



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

March 29, 2016

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, MC-46-15  
Response to Inquiry of February 17, 2016**

Dear Mr. Icaza:

Thank you for the letter of your office dated February 17, 2016, inquiring about U.S. views in the above-referenced matter. We take this opportunity to remind your office that we submitted such views on October 6, 2015, which your office acknowledged in a letter dated October 26, 2015. Both these documents are enclosed for your reference.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Fitzpatrick".

Michael J. Fitzpatrick  
Interim Permanent Representative

Enc. Al Alwi & Al Hawsawi U.S. Joint Response to Petitions, Oct. 6, 2015  
Acknowledgment of Oct. 6, 2015, Filing, Oct. 26, 2015



THE PERMANENT REPRESENTATIVE  
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UNITED STATES OF AMERICA  
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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).<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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

<sup>6</sup> 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).

<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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

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

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

<sup>10</sup> 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).

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.”<sup>14</sup> 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.

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

<sup>13</sup> 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).

<sup>14</sup> *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*,<sup>15</sup> 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.<sup>16</sup> 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.

<sup>15</sup> 553 U.S. 723, 796 (2008).

<sup>16</sup> 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,<sup>17</sup> 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*.

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<sup>17</sup> 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;<sup>18</sup> a requirement that an accused in a capital case be provided with counsel “learned in applicable law relating to capital cases”;<sup>19</sup> 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;

<sup>18</sup> 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.

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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](http://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

<sup>20</sup> 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.”

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

<sup>22</sup> 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,<sup>23</sup> 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."

<sup>23</sup> 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,<sup>24</sup> 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

<sup>24</sup> 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.<sup>25</sup> The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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

<sup>26</sup> "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.

<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.

<sup>28</sup> "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.

<sup>29</sup> "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.

<sup>30</sup> 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 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