

Kate Clark

Kafka in Cuba

The Afghan Experience in Guantánamo

EXECUTIVE SUMMARY

This report presents a detailed investigation into the cases of eight of the longest-serving Afghan detainees in Guantánamo (see Box 1). All are either still incarcerated in Guantánamo or have recently been transferred to the United Arab Emirates where they are believed still to be in some form of detention. Combined, these cases add up to exactly one hundred years of state-imposed detention without trial, under the harshest conditions.

Reading through the United States military and court documents outlining the allegations and evidence against these eight men, one enters a Kafkaesque world of strange, vague accusations, rife with hearsay, secret evidence, bad translations, gross errors of fact and testimony obtained under duress and torture. The tenuous nature of the allegations against the eight men has been further compounded by a shifting legal landscape and state secrecy.

The report finds that the US military has, in none of the eight cases, been able to substantiate its accusations. Military boards, designed to ensure

only enemy combatants who were a threat to the US were held, were unable even to clear out the obvious, multiple mistakes from the detainees' files or recognise the fantastical nature of many accusations. America's courts have also repeatedly shown themselves unable or unwilling to stand up to the executive. They have failed to question what the government has asserted or protect individuals from the arbitrary power of the state.

Of the eight cases scrutinised, six men were captured in the early years of the intervention when US forces were carrying out mass arbitrary detentions in Afghanistan. It was a time when US forces were desperate for intelligence on the whereabouts of Osama bin Laden. They were also intent on hunting down the 'remnants' of the Taliban even though, in terms of fighting forces offering resistance, there were no remnants. They ended up detaining large numbers of innocent Afghans. Many had been falsely denounced, often by Afghan strongmen who used their new US allies to get revenge against personal or factional enemies, or for financial reward.

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Pakistan also handed non-combatants over, claiming they were terrorists – and was paid for doing so. The result was that, although some senior Taleban were captured in those early years, almost anyone could end up in Guantánamo. Those detained included opponents of the Taleban, members of the new, post-Taleban establishment, old men, children and at least one Shia Muslim. The six Afghans in this study who were detained in 2002 and 2003, far from being the ‘worst of the worst’ as the Guantánamo detainees have repeatedly been described, are more like flotsam left stranded by the high tide of mass, arbitrary detentions. Two may possibly have been low-level insurgents, although not with al Qaeda; the others look to have been entirely innocent.

The other two men who are part of this study were detained in 2007 and their cases are somewhat different for three main reasons: by 2007, there was an actual insurgency and US intelligence was better, albeit still far from perfect; the US has also revealed far less about the specific allegations and evidence against these two men and; neither has had a chance to defend himself publically even in the limited ways open to other detainees. One, the last man to be rendered and tortured by the CIA, has been categorised as a ‘high value’ detainee, meaning much of the detail of the allegations against him is classified. Both of these detainees are accused of being facilitators for al Qaeda. However, in neither case has the US put forward evidence to substantiate its claims. Indeed, what can be seen points to the same worrying problems as seen in the first six cases, a reliance on unverified intelligence reports, hearsay and the use of torture.

The impression that none of the eight are ‘big fish’ is given weight by the fact that the Taleban did not try to get any of them out in exchange for captured US serviceman, Bowe Bergdahl, in 2014.

Failures of intelligence

None of the eight were detained on the battlefield, so US justifications for the detentions have relied almost entirely on intelligence. This intelligence has been parlous. US forces only captured two of the eight men directly, both following tip-offs from unknown sources. The other six were handed over to the US military or CIA by Pakistan or Afghan forces. In three of the cases, there are very strong indications that the detainees were denounced or handed over for political or monetary reasons. In two others, this looks likely or has been alleged. Five of the men have said American forces tortured them and in two of the cases there is independent corroboration of this. Another was likely ‘softened

up’ by Afghan allies prior to US interrogation. The remaining two men have not spoken publically either way about their treatment.

Where there are publically available documents, i.e. for the first six cases, they show multiple, basic mistakes in Afghan geography, dates and factional membership, as well as fundamental misunderstandings, such as mistaking non-belligerent and even anti-jihadist groups for extremists. Ahistorical allegations are made: reaching back into the 1980s, the US military deems as nefarious some of the associations it shared at the time, and asserts the existence of al Qaeda before bin Laden founded it. It assumes employment in itself can be counted as evidence of support for the ideological aims of the employer and his hostility to the United States. Meaningless strings of associations – detainee knew X who knew Y who knew Z who knew bin Laden – are put forward as evidence of wrongdoing. For all eight detainees, raw intelligence reports are routinely relied upon, along with hearsay, double hearsay (X said Y said detainee was a terrorist), statements obtained under duress or torture, and summaries, rather than transcripts, of interrogations. Resulting allegations have then been presented as uncontested fact.

All eight are alleged to have held multiple memberships or associations with as many as five organisations, including Afghan, Arab and Pakistani groups and mutually antagonistic or non-belligerent Afghan groups. The depiction of individuals as members of multiple, disparate organisations is bewildering. Afghanistan is a country where membership of an organisation is almost always grounded in a solidarity grouping – tribe, ethnicity, clan or former comradeship – even more so during an insurgency, where personal links are crucial for trust. Such allegations make no sense, either from an intelligence perspective where it is precise chains of command which form one of the prisms for understanding an enemy like al Qaeda or the Taleban, or from a legal perspective, where again, chains of command are fundamental for making a case that war crimes have been perpetrated. It suggests rather that the US military did not know who they had picked up or why exactly they might be dangerous and had to formulate cases against detainees retroactively, to present at the Combatant Status Review Tribunals (set up in 2004 to try to prevent habeas cases after the Supreme Court had determined that detainees could seek legal redress through the federal courts).

Failures of justice

It is significant that not a single one of the eight is accused of carrying out a particular attack. Mostly, the accusations against them are more inchoate – carrying out unspecified attacks, membership of, association with, planning to attack, training and translating. One is accused of financing only; under International Humanitarian Law (the ‘Laws of War’), this is considered a non-combat, support role. Where cases have reached the courts (Military Commission trials) and accusations had to be firmed up. Three of the men were charged, but only with ‘providing material aid for terrorism’ or ‘conspiring to commit terrorism’, not of committing actual acts of violence. All three saw these charges dropped, or, their trials folding after the Supreme Court deemed Military Commission trials were illegal.

The vague nature of the allegations has been aggravated by murky and changing laws, shifting interpretations of the law and the Byzantine way US governments, courts and military review boards have dealt with the detainees. The military boards established by the state, purportedly to ensure the US was only holding actual combatants and only those who were dangerous to the US or its allies, utterly failed to question the claims made to them. Even though they were not independent, it is difficult to see how clearly far-fetched allegations and case files rife with contradictions and factual errors could have stood scrutiny. Strikingly many of the detainees embraced the chance to speak at their first boards, to try to put matters straight, as they saw it, and correct errors. As they realised these were not forums where they would get a fair hearing, attendance at later hearings fell away.

As to getting justice through the courts, at Military Commission trials, detainees were charged with offences that did not exist in law and judges did not know what system of law they had to apply. Procedural matters have held up both habeas corpus petitions and military trials for years. The state has also been tardy in handing over documents to the defence or sought to introduce new evidence as cases went along. It has also sought to keep evidence secret from defendants, the public and even security-cleared counsel. Delays on the part of the state have not been punished by the courts. Indeed, one detainee had to wait for almost three years for the judge to make up her mind about his habeas petition.

Judges have, not always but often, accepted secret evidence, as well as hearsay and statements made under duress; they have even weighed up whether to accept testimony obtained from those who have been tortured. Most worryingly, judges have

shown a strong tendency to accept state evidence and the interpretation the state puts on its evidence. For example, the possession of a satellite phone was accepted as adequate evidence of involvement in terrorism. In three cases, the state’s assertion that the mass, quietist, missionary organisation, Jamat al-Tabligh, is a front for al Qaeda was accepted by judges with no delving into whether this was a reasonable claim to make. In the one habeas case which went to appeal, even as the bulk of the state’s evidence was shown to be wrong or had to be discarded, this had no impact on how the remaining evidence was assessed by the courts; the judge remained convinced that the state’s assertions were true.

This may now have changed, a little. A new body, the Periodic Review Board, has been reviewing all remaining detainee cases. In the last year, it has decided that six of the eight Afghans should be transferred, i.e. sent to another country with security guarantees. In two of these cases, the Board recognised that the allegations against the men were not true: one was told his role with the Taliban had been “limited” and that he had been “misidentified as the individual who had ties to al-Qaeda weapons facilitation,” as had been his contention all along. Another was told there was a “lack of clear information regarding his involvement with al-Qa’ida or the Taliban.” With the other four, the allegations against them were judged to be true, but they posed no risk to the US or the risk could be mitigated. In August 2016, three of the detainees were transferred to the United Arab Emirates, although they remain in some form of detention and it is not clear if they will be allowed to return to Afghanistan.

Viewing the US detention regime through the lens of the Afghan experience in Guantánamo raises broader questions about the effectiveness of US intelligence and justice. This study’s ‘deep dive’ into the Afghan files by a country expert has revealed multiple, obvious and persistent flaws in the intelligence which left men detained for more than a decade. Is this the case for the intelligence behind the detention of other nationalities also?

The Afghan experience in Guantánamo in itself highlights the peril of the power to arbitrarily detain. For individuals and their families, the consequences have been gross miscarriages of justice. For Afghanistan, the mass arbitrary detentions in the early years of the US-led intervention was a major factor driving some Afghans towards insurgency. It helped revive a conflict Afghans had hoped was finally over, one which they and the United States are still enmeshed in. At a time, also, when Afghanistan is facing an actual, terrorist threat, the United States

is still ploughing time and resources into keeping men in Guantánamo against whom it has yet to put

forward any real evidence of wrongdoing.

Box 1

The Eight Afghan Detainees

1. **Haji Wali Mohammed**, ISN 560, 53 years old from Baghlan, money changer at the Central Money Market in Kabul, accused of being al Qaeda and Taleban financier. Detained in Pakistan, 26 January 2002; handed over to US forces, February 2002; taken to Guantánamo, 30 April 2002: **14** years in detention. Habeas petition denied. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 26 September 2016. Still in Guantánamo.

2. **Abdul Zahir**, ISN 753, 44, from Logar, translator and *choki dar* (doorman), accused of being al Qaeda translator. Detained by US forces, July 2002; taken to Guantánamo, 27 October 2002: **14** years in detention. 2010 Task Force decided to refer him for prosecution; no action on his case since 2008. Cleared for transfer by Periodic Review Board, 11 July 2016. Still in Guantánamo.

3. **Obaidullah**, ISN 762, mid-30s from Khost, grocer accused of being member of al Qaeda IED cell. Detained by US forces in July 2002; taken to Guantánamo, 28 October 2002: **14** years in detention. Habeas petition denied. 2010 Task Force review decided to refer him for prosecution; no movement on his case since 2009. Cleared for transfer by Periodic Review Board, 19 May 2016. Transferred to UAE, 14 August 2016, where believed still in detention.

4. **Bostan Karim**, ISN 975, 46, from Khost, seller of plastic flowers and missionary accused of being leader of al Qaeda IED cell. Detained by Pakistan, August 2002; handed over to US, February 2003; taken to Guantánamo, 6 March 2003: **13** years in detention. Habeas petition denied. 2010 Task Force review decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 2 June 2016. Still in Guantánamo.

5. **Mohammed Kamin**, ISN 1045, 38, from Khost, imam accused of being terrorist with al Qaeda, Afghan Coalition Militia, North African Extremist Network, the Taleban, Harakat ul-Mujahedin and Jaish-e Muhammad. Detained by Afghan forces, 14 May 2003 and handed over to US; taken to Guantánamo, 21 November 2003: **13** years in detention. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 28 September 2015. Transferred to UAE, 14 August 2016, where believed still in detention.

6. **Hamidullah**, ISN 1119, 53, from Kabul, dealer in property and second-hand cars from prominent Hezb-e Islami family, accused of being a pro-monarchy plotter allied with Mahaz-e Milli, the Taleban, al Qaeda, Hezb-e Islami, Iran and various Jamiat commanders. Detained (probably) by NDS and handed over to US, August 2003; taken to Guantánamo, 21 November 2003: **13** years in detention. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 11 February 2016. Transferred to UAE, 14 August 2016, where believed still in detention.

7. **Harun Gul**, ISN 3148, 35, from Nangarhar, possibly a grocer, accused of being Hezb-e Islami commander and al Qaeda courier. US says NDS detained him, 4 February 2007, and handed him over (NDS denies this); taken to Guantánamo 22 June 2007: **nine** years in detention. 2010 Task Force decided to refer him for prosecution; no legal movement on his case. Periodic Review Board, 14 July 2016, recommended his continuing detention.

8. **Muhammad Rahim**, ISN 10029, 51, from Nangarhar, former used car salesman and possible buyer and seller of honey and vegetables, accused of being personal facilitator and translator for Osama bin Laden. Detained by Pakistan, February 2007; rendered to Afghanistan and tortured by CIA; taken to Guantánamo, March 2008; **nine** years in detention. Classified as 'high value' detainee, with extremely little information about him released; held in particularly stringent security. 2010 Task Force decided to hold him indefinitely. Periodic Review Board, 9 September 2016, recommended his continuing detention.

Abbreviations

ACM	Anti-Coalition Militia (term only used by US military, does not refer to a particular group)
ARB	Administrative Review Board
AUMF	Authorisation of the Use of Military Force
CSRT	Combatant Status Review Tribunals
FOB	Forward Operating Base
FOIA	Freedom of Information Act
JT	Jamat al-Tabligh
HIG	Hezb-e Islami Gulbuddin
IMU	Islamic Movement of Uzbekistan
IIS	Intelligence Information Report
ISI	Directorate of Inter-Services Intelligence (Pakistani military intelligence agency)
ISN	Internment Serial Number
NDS	National Directorate of Security (Afghan intelligence agency)
NIFA or NIF	National Islamic Front of Afghanistan
NAEN	North African Extremist Network (term only used by US military, does not refer to an actual group)
PDPA	People's Democratic Republic of Afghanistan (the 1978-1992 communist government)
TD	Telegraphic Dissemination (from the CIA)

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Kate Clark has worked for the Afghanistan Analysts Network since 2010 as senior analyst and country director. She was the BBC correspondent in Afghanistan, 1999-2002 and before the 9/11 attacks, was the only western journalist based in the country. She reported first hand on the Taleban regime and the foreign militants who enjoyed its protection, as well as the US military intervention and the new post-2001 Afghan polity. Between 2002 and 2010, Kate was based in London, but continued to return to Afghanistan to report on the country, making radio and television documentaries about the insurgency, the political economy of weapons smuggling and opium, and war crimes. Kate has an MA in Middle Eastern Politics from Exeter University in Britain and previously worked at the BBC Arabic Service. She has also lived, studied and worked in the Middle East.