

**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)



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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

¹ 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 2006,² 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.³

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

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.⁶

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

² 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*].

³ *Id.* at ¶¶ 17, 18, 19, 25, 26.

⁴ 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).

⁵ 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.

⁶ *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).

⁷ *Id.* at ¶ 22.

there as so-called “high-value detainees.”⁸ 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.⁹

Following years of detention without charge, the State Party has convened military commissions against a small number of Guantanamo Bay prisoners.¹⁰ 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.¹¹

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.¹²

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

⁸ 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.

⁹ 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).

¹⁰ *Periodic Report* at ¶ 56.

¹¹ 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).

¹² *Id.* at ¶ 5(a)(2).

and criminal law.¹⁴ 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,¹⁵ 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

¹³ 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).

¹⁴ *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>.

¹⁵ *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.¹⁶

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"¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

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.

¹⁶ *Mohammad Order* at ¶ 5(f); *Al Nashiri Order* at ¶ 27.

¹⁷ 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/>.

¹⁸ 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).

¹⁹ 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).

²⁰ 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.