAKEN TO GUANTÁNAMO IN 2002, AND THOUGH HE WAS CLEARED FOR RELEASE BY 2008, HE WOULD BE HELD THERE FOR FIVE MORE YEARS BEFORE BEING SENT TO ALGERIA. IT WAS IN THESE FIVE YEARS THAT HE CREATED MOST OF HIS ART, A SMALL COLLECTION OF WHICH IS FEATURED HERE.

Guantánamo images and imaginaries

v.

Engaging with the prison through art

What does the US military prison at Guantánamo Bay in Cuba look like? The answer is undoubtedly different for the detainees held captive there, the military personnel working there, and the limited numbers of lawyers, journalists, artists and other civilians who have been afforded restricted access on tightly controlled visits to the site over the last twenty years.

In addition to photos of the base released in the public domain, all subject to military review and censorship, Guantánamo also looms large in many people's imaginations. Myriad artists, among them current and former detainees, have used art as a means to depict, critique, escape or otherwise engage with Guantánamo through visual, written and experiential mediums. To mark the grim 20-year anniversary of the prison's operation in the disastrous "war on terror," ECCHR has produced five videos featuring different artistic engagements with Guantánamo, in conversation with the artists themselves.

This section of the anthology introduces the five artists featured in the online exhibition and offers a glimpse into their different images and imaginaries of the notorious detention camp. It highlights the artists' different approaches in using art to address injustice, to share stories and emphasize the humanity of those held captive at Guantánamo, and to inspire individual and collective conversation, imagination and action. Before these artist profiles, the section opens with a reflection piece by art scholar Sebastian Köthe, discussing unconventional ways in which art from Guantánamo manages to circumvent censorship to reach the public.

VISIT THE "GUANTÁNAMO IMAGES AND IMAGINARIES" ONLINE EXHIBITION HERE

Sebastian Köthe

Art From Guantánamo: Circumventing Censorship

Together with their allies, the men detained in Guantánamo Bay have found numerous ways to testify to their torture, to demand justice and to renounce their image as "enemy combatants." They have testified in international newspapers and through written memoirs. They won several landmark cases before the US Supreme Court. They have gone on multiple mass hunger strikes and committed self-harm while addressing the public with open letters. In 2007, the human rights lawyer Mark Falkoff edited a book with 21 poems written by men detained at Guantánamo, which became a worldwide bestseller. In 2017–18, the exhibition *Ode to the Sea*, curated by Erin Thompson, Paige Laino and Charles Shields, exhibited around 40 pieces of artwork by former and current detainees, generating international attention. While the detainees' protests garnered almost no attention during the Trump era, the exhibition of detainee artwork broke the barrier of silence around the camp: sculptures of ships made from repurposed bits and pieces; lush landscapes and deserted towns; still life paintings and images of the sea. In the catalogue, the artists explained how they appropriated materials, transformed their cells through makeshift windows or fled the camp by making art. They voiced a strong humanistic message and spoke directly to a US-American audience "Displaying the artwork is a way to show people that we are people who have feelings, who are creative, that we are human beings,"[1] said Djamel Ameziane. Moath al-Alwi testifies in a similar manner: "We only make beautiful things. We love life, we love everything and people. We are not extremists, we do not hate nice things. I want [an American audience] to think about us in this way."[2] Creativity, beauty, humanity, art, love—the artists inscribe themselves in categories with a universalistic appeal.

All the images presented in *Ode to the Sea* have gone through the censorship apparatus of the detention camp; stamps like "Approved by US Forces" remind the viewers. The curators were able to choose from over a thousand artworks. Yet, there is a corpus of art from Guantánamo that did not go through the usual path of state-regulated art censorship procedures. In the following pages, I want to talk about those images, their differing aesthetics, and their ways of circumventing Guantánamo's censorship.

Sami Alhaj was a Sudanese cameraman covering the war in Afghanistan for Al Jazeera before being detained and handed over to US forces. Alhaj spent six years in Guantánamo without ever being convicted. He was on hunger strike for more than 500 days, until he was released in 2008.[3] During the strike-periods, he drew a series of five images called *Sketches of My Nightmares*. After being unable to get the drawings through censorship, Alhaj wrote descriptions of the images for his lawyer Cori Crider, who was able to de-classify them. The

organization Reprieve then commissioned British cartoonist Lewis Peake for the reconstruction of the originals.[4] The images show Guantánamo as a landscape of death: the camp's insignia are a skull and bones, the hunger strikers appear as skeletons. None of them are moving or standing, everybody is sitting or lying down. A two-part drawing called *The Inflatable Man* shows a skeleton being force-fed on a scale while a group of soldiers and doctors is standing around it. At first, the skeleton is thin and frail. Then, it's pumped up, but still appears to us without fat, flesh, or skin. In another image depicting his force-feeding, Alhaj comments, "My picture reflects my nightmares of what I must look like, with my head double-strapped down, a tube in my nose, a black mask over my mouth, strapped into the torture chair with no eyes and only giant cheekbones, my teeth jutting out—my ribs showing in every detail, every rib, every joint."[5] Sami Alhaj's *Sketches of My Nightmare* are a visual testimony to the hunger strikes and force-feedings, an artistic self-questioning, a savvy transmedia endeavor to smuggle truth around censorship. The shape of a human figure is in question here. While uncovering the purportedly "humane" practices of force-feeding as a form of necropolitics, the images figure as a tactile self-questioning of the transformations of a tortured and resisting body.

Instead of being a victim of torture, Rabbani becomes a witness to it. He uses the censorship to indicate that the testimonies from Guantánamo must be more than simply read: they must be imagined and felt.

Ahmed Rabbani, who is still being held at Guantánamo without having ever been convicted of a crime, has written detailed descriptions of his paintings and handed them over to his lawyer, Clive Stafford Smith, who in turn let them be reconstructed by art students in Dorset. One of Rabbani's descriptions reads, "There is a pit, perhaps 20 feet deep, holding the prisoner. There is a grill at the top, with fluorescent lights casting a shadow down on him. A single twisted rope runs down from the center of the grill to the iron bar, suspended over the prisoner's head. His wrists are shackled by handcuffs, spread-eagled, on the iron bar, so he can just stand on his toes to reach it. The prisoner has on a light blue t-shirt, and long, straggly black hair. All around the pit, and its square of light, is darkness."[6] Instead of being a victim of torture, Rabbani becomes a witness to it. The description has a forensic quality, yet it is also an image to be realized by its readers/viewers. They are called upon to paint their understanding of Rabbani's testimony, they are being involved and hindered from detaching themselves or reducing torture to mere facts. Rabbani uses the censorship to indicate that the testimonies from Guantánamo must be more than simply read: they must be imagined and felt. As journalist Philip Gourevitch has put it in another context, this is about the "the peculiar necessity of imagining what is, in fact, real."[7]

Abu Zubaydah was the first person to be subjected to the CIA's so-called "enhanced interrogation program" in 2002. His torture came to be one of the centerpieces of the Senate's 2014 landmark *Report on Torture*. While the accusations against Abu Zubaydah have dwindled, he is still held at Guantánamo Bay. The CIA headquarters promised its agents that "[he] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released […] [he] should remain incommunicado for the remainder of his life."[8] Testimonies by Abu Zubaydah have been scarce. Yet, the 2019 report *How America Tortures* by Mark Denbeaux and his team combined a presentation of Abu Zubaydah's torture along with his written testimony and eight of his drawings.[9] Together with eight more drawings released in 2018 by *ProPublica*[10] and eleven more released by *CNN* in 2020,[11] this material constitutes one of the most challenging oeuvres from the Guantánamo detention camp.

Such drawings challenge us to reflect on the importance of art and evidence, testimony and aesthetics.

Since the success of *Ode to the Sea*, the military does not allow for any artwork to leave Guantánamo. Thus, the images published by Denbeaux and CNN were released as juridical materials. They depict what can be understood as a grammar of torture.[12] This grammar declines the violent relations between the body and various means of torture—waterboards, boxes, ventilators, walls, cells. It is a hand-drawn counter-investigation of the black sites. But the images are not only cataloging the means of torture, they also—not unlike Alhaj has put it—explore Abu Zubaydah's own contorted body, his expressions of pain, his loss of sensorial perception. By rigorously depicting the twisting of his body, they draw an image of torture in its etymological sense; "torture" derives itself from the Latin "torquere," which means to twist, turn, wind, wring, distort. But they also remind us that the torture apparatus is, as former detainee Mansoor Adayfi has put it, more than the shackles or the orange colors, but that "it was a life there."[13]

Sociologist Lisa Hajjar and legal scholar Hedi Viterbo have pointed us towards important aspects of these drawings and their function as testimonies.[14] In contrast to conventionally realistic representations of torture, the "surreal" style in Abu Zubaydah's drawings enables him to highlight the impossibility of fathoming torture. Unlike most camera-based or textual evidence, they are neither made by the torturers themselves nor based on their accounts. Hajjar and Viterbo point to an epistemological injustice that privileges seemingly objective, but exclusive (expensive, advanced, power-based) tools such as cameras in contrast to first-person testimonies in verbal or pictorial form. Epistemic justice would mean that everyone has access to acknowledged tools of knowledge production.

Queer scholar Michelle C. Velasquez-Potts has highlighted the use of sound in Abu Zubaydah's drawings. She argues that we should not reduce the drawings to mere representations:

"Listening to an image is not about fixing the represented subject in place, but rather about holding open the possibility of movement and the self-transformation of that subject. […] These drawings allow access, though not total, to the life that at times must stay hidden."[15] By following the invitation of the drawings, they might enable us "to commit ourselves to relational approaches to pain and suffering that facilitate abolitionist imaginaries, as opposed to merely empathetic ones."[16]

Such drawings challenge us to reflect on the importance of art and evidence, testimony and aesthetics. They challenge us to confront state power and our two-faced democracies. They challenge us to find meaningful ways to see or hear or touch them, to be moved by them. They challenge us to build new relations based in creative self-expression, in shared cultural forms, but also in silences, pain and injustice. Rebecca Adelman reminds us that the anger of the detainees is often voided in liberal discourses about Guantánamo.[17] The satirical drawings by Sami Alhaj, the invitations by Ahmed Rabbani, and Abu Zubayah's grotesque yet precise drawings have found ways to circumvent state censorship—maybe they can also circumvent our own.

SEBASTIAN KÖTHE STUDIED CULTURAL HISTORY AND THEORY, PHILOSOPHY AND SCREENWRITING. HE COMPLETED HIS DISSERTATION "WITNESSING GUANTÁNAMO" AT THE RESEARCH TRAINING GROUP "KNOWLEDGE IN THE ARTS" AT BERLIN UNIVERSITY OF THE ARTS IN 2021.

WITH THANKS TO REBECCA BOGUSKA AND REBECCA JACKSON.

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2 M. Al-Alwi and E. Thompson, 'Interview, with Moath al-Alwi', 2017 *Postprint Magazine* 33, 33.
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4 A. Worthington, 'Sami al-Haj: The Banned Torture Pictures of a Journalist in Guantánamo', *Andy Worthington's Blog*, 13 April 2008.
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10 R. Bonner and T. Golden, 'Pictures From an Interrogation: Drawings by Abu Zubaydah', *ProPublica*, 30 May 2018.
11 P. Bergen, 'Exclusive: More Drawings Allege CIA's Horrific Treatment of Abu Zubaydah', *CNN*, 13 February 2020.
12 Michelle C. Velasquez-Potts has used a similar terminology to describe the drawings.
13 M. Adayfi at al., 'Love Me. Special Episode: To My Heart', *CBC Radio*, 20 August 2018.
14 L. Hajjar and H. Viterbo, 'Seeing State Secrets: The Significance of Abu Zubaydah's Self-Portraits of Torture', *Jadaliyya*, 6 April 2020.
15 M. Velasquez-Potts, 'The Aesthetics of Torture: Listening to Abu Zubaydah's Interrogation Drawings', *Art Journal Open*, 28 January 2021.
16 Ibid.
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Debi Cornwall Photography

Debi Cornwall is a photographer and former civil rights lawyer, who took photographs during three visits to Guantánamo Bay in 2014 and 2015. On all three visits, she was given only limited access to the facilities while accompanied by a military escort, and was provided a long list of things she was prohibited from photographing, including faces. Cornwall refers to her work as "conceptual documentary art," mostly she says, "to manage expectations." Due to the military's strict access and censorship rules, as well as the sheer volume and repetition of certain kinds of images released in the public domain, she says, people tend to expect photography of Guantánamo to entail pictures of orange jumpsuits and barbed wire. But her approach is noticeably different. "I'm not telling narrative stories and not making the kinds of images that you might expect to see of Guantánamo," she explains. Instead, Cornwall says her images "are more about fostering critical thinking and about exploring ideas than they are about telling a story."

The culminating project of her three trips to Guantánamo is titled *Welcome to Camp America: Inside Guantánamo Bay*, which includes three bodies of work. The first is called *Gitmo at Home, Gitmo at Play*, inspired by something a military escort shared with Cornwall during her first visit—that Gitmo is "the most fun posting a soldier could have." In the resulting photos, Cornwall explains, "I juxtaposed home and play spaces of both the prisoners and guards," with a focus on a particular point of human connection between them: "that no one has chosen to live in this place." In the second part of the project, called *Gitmo on Sale*, she documented souvenirs sold at the Guantánamo gift shops, which she sees as an integral part of the messaging she experienced from the military authorities, "of the buying and packaging and consuming of American military power in Cuba," of the "'look-how-much-fun-we're-having' show."

In the third and final part of the project, titled *Beyond Gitmo*, Cornwall documented the lives of 14 men living in nine countries after being released from Guantánamo. When she started, she asked herself: "How do I convey the inner reality that these men are going through to lay people, that the trauma is still embodied long after the body is free?" She decided to make environmental portraits of each of the men, photographing them from behind as if he were still held in Guantánamo and subject to the military's no faces rule for photographers. She explains, "I didn't know how the men would relate to this conceptual idea, but each of them grasped it immediately and said, 'Absolutely, let's do it that way.'"

For the men who had been relocated to foreign countries, Cornwall collaborated with them to find locations emphasizing their disorientation. In Slovakia, for example, she photographed Hamza, a Tunisian, and Hussein, a Yemeni, who were both deemed ineligible to be returned to their home states. "What a disorienting experience to be dropped into a country where no one speaks Arabic. No one is Muslim. No one is brown like you," she reflects. She photographed the men by the edge of the river in the small town where they lived. "Hussein is photographed at midday prayer," she says, noting that "he's in the only country in Europe, as I understand it, without a single mosque." For the men who had been released back to their own countries, like Murat who returned home to Germany, she collaborated with them to find locations of relevance to their daily life.

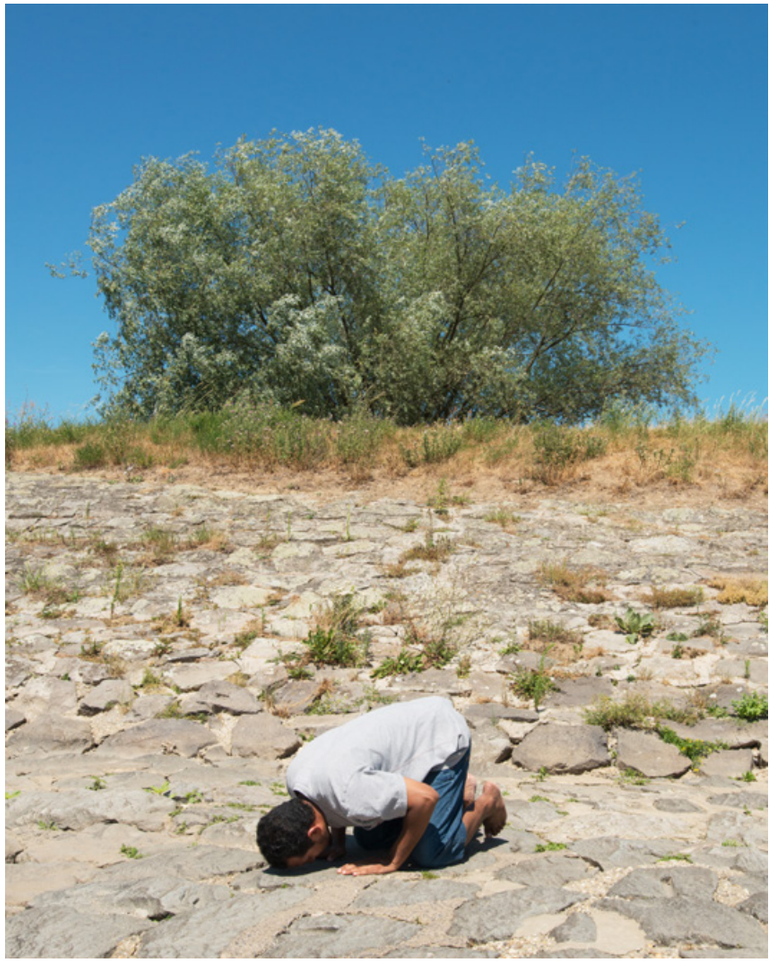
Today, Cornwall says that she no longer considers herself to be an "advocate" as she once was in her career as a lawyer. However, through the process of making this work, she says, she has learned "that art has the capacity to work alongside advocacy" and that "by inviting curiosity and using unexpected images, you can invite a different kind of a dialogue.

HAMZA, TUNISIAN (SLOVAKIA)

HELD: 12 YEARS, 11 MONTHS, 19 DAYS
CLEARED: JANUARY 12, 2009
TRANSFERRED TO SLOVAKIA: NOVEMBER 20, 2014
CHARGES: NEVER FILED

MURAT, TURKISH GERMAN (GERMANY)

REFUGEE COUNSELOR
HELD: 4 YEARS, 7 MONTHS, 22 DAYS
RELEASED: AUGUST 24, 2006
CHARGES: NEVER FILED



HUSSEIN, YEMENI (SLOVAKIA)

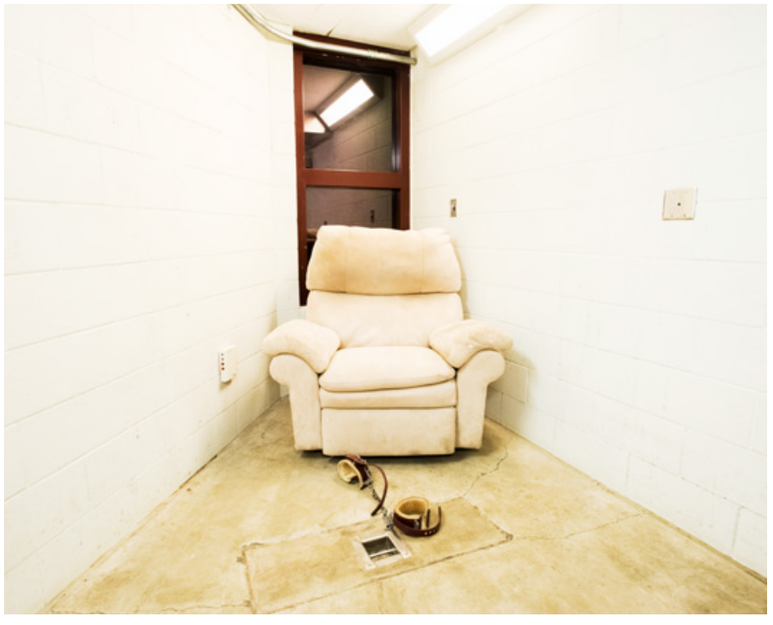
AT MIDDAAY PRAYER
HELD: 12 YEARS, 6 MONTHS, 11 DAYS
CLEARED: JANUARY 12, 2009
RELEASED: NOVEMBER 20, 2014
CHARGES: NEVER FILED

SMOKE BREAK

CAMP AMERICA, 2014
US NAVAL STATION, GUANTÁNAMO BAY, CUBA (GTMO)

KIDDIE POOL, 2015

MEDIUM-FORMAT NEGATIVE
HAND-DEVELOPED ON SITE UNDER
WATCH OF MILITARY CENSORS



COMPLIANT DETAINEE MEDIA ROOM

CAMP 5, 2014
US NAVAL STATION, GUANTÁNAMO BAY, CUBA (GTMO)

RECREATION PEN, CAMP ECHO, 2015

MEDIUM-FORMAT NEGATIVE
HAND-DEVELOPED ON SITE UNDER
WATCH OF MILITARY CENSORS

Molly Crabapple
Illustration and Courtroom Sketching

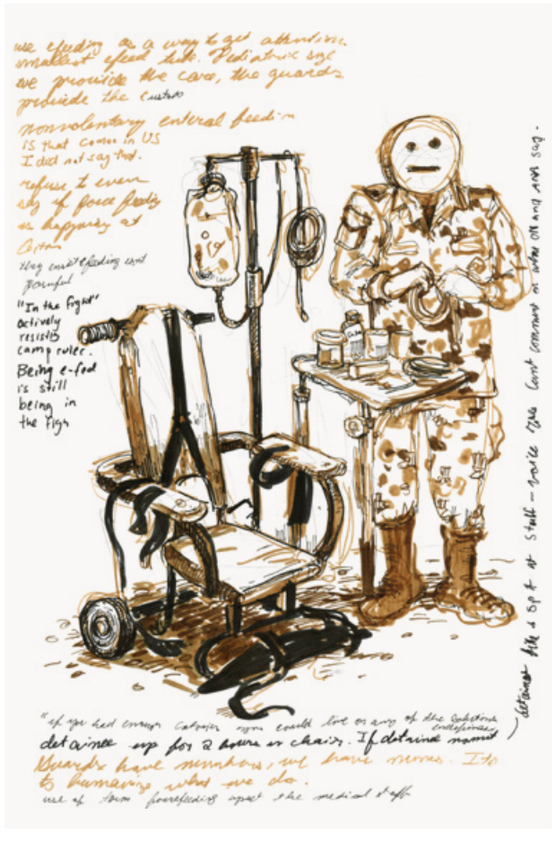
Molly Crabapple is an artist, writer and journalist based in New York (USA). As a correspondent for *Vice* magazine, she traveled twice to Guantánamo Bay to cover the 9/11 pretrial hearings of Khalid Sheikh Mohammed. As photography was banned at the hearings, the only people allowed to make visuals of the proceedings were artists. While artists like Janet Hamlin sought to capture objective representations of the trial, Crabapple says she took a different approach to courtroom sketching. "I was also trying to capture the emotion of it, the intense surrealism of it, and the tragedy of it as well. … to try to get people to feel what it's like there."

Beyond documenting the hearings, Crabapple also used her sketchbook as a means to capture other facets of life at Guantánamo, which she describes as "this concocted bit of faux America," where people carry on under the "bizarre and delusional belief that it's a totally normal place." But as one can view in her sketches, "It's a place where there's a gift shop that sells T-shirts saying 'It Don't Gitmo Better Than This.' It's a place where there's a karaoke bar with a mascot of an iguana holding a giant gun. A place where over 700 Muslims have been detained without charge and tortured."

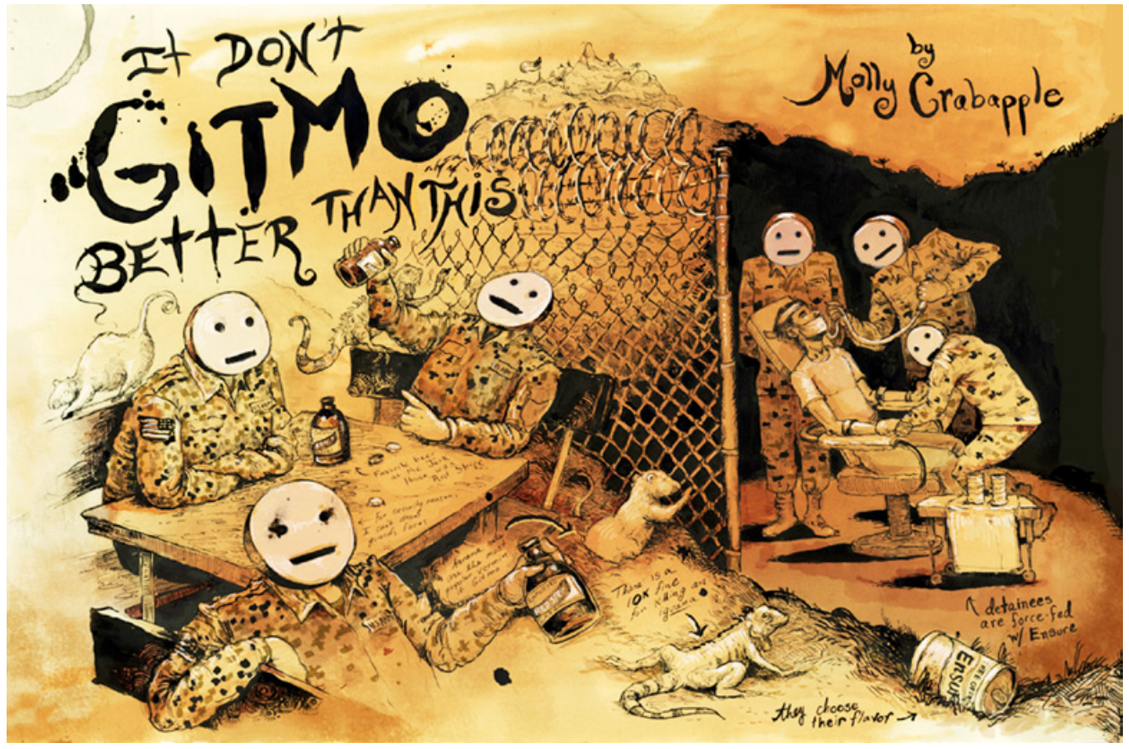
The surreal contrast was particularly evident for Crabapple when visiting and sketching the now-closed Camp X-Ray, which consists of "a series of these outdoor cages. No running water, no bathrooms or anything. Just outdoor cages behind razor wire …cages that humans lived in under the absolutely burning sun." When she visited the site, no one had lived there for a very long time. "It's all overgrown and it's this strange thing of just sitting there with your sketchbook," she describes, "drawing with your pen amidst this place that, in some ways, has bucolic elements of any nature in Cuba—the birds, the sun—but in other ways, it just looks like a concentration camp. There's no other way to describe it."

For Crabapple, drawing offers a tool with which she could circumvent or directly call attention to the extensive censorship at Guantánamo. While there, she used illustrative methods to make it "really obvious" when she wasn't allowed to draw something. For the faces of soldiers, for instance, she gave them all "these kind of blank masks," while for the face of Muslim cultural consultant Zak, who she described as "a profoundly sinister figure," she used black scribbles. "I didn't want to collaborate with the censorship," she explains.

Art also offers a means for confronting power, Crabapple notes: "Power does not usually allow cameras in places where they're doing their worst things. … The only visuals that exist, they live on in the minds of the perpetrators and the victims." What is powerful about drawing, she contends, is its ability to do what photography and videography cannot, in that it can "go back into people's memories. It can extract those memories and it can make them visual again." In general, Crabapple thinks that "when it comes to prisoners of any kind, power just wants everyone else to forget about them." What art and journalism can do, she says, is "make it impossible to forget. That's my hope."




CAMP
X-RAY


It DON't
"GITMO
BETTER THAN THIS
by
Molly Crabapple
detainees
are force-fed
w/ Ensure
ENSURE
they choose
their flavor

Ian Paul
Speculative Museum

Ian Paul is an artist, activist and writer currently based in Barcelona (Spain), whose work engages with questions regarding the relationship between politics and ethics in a wide variety of global contexts. On 29 August 2012, he and collaborators opened the virtual Guantánamo Bay Museum of Art and History to the public. As Paul describes it, "the project operates as a critical fiction and experimental documentary, asserting that the Guantánamo Bay detention facilities have been closed and replaced by a museum that critically reflects on the social and political significance of the prison."

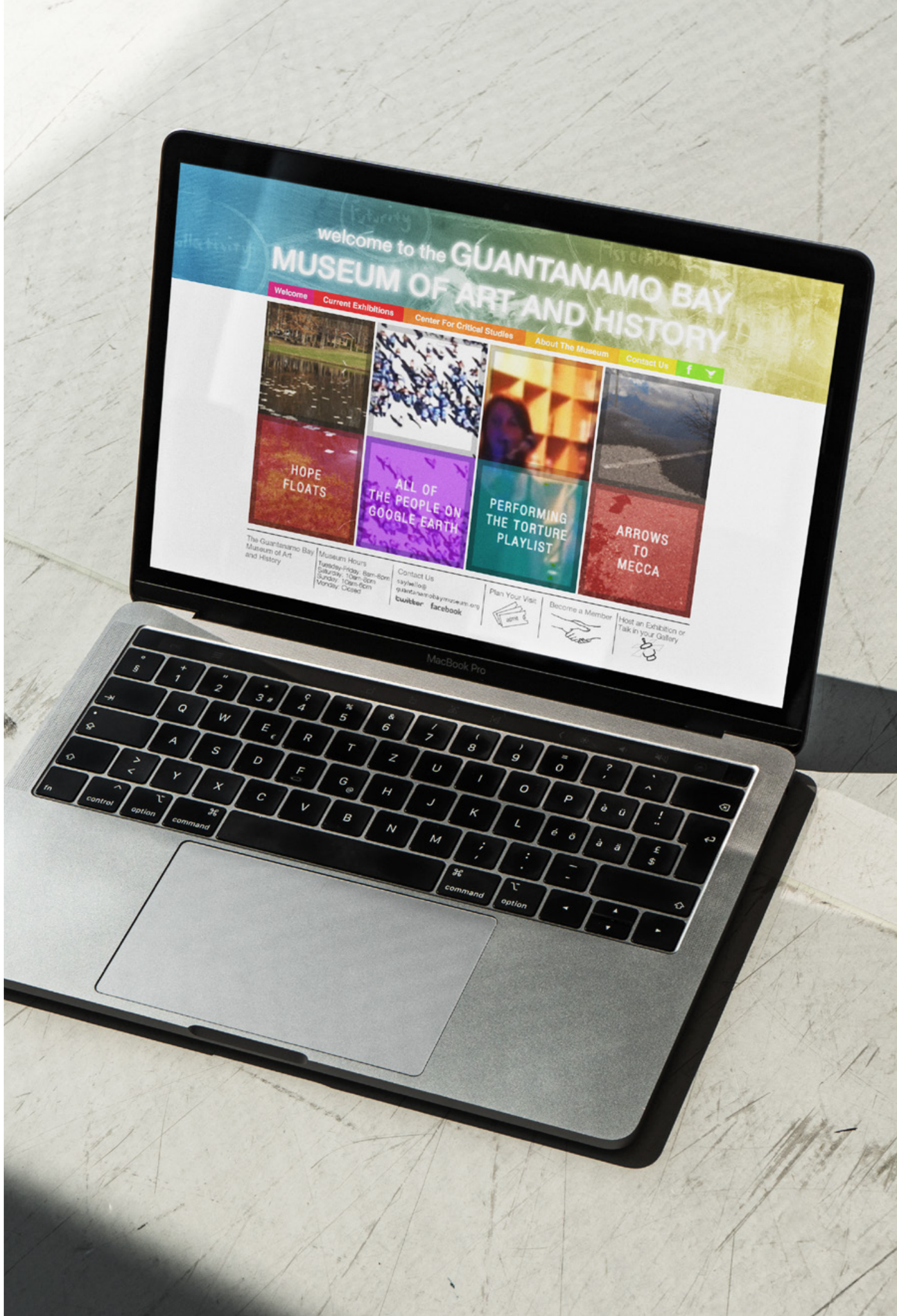
The museum features an array of contemporary art exhibitions, public programs, and a center for critical studies that are all freely accessible on the speculative institution's website, though there have also been a number of in-person "satellite exhibitions" staged over the years at museums, galleries and college campuses in North America, Europe and North Africa.

The gallery space on the museum webpage features original commissioned artwork, such as a piece called "Performing the Torture Playlist" by Adam Harms that engages the intersections between pop culture and national identity through a looped montage of various karaoke videos from the internet of songs used as part of the torture program at Guantánamo, where pop music was blasted at extreme volumes and odd hours as a means of mental torture. The museum also exists as a location on Google Maps, where visitors can leave comments and reviews.

On the medium of speculative institution-making, Paul explains: "One thing we're interested in is creating new kinds of political imagination." The speculative nature of the museum offers a way to think about the future, he says, and "allows us to perceive or imagine a kind of victory, a liberatory emancipatory potential, and on the other hand, to understand that the defense of human dignity is a never-ending struggle, that these things don't necessarily reach conclusions, can't be taken for granted, and need to be defended continuously." For Paul, this project reflects an approach to art as "a processual encounter with justice and ethics, as a way of being in the world, as opposed to particular ends or a particular goal that can be achieved."

The speculative nature of the museum also raises questions about national remembrance. Central to the project and the way that people imagine institutions like museums, says Paul, is "thinking about how we remember past atrocities, how we remember historical violence, and how we try to prevent the arrival of new kinds of violence." He sees remembering the past as entangled with the kind of future that we want to produce, noting that the museum confronts us with and prompts us to engage with this entanglement.

As we approach the 20-year history of the prison, which coincides with the 10-year anniversary of the museum, Paul remains committed to art and pedagogical work that emphasizes the ways in which Guantánamo and the security architectures and extralegal measures constructed after 9/11 are things that "arrived and were constructed in the world at a particular point." Thus, he says, we can also understand them "as something artificial that we can unmake."

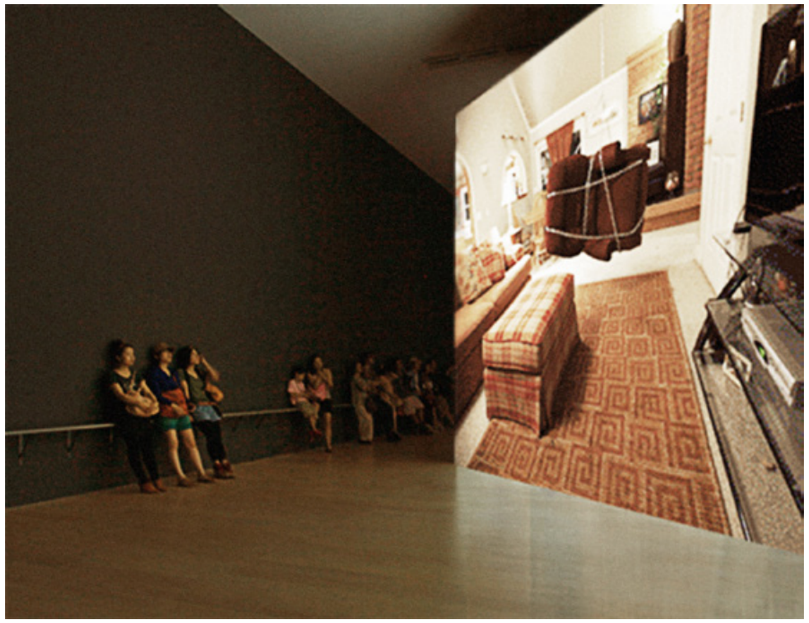


Planning a Visit to the Museum

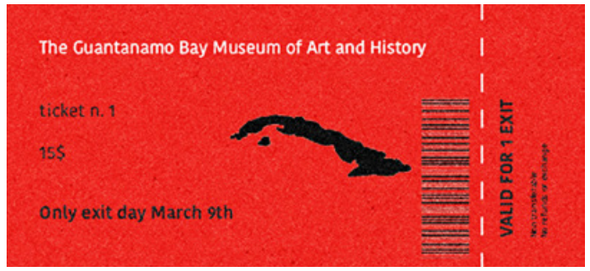
PINNED LOCATION OF THE MUSEUM ON GOOGLE MAPS.

Current Exhibitions

PERFORMING THE TORTURE PLAYLIST
BY ADAM HARMS



HUNG LAZY BOY
BY CARLING MCMANUS AND JEN SUSMAN



EXIT ONLY
BY FIAMMA MONTEZEMOLO

ARROWS TO MECCA
BY CARLING MCMANUS AND JEN SUSMAN

Sarah Mirk
Comics Journalism

Sarah Mirk is a graphic journalist, editor, zinemaker and teacher based in Portland, Oregon (USA). She is author of the book *Guantanamo Voices* (Abrams, 2020), a compilation of illustrated stories of 10 people whose lives have been shaped and affected by the prison, including former prisoners, lawyers, social workers, and service members. Mirk asked different artists to illustrate each story, so that each chapter features not only a different perspective on the prison, but also a unique visual voice. "The people in the book don't all agree with each other. They don't have the same experiences," she explains. "Together, hopefully they make an oral history of the prison that makes it easy for people to understand what happened there and why."

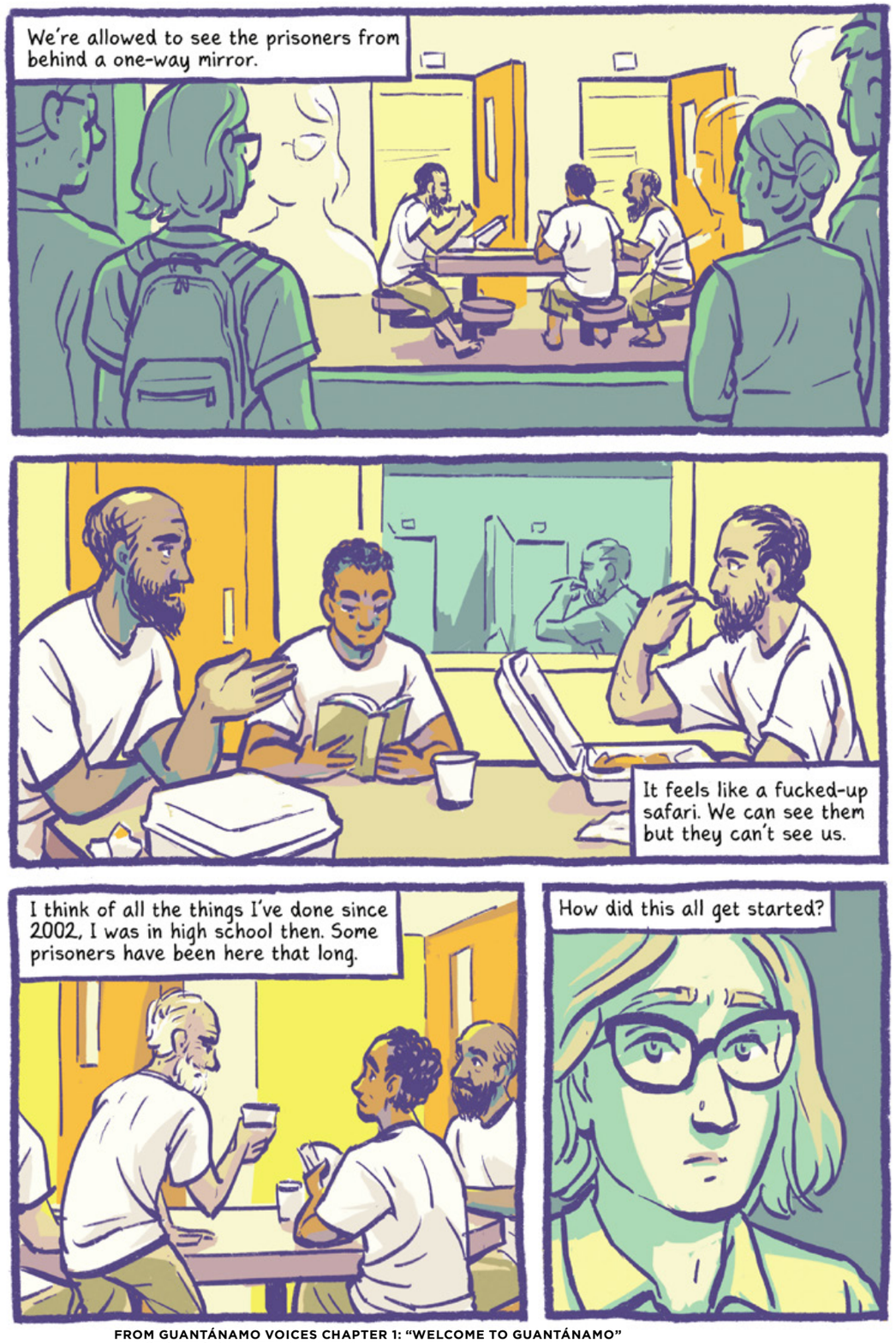
Through the book, Mirk invites readers to ask questions like: Why did we open this prison? How did we get here? What lives did we hurt in the process? And how can we face these terrible things we've done and figure out what to do next? Mirk says she wrote this book "to try and create cultural change, to change the stories that we tell about Guantánamo." Since Guantánamo opened, she says, "the government has really tightly controlled the narrative … and that story is inaccurate, that story is based on racism, Islamophobia and xenophobia. My job as a journalist is to counter that narrative, challenge the official government story that's told about this prison, and try to center the voices and experiences of people who are most impacted by it."

She chose the medium of a graphic novel because, she says, "comics have a lot of unique powers for storytelling." Given the extensive censorship around the prison, journalists must be granted military approval to visit and are only allowed access through special tours. There are strict rules about what they can photograph and they are not allowed to interview any of the individuals incarcerated there. However, she notes, comics can help get around censorship. "If there's something that we can't get a photo of, I can ask the artist to imagine what it looks like…and they can use their creativity to fill in the gaps." Comics can also traverse space and time, she says. "We can show something that happened 30 years ago right next to something that's happening today and help create that link between the past and the present on just one page."

The first and final chapters of *Guantánamo Voices* tell Mirk's own story of engaging with the prison and her two trips there as a journalist. For Mirk, showing the personal perspectives behind the stories she tells, including her own, is crucial. "The old school, mainstream way of thinking about journalism is that each reporter is reporting the objective truth," she says. "You're not supposed to bring your personal politics or ideas to your reporting, but that's impossible because … what you think is worth including and who you talk to for a story is shaped by your own experiences and history." Particularly with comics, she notes, "you can show that these are stories made by people because they're drawn by hand and the artist's voice comes through."

In using comics to engage others on Guantánamo, Mirk's overall aim is simple: "I want people to understand that this prison was made by people during my lifetime and it can be unmade by people during our lifetime. We often get into traps in thinking about Guantánamo: 'How can it close? What is the process? Is it ever going to happen?' It absolutely can happen. We made the prison open. We can make the prison close. It just takes political will and the desire to reckon with what we've done to create change."

FROM GUANTÁNAMO VOICES CHAPTER 5: "THOMAS WILNER"
ILLUSTRATED BY MAKI NARO



FROM GUANTÁNAMO VOICES CHAPTER 1: "WELCOME TO GUANTÁNAMO"
ILLUSTRATED BY HAZEL NEWLEVANT

FROM GUANTÁNAMO VOICES CHAPTER 4: "MOAZZAM BEGG"
ILLUSTRATED BY OMAR KHOURI

Mansoor Adayfi
Detainee Art

Mansoor Adayfi was just 19 years old when he was captured and taken to Guantánamo Bay. After spending over 14 years unjustly detained without charge or trial, he was finally released from Guantánamo in 2016. He was forcibly transferred to Belgrade (Serbia), as the US forbid him from returning to his home country of Yemen. Still living there today, he writes, studies, creates artwork and advocates for prisoner and detainee rights. While Adayfi considers writing to be his true artistic calling—he has published a memoir about his time at Guantánamo titled *Don't Forget Us Here* (Hachette Books, 2021) and is currently working on second book about his life after release, or what he calls *Guantánamo 2.0*—he also draws and paints, both practices he first picked up and developed during his years trapped at Guantánamo. In addition to contributing an interview for section one of the anthology about his life after Guantánamo, he also spoke to ECCHR about detainee art, both his own and that of others, for the *Guantánamo Images and Imaginaries* online exhibition.

For Adayfi, art is an integral part of the story of Guantánamo. When the detainees arrived to Cuba, he explains, they spanned over 50 different nationalities and spoke over 20 languages. Over years of shared experiences, they came to create common culture, reflected in music, poetry, prayer, dancing, drawing, painting and other forms of art. For those detained, he says, art played a transformational role in preserving memories and identity, communicating with loved ones, and finding moments of freedom even within the walls of Guantánamo. "There was a great hunger for art and writing," he notes. "To think the things that people take for granted every single day, just holding a pen, for us it was a form of freedom."

At first many detainees were not even allowed pens or paper, gaining only 20 minutes of access to these materials during intermittent visits from the International Committee of the Red Cross. Some would use this time to write poems or draw images, later flushing them down toilets so they would not be misinterpreted by guards. Through years of organizing and extensive hunger striking, detainees demanded better conditions at Guantánamo, including communication with their families, health care, and classes—among the latter, an art class.

Having to travel through checkpoints and invasive searches to reach the class, detainees were able to gain limited access to art supplies in short 45-minute blocks of time, such that a single painting could take months. Completed works of art then faced an uncertain fate, as military censorship could order the works destroyed. As Adayfi explains, "The art at Guantanamo suffered like us; it was treated as one of us, detained, tortured, abused, sentenced to death … and sometimes released." Thanks to lawyers and allies in academia and the art world, small samples of the art created in Guantánamo have been shown in exhibitions around the world.

"Art helped become like a therapy," says Adayfi. "When you paint you are not in jail, you are not in shackles, you are not being chained to the floor. You are inside your painting." Adayfi asks us to imagine spending years in solitary confinement, subject to torture and abuse, totally disconnected from the world, from family, from everything. "When people started painting," he says, "they found a way to escape out of Guantánamo, to go back to their previous lives, to themselves. So, art helped to connect us with ourselves, and connect us with the world outside."

THE FOLLOWING IS AN EXCERPT FROM MANSOOR ADAYFI'S MEMOIR "DON'T FORGET US HERE: LOST AND FOUND AT GUANTÁNAMO." WHILE DETAINED HE WROTE A SERIES OF MANUSCRIPTS THAT HE SENT AS LETTERS TO HIS ATTORNEYS, WHICH HE THEN TRANSFORMED INTO THIS BOOK IN COLLABORATION WITH WRITER ANTONIO AIELLO. IT IS A NARRATIVE OF FIGHTING FOR HOPE AND SURVIVAL IN UNIMAGINABLE CIRCUMSTANCES, OFFERING AN UNPRECEDENTED WINDOW INTO ONE OF THE MOST SECRETIVE PLACES ON EARTH AND THE PEOPLE WHO LIVED THERE WITH HIM.

Guantánamo was an upside-down world where nothing made sense, and that's the way the interrogators liked it. It was a place where salt was more valuable than gold, daylight existed only in our dreams, iguanas had more rights than we did, and the rules changed every day. We weren't allowed to know the time, but time is all we had—day after day in a never-ending cycle of interrogations where the interrogators tried to outsmart our supposed advanced counter-interrogation techniques and every second they couldn't meant the United States was under imminent threat of another catastrophic attack. It was a place where they'd rather believe lies than truth so long as it supported what they already believed. If our lives weren't at stake, it would have been funny.

But the interrogators and camp admin took whatever we did or said very seriously, no matter how ridiculous it was. At Guantánamo, even the most absurd jokes had real consequences. That didn't keep us from joking around though. Our jokes could be an innocent distraction or a dangerous game, depending on who was in on the joke. Either way, it was something to do, and sometimes the only thing to do, when we weren't waiting around for the guards to harass us or the interrogators to kick our asses. Our jokes were the only things we could control, that the interrogators couldn't take away from us, that reminded us we were human.

The Americans were scared of us and we could use that against them, often with unexpectedly delightful results. On one of those stormy nights during Guantánamo's rainy season, a Yemeni brother had a cold and was performing incantations known as Ruqyahs over his water bottle as a way to heal himself. Some brothers did this instead of asking their interrogators for a doctor. They recited short Surahs from the Holy Qur'an or Allah's beautiful names over their water bottles or cups, then blew into the water. Then they drank the water or passed it on to other brothers who were feeling sick.

New guards were always really confused by this no matter how many times we tried to explain it. They were told all kinds of things by the camp admin when they first arrived, like we were all crazy killers and religious extremists. But they never told them about this.

One of the new guards noticed this brother had covered himself with a sheet and was holding a water bottle to his lips and whispering. Like all of us, this brother had really long hair and a beard—we couldn't cut them—and maybe looked a little scary.

This guard watched him for a long time, nervous.

Lightning flashed, and this brother recited his verses louder and then the thunder clapped.

"What's he doing?" the new guard asked. "What language is he speaking?". "He's performing an Islamic healing," Othman said. He was always trying to help the guards with his English, even when it wasn't helpful.

Hamzah called the new guard to his cage. He had a wicked smile and I knew he was going to cause some trouble.

"Our brother here is a sorcerer," Hamzah whispered. "He's calling his jinns for help."

"What are jinns?" the new guard asked. She was really scared now.

"Jinns are demons," Hamzah said.

They both looked down the block at our brother reciting the Qur'an to his water bottle.

"Demons?" the guard said.

"You know," Hamzah whispered. "Shape-shifting spirits made of fire and air. Like Aladdin. He's just summoning the Two-Thunder jinni who controls thunder and lightning."

All the blood drained from the guard's face.

"Hey, brother," Hamzah called in Arabic. "I told her you're a sorcerer. I told her you're calling your thunder jinni to help you."

With the next lightning flash, the sorcerer recited the verses even more loudly and now rocked back and forth like he was summoning his jinni. The new guard watched him closely. When the thunder clapped again, she jumped and muffled a terrified cry. Crazy lightning flashed and the sorcerer spoke louder. Thunder hit one, two, three times in a row, each time closer and closer, louder and louder.

"Oh my God!" she cried. "Oh my God, oh my God, oh my God!" The new guard ran to the block sergeant and told him what was going on.

Soon the sorcerer had a big audience of guards watching his performance, all freaking out as he spoke louder and louder.

Lightning flashed. Thunder rumbled. It seemed to be on top of us and all around us.

"Tell him to stop," the sergeant said to Hamzah.

But the sorcerer kept talking. He kept rocking. Thunder kept clapping.

"This guy is crazy!" the guard cried. "He's going to kill us all."

He was such a good performer, even some brothers were worried now. Did he really have a thunder jinni?

The sergeant called the watch commander, and when he saw what was going on, he shouted at the sorcerer to stop or he'd call an IRF team to make him stop.

Our brother stopped. He had finished his incantations anyway. He took the sheet off his head and calmly handed the watch commander his water bottle. He was a good actor, this brother.

The thunder didn't stop though. It lasted all night long. So did our laughter. The new guard got a nickname: "Thunder Girl." The sorcerer got over his cold, but of course, he was punished—he wasn't allowed to have a water bottle for three months.

Appendix

ECCHR's post-9/11 US Torture Program and Guantánamo Casework

In response to the 11 September 2001 attacks in the United States, the US military and Central Intelligence Agency (CIA)—with approval at the highest levels of government—kidnapped, unlawfully detained, and tortured thousands of people in detention sites around the world. The detention center at the US Naval Station Guantánamo Bay, Cuba, was only one of many such sites established beyond US borders to evade legal protections guaranteed by the US Constitution and international law, violating fundamental and binding international legal standards. Numerous other countries, including several in Europe, hosted US black sites on their territory or otherwise condoned or tolerated the existence of this system. In the years after 9/11, ECCHR, together with partner organizations and lawyers—many of whom are featured in this anthology—has worked closely with former Guantánamo detainees and other victims of US torture and abuse, to seek reparation for the crimes they endured and accountability for the "architects"—high-ranking US officials, politicians, intelligence agents and military personnel—responsible for the US torture program, in a concerted transnational legal strategy utilizing European domestic courts as well as a variety of regional and international fora. Below are summaries of ECCHR's main areas of casework in this regard over the years.

2004

Germany

Criminal complaint against US torture program architects

On 29 November 2004, Wolfgang Kaleck, in collaboration with the Center for Constitutional Rights (CCR) in New York and three years before he would go on to co-found and become the general secretary of ECCHR—filed a criminal complaint in Germany on behalf of four Iraqi torture survivors and CCR. The complaint was directed against, among others, former Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet and a number of high-ranking military personnel in relation to breaches of the UN Convention against Torture and the German Code of Crimes against International Law.

The basis of the complaint was the failure of the US authorities to investigate evident torture and criminal acts that took place in its prisons in Guantánamo Bay, Cuba, and Abu Ghraib, Iraq. On 10 February 2005, the German prosecuting authorities decided against initiating an investigation on the matter. The reason given for the decision was that investigations in Germany are only permitted if the competent state, either the state in which the criminal acts took place, the victim's home state or the perpetrator's home state, is unwilling or unable to carry out an investigation. On behalf of the victims and a number of human rights and civil society organizations, Kaleck lodged an appeal against the decision, which was rejected by the Stuttgart Court of Appeals on 13 September 2005.

2006

Germany

Expanded criminal complaint against US torture program architects

On 14 November 2006, an expanded complaint against US officials was filed in Germany. Based on new evidence, the claim was directed against Donald Rumsfeld, George Tenet as well as other high-ranking government officials, including the government lawyers

Alberto Gonzales, William Haynes, David Addington, John Yoo and Jay Bybee, and other members of the US Armed Forces. The complaint cited the fact that no investigations had yet been conducted in either the US or in Iraq, and was supported by a number of lawyers' associations, human rights groups, civil society organizations, and scholarly experts.

Once again, the German prosecuting authorities rejected the request to initiate investigations. This time, the prosecution argued that the suspects did not reside, nor expect to reside, on German soil, thus creating an additional barrier to the initiation of legal proceedings against the US. The appeal, filed by Wolfgang Kaleck, requested the initiation of a legal inquiry based on the fact that investigations can take place even in the absence of the accused. According to this argument, the findings of the inquiry could be eventually taken into account in future proceedings in other states. On 21 April 2009 the Stuttgart Court of Appeals dismissed the appeal as inadmissible.

2007

France

Criminal complaint against Rumsfeld

On 25 October 2007, four human rights organizations filed a criminal complaint in France against Donald Rumsfeld: the International Federation for Human Rights (FIDH), Ligue des droits de l'Homme (LDH), CCR, and the newly-founded ECCHR. Rumsfeld was in France on a private visit at the time.

Once again, the complaint concerned torture and inhumane treatment in the US military prisons of Guantánamo Bay and Abu Ghraib, and specifically the illegal interrogation techniques applied and approved in a memo personally signed by Rumsfeld. In February 2008, the French authorities came to a final decision not to arrest Rumsfeld or initiate an inquiry, referring to his alleged immunity as former Secretary of Defense.

2009

Spain

Criminal complaint against "The Bush Six"

ECCHR partner lawyer Gonzalo Boye filed a criminal complaint on 17 March 2009 in Spain against six former US officials of the Bush administration for having aided and abetted crimes of torture, cruel, inhuman or degrading treatment and grave breaches of the 1949 Geneva Conventions. The complaint detailed how the six officials paved the way for the systematic torture in Guantánamo and Iraq by seeking to provide legal justification for the use of torture methods.

In the proceedings, ECCHR represented German citizen Murat Kurnaz, who was detained and tortured in Guantánamo from 2002 to 2006. Although Spain was one of the earliest states to implement universal jurisdiction, a 2014 reform to the relevant Spanish law limited its applicability to the prosecution of international crimes only when one of the perpetrators is a Spanish citizen or resident. After six years of criminal investigations, Spain's National Court therefore decided in July 2015 to close the investigations into US torture at Guantánamo.

2010

USA

Amicus curiae brief in support of Maher Arar before the US Supreme Court

Maher Arar, a Canadian citizen, was arrested and abducted by US officials in 2002 and brought to Syria. During his one-year detention in Syria he was imprisoned and tortured under inhumane and degrading conditions. After his return to Canada, a commission of inquiry established by the Canadian government brought the circumstances of his case to light. Arar sought compensation for his rendition to Syria by US officials before US courts. The lower courts dismissed the claim on the basis that state secrecy issues were at stake, allegedly threatening foreign relations and national security.

In association with the Bar of England and Wales Human Rights Committee, ECCHR filed an amicus curiae brief in March 2010 supporting CCR's petition in Arar's civil suit for compensation. The brief highlights that it is possible to open investigations and proceedings even where state secrecy may be affected, referencing a range of decisions by domestic European courts. Unfortunately, in June 2010 the US Supreme Court issued a decision refusing to review the case.

2011

Switzerland

Criminal complaints against Bush

ECCHR and CCR prepared criminal complaints against former US President George W. Bush in Geneva for two victims of the post-9/11 US torture program. The two 2,500-page complaints were supported by more than 50 organizations from around the world, as well as by Nobel Peace Prize winners Shirin Ebadi and Pérez Esquivel, and former UN Special Rapporteurs Theo van Boven and Leandro Despouy.

The evidence included documents concerning the torture program after 11 September 2001 with a particular focus on the liability of high-ranking American officials, including former President Bush. The possibility of immunity for former heads of state is precluded in the case of torture. In February 2011, Bush cancelled a public appearance in Geneva, with news reports suggesting the trip was called off due to fear of protests and the threat of criminal proceedings against him.

2014–2019

France

Criminal complaints against Miller, Haynes and Rumsfeld

In February 2014, ECCHR and CCR submitted a dossier to the High Court of Paris analyzing the criminal liability of former Guantánamo commander Geoffrey Miller, who was then summoned as an "accused witness" to testify about his role in Guantánamo and answer questions regarding his oversight of the torture of three French nationals at the prison. Miller did not appear in court.

In October 2016, a second expert report was filed with the investigative judge of the High Court of Paris, this time on the criminal liability of William Haynes, the former General Counsel for the US Department of Defense during the George W. Bush administration. The 26-page document established that Haynes was a key contributor to, and architect of, the Bush administration's interrogation and detention policies.

In November 2019, ECCHR and CCR submitted an expert opinion on the criminal liability of former US Secretary of Defense Donald Rumsfeld and demanded that he be summoned. In December 2019, the Paris Court of Appeals nevertheless decided to close the investigations, arguing state immunity for the US torture suspects and the lack of formal US cooperation in providing evidence and access to witnesses.

2014

Germany

Criminal complaint on behalf of Khaled El Masri

The German citizen Khaled El Masri was abducted by CIA officials at the Serbian-Macedonian border on 31 December 2003. The officials had mistakenly identified El Masri as a member of Al-Qaeda and a possible participant in a Neu-Ulm-based terrorist cell. Khaled El Masri spent nearly five months in a secret CIA detention center in Afghanistan. During this time, he was regularly interrogated, subjected to physical abuse, and humiliated. Eventually, the CIA brought him to Albania, where he was released on a roadside. He arrived back in Germany on 29 May 2004.

El Masri's case is one of the best documented extraordinary renditions carried out by the CIA. The US Senate report on the CIA's detention and interrogation program, a portion of which was made publicly available in December 2014, showed that the rendition of El Masri was by no means an exception, but part of a systematic rendition and torture program. Several inquiry commissions took up this case and a number of lawsuits were filed before different national and regional courts.

Following the release of the US Senate report, ECCHR filed another criminal complaint to the German Federal Prosecutor in December 2014, which led to the opening of a monitoring procedure. In follow-up submissions in the following years, ECCHR submitted evidence and analysis of the relevant chains of command responsible for the US torture program within the CIA and the military, including identifying individuals involved in the torture program. The filings and analysis also informed the International Criminal Court's Office of the Prosecutor in its preliminary examination into US war crimes in Afghanistan, which led to the opening of a formal investigation in 2020.

2017

Germany

Criminal complaint against Haspel in Germany

ECCHR filed a criminal complaint in June 2017 with the German Federal Public Prosecutor (Generalbundesanwalt) as part of the on-going monitoring procedure calling for investigations into Gina Haspel's role in the torture of detainees in Thailand in 2002, at which time she was the Chief of Base of the CIA secret prison there known as "Cat's Eye." Previously classified information about Haspel's role in the torture came to light when she was named CIA Deputy Director in February 2017, and again when she was appointed CIA Director in May 2018 by President Donald Trump. The submissions against Haspel (in June 2017 and September 2018) are follow-ups to the December 2014 complaint regarding El Masri and the US torture program filed by ECCHR in Germany.

UN Committee Against Torture

Complaint against Belgium on behalf of Musa Zemmouri

Musa Zemmouri was detained at the US military base in Guantánamo Bay from 2002 to 2005, where he was subjected to brutal beatings as well as sensory deprivation, exposure to extreme temperatures and other severe forms of physical and psychological abuse. In January 2017, the 15th anniversary of the arrival of the first detainees to Guantánamo Bay, ECCHR joined with partner lawyers Walter van Steenbrugge and Christophe Marchand in filing a complaint against Belgium before the UN Committee Against Torture in Geneva. The complaint argued that Belgian officials were complicit in Zemmouri's, abuse as they knew about the torture but failed to prevent it, and later failed to carry out adequate investigations into the crimes. In August 2019, the Committee found the complaint to be inadmissible, claiming that the case had already been sufficiently examined by the European Court of Human Rights, which in fact had not accepted the application, nor communicated why.

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