

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID  
 MUHAMMAD SALIH MUBARAK BIN  
 ‘ATTASH, RAMZI BIN AL SHIBH, ALI  
 ABDUL-AZIZ ALI, MUSTAFA AHMED  
 ADAM AL HAWSAWI

AE424(AAA)

**Mr. al Baluchi’s Motion to Compel**  
 Joint Task Force-Guantánamo Bay  
 to Permit Access of the United Nations Special  
 Rapporteur on Torture to Camp 7 and the  
 Defendants

12 May 2016

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel Joint Task Force-Guantánamo Bay (JTF-GTMO) to allow Mr. Juan Méndez, the United Nations Special Rapporteur on Torture, an inspection of Camp 7 and private interviews with consenting defendants, in accordance with his mandate.

3. **Overview:** Both domestic and international law prohibit torture and cruel, inhuman, and degrading treatment, and require the active prevention of such acts by states. The United Nations Special Rapporteur on Torture is mandated to carry out independent inspections of prisons and detention centers around the world in order to ensure compliance with the customary prohibition on torture. Despite the long history of torture at Guantánamo and continuing allegations of torture and abuse, JTF-GTMO has denied the Special Rapporteur access to Guantánamo in accordance with his mandate, which requires the ability to inspect the prison as well as interview detainees privately.<sup>1</sup> One of the many negative effects of this policy is to deny the defendants an important source of evidence about their former torture and current conditions of confinement. To remedy this violation of international norms and provide Mr. al Baluchi with a fair trial, the

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<sup>1</sup> See, e.g., Guardian, “Pentagon Denies U.N. Investigator Chance to Interview Guantánamo Detainees,” Mar. 15, 2015, available at <http://www.theguardian.com/us-news/2015/mar/15/pentagon-un-torture-investigator-interview-Guantánamo-detainees>.

commission should order JTF-GTMO to grant the Special Rapporteur an inspection of Camp 7 and to private interviews with consenting defendants.

4. **Burden and Standard of Proof:** The defense bears the burden of proof on this motion.

5. **Facts:** The United Nations Commission for Human Rights<sup>2</sup> created the position of Special Rapporteur on Torture in 1985 as one of the Commission's thematic experts tasked with examining issues and incidences of torture worldwide.<sup>3</sup> The rapporteurship on torture is therefore one of the longest-standing "Special Procedures" of the United Nations, and each Special Rapporteur may be serve a maximum of two consecutive three-year terms.<sup>4</sup> The Special Rapporteur on Torture's mandate is comprised of three main activities: transmitting urgent communications to states regarding individuals at risk of torture and past incidences of torture; undertaking fact-finding visits to states; and submitting annual reports to the Human Rights Council and General Assembly of the United Nations.<sup>5</sup> Notably, the Special Rapporteur's mandate covers all states, regardless of their status as signatories of the Convention Against Torture (CAT), due to the customary (binding) nature of the prohibition on torture and cruel, inhuman, and degrading treatment.<sup>6</sup>

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<sup>2</sup> Later to become the Human Rights Council.

<sup>3</sup> United Nation Office of the High Commissioner for Human Rights, "Special Rapporteur on Torture," *available at* <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx> ["OHCHR, Special Rapporteur on Torture"].

<sup>4</sup> Attachment B, Declaration of Juan Mendez, para. 2.

<sup>5</sup> OHCHR, Special Rapporteur on Torture.

<sup>6</sup> *Id.*; Declaration of Human Rights Watch; the American Civil Liberties Union; Human Rights First, The Center for Victims of Torture; Physicians for Human Rights; Appeal For Justice; Win Without War; The Bill of Rights Defense Committee/Defending Dissent Foundation; the National Association of Criminal Defense Lawyers; and the Allard K. Lowenstein International Human Rights Clinic at Yale Law School at para. 12 ["NGO Declaration"]. The Special Rapporteur's mandate also does not require the exhaustion of local remedies before taking action.



The current Special Rapporteur on Torture is Juan E. Méndez, who has held the position since November 2010. His mandate was renewed for a second term in 2013, until October 2016.<sup>7</sup> Special Rapporteur Méndez was appointed due to his four decades working to promote and protect human rights, particularly with regards to torture.<sup>8</sup> He is himself a torture survivor, having been imprisoned and tortured by the former Argentinian dictatorship in the 1970s for his representation of political prisoners.<sup>9</sup>

The Special Rapporteur's fact-finding country visits, key to the mandate, are governed by the Human Rights Council's Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights; which requires countries to guarantee freedom of movement, including to restricted areas within countries, and freedom of inquiry including private interviews with prisoners.<sup>10</sup> The scope of such private interviews is limited to treatment and conditions of confinement, for the purpose of ascertaining CAT compliance.<sup>11</sup>

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<sup>7</sup> Attachment B, Declaration of Juan Mendez, at para. 2.

<sup>8</sup> Attachment B, Declaration of Juan Mendez, at para. 5.

<sup>9</sup> Amnesty International, "Juan Mendez: The Torturer's Worst Nightmare," Dec. 10, 2014, available at <https://www.amnesty.org/en/latest/news/2014/12/juan-mendez-torturers-worst-nightmare/>.

<sup>10</sup> United Nations Office of the High Commissioner for Human Rights, "Terms of Reference for Fact-Finding Missions for Special Rapporteurs/Representatives of the Commission on Human Rights," E/CN.4/1998/45, available at <http://www2.ohchr.org/english/issues/torture/rapporteur/docs/terms.doc> ["Special Rapporteur Terms of Reference"].

<sup>11</sup> M. Nowak, "Fact-Finding on Torture and Ill-Treatment and Conditions of Detention," J. Hum. Rights Pract. 1 (2009) 101–119 ["Nowak"]: "At the beginning of each interview, it is also important that I clearly explain my mandate, *which relates to torture and prison conditions* [emphasis added]. For this purpose, we prepare a short leaflet about my mandate and the purpose of the visit in the relevant language(s), which we can hand to both prison staff and detainees . . . I wish to get an impression about the general conditions in places of detention and I wish to look for evidence of torture that is always practiced behind closed doors. The way in which a society treats its detainees tells much about the existence or non-existence of a culture of human rights."

In November 2014, Acting Legal Advisor for the Department of State, Mary Macleod, admitted publicly for the first time that the legal prohibitions on torture and cruel, inhuman, and degrading treatment (“CIDT”) apply “all times in all places,” including in CIA black sites abroad and the prison at Guantánamo Bay.<sup>12</sup> The admission came shortly before the Senate Select Committee on Intelligence released the redacted Executive Summary of their report on the CIA’s Detention and Interrogation Program, which confirmed horrific details of torture at the black sites by CIA officials, including at a black site at Guantánamo Bay.<sup>13</sup> The torture of the defendants by the CIA included - but was by no means confined to - waterboarding and other forms of water torture including ice water “baths” and near drownings<sup>14</sup>; being regularly stripped and paraded without clothes<sup>15</sup>; being diapered without access to bathroom facilities for lengthy periods of time<sup>16</sup>; constant beatings<sup>17</sup>; forced rectal penetration<sup>18</sup>; excruciating sleep deprivation<sup>19</sup>; confined in painful “stress” positions including hanging by the wrists for prolonged periods of time<sup>20</sup>; and threats of murder or sexual assault of family members.<sup>21</sup>

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<sup>12</sup> “Acting Legal Advisor McLeod: U.S. Affirms Torture is Prohibited At All Times In All Places,” Nov. 12-13, 2014, *available at* <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>.

<sup>13</sup> Executive Summary of the Report of the Senate Select Committee on Intelligence, Dec. 9, 2014, at 16 and 140, *available at* [http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909) [“SSCI Redacted Executive Summary”].

<sup>14</sup> *Id.* at 69, 82, and 107.

<sup>15</sup> *Id.* at 4, 79.

<sup>16</sup> Sen. Dianne Feinstein, “SSCI Study of the CIA’s R&I Program,” remarks in the Senate, Congressional Record, daily edition, vol. 160, no. 149 (December 9, 2014), p. S6409.

<sup>17</sup> SSCI Redacted Executive summary at 4, 79, 86.

<sup>18</sup> *Id.* at 82, 115.

<sup>19</sup> *Id.* at 16, 149.

<sup>20</sup> *Id.* at 53, 101.

<sup>21</sup> *Id.* at 4.



As one example among many, government agents slammed Mr. al Baluchi's head against a wall repeatedly: "As my head was being hit each time, I would see sparks of light in my eyes. As the intensity of these sparks were increasing as a result of repeated hitting[,] all of a sudden I felt a strong jolt of electricity in my head then I couldn't see anything[.] Everything went dark and I passed out."<sup>22</sup> A number of the named victims of the CIA's torture program are now detainees in Camp 7, including Mr. al Baluchi.<sup>23</sup>

The admission by the State Department also came as the prison at Guantánamo Bay approached its 13<sup>th</sup> anniversary, and nearly 12 years after senior officials at the Pentagon were made aware that detainees were being tortured and abused at the prison. Former General Counsel of the Navy Alberto Mora has described how he was told in December 2002 about the "use of stress positions, psychological coercion, physical contact, and degrading treatment such as dressing detainees in female underwear."<sup>24</sup> He later learned that Secretary Rumsfeld had authorized techniques that "when used either individually or in combination, could amount to torture and would almost certainly amount to cruel, inhuman, or degrading treatment."<sup>25</sup>

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<sup>22</sup> Attachment F, Statement of Ammar al Baluchi. More horrifying is the reality that "blunt force trauma . . . may be a 'softening up' prior to more elaborate methods of abuse." Pounder, D, "The Medical Contribution to Assessing Allegations of Torture in International Fact-Finding Missions," *Forensic Science Int'l* 208, 244 (2011)[*"Pounder"*]; *see also* AE195, Defense Motion to Compel Production of Communications Between Government and Filmmakers of *Zero Dark Thirty*; *Zero Dark Thirty* (Sony Pictures, 2012), which depicts the brutal torture of a character based on Mr. al Baluchi who is "strung up, beaten, waterboarded, and kept awake for 96 hours straight." Time, "Art of Darkness," Feb. 4, 2013, *available at* <http://entertainment.time.com/2013/01/24/cover-story-kathryn-bigelows-art-of-darkness/>.

<sup>23</sup> Mr. al Baluchi is referenced 153 times in the SSCI Redacted Executive Summary.

<sup>24</sup> Attachment C, Declaration of Alberto Mora.

<sup>25</sup> Attachment B, Declaration of Alberto Mora. *See also* Action Memo For Secretary of Defense From William J. Haynes II, November 27, 2002, *available at* <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf>; Washington Post, "Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials," Jan. 14, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html> (Susan J. Crawford, former Convening Authority of the Military Commissions: "Al Qahtani's



As early as 2003, the torture at Guantánamo was so dire that it resulted in multiple mass suicide attempts and detainee riots.<sup>26</sup> Hunger striking has taken place at Guantánamo since 2002, and the first mass hunger strike occurred in 2005, when over 200 detainees first sought to bring the prison into compliance with the prohibition on torture and the Geneva Conventions, and protest their conditions of confinement and detention without charge.<sup>27</sup> The hunger strikes

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treatment met the legal definition of torture.”); Associated Press, “Army Now Says G.I. Was Beaten in Role,” June 9, 2004, available at <http://www.nytimes.com/2004/06/09/world/army-now-says-gi-was-beaten-in-role.html> (Spc. Sean Baker was discharged from the Army after suffering a traumatic brain injury and seizures during a training exercise in which he was posing as a detainee; “He said the soldiers only stopped beating him when they realized he might be American.”); David L. McColgin, “The Theotorture of Guantánamo” in Nathan C. Walker and Edwin J. Greenlee, eds, *Whose God Rules? Is the United States a Secular Nation or a Theolegal Democracy?* (Palgrave MacMillan 2011), pp. 202-203 (“A female interrogator told a detainee that she was menstruating, then “slipped her hand into her pants and pulled it out with a red liquid smeared on it meant to look like menstrual blood. The detainee screamed at the top of his lungs, began shaking, sobbing, and yanked his arms against his handcuffs. The interrogator explained to [the detainee] that he would now feel too dirty to pray and that she would have the guards turn off the water in his cell so he would not be able to wash the red substance off. ‘What do you think your brothers will think of you in the morning when they see an American woman's menstrual blood on your face?’ she said as she left the cell.”); American Civil Liberties Union, “FBI Email Refers to Presidential Order Authorizing Inhumane Interrogation Techniques,” Dec. 20, 2004, available at <https://www.aclu.org/news/fbi-e-mail-refers-presidential-order-authorizing-inhumane-interrogation-techniques> (A December 2003 internal FBI email complained that Department of Defense interrogators were impersonating FBI officials during use of “torture techniques,” and that the FBI would be left “holding the bag before the public.” FBI Memorandum available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09\\_05\\_05\\_fbi\\_email.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_05_05_fbi_email.pdf)).

<sup>26</sup> BBC News, “Mass Guantánamo Suicide Protest,” Jan. 25, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4204027.stm>; CBS News, “Mass Suicide Attempts at Gitmo,” Nov. 30, 2004, available at <http://www.cbsnews.com/news/mass-suicide-attempts-at-gitmo/>; NPR, “Guantánamo Detainees Attempted Mass Suicide in 2003,” Jan. 24, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4464452>; Guardian, “Suicide Protest at Camp Delta,” Jan. 24, 2005, available at <http://www.theguardian.com/world/2005/jan/25/Guantanamo.usa>; NPR, “Guantánamo Tightens Security After Prison Riot,” Sept. 18, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=6095940>.

<sup>27</sup> Guardian, “Hunger Strikers Pledge to Die at Guantánamo,” Sept. 8 2005, available at <http://www.theguardian.com/world/2005/sep/09/uk.Guantanamo>; see also The Constitution Project’s Report of the Task Force on Detainee Treatment, available at <http://www.detaineetaskforce.org>, pp. 227-228 (Detainees “alleged that doctors used excessively



prompted abusive and punitive force-feeding procedures that continue to this day.<sup>28</sup> Guantánamo is synonymous with torture for good reason, as Mr. Mora describes that “pursuant to

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large feeding tubes that made inserting and extraction extremely painful, and causing bleeding, vomiting and loss of consciousness in some cases.” Former detainee Sami al Hajj stated that “They’re supposed to feed you [with] two cans, small cans ... but they feed us 24 cans and 24 bottle of water, continuous. And we [were] throwing up, it continues and we throwing up and it continues. This is one feeding; [it] would take 8 hours like that, you are in chair. Until your cell esophagus], they [would grab the tube and just walk away with it]. Then there was blood coming. And [the guard] takes it from you and he goes to another [detainee] directly and [inserts it] ... become full of [vomit]. And after that, when they come and [remove the feeding tube from the without cleaning.”); Al Jazeera, “Gitmo Hunger Striker v. Barack Obama,” Mar. 11, 2014, available at <http://america.aljazeera.com/opinions/2014/3/emad-hassan-Guantanamohungerstrikerforcefeeding.html> (describing how liquid was forced into detainees at excessive speeds, forcing them to vomit and/or defecate on themselves, yet forced to remain in the restraint chairs for “an hour or more.”).

<sup>28</sup> *Id.* In late 2005 and early 2006, JTF-GTMO used punitive force-feeding measures on hunger strikers to coerce them into ending their peaceful protest. The punitive tactics were confirmed by General Bantz J. Craddock, who was then in overall command of the armed forces at Guantánamo Bay. General Craddock candidly admitted that he and senior officials at the Department of Defense had decided to take measures intended to make hunger-striking at Guantánamo Bay “*less convenient*”—an obvious euphemism for more painful—saying that use of new techniques such as the infamous seven-point restraint chairs would coerce the detainees into calling off the strike, which had turned into a public relations nightmare for the Joint Task Force: “Pretty soon it wasn’t convenient, and they decided it wasn’t worth it,” Gen. Craddock said of the hunger strikers. “A lot of the detainees said: ‘I don’t want to put up with this. This is too much of a hassle.’ ” New York Times, “Force-Feeding at Guantánamo Is Now Acknowledged,” Feb. 22, 2006, available at <http://www.nytimes.com/2006/02/22/international/middleeast/22gitmo.html>. The DoD later stopped disclosing the number of detainees on hunger strike. See Washington Post, “Guantánamo Detainees’ Hunger Strikes Will No Longer Be Disclosed by U.S. Military,” Dec. 4, 2013, available at [https://www.washingtonpost.com/world/national-security/Guantánamo-detainees-hunger-strikes-will-no-longer-be-disclosed-by-us-military/2013/12/04/f6b1aa96-5d24-11e3-bc56-c6ca94801fac\\_story.html](https://www.washingtonpost.com/world/national-security/Guantánamo-detainees-hunger-strikes-will-no-longer-be-disclosed-by-us-military/2013/12/04/f6b1aa96-5d24-11e3-bc56-c6ca94801fac_story.html). The inhumanity of the force-feeding procedures at Guantánamo, representative of the Joint Task Force’s attitude towards all detainee treatment, was confirmed yet again in 2014, when a Navy nurse refused to participate in the feedings and faced disciplinary proceedings for his refusal to violate professional obligations to the patients. Washington Post, “He Refused To Forcefeed Detainees. Now He Could Lose His Job,” Dec. 11, 2014, available at <https://www.washingtonpost.com/news/storyline/wp/2014/12/11/he-refused-to-force-feed-detainees-now-he-could-lose-his-job/>; New York Times, “Nurses Urge Leniency Over Refusal to Force-Feed at Guantánamo Bay,” Nov. 19, 2014, available at <http://www.nytimes.com/2014/11/20/health/nurses-urge-leniency-over-refusal-to-force-feed-at-guantnamo-bay.html>.



[authorization from the highest levels] . . . Guantánamo detainees were subjected to torture and CID, including by members of the Joint Task Force at Guantánamo.”<sup>29</sup>

In 2006, five Special Rapporteurs, including the former Special Rapporteur on Torture, Manfred Nowak, called for the immediate closure of the prison at Guantánamo. They decried the fact that despite requests to the Department of Defense, Mr. Nowak had not been given access to inspect the prison and to interview detainees in accordance with his mandate. However, Mr. Nowak found based on media, statements from detainee counsel, and former detainee accounts that aspects of detainee treatment at Guantánamo amounted to torture.<sup>30</sup> The United States’ rejected the findings, noting ironically that the investigators’ report was not based on “direct, personal knowledge.”<sup>31</sup>

It was to the abusive conditions decried by Mr. Nowak in 2006 that the former CIA detainees, including Mr. al Baluchi, were brought that same year after years of torture at black sites around the world.<sup>32</sup> The defendants were placed directly in isolation at their own camp (Camp 7), where they have remained to this day, nearly ten years later. Camp 7 is known to be

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<sup>29</sup> Attachment C, Declaration of Alberto Mora.

<sup>30</sup> United Nations Commission on Human Rights, “Situation of detainees at Guantánamo Bay: Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt,” Feb. 15, 2006, *available at* [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_Guantánamo.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_Guantánamo.pdf).

<sup>31</sup> Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba (Mar. 10, 2006), *available at* [www.state.gov/documents/organization/98969.pdf](http://www.state.gov/documents/organization/98969.pdf).

<sup>32</sup> ABC News, “High-Value Detainees Transferred to Guantánamo,” Sept. 6, 2006, *available at* <http://abcnews.go.com/International/story?id=2400470>.



the most restrictive area at Guantánamo.<sup>33</sup> Until 2013, the military commission treated defendants' own memories of torture as classified, other information about their confinement was classified until 2015, and the information necessary for accountability is still classified.<sup>34</sup> Only now have those memories begun to be specifically declassified, making the time ripe for a visit by the Special Rapporteur.<sup>35</sup> The men are allowed only infrequent letters and occasional opportunities for [REDACTED] video-messaging.<sup>36</sup> Mr. bin al Shibh has testified that something at Camp 7 causes noises and vibrations targeted at him.

Even after the redacted Executive Summary shed light on the United States' state-sanctioned torture, Mr. al Baluchi has never received torture rehabilitation of any sort. Medical staff at Guantánamo have never taken a medical history of Mr. al Baluchi that include details of his torture. Mr. al Baluchi's attempts to discuss his torture with them, to seek help for his ongoing physical and mental ailments resulting from that torture, are ignored and discouraged.

<sup>33</sup> See, e.g., Sydney Morning Herald, "Judge Puts a Stop to Terrorism Censorship," Feb. 2, 2013, available at

<http://www.smh.com.au/world/judge-puts-a-stop-to-terrorism-censorship-20130201-2dq06.html>. There is also a serious concern about the physical conditions of Camp 7. In 2014, Gen. John Kelly, commander of SouthCom, told Congress that Camp 7 has become "increasingly unsustainable due to drainage and foundation issues" and needs to be replaced. A spokesman for SouthCom later said that the foundation of Camp 7 was "heaving and shifting." See Associated Press, "Window Opens on Secret Camp Within Guantánamo," Apr. 13, 2014, available at <https://www.yahoo.com/news/window-opens-secret-camp-within-Guantánamo-151856167.html?ref=gs>.

<sup>34</sup> AE013CCC Second Supplemental Ruling at 8; AE013RRR Government Motion to Amend AE013DDD Second Amended Protective Order #1 to Protect Against Disclosure of National Security Information.

<sup>35</sup> Huffington Post, "U.S. Government Starting to Allow CIA Torture Victims to Discuss Their Own Memories," June 11, 2015, available at [http://www.huffingtonpost.com/2015/06/11/Guantánamo-cia-torture\\_n\\_7552314.html](http://www.huffingtonpost.com/2015/06/11/Guantánamo-cia-torture_n_7552314.html) ["Huffington Post, CIA Victims Allowed to Discuss Memories"].

<sup>36</sup> AE321(AAA Sup.) Mr. al Baluchi's Supplement to Defense Motion to Permit Telephonic Access With Family Members.

Special Rapporteur Méndez renewed the request for access to the prison at Guantánamo Bay in 2011.<sup>37</sup> He has been informed by the Department of Defense that he would be granted only a visit to the Guantánamo Bay Naval Station, to receive a briefing from Joint Task Force officials, and to tour some parts of the prison. The terms issued by the Department of Defense in this offer to Special Rapporteur Méndez are identical to those governing the visits to Guantánamo by journalists, NGOs, and other observers,<sup>38</sup> which are “so controlled that [they] can raise more questions than answers.”<sup>39</sup> As these terms do not recognize the Special Rapporteur’s special status and are “entirely insufficient to carry out his mandate,”<sup>40</sup> Special Rapporteur Méndez has been unable to visit Guantánamo thus far.

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<sup>37</sup> Attachment B, Declaration of Juan Mendez at para. 6. His immediate predecessor, Manfred Nowak, also requested and was denied access to the prison in 2005: “In October 2005, the US Government finally extended an invitation to three of the five mandate holders who jointly carried out the fact-finding, and we started preparations for a mission in December 2005. About one month before the agreed dates, we had to postpone the mission as it became clear that the US Government was not willing to comply with the general TOR for fact-finding missions of special procedures, in particular, individual interviews with detainees.” Nowak.

<sup>38</sup> Full Transcript: U.S. Third Periodic Report to U.N. Committee Against Torture at p. 32, Nov. 12-13, 2014, available at [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat\\_complete\\_transcript\\_from\\_just\\_security.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_complete_transcript_from_just_security.pdf) (“Mr. Mendez would have the same access as is granted to members of our own Congress and civil society . . .”).

<sup>39</sup> NYT, “Guantánamo Tour” (“...[E]ven innocuous-seeming details about daily life inside the Guantánamo detention camps [are kept from the observers].”) A recent report about the tour describe it as more stripped down than ever before, stating that “Gone are opportunities to interview guards, meet with mental health professionals, to taste a detainee meal and to compare life in maximum-security detention for those who misbehave to those in communal captivity and get many more privileges.” See Miami Herald, “Restraint Chair? Gone. Camp X-Ray? Gone. U.S. Military Unveils Leaner Media Visit to Guantánamo,” Feb. 28, 2016, available at <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article63000807.html#storylink=cpy>.

<sup>40</sup> Attachment E, Declaration of Sir Nigel Rodley at para. 12.



Mr. al Baluchi and the other defendants are victims of torture, as the government has acknowledged.<sup>41</sup> The government is and continues to be in violation of the prohibition against torture: to fully investigate all allegations of torture, take steps to prevent acts of torture, and to provide remedies for torture victims.<sup>42</sup> As the experiences of the detainees with regard to torture are no longer considered classified,<sup>43</sup> the commission should order the JTF to fulfill their binding legal obligations and grant Special Rapporteur Méndez access to Camp 7, and to private interviews with Mr. al Baluchi and the other defendants.

## **6. Law and Argument**

### **A. Granting Special Rapporteur Méndez access to the prison at Guantánamo is critical to compliance with domestic and international requirements, including a fair trial for the defendants.**

“To this day, there are reports that the U.S. engages in practices at Guantánamo Bay that can amount to torture or ill-treatment.”<sup>44</sup> Documentation of torture or CIDT at Guantánamo by the Special Rapporteur’s inspection will produce important evidence in hearings regarding suppression, outrageous governmental conduct, conditions of confinement, and mitigation.

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<sup>41</sup> AE397 Government’s Proposed Consolidation of Motions to Compel Information Relating to the CIA’s Rendition, Detention, and Interrogation Program; SSCI Redacted Executive Summary; Politico, “Obama: ‘We Tortured Some Folks,’” Aug. 1, 2014, *available at* <http://www.politico.com/story/2014/08/john-brennan-torture-cia-109654>.

<sup>42</sup> United Nations Convention Against Torture, UN Doc. A/39/51 (1984); 1465 UNTS 85, arts. 2, 14, 12 [“CAT”].

<sup>43</sup> Huffington Post, CIA Victims Allowed to Discuss Memories (“The interrogation techniques as applied to former CIA detainees, as well as those detainees’ conditions of detention, are no longer subject to the military commission judges’ protective orders, with the exception of information that involves places of capture and detention and identities of persons involved,” Lt. Col. Myles B. Caggins III, the Pentagon spokesman for detainee policy, told The Huffington Post in an email this week”).

<sup>44</sup> NGO Declaration, at para 13.

**(1) Binding domestic and international law prohibits torture and CIDT, and imposes related duties on the United States.**

“Protection against torture and cruel, inhuman or degrading punishment or treatment is provided by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and through U.S. federal and state laws, both criminal and civil.”<sup>45</sup> This was part of the United States’ statement to the United Nations Human Rights Committee in 2011, and they were correct on this point.

The “contemporary standards of decency” implicated by the Eighth Amendment “always are violated when prison officials maliciously and sadistically use force to cause harm . . . whether or not significant injury is evident.”<sup>46</sup> Similarly, “‘conduct that shocks the conscience’ or ‘affords brutality the cloak of law’ . . . violates the 14th Amendment.”<sup>47</sup> The Fifth Amendment’s protection against self-incrimination (which has its roots in England’s torture-ridden Star Chamber) also governs issues of abuse, as “coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.”<sup>48</sup>

The legacy of “coercion” rising to torture and CIDT at Guantánamo is so strong that in addition to the Supreme Court, Congress and the President have issued legally binding

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<sup>45</sup> Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights (December 30, 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>, at 16.

<sup>46</sup> *Hudson v. McMillan*, 503 U.S. 1, 7-8 (1992) (Excessive force constitutes an “unnecessary and wanton infliction of pain,” under the Eighth Amendment.).

<sup>47</sup> *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986) (citing *Rochin v. California*, 342 U.S. 165, 172, 173 (1952)).

<sup>48</sup> *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (citing *Chambers v. Florida*, 309 U.S. 227 (1940)).



statements prohibiting such treatment in, respectively, the Detainee Treatment Act of 2005<sup>49</sup> and Executive Order 13492 on Ensuring Lawful Interrogations.<sup>50</sup> Any acts of torture or CIDT that occur currently at Guantánamo are fully prohibited by U.S. domestic law incorporating customary international law prohibitions, regardless of the nationality of the defendants or the location of their prison.

After the litigation over the CAT in the military commission, the United States formally acknowledged the applicability of the specific obligations contained in the Convention Against Torture at Guantánamo Bay in 2014, a position that most other states, legal experts, and NGOs had argued for over a decade.<sup>51</sup> This acknowledgement must be accompanied by a corresponding

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<sup>49</sup> Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739. The second provision of the DTA prohibits persons in the custody or control of the U.S. government, regardless of their nationality or physical location, from being subjected to “cruel, inhuman, or degrading treatment or punishment.” The DTA specifies that this restriction is without geographical limitation as to where and when the government must abide by it.

<sup>50</sup> Executive Order 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 4894 (2009), available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/). “Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340 2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely 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 United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.”

<sup>51</sup> The military commission ruled in AE200II Order at 4 that the CAT does not confer individual rights upon the defendants. That ruling predates the United States’ change of position in November 2014, to expressly acknowledge that not only does the general prohibition on torture, but the specific textual provisions of the CAT apply at Guantánamo: “[CAT] obligations apply to a State Party in ‘any territory under its jurisdiction,’ such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to ‘all places that the State Party controls as a governmental authority.’ We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantánamo Bay, Cuba.” Statement of McLeod. Additionally, the government has admitted that “it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every

examination of the actual and potential CAT violations at Guantánamo.

**(2) The defendants have made credible allegations of torture and other cruel, inhuman, and degrading treatment.**

Not only has the government admitted to committing acts of torture, but allegations of torture and CIDT persist at Guantánamo, in violation of the customary prohibition on torture, the CAT, and Mr. al Baluchi's constitutional and statutory rights. Special Rapporteur Méndez has previously found that "[e]ven if solitary confinement is applied for short periods of time, it often causes mental and physical suffering or humiliation, amounting to cruel, inhuman or degrading treatment or punishment, and if the resulting pain or sufferings are severe, solitary confinement even amounts to torture."<sup>52</sup> Mr. al Baluchi and the other defendants have been held in isolation, often descending to the level of solitary confinement, at Guantanamo since 2006. The commission of this violation, which can be confirmed by the Special Rapporteur, may well entitle them to credits at the potential sentencing phase of this trial.

Mr. bin al Shibh has testified that someone is using noises and vibrations to deprive him of sleep and quiet.<sup>53</sup> Because "sleep undoubtedly counts as one of life's basic needs,"

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jurisdiction within the United States." United States of America, Initial Report of States Parties Due in 1995, Committee Against Torture, CAT/C/28/Add.5 ¶ 101 (Feb. 9, 2000). The military commission must therefore consider violations of the CAT as actionable in addition to domestic violations.

<sup>52</sup> United Nations Office of the High Commissioner for Human Rights, "California jails: 'Solitary confinement can amount to cruel punishment, even torture,'" Aug. 23, 2013, *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655>.

<sup>53</sup> AE152 (RBS), Emergency Defense Motion To Order the Cessation of External Use of Sounds and Vibrations to Interfere with Mr. Bin al Shibh's Confinement and with the Attorney Client Relationship and to Allow Expert Inspection of his Cell, Substructure/Foundation, Surrounding Areas of the Cell, and the Cell Control Room; and AE152LL (RBS), Emergency Motion to Show Cause Why The Government, JTF Camp Commander and JTF Guard Force Members Should Not Be Held in Contempt.



“conditions designed to prevent sleep may violate the Eighth Amendment.”<sup>54</sup> It would require the independent inspection of Special Rapporteur Méndez to determine both the objective and subjective components of the Eighth Amendment test to the allegations of continued sleep deprivation, and conclude whether such deprivation requires a change in conditions of confinement.

Perhaps the most egregious current violation is the utter lack of remedy or treatment for the prolonged torture inflicted upon the defendants during their years in CIA custody, as recounted. The government is hard pressed to deny that each of the techniques used during interrogation of the defendants constitutes Fifth, Eighth, and Fourteenth Amendment violations, as well as CAT violations.<sup>55</sup>

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<sup>54</sup> *Garrett v. Thaler*, No. 13-4-0599 (5<sup>th</sup> Cir., Apr. 1, 2014) (citing *Harper v. Showers*, 174 F.3d 716, 720 (5<sup>th</sup> Cir. 1999)); *see also Walker v. Schult*, 717 F.3d 119 (2<sup>nd</sup> Cir. 2013): “[S]leep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment.” (citing *Tafari v. McCarthy*, 714 F. Supp. 2d 317, 367 (N.D.N.Y. 2010): “Courts have previously recognized that sleep constitutes a basic human need and conditions that prevent sleep violate an inmate’s constitutional rights.”).

<sup>55</sup> The Second Circuit summarized the law of confinement conditions in *Walker*, 717 F.3d at 126: First, it is well settled that exposing prisoners to extreme temperatures without adequate ventilation may violate the Eighth Amendment. *See Gaston v. Coughlin*, 249 F.3d 156, 164 (2<sup>nd</sup> Cir. 2001) (“We have held that an Eighth Amendment claim may be established by proof that the inmate was subjected for a prolonged period to bitter cold.”); *see also, e.g., Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir.1988) (claims that inmate was exposed to subfreezing temperatures for three months with ice forming in toilet bowl were sufficient to raise issues of fact for jury, even where prison officials gave inmate extra blanket). Second, sleep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment. *See Tafari*: (“Courts have previously recognized that sleep constitutes a basic human need and conditions that prevent sleep violate an inmate’s constitutional rights.”) (citing *Harper v. Showers*, 174 F.3d 716, 720 (5<sup>th</sup> Cir.1999)); *see also, e.g., Wright v. McMann*, 387 F.2d 519, 521-22, 526 (2d Cir.1967) (inmate stated Eighth Amendment claim by alleging he was “forced to sleep completely nude on the cold rough concrete floor and that the cell was so cold and uncomfortable that it was impossible for him to sleep for more than an hour or two without having to stand and move about in order to keep warm”); *Robinson v. Danberg*, 729 F. Supp. 2d 666, 683 (D. Del. 2010) (denying motion

Adequate rehabilitation for torture victims is essential and legally mandated because without such treatment, the victims continue to suffer the effects of their torture in perpetuity, and to deteriorate as a result.<sup>56</sup> As observed by Prof. Derrick Pounder, a forensic pathologist who

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to dismiss Eighth Amendment claims based on allegations that "defendants took specific acts designed to deprive [plaintiff] of sleep").<sup>[7]</sup> Further, at least one court recently found that the condition of a prisoner's mattress may be so inadequate as to constitute an unconstitutional deprivation. *See Bell v. Luna*, 856 F.Supp.2d 388, 397-98 (D. Conn. 2012) (denying motion to dismiss where inmate lived for seven months with mattress that was torn, unstuffed, and smelled like mildew). Third, we have long recognized that unsanitary conditions in a prison cell can, in egregious circumstances, rise to the level of cruel and unusual punishment. *See Lareau v. Manson*, 651 F.2d 96, 106 (2d Cir. 1981) (noting that prisoners are entitled to, *inter alia*, sanitation); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) ("Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted."); *Young v. Quinlan*, 960 F.2d 351, 365 (3d Cir.1992) (noting that the denial of "basic sanitation... is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose." (citation and internal quotation marks omitted)). Indeed, unsanitary conditions lasting for mere days may constitute an Eighth Amendment violation. *See, e.g., Gaston*, 249 F.3d at 165-66 (inmate stated an Eighth Amendment claim where the area in front of his cell "was filled with human feces, urine, and sewage water" for several consecutive days); *Wright*, 387 F.2d at 522, 526 (placement of prisoner for thirty-three days in cell that was "fetid and reeking from the stench of the bodily wastes of previous occupants which ... covered the floor, the sink, and the toilet," combined with other conditions, would violate the Eighth Amendment). Further, the failure to provide prisoners with toiletries and other hygienic materials may rise to the level of a constitutional violation. *See Trammell v. Keane*, 338 F.3d 155, 165 (2d Cir.2003) ("[T]his court and other circuits have recognized that deprivation of toiletries, and especially toilet paper, can rise to the level of unconstitutional conditions of confinement..."); *see also, e.g., Atkins v. Cnty. of Orange*, 372 F.Supp.2d 377, 406 (S.D.N.Y.2005) ("The failure to regularly provide prisoners with ... toilet articles including soap, razors, combs, toothpaste, toilet paper, access to a mirror and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions." (internal quotations marks and citations omitted)). Availability of hygienic materials is particularly important in the context of otherwise unsanitary living conditions. *See, e.g., MacDougall*, 473 F.2d at 978.

<sup>56</sup> Walter Kälin, "The Struggle Against Torture," International Review of the Red Cross, No. 324, Sept. 30, 1998, available at <https://www.icrc.org/eng/resources/documents/misc/57jppg5.htm> ["Walter Kälin, "The Struggle Against Torture"]("Acts of torture cannot be undone and



has accompanied the Special Rapporteurs on Torture on fact-finding missions: “The extreme nature of the torture event is powerful enough on its own to produce mental and emotional consequences regardless of a person’s pre-torture psychological status.”<sup>57</sup> The National Consortium of Torture Treatment Programs wrote in their 2014 CAT Shadow Report,

Torture survivors have been transformed by their traumatic experiences that have been consciously caused by other human beings . . . Survivors of torture commonly demonstrate symptoms such as chronic pain in muscles and joints, headaches, incessant nightmares and other sleep disorders, stomach pain and nausea, severe depression and anxiety, guilt, self-hatred, the inability to concentrate, thoughts of suicide and posttraumatic stress disorder.<sup>58</sup>

To this day, Mr. al Baluchi suffers a great deal of pain, psychological disorders, and a lack of ability to sleep, all direct results of his abuse: “I am still reliving the nightmare of this incident every night, every time I try to close my eyes it just pops up . . .”<sup>59</sup> Therefore, detailed information about “the prison facilities in which they are now being held is crucial to assess the trauma that they have suffered and [to confirm] whether such effects continue” as a result, and whether conditions of confinement should be modified, as the defendants have long argued.<sup>60</sup>

**(3) The Special Rapporteur inspection mandate is the gold standard for independent assessment of torture and cruel, inhuman, and degrading treatment.**

As a consortium of prominent non-governmental organizations attest, there have been numerous calls “requesting full [independent] access to the Guantánamo Bay detention facility

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psychological damage continues long after the physical wounds inflicted on the victim are healed. Yet human rights law recognizes that reparation and compensation for such victims may enhance the healing process by supporting the victim’s sense of justice.”).

<sup>57</sup> Pounder, at 145.

<sup>58</sup> National Consortium of Torture Treatment Programs, “Shadow Report Article 14: The Right to Rehabilitation,” Nov. 2014, *available at* [http://www.ncttp.org/INT\\_CAT\\_CSS\\_USA\\_18541\\_E.pdf](http://www.ncttp.org/INT_CAT_CSS_USA_18541_E.pdf).

<sup>59</sup> Attachment F, Statement of Ammar al Baluchi.

<sup>60</sup> Attachment B, Declaration of Juan Mendez, para. 10.

for more than a decade.”<sup>61</sup> However, such independent access has never been granted, and there have been no independent investigations of Guantanamo conditions. An independent inspection by the Special Rapporteur on Torture would produce the most authoritative possible evidence of torture and CIDT—or the lack of torture and CIDT.

The government cannot claim transparency while continuing to hide past or present abuses from the Special Rapporteur. As Ambassador Pickering states,

The current public reports regarding Guantánamo detail heavy-handed and even brutal force-feedings, indifferent medical care . . . indefinite solitary confinement, and other potential violations of both the CAT and the Geneva Conventions. These reports are of serious concern to our allies, and should be of serious concern to the U.S. government. If they are in error, it will be the responsibility of Special Rapporteur Méndez to correct that erroneous reporting; if they are true, it is the responsibility of the United States immediately to correct those mistakes.<sup>62</sup>

The single internal review conducted at Guantánamo recommended in 2009 that the DoD “consider inviting non-governmental organizations and appropriate international organizations to send representatives to visit Guantánamo” because “[t]he involvement of other international and non-governmental organizations [in addition to the International Committee of the Red Cross] . . . may be beneficial in making the operations at Guantánamo more transparent, and in offering their services for the humane care and treatment of detainees.”<sup>63</sup> As the ten NGOs supporting

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<sup>61</sup> NGO Declaration at para. 14. *See also* CAT art. 12; BBC News, U.N. Calls for Guantánamo Closure; American Civil Liberties Union, “Latest Guantánamo Death Highlights Need for Independent Investigation, May 19, 2011, available at <https://www.aclu.org/news/latest-guantanamo-death-highlights-need-independent-investigation>; Amnesty USA, “Independent Investigation Urged Into Guantánamo Detainee Death,” available at <http://www.amnestyusa.org/news/news-item/independent-investigation-urged-into-guantanamo-detainee-death>, May 19, 2011.

<sup>62</sup> Attachment D, Declaration of Thomas Pickering, para. 16.

<sup>63</sup> U.S. Department of Defense, “Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement,” 2009, [http://www.defense.gov/Portals/1/Documents/pubs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf). *See also* NGO Declaration at para. 15.



this motion state, “An internal review from over seven years ago is no substitute for regular independent monitoring and access.”<sup>64</sup> It is clear that only an independent investigation by the Special Rapporteur will suffice to assess the continuing allegations of torture and CID.

The Special Rapporteur’s fact-finding country visits are the most important method of investigating allegations of torture and CIDT around the world, and bringing evidence to light. Former Special Rapporteur Manfred Nowak called the inspections “the most important tool for an effective investigation of torture, ill- treatment, and conditions of detention.”<sup>65</sup> Another of Special Rapporteur Méndez’ predecessors, Sir Nigel Rodley, confirms that “[s]ome of the most important information on the commission of torture that I was able to obtain . . . was that obtained as a result of on-site visits to prisons.”<sup>66</sup> Special Rapporteur Méndez also states that “[t]he importance of inspecting current and former facilities . . . cannot be overstated,” as such Special Rapporteur inspections remain “one of the most effective methods of ascertaining the duration and substance of torture.”<sup>67</sup>

Because of the importance of the inspections, they are governed by the Terms of Reference for Fact-Finding Missions for Special Rapporteurs/Representatives of the Commission on Human Rights, which provide that states should ensure freedom of movement and freedom of inquiry for Special Rapporteurs, along with assurances that interviewees will not be subject to retaliation.<sup>68</sup> As Special Rapporteur Méndez details, his fact-finding visits “always include visits to prisons, detention centers, and other places where persons are deprived of freedom, including

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<sup>64</sup> NGO Declaration at 15.

<sup>65</sup> Nowak at 103.

<sup>66</sup> Attachment E, Declaration of Sir Nigel Rodley, para. 14.

<sup>67</sup> Attachment B, Declaration of Juan Mendez, at para. 9. *See also*, Nowak at 103.

<sup>68</sup> Special Rapporteur Terms of Reference.

private interviews with inmates,” on the subject of treatment and conditions of confinement.<sup>69</sup> He later “makes recommendations about how to bring the facilities up to international standards.”<sup>70</sup> The general tour and briefing offered by the Department of Defense to Special Rapporteur Méndez would not allow proper assessment of the conditions of confinement and allegations made by the current detainees, and would therefore be wholly incompatible with the mandate of the Special Rapporteur.<sup>71</sup> On the contrary, the very “reason for the effectiveness of the information” obtained by the Special Rapporteurs is due to the ability to freely inspect the prison and speak to inmates or detainees.<sup>72</sup>

Special Rapporteur Méndez’ independent assessment of the defendants’ allegations of torture at Guantánamo, therefore, depends on his ability to inspect Camp 7 and speak to them directly about their treatment – the latter being a condition that the Department of Defense has specifically rejected for Special Rapporteur Méndez, whether monitored or unmonitored. Although Special Rapporteur Méndez “should be granted full access to [Guantánamo],” Mr. al

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<sup>69</sup> Nowak at 116. *See also* Pounder at 143-148: “The interview is usually relatively brief and must be appropriately focused since there is usually no possibility for re-interview. Most importantly fact finding missions serve the purpose of documenting ill-treatment with a view to future prevention in general and offer little or nothing to the individual detainee other than an opportunity to contribute to this process . . . The content of the interview with the detainee should encompass, but not necessarily in a predetermined order, the circumstances of apprehension, an overview of the period and places of detention and ill-treatment, the conditions of detention and the regime, any contact with lawyers or doctors, and the methods of ill-treatment. A description by the interviewee of the transient effects of the ill-treatment and a description of any acute but now resolved injuries provide important medical evidence and needs to be specifically elicited.”

<sup>70</sup> Attachment B, Declaration of Juan Mendez, at para. 4.

<sup>71</sup> Attachment B, Declaration of Juan Mendez, at para. 7. *See also* Statement of Amb. Harper at the presentation of the 3<sup>rd</sup> Periodic Report of the United States to the Committee Against Torture, Nov. 13, 2014, *available at* [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat\\_complete\\_transcript\\_from\\_just\\_security.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_complete_transcript_from_just_security.pdf) [“Harper CAT Statement”]: “Mr. Mendez would have the same access as is granted to members of our own Congress and civil society.”

<sup>72</sup> Attachment E, Declaration of Nigel Rodley, at para. 15.



Baluchi's proposed compromise to allow Special Rapporteur Méndez access to Camp 7 and the five defendants would "allow him to begin to examine the compliance of the United States with the [prohibition against torture] and to bring any violations to public attention."<sup>73</sup>

**(4) JTF-GTMO's exclusion of the Special Rapporteur denies Mr. al Baluchi the right to a fair trial.**

Mr. al Baluchi has continually sought to report and compel further information about his interrogation and conditions of confinement by the government in connection with his defense. The Special Rapporteur's inspection would produce factual and opinion evidence vital to his defense.

Mr. al Baluchi has a constitutional and statutory right to access to evidence. "Under the Due Process Clause of the [United States Constitution], criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'"<sup>74</sup> This constitutional right is reinforced by 10 U.S.C. § 949j(a)(1), which guarantees the reasonable opportunity to obtain witnesses and other evidence. In fact, R.M.C. 701(j) specifically prohibits the government from "unreasonably imped[ing] the access of another party to a witness or evidence."

First, the Special Rapporteur's inspection would reveal further evidence of past torture of the defendants either in CIA custody or at Guantánamo, which would support vital claims

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<sup>73</sup> Attachment C, Declaration of Alberto Mora at para. 25.

<sup>74</sup> *California v. Trombetta*, 467 U.S. 479, 485 (1984) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

regarding suppression, outrageous government conduct, and mitigation before this commission.<sup>75</sup>

Details of their torture, including those that are still obscured and may be uncovered by interviews with the Special Rapporteur, will be critically important to the persuasive value of these legal claims. These details may also form the basis for informed expert opinion regarding torture or CIDT.

Furthermore, the Special Rapporteur's inspection is likely to determine that Mr. al Baluchi was subject to torture or CIDT in January 2006, while he and the other defendants were being held in long-term solitary confinement. Such information would support Mr. al Baluchi's motion to suppress his alleged statements to the joint Department of Justice-Department of Defense interrogation team. "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . whether or not under color of law, shall be admissible in a military commission under this chapter."<sup>76</sup> Mr. al Baluchi's suppression all evidence obtained by or derived from torture or CIDT is fundamental to his defense, and it is therefore crucial to use all available evidence in support of his claims.<sup>77</sup>

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<sup>75</sup> See AE112 Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention, and Interrogation Program (describing bases for materiality of torture and CIDT evidence); AE397 Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program (conceding these bases for materiality).

<sup>76</sup> 10 U.S.C. § 948r(a); see also M.C.R.E. 304(a)(1). Because "color of law" is irrelevant to the method by which the statement is obtained, statements extracted by foreign officials and non-governmental actors are excluded to the same extent as those extracted by individuals acting on behalf of the United States. This principle remains the same under international and constitutional law; see, e.g., CAT art. 15, which states that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." See also *United States v. Karake*, 443 F. Supp. 2d 8, 52 (D.D.C. 2006) (quoting *Brown v. Mississippi*, 297 U.S. 278, 284 (1936)) ("The use of torture to extract a statement clearly contravenes 'principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

<sup>77</sup> See AE112.



Indeed, the reason that JTF-GTMO has refused the Special Rapporteur an inspection on acceptable terms is the well-founded concern that he will determine past and present conditions constitute torture or CIDT. This refusal denies Mr. al Baluchi his right to present a complete defense using reasonably available evidence.

**B. The national security interests of the United States require JTF-GTMO to authorize the Special Rapporteur's inspection on reasonable terms.**

**(1) The United States sets a harmful precedent to other countries in denying the Special Rapporteur access to Guantánamo.**

During the presentation of the Third Periodic Report of the United States to the Committee Against Torture, Ambassador Keith Harper of the State Department said that “Security concerns dictate limitations on detainees’ ability to communicate with others during wartime . . . Private access to detainees is only granted, however, first to the International Committee on the Red Cross, as contemplated by the Geneva Conventions, and two, to detainee counsel. Both detainee counsel and [the] ICRC have special roles and responsibilities. Both, furthermore, are bound by duties of confidentiality.”<sup>78</sup>

The “security concerns” that Ambassador Harper cited have no basis in the Geneva Conventions,<sup>79</sup> which contain provisions regarding detainees’ ability to send and receive letters. Art. 70 of the third Geneva Convention allows prisoners of war to “send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly . .

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<sup>78</sup> Harper CAT Statement.

<sup>79</sup> The Fourth Geneva Convention is the authority governing Mr. al Baluchi’s detention. *See* AE321(AAA Sup). Other detainees may be subject to the Third Geneva Convention.

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If detainee counsel and the ICRC have special roles and responsibilities, so too does the Special Rapporteur on Torture, whose role was established after the drafting of the Geneva Conventions and the Convention Against Torture, but which has nonetheless become an integral part of torture prohibition worldwide.<sup>82</sup> In fact, the Special Rapporteur’s role in the prevention of

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<sup>80</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention).

<sup>81</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention).

<sup>82</sup> Walter Kälin, “The Struggle Against Torture,” (“The Convention against Torture allows the Committee to investigate situations of systematic violations and, with the consent of the State Party concerned, to carry out on-site visits. Investigations of systematic violations of the prohibition on torture (including visits to the countries concerned) are also undertaken by the Special Rapporteur on Torture and other Rapporteurs and Working Groups appointed by the UN Commission on Human Rights who have to report on allegations of torture and their findings.”).

Regarding the government’s attempt at creating hierarchy between the International Committee for the Red Cross and the U.N. Special Rapporteur on Torture: “Customary international law possesses *more* jurisprudential power than does treaty law. Unlike treaties, which bind only the parties thereto, once a norm is established as customary international law, it is binding on all States, even those new to a type of activity, so long as they did not persistently object during its formation.” Int’l Law Association, London Conference: Committee on Formation of Customary (General) International Law 25 (2000), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/30>. Customary international law is formed through two elements: widespread state practice, and *opinio juris* (subjective obligation, intent to be bound by a norm). “Legal Information Institute, “*Opinio Juris*,” *available at* [https://www.law.cornell.edu/wex/opinio\\_juris\\_international\\_law](https://www.law.cornell.edu/wex/opinio_juris_international_law). 115 United Nations member states, including those who have endured recent terrorist attacks such as France, Belgium, Kenya, Iraq, Turkey, Lebanon, and India, have issued standing invitations to the Special Procedures of the Human Rights Council, which includes the Special Rapporteur on Torture. United Nations Office of the High Commissioner of Human Rights, “Standing Invitations,” *available at* [http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/StandingInvitations.aspx](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/StandingInvitations.aspx). Such



torture and CIDT is so vital that the United States has on many occasions negotiated with other states on behalf of the Special Rapporteur to obtain site visits. Ambassador Pickering recalls that “granting access to the Special Rapporteur on Torture to prisons within U.S. jurisdiction, including Guantánamo, is an important part of demonstrating compliance with the CAT, and is fully in keeping with many approaches which I and other senior officials of the U.S. government have made to foreign states to secure in their countries the same access and rights.”<sup>83</sup> Sir Nigel affirms that, “I recall deeply appreciating the support I received from the United States, when it made supportive interventions with reluctant States from which I had requested invitations for on-site visits on [the] standard terms.”<sup>84</sup>

If the United States continues to block all access to the most infamous prison on earth, it sets a dangerous precedent for hostile states to engage in the same refusals. As Mr. Mora explains, “[The Special Rapporteur] is understandably unwilling to accept restrictive terms from one country that would impede his ability to negotiate access with another country . . . this refusal sets a bad precedent in that other states that also wish to deny him access may cite to the American example as justification; it damages the authority of his office; it diminishes the international community’s efforts to curb the use of cruelty; it weakens the norm against torture;

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widespread state practice in the face of a constant and growing threat of terrorism indicates *opinio juris*, and therefore establishes an emerging customary norm. The ICRC has a treaty-based right of access (now customary law) during the *lex specialis* of international armed conflict. International Committee of the Red Cross, “Customary IHL: Rule 124,” *available at* [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule124](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule124) . However, Special Rapporteur Mendez now also has a custom-based right of access grounded in the prohibition against torture, which is applicable both during armed conflict and during peacetime. There is no argument, therefore, that would justifies admitting the ICRC delegates while barring Special Rapporteur Mendez.

<sup>83</sup> Attachment D, Declaration of Ambassador Pickering at para. 13.

<sup>84</sup> Attachment E, Declaration of Sir Nigel Rodley at para. 16.

and it puts detained individuals at greater risk of abuse.”<sup>85</sup> Ambassador Pickering, who has extensive experience in national security matters from over forty years as a career diplomat (including overseeing the official government inquiry into the Benghazi embassy attack) agrees that, “As a policy consideration, it would be detrimental to the Special Rapporteur’s mandate to accept a lower level of access in one country than in another, and U.S. opponents have, are, and will continue to seize upon the restriction as an opportunity to hide their bad practices.”<sup>86</sup> The United States is well aware by now of the rippling effects of torture and CID, and our encouragement of other states’ bad acts are likely to result in circumstances that threaten our national security.

**(2) Barring access of the Special Rapporteur to Guantánamo will further inflame anti-American sentiment and poses a serious threat to national security.**

The most telling phrase used by Ambassador Harper before the Committee Against Torture is in describing the ICRC and detainee counsel as “bound by confidentiality.” This is the crux of the government policy – that they have so far only allowed into the prison observers who cannot publicly comment on the conditions in which the detainees are being held, or the abuse that they report. The sole reason for this unprecedented level of secrecy is to shield the United States from any accountability for torture and CIDT.

This position is untenable. Naked claims of “classification” or “national security” cannot, as Ambassador Pickering explains, “be used to hide or protect actions by the United States that are contrary to the international law which is now fully incorporated into U.S. domestic

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<sup>85</sup> Attachment C, Declaration of Alberto Mora at para. 21.

<sup>86</sup> Attachment D, Declaration of Thomas Pickering at para. 14.



legislation in order to carry out binding obligations under the CAT.”<sup>87</sup> On the contrary, national security demands that the government allow the Special Rapporteur to carry out his mandate.

First, Guantánamo is used as a “recruiting tool” by extremists precisely because of the commission of torture and CID at the prison - it is a “symbol of lawlessness that grossly undermines U.S. national security.”<sup>88</sup> Current counterterrorism operations rely heavily on “the ability to negotiate with and issue sanctions on other countries and non-state entities. Where the threat of terrorism is concerned, the importance of that ability cannot be overestimated, nor the assurance of cooperation of friends and allies around the globe.”<sup>89</sup>

An enormous amount of damage to our counterterrorism ability has already occurred, and must now be repaired. Ambassador Pickering, who has continued to engage with foreign allies on behalf of the U.S. government, explains that “one of the most pressing issues raised by those allies is the continuing detention of individuals at Guantánamo Bay. Apart from the issue of detention of some individuals without charge or trial, the publicly reported conditions at Guantánamo have been criticized around the world and I have seen firsthand the great deal of influence and respect that we have lost from our allies as a result.”<sup>90</sup>

Mr. Mora, who famously spoke out against the use of torture during Guantánamo’s early years, says unequivocally that, “Through years of detainee abuse and the failure to permit international inspections, Guantánamo has become a symbol of U.S. violations of the laws of war and of crucial human rights law, including the [CAT].”<sup>91</sup> He recounts from firsthand experience numerous concrete examples of harm to national security that stem directly from the

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<sup>87</sup> Attachment D, Declaration of Thomas Pickering at para. 17.

<sup>88</sup> *Id.* at para. 18.

<sup>89</sup> *Id.* at para. 20.

<sup>90</sup> *Id.* at para. 15.

<sup>91</sup> Attachment C, Declaration of Alberto Mora, para. 19.

government's practice of torture.<sup>92</sup> Such examples include British soldiers releasing a confirmed terrorist rather than hand him over to inevitable torture by the United States, and military lawyers from allied countries informing him that they considered the U.S. military to be engaged in criminal activity that they would not join.<sup>93</sup> In short, the former General Counsel of the U.S. Navy believes that "U.S. torture adversely affected our operational military capabilities."<sup>94</sup>

The government's refusal to end torture and increase transparency also directly threatens American troops abroad, according to Mora: "Members of the U.S. military continually put themselves in harm's way around the world . . . it is unfair to them and compromises our mission for the United States to engage in acts such as torture or CID that could place our troops at risk of retaliatory abuse."<sup>95</sup>

Special Rapporteur Méndez' role is to observe treatment and conditions of confinement and to discuss those issues with Mr. al Baluchi and the defendants, whose experiences are "no longer subject to the military commission judges' protective orders, with the exception of information that involves places of capture and detention and identities of persons involved."<sup>96</sup> The scope of the Special Rapporteur's interviews does not include information related to the merits of the pending case before this commission. Further, the Terms governing the Special Rapporteur's site visits naturally provide for "appropriate security arrangements," that do not limit the freedom of movement and inquiry that must be accorded to the Special Rapporteur.<sup>97</sup> Such arrangements may be negotiated with Special Rapporteur Méndez, and his acquiescence to

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<sup>92</sup> *Id.* at para. 18.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at para. 24.

<sup>96</sup> Huffington Post, CIA Victims Allowed to Discuss Memories.

<sup>97</sup> Special Rapporteur Terms of Reference.



the access requested by Mr. al Baluchi indicates his willingness to accommodate security arrangements as long as they are in accordance with his mandate.<sup>98</sup>

Camp 7 houses those detainees who were subjected to the worst torture and continue to be held in the most restrictive conditions.<sup>99</sup> As Mr. Mora states, the “access proposed in this motion would allow [Special Rapporteur Méndez] to begin to examine the compliance of the United States with the Convention Against Torture and to bring any violations to public attention.”<sup>100</sup> And if, as the government claims, Guantánamo is “safe, humane, [and] legal” and the reports otherwise are erroneous, then only transparency will allow Special Rapporteur Méndez to “illustrate that we have overcome the dark years of torture and abuse that so shake our standing in the world.”<sup>101</sup> Therefore, “national security is the most important reason to *grant* Special Rapporteur Méndez access to the prison and detainees at Guantánamo.”<sup>102</sup>

In 2006, the United States rejected the findings of the Special Rapporteur on Torture regarding Guantánamo with the defense that the Special Rapporteur had not visited Guantánamo.<sup>103</sup> Ten years later, the government once again has an opportunity to comply with the request of the United Nations Special Rapporteur on Torture, demonstrate compliance with a binding norm of international law that has been repeatedly violated since September 11, 2001, and rebuild rights-based national security. President Obama has stated that “From Europe to the Pacific, we’ve been the nation that has shut down torture chambers and replaced tyranny with the

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<sup>98</sup> Attachment B, Declaration of Juan Mendez, paras. 10-12.

<sup>99</sup> Attachment F, Statement of Ammar al Baluchi; Guardian, “CIA Sexual Abuse And Torture Went Beyond Senate Report Disclosures, Detainee States,” Jun. 2, 2015, *available at* <http://www.theguardian.com/us-news/2015/jun/02/cia-sexual-abuse-torture-majid-khan-guantanamo-bay> (“Majid Khan said interrogators poured ice water on his genitals, twice videotaped him naked and repeatedly touched his “private parts”).

<sup>100</sup> Attachment C, Declaration of Alberto Mora, at para. 25.

<sup>101</sup> Attachment D, Declaration of Thomas Pickering, at para. 20.

<sup>102</sup> *Id.* at para. 17.

<sup>103</sup> BBC News, U.N. Calls for Guantánamo Closure.

rule of law . . . the prison at Guantánamo has weakened American national security,” while the government has maintained secrecy and abuse over the promised transparency.<sup>104</sup> The government may no longer be allowed to claim that torture at Guantánamo has ended until they are prepared to prove it.

7. **Request for Oral Argument:** The defense requests oral argument.

8. **Conference with Opposing Counsel:** The prosecution has indicated that it will oppose this motion.

9. **Attachments:**

- A. Certificate of Service
- B. Declaration of Juan E. Méndez
- C. Declaration of Alberto J. Mora
- D. Declaration of Thomas R. Pickering
- E. Declaration of Nigel S. Rodley
- F. Statement of Ammar al Baluchi
- G. Declaration of Ten Non-Governmental Organizations

Very respectfully,

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

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Detailed Military Defense Counsel

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<sup>104</sup> “Remarks by the President on National Security,” May 21, 2009, *available at* <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> (“Our democracy depends on transparency . . .”).



# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 12th day of May, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

*//s//*

JAMES G. CONNELL, III

*Learned Counsel*



# Attachment B

**Declaration of Juan E. Méndez**

**Background**

1. My name is Juan E. Méndez. I am over eighteen years of age and competent to make a declaration.
2. I am currently the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a position that I have held as an independent expert since November 1, 2010, after being appointed to it by the Human Rights Council of the United Nations. My mandate was renewed in October 2013. First created in 1985, the Special Rapporteurship is one of more than fifty “Special Procedures” of the United Nations, and one of its longest-standing. Mandate-holders are appointed to serve for up to two consecutive three-year terms, on the basis of their expertise in the respective subject matter covered by the mandate.
3. My declaration made in my capacity as Special Rapporteur and as an expert on torture should not be interpreted in any way as waiving, limiting or having any other effect on the immunities enjoyed by the United Nations before United States courts.
4. As Special Rapporteur on Torture, I visit countries upon invitation in order to advise them on how to meet their obligation to observe the absolute prohibition in international law of both torture and cruel, inhuman or degrading treatment or punishment (CIDT). On such missions, I always include visits to prisons, detention centers and other places where persons are deprived of freedom, including private interviews with inmates, and I eventually make recommendations on how to bring the facilities up to international standards. I also write thematic reports on various aspects of the international law regarding torture with recommendations to the international community and to all member States of the UN on how to fulfill the various obligations that are derived from the absolute prohibition on torture and CIDT.
5. My appointment as Special Rapporteur is the result of a long career dedicated to the promotion and protection of human rights, particularly in regards to torture. I have been a Special Advisor to the Prosecutor of the International Criminal Court on prevention of the crimes under that tribunal’s jurisdiction, and co-chair of the Human Rights Institute of the International Bar Association. Between 2004 and 2007, I was Special Advisor to the UN Secretary General on the Prevention of Genocide. As a member of the Inter-American Commission on Human Rights of the Organization of American States between 2000 and 2003 and as its President in 2002, I also visited prisons in the western hemisphere and authored reports on visits and case complaints about them. Earlier, as a researcher and manager for Human Rights Watch between 1982 and 1994, and later as HRW General Counsel between 1994 and 1996, I had occasion to visit detention centers in many



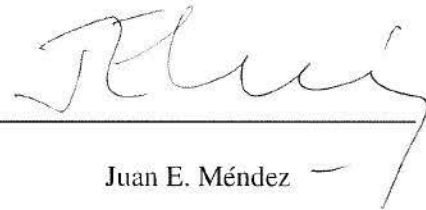
countries as well, and to write reports on their compliance or non-compliance with international standards.

**Engagement with the United States Regarding the Prison at Guantanamo Bay**

6. In early 2011, while meeting with then-General Counsel of the Department of Defense, Mr. Jeh Johnson, I requested access to the Guantanamo Bay prison in my capacity as Special Rapporteur. As in other countries and regarding prisons within mainland U.S. territory, my purpose was to meet with detainees and observe the conditions of confinement at Guantanamo, in order to assess the compliance of the United States with international standards, including the provisions of the United Nations Convention Against Torture (CAT).
7. In February 2012 I received a response from the Department of Defense stating that I would be allowed to visit the base, receive a briefing from its authorities and take a tour of certain – but not all – parts of the prison. The invitation specifically said that I would not be able to meet or speak with any of the detainees. My understanding is that the tour offered by the Department of Defense is the same one offered to members of the press or other public observers. Meanwhile, the United States admitted in November 2014 before the Committee Against Torture, that the Convention Against Torture applies to the prison at Guantanamo Bay. It is my mandate to assess whether the standards contained in the CAT are being upheld by the United States.
8. I declined that invitation and have continued to refuse to visit Guantanamo under the conditions offered by the Department of Defense, while insisting on an invitation under terms that are consistent with those established by the UN Human Rights Council for all Special Procedures. My mandate from that Council requires me to demand the same conditions for my visit on every country equally. If I were to accept a surface-level tour of Guantanamo Bay, I would be setting a precedent that would hamper my ability to conduct meaningful tours of prisons in other countries. A tour under the conditions offered to me in 2012 would result in a lower quality of assessment of the prisons at Guantanamo.
9. The importance of inspecting current and former (where available) detention facilities to my mandate as Special Rapporteur cannot be overstated. The inspection of former detention sites at which torture occurred remains one of the most effective methods of ascertaining the duration and substance of torture. Moreover, regular inspection of places of detention remains the most effective preventive measure against torture and ill-treatment. Such inspections enable proper recourse for torture, ensure the adequate implementation of safeguards against torture, and create a strong deterrent effect. The rationale behind this is based on the experience that torture and ill-treatment usually takes place in isolated and unmonitored places of detention. Equally important is the need for assurances that I can hold unmonitored conversations with inmates in order to better assess the credibility of their testimonies.

10. According to public reports and admissions by the United States government, a number of the detainees at Guantanamo Bay, and all of the so-called "High Value Detainees" held at Camp 7, were held and tortured by the Central Intelligence Agency in such isolated and unmonitored secret prisons over a number of years before being transferred to Guantanamo Bay. Detailed information about both the secret prisons in which they were held during their CIA detention, and the prison facilities in which they are now being held, is crucial to assess the trauma that they have suffered and whether such effects continue.
11. As a preliminary step, it is essential to my mandate to ensure that that State institutions, including the facility at Guantanamo Bay, uphold unambiguously a zero tolerance policy against torture and ill-treatment and make efforts to eliminate the risk of ill-treatment and excessive use of force by the detaining authorities while in detention.
12. Finally, as my mandate is victim-centered, I must have access to individuals who have been tortured, and whose torture has been acknowledged by the United States. As Special Rapporteur on Torture, I have visited prisoners around the world, including those considered security risks by the detaining States. My access to these individuals is generally considered crucial and States that invite me to country visits accept that condition and observe it in practice.
13. I have been informed that counsel for the defendants at the Guantanamo Bay military commissions have also requested to inspect the previous and current prison facilities in which their clients were held (to the extent that previous facilities still exist). In my experience, the rigorous inspection of detention sites is so important that I work with forensic scientists when possible, whose expertise provides significant insight into the methods and pattern of torture employed in places of detention. Working with prison and forensic experts in inspections has been valuable to framing my recommendations aimed at addressing systemic causes or facilitators of torture and ill-treatment in places of detention and increasing compliance with international standards, including those contained in the Convention Against Torture.

Dated: April 13, 2016



Juan E. Méndez



District of Columbia: SS  
Subscribed and Sworn to before me  
this 13<sup>th</sup> day of April, 2016  
Kathryn Cecilia Foster  
Notary Public, D.C.  
My commission expires 01/14/2021



11/14/2011  
11/14/2011  
11/14/2011



# Attachment C



**DECLARATION OF ALBERTO J. MORA**

**Background**

1. My name is Alberto J. Mora. I am over 18 years of age and competent to make a declaration.
2. Since 2014, I have been a Senior Fellow at the Carr Center at Harvard University, where I teach and serve as co-director of the Center's "Cost and Consequences of Torture" research program. The program focuses on gathering hard data for analysis of the operational and strategic damage caused by the United States' decision to use torture on detainees after September 11, 2001.
3. I received a BA with Honors (1974) and an honorary doctorate (2006) from Swarthmore College and a J.D. from the University of Miami (1981). In 2014 I was an Advanced Leadership Fellow at Harvard University.
4. Following my graduation from college and prior to entering law school, I served in the Department of State as a Foreign Service Officer. I was posted to the U.S. Embassy in Lisbon, Portugal (1975-1977) and the International Organizations Directorate in Washington, D.C. (1977-1978). In my last assignment, my work focused on United Nations affairs.
5. I am a member of the District of Columbia and Florida Bars and practiced law continuously both in the private sector and in the federal government from 1981 until 2013. Following my graduation from law school, I practiced law in Miami, Florida, and in Washington, D.C. My practice focused on primarily civil litigation and international disputes. I was a partner in Holland & Knight and Of Counsel to Greenberg Traurig, LLP. Later in my career, I served as General Counsel to the International Division of Walmart, Inc., and General Counsel of Mars, Incorporated.
6. In addition to my work in the State Department,
  - a. I was appointed by President George H.W. Bush as General Counsel of the U.S. Information Agency, where I served from 1989 to 1993;
  - b. I was appointed by President Bill Clinton and confirmed by the Senate for three consecutive terms (1995-2001) on the Broadcasting Board of Governors, the entity which governs U.S. international broadcasting, including the Voice of America, Radio Free Europe/Radio Liberty, Radio and TV Marti, and Radio Free Asia; and

- c. I was appointed by President George W. Bush and confirmed by the Senate as General Counsel of the Department of the Navy, an SES civilian position that accorded me a rank equal to that of a four-star general. I held this position from 2001 until 2006.
7. Among my civic and professional associations, I am a member of the Council on Foreign Relations and serve or have served on the boards of Human Rights First, Freedom House, the National Council for International Visitors, Radio Free Asia, and Radio Free Europe/Radio Liberty.
8. Among other awards, I was honored with the 2006 Profile in Courage Award from the John F. Kennedy Presidential Library and Museum for my efforts as Navy General Counsel to put an end to detainee torture and abuse at Guantánamo Bay.

**Experience with Detainee Abuse At Guantánamo Bay**

9. During the course of my service as Navy General Counsel I became closely involved with detainee treatment and interrogation issues.
10. In December 2002, officials of the Naval Criminal Investigation Service, which I supervised, informed me that they suspected that detainees at Guantánamo Bay were being subjected to techniques during their interrogations that constituted cruel, inhuman, or degrading treatment. The techniques described to me involved the use of stress positions, psychological coercion, physical contact and abuse, and degrading treatment such as dressing detainees in female underwear. I immediately recognized that this treatment was probably unlawful and certainly contrary to U.S. values.
11. When I inquired about the use of abusive interrogation techniques with the Department of the Army (which was responsible for detainee operations), I was shown for the first time a memorandum dated December 2, 2002, from then-Secretary of Defense Donald Rumsfeld approving the use of the interrogation techniques discussed by the NCIS investigators, as well as others such as sensory deprivation and detainee-specific phobia techniques. In my view, many of the techniques authorized by Secretary Rumsfeld, when used either individually or in combination, could amount to torture and would almost certainly amount to cruel, inhuman, or degrading treatment (CID).

12. The following day I raised my concerns with Jim Haynes, then the General Counsel of the Department of Defense. I also noted that unless the Secretary's memo was withdrawn, it was "sure to be discovered and used at trial in the military commissions."<sup>1</sup>
13. Upon learning in January 2003 that detainee abuse was continuing despite my warning, I continued to meet with Haynes and other Pentagon officials in an attempt to end the use of the abusive interrogation techniques. I eventually delivered a draft memorandum to Haynes that asserted that the interrogation techniques approved by Secretary Rumsfeld could authorize torture. That same day Haynes informed me that Secretary Rumsfeld was suspending use of the techniques.
14. Also on that day, Secretary Rumsfeld instructed the General Counsels and Judge Advocate Generals (JAGs) of each of the four services to form a Working Group under the direction of Haynes to prepare a report evaluating the law and policy regarding detainee interrogations. After the group was formed and began its work, it quickly became clear to me that the contributions of members would be rejected if they did not agree that techniques constituting CID were permissible for use against detainees.
15. I voiced my disagreement with much of the legal analysis in the Working Group draft report (as did, I was told, the senior JAGs of the Army, Navy, Air Force, and Marines) and informed Haynes that the Navy and Marine Corps would not concur with any final Working Group report that contained such objectionable analysis. Because the Working Group was disbanded and no draft report was ever circulated for final approval by the GCs and JAGs, I and other senior members of the Working Group, including the JAGs of all four services, came to believe by about June 2003 that the project had been abandoned.
16. However, I learned in 2004, after the Abu Ghraib scandal became public, that in 2003 Secretary Rumsfeld, on his own authority and without the knowledge or approval of most of the Working Group members, had approved a report styled as a joint service "working group report" on detainee interrogations and had ordered it to be distributed to each of the Combatant Commanders (including SOUTHCOM, which had authority over Guantánamo detention operations) to serve as guidance. When I later reviewed a copy of this "working group report," it appeared to be substantially similar to the legally flawed Working Group draft report that the service JAGs and I had objected to and believed had been shelved.

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<sup>1</sup> I submitted a detailed memorandum on my efforts to end abuse at Guantanamo to the Inspector General of the Navy in 2004. That memo was publicly released in 2006 and is available at the following link: <http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf>.



17. It is my view that interrogation techniques amounting to torture and CID were authorized for use at Guantánamo by some of the highest-level officials in the United States government. Upon information and belief I am also of the opinion that, pursuant to that authorization, some Guantánamo detainees were subjected to torture and CID, including by members of the Joint Task Force at Guantánamo.
18. In my capacity as General Counsel of the Navy, I received multiple reports of the adverse policy consequences of the U.S. government's cruel interrogation practices. Our allies, including some in NATO, would often refuse to participate in discussions of detention operations overseas because they did not want to implicate themselves in wrongdoing. I heard from U.S. military officers that on at least one occasion, British forces in Iraq captured a terrorist and released him with a 48-hour head start before telling American forces, because they did not want to aid and abet criminal activity. I was personally approached by uniformed military lawyers from four allied countries at a legal conference overseas and told unequivocally that, despite having trained with the U.S. military throughout their careers and being sympathetic to U.S. objectives in the War on Terror, they and their countries regarded the use of torture as criminal activity and they would not be party to it. As a result of these experiences, I am convinced that U.S. torture adversely affected our operational military capabilities.

#### **Access of the Special Rapporteur on Torture to the Prison at Guantánamo Bay**

19. Through years of detainee abuse and the failure to permit international inspections, Guantánamo has become a symbol of U.S. violations of the laws of war and of crucial human rights law, including the Convention Against Torture.
20. I have been informed that the current Special Rapporteur on Torture, Juan Méndez, has requested unrestricted access to the prison at Guantánamo Bay and private interviews with the detainees, in accordance with his mandate from the Human Rights Council of the United Nations to monitor compliance with the Convention Against Torture.
21. I am further informed that the Department of Defense has refused Special Rapporteur Méndez all access to Guantánamo beyond a basic tour that would provide no ability to inspect the facilities and no contact with detainees, and that Special Rapporteur Méndez has refused this offer as inconsistent with his mandate. Further, I am informed that he is understandably unwilling to accept restrictive terms from one country that would impede his ability to negotiate access with another country. It is my understanding that the United States has previously assisted the Special Rapporteurs on Torture with gaining access to states that were reluctant to agree to the terms of his mandate.

22. I am troubled that the United States is refusing the Special Rapporteur full access to Guantánamo. This refusal sets a bad precedent in that other states that may also wish to deny him access may cite to the American example as justification: it damages the authority of his office; it diminishes the international community's efforts to curb the use of cruelty; it weakens the norm against torture; and it puts detained individuals at greater risk of abuse. All of these effects are contrary to our national interest.
23. Moreover, I am aware of current reports detailing detainee claims of ongoing abuse at Guantánamo, including potentially abusive force-feedings, unwanted physical contact by female guards, and a refusal to provide torture rehabilitation despite the fact that the government has admitted to torturing many of the "high value detainees" who were formerly in CIA custody. I find such reports – which come more than 13 years after I first raised objections over the abuse of detainees there – extremely troubling. Based on personal experience, I believe that such mistreatment continues to diminish U.S. ability to engage with allies and to confront our enemies effectively at a time when global terrorism is rising and a coordinated international response will be necessary.
24. At the same time, members of the U.S. military continually put themselves in harm's way around the world for the purpose of safeguarding our interests and values. It is unfair to them and compromises their mission for the United States government to engage in acts such as torture and CID that could place our troops at risk of retaliatory abuse.
25. It is crucial for the United States to resume our traditional global leadership role in the field of human rights. To do so, we will have to regain our moral authority by practicing transparency and behavior consistent with human rights laws and principles, including in detention operations. One key way in which to accomplish that is by allowing Special Rapporteur Méndez access to Guantánamo - even if only to the limited extent that Mr. al Baluchi has proposed. Although I believe that Special Rapporteur Méndez should be granted full access to the prison, access proposed in this motion would allow him to begin to examine the compliance of the United States with the Convention Against Torture and to bring any violations to public attention. A visit by Special Rapporteur Méndez would help by either identifying any such abuse or disproving that it is taking place. Either way, his visit would both advance the cause of human rights and, by helping ensure that our actions are consistent with our laws and values, contribute to rehabilitating our nation's moral, political, and legal standing in the world.

I declare that the above is true under penalty of perjury under the laws of the United States of America.

Dated 20 April, 2016

A handwritten signature in black ink, appearing to read "Am J", followed by a horizontal line extending to the right.

Alberto J. Mora



# Attachment D

**DECLARATION OF THOMAS R. PICKERING**

**Background**

1. My name is Thomas Reeve Pickering. I am over 18 years old and fully competent to make a declaration.
2. I earned my AB from Bowdoin College in 1953, and a MA from the Fletcher School of Law and Diplomacy at Tufts University. Following my MA, I received a Fulbright Fellowship and earned a second MA from the University of Melbourne in Australia. I am also the recipient of 14 honorary degrees.
3. I entered on active duty in the U.S. Navy in 1956-1959 as an air intelligence officer and photo interpreter, and later served in the Naval Reserve up to the grade of Lieutenant Commander.
4. For over forty years, I was a U.S. diplomat, earning the personal rank of Career Ambassador, which is the highest in the Foreign Service. I served as ambassador to El Salvador, India, Israel, Jordan, Nigeria, Russia, and the United Nations. I also served as Executive Secretary to the Department of State and Special Assistant to Secretaries William P. Rogers and Henry A. Kissinger. Between 1959 and 1961, I worked in the Bureau of Intelligence and Research of the State Department.
5. From 1997 until 2001, I was Under Secretary of State of Political Affairs. During that time, I went to Nigeria, which was in the midst of transition from military to democratic rule, and among other issues, sought the release of a prominent Nigerian leader who was a political prisoner.

6. During my diplomatic career, I engaged substantively with foreign officials on counter-terrorism and human rights issues, some of which were highly controversial, including the expulsion of suspected Palestinian dissidents from Israel, and coordinating the United Nations Security Council's response to Iraq's invasion of Kuwait.
7. Following my retirement from the State Department in 2001, I was Senior Vice President for International Relations at Boeing until June 2006, and also was until 2011 an independent board member at OAO TMK, the world's largest steel pipe company based in Moscow, Russia. I am currently an independent board member of a Russian-founded software company, Luxoft.
8. I have been Chairman and co-chair of the International Crisis Group, coordinating their international responses; Chairman of the Institute for the Study of Diplomacy; Chairman of the American Academy of Diplomacy; Vice Chairman of the Board of Directors for The Stimson Center (dedicated to enhancing international peace and security); a member of the Board of the Council on Foreign Relations; and a member of the board of the Global Leadership Foundation (to promote good governance in democratic institutions). I am the current Vice Chairman of Hills & Company, an international consulting firm based in Washington, DC.
9. I am a current member of The Constitution Project's bipartisan Liberty and Security Committee. I also served on the Task Force for Detainee Treatment, a bipartisan group of former government officials, judges, and other prominent persons in law and security. The Task Force released a comprehensive report in



2013 on U.S. detainee treatment since 2001, which included original investigations into U.S. operations in Afghanistan and Iraq, Libya, the CIA's secret prisons (known as "black sites"), and the prison at Guantanamo Bay. As a key part of the investigation, I personally visited a country publicly reported to have hosted a CIA black site, and met with senior foreign officials there. The Task Force unanimously concluded that the United States had engaged in the practice of torture, a conclusion that was validated in 2014 by the release of the redacted summary of the Senate Select Committee on Intelligence's report on the CIA's rendition, detention, and interrogation program. The Task Force also unanimously concluded that "The United States cannot be said to have complied" with its legal obligations under the Convention Against Torture.

10. In 2012, I led an independent State Department panel charged with investigating the attacks on the U.S. mission in Benghazi, Libya. The resulting report, released in December 2012, concluded that systemic mistakes at the State Department led to severely inadequate security at the U.S. mission in Benghazi.
11. As a result of my lengthy career at the State Department and my many assignments following my retirement from the State Department, I am an expert on the impact of U.S. actions on crucial strategic relationships, as well as a specialist on the adherence to human rights obligations within the context of counter-terrorism. I am familiar with the role and mandate of the United Nations' Special Rapporteur on Torture.

**Access of the Special Rapporteur on Torture to the Prison at Guantanamo Bay**

12. I understand that the current Special Rapporteur on Torture, Juan E. Mendez, has requested access to the U.S. detention facility at Guantanamo Bay, Cuba, which has been open since January 2002. I further understand that the access offered to Special Rapporteur Mendez by the Department of Defense is the same as that offered to visiting journalists and observers, and does not include the ability to inspect the facilities or speak privately with detainees.
13. I believe that the access offered to Special Rapporteur Mendez is inadequate and the restriction is detrimental to our national security. The Special Rapporteur on Torture is mandated to investigate countries' compliance with the United Nations Convention Against Torture ("CAT"), a treaty that entered into force in the U.S. in November 1994, and prohibits and offers safeguards against one of the most serious crimes under international law and the principal provisions of which have been fully incorporated into U.S. domestic law by Congress. I believe that granting access to the Special Rapporteur on Torture to prisons within U.S. jurisdiction, including Guantanamo, is an important part of demonstrating compliance with the CAT, and is fully in keeping with many approaches which I and other senior officials of the U.S. government have made to foreign states to secure in their countries the same access and rights.
14. In fulfilling his mandate, the Special Rapporteur necessarily must be granted the ability to inspect prison conditions in every country, and to meet privately with prison inmates in order to obtain accounts of their treatment that are independent of the state's influence. As a policy consideration, it would be detrimental to the

Special Rapporteur's mandate to accept a lower level of access in one country than in another, and U.S. opponents have, are, and will continue to seize upon the restriction as an opportunity to hide their bad practices.

15. My career has continued to require my engagement with senior foreign officials, including from countries that are some of our closest allies. Following the closure of the CIA black sites, one of the most pressing issues raised by those allies is the continuing detention of individuals at Guantanamo Bay. Apart from the issue of detention of some individuals without charge or trial, the publicly reported conditions at Guantanamo have been criticized around the world and I have seen firsthand the great deal of influence and respect that we have lost from our allies as a result.
16. The current public reports regarding Guantanamo detail heavy-handed and even brutal force-feedings, indifferent medical care, unacceptably cold stainless steel cells, indefinite solitary confinement, and other potential violations of both the CAT and the Geneva Conventions. These reports are of serious concern to our allies, and should be of serious concern to the U.S. government. If they are in error, it will be the responsibility of Special Rapporteur Mendez to correct that erroneous reporting; if they are true, it is the responsibility of the United States immediately to correct those mistakes.
17. I am informed that the Department of Defense has raised national security as a reason to bar Special Rapporteur Mendez from full access to the prison and detainees at Guantanamo. This presumably stems from the presence of classified actions or information at the site. The U.S. Executive Order defining classification

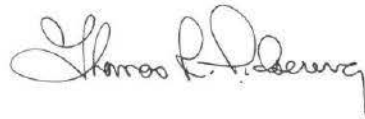


in no way should be used to hide or protect actions by the United States that are contrary to the international law which is now fully incorporated into U.S. domestic legislation in order to carry out binding obligations under the CAT. It is my expert opinion that national security is the most important reason to *grant* Special Rapporteur Mendez access to the prison and detainees at Guantanamo.

18. Guantanamo is currently used by our enemies as a symbol of lawlessness that grossly undermines U.S. national security. If the public reports about current abusive conditions there are false, then I believe that the United States government has much to gain by allowing Special Rapporteur Mendez to perform his duty and certify U.S. compliance with the CAT. Such a report would begin to rehabilitate the damage done by the U.S. torture of detainees, and help the U.S. to regain leadership in international human rights.
19. If, however, the public reports about continuing abuse at Guantanamo are true, I believe that it is even more crucial that the Special Rapporteur shed [a] light on any noncompliance with the CAT, ensure humane detention at the prison, and open the door to change. Any continuation of torture, abuse, and other practices that run contrary to U.S. values and legal obligations poses a serious threat to ourselves and our allies by inspiring action against us and by serving as a ‘recruiting tool’ for those opposed to us, especially in the Middle East.
20. In my considered view, the most effective way to uphold our national security is to be as transparent as possible in our long-term detention operations to illustrate that we have overcome the dark years of torture and abuse that so shake our standing in the world. That standing translates into the ability effectively to

negotiate with and issue sanctions on other countries and non-state entities. Where the threat of terrorism is concerned, the importance of that ability cannot be overestimated, nor the assurance of the cooperation of friends and allies around the globe.

I declare that the foregoing is true under penalty of perjury under the laws of the United States.

A handwritten signature in black ink, appearing to read "Thomas R. Pickering". The signature is cursive and somewhat stylized, with the first letters of the first and last names being prominent.

Dated this 12<sup>th</sup> day of April, 2016

Thomas R. Pickering

# Attachment E



**DECLARATION OF NIGEL S. RODLEY**

**Background**

1. My name is (Sir) Nigel Simon Rodley. I am over 18 years of age and competent to make a declaration.
2. I earned an LLB from the University of Leeds in 1963, followed by two LLMs (in international law), from Columbia University in 1965 and New York University in 1970, respectively. I also earned a Ph. D in Law from the University of Essex in 1992.
3. From 1965 until 1968, I was an Assistant Professor of Law at Dalhousie University in Halifax, Nova Scotia. I then joined the United Nations as an Associate Economic Affairs Officer at headquarters in New York from 1968 till 1969.
4. I was a visiting lecturer of political science at the graduate faculty at the New School for Social Research from 1969 until 1972, and also a Research Fellow at the New York University Center for International Studies from 1970 until 1972 (specializing in international law).
5. In 1973, I returned to England and became the founding head of the legal office at the International Secretariat of Amnesty International, a position I retained until 1990. While at Amnesty, I was responsible for the legal and inter-governmental dimensions of the global campaign against torture that Amnesty initiated in 1973. I participated, on behalf of Amnesty, in the negotiations at the United Nations that led to the drafting of the 1984 Convention Against Torture (CAT), which codified torture and cruel, inhuman, and degrading treatment as crimes under international law. I was also a principal drafter of Amnesty's 12-Point Program against Torture, one of which was ensuring access to

prisoners, a point that I believe should be understood to include access by international mechanisms, such as the Special Rapporteur on Torture.

6. From 1973 until 1990, I was also a lecturer in law at the London School of Economics and Political Science in London.
7. I became a Reader at the University of Essex in 1990, teaching international law, international human rights, and jurisprudence. I was Director of the LLM in International Human Rights Law from 1991-1993 and from 1996-2001, and Dean of the School of Law from 1992-1995. I am currently Chair of the Human Rights Centre at the University of Essex, with the title of Professor Emeritus.
8. I was appointed the Special Rapporteur on Torture by the United Nations Commission on Human Rights in 1993, a mandate I held until 2001. My primary responsibilities as Special Rapporteur included visits to prisons in countries around the world; the transmission of information, including potential CAT violations, to responsible governments; the processing of follow-up information in response to amendments made by responsible governments; reporting annually to the Commission on Human Rights and the United Nations General Assembly; and liaising with the Committee Against Torture, which is the treaty body of experts tasked with monitoring states' compliance with the CAT.
9. Since 2001, I have been a member of the Human Rights Committee, which is the treaty body of experts tasked with monitoring compliance of states parties with the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee prepares responses to states parties' reports on their implementation of the ICCPR, and also receives individual petitions on potential violations in states who are parties to the

Optional Protocol (the United States is not a party to this protocol). I served as Vice-Chairperson of the Human Rights Committee in 2003-2004 and 2009-2010 and as Chairperson in 2013-2014.

10. I have authored and edited numerous publications, including the Routledge Handbook of International Human Rights Law (co-edited with Scott Sheeran, 2013); The Treatment of Prisoners under International Law (Clarendon Press/UNESCO, 1987; 2nd ed. 1999; 3rd ed 2009); "International Responses to Traumatic Stress," Baywood Publishing (1996); "The Definition(s) of Torture in International Law," 55 Cur'nt Leg. Probs. 467 (2002); and "U.N. Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights-Complementarity or Competition?" 25 HRQ 882 (2003), which concluded that the Special Procedures of the United Nations (including the Special Rapporteurship on Torture) provide important complementary functions to the United Nations treaty bodies.
11. Among my professional associations, I am a member of the academic panel of Doughty Street Chambers; a Patron and former Trustee of Freedom From Torture (the medical foundation for the care of victims of torture); and President of the International Commission of Jurists. In 1998, I was knighted in the Queen's New Year's Honours list for services to Human Rights and International Law. I was awarded the American Society of International Law's 2005 Goler T. Butcher Medal for distinguished work in human rights, and was also made an honorary fellow by the Faculty of Forensic Law and Medicine at the Royal College of Physicians in 2008.

**Access of the Special Rapporteur on Torture to Guantanamo Bay**

12. I have been informed that the current United Nations Commission on Human Rights Special Rapporteur on Torture, Juan Méndez, has been barred by the U.S. Department of Defense from conducting an inspection of the prison and conducting interviews with the prisoners at Guantanamo Bay. I understand that Special Rapporteur Méndez has been offered a tour of the prison similar to that offered to journalists, which in my view is entirely insufficient to carry out his mandate.
13. The guidelines for fulfilment of the mandate of Special Rapporteurs are contained in the Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights, which was adopted in 1998.<sup>1</sup> The Terms of Reference state that governments should offer guarantees regarding the Special Rapporteurs' freedom of movement in the country, "including facilitation of transport, in particular to restricted areas"; freedom of inquiry including "confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty"; and that no persons who have been in contact with the Special Rapporteurs will be subject to retaliation by the government.
14. Some of the most important information on the commission of torture that I was able to obtain in pursuance of my mandate as Special Rapporteur on Torture was that obtained as a result of on-site visits to prisons.
15. The reason for the effectiveness of the information was my ability to rely on confidential unsupervised access to all places of detention and sources of information, including

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<sup>1</sup> Appendix V, E/CN.4/1998/45, *available at* <http://www2.ohchr.org/english/issues/torture/rapporteur/docs/terms.doc>.



especially that of detainees and prisoners (as alleged victims or witnesses), on the basis of the Terms of Reference for Fact-Finding Visits.

16. I would refuse to undertake visits to States that would not accept these terms. I recall deeply appreciating the support I received from the United States, when it made supportive interventions with reluctant States from which I had requested invitations for on-site visits on those standard terms.

17. It is with dismay that I have followed the current negative example it is setting by refusing to accept visits on the same conditions for my successors.

Dated this 12th day of April, 2016

A handwritten signature in black ink, appearing to read 'Nigel S. Rodley', with a stylized flourish at the end.

Nigel S. Rodley

# Attachment F

P. 1/2

CR-133-AAA

UNCLASSIFIED

END OF MAY EARLY JUNE 2003

Head Trauma (Injury) Incident 1

At the CIA Black site, in the very first days  
After US Gov. Agents shaved my head, then they smashed  
my head against the wall repeatedly.....

It continued until I lost count at each session.  
As my head was being hit each time, I would see sparks of lights  
in my eyes, as the intensity of these sparks were increasing as  
a result of repeated hitting then all of sudden I felt a strong  
jolt of electricity in my head then I couldn't see anything everything  
went dark and I passed out.

Next thing I found myself in a different place suspended to  
the ceiling in a dark cold cell. I don't know for how many hours  
I was unconscious. Naked while my legs were swollen as a result of  
extended standing. My legs couldn't support my body, the handcuffs were  
cutting my wrists which were pulled over above my head. A very sharp  
throbbing pain in my head. There was an extremely loud and disturbing  
music with a mixture of grating screeching shrill sounds cutting into  
my ears pounding my mind. As every now and then an agent would come

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~~UNCLASSIFIED~~

Continued "Head Injury Incident 1"

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

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

AMMAR AL-BALUCHI

GWANTANAMO BAY

6th AUG 2015



# Attachment G

**DECLARATION OF HUMAN RIGHTS WATCH, THE AMERICAN CIVIL LIBERTIES UNION,  
HUMAN RIGHTS FIRST, THE CENTER FOR VICTIMS OF TORTURE,  
PHYSICIANS FOR HUMAN RIGHTS, APPEAL FOR JUSTICE, WIN WITHOUT WAR,  
THE BILL OF RIGHTS DEFENSE COMMITTEE/DEFENDING DISSENT FOUNDATION,  
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND  
THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AT YALE LAW  
SCHOOL**

**Background**

1. **Human Rights Watch** is a nongovernmental organization that reports on violations of international human rights and humanitarian law by state and non-state actors in more than 90 countries around the world, including the United States.
2. **The American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. Headquartered in New York City, the ACLU is the largest civil liberties organization in the country with offices in all 50 states, Puerto Rico and Washington, D.C. and over 500,000 members. Founded in 1920, largely in response to the curtailment of liberties that accompanied the United States' entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens, the ACLU has advocated in the intervening decades to hold the U.S. government accountable to the rights protected under U.S. Constitution as well as other civil and human rights laws and treaties.
3. **Human Rights First** is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the global struggle for human rights, so we press the U.S. government and private companies to respect human rights and the rule of law. When they fail, we step in to demand reform, accountability and justice. Around the world, we work where we can best harness American influence to secure core freedoms.
4. **The Center for Victims of Torture** ("CVT") is an international nonprofit dedicated to healing the wounds of torture and ending the practice of torture worldwide. CVT provides healing services to survivors of torture and war atrocities at its clinics in the United States, the Middle East, and Africa, engages in training and capacity building initiatives in support of torture survivor rehabilitation programs worldwide, and advocates for human rights and an end to torture.
5. **Physicians for Human Rights** is a nongovernmental advocacy organization that uses science and medicine to document and call attention to mass atrocities and severe human

rights violations. PHR investigates and documents acts of torture around the world, medically examines torture victims, and reports on the devastating consequences of torture on individuals, institutions, and society. For the past decade, PHR has investigated the systematic torture and ill-treatment of national security detainees held by the United States.

6. **Appeal for Justice** is a non-profit human rights and civil liberties law practice founded by David Remes. Mr. Remes established the practice in 2008 when he left his partnership at a prominent Washington, D.C. law firm after 25 years to devote himself full time to fighting government overreach in the war against terrorism.

7. **Win Without War** is a coalition of national organizations with diverse constituencies representing more than 11 million Americans who seek a more progressive national security and foreign policy for America. We seek a fundamentally new approach to meet the national security challenges of the United States that is consistent with our nation's highest values.

8. **The Bill of Rights Defense Committee/Defending Dissent Foundation** is a national civil liberties organization that protects the right to political expression and works to ensure government accountability and transparency to strengthen participatory democracy and to fulfill the promise of the Bill of Rights.

9. **The National Association of Criminal Defense Lawyers** ("NACDL") is a nonprofit voluntary professional association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL is dedicated to promoting a rational and humane criminal justice system. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL has more than 9,000 members who include private criminal defense attorneys, public defenders, and law professors, and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

10. **The Allard K. Lowenstein International Human Rights Law Clinic at Yale Law School**, established in 1989, undertakes a wide variety of work on behalf of human rights organizations and individual victims of human rights abuse. Since 2001, the Clinic has joined efforts to oppose human rights violations arising from U.S. counterterrorism operations. The Clinic has investigated abuses, supported litigation on behalf of detainees and torture survivors, and filed numerous amicus briefs before domestic courts and international tribunals.

#### **Access of the Special Rapporteur on Torture to the Detention Facilities at Guantanamo Bay**

11. We write this declaration in support of the motion filed by Mr. al Baluchi, and joined by his co-defendants, to grant United Nations Special Rapporteur on Torture Juan E.

Méndez access to the detention facilities and detainees at the US Naval Base at Guantanamo Bay, Cuba. Over the course of several years, Special Rapporteur Mendez has repeatedly sought adequate access to the detention facilities at Guantanamo, but the US Department of Defense has denied all such requests. The US has only offered him a highly restricted form of access to the facility that explicitly excludes the possibility of conducting private, unmonitored interviews or any meetings with detainees.<sup>1</sup> Such restrictions impede the kind of inspection and review that Special Rapporteur Méndez would need to conduct to fulfill his responsibility as a UN independent expert.

12. Special Rapporteur Mendez’s mandate—as approved by United Nations Commission on Human Rights Resolution 1985/33—includes conducting fact-finding missions to countries and investigations of individuals reported to be at risk of torture. It also involves monitoring compliance with obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994. The mandate covers all countries, irrespective of whether a state has ratified the Convention against Torture. Accordingly, the Special Rapporteur frequently seeks and has obtained access to detention facilities in multiple countries around the world,<sup>2</sup> such as Mexico,<sup>3</sup> Ghana,<sup>4</sup> and Indonesia.<sup>5</sup> To fulfill his mandate, Special Rapporteur Méndez needs to be able to move freely about the detention facilities and conduct private, unmonitored interviews with the detainees.

13. Public reports of torture and ill-treatment at Guantanamo Bay began to emerge soon after the US began housing detainees there in January 2002. To this day, there are reports that the US engages in practices at Guantanamo Bay that can amount to torture or ill-treatment. This includes prolonged solitary confinement of detainees, and conducting force feedings on detainees who are competent to refuse food and are engaged in hunger strikes.

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<sup>1</sup>“Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay,” Inter-American Commission on Human Rights, October 3, 2013, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E> (accessed April 13, 2016).

<sup>2</sup> United Nations Human Rights Council, “Report of the Working Group on Arbitrary Detention,” 2009, A/HRC/10/21, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement>, para 48.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Ghana,” March 5, 2014, A/HRC/25/60/Add.1.

<sup>4</sup> Office of the United Nations High Commissioner for Human Rights, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Mexico,” December 29, 2014, A/HRC/28/68/Add.3.

<sup>5</sup> Office of the United Nations High Commissioner for Human Rights, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Indonesia,” March 10, 2008, A/HRC/7/3/Add.7.



14. Human Rights Watch and the ACLU, along with several other human and civil rights organizations, have also been requesting full access to the Guantanamo Bay detention facility for more than a decade. We renewed our requests in 2009 after President Barack Obama took office and on subsequent occasions, but the US Department of Defense has invited us only to attend a VIP tour to observe a model Guantanamo detention camp. It has yet to grant us any meaningful access to the facilities and detainees.

15. The US government has pointed to a Defense Department review conducted in 2009 that found the conditions of confinement at Guantanamo to be in “conformity with Common Article 3 of the Geneva Conventions” and that they “also meet the directive requirements of Common Article 3 of the Geneva Conventions.”<sup>6</sup> That review also recommended, however, that the U.S. Defense Department “consider inviting non-governmental organizations and appropriate international organizations to send representatives to visit Guantánamo” because “[t]he involvement of other international and non-governmental organizations [in addition to the International Committee of the Red Cross]...may be beneficial in making the operations at Guantánamo more transparent, and in offering their services for the humane care and treatment of detainees.”<sup>7</sup> An internal review from over seven years ago is no substitute for regular independent monitoring and access; the US unwillingness to grant access to the UN and other impartial organizations that publicize their findings raises questions about the reasons behind this lack of transparency. Until the US provides impartial observers with adequate access to the detention facilities and detainees, it will not be possible to assess US claims that it is meeting its obligations under international law.

16. The US imposition of major restrictions on the Special Rapporteur’s access not only raises concerns about US compliance with the Convention against Torture, but also risks undermining the Special Rapporteur’s ability to do his work more generally. For the Special Rapporteur to conduct credible and independent inspections, it is critical that he insist upon unfettered access to detainees and their conditions of confinement. To agree to substandard access to facilities in the United States while demanding more complete access elsewhere would hamper his ability to carry out his mission. Instead of continuing to restrict the Special Rapporteur’s access to Guantanamo, the United States should seize the opportunity to demonstrate its commitment to transparency and to its international obligations, by granting meaningful access to the Special Rapporteur. Doing so would also provide the US with important information to assist it in ensuring detention conditions comply with international standards. If the conditions fall short of such standards, the US should be ready to accept and address criticisms; in doing so, it will encourage other countries to do the same.

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<sup>6</sup> US Department of Defense, “Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement,” 2009, [http://www.defense.gov/Portals/1/Documents/pubs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf) (accessed April 14, 2016).

<sup>7</sup> *Id.*

Signed this 6<sup>th</sup> day of May, 2016

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