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**United States' Compliance with the Convention Against Torture**

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Center for Constitutional Rights  
Suggested List of Issues to U.N. Committee Against Torture**

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## I. SPECIAL ADMINISTRATIVE MEASURES: ISSUE SUMMARY

The United States government subjects certain categories of defendants and convicted prisoners to near-total sensory deprivation and social isolation. Since 9/11, the policy – a regime of regulations known as “Special Administrative Measures” or “SAMs” – has primarily targeted people suspected of terrorism-related offenses.<sup>1</sup> Prisoners under SAMs are typically locked in their cells for twenty-two to twenty-four hours per day and are forbidden from speaking with other inmates, among other restrictions. For pretrial detainees, the imposition of SAMs is fundamentally coercive, as defendants may agree to cooperate with the prosecution in part to alleviate the acute distress of their conditions. The few people – immediate family members and lawyers – allowed contact with SAMs prisoners are monitored and generally forbidden from sharing any of their communications with third parties. Thus, the full extent of the government’s actions and their impact are completely shielded from the outside world.

Public information about the use of SAMs is scarce. The U.S. government has refused to respond to Freedom of Information Act (“FOIA”) requests seeking information on, among other things, exactly who and how many individuals are subject to SAMs, where they are being held, and what their measures entail. However, available data show that the Department of Justice has drastically increased its use of these measures in the wake of the September 11, 2001 attacks.<sup>2</sup> Existing data also suggest that, since then, SAMs have been disproportionately imposed on Muslim men accused of terrorism.<sup>3</sup>

These measures, in compounding the isolation of individuals already held in solitary confinement, constitute torture and/or cruel, inhuman and degrading treatment in violation of the U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. We respectfully request that the Committee ask the United States to provide more information as to the manner in which it imposes this extreme form of isolation.

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<sup>1</sup> Public information about SAMs is largely lacking. The conclusions and descriptions in this submission are based on the available data.

<sup>2</sup> HUMAN RIGHTS WATCH & COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 143-44 (2014) (“Illusion of Justice”).

<sup>3</sup> Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1370; 1407 (2012).

### A. Overview of SAMs

Unlike other forms of isolation, which are imposed by the Bureau of Prisons (“BOP”), SAMs are imposed by the Attorney General.<sup>4</sup> The Attorney General may order the director of the BOP to impose a variety of restrictions on a prisoner’s communications within and outside of the prison. The standard for such imposition is highly discretionary, and depends on the Attorney General’s determination that there is a “danger that the inmate will disclose information that would pose a threat to national security”<sup>5</sup> or that the inmate’s communications would pose a “substantial risk of death or serious bodily injuries to persons.”<sup>6</sup>

The consequences of the Attorney General’s determination are severe. The government may limit a prisoner’s “correspondence, visiting, interviews with representatives of the news media, and use of telephone, as is reasonably necessary to prevent the disclosure of classified information.”<sup>7</sup> This list is non-exhaustive. SAMs typically deny prisoners the opportunity to communicate in any form with other prisoners or with anyone outside the prison, other than immediate family members and attorneys, who must be cleared by the government. Even those communications are restricted and monitored. The government imposes these harsh measures not only on people convicted of crimes, but also on pre-trial detainees who must be presumed innocent under the law.

There are no effective administrative means to challenge the imposition of SAMs. Regulations require the BOP to provide detainees with notice that SAMs have been imposed and the basis for their imposition. However, notice “may be limited in the interest of prison security or safety or national security.”<sup>8</sup> In practice, inmates are rarely, if ever, provided with information regarding the basis for the imposition of these restrictions beyond boilerplate statements that the inmate poses a threat to safety and security. Additionally, the government ostensibly conducts annual reviews of SAMs, but there is typically

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<sup>4</sup> 28 CFR §§ 501.2(a); 501.3(a).

<sup>5</sup> 28 CFR § 501.2(a).

<sup>6</sup> 28 CFR 501.3(a).

<sup>7</sup> *Id.*

<sup>8</sup> 28 CFR §§ 501.2(b); 501.3(b).

no explanation of the reasons for the SAMs or how the detainee might earn the lifting of the restrictions; the detainee simply receives a notice that the SAMs will or will not be continued.<sup>9</sup>

The Attorney General may authorize SAMs for up to one year and renew them continuously, for as long as a given prisoner's sentence.<sup>10</sup> For example, Ahmed Abu Ali, a prisoner currently incarcerated in ADX, has been held under SAMs and in solitary confinement continuously since 2005, beginning with his pretrial detention, through his criminal trial, and now for years post-conviction. He is serving a life sentence, meaning his SAMs could be renewed each year for the rest of his life.

### **B. An Extreme Manifestation of Solitary Confinement**

SAMs are an extreme form of isolation. These measures severely limit prisoners' abilities to communicate with others, learn what is happening outside of their prison walls, and practice their religion where group prayer is a tenet. SAMs also shield prisoners' thoughts and feelings from the public, by barring anyone who is permitted to communicate with a SAMs prisoner from sharing what they said to any unauthorized third party. The total isolation of prisoners under SAMs can cause serious psychological and physical health effects.

SAMs deprive prisoners of virtually all human contact. Prisoners in the Administrative Maximum ("ADX") "Supermaximum" prison in Florence, Colorado, where many SAMs prisoners are incarcerated, are confined by themselves in 75.5 square-foot cells for twenty-two to twenty-four hours a day.<sup>11</sup> They typically are allowed up to only five hours of out-of-cell time a week, alone, in an outdoor cage hardly bigger than their cell.<sup>12</sup> And in addition to the already profoundly isolating features of solitary confinement for other prisoners, inmates under SAMs are generally forbidden from speaking even with other inmates *in* the prison, for instance by yelling through the walls or while outside their cells.<sup>13</sup> They are completely and utterly isolated from other human beings.

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<sup>9</sup> See 28 CFR §§ 501.2(c); 501.3(c).

<sup>10</sup> See 28 C.F.R. § 501.3 (c).

<sup>11</sup> ILLUSION OF JUSTICE, *supra* note 2 at 146.

<sup>12</sup> *Id.*; Rovner & Theoharis, *Preferring Order to Justice*, *supra* note 3 at 1405.

<sup>13</sup> ILLUSION OF JUSTICE, *supra* note 2 144.

SAMs also prevent prisoners from communicating with their loved ones. With few exceptions, communications with those outside of prison walls are restricted to only immediate family members and their attorneys, all of whom must have been cleared by the U.S. government as a condition of access.<sup>14</sup> Even then, prisoners under SAMs can generally only write to one family member per week, using three double-sided pages of 8.5 x 11 paper, and place one to three fifteen-minute family phone calls per month.<sup>15</sup> All of their communications are monitored. Non-legal visits generally require two weeks' notice and are limited to one adult at a time. The visits are strictly non-contact, prohibiting even a brief embrace upon entering or leaving the prison, and can be limited to four one-hour visits per month.<sup>16</sup>

Moreover, SAMs impose a gag order not only on the SAMs prisoner, but also on the person's family and attorneys, prohibiting them under threat of criminal prosecution from revealing anything the prisoner has said to unauthorized third parties.<sup>17</sup> Communication with the media is also explicitly prohibited. As a result, the prisoner's thoughts, feelings, actions, and treatment are virtually completely hidden from the outside world. This creates a unique chilling effect not only on advocacy but also accountability, as lawyers and family members "face prosecution if they provide details of any conversation or interaction with the detainee, thus making it illegal to speak out publicly against the damage the SAMs are having on the inmate."<sup>18</sup>

SAMs can also severely restrict prisoners' religious practices – one of the few sources of comfort for many people in confinement. Muslim prisoners for the most part cannot engage in group prayer, and some have been denied access to imams, Qu'rans, and halal food. Some prisoners have reported that prison guards purposefully target Muslims, for instance by blasting the radio or delivering food while Muslim prisoners are praying, knowing they cannot say anything during prayer.<sup>19</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 145; 149.

<sup>16</sup> *Id.* at 149.

<sup>17</sup> *Id.* at 141.

<sup>18</sup> Rovner & Theoharis, *Preferring Order to Justice*, *supra* note 3 at 1371-72.

<sup>19</sup> ILLUSION OF JUSTICE, *supra* note 2 at 117.

SAMs not only inhibit a person’s capacity to reach out to others, they also restrict prisoners’ ability to know what is happening beyond prison walls. SAMs typically ban or severely limit access to newspapers, books, television, and radio.<sup>20</sup> Opportunities for education and other rehabilitative and recreational activities are rare, and generally do not allow for any human contact with other prisoners or even instructors.<sup>21</sup>

This total isolation, which can last for years, causes severe psychological and physical harm. The psychological effects of long-term solitary confinement mirror the effects of other forms of torture or trauma, including anxiety, panic, paranoia, hallucinations, self-mutilation, and suicide.<sup>22</sup> Prolonged solitary confinement can also cause or exacerbate mental illness.<sup>23</sup> As Juan Méndez, Special Rapporteur on Torture, observed, these effects may occur after just fifteen days.<sup>24</sup> Some prisoners are held under SAMs for years.<sup>25</sup> SAMs can also cause physical health issues. Uzair Paracha, who was held in isolation for two-and-a-half years pending trial, suffered a severe weakening of his eyesight, brought about by “having his entire world just a few feet away.”<sup>26</sup> His physical coordination also deteriorated, making it difficult to walk on stairs, and he developed breathing problems, particularly when he slept.<sup>27</sup>

### C. Use of SAMs on Pre-Trial Detainees

The U.S. government’s imposition of SAMs on pre-trial detainees poses unique harms, including coercion to plead guilty and limiting meaningful attorney-client contact. Defendants who are incarcerated

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<sup>20</sup> *Id.* at 145. Under the auspices of public safety, the government has restricted access to articles related to politics, issues of the *Nation*, *Atlantic Monthly*, and *Time*, the world almanac, and President Obama’s memoirs. Dec. of Mahmud Abouhalima at 40-41, *Ayyad v. Holder*, No. 5-cv-02653 (D. Colo); ILLUSION OF JUSTICE, *supra* note 2 at 146.

<sup>21</sup> Rovner & Theoharis, *Preferring Order to Justice*, *supra* note 3 at 1405.

<sup>22</sup> Rovner & Theoharis, *Preferring Order to Justice*, *supra* note 3 at 1364 (citing Expert Report of Dr. Craig Haney at 7, *Silverstein v. Bureau of Prisons*, No. 1:07-cv-02471-PAB-KMT (D. Colo. Apr. 13, 2009)).

<sup>23</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 329 (2006).

<sup>24</sup> Special Rapporteur of the Human Rights Council, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly resolution 67/161, transmitted by Note of the Secretary-General, 76 U.N. Doc. A/68/295 (Aug. 2, 2013) (by Juan E. Méndez); *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 132 (2003) (stating such effects can be seen after ten days).

<sup>25</sup> Arun Kundnani, *The Guantanamo in New York You’re Not Allowed to Know About*, THE INTERCEPT (Feb. 5, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

pre-trial under any conditions are significantly more likely to cooperate and plead guilty than those that are released pending trial.<sup>28</sup> The uniquely severe restrictions defendants under SAMs are forced to bear – sometimes for years at a time before trial – can place immense pressure on them to plead guilty in part to escape these harsh conditions.<sup>29</sup>

Many attorneys believe SAMs are imposed precisely to coerce defendants into pleading guilty. SAMs, says Sean Maher, an attorney who has represented numerous clients under these restrictive measures, are “meant to bludgeon people into cooperating with the government, accepting a plea, or breaking their spirit.”<sup>30</sup> For instance, Uzair Paracha was incarcerated for months pending trial. Nine months after his arrest, when he refused to accept a plea deal, the government put Paracha under SAMs.<sup>31</sup> Under the terms of his SAMs while he awaited trial, Paracha was prohibited from speaking with anyone inside the prison but his guards. After he was convicted, the government permitted him to communicate with other prisoners.<sup>32</sup> “I faced the harshest part of the SAMs while I was innocent in the eyes of American law,” Paracha said.<sup>33</sup>

SAMs also create a climate of fear and suspicion, often rendering prisoners reluctant to trust their attorney – especially if he or she is appointed by the government. In many SAMs cases, the government can monitor an attorney’s communications with their client, and most attorneys representing people under SAMs operate under the assumption that their conversations are being monitored. This leads to self-censorship, preventing defendants from informing their lawyers of possible investigative avenues and

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<sup>28</sup> See Mary T. Phillips, New York Criminal Justice Agency, *A Decade of Bail Research in New York City* 116 (2012), available at <http://www.nycja.org/library.php> (“The data suggest that detention itself creates enough pressure to increase guilty pleas.”).

<sup>29</sup> See ILLUSION OF JUSTICE, *supra* note 2 at 200; David Thomas, *How Mohammed Warsame Became an Accidental “Terrorist,”* THE NATION (Nov. 27, 2013), available at <http://www.thenation.com/article/how-mohammed-warsame-became-accidental-terrorist/> (“Studies show that people who are imprisoned before trial ‘are far more often convicted, far more often given a prison term, and far more often given a long prison term than those people who obtain their release.’ By suffering punishment before trial, these defendants develop a fatalistic attitude toward their situation. Because they are also involuntarily accruing ‘time served,’ a plea bargain offer becomes attractive, regardless of their innocence.”). See also Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 84 (2003) (noting nearly all defendants charged with terrorism-related crimes are denied bail).

<sup>30</sup> Telephone interview with Sean Maher, Feb. 17, 2016 (on file with author).

<sup>31</sup> ILLUSION OF JUSTICE, *supra* note 2 at 121.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

hindering attorneys from discussing important trial strategy. Additionally, the psychological toll of SAMs on prisoners can render it nearly impossible for them to focus during meetings and communicate effectively with their attorneys.<sup>34</sup> Uncovering and crafting a defendant's narrative is vital in all cases, and particularly in death penalty cases, "not just because the punishment is greater but also because the project of capital defense cannot be done without the ability to construct a narrative."<sup>35</sup> SAMs prevent counsel from creating a narrative because they cannot share the defendant's thoughts, feelings with the court, or with the family.

#### **D. Effects of SAMs: The Case of Fahad Hashmi**

CCR client Fahad Hashmi, a U.S. citizen of Pakistani origin, spent over four years under SAMs, including three years pretrial. The effects he endured on his physical and mental health and his rights to a fair trial help illustrate the significant toll the measures exact.

From May 2007 to April 2010, the U.S. government held Hashmi under SAMs for nearly three years pending trial. The arrest stemmed from allegations that Hashmi allowed an acquaintance to store luggage, containing ponchos and socks, in his apartment, items that purported were later delivered to an Al Qaeda member in Pakistan. The charges, conspiracy to provide material support to Al Qaeda, carried a possible sentence of seventy years. Hashmi initially refused to cooperate with federal prosecutors, at which point the government imposed SAMs, despite the fact that Hashmi had not engaged in any threats or acts of violence.<sup>36</sup>

For nearly three years, Hashmi spent twenty-three hours a day in a small cell in the Metropolitan Correctional Center in New York City. Prison officials subjected Hashmi to video and audio surveillance around the clock, including during bathroom and shower breaks.<sup>37</sup> He was barred from seeing or communicating with other detainees, even during his brief periods out of cell. That one hour of

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<sup>34</sup> Rovner & Theoharis, *Preferring Order to Justice*, *supra* note 3 at 1366.

<sup>35</sup> Interview with Denny LeBeouf, Yale Law School (Feb. 5, 2016) (on file with author).

<sup>36</sup> Jeanne Theoharis, *My Student, the 'Terrorist'*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 3, 2011); Amnesty International, Letter to Att'y Gen. Eric H. Holder, Sept. 6, 2011.

<sup>37</sup> Jeanne Theoharis, *The unfair trial of Syed Fahad Hashmi*, SLATE (Apr. 27, 2010).

“recreation” occurred in isolation in a confined space without fresh air.<sup>38</sup> By the time of his trial, he had not seen the sun for more than four years.

The SAMs also severely restricted Hashmi’s communication with the outside world. The measures prohibited him from communicating with anyone but his lawyers, his parents and his brother.<sup>39</sup> His family visits were limited to a little over one hour with one person every other week, which prison officials could and did revoke as punishment.<sup>40</sup> Letters to his family were limited to one person per week using no more than three pieces of paper. Under the SAMs, Hashmi could only read newspapers over a month old that were pre-screened by the authorities.

One of Hashmi’s college professors who attended Hashmi’s pre-trial hearings observed his mental health “deteriorating” over time. She noted that he “used to pay attention to everything happening in court, constantly talking to his lawyer and for brief moments entering and leaving the court, making eye contact and smiling at people in the audience;” however, with each day under SAMs, he “appear[ed] less focused and more jittery” and “much more withdrawn.”<sup>41</sup> Hashmi’s attorneys also publicly warned that the conditions of confinement under SAMs would “cause lasting psychological, emotional, and physical damage” that would impact “Hashmi’s ability to assist counsel in preparing for trial.”<sup>42</sup> Because of the gag they were themselves subject to, however, they could not say more about the basis for their concerns. And while members of the press attempted to report on Hashmi’s conditions and pre-trial proceedings, journalists were also limited in the scrutiny they could bring to bear because of the explicit prohibition in Hashmi’s SAMs on contact with the media.

After nearly three years of being held under SAMs and in solitary confinement pre-trial, Hashmi pleaded guilty on the eve of his trial to one count of material support in exchange for a fifteen-year

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> William Fisher, *Hashmi: Finally, A Trial!*, TRUTHOUT (Apr. 26, 2010), available at <http://truth-out.org/archive/component/k2/item/89211:hashmi-finally-a-trial>.

<sup>42</sup> Nat Hentoff, *A Brooklyn College Grad Experiences the Constitution in a Cage*, THE VILLAGE VOICE (Nov. 5, 2008), available at <http://www.villagevoice.com/news/a-brooklyn-college-grad-experiences-the-constitution-in-a-cage-6392460>.

sentence. The government, who had insisted throughout Hashmi's pretrial detention that he must kept under these extreme measures, removed the SAMs just a few months after he cooperated and pled guilty. U.N. Special Rapporteur on Torture Juan Mendez, who made several requests to the United States to visit Hashmi while he was incarcerated at ADX to no avail, described Hashmi's SAMs as "no more than [] punitive measure[s] that [are] unworthy of the United States as a civilized democracy."<sup>43</sup> The Special Rapporteur concluded that, based on the available evidence, Hashmi's pretrial conditions constituted a violation of his rights under the Convention Against Torture.<sup>44</sup>

### E. Conclusion

The United States' continued reliance on Special Administrative Measures, which intensify the already extreme experience of solitary confinement, is out of step with the growing national consensus against solitary. The newly revised U.N. Standard Minimum Rules for the Treatment of Prisoners, or the "Mandela Rules," condemn the isolation of prisoners for longer than fifteen days and forbid its use as punishment.<sup>45</sup> This Committee has already called on the United States to reconsider its use of prolonged isolation,<sup>46</sup> and the Inter-American Court of Human Rights has described the use of solitary confinement as "cruel and inhuman treatment[], damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent to the human person."<sup>47</sup> The U.N. Special Rapporteur on Torture and Other

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<sup>43</sup> Sally Eberhardt & Jeanne Theoharis, *Five Years Ago, Obama Pledged to End Torture. He Still Hasn't*, THE NATION (Jan. 22, 2014), available at <http://www.thenation.com/article/five-years-ago-obama-pledged-end-torture-he-still-hasnt/>.

<sup>44</sup> See Special Rapporteur of the Human Rights Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Observations or Communications Transmitted to Governments and Replies Received ¶ 179, A/HRC/22/53/Add. 4 (Mar. 12, 2013) (by Juan E. Méndez).

<sup>45</sup> United Nations Office of Drugs and Crimes, United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. E/CN.15/2015/L.6/Rev.1 [hereinafter Mandela Rules]. The Mandela Rules reflect "the general consensus of contemporary thought and the essential elements of the most adequate systems of today [and] set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management." *Id.*, preliminary observation 1.

<sup>46</sup> U.N. Comm. Against Torture, 36th Sess., Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: United States of America, CAT/C/USA/CO/2, at ¶36 (May 18, 2006). The Committee Against Torture is the official body of independent experts established pursuant to the Convention Against Torture, a treaty ratified by the United States and part of United States law. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 17, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

<sup>47</sup> *Case of the Miguel Castro-Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160, at ¶323 (Nov. 25, 2006).

Cruel, Inhuman and Degrading Treatment or Punishment has also recognized the “adverse acute and latent psychological and physiological effects” of prolonged isolation, and noted that because it “deprived [prisoners] of their liberty,” they must be allowed to “to challenge expeditiously the lawfulness of the detention.”<sup>48</sup> In the case of pre-trial detainees, the Special Rapporteur has called for the total prohibition of solitary confinement.<sup>49</sup>

The United States’ policy of Special Administrative Measures violates these principles in several critical ways. First, SAMs represent one of the most severe forms of isolation imposed by any government; they can be imposed indefinitely and without regard for the mental health of the detainee, despite the well-known harms attendant to solitary confinement. Second, the process for the imposition of SAMs is opaque, highly discretionary and does not offer any meaningful administrative process for challenge or fair review. Third, SAMs appear to be imposed primarily by virtue of the underlying crime, and thus occur as part of punishment, not for legitimate penological concerns. Finally, SAMs imposed on pre-trial detainees can operate as a means to coerce cooperation with the government.

## II. SUGGESTED QUESTIONS

1. How many sentenced individuals and pre-trial detainees are currently held under SAMs?
2. What is the longest term that a prisoner currently under SAMs has been under the restrictions? What is the median term that SAMs prisoners are serving under SAMs?
3. How many individuals under SAMs have been diagnosed with serious mental illness?
4. How many individuals under SAMs are Muslim?

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<sup>48</sup> Special Rapporteur of the Human Rights Council, Interim Rep. of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly resolution 67/161, transmitted by Note of the Secretary-General, ¶¶ 41, 76 U.N. Doc. A/68/295 (Aug. 2, 2013) (by Juan E. Méndez).

<sup>49</sup> *Id.*