

Reply of Mr. Mustafa al-Hawsawi to the United States of America's 1 April 2015 Response to the Human Rights Committee on Priority Actions Regarding the International Covenant on Civil and Political Rights (ICCPR)

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Introduction

The ongoing human rights violations at United States Naval Station, Guantanamo Bay, Cuba constitute an affront to all civilized nations and to internationally recognized norms for the humane treatment of prisoners. The prolonged imprisonment of “detainees” at Guantanamo Bay is *ipso facto* a manifest violation of the purposes and obligations of the International Covenant of Civil and Political Rights, one of the three original textual sources considered to comprise the International Bill of Rights. There is no semantic calculus by which U.S. policies in Guantanamo Bay square with the Covenant and international human rights law. Unfortunately, the only question is not whether the U.S. Government is in compliance, but instead the sheer degree and severity by which our Government violates international law every hour of every day at Guantanamo Bay. Nowhere is this flagrant and banal criminality more evident than through the Guantanamo military commissions and the case of Mr. Mustafa al-Hawsawi.

Mr. al-Hawsawi is a 46-year old Saudi Arabian citizen who has been held without trial since 2003 and who faces death if convicted by military commission (i.e. military tribunal). Despite the fact that Mr. al-Hawsawi was never a member of Al-Qaeda and the CIA's acknowledgement in the pages of the U.S. Senate Torture Report that “he hardly seemed like a financial mastermind,”¹ Mr. al-Hawsawi was detained and tortured at CIA black sites for three years before transferred to Guantanamo Bay where he and other CIA captives were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.² The SSCI Report does not indicate that the CIA has ever relinquished operational control. During this captivity, by the CIA, Mr. al Hawsawi was sodomized, subjected to rectal examinations with excessive force without any evidence of medical necessity, sleep deprived, tortured by water dousing akin to waterboarding, and suffered a medical emergency for which he did not receive timely or appropriate treatment. Mr. al Hawsawi continues to suffer from the aftermath of this torture.

On or about 1 March 2003, he was abducted from Rawalpindi, Pakistan. Mr. al Hawsawi was then imprisoned by agents of the U.S. Government at undisclosed locations until his transfer to the U.S.

¹ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* 106 (2014) [hereinafter “SSCI Report”], p. 432. fn. 2423.

² SSCI Report, p. 160 (noting that fourteen CIA captives were moved to military custody at GTMO in September 2006, but remained at a separate camp under the operational control of the CIA); *CIA's Captives Moved to Gitmo*, St. Petersburg Times (Sept. 7, 2006), http://www.sptimes.com/2006/09/07/news_pf/Worldandnation/CIA_s_captives_moved_.shtml (noting that Mr. al-Hawsawi was one of the fourteen).

Naval Base at Guantanamo Bay, Cuba, in September 2006. Mr. al-Hawsawi remains imprisoned at a secret facility at Guantanamo Bay. Recently, in a published opinion, the UN Working Group on Arbitrary Detention (WGAD) has called for Mr. al Hawsawi's release and repatriation to his native Saudi Arabia. The WGAD report makes clear that domestic policies authorizing Mr. al Hawsawi indefinite detention still do not conform with human rights law, international humanitarian law, and customary international law. In their final report, the WGAD defines Mr. al-Hawsawi's continued detention as "arbitrary and in contravention of Articles 9 and 10 of the Universal Declaration of Human Rights and Articles 9 and 14 of the International Covenant on Civil and Political Rights."

In the paragraphs that follow, Mr. al-Hawsawi replies to the text of the 1 April 2015 USA follow-up report to the Human Rights Committee on those sections that have a direct connection with his captivity and the quasi-legal proceedings currently imposed upon him.

The Position of the United States Government on the U.S. Senate Select Committee on Intelligence
Torture Report

14. On December 9, 2014, the Senate Select Committee on Intelligence released its Findings and Conclusions and an Executive Summary of its Study of the CIA's former Detention and Interrogation Program (Torture Report). Upon the request of the Committee and in the interest of transparency, these documents, totaling over 500 pages, were declassified with minimal redactions to protect national security, leaving 93 percent of the released portion of the Study declassified. Harsh interrogation techniques highlighted in that Report are not representative of how the United States deals with the threat of terrorism today, and are not consistent with our values. The United States supports transparency and has taken steps to ensure that it never resorts to the use of those techniques again. (p. 7)

Mr. al-Hawsawi's Reply

Mr. al-Hawsawi, a torture victim, is facing the death penalty before Military Commission at Guantanamo Bay, Cuba. Professional staff of the United States Senate Select Committee on Intelligence (SSCI) had access to over 6 million pages of documents and the actual Senate Report is purportedly 6,000 pages in its entire length. Therefore, less than 10% of the Torture Report has been released, and the U.S. Government redacted the most crucial information in the report such as locations of black sites and personnel who physically and psychologically abused Mr. al-Hawsawi. Moreover, the Torture Report refers to extensive information in Appendix 3 of the report on Mr. al-Hawsawi's treatment, which has yet to be declassified or provided to his attorneys.

Despite possessing Top Secret Clearances equivalent of the SSCI staff, Mr. al-Hawsawi's attorneys know little more about his experiences during the three years he was disappeared and tortured than the information contained in the declassified summary of the Torture Report. Similarly, what additional information they do know, they are not allowed to comment on or use for his defense.

Beginning in April 2014, the Prosecution informed counsel for Mr. al-Hawsawi that it could not obtain access to the report despite copies being in possession of the Executive Branch including Department of Defense, Department of State, and Original Classification Authorities with whom the Prosecution is

in continual communication. It was not until 24 February 2015 that the Prosecution ultimately informed Mr. al-Hawsawi's attorneys that it had obtained a copy and would review it for pieces of the report that the Prosecution thinks are relevant for Mr. al-Hawsawi's legal team to see.

Transparency requires making 100% percent of the Torture Report and supporting documents available to Mr. al-Hawsawi's attorneys, especially since the U.S. Government intends to execute him.

Furthermore, although the U.S. Government observes in its response that torture is not "representative of how the United States deals with the threat of terrorism today, and are not consistent with our values," its abstract acceptance of responsibility ends with that sentence. The U.S. Government is not providing Mr. al-Hawsawi with adequate basic medical treatment or rehabilitation for the assaults it inflicted upon his body and mind, ostensibly because doing so would be to confront a very tangible consequence of American torture.

The Position of the United States Government on the Indefinite Detention of Individuals at Guantanamo Bay, Cuba

24. We preface this response by recalling the longstanding position of the United States that obligations under the Covenant apply only with respect to individuals who are both within the territory of a State Party and within its jurisdiction. The United States continues to have legal authority under the law of war to detain Guantanamo detainees until the end of hostilities, consistent with U.S. law and applicable international law, but it has elected, as a policy matter, to ensure that it holds them no longer than necessary to mitigate the threat they pose. (p. 9)

Mr. al-Hawsawi's Reply

In October 2013, during litigation over Mr. al-Hawsawi's inability to make a written complaint to the Committee Against Torture regarding his confirmed cruel, inhuman, and degrading treatment while under the effective control of U.S. authorities, U.S. Prosecutors stated their official position for the court as being that Mr. al-Hawsawi's brain (i.e. his thoughts, memories, and experiences) is literally classified as Top Secret by the United States Government because such information belongs to and is under the control of the U.S. Government despite the fact this information comes from Mr. al Hawsawi's independent recollections of his torture. U.S. Prosecutor Clayton Trivett, as indicated in the court transcript, asserted that Mr. al Hawsawi was exposed to "sources and methods" which are deemed classified. "Sources and methods" are official euphemisms for the details of Mr. al-Hawsawi's torture including the nations and persons complicit in that torture.³

³Judge Pohl: [T]he question becomes, "Is the government's position on life experiences -- I'm going to use that term -- of the accused, that they know personally, would that be classified information?"

Mr. Trivett: Yes.

Judge Pohl: Okay. Then I come back to the executive order about being in control of the United States Government, I'm not paraphrasing it.

Mr. Trivett: Yes.

Judge Pohl: Is that considered in control of the United States Government, if it's in the accused' brain?

Therefore, the statement of the U.S. Government in para. 24, is completely irrelevant in the case of Mr. al-Hawsawi. He is not being held until the end of hostilities, he is being held until the information contained in his mind is deemed declassified by the same authorities who tortured him. If the declassification of 10% of the 6,000 page Torture Report (or actually 0.1% of the total number of documents relating to Mr. al-Hawsawi's torture) is an indication, the United States Government has no intention of declassifying the contents of his mind without pressure from international human rights bodies.

The Position of the United States Government on the Use of Military Commission as a Substitute for U.S. Federal Courts

29. The United States remains of the view that in our efforts to protect our national security, both military commissions and federal courts can, depending on the circumstances of the specific case, provide tools that are both grounded in applicable law and effective. However, U.S. law currently precludes transfer of detainees from Guantanamo for prosecution in the United States (pp. 10-11).

Mr. al-Hawsawi's Reply

Put simply, para. 29 of the United States Follow-up Response is a "separate, but equal" assertion, which has long been discredited as a legal and societal methodology.

The use of military commissions to prosecute members of small, armed groups for war crimes is unprecedented and, indeed, has lately been abandoned by the United States. Before 2001, such groups (whether labeled as pirates or terrorists) have always been prosecuted in civilian court under civilian standards. More recently, the United States has brought all newly captured individuals accused of terrorist acts directly to U.S. soil and into the jurisdiction of the federal court system. President Obama himself has noted that over 190 individuals accused of terrorist acts have been tried successfully in U.S. domestic civilian courts operating under U.S. Constitutional protections and that cases like Mr. al Hawsawi's should be handled within the constitutional framework of the federal courts.

Still, Mr. al Hawsawi remains in a quasi-judicial system intentionally created to prosecute a discrete group of Muslim men outside the normal legal framework of federal courts in order to guarantee conviction and execution. The illegitimate concept of an "unprivileged enemy belligerent"—a person with the responsibilities, but not the rights, of a combatant—is designed for no other purpose than to strip fundamental rights away from the accused, deny the accused a trial altogether, or try the accused in tribunals that lack basic procedural safeguards.

Mr. Trivett: The accused are currently in control of the United States Government. That's one part of the analysis.

Judge Pohl: Okay.

Mr. Trivett: The second part of the analysis is the fact that the accused were exposed to sensitive sources and methods that were produced by the U.S. Government.

Indeed, no Guantanamo detainee who was tortured by the CIA is allowed to be prosecuted by a U.S. federal civilian court. Torture victims, like Mr. al-Hawsawi, are, instead, exclusively on trial before military tribunals at Guantanamo Bay inside a classified courtroom from which both the public and Mr. al-Hawsawi are excluded when the U.S. intelligence community deems that a piece of information is classified in the imminent interests of national security, such as details of Mr. al-Hawsawi's torture a decade ago.

The Position of the United States Government on the Procedural Legitimacy of the
Guantanamo Bay Military Commissions

30. As further explained by the U.S. delegation during the Committee's 110th session, all current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions. The 2009 Military Commissions Act also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review (CMCR). The detainee has a right to appeal that CMCR decision to the U.S. Court of Appeals for the District of Columbia Circuit and then the United States Supreme Court, both federal civilian courts consisting of life-tenured judges (p. 11).

Mr. al-Hawsawi's Reply

The procedural manipulations inherent in the military commissions system are designed to guarantee Mr. al Hawsawi's permanent silence in an effort to suppress and conceal criminal conduct by U.S. Government agents. This military commissions system is subservient to domestic political interests, corrupted by manipulation from domestic intelligence agencies and interference by Federal government agents, and ultimately biased and discriminatory. It is wholly incapable of providing the guarantees of basic rights enshrined in the ICCPR.

The United States Government has yet to detail out what the requirements are for meeting standards of Common Article 3, the nature of "other applicable law," or formally apply the Geneva Convention protections in legal proceedings at Guantanamo. Even less so has the Government explained systematically how they are "meeting" and "exceeding" the standards they refer to vaguely in paragraph 30. Mr. al-Hawsawi has no virtually no realistic ability to challenge the Government in the military commissions on its application of these sources of law. The U.S. Government has constructed an intricate quasi-legal framework to be able to say that Mr. al-Hawsawi has external judicial review and options; yet, they are non-existent in actuality because of extra technicalities that the U.S. Government omits from its public statements.

For example, here are some serious violations of international due process standards, that the Government overlooks when asserting its "meet or exceed" success in paragraph 30.

Self-Serving National Security Classifications

U.S. Prosecutors continue to take the position that the memories, impressions and experiences of torture victims such as Mr. al-Hawsawi are classified and belong to the United States Government. This position effectively denies torture victims the ability to seek rehabilitation, redress, and accountability for their torture.

Intelligence Agency and Other Government Actors Manipulation and Interference

In well documented incidents, intelligence agencies have shut off the external audio and video feeds of the court room unbeknownst to the presiding judge. The FBI has infiltrated at least one defense team and attempted to place confidential informants within additional defense teams. Disguised listening devices have also been found in our attorney-client meeting rooms, which compels us to operate under the assumption that our privileged conversations continue to be monitored even today.

Lack of Consular Assistance

Mr. al Hawsawi has attempted to communicate with the Saudi Arabian Government to no avail, even as the Saudi Arabian Government has likewise requested to meet with Mr. al-Hawsawi. Recently, General Mark Martins, the Chief Prosecutor for Military Commissions, took the position that Mr. al-Hawsawi should not have access to representatives of his government pursuant to the Vienna Convention for Consular Relations because the Government of Saudi Arabia could instead watch his capital punishment trial on television.⁴

Admissibility of Evidence Derived from Torture

Current Military Commission Rules of Evidence continue to allow the admissibility of evidence “derived” from torture and coercion, even though this military commission has been advertised otherwise over the years.⁵ Indeed, one of the justifications for the continued use of military commissions is that they now protect against the use of statements “obtained” through torture. The Government has yet to explain the practical difference of evidence “obtained” through torture instead of evidence “derived” from the same acts of torture.

Denial of the Right to Complain to International Human Rights Authorities

Torture Victims such as Mr. al-Hawsawi facing military commissions are denied the right to reveal evidence of their torture and to complain under the Convention Against Torture. Rather, the U.S. Government seeks to put Mr. al-Hawsawi to death even after admitting that what our Government did to him for three years violated not only *jus cogens* norms but also our core national “values” (see again, para. 14).

The aggregate effect of the governmental manipulation is to cripple the defense’s ability to effectively defend Mr. al-Hawsawi.

⁴ [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS12Feb2015\)-PM.pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS12Feb2015)-PM.pdf), pp. 8475-876, lines 22-1.

⁵ Military Commissions Rule of Evidence 304(5)(A)(ii) and 304(5)(B)(i) – (ii).

The Position of the United States Government on Military Commission Transparency

31. The United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are now transmitted via video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the Office of Military Commissions website (p. 31).

Mr. al-Hawsawi's Reply

The Original Classification Authorities (i.e. U.S. intelligence agencies) have the sole discretion to decide what elements of the hearings, transcripts, filings, and other motions are those to “protect against disclosure”. Mr. al-Hawsawi has no ability to challenge the decision of intelligence agencies outside of the Military Commissions regarding the on-site, real time censorship of his death penalty trial. Nor is he able to effectively challenge the transcripts, filings, and other materials prohibited from public availability on the website because they have been redacted in whole or part.

The Position of the United States Government Regarding the Substantive Progress of the Guantanamo Military Commissions

32. There are no current plans to end prosecutions by military commissions. Since the Committee issued its recommendations in March 2014, the military commissions convened to try the defendants charged with the attacks on the USS COLE and on the United States on September 11, 2001 have continued with pretrial litigation. In each case more than 300 motions have been filed by the defendants challenging the structure of the commissions and the admissibility of evidence at trial, and presenting Constitutional questions, among other matters (pp. 11-12).

Mr. al-Hawsawi's Reply

Citing the number of filings is deceptive. The military commission judge has ruled on far less than half of the pleading submitted to him, many of which were filed over three years ago. Filings arising from real-time practical or legal developments, even when filed as an emergency motion such as when Mr. al-Hawsawi's health suddenly deteriorated, remain *status quo ante* until a decision is entered by the judge against the Prosecution's opposition. Thus, relief is often de facto denied for years. Indeed, many of the 300 motions have been filed in attempt to bring other motions to the forefront of the attention of the judge.

On Constitutional matters the judge has ruled that the U.S. Constitution applies on a “case by case” basis. Motions involving international treaties and fundamental rights, such at the Convention Against Torture, have been denied on the grounds that they are not self-executing and customary international law is not binding on conditions at Guantanamo Bay. The judge has reaffirmed on numerous occasions that his powers and authority are limited by the Military Commissions Act (MCA) of 2009, and he has

yet to rule in favor of Mr. al-Hawsawi in any way that would minimally alter the structure of the trial in challenge to the MCA.

Amongst the “other matters” upon which extensive filings have been submitted over the last calendar year is the verified infiltration of defense teams by FBI informants as well an interpreter who formally worked for the CIA. The trial has not progressed since the discovery of the FBI infiltration because the FBI has not provided the judge with sufficient information to present to the defense in order to determine whether defense teams are compromised by the clandestine investigation into their attorney-client privilege. Until such determination can be made, further progression on the case is not likely and the basic interests of Mr. al-Hawsawi will continue to languish.

In fact, Mr. al-Hawsawi himself has moved for his case to be severed and “fast-tracked” in order to face trial and have his guilt or innocence weighed. The Prosecution has refused to allow Mr. al-Hawsawi’s positive efforts towards a trial, and has informed the judge that Mr. al-Hawsawi’s case should continue to be put on hold indefinitely.

Conclusion

On the U.S. Government responses to the follow-up report that relate to Mr. al-Hawsawi first-hand, the Permanent Mission of the United States to the United Nations in Geneva is grossly misleading the Human Rights Committee, either unwittingly or deliberately. It is Mr. al-Hawsawi’s hope that the Human Rights Committee will investigate the actual facts in contradiction to the U.S. Government’s sweeping generalizations, equivocations, and unsubstantiated self-rationalizations.

Furthermore, it is clear throughout the U.S. follow-up report that when confronted with realities that cannot be circumvented, the fallback position of the U.S. Government is to attempt to mitigate consequences and embarrassment by labeling a violation of international law and ICCPR as being “in the interests of national security”. The ICCPR and clearly established non-derogability of many of the rights applicable to Mr. al-Hawsawi’s case, make the inclusion of such statements by the U.S. Government baffling and shamefully disingenuous.