



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

October 6, 2015

Mr. Emilio Alvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Moath Al Alwi, Petition No. P-98-15
Mustafa Al Hawsawi, Petition No. P-1385-14
Joint Response to Petitions

Dear Mr. Icaza:

We appreciate the opportunity to provide observations on the various communications (collectively, “Petitions”) forwarded to the United States in the above-referenced matters. We have chosen to address both matters in this letter, and refer collectively to Mr. Al Alwi and Mr. Al Hawsawi as the “Petitioners.” We urge the Inter-American Commission on Human Rights (“Commission”) to find these matters inadmissible because it lacks competence to review certain claims and because the claims do not meet the requirements of Articles 31 and 34 of the Rules of Procedure (“Rules”).

The Petitioners are detained lawfully under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the ongoing conflict with al-Qa’ida, the Taliban, and associated forces. This law authorizes the President of the United States to “use all necessary and appropriate force against those ... organizations[] or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” including the authority to detain persons who are part of al-Qaida, the Taliban, or associated forces.

Lack of competence

Petitioners allege that the United States has “violated” certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”) through their detention at the Guantanamo Bay Detention Facility (“Guantanamo”). The United States has undertaken a political commitment to uphold the American Declaration, a non-binding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).¹ Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal remedies have been pursued and exhausted. The Commission also lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to determine the legality of the petitioners’ detention because, during situations of armed conflict, the law of war is the *lex specialis*. As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.² Moreover, the Commission has no competence under its Statute or Rules to consider matters arising under the law of war and may not incorporate the law of war into the principles of the American Declaration.³

¹ As the American Declaration is non-binding, the United States understands any allegation of a “violation” of it to be an allegation that a country has not lived up to its political commitment to uphold the American Declaration.

² See Submission of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II. Doc. 30 January 2015, Mar. 30, 2015.

³ The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Despite the general presumption that specific law of war rules govern the entire process of planning and executing military operations in armed conflict, certain provisions of human rights treaties may apply in armed conflicts. However, treaties and customary international law may not be applied by the Commission through the non-binding American Declaration.

Failure to exhaust domestic remedies

Article 31(1) of the Rules only allows the Commission to consider a petition after it has verified that the “remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” Petitioners continue to pursue domestic remedies—respectively in federal court and in a military commission proceeding—for many of the claims asserted in the Petitions before the Commission, or have declined to raise these claims in available domestic fora.

Mr. Al Alwi filed a petition for a writ of *habeas corpus* with the United States District Court for the District of Columbia in 2005. After a two-day hearing in December 2008, the Court denied the petition, finding that Mr. Al Alwi (1) stayed at several guesthouses in Pakistan and Afghanistan that were closely associated with the Taliban and al-Qa’ida; (2) voluntarily surrendered his passport at a guesthouse closely associated with al-Qa’ida; (3) received military training at a Taliban camp and then travelled to two different fronts in Afghanistan to support Taliban forces; and (4) remained with Taliban forces after the attacks on September 11, 2001, and did not leave until U.S. forces began bombing the area. Based on these findings, the District Court concluded that Mr. Al Alwi’s detention was lawful under the AUMF.⁴ Mr. Al Alwi appealed this decision to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the decision of the District Court in July 2011 and concluded that Mr. Al Alwi was part of Al-Qa’ida or Taliban forces.⁵ In May 2015, Mr. Al Alwi filed a new petition for a writ of *habeas corpus* with the D.C. District Court, which is currently pending, claiming that the President declared an end to the combat mission in Afghanistan and there is no longer any lawful basis for his continued detention.⁶ The U.S. Government moved to dismiss that petition on September 4, 2015, arguing that active hostilities are ongoing in Afghanistan and citing to a recent order of the same court dismissing a similar petition by another Guantanamo Bay detainee.⁷

⁴ Al Alwi v. Bush, 593 F.Supp.2d 24 (D.D.C. 2008).

⁵ Al Alwi v. Obama, 653 F.3d 11, 13-15 (D.C. Cir. 2011).

⁶ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Al Alwi v. Obama, No. 1:15-cv-00681 (D.D.C. May 4, 2015).

⁷ Al Warafi v. Obama, No. 09-2368 (D.D.C. July 30, 2015).

Mr. Al Alwi argues that he need not exhaust domestic remedies because “there is no opportunity at all [in the domestic system] for him to address the appalling conditions of his detention.”⁸ However, in February 2014, the D.C. Circuit Court of Appeals ruled that detainees at Guantanamo can use a petition for a writ of *habeas corpus* to challenge certain “conditions of confinement” where such conditions would render that custody unlawful.⁹ Because Mr. Al Alwi’s most recent petition is actively under consideration by a U.S. domestic court, and because Mr. Al Alwi had the opportunity to raise appropriate habeas claims regarding both the lawfulness of his detention and the conditions of his confinement in this petition, his claims are inadmissible under Article 31 of the Rules.¹⁰

An attorney filed a petition for a writ of *habeas corpus* on behalf of Mr. Al Hawsawi in the D.C. District Court in 2008. In 2009, however, the petition was dismissed without prejudice because Mr. Al Hawsawi had not authorized the attorney to file the petition.¹¹ Although Mr. Al Hawsawi has not re-filed a petition challenging the factual basis for his detention, he did file a purported *habeas* petition in August 2015 seeking to obtain an independent medical examination, unredacted copies of his medical records, and other materials relating to his treatment and medical care during the course of his detention. Following a hearing on September 3, 2015, the District Court dismissed the petition on September 10, 2015. The District Court concluded that Mr. Al Hawsawi’s claims were not proper habeas claims because they neither challenged the legality of his detention nor the conditions of his confinement. Therefore, the court held the petition was

⁸ Al Alwi v. United States, Petition No. P-98-15, PM 46/15, Petition and Request for Precautionary Measures, Feb. 24, 2015, at 35.

⁹ Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014).

¹⁰ Compare Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Petition No. 478-05, Report No. 78/08 & 78/09, Admissibility, Aug. 5, 2009, ¶ 60 & Decision ¶ 3 (declaring case inadmissible with respect to one petitioner “because the presumed victim is pursuing civil domestic remedy”); Cherokee Nation v. United States, Case No. 11.071, Report No. 6/97, Admissibility, Mar. 12, 1997, ¶ 41 (finding petition inadmissible because “[t]here are still available, domestic remedies in the United States to be invoked and exhausted” and accordingly closing the case); Move Organization v. United States, Case No. 10.865, Report No. 19/92, Admissibility, Oct. 1, 1992, Analysis § b(2) & Conclusion ¶ 1 (finding petition inadmissible for failure to exhaust because petitioner “has invoked and is currently pursuing” domestic remedies).

¹¹ Order, Al Hawsawi v. Gates, No. 08-1645 (D.D.C. Jan. 28, 2009) (dismissing petition for writ of habeas corpus without prejudice).

jurisdictionally barred under Section 2241(e)(2) of Military Commissions Act of 2006.¹²

Additionally, Mr. Al Hawsawi has charges pending against him before a U.S. military commission. In that case, charges have been referred to a military commission, convened pursuant to the Military Commissions Act of 2009 (2009 MCA), and those proceedings are now in the pre-trial litigation phase.

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies.¹³ Although remedies may be considered ineffective when a claim has “no reasonable prospect of success” before domestic courts, “for example because the State’s highest court has recently rejected proceedings in which the issue posed in a petition had been raised[,] [m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”¹⁴ Because Mr. Al Hawsawi’s trial is currently ongoing in a military commission proceeding, he has not exhausted his appeal options related to the recent denial of his *habeas* petition, and he has the ability to raise appropriate habeas claims regarding both the lawfulness of his detention—although he has not chosen to do so—and the conditions of his confinement in this petition, his claims are also inadmissible under Article 31 of the Rules.

The Rules enumerate, at Article 31(2), the factors that could excuse the need for exhaustion: absence of due process, denial of access to remedies, and unwarranted delay. Both Petitioners argue that the domestic processes available to them have due process deficiencies, and that there has been unwarranted delay in the completion of domestic proceedings. However, we note that the evidentiary issues and other procedural concerns raised in the Petitions are matters within the expertise and competence of our independent federal judiciary, as the U.S.

¹² Memorandum Order, *Al-Hawsawi v. Obama*, No. 15-1257 (RJL) (D.D.C. Sept. 10, 2015).

¹³ *See, e.g.,* *Páez García v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) and Conclusion ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

¹⁴ *Sánchez et. al v. United States*, Petition 65/99, Report No. 104/05, Oct. 27, 2005, ¶ 67. *See also* *Kenneth Walker v. United States*, Case No. 12.049, Report No. 62/03, Admissibility, Oct. 10, 2003 (finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

Supreme Court ruled in *Boumediene v. Bush*,¹⁵ in holding that Guantanamo detainees have the right to challenge the legality of their detention through a petition for writ of *habeas corpus*. Indeed, many of the detainees at Guantanamo today have challenged their detention through *habeas* petitions in U.S. federal court.¹⁶ All of the detainees at Guantanamo who have prevailed in *habeas* proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. To date, 32 detainees have been ordered released as a result of *habeas* proceedings in federal court. In each of those cases, the United States relinquished custody of the detainees, and they were repatriated or resettled as appropriate.

Mr. Al Hawsawi claims that there has been unwarranted delay in his trial before a military commission. He is one of five co-defendants charged with committing multiple offenses related to an attack that killed approximately 3,000 victims. In complex cases such as these, the pace of the proceedings may be heavily influenced by defense counsel, who, in zealously representing their clients, challenge the rules, the law, and even the system itself. The seriousness of criminal proceedings and accountability under law require that the defense be given a full and fair opportunity to raise such legal challenges, and each one must be taken up methodically, and without resorting to perceived shortcuts, in order to pursue a justice that is truly sustainable. In Mr. Al Hawsawi's case, the parties have filed 183 substantive motions and have orally argued 43 motions in previous pre-trial sessions. Of the 183 substantive motions filed, eight have been mooted, dismissed, or withdrawn; 92 have been ruled on by the Commission; and an additional 36 have been submitted for and are pending decision.

¹⁵ 553 U.S. 723, 796 (2008).

¹⁶ Mr. Al Alwi argues that the Inter-American Court of Human Rights ("Inter-American Court") decision in *Velásquez Rodríguez v. Honduras* is analogous to this case. In that case, the Inter-American Court found the Petitioner did not have to exhaust domestic remedies because Petitioner was clandestinely held by the State in an unknown location with only hearsay evidence to establish his whereabouts. This is not analogous to either Petitioner's situation, as both are held in a known location at Guantanamo, with the opportunity for visits from their counsel and from the International Committee of the Red Cross, and classified evidence used by the government in *habeas* proceedings is made available to defense counsel who have proper clearance and to the judge for judicial evaluation. Additionally, Mr. Al Alwi argues that exhaustion is not required because the Commission stated that domestic remedies are ineffective when there is no reasonable possibility of success—in that case, because the Petitioners were challenging a life imprisonment without parole for a juvenile offender, and such a sentence had already been upheld in a prior case as constitutional. *Juvenile Offenders Sentenced to Life in Imprisonment Without Parole*, Petition 161/06, Report No. 18/72, Admissibility, Mar. 20, 2012. Petitioners' cases are not analogous, as the U.S. Supreme Court has held that Guantanamo detainees do have the right to challenge the legality of their detention.

Finally, Article 34(c) of the Rules requires that petitions be declared inadmissible when “supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order.” Both Petitioners, since the filing of their Petitions with the Commission, have filed separate petitions for a writ of *habeas corpus* with Federal courts in the United States as described above. This supervening information is further proof that the Petitioners are still actively engaged in domestic processes and have failed to exhaust domestic remedies under Article 31 of the Rules. Because effective domestic remedies are available and neither Petitioner has completed pursuit of his claims in either U.S. Federal court or the relevant military commission, the Petitions are inadmissible and the Commission must, in line with past practice, dismiss them.

Precautionary measures

The Commission requested precautionary measures in these matters on April 7, 2015, and May 7, 2015, respectively. The United States respectfully reiterates that the Commission does not have the authority to request that States not party to the American Convention adopt precautionary measures. As the reasons for the U.S. position on precautionary measures are well known,¹⁷ we will not restate them here. As such, the United States has construed the Commission’s request for precautionary measures as a nonbinding recommendation.

* * *

As a courtesy, we append to this letter our submission of March 2015 for material on the detention program at Guantanamo (Appendix A), and here provide some additional information including, where relevant, information specific to the Petitioners.

Procedural protections during habeas proceedings in Federal court and in military commission proceedings

All Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*.

¹⁷ See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D.

Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government in *habeas* proceedings to justify detention is disclosed to detainees' counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose *habeas* petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings.

As part of efforts to protect U.S. national security, military commissions and federal courts can—depending on the specific case—each provide tools that are both effective and legitimate. Eight charges against Mr. Al Hawsawi have been referred to a military commission: conspiracy; murder in violation of the law of war; attacking civilians; attacking civilian objects; destruction of property in violation of the law of war; intentionally causing serious bodily injury; hijacking aircraft; and terrorism. Mr. Al Hawsawi is presumed innocent unless and until proven guilty beyond a reasonable doubt. Pursuant to the requirements of the 2009 MCA, he has been provided defense counsel with specialized knowledge and experience in death penalty cases. As discussed above, these proceedings are currently in the pre-trial litigation phase.

All current military commission proceedings at Guantanamo are governed by the 2009 MCA, which instituted significant reforms to the system of military commissions. These reforms include prohibiting the admission at trial of statements obtained through cruel, inhuman, or degrading treatment, in addition to the existing prohibition on statements obtained through torture, except for statements by individuals alleging that they were subject to such treatment as evidence against a person accused of committing the torture or mistreatment. Evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment may not be received in evidence against an accused who made the statement unless the military judge determines by a preponderance of the evidence that (1) the evidence would have been obtained even if the statement had not been made, or (2) use of such evidence would otherwise be consistent with the interests of justice.

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 consistent with those in Additional Protocol II to the 1949 Geneva Conventions, including: the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; prohibitions on the use of coerced evidence; additional evidentiary requirements for the admission of hearsay evidence;¹⁸ a requirement that an accused in a capital case be provided with counsel “learned in applicable law relating to capital cases”;¹⁹ the provision of latitude to the accused in selecting his or her own military defense counsel; and enhancements to the accused’s right of discovery of evidence.

By statute and regulation, the Office of Military Commissions Convening Authority is responsible for ensuring that the defense and prosecution receive equitable resources and support for conducting their respective duties. The Convening Authority has approved millions of dollars of funding for defense experts and for travel associated with defense efforts in military commissions. Examples of the diverse array of support provided to an accused before military commissions include: civilian counsel learned in capital cases; multiple assistant defense counsel, both military and civilian; investigators, including those resident in particular countries that are difficult for U.S. personnel to access; intelligence analysts; security officers; linguists; mitigation specialists’ cultural competency consultants; medical experts, including psychologists and neuropsychologists;

¹⁸ International human rights law does not prohibit the use of hearsay in judicial proceedings. Moreover, in many international criminal tribunals, hearsay is admissible provided that it is relevant and probative. *See, e.g.*, International Criminal Tribunal for the former Yugoslavia, Order on Revised Guidelines on the Admission and Presentation of Evidence, Prosecutor v. Stanisić and Župljanin, Case No. IT-08-91-T, Oct. 2, 2009. In U.S. military commission proceedings, hearsay is admissible only after the commission applies a rigorous test to ensure that the statements bear the hallmarks of trustworthiness and reliability and that the declarants are unavailable to testify. The government must establish for each hearsay statement it seeks to admit into evidence that the statement is corroborated by other evidence, there exist indicia of reliability within the statement, and the statement was voluntary. Military Commissions Rule of Evidence (MCRE) 803(b)(2), Department of Defense Office of Military Commissions, U.S. MANUAL FOR MILITARY COMMISSIONS, 2012, at III-53. Additionally, in accordance with MCRE 803(b)(2)(A)–(D), the government must demonstrate that each statement is probative of the evidence of a materiel fact, the declarant is not available to testify at trial, and the general purposes of the rules of evidence and the interests of justice will be best served by admitting the statement into evidence.

¹⁹ Rules for Military Commissions (RMC) 506(b), Department of Defense Office of Military Commissions, U.S. MANUAL FOR MILITARY COMMISSIONS, 2012, at III-33.

victim outreach specialists; videographers; forensic accountants; jury consultants; and DNA and ballistic experts.

The 2009 MCA also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review, and subsequently to the D.C. Circuit Court of Appeals, and then to the U.S. Supreme Court, both of which are federal civilian courts comprised of life-tenured judges. An example of this right to appellate review is ongoing litigation over what offenses can be tried by military commission under the U.S. Constitution and whether conviction for certain offenses in the MCA for pre-2006 conduct would amount to an *ex post facto* violation.²⁰ The D.C. Circuit Court of Appeals has held that two MCA offenses, material support for terrorism and solicitation, could not be applied to certain pre-2006 conduct, but did not find an *ex post facto* violation for convicting a defendant on conspiracy to commit war crimes under a plain error standard of review.²¹ The separate question of whether a conspiracy can be prosecuted by military commission under the U.S. Constitution is currently being litigated in the D.C. Circuit.²² Mr. Al Hawsawi may ultimately choose to litigate in U.S. federal appellate courts his arguments that it would be unconstitutional to try by military commission the offenses of (1) terrorism or (2) hijacking or hazarding a vessel or aircraft, or that it would amount to an *ex post facto* violation to do so for pre-2006 conduct.

Further, the United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are transmitted via video feed to locations at Guantanamo 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 website of the Office of Military Commissions: www.mc.mil.

The United States has a strong interest in ensuring that the detainees at Guantanamo have meaningful access to counsel in both *habeas* and military

²⁰ U.S. CONST., art. 9 § 9. Additionally, Article 15 of the International Covenant on Civil and Political Rights, states that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

²¹ *Al Bahlul v. United States*, 792 F. 3d 1, 3 (D.C. Cir. 2015).

²² Order, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Sept. 25, 2015) (granting rehearing en banc).

commission proceedings. The U.S. Government respects the critical role of detainees' counsel in these proceedings and, more broadly, the fundamental importance of that role in the U.S. system of justice. It will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

To that end, in response to defense concerns that presumptive classification, a handling procedure designed to enable counsel to use information obtained from their clients while also safeguarding classified information, unfairly burdens the attorney-client relationship, in September 2012, the U.S. Government requested a modification of the protective order applicable to the military commission proceedings for Mr. Al Hawsawi specifically. That modification, which was granted by the military commission judge and reflected in the revised protective order issued in December 2012, removes the presumption of classification from statements made by Mr. Al Hawsawi and is intended to clarify that defense counsel, who have always had the ability to discuss with their client a broad range of topics directly related to the military commission proceeding, may now publicly discuss information unless they have reason to know it is classified. Additionally, the military commission procedures provide for a robust attorney-client privilege, which is not waived by any application of the handling procedures required by the protective order.

As holders of a valid U.S. security clearance,²³ detainees' defense and *habeas* lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. Government. All holders of U.S. security clearances are subject to these same obligations. In accordance with Executive Order 13526, in no case may information be classified in order to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency."

²³ According to applicable Counsel Access procedures for military commissions, defense counsel must have a valid, current U.S. security clearance at the appropriate level in order to have in-person access to detainees at Guantanamo. The Counsel Access procedures governing prosecutions by military commissions are modeled on the Counsel Access procedures applicable to counsel representing detainees in *habeas corpus* cases, which were issued by a U.S. federal court. These procedures balance the strong interest in counsel access with the need to comply with U.S. law and regulations regarding the protection of classified national security information.

Periodic Review Boards

Certain detainees at Guantanamo, including Mr. Al Alwi,²⁴ are also eligible for review by the Periodic Review Board (PRB), which continues its work of assessing whether continued law of war detention of certain detainees is necessary to protect against a continuing significant threat to the security of the United States. Mr. Al Alwi's PRB hearing took place on September 22, 2015. Since the PRB began its work in October 2013, it has held 22 full hearings, with the results of 18 now made publicly available. Of those 18 determinations, 13 detainees were designated for transfer, three of whom have already been transferred to their countries of origin. The pace of hearings has already increased in 2015, with 12 hearings and four file reviews conducted thus far this year and more upcoming, as listed on the PRB website. The PRB is not designed to assess the lawfulness of a detainee's detention. If, however, at any time during the periodic review process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Treatment in detention

The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. On one of his first days in office, January 22, 2009, President Obama issued Executive Order 13491, Ensuring Lawful Interrogations. The Executive Order directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It further ordered that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in the Army

²⁴ Mr. Al Hawsawi is currently being tried in a military commission proceeding, and therefore is not eligible for PRB review at this time.

Field Manual 2-22.3. The Field Manual explicitly prohibits threats, coercion, and physical abuse.

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. Facilities at Guantanamo are routinely maintained for habitability, which would include repairing or replacing equipment, plumbing, or structures in the interest of humane treatment consistent with applicable treatment standards.

The U.S. Department of Defense has been working closely with the International Committee of the Red Cross to facilitate increased opportunities for Guantanamo detainees to communicate with their families. The addition of near real-time communication is another step in the Department of Defense's efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of detention for detainees in its custody. The Department of Defense has concluded that increasing family contact for the high-value detainees can be done in a manner that is consistent with both humanitarian and security interests.

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention.²⁵ The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while

²⁵ Respondent's Opposition to Petitioner's Motion to Reinstate His Habeas Petition and for Judgement on the Record, Exhibit 1, *Odah v. Obama*, 1:06-cv-01668-TFH (D.D.C. Sept. 9, 2015) ¶¶ 7, 8 ("Respondent's Opposition"). "Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians." *Id.* ¶ 7. "Detainees may make a request to guard personnel in the cell blocks or to the medical personnel who make daily rounds on each cell block at any time in order to initiate medical care. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by ... staff. In general, health care is provided with the consent of the detainee. ... The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees and the medical staff, followed by inpatient care as needed." *Id.* ¶ 8.

serving at Joint Task Force–Guantanamo.²⁶ U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Department of Defense physicians and healthcare personnel charged with providing care to detainees take their responsibility for the health of detainees very seriously.²⁷ Military physicians, psychologists, and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Medical care is not provided or withheld based on a detainee’s compliance or noncompliance with detention camp rules or based on his refusal to accept food or drink.

Mr. Al Alwi raises in his petition concerns about enteral feeding. It is the policy of the United States to support the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws. To that end, the Department of Defense has established clinically appropriate procedures to address the medical care and treatment of individual detainees experiencing the adverse health effects of clinically significant weight loss, including those individuals who are engaged in hunger strikes. Involuntary feeding is used only as a last resort, if necessary to address significant health issues caused by malnutrition and/or dehydration, and is never used as a form of

²⁶ “The JMG staff includes licensed, board-certified physicians of different specialties. Specifically, as of July 2015, the medical staff ... professionally trained individuals, including 2 family physicians, a physician’s assistant, an internist/oncologist, a psychologist, a dentist, licensed medical/surgical nurses, corpsmen (formally trained Navy medical personnel akin to a ‘medic’ in the Army), various technicians (lab, radiology, pharmacy, operating room, respiratory therapy, physical therapy, and biomedical repair), and administrative staff. The Naval Hospital Guantanamo provides additional consultative services from numerous medical professionals including an anesthesiologist, a general surgeon, an orthopedic surgeon, a licensed dietician, and a physical therapist. We routinely bring in specialists, including medical professionals practicing in the area of Dermatology, Cardiology, Otorhinolaryngology (Ear, Nose, and Throat), Gastroenterology, Urology, and Audiology, and have the ability to request specialists from other areas as needed.” *Id.* ¶ 4.

²⁷ DoD Instruction 2310.08E states: “Health care personnel charged with the medical care of detainees have a duty to protect detainees’ physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces.” U.S. Department of Defense, *Medical Program Support for Detainee Operations*, Instruction 2310.08E, June 6, 2006, available at <http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf>.

punishment.²⁸ These procedures are administered in accordance with all applicable domestic and international laws pertaining to humane treatment.

Once a decision has been made to approve a detainee for enteral feeding, JMG staff continues to perform an ongoing assessment of the detainee's medical condition (including laboratory tests if permitted by the detainee) and his need to be enterally fed. The goal is always to restore a detainee to a normal, healthy weight and foster eating habits that include regular meals.²⁹

The Joint Task Force makes every effort to accommodate the religious and cultural practices of detainees. Detainees at Guantanamo have the opportunity to pray five times each day.³⁰ Prayer times are posted for the detainees, and arrows are painted in the living areas—in each cell and in communal areas—so that the detainees know the direction of Mecca. Once prayer call sounds, detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if detainees are not involved in religious activity. The majority of detainees are in communal living accommodations, where they are able to pray communally. Even detainees who are in single-cell living accommodations conduct prayer together.

²⁸ “Joint Medical Group personnel provide extensive counseling and detailed warnings to detainees concerning the risks of their failure to eat or drink. Medical personnel (including behavioral health professionals) continually remind detainees, who persist in their refusal to consume meals and water, that this behavior could endanger their health or life. During these conversations, the medical personnel explain that their role is to preserve and promote the detainee's life and health, and urge the detainees to accept voluntarily accept enough nutrients to increase their weight and improve their health.” Respondent's Opposition, *supra* note 25, at ¶ 12.

²⁹ “Once a decision has been made to approve a detainee for enteral feeding, JMG staff continues to perform an ongoing assessment of the detainee's medical condition (including laboratory tests if permitted by the detainee) and his need to be enterally fed. Our goal is always to restore a detainee to a normal, healthy weight and foster eating habits that include regular meals. We look at detainee weight trends and other clinical factors, such as meal or calorie intake and medical comorbidities, every day to determine whether detainees should remain approved for enteral feeding. We continually assess what would happen if a detainee stopped his intake of food and fluids, and how his clinical history and other factors bear upon the consequent health risks. Notably, our concern is with ensuring that a fasting detainee consumes proper nutrition, not with enteral feeding per se. So even after a detainee is approved for enteral feeding, he is offered opportunity to eat a standard meal or consume the liquid supplement orally in advance of every enteral feeding and if he does so, he will not be enterally fed.” *Id.* ¶13.

³⁰ Joint Task Force Guantanamo schedules detainee medical appointments, interviews, classes, legal visits, and other activities mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meal schedules in observance of religious requirements. Special accommodations are made to adhere to Islamic dietary needs. Department of Defense personnel deployed to Guantanamo receive cultural training to ensure they understand Islamic practices.

* * *

In sum, the Petition is inadmissible for lack of competence and for failure to exhaust domestic remedies under Articles 31 and 34. The Commission should accordingly declare the Petition inadmissible and, in line with its own practice, close this matter. It should not hold the Petition in abeyance pending exhaustion of domestic remedies. Holding an inadmissible petition in abeyance—by explicitly deciding to hold the petition or by simply taking no action and allowing the matter to remain open on the Commission’s docket—has no basis in the Rules and sets a poor example for future petitions that are similarly deficient. The information provided above as a courtesy, and appended to this letter, also shows that these petitions to lack merit. We reserve the right to submit further observations should these matters reach the merits stage.

Please accept renewed assurances of my highest consideration.

Sincerely,



Michael J. Fitzpatrick
Interim Permanent Representative

Enc. Submission of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II. Doc. 30 January 2015, Mar. 30, 2015



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D. C. 20520

March 30, 2015

Dr. Emilio Alvarez-Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Draft Report on the Closure of Guantanamo Bay detention
facility**

Dear Dr. Alvarez-Icaza:

I have the honor to transmit to you the enclosed U.S.
Government response to the Inter-American Commission on Human
Rights Draft Report on the Closure of Guantanamo Bay detention
facility.

Please accept renewed assurances of my highest
consideration.

Sincerely,

for: [Signature] (for)

Michael J. Fitzpatrick
Interim Permanent Representative

Submission of the Government of the United States to the
Inter-American Commission on Human Rights
with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II.
Doc. 30 January 2015

I. Introduction

The Government of the United States appreciates the opportunity to comment on the draft report “Towards the Closure of Guantanamo.” We appreciate the Commission’s extensive efforts in preparing this draft report. The United States respects and supports the Commission and the strong sense of integrity and independence that historically has characterized its work.

This response aims at assisting the Commission by providing general views of the United States on several of the matters addressed in the Commission’s draft report. The lack of any specific objection to particular legal or factual propositions in the draft report should not be read as agreement with such propositions. In order to frame our substantive response to the Commission’s draft report, we believe it important to offer some reflections on the legal framework the Commission has used in its discussion and analysis of U.S. law of war detention operations at Guantanamo. Subsequently, we will provide comments regarding the discussion of particular issues in the report.

II. Relevant International Legal Framework

All U.S. military detention operations conducted at Guantanamo Bay are carried out in accordance with the law of armed conflict, also known as the “law of war” or international humanitarian law (IHL), including Common Article 3 of the Geneva Conventions of 1949, and all other applicable international and domestic laws.

The detainees who remain at the Guantanamo Bay detention facility continue to be detained lawfully, both as a matter of international law and under U.S. domestic law. As a matter of international law, the United States is engaged not in a “war on terrorism,” as characterized in the draft report, but in an ongoing armed conflict with al-Qaida, the Taliban, and associated forces. As part of this conflict, the United States has captured and detained enemy belligerents, and is permitted under the law of war to hold them until the end of hostilities. Further, as a matter of domestic law, this detention is authorized by the 2001 Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war. We object to the finding that U.S. detention operations at Guantanamo constitute arbitrary detention in violation of applicable international law. In both international and non-international armed conflicts, a State may detain enemy belligerents consistent with the law of armed conflict until the end of hostilities, and such detention is not arbitrary.

During situations of armed conflict, the law of war is the *lex specialis* and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Further, despite the general presumption that specific law of war rules govern the entire process of planning and executing military operations in armed conflict, certain provisions of human rights treaties may apply in armed conflicts. For example, the obligations to prevent torture and cruel, inhuman, or degrading treatment or punishment in the Convention Against Torture (CAT) remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of war. As our response in Section IV further demonstrates, the United States is fully committed to ensuring that individuals it detains in any armed conflict are treated humanely in all circumstances, consistent with applicable U.S. treaty obligations, U.S. domestic law, and U.S. policy.

The United States notes that many of the sources referred to by the Inter-American Commission do not give rise to binding legal obligations on the United States or are not within the Commission's mandate to apply with respect to the United States. The United States has undertaken a political commitment to uphold the American Declaration of the Rights and Duties of Man ("American Declaration"), a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory states.¹ Article 20 of the Statute of the Inter-American Commission on Human Rights ("IACHR Statute") sets forth the powers of the Commission that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Further, the United States reiterates its understanding that the Commission lacks the authority to issue precautionary measures to a non-State Party to the American Convention.² Accordingly, we continue to have concerns about the

¹ Because the American Declaration is non-binding, the United States interprets any assertions regarding alleged violations of the American Declaration as allegations that the United States has not lived up to its political commitment to uphold the Declaration. Furthermore, as the IACHR Statute makes clear, the powers of the Commission to issue recommendations as set forth in Article 20 to States not party to the American Convention are strictly advisory. Article 18 of the IACHR Statute sets forth enumerated powers of the Commission with respect to Member States of the OAS including preparing "such studies or reports as it considers advisable for the performance of its duties," making "recommendations to the governments of the states on the adoption of progressive measures in favor of human rights," and conducting "on-site observations in a state, with the consent or at the invitation of the government in question."

² See July 15, 2002, U.S. Additional Response to the request for precautionary measures – detention of enemy combatants at Guantanamo Bay, Cuba.

jurisdictional competence of the Commission with respect to the United States and the law of war.

Moreover, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor, as previously noted, is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention does not govern U.S. commitments under the American Declaration. Likewise, advisory opinions of the Inter-American Court interpreting other international agreements, such as the International Covenant on Civil and Political Rights (ICCPR), are not relevant.

III. Overview of United States’ Efforts and Accomplishments Regarding Guantanamo Closure

The United States continues to work toward the goal of closing the detention facility at Guantanamo Bay, a process that started under the Bush Administration, and is working assiduously to reduce the detainee population at Guantanamo and to close the facility in a responsible manner that protects national security. President Obama has repeatedly reaffirmed this commitment, including in his State of the Union Address in January 2015; he has stated that closing the detention facility at Guantanamo is a national security imperative and that its continued operation weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists.

On January 22, 2009, President Obama signed Executive Order (E.O.) 13492, which ordered the closure of the detention facility at Guantanamo Bay. Pursuant to that order, the Department of Justice coordinated a special Guantanamo Review Task Force, which was established to review comprehensively information in the possession of the U.S. Government about the detainees in order to determine the appropriate disposition--transfer, prosecution, or other lawful disposition--for each of the 240 detainees subject to the review.

It is important to note that a decision to designate a detainee for transfer does not reflect a decision that the detainee poses no threat, nor does it equate to a judgment that the U.S. Government lacks legal authority to hold the detainee. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. The United States continues to have legal authority to hold Guantanamo detainees in law of war detention until the end of hostilities, consistent with U.S. law and applicable international law, but has elected, as a policy matter, to ensure that it holds them no longer than necessary to mitigate the threat posed.

Subsequently, after working through numerous, complex issues associated with building a comprehensive process, the Periodic Review Board (PRB) process commenced in October 2013. The PRB consists of senior national security officials from the Departments of Defense, Homeland Security, Justice, and State, as well as from the Office of the Chairman of the Joint Chiefs of Staff and the Office of the Director of National Intelligence. The PRB process is a discretionary, administrative, interagency process that is reviewing the status of detainees at Guantanamo Bay to determine whether continued detention remains necessary to protect against a continuing significant threat to the security of the United States. In this way, the United States will ensure that any continued detention is carefully evaluated and justified. The PRB process thus makes an important contribution toward the Administration's goal of closing the Guantanamo Bay detention facility by ensuring a principled and sustainable process for reviewing the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

The PRB has conducted fourteen full hearings and three six-month file reviews. Eight of the full hearings have resulted in a final determination that law of war detention is no longer necessary, and one hearing is still pending a final determination.

Since 2002, more than 640 detainees have departed Guantanamo Bay to more than 40 countries, including OAS Member States. The United States is grateful to these governments for their support for U.S. efforts to close the Guantanamo Bay detention facility. All told, more than 80 percent of those at one time held at the Guantanamo Bay facility have been repatriated or resettled, including all detainees subject to final court orders directing their release. Of the 242 detainees at Guantanamo at the beginning of the Obama Administration, 116 have been transferred out of the facility. In 2014, 28 detainees were transferred from the facility, more than in any year since 2009. As of March 27, 2015, 122 detainees remain at the Guantanamo Bay detention facility, the lowest number since the initial weeks after the facility was opened. Of these, 56 are eligible for transfer, 10 are being prosecuted or have been convicted, with 2 currently awaiting sentencing, and the remaining 56 will be reviewed by the PRB.

IV. Responses to Particular Issues Raised

A. Conditions of Detention

1. Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

It is the clear position of the United States that torture and cruel treatment are categorically prohibited under domestic and international law, including human rights law and the law of armed conflict. The United States has taken important steps to ensure adherence to its legal obligations, establishing laws and procedures to strengthen the safeguards against torture and cruel treatment. For example, E.O. 13491, issued by President Obama during his first days in office, directs that, consistent with the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions, as

well as U.S. law, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. The Executive Order also directs that no individual in U.S. custody in any armed conflict “shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.” The manual explicitly prohibits threats, coercion, and physical abuse. Interrogations undertaken in compliance with the Army Field Manual are consistent with U.S. domestic and international legal obligations. E.O. 13491 also revoked all previous executive directives that were inconsistent with the Order, provided that no officer, employee, or agent of the U.S. Government could rely on any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009, and created a Special Task Force on Interrogations and Transfer Policies, which helped strengthen U.S. policies so that individuals transferred to other countries would not be subjected to torture.

The United States does not permit its personnel to engage in acts of torture or cruel, inhuman, or degrading treatment or punishment of any person in its custody either within or outside U.S. territory. As the United States recently reaffirmed in its presentation before the U.N. Committee Against Torture in November 2014, torture and cruel, inhuman, or degrading treatment or punishment are prohibited at all times in all places.

The Commission’s draft report references the release of the declassified Executive Summary, Findings, and Conclusions of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program (“SSCI Report”). The SSCI Report contains a review of a program that included interrogation methods used on terrorism suspects in secret facilities at locations outside of both the United States and Guantanamo Bay. 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. In E.O. 13491, President Obama prohibited the use of those techniques and ended the detention and interrogation program described in the SSCI Report. President Obama also determined that the Executive Summary, Findings, and Conclusions of the SSCI Report should be declassified, with appropriate redactions necessary to protect national security, because public scrutiny, debate, and transparency will help to inform the public’s understanding of the program to ensure that the United States never resorts to these kinds of interrogation techniques again.

2. Accountability

The Department of Defense, the Central Intelligence Agency (CIA), the Department of Justice, and others have conducted numerous independent, rigorous investigations into detainee treatment, detention policy, and conditions of confinement since the September 11 attacks.

Reports have been issued by, among others, the Inspectors General of the Army, Navy, and CIA; Major General Ryder, the General Officer appointed by the Commander, U.S. Southern Command, for the purpose of investigating conditions of detention; an independent panel led by former Secretary of Defense James Schlesinger; the Senate Armed Services Committee; and the Senate Select Committee on Intelligence. For the sake of transparency and accountability, many of these reports were released to the public, to the extent consistent with national security and other applicable U.S. law and policy. These investigations led to hundreds of recommendations on ways to improve detention and interrogation operations, and the Department of Defense and the CIA have instituted processes to address these recommendations.

The U.S. military is, and has always been, required to investigate every credible allegation of abuse by U.S. forces in order to determine the facts, including identifying those responsible for any violation of law, policy, or procedures. The Department of Defense has multiple accountability mechanisms in place to ensure that personnel adhere to law and policy associated with military operations and detention.

The Department of Justice conducted preliminary reviews and criminal investigations into the treatment of individuals alleged to have been mistreated while in U.S. Government custody subsequent to the September 2001 terrorist attacks, brought criminal prosecutions in several cases, and obtained the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody. Further, in August 2009, the Department of Justice commenced a preliminary review of the treatment of 101 persons alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks. That review, led by Assistant United States Attorney John Durham, who is a career federal prosecutor, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution consistent with the Principles of Federal Prosecution, which require that each case be evaluated for a clear violation of a federal criminal statute with provable facts that reflect evidence of guilt beyond a reasonable doubt and a reasonable probability of conviction.

With respect to accountability for legal advice, the conduct of two senior Department of Justice officials in giving legal advice that justified the use of certain “enhanced interrogation techniques” following the September 11 attacks was reviewed by an Associate Deputy Attorney General, a longtime career Department of Justice official. In a 69-page January 5, 2010 memorandum subsequently released publicly with limited redactions, he found that they had narrowly construed the torture statute, often failed to expose countervailing arguments, and overstated the certainty of their conclusions. He concluded that although they had exercised poor judgment, the evidence did not establish that they had engaged in professional misconduct.

3. Camp 7 Conditions

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo Bay, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other

applicable international and domestic laws. Camp 7 is a climate-controlled, single-cell facility currently used to house a small group of special detainees at Guantanamo captured during operations in the war against al-Qaida, the Taliban, and associated forces. The transfer of these detainees to Guantanamo Bay was announced in 2006. Individuals in this group are accused of plotting the September 11 attacks on the United States, the attack on the USS COLE, and various other attacks that have taken the lives of innocent civilians around the world. Facilities at Camp 7 or at any of the other camps are routinely maintained for habitability, which would include repairing or replacing equipment, plumbing, or structures in the interest of humane treatment consistent with applicable treatment standards.

The Department of Defense has been working closely with the International Committee of the Red Cross to facilitate increased opportunities for high-value Guantanamo detainees to communicate with their families. The addition of near-real-time communication is another step in the Department of Defense's efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of confinement for detainees in its custody. The Department of Defense has concluded that increasing family contact for the high-value detainees can be done in a manner that is consistent with both humanitarian and security interests.

4. Role of Health Professionals

The Joint Medical Group at Guantanamo is committed to providing appropriate and comprehensive medical care to all detainees. The healthcare provided to the detainees being held at the Guantanamo Bay detention facility is comparable to that which our own service personnel receive while serving at Joint Task Force-Guantanamo. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialty physicians.

U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Department of Defense physicians and health care personnel charged with providing care to detainees take their responsibility for the health of detainees very seriously. DoD Instruction 2310.08E, "Medical Program Support for Detainee Operations," June 6, 2006, states: "Health care personnel charged with the medical care of detainees have a duty to protect detainees' physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces."

Military physicians, psychologists, and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations.

Department of Defense policy authorizes healthcare personnel qualified in behavioral sciences to provide consultative services to support authorized law enforcement or intelligence activities, including observation and advice on the interrogation of detainees when the interrogations are fully in accordance with applicable law and interrogation policy. These behavioral science consultants are not involved in the medical treatment of detainees and do not access medical records.

It is the policy of the United States to support the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws. To that end, the Department of Defense has established clinically appropriate procedures to address the medical care and treatment of individual detainees experiencing the adverse health effects of clinically significant weight loss, including those individuals who are engaged in hunger strikes. Involuntary feeding is used only as a last resort, if necessary to address significant health issues caused by malnutrition and/or dehydration. These procedures are administered in accordance with all applicable domestic and international laws pertaining to humane treatment.

5. Religious and Cultural Accommodations

Detainees at Guantanamo have the opportunity to pray five times each day. Prayer times are posted for the detainees, and arrows are painted in the living areas—in each cell and in communal areas—so that the detainees know the direction of Mecca. Once prayer call sounds, detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if detainees are not involved in religious activity. The majority of detainees are in communal living accommodations, where they are able to pray communally. Even detainees who are in single cell living accommodations conduct prayer together.

Joint Task Force Guantanamo schedules detainee medical appointments, interviews, classes, legal visits, and other activities mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meal schedules in observance of religious requirements. Special accommodations are made to adhere to Islamic dietary needs. Department of Defense personnel deployed to Guantanamo receive cultural training to ensure they understand Islamic practices.

6. Requests by the Commission to Visit the Guantanamo Bay Detention Facility

The United States is committed to being as open and transparent to the international community as possible. We have invited the Commission to visit the Guantanamo Bay detention facility and view the detention operations there. However,

because of relevant security procedures in effect at the detention facility, we are unable to accommodate the Commission's request to meet with detainees held there. The United States continues to recognize the special role of the International Committee of the Red Cross (ICRC) under the Geneva Conventions of 1949 and grants it access to all detainees held at Guantanamo Bay. We value our relationship with the ICRC and address any concerns it may raise at all levels of the chain of command.

B. Access to Justice

1. Habeas Corpus

All Guantanamo Bay detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge. Except in rare instances required by compelling security interests, all of the evidence relied upon by the government in habeas proceedings to justify detention is disclosed to the detainees' counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose cases have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during pendency of proceedings.

With regard to the effectiveness of the habeas remedy afforded to Guantanamo detainees, the United States notes that the evidentiary issues and other procedural concerns raised in the draft report are matters within the expertise and purview of our independent federal judiciary, as the U.S. Supreme Court ruled in *Boumediene v. Bush*, 553 U.S. 723, 796 (2008). Many of the detainees at Guantanamo today have challenged their detention in U.S. federal courts. All of the detainees at Guantanamo who have prevailed in habeas proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. To date, 32 detainees have been ordered released, and they were transferred from Guantanamo pursuant to U.S. federal court orders.

2. Military Commissions

The U.S. Government remains of the view that in our efforts to protect our national security, military commissions and federal courts can – depending on the circumstances of the specific prosecution – each provide tools that are both effective and legitimate. A statutory ban currently prohibits the use of funds to transfer Guantanamo detainees to the United States, however, even for prosecution in federal court.

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 consistent with those in Additional Protocol II to the 1949 Geneva Conventions, as well.

These include: (1) innocence is presumed and the prosecution must prove guilt beyond a reasonable doubt; (2) there is a prohibition on the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except against a person accused of torture or such treatment as evidence that the statement was made; (3) the accused has latitude in selecting defense counsel; (4) in capital cases, the accused is provided counsel “learned in applicable law relating to capital cases”; and (5) the accused has the right to pre-trial discovery.

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, and subsequently to the U.S. Court of Appeals for the District of Columbia Circuit and then to the U.S. Supreme Court, both of which are federal civilian courts comprised of life-tenured judges.

Further, 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, www.mc.mil.

C. Transfer Issues

1. Yemeni Detainees

Seventy-five of the remaining 122 detainees at Guantanamo are Yemeni nationals, 18 of whom are designated for transfer subject to appropriate security measures. An additional 30 Yemeni nationals are designated for “conditional detention,” which means they are not approved for repatriation to Yemen at this time, but may be transferred to third countries if an appropriate resettlement option becomes available, or repatriated to Yemen in the future if security conditions improve.

The current situation in Yemen precludes us from repatriating Yemeni detainees at this time. Accordingly, we are vigorously engaging with partners and allies around the world for assistance in resettling these detainees. The U.S. Government, through intensive diplomatic efforts across the world, has found and continues to identify countries willing to resettle Yemeni detainees, including recent transfers of four individuals to Oman, three to Kazakhstan, three to Georgia, and one each to Slovakia and Estonia.

2. Non-refoulement

As a matter of fundamental policy and practice, the United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured.

The United States' firm and long-standing commitment to this policy is demonstrated in many ways, such as in section 1242 of the Foreign Affairs Reform and Restructuring Act where it is explicitly stated, and in E.O. 13491, which required the formation of a special U.S. Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and U.S. policies pertaining to treatment.

The United States considers the totality of relevant factors relating to the individual to be transferred and the proposed recipient government in question. Such factors include, but are not limited to:

- the individual's allegations of prior or potential mistreatment by the receiving government;
- the receiving country's human rights record;
- whether post-transfer detention is contemplated;
- the specific factors suggesting that the individual in question is at risk of being tortured by officials in that country;
- whether similarly situated individuals have been tortured by the country under consideration;
- and, where applicable, any diplomatic assurances of humane treatment from the receiving country (including an assessment of their credibility).

Humane treatment assurances are necessarily tailored to the specific context of a particular transfer. With respect to law of war detainee transfers, it is U.S. practice to obtain access for post-transfer monitoring where post-transfer detention by the receiving state is anticipated. Specifically, the United States seeks consistent, private access to the individual who has been transferred and thereafter detained, with minimal advance notice to the detaining government.

If the United States determines, after taking into account all relevant information, including any assurances received and the reliability of such assurances, that it is more likely than not that a person would be tortured if transferred to a foreign country, the United States would not approve the transfer of the person to that country.

V. Conclusion

We wish to again thank the Commission for the opportunity to comment on this draft report. We respectfully request that the Commission carefully consider the U.S. Government's response to the Commission's draft report as conveyed herein, and assimilate that response into the final report.