



UNITED STATES MISSION
TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

December 19, 2013

Sir Ben Emmerson
Special Rapporteur on the Promotion and Protection of Human Rights
and Fundamental Freedoms While Countering Terrorism
Office of the High Commissioner for Human Rights
Geneva, Switzerland

OHCHR REGISTRY

20 DEC. 2013

Recipients : ... SPD
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Ms. Gabriela Knaul
Special Rapporteur on the Independence of Judges and Lawyers
Office of the High Commissioner for Human Rights
Geneva, Switzerland

Mr. El Hadji Malick Sow
Chair, Working Group on Arbitrary Detention
Office of the High Commissioner for Human Rights
Geneva, Switzerland

Mr. Juan E. Mendez
Special Rapporteur on Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment
Office of the High Commissioner for Human Rights
Geneva, Switzerland

Dear Sir Ben, Ms. Knaul, Mr. Sow, Mr. Mendez:

The Government of the United States of America received your letter dated November 30, 2012, regarding Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Bin al Shibh, Ali Abdul Aziz Ali (also known as Anmar al Baluchi), and Mustafa Ahmed Adam al Hawsawi. In response to your inquiry, the United States provides the following information:

The five detainees at the Guantanamo Bay detention facility, who are the subject of the present inquiry, continue to be detained lawfully under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war, in the ongoing armed conflict with al-Qaida, the Taliban, and associated forces. This law authorizes the President of

the United States to “use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” including the authority to detain persons who are part of al-Qaida, the Taliban, or associated forces.

Section 1021 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, by its terms, does not limit or expand the authority of the President or the scope of the AUMF. It does not alter the President’s authority to use force, including to detain, as already authorized by the AUMF. As President Obama noted in his signing statement for the NDAA, “[t]he authority [section 1021] describes was included in the 2001 AUMF,” and the limitations explicit in section 1021 “make clear beyond doubt that the legislation does nothing more than confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF.” He further emphasized that his “Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.”

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

Regarding the five detainees who are the subject of the present inquiry, Khalid Sheikh Mohammed and Walid Muhammad Salih Mubarak Bin Attash have not availed themselves of their right to habeas corpus to challenge the lawfulness of their detention. An attorney filed a habeas petition on behalf of Mr. Mustafa Ahmed Adam al Hawsawi in 2008 without Mr. Al Hawsawi’s authorization, leading to the dismissal of the case in 2009; Mr. Al Hawsawi has never re-filed. The two remaining detainees have both filed habeas petitions. Mr. Ramzi Bin al Shibh’s habeas case is currently stayed by consent of both parties until completion of his military commission proceedings. Presently, the parties are submitting briefs to the court on a U.S. Government motion requesting to stay Mr. Anmar al Baluchi’s habeas case pending the completion of his military commission proceedings.

In order to ensure further that continued law of war detention is carefully evaluated and justified, President Obama issued Executive Order (E.O.) 13567 to establish a new process of periodic

review by an interagency Periodic Review Board (PRB) for the detainees at Guantanamo Bay who are designated for continued law of war detention or referred for prosecution but not yet charged or convicted. The PRB is charged with determining whether continued law of war detention of a detainee subject to the periodic review process is necessary to protect against a continuing significant threat to the security of the United States. If a final determination is made that a detainee no longer meets that standard, E.O. 13567 provides that the Secretaries of State and Defense are to identify a suitable transfer location for the detainee outside the United States, consistent with the national security and foreign policy interests of the United States and applicable law. Although the periodic review process, unlike habeas proceedings, was established to review the Executive Branch's discretionary exercise of existing detention authority in individual cases, and therefore does not address the legality of detention, E.O. 13567 requires any material information calling into question the legality of detention that comes to light during this process be referred immediately to the Secretary of Defense and Attorney General for appropriate action.

The five detainees who are the subject of the present inquiry are not currently eligible for this periodic review process because they have been referred for prosecution and charged with violations of the law of war. The charges have subsequently been referred to a military commission for trial. There were eight charges referred common to all five accused: conspiracy; murder in violation of the law of war; attacking civilians; attacking civilian objects; destruction of property in violation of the law of war; intentionally causing serious bodily injury; hijacking aircraft; and terrorism. Each accused is presumed innocent unless proven guilty beyond a reasonable doubt. Pursuant to requirements of the 2009 Military Commissions Act (MCA), each accused has been provided defense counsel with specialized knowledge and experience in death penalty cases. These proceedings are currently in the pre-trial litigation phase.

Military commissions are a lawful and appropriate forum for trying violations of the law of war. All current military commission proceedings at Guantanamo Bay are governed by the 2009 MCA, which instituted significant reforms to the system of military commissions. These reforms include prohibiting the admission at trial of statements obtained through cruel, inhuman, or degrading treatment, in addition to torture, except for statements by individuals alleging that they were subject to torture or such treatment as evidence against a person accused of committing the torture or mistreatment. The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism referenced in your letter (A/63/223) was published prior to the enactment of the 2009 MCA, and references an evidentiary rule that is no longer in effect. All military commissions under the MCA incorporate fundamental procedural guarantees, including: the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; prohibitions on the use of coerced evidence; additional evidentiary requirements for the admission of hearsay evidence; a requirement that an accused in a capital case be provided with counsel "learned in applicable

law relating to capital cases;” the provision of latitude to the accused in selecting his or her own military defense counsel; and enhancements to the accused’s right to discovery of evidence. The MCA also affords the right to appeal final judgments rendered by a military commission to the U.S. Court of Appeals for the District of Columbia Circuit, a Federal civilian court consisting of life-tenured judges, and ultimately to the U.S. Supreme Court. Further, the United States is committed to ensuring the transparency of commission proceedings. To that end, proceedings are now broadcast via live video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the Office of Military Commissions website: www.mc.mil.

The United States has a strong interest in ensuring the detainees at the Guantanamo Bay detention facility have meaningful access to counsel in both habeas and military commissions proceedings. The government respects the critical role of detainees’ counsel in these proceedings and the fundamental importance of that role in the U.S. system of justice, and will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients. Presumptive classification has been a handling procedure to enable counsel to use information obtained from their clients while also safeguarding classified information. In response to defense concerns that this handling procedure unfairly burdens the attorney-client relationship, in September 2012, the U.S. Government requested a modification of the protective order applicable to the military commissions proceedings for the five detainees who are the subject of the present inquiry. That modification, which was granted by the judge and reflected in the revised protective order issued in December 2012, removes the presumption of classification from statements made by the five detainees and is intended to clarify that defense counsel, who have always had the ability to discuss with their clients the full range of topics necessary to legal representation, may now publicly discuss information unless they have reason to know it is classified. Additionally, the military commission procedures provide for a robust attorney-client privilege, which is not waived by any application of the handling procedures required by the protective order.

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

treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The Executive Order also revoked all previous executive directives, orders, and regulations to the extent inconsistent with that order. All U.S. detention operations, including those at Guantanamo Bay, comply with Common Article 3 of the Geneva Conventions, and other applicable international laws.

Should you have additional questions, please do not hesitate to contact us.

Sincerely,



Peter F. Mulrean
Chargé d'Affaires ad interim