



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

July 20, 2016

Mr. José Guevara
First Vice Chair on behalf of the Working Group on Arbitrary Detention
Geneva, Switzerland

Mr. Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health
Geneva, Switzerland

Ms. Mónica Pinto
Special Rapporteur on the independence of judges and lawyers
Geneva, Switzerland

OHCHR REGISTRY

21 JUL 2016

Mr. Ben Emmerson
Special Rapporteur on the promotion and protection
of human rights while countering terrorism
Geneva, Switzerland

Recipients: SLB
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Mr. Juan E. Méndez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment
or punishment
Geneva, Switzerland

Dear Mr. Guevara, Mr. Puras, Ms. Pinto, Mr. Emmerson, and Mr. Méndez:

Thank you for your inquiry of May 6, 2016, which expresses concern about information you received regarding the situation of Mr. Mustafa al-Hawsawi, particularly with regard to his access to adequate medical care and the access of his attorneys to information relevant to his legal representation.

As an initial matter, we wish to note that Mr. al-Hawsawi is detained lawfully under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the ongoing conflict with al-Qaeda, the Taliban, and associated forces. This law authorizes the President of the United States to “use all necessary and appropriate force against those ... organizations,[] or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,”

including the authority to detain persons who are part of al-Qaeda, the Taliban, or associated forces. An attorney filed a petition for a writ of habeas corpus on behalf of Mr. al-Hawsawi in the D.C. District Court in 2008. In 2009, the petition was dismissed without prejudice because Mr. al-Hawsawi had not authorized the attorney to file the petition. Mr. al-Hawsawi has not re-filed a petition challenging the factual basis for his detention.^[1] Mr. al-Hawsawi has charges pending against him before a U.S. military commission, convened pursuant to the Military Commissions Act of 2009 (2009 MCA), and those proceedings are now in the pre-trial litigation phase. He is one of five co-defendants charged with committing multiple offenses related to an attack that killed approximately 3,000 people.

Access to adequate medical care

As a matter of long-standing policy intended to safeguard the privacy of detainees' medical information, and because allegations like these are the subject of ongoing litigation, we are not able to provide information regarding the specifics of Mr. al-Hawsawi's medical condition. Nevertheless, we hope that the following information will be useful:

The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. On one of his first days in office, January 22, 2009, President Obama issued Executive Order 13491, Ensuring Lawful Interrogations. The Executive Order directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States.^[2] It further ordered that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in Army Field Manual 2-22.3. The Field Manual explicitly prohibits threats, coercion, and physical abuse. The 2016 National Defense Authorization Act, signed into law in November 2015, codified certain key provisions of Executive Order 13491.

^[1] We wish to note that the U.S. Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees have the right to challenge the legality of their detention through a petition for writ of habeas corpus. 553 U.S. 723 (2008). Indeed, many of the detainees at Guantanamo today have challenged their detention through habeas petitions in U.S. federal court. All of the detainees at Guantanamo who have prevailed in habeas proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. To date, 32 detainees have been ordered released as a result of habeas proceedings in federal court. In each of those cases, the United States relinquished custody of the detainees, and they were repatriated or resettled as appropriate.

^[2] The Executive Order stated that the foregoing requirements do not preclude the Federal Bureau of Investigation, or other federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.

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

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention. The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while serving at Joint Task Force-Guantanamo. U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

Detainees may make a request to personnel in the cell blocks or to the medical personnel at any time for medical attention. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by staff. The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees and the medical staff, followed by inpatient care as needed.

The Naval Hospital Guantanamo provides additional consultative services provided by numerous medical professionals, including an anesthesiologist, a general surgeon, an orthopedic surgeon, a licensed dietician, and a physical therapist. The JMG routinely brings in specialists, including medical professionals practicing in the areas of Dermatology, Cardiology, Ear, Nose, and Throat, Gastroenterology, Urology, and Audiology, and it has the ability to request specialists from other areas as needed.

All military healthcare personnel whose duties involve support of detainee operations or contact with detainees receive advance training commensurate with their duties prior to seeing detainees. The purpose of this training is to equip military healthcare personnel to provide quality care in a detention setting by ensuring that they have a working knowledge and understanding of the requirements and standards for providing healthcare to detainees. Upon arrival at Guantanamo, non-specialists have mandatory orientation that includes classroom time as well as a two-week formal transition between incoming and outgoing personnel. Specialists making their first visit to Guantanamo have another medical

staff member with them at all times to help them acclimate and to assist in the provision of care.

The U.S. government has granted defense counsel access to all of Mr. al-Hawsawi's medical records through February 2016, and will continue to provide Mr. al-Hawsawi his medical records on a rolling basis. An additional release up to and including April 2016 is expected soon.

We hope that this information helps to demonstrate our absolute commitment to providing all detainees held at Guantanamo with exemplary medical care.

Access to counsel and to classified information for purposes of a legal defense

Eight charges against Mr. al-Hawsawi have been referred to a military commission, including: conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, destruction of property in violation of the law of war, intentionally causing serious bodily injury, hijacking aircraft, and terrorism. Mr. al-Hawsawi is presumed innocent unless and until proven guilty beyond a reasonable doubt. Pursuant to the requirements of the 2009 MCA, he has been provided defense counsel with specialized knowledge and experience in death penalty cases. As discussed above, these proceedings are currently in the pre-trial litigation phase.

The seriousness of these criminal proceedings and accountability under law require that the defense be given a full and fair opportunity to raise legal challenges to the rules, the law, and even the system itself. In Mr. al-Hawsawi's case, the parties have so far filed 213 substantive motions and have orally argued 48 motions in previous pre-trial sessions. Of the 213 substantive motions filed, 12 have been mooted, dismissed, or withdrawn; 94 have been ruled on by the Commission; and an additional 38 have been submitted for and are pending decision.

All current military commission proceedings at Guantanamo are governed by the 2009 MCA, which instituted significant reforms to the military commissions system, and incorporated fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 of the Geneva Conventions of 1949 and other applicable law, and are consistent with those in Additional Protocol II to the Geneva Conventions of 1949. These include 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 of discovery of evidence. The 2009 MCA also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review, and subsequently to the D.C. Circuit Court of Appeals, and then to the U.S. Supreme Court, both of which are federal civilian courts composed of life-tenured judges.

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

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

The United States has a strong interest in ensuring that the detainees at Guantanamo have meaningful access to counsel in both habeas and military commission proceedings. The U.S. government respects the critical role of detainees' counsel in these proceedings and, more broadly, the fundamental importance of that role in the U.S. system of justice. We will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

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

As holders of a valid U.S. security clearance, detainees' defense and habeas lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. government. All holders of U.S. security clearances are subject to these same obligations. In accordance with

Executive Order 13526, in no case may information be classified in order to “conceal violations of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency.”

We thank you for this opportunity to address the issues you raised in your May 6, 2016 communication.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Harper', with a stylized flourish at the end.

Keith M. Harper
Ambassador
U.S. Representative to the UN Human Rights Council