



## **The United States' Compliance with the United Nations Convention Against Torture with Respect to Arbitrary Detention at Guantánamo**

*53rd Session, Geneva, 3 November – 28 November 2014*

### **I. Reporting Organization**

This submission is by the Center for Constitutional Rights (CCR), a nongovernmental organization based in the United States that is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR has been at the forefront of defending the rights of men detained at Guantánamo since the beginning of the prison's operation. We were counsel in *Rasul v. Bush*, 542 U.S. 466 (2004), which first established the right of detainees to challenge the legality of their detentions in U.S. courts, and have coordinated the legal representation of detainees by hundreds of pro bono counsel for over a decade. We have also directly represented dozens of current and former detainees in their efforts to ensure humane treatment during detention, timely release, reintegration, and rehabilitation after release.

### **II. Issue Summary**

In its Concluding Observations of 2006,<sup>1</sup> the Committee expressed its concern about indefinite detention of individuals held at Guantánamo Bay, at the time with no access to any meaningful procedures to review the lawfulness of their detention. Much has changed since then, but indefinite detention is as much an issue today as it was eight years ago. Despite repeated public assurances that the government is committed to closing Guantánamo, 149 men remain imprisoned. Most have never been charged and will never be charged. More than half of them – 79 – have been approved for transfer, the vast majority of them by the unanimous consent of an inter-agency task force over four years ago.<sup>2</sup>

In 2013, detainees staged a prolonged prison-wide hunger strike to protest their treatment and indefinite detention – the largest and longest in Guantánamo's history. Our clients, like the majority of the other detainees, sacrificed their health, and in some cases endangered their lives in an effort to draw attention to their plight. At Guantánamo, hunger striking detainees are often made to endure highly painful and humiliating procedures to remove them from their cell (“forced cell extractions”) and forcible feedings via nasogastric intubation. During the height of the 2013 hunger strike, our clients reported that some detainees had become “skeletal,” were “barely moving,” and had coughed up blood or lost consciousness.

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<sup>1</sup> Committee Against Torture, *Conclusions and recommendations: United States of America*, adopted at the 36th session of the Committee Against Torture, CAT/C/USA/CO/2 (Jul. 25, 2006). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f2&Lang=en).

<sup>2</sup> Four men out of the 79 currently cleared detainees were cleared by a Periodic Review Board (PRB) over the course of the last year. The PRB process also relies on interagency consensus in reaching its decisions.

According to our clients, under the restrictive conditions of detention at Guantánamo, hunger striking is the only way to raise concern over their detention after years of inaction by the United States and to resist the regime of secrecy at the prison that keeps their torment out of the view of the international community. More importantly, our clients explained that the hunger strike was compelled out of an abiding hope that they might one day regain their freedom. During a March 2013 meeting, our client Fahd Ghazy stated it this way: “Hunger striking is not my choice. [The United States government] cleared me for transfer. My choice is to be home and to live as a human being.”

In response to the protest, the United Nations and regional human rights bodies joined in the call for a prompt closure of Guantánamo. President Obama promised to renew efforts to close the facility in a speech on May 23, 2013. He pointed to his deep unease with holding men without charge for so many years and the ongoing forced feeding of thirty men who were then on hunger strike. “Our sense of justice is stronger than that,” the President concluded.<sup>3</sup>

More than a year later, those words have not translated into action. The government’s goal of closing Guantánamo appears aspirational at best. An estimated twenty detainees continue their hunger strike and the government continues to submit them to forcible feeding and solitary confinement. We find the government’s report unsatisfactory, as it does not fully explain why, despite the “absolute commitment” of the government to close the facility, transfers continue to proceed at a glacial speed. The government lifted the moratorium on transfers to Yemen in May 2013, but not a single Yemeni has left the prison alive since July 2010. As of this submission, well over half of the 149 remaining Guantánamo detainees are from Yemen. Sadly, Guantánamo is devolving into an indefinite detention camp housing exclusively Muslim men from Yemen – all while proposals for new restrictions on transfers are pending in Congress. The lack of certainty over their fate creates unbearable anguish for our clients and the other detainees, a situation that the government has so far failed to address.

### III. Legal Framework

#### *Article 1*

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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<sup>3</sup>The White House, *Remarks by the President at the National Defense University* (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

#### **Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

#### **Article 3**

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

#### **Article 11**

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

#### **Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

### **IV. The CAT Committee General Comments & List of Issues**

The Committee prepared its list of issues for the United States in 2010.<sup>4</sup>

In question 8, the Committee asked the United States government, *inter alia*, to clarify the steps it has taken to ensure it does not detain suspects indefinitely, without charge, and the legal safeguards available to the detainees. It also asked about safeguards to ensure no detainee is

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<sup>4</sup> Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of the United States of America*, CAT/C/USA/Q/3-5 (Jan. 20, 2010). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en).

transferred to a country where they could face a real risk of being tortured, and the type of post-transfer monitoring arrangements the government has adopted. For detainees who are undergoing criminal prosecution, the Committee asked for information on the type of court and fair trial safeguards available to the accused, and which steps the government has taken to ensure such prosecutions correspond to international fair trial standards.

In question 10, the Committee enquired about steps taken to ensure the respect for the principle of *non-refoulement*, in particular the establishment of judicial mechanisms to challenge all removal decisions and the safeguards in place to cross-check the reliability of diplomatic assurances.

In question 38, the Committee enquired about current conditions of detention, the availability of contacts with the detainees' families, and the opportunities for detainees for education and recreation. The Committee also wished to know how effective measures to improve conditions of detention were.

In question 43, the Committee encouraged the government to accept the requests to visit the Guantánamo detention facility by the UN Special Rapporteur on the question of torture and other special procedure mechanisms.

In its General Comment No. 2, the Committee has reiterated the absolute character of the prohibition of torture, allowing no exceptions in emergencies and armed conflict.<sup>5</sup> The Committee also recently reiterated its recommendation that “solitary confinement might constitute torture or inhuman treatment and should be regulated as a measure of last resort to be applied in exceptional circumstances, for as short a time as possible, under strict supervision including being subjected to judicial review. Indefinite solitary confinement is prohibited.”<sup>6</sup>

## V. The Government's Response

In December 2013, the government provided a detailed reply to the Committee's questions summarized above.<sup>7</sup> It reaffirmed its “commitment to close the Guantánamo detention facility,” and listed a number of procedural steps it has taken to work towards the closure of the site,

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<sup>5</sup> Committee Against Torture, *General Comment No. 2, Implementation of article 2 by States parties*, CAT/C/GC/2 (Jan. 24, 2008). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en).

<sup>6</sup> Committee Against Torture, *CAT observations on the revision of the Standard Minimum Rules for the Treatment of Prisoners (SMR), for the Expert Group meeting, Brasilia. 28 to 31 January 2014*, CAT/C/51/4 (Dec. 16, 2013), para. 32. Available at <http://www.ohchr.org/Documents/HRBodies/CAT/CATObservationsToSMR.doc> (internal citations omitted).

<sup>7</sup> Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure. Third to fifth periodic reports of States parties due in 2011: United States of America*. CAT/C/USA/3-5 (Dec. 4, 2013). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en) [hereinafter CAT/C/USA/3-5 (Dec. 4, 2013)].

which it called a “difficult and complex” process.<sup>8</sup> It asserted its authority to detain “‘persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or coalition partners.’ Such detention is permitted by the law of war until the cessation of hostilities covered by the AUMF.” The government explained the work of the 2010 Guantánamo Task Force, which designated 126 detainees for “transfer subject to appropriate security measures,” 36 for military prosecution, 48 for continued detention, and 30 Yemeni nationals for detention conditional to the evolving security situation in Yemen and realization of plans for a rehabilitation program in Yemen, or the availability of a third country resettlement option. At the time of the government’s submission, the Obama administration had transferred 71 detainees home or to third countries, one detainee was tried in a federal court in the United States, and four detainees had died, three of them through suicide, according to the military’s claims.<sup>9</sup>

The government then described the process set up after the U.S. Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008) affirmed the detainees’ right under the U.S. Constitution to seek judicial review of the lawfulness of their detention (“habeas corpus”), assisted by counsel of their choice, who may view classified evidence after receiving appropriate security clearances.<sup>10</sup> The government “has the burden in these cases to establish its legal authority to hold the detainees.”<sup>11</sup>

In addition, the government established an inter-agency Periodic Review Board (PRB) to evaluate whether the 48 detainees slated for continued detention in 2010 continue to pose “a significant threat to the security of the United States.” A recommendation by the Periodic Review Board for transfer or release commits the United States to “vigorous efforts [...] to identify a suitable transfer location outside the United States,” in line with the security interests of the United States, and subject to its obligation of *non-refoulement*.<sup>12</sup>

As to transfers, the government referred to its “longstanding and firm commitment not to transfer any detainee from Guantánamo to a State where it is more likely than not that he will be tortured.”<sup>13</sup> The government will seek diplomatic assurances from the possible country of transfer and take into account “the foreign government’s past practice and capacity to fulfill its assurances,” relevant political and legal developments, and the “U.S. diplomatic relations with that country.”<sup>14</sup> Since the 2009 Special Task Force recommendations on diplomatic assurances,<sup>15</sup> the government “is not aware of any cases in which humane treatment assurances have not been honored in the case of an individual transferred from the United States or

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<sup>8</sup> CAT/C/USA/3-5 (Dec. 4, 2013), para 42.

<sup>9</sup> *Id.*, para 44. Three additional detainees committed suicide before the last United States submission to the Committee against Torture in 2006. *See* note 25 below.

<sup>10</sup> *Id.*, para 60-61.

<sup>11</sup> *Id.*, para 61.

<sup>12</sup> CAT/C/USA/3-5 (Dec. 4, 2013), para 62.

<sup>13</sup> *Id.*, para 48.

<sup>14</sup> *Id.*, para 49.

<sup>15</sup> *Id.*, para 67.

Guantánamo.”<sup>16</sup> The government also made efforts to identify “credible, independent organizations” for post-transfer monitoring, and would take “corrective steps” in case of “any credible report of conduct contrary to those assurances.” The government had also refrained from transferring individuals where it felt assurances were not satisfactory.<sup>17</sup>

As to conditions of detention, the government asserted it “exceeded” its obligations under Common Article 3 of the 1949 Geneva Conventions.<sup>18</sup> The government implemented recommendations made by the Department of Defense review in 2010 and continues to review its procedures and make “improvements wherever possible for the comfort of detainees and the safety of the guard force.”<sup>19</sup> The report describes the newly established communal living facilities and measures in place to account for religious needs of the detainees, both in terms of meals and of praying. The government has introduced opportunities for linguistic, educational, and vocational training, indoor and outdoor recreation, and maintains a library with “thousands of books, magazines, and DVDs,” from “picture books to doctoral-level reading.”<sup>20</sup> The report also describes the medical facilities and the health care available to detainees.<sup>21</sup> For family contact, the government continued to avail itself of the videoconferencing system administered by the International Committee of the Red Cross (ICRC), phone calls where families do not have access to such a system, and an “unlimited amount of mail.”<sup>22</sup>

As to invitations for U.N. Special Rapporteurs to visit Guantánamo, the government repeated its position that it has issued such invitations subject to the limitations on access “consistent with the nature of those facilities,” in particular the prohibition on communicating in private with “enemy forces.”<sup>23</sup>

## VI. Compliance by the United States

The U.S. government has generally made improvements to conditions of confinement for most detainees since 2009; however, such changes do not offset the harmful effects on our clients resulting from their uncertainty about when and whether they will ever be released. Currently, 79 men are approved for transfer. 56 of them are Yemeni nationals. CCR clients Mohammed Al Hamiri, Fahd Ghazy, and Tariq Ba Odah of Yemen remain detained despite being approved for transfer several years ago. In May 2014, CCR Client Ghaleb Mohammad Al Bihani was approved for transfer by the Periodic Review Board, an inter-agency mechanism which started its work in late 2013.

Our clients carry with them the aftereffects of previous ill-treatment. The persistent uncertainty over their fate freezes their minds in place and time, making it impossible to overcome the

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<sup>16</sup> *Id.*, para 75.

<sup>17</sup> *Id.*, para 49.

<sup>18</sup> *Id.*, para 216.

<sup>19</sup> *Id.*, para 218.

<sup>20</sup> *Id.*, para 220.

<sup>21</sup> *Id.*, para 222.

<sup>22</sup> *Id.*, para 223.

<sup>23</sup> CAT/C/USA/3-5 (Dec. 4, 2013), para 251.

trauma of physical and psychological abuse. Improvements in their living conditions, while essential, are not experienced as meaningful changes in such circumstances. Yet, our clients do grasp at welcome opportunities to educate themselves and prepare them for a life of freedom with their families.

Numerous studies have shown that the experience of indefinite detention psychologically torments detainees and compromises their health, with long-term effects that are hard to undo even after release.<sup>24</sup> This is exacerbated by the detainees' lack of control over their situation and limited means of expressing their grievances. Indefinite detention, particularly in the Guantánamo context, also generates justifiable resentment in the outside world at the treatment meted out to a prison population that has only ever consisted of Muslim foreign nationals. Since the opening of Guantánamo, six detainees have committed suicide (according to the military's claims) as they were unable to cope with their situation, and many more have attempted to do so.<sup>25</sup> Such incidents also increase the anxiety of other detainees.

### ***Lack of Effective Legal or Administrative Review***

Any preventive detention regime requires a mechanism to review the need for continued detention on an ongoing basis, but neither the habeas courts nor the Periodic Review Board process can ensure that detainees will be released in the foreseeable future. Federal courts have refused to grant detainees' habeas petitions even where the government has recommended them for transfer, and have been unwilling to mandate release (outside of rare cases where the government has assented to release). The Secretary of Defense has publicly declared he would hesitate approving the transfer of detainees for fear of recidivism.<sup>26</sup> Instead of hastening the release of elderly, seriously ill or disabled detainees to accelerate the rate of transfers, the government fights such petitions, with success, in the courts.<sup>27</sup>

The Periodic Review Board, established by Executive Order in 2011, with a mandate of completing initial reviews within one year, started to review detainee cases only two years later, in 2013. It has reviewed only nine detainees so far, and made final determinations for only seven men, recommending three men for continued detention, and four men for release, including our client Ghaleb Al-Bihani. None of these four have actually been released, however; they have only been put in another cycle of endless waiting after a brief surge of hope. At his PRB hearing, Mr. Al-Bihani expressed in deeply-felt words his hope for a new start in a new country,

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<sup>24</sup> See, e.g., Physicians for Human Rights, *Punishment Before Justice: Indefinite Detention in the US* (Jun. 2011), <http://physiciansforhumanrights.org/library/reports/indefinite-detention-june2011.html#sthash.8Q6ugnPs.dpuf>.

<sup>25</sup> See, e.g., Charlie Savage, *As Acts of War or Despair, Suicides Rattle a Prison*, N.Y. Times (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/world/guantanamo-files-suicide-as-act-of-war-or-despair.html> (describing the shift in the government's attitude from treating suicidal tendencies as a sign of depression to stigmatizing them as another form of "asymmetric warfare"); James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guantánamo*, N.Y. Times (Jun. 11, 2006), <http://www.nytimes.com/2006/06/11/us/11gitmo.html?pagewanted=all> (quoting official statistics of 41 suicide attempts by 25 detainees between 2002 and 2006).

<sup>26</sup> Nedra Pickler, *Obama Goal of Gitmo Closure Stalled at Pentagon*, Associated Press (Sep. 30, 2014, 2:45 PM ET), <http://abcnews.go.com/Politics/wireStory/obama-goal-gitmo-closure-stalled-pentagon-25854351?singlePage=true>.

<sup>27</sup> See, e.g., *Aamer v. Obama*, 2014 U.S. Dist. LEXIS 85343 (D.D.C. Jun. 24, 2014).

and his efforts in prison, despite the difficulty, to prepare himself for the life he wants.<sup>28</sup> In approving Mr. Al-Bihani for transfer, the PRB found him “credible on his commitment to living a peaceful life,”<sup>29</sup> and recommended his resettlement in a third country, in line with Mr. Al-Bihani's own wishes. Yet five months later, he – like 78 other men cleared for transfer – continues to languish at Guantánamo with no sense of whether or when he will finally be released.

Detainees recommended for prosecution are likewise caught in a system marked by uncertainty and delays. In an effort to establish some certainty about his fate, CCR client Sufyian Barhoumi offered to plead guilty before a military commission to any charge the government would be willing to bring against him. He hoped only that once he was sentenced he would obtain a certain date by which he could return home to Algeria. Despite the fact that Mr. Barhoumi was designated for prosecution by the Task Force, the military prosecutors refused to accept his plea. As a result, Mr. Barhoumi continues to sit in limbo, neither cleared nor charged, without explanation.

The government claims that detentions at Guantánamo are lawful as part of the conflict authorized by the post-9/11 Authorization of Military Force (AUMF). When detention is justified as a means to prevent detainees from returning to an armed conflict, as here, the end of hostilities should mark an end to detention. The government, however, continues to describe new military operations against organizations such as ISIS/ISIL as continuations of the conflict covered under the AUMF. The government may be expected to argue that these developments, entirely outside of the control of our clients, and unrelated to their initial capture, nonetheless justify their continued detention even after the expected withdrawal of U.S. combat forces from Afghanistan later this year. This, contrary to the U.S. government's assertion in its reply to the list of issues adopted by the Human Rights Committee in 2013,<sup>30</sup> does constitute indefinite detention.

### ***Detention Based on Yemeni Nationality***

For prisoners from Yemen, the prolonged mental anguish caused by continuing indefinite detention at Guantánamo is particularly acute. More than half of all remaining prisoners – and three-quarters of the men currently approved for transfer – are of Yemeni descent. Yet, no Yemenis have left the prison alive since July 2010, when the U.S. government was ordered by a federal court to release Mr. Mohammed Odaini. Predictably, Guantánamo, always a prison exclusively for Muslim men and boys, is increasingly becoming a prison for Muslim men and

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<sup>28</sup> *Statement of Ghaleb Nasser Al Bihani*, Periodic Review Board, Ghaleb Nasser Al-Bihani, ISN 128 (Apr. 8, 2014), [http://www.prs.mil/Portals/60/Documents/ISN128/140408\\_ISN128\\_U\\_DETAINEE%27S\\_WRITTEN\\_SUBMISSION\\_PUBLIC.pdf](http://www.prs.mil/Portals/60/Documents/ISN128/140408_ISN128_U_DETAINEE%27S_WRITTEN_SUBMISSION_PUBLIC.pdf).

<sup>29</sup> *Unclassified Summary of Final Determination*, Periodic Review Board, Ghaleb Nasser Al-Bihani, ISN 128 (May 15, 2014), [http://www.prs.mil/Portals/60/Documents/ISN128/140515\\_U\\_ISN128\\_FINAL\\_DETERMINATION\\_PUBLIC.pdf](http://www.prs.mil/Portals/60/Documents/ISN128/140515_U_ISN128_FINAL_DETERMINATION_PUBLIC.pdf).

<sup>30</sup> *Replies of the United States of America. Addendum to: List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr.1)*, adopted by the Committee at its 107th session (11–28 March 2013), CCPR/C/USA/Q/4/Add.1 (Sep. 13, 2013), para 89. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fQ%2f4%2fAdd.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fQ%2f4%2fAdd.1&Lang=en).



boys from a single country – Yemen. In response, the United States has offered only rhetoric. In May 2013, the government announced that it would formally lift its self-imposed moratorium on transfers to Yemen and pledged to review the Yemeni Guantánamo population for transfer on a “case by case basis.”<sup>31</sup> To date, however, there still appears to be no plan for gradual repatriation of Yemeni detainees based on an individualized assessment of their probability of successful adjustment to civilian life after release, or to resettle cleared Yemenis who would accept transfer to a third country.<sup>32</sup> And as of October 2014, federal draft legislation again threatens to prohibit transfers from Guantánamo to Yemen until 2016.<sup>33</sup>

In light of the above, it is indisputable that Yemeni men are detained at Guantánamo based on, or because of, their citizenship and nationality. If they were not from Yemen, most would not be in Guantánamo today. As such, the continuing detention of Yemeni prisoners is classic arbitrary detention based on nationality, which violates U.S. law as well as international humanitarian law and human rights law, and which causes severe pain and suffering that amounts to torture or other cruel, inhuman and degrading treatment.<sup>34</sup>

### ***Hunger Strikes, Forcible Feedings and Poor Conditions of Confinement***

Detention in the Guantánamo context enhances detainees’ feelings of helplessness and despair. It adds to the trauma they experienced under the coercive interrogation methods – many of which amounted to torture – of the Bush administration. Detainees feel compelled to endanger their health as the only means to make their voices heard. Those on hunger strike have to undergo humiliating and painful forcible feeding that a medical expert, based on publicly available information, described as “an extraordinary departure from customary medical practice.”<sup>35</sup> The

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<sup>31</sup> The White House, *Remarks by the President at the National Defense University* (May 23, 2013),

<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

<sup>32</sup> Note that the proposed rehabilitation center in Yemen, establishment of which the government has long treated as among the preconditions for repatriation of Yemenis in large numbers, has barely entered in its planning phase. See *Yemen moves to set up rehab center for Gitmo detainees*, Al Jazeera America (May 14, 2014 5:30PM ET), <http://america.aljazeera.com/articles/2014/5/14/yemen-moves-to-setuprehabcenterforgitmodetainees.html> (reporting that the Yemeni government has created a committee to “advance the project” of the rehabilitation center, but no funds have been earmarked yet); David S. Cloud *U.S. holds talks about Yemen detention center for Guantanamo inmates*, L.A. Times (Nov. 6, 2013), <http://articles.latimes.com/2013/nov/06/world/la-fg-yemen-gitmo-20131107> (describing disagreement over funding and type of facility as well as the insecurity in Yemen as obstacles to moving forward with the plan to build a rehabilitation center in Yemen).

<sup>33</sup> U.S. Senate Committee on Armed Services, *Senate Armed Services Committee Roll Call Votes on National Defense Authorization Act for Fiscal Year 2015* (May 23, 2014), <http://www.armed-services.senate.gov/press-releases/senate-armed-services-committee-roll-call-votes-on-national-defense-authorization-act-for-fiscal-year-2015>.

<sup>34</sup> The U.S. government’s failure to transfer Yemeni detainees is indefensible. It is no excuse to say that Yemen is too unstable to accept its citizens back. Even if that were true, which CCR disputes, it would not explain the failure to resettle these men in third countries. It is also no excuse for the government to blame the U.S. Congress for enacting legislation that makes it more difficult to transfer detainees. Congress has twice changed the law at the request of President Obama, but the rate of transfers has not increased in any meaningful fashion. Since January 2011, only 22 detainees have left Guantánamo alive, most between August and December 2013. So far in 2014, apart from five detainees exchanged for a U.S. soldier held prisoner by the Taliban, only one detainee has left Guantánamo. None was Yemeni.

<sup>35</sup> Declaration of Steven H. Miles, MD, *Hassan v. Obama*, No. 04-cv-1194 (UNA) (D.D.C. Mar. 5, 2014), para 8(d). Available at [http://www.reprive.org/uploads/2/6/3/3/26338131/2014\\_03\\_07\\_steven\\_miles\\_declaration.pdf](http://www.reprive.org/uploads/2/6/3/3/26338131/2014_03_07_steven_miles_declaration.pdf).

daily re-insertion of a tube that is wider than normally used in nasogastric feeding, the speed and quantity of entering fluids, and the use of olive oil as lubricant – the latter abandoned since June 2014 – are all non-standard, painful and potentially dangerous to the detainees’ health.<sup>36</sup> During the forcible feeding, detainees are often secured to a restraint chair designed to immobilize their hands, legs, and head, where they remain for up to two hours to ensure the liquid supplement is digested.<sup>37</sup> When a detainee stated in his petition to a federal court he would consent to less intrusive and painful ways of enteral feeding, the government refused to consider such an option.<sup>38</sup> It also did not offer him the option of a more comfortable procedure that was already in use with six other hunger strikers.<sup>39</sup>

In addition, detainees who refuse this painful procedure have to endure what the government calls “forcible cell extraction,” another humiliating protocol. According to CCR client and long-term hunger striker, Tariq Ba Odah, forcible cell extractions are conducted in an unnecessarily punitive manner. He reports that though his weight often dips to just approximately 100 pounds (45 kilograms) during cell extractions, he is often violently subdued by up to six military guards in riot equipment who transport him to feeding sessions. Despite this, Mr. Ba Odah says that the humiliation of having his will overborn during cell extractions and nasal force feeding is far worse than the physical pain either causes.

We estimate that between 15 and 25 detainees remain on long-term hunger strike.<sup>40</sup> In 2014, the government refused to publish the number of detainees who are committed to hunger strike, and prefers now to call their protest “long term non-religious fasting.”<sup>41</sup> The cynical euphemism notwithstanding, nothing has been done to address the concerns related to the treatment of men who continue to protest their unbearable situation. Also, we question how publishing the number of detainees on hunger strike would compromise detention operations, and would “detract[] from the more important issues, which are the welfare of detainees and the safety and security of

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<sup>36</sup> *Id.*

<sup>37</sup> Brief of appellants, *Aamer v. Obama*, 742 F.3d 1023 (No. 13-5223) (D.C. Cir. Jul. 22, 2013), at 22 (quoting from the superseded Joint Task Force Guantánamo Bay, Cuba, Joint Medical Group, *Medical Management of Detainees on Hunger Strike* (Mar. 5, 2013)). The government revised those procedures in December 2013, but many details have not been made public. See Joint Task Force Guantánamo Bay, Cuba, *Joint Medical Group, Medical Management of Detainees with Weight Loss* (Dec. 16, 2013). Available at <http://media.miamiherald.com/smedia/2014/03/11/08/40/8qyQk.So.56.PDF>.

<sup>38</sup> *Dhiab v. Obama*, 2014 U.S. Dist. LEXIS 116072 (D.D.C. Aug. 5, 2014).

<sup>39</sup> Carol Rosenberg, *Guantánamo ‘experiment’ didn’t break hunger strike but gets judge’s attention*, Miami Herald (last update Oct. 9, 2014 12:25 AM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2618030.html>.

<sup>40</sup> Carol Rosenberg, *Obama to Congress: Close Guantánamo prison* (Jan. 29, 2014 8:38 AM, last update Feb. 9, 2014 10:10 PM), <http://www.miamiherald.com/news/nation-world/world/americas/article1959749.html> (noting that at the time of the last official disclosure in December 2013, fifteen detainees were on hunger strike and all force-fed through nasogastric tubes. According to lawyers of the detainees, that number had risen to 25 by the end of January 2014, 16 of which were being force-fed).

<sup>41</sup> Carol Rosenberg, *U.S. now calls Guantánamo hunger strike ‘long term non-religious fasting’*, Miami Herald (last update Mar. 12 2014 5:24 PM), <http://www.miamiherald.com/news/nation-world/article1961235.html#storylink=cpy>.

[U.S.] troops,” as the government has argued.<sup>42</sup> Transparency and independent oversight by established experts on how to ensure compliance with international legal and ethical standards would improve the welfare of detainees and safety of prison staff, as well as the image of the United States abroad.

The World Medical Association, the ICRC, and the American Medical Association all have issued ethical guidelines for medical personnel faced with a protesting hunger-striker in detention.<sup>43</sup> The painful and coercive manner of forcible feeding, as it is practiced at Guantánamo, contravenes these standards, does not serve a medical interest, and appears designed to discourage the hunger strikers from continuing their protest.<sup>44</sup> It thus amounts to cruel, inhuman, and degrading treatment under the Convention against Torture.<sup>45</sup> Our clients who are on hunger strike experience it as such. In an April 2013 letter to CCR, Tariq Ba Odah likened the fast insertion of too much liquid, while being strapped into a chair, to the practice of water-boarding: He explained that in some feeding sessions it was impossible to keep down the large amount of supplement, making him choke up vomit and blood. He has endured forcible feedings thousands of times, and now complains of physical ailments, including damaged nostrils, excruciating abdominal pain, and a racing heartbeat.

Long-term hunger strikers are also penalized for their protest through placement in blocks with stricter procedures as to searches, access to open air and exercise, and limited communication

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<sup>42</sup> Jason Leopold, *Gitmo officials alter hunger strike protocols*, Al Jazeera America (last updated Dec. 6 2013 13:09), <http://www.aljazeera.com/humanrights/2013/12/gitmo-officials-alter-hunger-strike-protocols-2013126124042381368.html> (quoting prison spokesperson Navy Cmdr. John Filostrat).

<sup>43</sup> Article 6, World Medical Association, *Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment* (1975, revised, 2006). Available at <http://www.wma.net/en/30publications/10policies/c18/> (“Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.”); Article 13, World Medical Association, *Declaration of Malta on Hunger Strikers* (1991, revised 2006). Available at <http://www.wma.net/en/30publications/10policies/h31/> (“Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.”); International Committee of the Red Cross, *Hunger strikes in prisons: the ICRC’s position* (Jan. 31, 2013). Available at <http://www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm>; Jeremy A. Lazarus, MD, President of the American Medical Association, *Letter to Chuck Hagel, U.S. Secretary of Defense* (Apr. 25, 2013). Available at <http://media.miamiherald.com/smedia/2013/04/30/07/58/FRs25.So.56.pdf>.

<sup>44</sup> See Lacey Johnson, *Guantanamo force feedings aimed at discouraging other prisoners – witness*, Reuters (Oct. 7, 2014 9:51pm BST), <http://uk.reuters.com/article/2014/10/07/uk-usa-guantanamo-forcefeeding-idUKKCN0HW1VZ20141007> (summarizing the testimony of a medical expert before a federal district court); Josh White, *Guantanamo Force-Feeding Tactics Are Called Torture*, Washington Post (Mar. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/28/AR2006022801344.html> (quoting then commander of U.S. Southern Command, Army Gen. Bantz J. Craddock, stating “that the new techniques of [strapping detainees to the padded chair and using a larger tube that was removed after each feeding] were designed to end the strike.”).

<sup>45</sup> Article 13, *Declaration of Malta on Hunger Strikers*, see note 42 above; Declaration of Steven H. Miles, MD, *Hassan v. Obama*, Civil Action No. 04-cv-1194 (UNA) (D.D.C. Mar. 5, 2014), para 4. Available at [http://www.relieve.org/uploads/2/6/3/3/26338131/2014\\_03\\_07\\_steven\\_miles\\_declaration.pdf](http://www.relieve.org/uploads/2/6/3/3/26338131/2014_03_07_steven_miles_declaration.pdf).

with their fellow inmates. Prolonged solitary confinement, as indefinite detention, adds to the anguish of detainees whose mental health is already fragile from years of abuse and promises not kept. Our client, Mr. Ba Odah has been held in solitary confinement for at least six years of his time in Guantánamo. He is allowed only a few hours every day outside the cell, and reports that he regularly goes days with virtually no human contact other than the military personnel responsible for forcibly feeding him. Because of his hunger strike, he is often too weak to exercise outside, but instead tries to pace inside his cell. Now in year twelve of his indefinite detention, Mr. Ba Odah, meditates, prays, and reads to ready himself for the day when he is freed and will have the opportunity to care for his aging mother.

All of these measures – the force feeding protocols, the use of the restraint chair, the forced cell extractions, and the warehousing of long-term hunger strikers in isolation blocks – appear punitive in intent, calculated to break the will of the hunger strikers.

Furthermore, our clients fear the humiliating genital search procedures they have to undergo whenever they are taken out of their cell. This also makes it difficult for them to meet with counsel in person at the base or receive phone calls from counsel. While a district court judge agreed with the detainees that genital searches for the purpose of making phone calls or meeting with counsel had no legitimate security justification, the appeals court found it had to defer to the judgment of the prison commander, even where prison policies interfered with the detainees’ ability to interact with counsel and, therefore, to litigate their habeas corpus cases.<sup>46</sup>

The detainees’ contact with their families is too infrequent and impersonal, as video calls, phone calls, and mail are the only options for the detainees. The scarcity of contact and the lack of family visits make it even more difficult for detainees to bear their isolation at Guantánamo.

### ***Non-refoulement***

While we welcome recent transfers, one of our clients, Djamel Ameziane, was transferred in December 2013 to his home country Algeria, despite his declared fear he would be ill-treated there. He informed us after his return that upon arrival, the Algerian authorities placed him in secret detention, interrogated him repeatedly, and kept him in “deplorable prison conditions.” Mr. Ameziane fell seriously ill as a result. Algeria has blocked the access of human rights organizations, and even the ICRC, to provide material and psychological assistance to Mr. Ameziane, which would help him adjust to his new life. In addition, the U.S. government had failed to return his personal property to him upon transfer.<sup>47</sup>

We do not consider the government’s reply to the Committee’s question satisfactory. It does not describe a clear plan and timeline to close the facility. Every review and new mechanism is beset with delays. Detainees with Yemeni nationality have no control over the political and security situation in Yemen, and plans for the rehabilitation center in Yemen are advancing too

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<sup>46</sup> *Hatim v. Obama*, 2014 U.S. App. LEXIS 14759, 1 (D.C. Cir.2014).

<sup>47</sup> Motion for Grant of Habeas Relief in the Form of an Order Requiring the Government to Return Petitioner’s Personal Property, *Ameziane v. Obama*, 2014 U.S. Dist. LEXIS 98334(No. 05-392 (ESH)) (D.D.C. Mar. 7, 2014). Available at [http://ccrjustice.org/files/2014-03-07\\_Ameziane\\_MotionGrantHabeasReliefReturnPersonalProperty.pdf](http://ccrjustice.org/files/2014-03-07_Ameziane_MotionGrantHabeasReliefReturnPersonalProperty.pdf).

slowly to present a viable option for a foreseeable release. While we do not underestimate the complex nature of negotiations at the domestic and foreign level, we believe that detainees should not continue to bear the burden of this lengthy process. The government's response avoids the heart of the matter: the unlawfulness of indefinite detention and the heavy toll it takes on the mental and physical health of the detainees. Its vague answers prevent meaningful review of the United States' compliance with its international obligations under the Convention. We strongly urge the Committee to continue to press the government delegation for adequate answers to questions about how and when the United States will finally close Guantánamo and release the detainees to their home countries or resettlement countries.

## VII. Other UN Body Recommendations

**April 2013 Statement by UN High Commissioner for Human Rights:** In April 2013, UN High Commissioner for Human Rights Navi Pillay stated that the “continuing indefinite incarceration of many of the detainees [at Guantánamo] amounts to arbitrary detention and is in clear breach of international law.”<sup>48</sup> In response to the mass hunger strike at the prison, Pillay said that “given the uncertainty and anxieties surrounding their prolonged and apparently indefinite detention in Guantánamo, it is scarcely surprising that people’s frustrations boil over and they resort to such desperate measures.” As a first step towards closing the prison, Pillay urged the government to first release detainees who have been cleared for release.<sup>49</sup>

**May 2013 Joint Press Release:** The Inter-American Commission on Human Rights, the UN Working Group on Arbitrary Detention, and the UN Special Rapporteurs on Torture, Human Rights and Counter-Terrorism, and on Health called “the indefinite detention of individuals [...] “beyond a minimally reasonable period of time,” “even in extraordinary circumstances [...] a flagrant violation of international human rights law and in itself a form of cruel, inhuman, and degrading treatment.” They condemned as “unjustifiable” the “forced feeding of individuals contrary to their informed and voluntary refusal of such a measure.” The restrictions on transfers of Yemeni nationals, “based solely on their nationality and on the political situation in Yemen [...] constitute a clear violation of the principle of non-discrimination.” The press release urged the United States to “take concrete, decisive steps toward closing the detention center at the Guantánamo Naval Base once and for all.”<sup>50</sup>

**October 28, 2013 Statement by Juan Méndez to the Inter-American Commission on Human Rights:** In his statement as independent expert to the Inter-American Human Rights Commission, UN Special Rapporteur Juan Méndez noted that the uncertainty arising from

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<sup>48</sup> Pillay says Guantánamo detention regime is in “clear breach of international law” and should be closed (Apr. 5, 2013), <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13212&LangID=E#sthash.vUK9QHJg.dpuf>.

<sup>49</sup> *Id.*

<sup>50</sup> IACHR, *UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis* (May 1, 2013), [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/029.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/029.asp).

indefinite detention “increases the risk of serious mental pain and suffering to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.” He considered the situation in Guantánamo amounted to indefinite detention.<sup>51</sup>

**December 2013 Statement by UN SRs Juan Méndez and Ben Emmerson on Ameziane Forced Transfer:** When the U.S. government forcibly transferred Algerian national, Djamel Ameziane, against his will from Guantánamo to Algeria, United Nations Special Rapporteurs on torture, Juan E. Méndez, and on human rights and counter-terrorism, Ben Emmerson, recalled their concerns over the unreliability of diplomatic assurances as a safeguard against torture and other-forms of ill-treatment, and called upon States not to make use of them.<sup>52</sup>

**2014 ICCPR Concluding Observations:** The Human Rights Committee, in its Concluding Observations to the 2014 periodic review of the U.S., regretted the lack of a timeline for the closure of Guantánamo Bay. It recommended ending the system of indefinite detention, and try those accused of crimes in civilian courts, in full respect of the fair trial rights of Article 14 ICCPR, rather than the protracted military commissions.<sup>53</sup>

**2014 ICERD Concluding Observations:** The Committee on the Elimination of All Forms of Racial Discrimination, also in 2014, expressed its concern over the continued arbitrary detention of non-citizens at Guantánamo Bay. It called upon the United States to “end the system of administrative detention without charge or trial and ensure the closure of the Guantánamo Bay facility without further delay.”<sup>54</sup>

## VIII. Recommended Questions

- 1) Does the United States have a specific plan and timetable for the closure of Guantánamo? What is that plan and timetable?
- 2) Does the United States expect or intend, before the end of this year, to transfer Mohammed Al Hamiri, Ghaleb Al-Bihani, Fahd Ghazy, Tariq Ba Odah, or any other

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<sup>51</sup> Juan E. Méndez, UN Special Rapporteur on torture and other cruel, inhuman, degrading treatment or punishment, *Re: Hearing on the human rights situation of detainees at Guantánamo Naval Base, United States* (Oct. 28, 2013). Available at <http://antitorture.org/wp-content/uploads/2013/10/SRT-IACHR-Hearing-Guantanamo-statement-Oct-28-13.pdf>.

<sup>52</sup> *UN rights experts on torture and counter-terrorism concerned about the fate of Guantánamo detainees* (Dec. 10 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14084&LangID=E#sthash.08sCxKHV.dpuf>.

<sup>53</sup> Human Rights Committee: *Concluding observations on the fourth periodic report of the United States of America* U.N. Doc. CCPR/C/USA/CO/4, para. 21 (Apr. 23, 2014). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en).

<sup>54</sup> Committee on the Elimination of Racial Discrimination: *Concluding observations on the combined seventh to ninth periodic reports of United States of America* U.N.Doc. CERD/C/USA/CO/7-9, para 22 (Aug. 29, 2014). Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2fCO%2f7-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2fCO%2f7-9&Lang=en).

Yemeni detainees currently held at Guantánamo?

- 3) Is the Periodic Review Board limited to making recommendations for transfer, or can it provide any concrete relief to Guantánamo detainees?
- 4) Will the United States address the legitimate grievances of detainees on long-term hunger strike, and does it plan to adapt its detention protocol for artificial feeding in order to comply with relevant standards under the Convention against Torture?
- 5) What are the measures used to ensure solitary confinement is only used as a temporary measure under exceptional circumstances, in accordance with international recommendations?
- 6) Does the United States intend to “expand program content for intellectual stimulation, and provide for wider detainee access; maximize interaction between detainees, communal living and recreation interaction; approve and implement family visits; and consider inviting non-governmental organizations and appropriate international organizations to send representatives to visit Guantánamo,” as recommended by the government’s review of conditions at Guantánamo in 2009?

## **IX. Suggested Recommendations**

- 1) Exercise authority under the 2014 NDAA to effect additional transfers without further delay.
- 2) Close Guantánamo by transferring all men whom the government does not plan to charge to their home or resettlement countries.
- 3) Provide the anticipated date by which the Administration expects to complete Periodic Review Board hearings for all detainees slated for review.
- 4) Disclose the number of detainees currently on hunger strike and currently being forcibly fed.
- 5) Disclose the number of detainees currently being held in solitary confinement at Guantánamo.
- 6) Adapt procedures for treatment of detainees on hunger strike, including medical counselling, in accordance with international recommendations for ethical procedures in protest hunger strikes and limited use of solitary confinement.
- 7) Ensure all detainees who express a fear of being subjected to torture, or cruel, inhuman, and degrading treatment after transfer to their home country or a resettlement country, have access to meaningful judicial review of this decision.