



DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
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WASHINGTON, DC 20301-1620

June 27, 2016

Mr. Patrice Gillibert  
Secretary, United Nations Committee Against Torture  
Palais Wilson  
52 rue des Pâquis  
CH-1201  
Geneva, Switzerland

Encl: (1) October 10, 2014 Alternative Report of Counsel for Ammar al Baluchi to the Committee Against Torture  
(2) February 26, 2016 Follow-up Report of Counsel for Ammar al Baluchi and the National Coalition to Protect Civil Freedoms to the Committee Against Torture  
(3) August 6, 2015 Statement of Ammar al Baluchi

Dear Mr. Gillibert,

As the Committee prepares for its adoption of the List of Issues Prior to Reporting for the 2018 Periodic Review of the United States, we here submit proposed questions based on previous and ongoing violations of the Convention Against Torture committed against our clients, Ammar al Baluchi and Khalid Shaikh Mohammad, who are currently detained at Guantánamo Bay, Cuba, and are joint defendants before the United States Military Commissions at Guantánamo Bay, where they face the possibility of the death penalty.<sup>1</sup>

Additionally, we enclose here as background our previous reports to the Committee Against Torture. Our previous reports detail the torture of the Guantánamo Bay prisoners at the hands of the government at secret detention centers between 2002 and 2006, and their continuing substandard conditions of confinement, including being held indefinitely without consular access, visits or simultaneous communication with their families, and access to monitors other than the ICRC. The prisoners currently being tried before the military commissions, including our clients, are held in isolation, without communal worship, meals, indoor recreation, or educational opportunities, and without crucial treatment for the torture that they have suffered. Even the

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<sup>1</sup> The Military Commissions Defense Organization is responsible for providing legal services to persons charged in a United States Military Commission. *See* 10 U.S.C. § 938k(c). The Chief Defense Counsel has detailed James G. Connell III, and Alka Pradhan, among others, as counsel for Mr. al Baluchi, and David Nevin, among others, as counsel for Mr. Mohammad. This letter does not represent the official position of the United States of America, the Department of Defense, the Military Commissions Defense Organization, or of any person other than its authors, Mr. al Baluchi, and Mr. Mohammad. This letter is not based upon classified information, and should not be read to confirm or deny any information the United States considers classified.

United Nations Special Rapporteur on Torture has not been permitted to meet with Guantánamo Bay prisoners.<sup>2</sup>

All of these conditions are ongoing, and in violation of the Convention Against Torture (CAT), Common Article 3 of the Geneva Conventions, and Article 75 of Additional Protocol I of the Geneva Conventions. The following is a list of the most pressing issues concerning the Convention Against Torture (CAT) that are currently faced by the detainees at Camp 7, the most restrictive facility (reserved for former CIA torture victims) at Guantánamo Bay.

### **Issue 1: Enforceability of CAT Protections at Guantánamo Bay**

The United States systematically denies that CAT provisions are enforceable by those the CAT protects. In 2014, before the Committee Against Torture, the U.S. delegation stated that “[CAT] obligations apply to a State Party in ‘any territory under its jurisdiction,’ such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman or degrading treatment or punishment, extend . . . specifically to ‘all places that the State Party controls as a governmental authority.’ We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantánamo Bay, Cuba.”<sup>3</sup>

Notwithstanding this position, the United States has continued to deny that CAT restrains the United States at Guantanamo Bay in any enforceable way.<sup>4</sup> Prior to the 2014 announcement,

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<sup>2</sup> The Guardian, “Pentagon Denies UN Investigator Chance to Interview Guantánamo Detainees,” March 15, 2015, available at <http://www.theguardian.com/us-news/2015/mar/15/pentagon-un-torture-investigator-interview-Guantanamo-detainees>. Counsel for Mr. al Baluchi filed a motion in May 2016 to compel the U.S. Department of Defense to allow Special Rapporteur Juan Méndez to conduct a limited independent inspection of Camp 7 (where the former CIA-tortured detainees are held) and private interviews with the five 9/11 defendants. See The Guardian, “Secret Area of Guantánamo Could be Opened to U.N. Watchdog For First Time,” May 12, 2016, available at <https://www.theguardian.com/us-news/2016/may/12/Guantánamo-camp-7-torture-ammal-baluchi-un>. The United States has opposed this motion.

<sup>3</sup> “Acting Legal Advisor McLeod: U.S. Affirms Torture is Prohibited At All Times In All Places,” Nov. 12-13, 2014, available at <https://geneva.usmission.gov/2014/11/12/acting-legaladviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>. Despite the acknowledgement in 2014 of the U.S. delegation to the Committee that the CAT obligations apply to the prison at Guantánamo, the Department of Defense appears to reject the application of CAT standards, stating most recently with regard to the CAT requirement of independent investigation of torture claims that “the Department of Defense gives the International Committee of the Red Cross access to the detainees, which . . . satisfies the Department of Defense’s obligations under International Law.” U.S. Department of Defense, “Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement,” 2009, [http://www.defense.gov/Portals/1/Documents/pubs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf).

<sup>4</sup> Similarly, the United States Military Commission maintains that it lacks authority “to rely on customary international law [including the *jus cogens* norm against torture] to grant any relief” AE200II Order to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the

the United States Military Commission at Guantanamo held, “Articles 1-16 of the Convention Against Torture confer no rights to each Accused.”<sup>5</sup> That position has remained unchanged, and as recently as May 26, 2016, the United States repeated that “Notwithstanding [the] change in U.S. Government policy . . . absent [federal] legislation, ‘Articles 1-16 of the Convention Against Torture confer no rights to each Accused.’”<sup>6</sup>

### Questions for Issue 1:

1. Given the position of the United States that the protections in Articles 1-16 extend to Guantánamo Bay, does the United States’ agree that these protections are enforceable by prisoners at Guantánamo Bay?
2. Does the United States maintain that additional domestic action is required to provide enforceable protections of the CAT to prisoners at Guantánamo Bay?
3. If the United States maintains that additional domestic action is required to provide enforceable protections of the CAT to prisoners at Guantánamo Bay, does the United States intend to take such domestic action?

### Issue 2: Continuing Allegations of CIDT at Guantánamo Bay

The United States maintains Guantánamo Bay prisoners, especially former CIA prisoners, in strict isolation which falls far below the requirements of the Mandela Rules. In its 2014 Concluding Observations on the Third to Fifth Periodic Reports of the United States, the Committee stated its concern about “the cumulative effect that the conditions of detention and treatment in Guantánamo have had on the psychological health of the detainees.”<sup>7</sup> One detainee, Hassan Guleed, recently testified in open court that “We have a mental torture in Camp 7,”

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Convention Against Torture, *available at* [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200II\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200II).pdf). The United States even maintains that the Common Article 3 requirement of humane treatment is not enforceable by Guantánamo Bay prisoners, stating that “The Military Commissions Act . . . precludes alien unprivileged enemy belligerent[s], subject to trial by military commission . . . from invoking the Geneva conventions as a basis for a private right of action.” AE303D, Ruling on Defense Motion for Appropriate Relief To Require Confinement Conditions That Comply With International Humanitarian Law Standards, June 22, 2015, *available at* [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE303D\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE303D).pdf).

<sup>5</sup> AE200II Order to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, *available at* [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200II\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200II).pdf).

<sup>6</sup> AE424A Government Response to Mr. Ali’s Motion to Compel Joint Task Force-Guantanamo Bay to Permit Access of the United Nations Special Rapporteur on Torture to Camp 7 and the Defendants. The complete document is currently undergoing a United States censorship process, but will eventually be available at [www.mc.mil](http://www.mc.mil).

<sup>7</sup> Committee Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the United States of America, Nov. 20, 2014, *available at* <http://www.state.gov/documents/organization/234772.pdf> [2014 Concluding Observations].

comparing it to treatment at the CIA black sites.<sup>8</sup>

Men at Guantánamo, including Mr. al Baluchi and Mr. Mohammad, are detained indefinitely in isolation without consular access, visits or simultaneous communication with their families, communal worship, communal meals, indoor recreation, educational opportunities, independent medical care, or access to monitors other than the ICRC. The United States is seeking the death penalty against six of these men.

### **Questions for Issue 2:**

1. Does the United States stated commitment to provide “humane” treatment for Guantánamo Bay inmates include compliance with the Mandela Rules?
2. Does the United States maintain that it can seek the death penalty against individuals whom it has tortured?

### **Issue 3: Refusal to Allow the Special Rapporteur to Investigate Allegations of Torture and CIDT**

The United States has resisted all efforts at independent review of allegations of former torture and current CIDT at Guantánamo Bay. Article 12 of the CAT requires, in accordance with customary law, that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”<sup>9</sup> There have been numerous calls requesting full [independent] access to the Guantánamo Bay detention facility for more than a decade.<sup>10</sup> However, the United States has never granted access for an impartial investigation to any outside party other than the International Committee of the Red Cross (which may not make public its conclusions), including the Special Rapporteur on Torture.

The Department of Defense has informed the Special Rapporteur that he would be granted only a visit to the Guantánamo Bay Naval Station, to receive a briefing from Joint Task Force officials, and to tour some parts of the prison. These terms are identical to those governing the

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<sup>8</sup> Associated Press, “Prisoner Tells of ‘Mental Torture’ in secret Guantánamo Camp,” June 2, 2016, *available at* <http://bigstory.ap.org/article/c5cb115da8734fdf86ce4a734b7a23cd/prisoner-tells-mental-torture-secret-Guantanamo-camp>.

<sup>9</sup> CAT art. 12.

<sup>10</sup> Joint NGO Declaration in Support of Independent Inspection by Special Rapporteur Juan Méndez , *available at* <https://www.hrw.org/news/2016/06/21/declaration-support-access-Guantanamo-un-torture-expert>. *See also*, BBC News, U.N. Calls for Guantánamo Closure, February 16, 2006, *available at* <http://news.bbc.co.uk/2/hi/americas/4718724.stm>; American Civil Liberties Union, “Latest Guantánamo Death Highlights Need for Independent Investigation, May 19, 2011, *available at* <https://www.aclu.org/news/latest-Guantanamo-death-highlights-need-independent-investigation>; Amnesty USA, “Independent Investigation Urged Into Guantánamo Detainee Death,” *available at* <http://www.amnestyusa.org/news/news-item/independent-investigation-urged-into-Guantanamo-detainee-death>, May 19, 2011.

visits to Guantánamo by journalists, NGOs, and other observers,<sup>11</sup> which are “so controlled that [they] can raise more questions than answers.”<sup>12</sup> As these terms do not recognize the Special Rapporteur’s special status and are not in accordance with his mandate, Special Rapporteur Méndez has been unable to visit Guantánamo thus far. In acknowledgement of the security restrictions at Guantánamo, he has offered as a preliminary matter a limited inspection of Camp 7, which holds the former CIA torture victims, and private interviews with the five 9/11 defendants, including Mr. al Baluchi and Mr. Mohammad. The government has continued to oppose independent access. As a result, there have been no independent investigations of the current allegations in accordance with CAT obligations.

Mr. al Baluchi has filed a motion seeking to compel the United States to permit the Special Rapporteur access to himself, his detention facility, and his co-defendants.<sup>13</sup> The United States has opposed this request.

### **Questions for Issue 3:**

1. Please submit information regarding any/all completed inquiries or investigations into allegations of torture/CIDT at Guantánamo, including remedies implemented.
2. Given the current indefinite detention of individuals at Guantánamo Bay, please explain the United States’ procedure for future impartial investigations of future allegations of torture/CIDT at Guantánamo Bay pursuant to CAT Art. 13.
3. Please explain the United States’ persistent refusal to grant access for an independent inspection of Guantánamo Bay by the United Nations Special Rapporteur on Torture despite the Special Rapporteur’s ability to negotiate security restrictions.

### **Issue 4: Withholding and Destruction of Previous Torture Evidence for Current Guantánamo Detainees Facing Trial By Military Commission**

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<sup>11</sup> Full Transcript: U.S. Third Periodic Report to U.N. Committee Against Torture at p. 32, Nov. 12-13, 2014, *available at* [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat\\_complete\\_transcript\\_from\\_just\\_security.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_complete_transcript_from_just_security.pdf) (“Mr. Méndez would have the same access as is granted to members of our own Congress and civil society . . .”).

<sup>12</sup> The New York Times, “Tour of Guantánamo Offers a Look, But Little Else,” Aug. 11, 2010, *available at* <http://www.nytimes.com/2010/08/12/us/12gitmo.html> (“[E]ven innocuous-seeming details about daily life inside the Guantánamo detention camps” are kept from the observers.) A recent report about the tour describe it as more stripped down than ever before, stating that “Gone are opportunities to interview guards, meet with mental health professionals, to taste a detainee meal and to compare life in maximum-security detention for those who misbehave to those in communal captivity and get many more privileges.” *See* Miami Herald, “Restraint Chair? Gone. Camp X-Ray? Gone. U.S. Military Unveils Leaner Media Visit to Guantánamo,” Feb. 28, 2016, *available at* <http://www.miamiherald.com/news/nation-world/world/americas/Guantanamo/article63000807.html#storylink=cpy>.

<sup>13</sup> AE424 Mr. al Baluchi’s Motion to Compel Joint Task Force- Guantamo Bay to Permit Access of the United Nations Special Rapporteur on Torture to Camp 7 and the Defendants, *available at* [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE424\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE424(AAA)).pdf).

The United States has announced its intention to use statements obtained from torture survivors after their transfer from CIA black sites to Guantánamo Bay, which violates the prohibition on use of statements derived from torture. Article 15 of the CAT states, “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” Both clauses of this article continue to be violated by the United States: torture-derived evidence is relied upon by the government in the prosecution of Mr. al Baluchi and Mr. Mohammad, while evidence of their torture is withheld or destroyed to avoid accountability.

In December 2014, the Senate Select Committee on Intelligence (SSCI) released the redacted Executive Summary of their report on the CIA’s Detention and Interrogation Program, which confirmed horrific details of torture at the black sites by CIA officials, including at a black site at Guantánamo Bay.<sup>14</sup> As one example among many, government agents slammed Mr. al Baluchi’s head against a wall repeatedly: “As my head was being hit each time, I would see sparks of light in my eyes. As the intensity of these sparks were increasing as a result of repeated hitting[,] all of a sudden I felt a strong jolt of electricity in my head then I couldn’t see anything[.] Everything went dark and I passed out.”<sup>15</sup> A number of the named victims of the CIA’s torture program are now detainees in Camp 7 at Guantánamo Bay, including Mr. al Baluchi and Mr. Mohammad.

Mr. al Baluchi and Mr. Mohammad currently face a joint trial with three other defendants for which the government is seeking the death penalty. Defense counsel for the five co-defendants hold the highest-level security clearances issued by the United States government, on par with counsel for the prosecution. However, in violation of customary and constitutional due process guarantees, the government has consistently withheld potentially exculpatory and mitigating information regarding the torture of the defendants by the CIA.<sup>16</sup> At the same time, the government seeks to use factual statements made by the defendants following more than three years of torture in CIA custody to prosecute them.

One example of the government’s conflicted position on providing evidence of torture to the defense is illustrated by a recent oral argument before the commission concerning the CIA’s collaboration with the Hollywood filmmakers of Zero Dark Thirty, in which a character based

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<sup>14</sup> Executive Summary of the Report of the Senate Select Committee on Intelligence, Dec. 9, 2014, at 16 and 140, available at [http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909) [“SSCI Redacted Executive Summary”].

<sup>15</sup> Statement of Ammar al Baluchi (enclosed).

<sup>16</sup> See, e.g., General Comment 32 of the Human Rights Committee at para. 33: “ ‘Adequate facilities’ must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory . . . In cases of a claim that evidence was obtained in violation of article 7 of that Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.”

directly on Mr. al Baluchi is tortured. In February 2016, counsel for Mr. al Baluchi argued that the United States should release all communications between the CIA and the filmmakers to counsel.<sup>17</sup> The government responded that the information was not relevant to defense counsel.<sup>18</sup>

Defense counsel are also bound by classification rules, issued in the form of protective orders by the military commission, that prohibit the disclosure of any information that would reveal or tend to reveal details surrounding the capture of the defendants other than the location and date; the foreign countries in which any of the defendants were held; and details about any of the persons involved in the defendants' capture, rendition, detention, or interrogation. These rules, which encompass publicly available and frequently reported information, prevent defense counsel from conducting a great deal of independent investigation into the interrogation and torture of our clients both in the United States and abroad. The "draconian system of secrecy surrounding high-value detainees that keeps their torture claims out of the public domain," that so disturbed the Committee in the 2014 Concluding Observations, remains in place.<sup>19</sup>

The withholding of torture evidence from defense counsel has recently turned into the actual destruction of torture evidence. In May 2016, the CIA admitted to Congress that they had destroyed their only copy of the full, un-redacted SSCI report on the CIA torture program, which remains at the heart of litigation by defense counsel,<sup>20</sup> despite acknowledging many of the details in the redacted SSCI summary.<sup>21</sup> The full report has not been publicly released; moreover, while the prosecution has access to the full, unredacted report, such access has been denied to defense counsel. Additionally, defense counsel recently learned that the United States government secretly destroyed important evidence that the military judge publicly ordered to be preserved.<sup>22</sup>

#### **Questions for Issue 4:**

1. Please submit information regarding any potential use of torture-derived evidence in violation of Article 15 in the military commission proceedings, including the United States' interpretation of the phrase "made as a result of torture" in Art. 15.

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<sup>17</sup> Jonathan Hafetz, "Torture and Transparency in the Military Commissions," Feb. 24, 2016, available at <https://www.justsecurity.org/29505/torture-transparency-military-commissions/>.

<sup>18</sup> Miami Herald, "Guantánamo War Court Screens Grisly 'Zero Dark Thirty' Torture Scenes," Feb. 18, 2016, available at <http://www.miamiherald.com/news/nation-world/world/americas/Guantanamo/article61163027.html>.

<sup>19</sup> 2014 Concluding Observations at para. 15.

<sup>20</sup> The Hill, "CIA Watchdog 'Accidentally Destroyed' Only Copy of Torture Report," May 16, 2016, available at <http://thehill.com/policy/national-security/280002-cia-watchdog-accidentally-destroyed-only-copy-of-torture-report>.

<sup>21</sup> BuzzFeed News, "The CIA Corrected Its Own Corrections of the Torture Report Without Telling Anyone," Feb. 10, 2016, available at <http://www.buzzfeed.com/alimwatkins/the-cia-corrected-its-own-corrections-of-the-torture-report#.lb5OpAljXy>

<sup>22</sup> Reuters, "September 11 Suspect Asks That U.S. Judge Step Down, Cites Evidence Destruction," May 31, 2016, available at <http://www.reuters.com/article/us-usa-Guantanamo-idUSKCN0YM2JA>. Due to classification restrictions, counsel for Mr. Mohammad and Mr. al Baluchi may not provide further details regarding the destroyed evidence.

2. Please explain the United States' withholding of potentially exculpatory or mitigating torture details from security-cleared counsel for defendants in a capital case. Specifically, please explain the inability of defense counsel to access the full, unredacted SSCI report containing details of their clients' torture and interrogations.
3. Please explain the United States' justification for classification rules that prevent defense counsel from utilizing widely and publicly reported information on their clients' treatment.
4. Please explain the United States' intentions regarding the public release of the full report of the Senate Select Intelligence Committee on the CIA's torture program, as has been requested by civil society in the United States and abroad.
5. Please submit all information regarding the destruction of CIA torture evidence in violation of Arts. 12, 13, and 15 of the CAT.
6. Please provide information regarding any safeguards that have been implemented to prevent the further destruction or withholding of torture evidence in the military commission trials of former CIA detainees.

### **Issue 5: Failure to Provide Adequate Medical Care and Torture Treatment at Guantánamo Bay**

Despite acknowledging its torture of some men now at Guantánamo Bay, the United States has consistently refused to allow treatment or rehabilitation for their torture. Article 14 of the CAT states in relevant part that “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible . . .”

Classification of prisoner's experiences of torture severely hampers provision of medical care.<sup>23</sup> Doctors at Guantánamo sometimes refuse to take the medical histories of Mr. Mohammad and Mr. al Baluchi, as well as of other former CIA detainees. For example, in August 2015, a medical professional began to take Mr. Mohammad's full history, taking copious notes over the course of an hour, but Mr. Mohammad never saw that medical provider again. Mr. Mohammad has musculoskeletal problems stemming from his torture that require certain specific exercises, but the exercise equipment provided for him has been broken for almost a year and the only physical therapists available to him are female, which violates religious considerations and implicates former trauma.

The remote, military nature of Guantánamo Bay, combined with the refusal of independent medical care, also interferes with treatment for torture-related injuries. Military doctors rotate quickly, and can never form an adequate therapeutic relationship with the survivors of their government's torture. Mr. al Baluchi probably suffered a traumatic brain injury in CIA custody,<sup>24</sup> but the United States has refused to allow an MRI scan to confirm the medical diagnosis.

Adequate rehabilitation for torture victims is essential and legally mandated because

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<sup>23</sup> The enclosed statement of Ammar al Baluchi was declassified after a lengthy review that is required for each one of his or any former CIA detainee's statements.

<sup>24</sup> See enclosure, Statement of Ammar al Baluchi.

without such treatment, the victims continue to suffer the effects of their torture in perpetuity, and to deteriorate as a result.<sup>25</sup> As observed by Prof. Derrick Pounder, a forensic pathologist who has accompanied the Special Rapporteurs on Torture on fact-finding missions: “The extreme nature of the torture event is powerful enough on its own to produce mental and emotional consequences regardless of a person’s pre-torture psychological status.”<sup>26</sup> The United States’ continuing refusal to properly treat survivors of its torture compounds its earlier violations of its legal obligations.

### Questions for Issue 5:

1. What is the United States’ position on the legal obligation for provision of torture rehabilitation for the former CIA detainees at Guantánamo?
2. Given the involvement of government-contracted personnel in the CIA’s torture program, please submit information regarding the ability of torture victims at Guantánamo to obtain independent medical care for torture rehabilitation.

Many thanks to you and to the Committee for your consideration of these proposed issues and questions.

Regards,

//s//  
JAMES G. CONNELL, III  
Detailed Learned Counsel

//s//  
ALKA PRADHAN  
Detailed Defense Counsel

Counsel for Mr. al Baluchi

//s//  
DAVID NEVIN  
Detailed Learned Counsel for Mr. Mohammad

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<sup>25</sup> Walter Kälin, “The Struggle Against Torture,” *International Review of the Red Cross*, No. 324, Sept. 30, 1998, available at <https://www.icrc.org/eng/resources/documents/misc/57jpg5.htm> [“Walter Kälin, “The Struggle Against Torture”] (“Acts of torture cannot be undone and psychological damage continues long after the physical wounds inflicted on the victim are healed. Yet human rights law recognizes that reparation and compensation for such victims may enhance the healing process by supporting the victim’s sense of justice.”).

<sup>26</sup> Derrick Pounder, “The Medical Contribution to Assessing Allegations of Torture in International Fact-Finding Missions,” *Forensic Science Int’l* 208, 245 (2011).

**The United States' Compliance with the Convention Against Torture  
with Respect to the Classification of Information  
Regarding the Ill-Treatment of Detainees in Secret Detention**

(Article 12: Investigation; Article 13: Right to complain; and Article 14: Right to redress)



The author of this alternative report is James G. Connell, III, representative of Ammar al Baluchi, a prisoner at Guantanamo Bay.<sup>1</sup>

**I. Issue Summary**

The State Party seeks to execute six men imprisoned at Guantanamo Bay before they can reveal the truth of their torture. Furthermore, State Party policy threatens criminal liability for any doctor, attorney, or other professional who reveals information regarding ill-treatment to anyone outside the Executive Branch. The State Party's absolute prohibition on revealing torture—implemented by classification of information about ill-treatment—strikes at the heart of the international norm against torture.

In 2006, after subjecting a number of men to torture and other cruel, inhuman, and degrading treatment in secret detention, the State Party transferred them to Guantanamo Bay. The State Party now seeks to execute six of these men in a military commission, outside the ordinary judicial process.

The State Party considers the observations and experiences of its victims of ill-treatment to be owned and controlled by the State. Specifically, the State Party has classified almost all information regarding ill-treatment, preventing prisoners at Guantanamo Bay or their attorneys from presenting information about ill-treatment to relevant authorities. These classification restrictions block virtually all attempts to obtain the truth about the State Party's ill-treatment, to seek treatment for the effects of the abuse, or to use ill-treatment to mitigate the State Party's attempt to execute the six men.

When men charged in the military commissions sought relief from this oppressive classification scheme, the United States Military Commission at Guantanamo Bay formally ruled

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<sup>1</sup> The State Party referenced attorneys fulfilling this role in *Periodic Report of the United States of America, United Nations Committee Against Torture* ¶¶ 51, 53, 145 (5 August 2013) [hereinafter *Periodic Report*], available at <http://www.state.gov/documents/organization/213267.pdf>. This alternative report does not state the position of the United States Government, the Department of Defense, the Office of Chief Defense Counsel, or any person or organization other than Mr. al Baluchi's attorneys. This alternative report does not rely upon, confirm, or deny information classified by the United States Government.

that the Convention Against Torture does not govern the State Party's activities at Guantanamo Bay.

## II. Use of classification to block investigation, complaint, and rehabilitation

At the time the Committee issued its conclusions and recommendations in 2006,<sup>2</sup> the State Party was ill-treating at least fourteen men in a secret detention facility or facilities whose location(s) the State Party considers classified. The Committee recommended that the State Party close any secret detention facilities, investigate the ill-treatment of those arbitrarily detained, and prosecute those responsible.<sup>3</sup>

The State Party considers almost all information regarding its secret detention to be classified information whose transmission is a criminal offense punishable by imprisonment.<sup>4</sup> The State Party has, however, declassified redacted documents acknowledging the existence of the Central Intelligence Agency (CIA) Rendition, Detention, and Interrogation Program.<sup>5</sup>

In 2006, the Commission expressed its concern about “the limitations on detainees’ effective right to complain,” and recommended the following:

The State party should ensure that its obligations under articles 13 and 15 are fulfilled in all circumstances, including in the context of military commissions and should consider establishing an independent mechanism to guarantee the rights of all detainees in its custody.<sup>6</sup>

Rather than close Guantanamo Bay as the Committee recommended,<sup>7</sup> the State Party in September 2006 transferred men from CIA custody to super-maximum incarceration conditions

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<sup>2</sup> Committee Against Torture, *Conclusions and recommendations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2 (25 July 2006) [hereinafter *Concluding Observations*].

<sup>3</sup> *Id.* at ¶¶ 17, 18, 19, 25, 26.

<sup>4</sup> See 18 U.S.C. §§ 798, 1924; 50 U.S.C. §§ 421, 783. For example, one of only two declassified items of information regarding Mr. al Baluchi is that the film *Zero Dark Thirty* “includes several interrogation scenes the first of which is an interrogation of a character who is modeled after Ammar al-Baluchi.” Adrian Chen, *Newly Declassified Memo Shows CIA Shaped Zero Dark Thirty’s Narrative* (6 May 2013), available at <http://gawker.com/declassified-memo-shows-how-cia-shaped-zero-dark-thirty-493174407> (publishing redacted memorandum obtained through the U.S. Freedom of Information Act).

<sup>5</sup> See, e.g., Office of Inspector General, Central Intelligence Agency, *[Redacted] Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)* (7 May 2004), available at [www.aclu.org/sites/default/files/torturefoia/released/052708/052708\\_Special\\_Review.pdf](http://www.aclu.org/sites/default/files/torturefoia/released/052708/052708_Special_Review.pdf).

<sup>6</sup> *Concluding Observations* at ¶ 30; see also *id.* at ¶¶ 14, 15 (recommending that the State party recognize the applicability of the CAT to all persons under its effective control).

<sup>7</sup> *Id.* at ¶ 22.

there as so-called “high-value detainees.”<sup>8</sup> In the State Party civilian courts, all statements by Guantanamo Bay prisoners, including information about their ill-treatment, are considered classified until the State Party determines otherwise.<sup>9</sup>

Following years of detention without charge, the State Party has convened military commissions against a small number of Guantanamo Bay prisoners.<sup>10</sup> In each case, the military commissions have entered Orders which describe the following information as classified:

- (a) Details of capture other than location and date;
- (b) Countries involved in secret detention;
- (c) Persons involved in capture, rendition, detention, or interrogation;
- (d) Descriptions, duration, frequency, and sequencing of “enhanced” interrogation techniques; and
- (e) Conditions of confinement in secret detention.<sup>11</sup>

The military commissions have also required the undersigned attorneys to sign a Memorandum of Understanding acknowledging that the State Party may prosecute them criminally for violation of the Order.<sup>12</sup>

In response to the Committee’s questions regarding the rights to investigation, complaint, and redress,<sup>13</sup> the State Party pointed to a number of mechanisms to seek redress under its civil

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<sup>8</sup> Vice Chief of Naval Operations Admiral Patrick M. Walsh described Camp 7 as “effectively” a super-maximum confinement facility. *DoD News Briefing with ADM Walsh from the Pentagon* (23 Feb. 2009), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4359>; see also Tara McKelvey, *A visit to Guantanamo’s secretive Camp 7*, BBC News (20 Aug. 2013), available at <http://www.bbc.com/news/world-us-canada-23771851>. The Committee has recommended the State Party review its use of supermax prisons, particularly the practice of prolonged isolation. *Concluding Observations* at ¶ 36.

<sup>9</sup> See *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143, 147 (D.D.C. 2008); *Al Odah v. United States*, 346 F. Supp. 2d 1, 13 (D.D.C. 2004); *In re Guantanamo Bay Cases*, 344 F.2d 174, 179-80 (D.D.C. 2004); see also Mr. al Baluchi’s Motion to End Presumptive Classification, AE009 (17 April 2009), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE009\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE009(AAA)).pdf).

<sup>10</sup> *Periodic Report* at ¶ 56.

<sup>11</sup> See, e.g., Second Amended Protective Order #1 to Protect Against Disclosure of National Security Information ¶ 2(g)(4)(a)-(e), AE013DDD, *United States v. Mohammad* (16 December 2013) [hereinafter *Mohammad Order*], available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013DDD\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013DDD(KSM%20et%20al)).pdf); Amended Protective Order #1 Protection of Classified Information Throughout All Stages of Proceedings ¶ 10(d), AE013M, *United States v. al Nashiri* (27 March 2014) [hereinafter *al Nashiri Order*], available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/A1%20Nashiri%20II%20\(AE013M\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/A1%20Nashiri%20II%20(AE013M).pdf).

<sup>12</sup> *Id.* at ¶ 5(a)(2).

and criminal law.<sup>14</sup> The State party fails to acknowledge, however, that its policy of classifying all information regarding ill-treatment blocks Guantanamo Bay prisoners from pursuing any remedy for ill-treatment other than suppression of their coerced statements. Examples follow:

- The State Party has prohibited “high-value” Guantanamo Bay prisoners from communicating with the governments of their States of origin regarding the State Party’s past and current treatment of them. The State Party has denied both these governments and the prisoners their treaty right to consular visits on the basis that the prisoners might reveal information regarding ill-treatment the State Party considers classified.
- An international non-governmental organization has forwarded counsel for some prisoners questions regarding the conditions of confinement and methods of interrogation during secret detention. The State party considers the answers to these questions classified, and will not permit counsel to provide information on these topics to international organizations. The State party prohibits the former CIA prisoners themselves from providing information to international bodies through the simple expedient of denying them access to the telephone, internet, and (non-ICRC) postal system.
- Some detainees have sought and obtained relief from States through international tribunals. The State Party’s prohibition on transmission of information regarding ill-treatment makes it extremely difficult to seek redress in an international forum because prisoners cannot allege the facts needed to state a claim unless those facts appear in declassified documents.
- The Senate Select Committee on Intelligence (SSCI) of the United States Congress has conducted an investigation of the CIA secret detention program. Some prisoners have sought permission to provide information to the SSCI regarding the State Party’s treatment and condition,<sup>15</sup> but no such permission has been forthcoming.
- The rules prohibiting transmission of classified information prohibit even prisoners’ own attorneys from collaborating to gather and present information about ill-treatment. State

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<sup>13</sup> Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of United States of America* ¶¶ 23, 26, 27, CAT/C/USA/Q/5 (20 Jan. 2010).

<sup>14</sup> *Periodic Report* at ¶¶ 127, 130, 147; *see also Common Core Document of the United States of America: Submitted with the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* ¶¶ 536-46 (30 Dec. 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>.

<sup>15</sup> *See* Mr. al Baluchi’s Motion to Authorize Counsel to Provide Classified Information to Appropriately Cleared Members of the Legislative Branch, AE232(AAA), *United States v. Mohammad* (4 October 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE232\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE232(AAA)).pdf).

party policies prohibit military commission attorneys from providing information about ill-treatment to attorneys in civilian courts, as well as the reverse.<sup>16</sup>

CAT obviously prohibits the State Party from denying the rights to complain, to investigation, and to rehabilitation simply by declaring the State Party's action to be classified. The State Party has overcome the protections of CAT by simply declaring that CAT is not enforceable at Guantanamo Bay. The State Party's claim to the Human Rights Council that military commissions provide "all applicable protections under domestic and international law"<sup>17</sup> does not reflect its actual policy at Guantanamo Bay.

In 2013, faced with the obstacles the State Party has created, military commission defendants challenged the classification policy as a violation of CAT.<sup>18</sup> The State Party responded that it could classify the observations and experiences of victims of ill-treatment because they "have been exposed to highly classified sources and methods," *i.e.*, the interrogation techniques and conditions of confinement.<sup>19</sup> The military commission, which is a component of the U.S. Department of Defense rather than an independent judicial body, accepted the State Party position and ruled that Mr. al Baluchi and his co-defendants have no rights under the Convention against Torture.<sup>20</sup>

The exclusion of Guantanamo Bay prisoners from the protections of CAT continues to this day: the State Party continues to use its classification power to deny the Article 12, 13, and 14 rights of Guantanamo Bay prisoners. The Committee should inquire into this practice, which is not addressed by the State Party's submissions.

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<sup>16</sup> *Mohammad Order* at ¶ 5(f); *Al Nashiri Order* at ¶ 27.

<sup>17</sup> U.S. Department of State, *UPR Recommendations Supported by the U.S. Government* ¶ 218 (June 2014) ("Persons who are charged with terrorist-related crimes are tried under legally established processes in either civilian courts or military commissions, depending on the nature of the crime and the individual. They are afforded all applicable protections under domestic and international law."), available at <http://www.state.gov/j/drl/upr/recommendations/>.

<sup>18</sup> Mr. al Baluchi's Notice of Joinder, Factual Supplement & Argument to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE200(AAA) (17 Sept. 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200(AAA)).pdf).

<sup>19</sup> Government Response to Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture, AE200F (3 Oct. 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200F\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200F(KSM%20et%20al)).pdf).

<sup>20</sup> Order to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE200II (16 December 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200F\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200F(KSM%20et%20al)).pdf).

### **III. Suggested Question & Recommendation**

**Suggested question:** How, if at all, may prisoners at Guantanamo Bay complain of, demand an investigation of, and seek rehabilitation for ill-treatment outside the State Party's Executive Branch, given the State Party's classification of information regarding the treatment of prisoners in secret detention?

**Suggested recommendation:** The State Party should remove all obstacles to the exercise of the rights to complain, to seek an investigation, and to seek rehabilitation for alleged torture victims at Guantanamo Bay, including declassifying all information regarding their treatment in secret detention.

**United States of America**  
**NGO assessment of actions government**  
**has taken on issue since review**

Current Status: Follow-Up Report of the  
State submitted November 28, 2015.

**Follow-up Issues Report of**  
**Attorneys for Guantánamo Bay Prisoner<sup>1</sup> Ammar al Baluchi**  
**and the National Coalition to Protect Civil Freedoms (NCPCF)**

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<sup>1</sup> The Office of the Chief Defense Counsel is responsible for providing legal services to persons charged in a United States Military Commission. *See* 10 U.S.C. § 938k(c). The Chief Defense Counsel has detailed James G. Connell, III and Alka Pradhan, among others, as counsel for Mr. al Baluchi. This Report does not represent the official position of the United States of America, the Department of Defense, or of any person other than its authors, Mr. al Baluchi and the NCPCF. This Report is not based upon classified information, and should not be read to confirm or deny any information the United States considers classified.

**This follow-up recommendation report will assess Paragraph 14(c)(Guantanamo Bay detention facilities):** *“The Committee expresses its deep concern that the State party continues to hold a number of individuals without charge in the Guantanamo Bay detention facilities. Notwithstanding the State party’s position that those individuals were captured and detained as “enemy belligerents” and that, under the law of war, it is permitted “to hold them until the end of the hostilities”, the Committee reiterates that indefinite detention without charge constitutes, per se, a violation of the Convention (CAT/C/USA/CO/2, para. 22). According to the figures provided by the delegation, to date, out of the 148 men still held at the facility, only 33 have been designated for potential prosecution, either in federal court or by military commissions, and the latter fail to meet international fair trial standards. The Committee notes with concern that 36 others have been designated for “continued law of war detention”. While noting that detainees held in Guantanamo Bay have the constitutional privilege of the writ of habeas corpus, the Committee is concerned at reports that indicate that federal courts have rejected a significant number of habeas corpus petitions. While noting the explanations provided by the State party concerning the conditions of detention at Guantanamo Bay, the Committee remains concerned about the secrecy surrounding conditions of confinement, especially in Camp 7, where high-value detainees are housed. It also notes the studies received on the cumulative effect of the conditions of detention and treatment in Guantanamo Bay on the psychological health of detainees. There have been nine deaths in Guantanamo during the period under review, including seven suicides. In that respect, another cause of concern is the repeated suicide attempts and recurrent mass hunger strike protests by detainees over indefinite detention and conditions of detention. In that connection, the Committee considers that force-feeding of prisoners on hunger strike constitutes ill-treatment in violation of the Convention. Furthermore,*

*it notes that lawyers of detainees have argued in court that force-feedings are allegedly administered in an unnecessarily brutal and painful manner (arts. 2, 11, 12, 13, 14, 15 and 16)."*

### **Grade as of November 2, 2015: C1**

The United States continues to detain at Guantanamo Bay a group of Muslim male non-citizens, many of whom have been subjected to state-sanctioned torture and continue to be held in conditions constituting cruel, inhuman, or degrading treatment at a minimum. With limited exceptions, the United States continues to classify the detainees' memories of their torture and blocks effective rehabilitation for their torture. Finally, the United States seeks to execute six men currently on trial before military commission at Guantanamo Bay while maintaining classification of their own statements about their torture. Therefore, the United States continues to be in flagrant violation of Articles 2 and 10-16 of the Convention Against Torture.

### **Actions taken by the State Party**

In its presentation before the Committee Against Torture on November 12, 2014, the United States acknowledged for the first time that the CAT applies to operations at Guantanamo Bay, as the Committee, other States Party, civil society, and detainee counsel had asserted for the nearly 13 years since Guantanamo was opened in January 2002.<sup>2</sup>

On Dec. 9, 2014, the heavily-redacted summary of the Senate Select Committee on Intelligence's (SSCI) report on the CIA's torture and rendition program was publicly released.<sup>3</sup> Although the government continues to withhold crucial information from the report that is

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<sup>2</sup> See, e.g., Amnesty International, "Response to USA's Recognition that the Convention Against Torture Applies at Guantanamo Bay," Nov. 12, 2014, available at <http://www.amnestyusa.org/news/press-releases/amnesty-international-responds-to-usa-s-recognition-that-the-convention-against-torture-applies-at-g>.

<sup>3</sup> Chicago Tribune, "President Obama Vows Actions in CIA Report Won't Take Place on His Watch," Dec. 9, 2014, available at <http://www.chicagotribune.com/news/nationworld/chi-cia-torture-report-20141209-story.html>.

necessary to the defense of Mr. al Baluchi along with the other 9/11 defendants, the SSCI's redacted summary confirmed that Mr. al Baluchi and others were in fact held by the CIA in multiple locations worldwide and brutally tortured pursuant to a state-sanctioned program.<sup>4</sup>

Despite these developments, in its follow-up report to the Committee, the United States repeats the position that the Department of Defense as a matter of policy – not through legal obligation to the CAT – “has required that all its detention operations meet a high standard of humane care and custody.”<sup>5</sup> The United States also says that it “has conducted thousands of investigations since 2001, and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees,” despite the fact that even the redacted SSCI summary proved that the torture of detainees was authorized at the highest levels of the United States government, and to date there has been no investigation or prosecution of the responsible parties.<sup>6</sup> On the contrary, the government has affirmatively stated that no prosecutions will take place based on the information in the redacted SSCI summary.<sup>7</sup> This is despite the fact that the CIA has now acknowledged most of the details in the redacted SSCI summary.<sup>8</sup> The Department of Justice has in fact barred all executive agencies from reading the full report, and the

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<sup>4</sup> Senate Select Committee on Intelligence, *Executive Summary, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* [hereinafter *Redacted SSCI Executive Summary*], S. Rep. 113-288 (Dec. 9, 2014), available at <http://www.intelligence.senate.gov/study2014.html>

<sup>5</sup> U.S. Department of State, One Year Follow-Up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports, Nov. 27, 2015, available at <http://www.state.gov/j/drl/rls/250342.htm>

<sup>6</sup> *Id.*

<sup>7</sup> The Telegraph, “Why Won't Barack Obama Prosecute CIA Torturers?” Dec. 12, 2014, available at <http://www.telegraph.co.uk/news/worldnews/barackobama/11291476/Why-wont-Barack-Obama-prosecute-CIA-torturers.html>.

<sup>8</sup> BuzzFeed News, “The CIA Corrected Its Own Corrections of the Torture Report Without Telling Anyone,” Feb. 10, 2016, available at <http://www.buzzfeed.com/alimwatkins/the-cia-corrected-its-own-corrections-of-the-torture-report#.lb5OpAljXy>

government has refused thus far to provide security-cleared attorneys for the tortured men with even the un-redacted summary of the SSCI report.<sup>9</sup>

### **Impact of the action of the State Party (if any)**

The United States' release of the redacted SSCI summary confirmed the government's secret torture program and allowed victims of the program, such as Mr. al Baluchi, some public acknowledgement of his torture. However, Mr. al Baluchi and other defendants remain on trial without full access to his own torture records that contributed to the redacted SSCI report, without the ability to speak publicly about his torture, and without the ability to seek meaningful rehabilitation for his torture.<sup>10</sup> Therefore, the United States' actions, rather than alleviating the effects of state-sponsored torture, have confirmed an unwillingness to properly investigate confirmed acts of torture, to prosecute acts of torture, and to provide proper means of redress for victims of torture, all of which constitute violations of the CAT.

### **Current situation/update of the Issue**

#### ***Continuing Torture and Cruel, Inhuman Or Degrading Treatment***

The United States continues to imprison men at Guantánamo Bay, especially those previously held by the CIA, in a manner inconsistent with CAT standards.<sup>11</sup> Between 2002 and 2006, the United States held the six men it now seeks to execute in secret torture centers.

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<sup>9</sup> New York Times, "Classified Report on the CIA's Secret Prisons is Caught In Limbo," Nov. 9, 2015, available at [http://www.nytimes.com/2015/11/10/us/politics/classified-report-on-the-cias-secret-prisons-is-caught-in-limbo.html?\\_r=0](http://www.nytimes.com/2015/11/10/us/politics/classified-report-on-the-cias-secret-prisons-is-caught-in-limbo.html?_r=0).

<sup>10</sup> BuzzFeed News, "Gitmo's Defense Lawyers Are Still In the Dark a Year After the Torture Report," Dec. 9, 2015, available at <http://www.buzzfeed.com/alimwatkins/gitmos-defense-lawyers-are-still-in-the-dark-a-year-after-th>.

<sup>11</sup> CAT Articles 2, 10-16. See also, ICCPR Article 7 (torture and cruel, inhuman and degrading treatment); Article 10(1) (inherent dignity of the person); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 75 (8 June 1977); IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 3 (12 August 1949).

Among other forms of torture and other cruel, inhuman, and degrading treatment, authorized agents of the United States drowned, raped, and mock-executed various secret prisoners.<sup>12</sup> Our client, Mr. al Baluchi, suffered a traumatic brain injury among other effects of torture while in CIA custody. In 2006, the United States transferred the tortured men from CIA secret detention to Guantánamo Bay Naval Station, but housed them separately from other military detainees and kept them under “operational control” of the CIA, thereby extending the effects of their torture.<sup>13</sup> Even before the United States transferred these men to conditions even harsher than those of most Guantánamo prisoners, the Special Mandate Holders had noted potential violations of humane treatment requirements.<sup>14</sup>

Since 2006, the United States has continued to subject the men it seeks to execute to torture or cruel, inhuman, and degrading treatment at Guantánamo Bay. The government held the men indefinitely, without access to attorneys, consular officials, family members, or human rights monitors other than the ICRC until 2008, when it briefly charged the men in a military commission. Following aborted military commission proceedings in 2008, the United States continued to hold the men indefinitely until 2011 (for Mr. Abd al-Rahim al Nashiri) or 2012 (for the other five men including Mr. al Baluchi), when it charged them in military commissions explicitly designed to seek death sentences. Although the United States has now provided

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<sup>12</sup> See generally Senate Select Committee on Intelligence, *Executive Summary, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* [hereinafter *Redacted SSCI Executive Summary*], S. Rep. 113-288 (Dec. 9, 2014), available at <http://www.intelligence.senate.gov/study2014.html>.

<sup>13</sup> *Redacted SSCI Executive Summary* at 160.

<sup>14</sup> Commission on Human Rights, *Situation of detainees at Guantánamo Bay*, E/CN.4/2006/120, ¶ 53 (Feb. 15, 2006).

attorneys for the men, it continues to deny consular access, visits or simultaneous communication with family, and access by human rights monitors other than the ICRC.<sup>15</sup>

For the entire period since their arbitrary arrests, the United States has held the men in solitary confinement under “super-maximum” [Supermax] conditions,<sup>16</sup> without communal worship, meals, indoor recreation, or educational opportunities. The United States does not permit the men telephone calls with their families or attorneys, even after the death of a family member. The United States prohibits independent medical treatment for the prisoners, and denies all attempts to obtain rehabilitation services for torture survivors. All of the six men targeted for execution are subject to these shockingly punitive conditions, but none has been convicted of any crime. Although the Special Rapporteur on Torture has not been allowed to visit Guantanamo Bay, he has found that solitary confinement as practiced in prisons in the United States amounts to torture or CID.<sup>17</sup> Given that detention at Guantanamo Bay is modeled on the most restrictive Supermax prisons, this means that the men continue to be tortured at Guantanamo.

The *ad hoc* military commissions have consistently refused to remedy these violations. The United States has prohibited bail, pre-trial release, or even transfer to the United States for

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<sup>15</sup> Associated Press, “Window Opens on Secret Camp Within Guantanamo,” Jun. 13, 2014, available at [http://www.huffingtonpost.com/2014/04/13/guantanamo-secret-camp\\_n\\_5142854.html](http://www.huffingtonpost.com/2014/04/13/guantanamo-secret-camp_n_5142854.html).

<sup>16</sup> *Dep’t of Def. News Briefing with Vice Chief of Naval Operations, Adm. Patrick M. Walsh*, 23 February 2009, transcript, available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4359>.

<sup>17</sup> The Guardian, “Pentagon Denies UN Investigator Chance to Interview Guantanamo Detainees,” March 15, 2015, available at <http://www.theguardian.com/us-news/2015/mar/15/pentagon-un-torture-investigator-interview-guantanamo-detainees>; National Public Radio, “Observers Hope California Agreement Succeeds in Ending Indefinite Solitary,” Sept. 5, 2015, available at <http://www.npr.org/2015/09/05/437824615/observers-hope-california-agreement-succeeds-in-ending-indefinite-solitary>.

medical treatment.<sup>18</sup> One military commission has held that it cannot enforce the defendants' rights under the Convention Against Torture or the Vienna Convention on Consular Relations.<sup>19</sup> When Mr. al Baluchi sought a humanitarian telephone call with his family following the death of his father, a military commission ruled that it "does not run detention facilities and will defer to the judgment of the facility commander unless that judgment impacts on the legal proceedings in some manner."<sup>20</sup> The military commission has held that it cannot even require the United States to release a defendant if he is acquitted.<sup>21</sup>

Mr. al Baluchi suffers from great pain, sleep problems, and ongoing emotional distress as a result of his U.S.-sponsored torture over 13 years. Authorities on torture rehabilitation note that

The effects of torture on the individual have interacting social, political, cultural, economic, medical, psychological, and biological dimensions. Nearly all clients have a major psychiatric disorder. Their course is chronic with exacerbations and remissions . . . The needs of survivors are multiple and, in response, the programmes have usually adopted a multidisciplinary approach . . .<sup>22</sup>

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<sup>18</sup> National Defense Authorization Act, P.L. 112-239 § 1027.

<sup>19</sup> Military Commissions Trial Judiciary, AE200II Order, *United States v. Mohammad* (16 December 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE200II\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200II).pdf); Military Commissions Trial Judiciary, AE214H Order, *United States v. Mohammad* (9 April 2015), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE214H\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE214H).pdf)

<sup>20</sup> Military Commissions Trial Judiciary, AE093A Ruling, *United States v. Mohammad* (9 February 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE093A\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE093A).pdf)

<sup>21</sup> Military Commissions Trial Judiciary, AE231B Order, *United States v. Mohammad* (22 May 2014), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE231B\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE231B(AAA)).pdf).

<sup>22</sup> Jarensen and Quiroga, International Rehabilitation Council for Torture Victims, "Evaluating the Services of Torture Rehabilitation Programs," *Torture* Vol. 21, No. 2 (2011).

Additionally, “[t]he evidence that torture has psychiatric consequences is overwhelming . . .”<sup>23</sup>

The Committee itself has provided detailed guidance for States Party to the CAT on proper torture rehabilitation under Art. 14:

Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability . . . Furthermore, victims may be at risk of re- traumatisation and have a valid fear of acts which remind them of the torture or ill- treatment they endured. Consequently, a high priority should be placed on the need to create a context of confidence and trust in which assistance can be provided.<sup>24</sup>

According to General Comment No. 3, continued solitary confinement in conditions that mirror CIA torture and detention and the inability of the tortured men to discuss their torture freely without fear of reprisal clearly violate Article 14.

Further, Mr. al Baluchi’s pleas for assistance are rejected by the medical staff at Guantanamo, and even attempts by his attorneys to facilitate access to independent doctors have been severely limited by the government, with only one independent psychiatrist having been given permission to see him on a short-term basis. As of the time of this report, further funding for the independent psychiatrist has been denied. Meaningful treatment or rehabilitation for Mr. al Baluchi’s and other defendants’ torture under CAT Article 14, therefore, is impossible, and their conditions will continue to deteriorate.

### ***Secrecy/Classification of Torture***

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<sup>23</sup> *Id.*

<sup>24</sup> Committee Against Torture, “General Comment No. 3 of the Committee Against Torture: Implementation of Article 14 by States Parties,” Nov. 19, 2012, *available at* [https://www1.umn.edu/humanrts/cat/general\\_comments/cat\\_gen\\_com3.html](https://www1.umn.edu/humanrts/cat/general_comments/cat_gen_com3.html).

Nearly all of the details provided in our initial shadow report to the Committee regarding the extensive and illegal classification of torture by the United State remain current. Before the military commission, the following information pertaining for each defendant, including Mr. al Baluchi, remains classified (aside from the few details contained in the redacted SSCI summary, released since the submission of our initial shadow report):

- (a) Details of capture other than location and date;
- (b) Countries involved in secret detention;
- (c) Persons involved in capture, rendition, detention, or interrogation.<sup>25</sup>

Additionally, other than those details in the redacted SSCI summary, all of the same restrictions on recourse for the torture suffered by the six men currently facing military commission prosecution, remain in place. Mr. al Baluchi has no consular rights or right of family access on the basis that he may reveal to his state of origin his torture at the hands of the United States. To date, all lawsuits filed in the United States on behalf of CIA torture victims have been dismissed by the judiciary on the basis of the State Secrets Privilege after the government has invoked national security classification.<sup>26</sup> It is extremely difficult for attorneys for Mr. al Baluchi and the other commission defendants even to pursue recourse in international courts and tribunals, because they may not allege any facts that are not contained in declassified documents.

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<sup>25</sup> See, e.g., Third Amended Protective Order #1 to Protect Against Disclosure of National Security Information ¶ 2(g)(4)(a)-(e), AE013BBBB, *United States v. Mohammad* (6 July 2015) [hereinafter *Mohammad Order*], available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013BBBB\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013BBBB).pdf); Amended Protective Order #1 Protection of Classified Information Throughout All Stages of Proceedings ¶ 10(d), AE013M, *United States v. al Nashiri* (27 March 2014) [hereinafter *al Nashiri Order*], available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/A1%20Nashiri%20II%20\(AE013M\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/A1%20Nashiri%20II%20(AE013M).pdf).

<sup>26</sup> The Constitution Project, “Don’t Use State Secrets Privilege to Block CIA Torture Lawsuit, Groups Tell Attorney-General,” Nov. 20, 2015, available at <http://www.constitutionproject.org/documents/dont-use-state-secrets-privilege-to-hide-cia-torture-program-groups-tell-attorney-general/>

The United States' representation to the Committee, therefore, that low-level U.S. service-members have previously been prosecuted or disciplined for acts of detainee abuse, is woefully inadequate to address its failure to investigate or alleviate massive and ongoing violations of CAT Articles 12-14.

### **Conclusion**

The United States' follow-up report to the Committee is incomplete and misleading. Even the acknowledgement of the applicability of the CAT to operations at Guantanamo Bay have not effected any meaningful change by the United States in the ongoing commission of acts of torture and CID, and the continuing efforts to block any investigation or recourse for such acts. The United States' statement that the Department of Defense' "policy" is to exceed international standards for detention conditions makes clear that the United States does not view such standards as binding legal obligations, despite its belated acknowledgment that the CAT applies to Guantanamo Bay. The Committee should censure the United States in the strongest terms possible for its ongoing legal violations of the CAT at Guantanamo Bay: the continued commission of acts of torture/CID, the failure to investigate or prosecute acts of torture/CID, and the failure to provide recourse or rehabilitation to victims of state-sponsored torture/CID.

END OF MAY EARLY JUNE 2003

### Head Trauma (Injury) Incident 1

At the CIA Black site, In the very first days  
After US Gov. Agents shaved my Head, Then they Smashed  
my Head against the wall repeatedly.....

It continued until I lost count at each session.  
As my Head was being Hit each time, I would see sparks of lights  
in my Eyes, As the Intensity of these sparks were increasing as  
a result of repeated hitting Then all of sudden I felt a strong  
Jolt of Electricity in my Head then I couldn't see Anything everything  
went Dark and I Passed out.

Next thing I found my self in a different place suspended to  
the ceiling in a Dark Cold Cell. I don't know for how many hours  
I was unconscious. Naked while my legs were swollen as a result of  
extended standing. My legs couldn't support my body, the Handcuffs were  
cutting my wrists which were Pulled over above my Head. A very sharp  
throbbing Pain in my Head. There was an Extremely loud and disturbing  
music with a mixture of grating screeching shrill sounds cutting into  
my Ears Pounding my mind As every now and then an agent would come  
[REDACTED]

Continued "Head Injury Incident 1"

And hit the steel Door with a Metal Bar in his/her hands making verbal threats pointing to the metal Bar in addition to flashing a sharp light into my face. And when I indicate that I need water to drink someone would come and stand at the doorstep holding a ~~cup~~ container of water showing it to me then he or she would spill it on the floor and leave.

After this particular Head injury incident I lost my ability to sleep ever since. I was not able to have a normal or deep sleep. I am still reliving the nightmares of this incident ~~this is~~ every night everytime I try to close my eyes it just pops up And this was <sup>just one</sup> among many incidents.

AMMAR AL-BALUCHI

GUANTANAMO BAY

6th AUG 2015