

## Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

1. The Special Rapporteur (SR) welcomes the technical visit to the United States and the detention facility at the U.S. Naval Station Guantánamo Bay, Cuba. The visit comprised three parts: the rights of victims of terrorism, rights of detainees at Guantánamo Bay, and rights of former detainees. Enabling access by United Nations (UN) experts is an important signal from the United States Government to the international community that the Guantánamo detention facility is on a path to de-exceptionalism. It opens the possibility to address the profound human rights violations that have occurred there and the irreparable harms to the lives and health of the 780 Muslim men who have been detained there, including 30 men who remain. It affirms the fundamental principle of access to all places of detention including high-security settings. It upholds the value of UN human rights expert visits in accordance with the Terms of Reference for Country Visits by Special Procedure Mandate Holders, enabling all requested access to former and current detention facilities and to detainees, including “high value” and “non-high value” detainees,<sup>1</sup> military and civilian personnel, military commission personnel, and defense lawyers. The SR also interviewed victims, survivors, and families of victims of the September 11, 2001 terrorist attacks, former detainees in countries of resettlement or repatriation, and human rights and humanitarian organizations.

2. In every meeting she held with a detainee or former detainee, the SR was told with great regret that she had arrived “too late.” She agrees. At the time of her visit only 34 detainees remained at the site. It is evident that the horror and harms of extraordinary rendition, arbitrary detention, and systematic torture, cruel, inhuman, and degrading treatment or punishment inflicted over time occurred in part because of an exceptional and international law deficient legal and policy regime; the permeation of arbitrariness across subsequent detention practices; and the lack of international law compliant domestic oversight and accountability. She addressed these issues in her 2022 Report to the UN Human Rights Council and reaffirms those findings here.<sup>2</sup> She underscores that there has been no adequate accounting of the international law violations including violations of *jus cogens* norms that occurred from September 11, 2001 onwards.<sup>3</sup> The SR reaffirms the right to remedy and reparations for victims of serious violations of international human rights and humanitarian law, underscoring that such rights encompass preventive and investigative elements, as well as the right to access justice, remedy, and reparation.<sup>4</sup> The U.S. Government is under a continued obligation to ensure accountability, make full reparation for the injuries caused, and offer appropriate guarantees of non-repetition for violations committed post-9/11.<sup>5</sup> The world has and will not forget. Without accountability, there is no moving forward on Guantánamo.

3. The SR nonetheless accepts and affirms the positive engagement that enabled her visit. Few countries take meaningful steps to address egregious past human rights violations or undertake action to undo the most shocking of harms. She recognizes that the *sui generis* existence of the detention facility at Guantánamo Bay poses immense challenges for the U.S. Government, which now positively seeks to move forward. The U.S. Government, which has a standing invitation to all thematic Special Procedures mechanisms,<sup>6</sup> understood that this visit would put its detention practices, repatriation and resettlement efforts, and treatment of victims and family members of the 9/11 terrorist attacks under close scrutiny, and it is a sign of a commitment to international law that the visit occurred, was highly cooperative, constructive, and engaged at all levels of government, and is reported upon. As this report demonstrates, there is challenging human rights work to be done. But, at the outset, the SR affirms the U.S. Government’s substantial efforts to live up to its international human rights law obligations and demonstrate to the Member States of the United Nations its readiness to lead by example on the hardest human rights legacies. The SR thus commends the U.S. Government for enabling and supporting this visit and the good practice it demonstrates in respect of engagement with UN human rights mechanisms.

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<sup>1</sup> As required by the Terms of Reference, these interviews were confidential and unsupervised.

<sup>2</sup> A/HRC/49/45; see also A/HRC/13/42.

<sup>3</sup> See A/HRC/49/45, ¶ 14; see also A/HRC/WGAD/2022/66, ¶¶ 115-116.

<sup>4</sup> See A/RES/60/147 (citing, inter alia, Universal Declaration of Human Rights (UDHR), art. 8; International Covenant on Civil and Political Rights (ICCPR), art. 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 14; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art. 6; Fourth Geneva Convention (GCIV), art. 3; Additional Protocol I (API), art. 91); see also ILC, Draft Articles on State Responsibility, art. 34.

<sup>5</sup> Draft Articles on State Responsibility, arts. 30-37.

<sup>6</sup> OHCHR, “Standing Invitations” (accessed May 31, 2023), <https://spinternet.ohchr.org/StandingInvitations.aspx>. A standing invitation for the United States was announced on October 19, 2021.

## PART I: VICTIMS OF TERRORISM<sup>7</sup>

4. On September 11, 2001, horrifying terrorist attacks were perpetrated against the United States. With the transformation of commercial airplanes into lethal weapons of mass killing, a crime against humanity was committed as flights AA11 and UA175 were deliberately flown into the Twin Towers in New York. 2,753 people were killed and hundreds more were injured. Subsequently, the hijacking of flight UA93 and its downing in Pennsylvania added 40 to the death toll, and thereafter the hijacking of flight AA77 into the west side of the Pentagon added another 184 victims of terrorism. As heroic first responders raced to all three sites, the numbers of those killed rose in New York because those who went to protect became victims themselves. The cost of that morning was profound, and the experience of loss never singular. At least 102 nationalities were estimated among the dead. In an instant, children lost fathers and mothers, wives became widows, friends and relationships were destroyed by loss, families were left bereft, and communities scarred. Families and loved ones had to reckon with the unimaginable, including uncertainties about the fate of family members, the absence of a body to bury and mourn, and the unrelenting fear which characterized a nation scarred by the scale of this unprecedented violence. The SR notes the U.S. Government's position that the 9/11 attacks constituted war crimes.

5. The SR held many meetings with victims, survivors, and families during the technical visit, all of whom have equal right to remedy and reparation, encompassing a wide set of entitlements like access to justice and access to information.<sup>8</sup> The SR highlights the gendered fault-lines of loss. The vast majority of primary victims were men going to work or to rescue, and those left behind predominantly women and children,<sup>9</sup> with extraordinary women (mothers, grandmothers, aunts, sisters, and daughters) especially taking on the role of caring, advocating for, and protecting those left behind.<sup>10</sup> Without understanding the gendered impact of the attacks, the remedies provided were often inadequate for the long-haul, underestimating the long-term economic, social, and health needs of children and their mothers.

6. Although the United States was initially unprepared to address the scale and needs of victims, the SR positively acknowledges multiple constructive actions taken to address short, medium, and long-term needs—often achieved because of direct advocacy from victims. She highlights the extraordinary emotional and symbolic support to families and the ways in which federal and local government, as well as countless private actors including religious, cultural, and corporate entities and communities stepped up.<sup>11</sup> Pressed by victims, early legal and political action included adjustment of the legal rules on the notification of death and coroner's procedures and modifications to the tax code. Quick passage of the *Air Transportation Safety and System Stabilization Act* on September 22, 2001 created the original September 11<sup>th</sup> Victim Compensation Fund (2001-2004), which has been re-activated and expanded and has awarded nearly \$11.4 billion in compensation to more than 50,000 individuals.<sup>12</sup> Legislative action also includes compensation for 9/11 victims found in the *Justice for United States Victims of State Sponsored Terrorism Clarification Act* and the *Fairness for 9/11 Families Act*. While the bulk of compensation was undertaken at the federal level, state initiatives were also taken, including the World Trade Center Volunteer Fund (2002) and most recently the adoption of four pieces of New York legislation addressing compensation (2022).<sup>13</sup> Government programs for workers and businesses and the residents of lower Manhattan were also initiated.<sup>14</sup> She acknowledges and commends all these efforts.

7. The SR finds continued gaps in realizing victims' rights to reparation, however, including compensation and medical entitlements of victims, and urges that long-term legislative provision be made to ensure the security and reliability of entitlement for victims without discrimination. She expresses concern that in accepting compensation in

<sup>7</sup> The SR's mandate has an abiding commitment to a human rights-based approach to victims of terrorism as victims of international human rights law and international humanitarian law. See, e.g., A/HRC/20/14; see also A/HRC/RES/42/18, p. 3.

<sup>8</sup> See A/74/790, ¶¶ 8, 57-58; UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* (2015).

<sup>9</sup> She notes that the age of the victims also skewed young as the men killed were of working age, often with young families so the victim community was made up of younger women and very young children in many cases.

<sup>10</sup> See A/HRC/46/36, ¶ 31.

<sup>11</sup> Including but not limited to the American Red Cross, Stephen Siller Tunnel to Towers Foundation, Tuesday's Children, FDNY Foundation, New York City Police Foundation, 9/11 Families United, USA Cares, Inc., Scholarship America, and Catholic Charities USA.

<sup>12</sup> April 2023 Monthly Statistics Report with statistics as of April 30, 2022 (Apr. 30, 2023). The Fund was first re-activated with the *James Zadroga 9/11 Health and Compensation Act of 2010* (2011) and subsequently the *Never Forget Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11<sup>th</sup> Victim Compensation Fund Act*, expanding the scope and extending the claim filing deadline to October 2090.

<sup>13</sup> S.6810/A.7425; S.6812/A.7425; S.9370/A.9922A; S.9294A/A.10416.

<sup>14</sup> These include the New York State Workers' Compensation Fund for rescue and recovery workers and volunteers, FEMA reimbursement for displaced residents, and small business low-interest loans for "home repairs and cleanup." See Dixon and Stern, *Compensation for Losses from the 9/11 Attacks*, Inst. for Civil Justice, 75-77 (2004).

the immediate aftermath of the attacks, many family members had limited capacity to meaningfully consent to waive their rights (or their children's) to legal remedies, including litigation. Many victims at that time were managing profound grief and extraordinary burdens of care. She affirms the rights of child-victims of terrorism to pursue independent remedies for harm.<sup>15</sup> The SR heard from victims and families about the challenges then and now regarding compensation, health care, long-term trauma and post-traumatic stress disorder, and fulsome educational opportunities for children. She has met with foreign and out-of-state victims of the attacks and confirms the particular difficulties they have faced in ensuring compensation, health, and other necessary support. While the *Fairness for 9/11 Families Act* helped to reduce financial compensation limitations, long-term medical provision still has significant gaps. She highlights that the World Trade Center Health Program providing care and monitoring for victims faces a significant financial deficit.<sup>16</sup> Family members highlighted the urgency of providing long-term care for trauma, inter-generational mental health support, and psychological care for second-generation survivors, as well as families of victims and rescue and recovery workers previously undocumented. She observes the panoply of public and private actors that came together to provide a multifaceted response to address mental health needs stemming from 9/11,<sup>17</sup> recognizing, in particular, the extraordinary peer support within the broad 9/11 family. However, institutionalizing tailored systems of care with the long-term financial and technical support of the U.S. Government is essential.

8. Victims of terrorism also have a right to access justice and to access relevant information.<sup>18</sup> She recognizes that the creation of the Department of Defense (DoD) Victims/Witness Assistance Program, which has engaged many 9/11 victims, is a positive and supportive experience for many. However, some victims she met lacked information as to program processes and eligibility. She notes that although the Regulations for Trial by Military Commission limits the definition of a victim family to immediate family members—spouses, parents, children, and siblings<sup>19</sup>—extended family members are also eligible to request case updates. She recognizes the generally open communication with which staff has engaged with victims and family members, including travel to observe the proceedings in-person or at regional viewing sites, although she heard some frustration at the irregularity of updates on case developments, such as plea negotiations. She positively acknowledges the diligent work of 9/11 family associations and informal networks, non-governmental organizations, and the 9/11 Memorial and Museum in referring families to the program. However, she is concerned that the register continues to fall exclusively in the purview of the Office of the Chief Prosecutor. She interviewed several family members who felt instrumentalized or paternalized, particularly when attending military commissions.

9. Many victims expressed challenges with the lack of access to information and transparency from the U.S. Government due to the classification of pertinent information, including information related to allegations of criminal responsibility and state sponsorship of terrorism. She underscores the right of victims to know as much information and truth about 9/11 as possible, facilitating an indispensable aspect of their rights to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to serious violations of international law.<sup>20</sup> She positively acknowledges the Executive Order on Declassification Review of Certain Documents Concerning the Terrorist Attacks of September 11, 2001 and recent push to disclose “information collected and generated in the United States Government’s investigation of the 9/11 terrorist attacks,” including the release of 900+ documents.<sup>21</sup> She recommends that the U.S. Government continue to expediently declassify information so that victims and families can establish the truth related to the loss of their loved ones.

10. The SR acknowledges the collective exhaustion and frustration with the lack of criminal accountability for 9/11. She recognizes differing views within the victim community on the legitimacy of the military commissions, the use of the death penalty, and the operation of the Guantánamo detention facility. She had many difficult conversations with victims and families addressing the direct consequences of the systematic practices of rendition, torture, and arbitrary detention. The SR unequivocally states that the systematic rendition and torture at multiple (including black) sites and thereafter at Guantánamo Bay, Cuba—with the entrenched legal and policy practices of occluding and protecting those who ordered, perpetrated, facilitated, supervised, or concealed torture—comprise the single most

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<sup>15</sup> A/HRC/52/39, ¶¶ 52-55.

<sup>16</sup> US\$3 billion. The Fund was primarily set up for responders and survivors, though 9/11 families could also register.

<sup>17</sup> This includes government funding through Project Liberty and later the Red Cross Recovery Grants and other private funding sources that enabled multiple non-traditional programs, including Tuesday’s Children, FDNY, and NYPD counseling and peer support services. Federal agencies like SAMHSA, OVC, CDC/NIOSH, FEMA, and DHS have also supported services over the last two decades.

<sup>18</sup> See A/RES/60/147; A/HRC/20/14, ¶¶ 36-45.

<sup>19</sup> Regulation for Trial by Military Commission, §16-3(a). The person must have suffered direct physical, emotional, or pecuniary harm or loss as a result of the commission of an offense as defined in 10 U.S. Code Ch. 47A or the law of war and Ch. 16.

<sup>20</sup> See A/HRC/22/52, ¶ 23.

<sup>21</sup> EO 14040 Release Update 3 (Apr. 2022).

significant barrier to fulfilling victims' rights to justice and accountability. In her view, the use of torture was a betrayal of the rights of victims. The importance of apology and guarantees of non-repetition<sup>22</sup> to both the victims of terrorism and the victims of torture betrayed by these practices will be no less pressing in the years ahead.

11. The SR stresses that accountability for torture is also accountability to the human rights of victims and survivors. She notes the commitment expressed by the Victims/Witness Assistance Program and Office of the Chief Prosecutor to seek victim and family member input on any plea agreement prior to the conclusion of negotiations and observes that the U.S. Government is legally and morally bound to do the same. She positively acknowledges that the 9/11 case prosecution is meeting with victims and families across the United States and underscores that these individuals have the right to be treated with dignity, which includes treating them as capable and autonomous subjects entitled to honesty, transparency, and the truth. Systematic use of torture cannot be hidden from *all* of those whose human rights are impacted by its use. The practice of systematic torture goes to the heart of the now available justice for victims. It must be recognized as such.

12. The SR affirms the importance of memorialization for the victims of terrorism.<sup>23</sup> She acknowledges and commends the establishment of the National September 11<sup>th</sup> Memorial Museum.<sup>24</sup> She validates the central role that victims played through their advocacy and perseverance to secure this memorial site, engage its creation, and ensure its relevance and meaning. She recognizes the Pentagon Memorial<sup>25</sup> and the Flight 93 National Memorial. She understands that the centrality of memorializing this day in the public life of the United States also has a lingering and painful quality for many victims, the unavailability of public gaze for private grief. She shares the disappointment of families that marked the closure of the family-led September 11 Tribute Museum, as it struggled for financial viability. She underscores how different groups of 9/11 families and communities have different needs for the form and location of memory work and support. She recommends ongoing engagement with the diverse 9/11 victim community to ensure that no hierarchy of victims emerges in the move from memory to history for 9/11, that the multifaceted aspects of the 9/11 experience and its complex human rights and foreign policy legacy in the United States and beyond be fully represented as private and public memorial work endures, and that adequate funds remain available to ensure that engaged, consultative, victim-led memorial work continues.

13. The SR ends by recognizing the courage, dignity, and power of the victims, survivors, and families she met. They are not a unidimensional community but their advocacy for their community as a whole<sup>26</sup> has moved legal, medical, administrative, and political mountains. She urges the adoption of comprehensive and forward-facing federal legislation to protect the human rights of victims of terrorism in all dimensions using the UN Model Legislative Provisions to Support the Needs and Protect the Rights of Victims of Terrorism as a best practice guide in this endeavor,<sup>27</sup> not only recognizing the contemporary need for such legislation but to honor the ongoing work of the survivors and victims of 9/11.

**Recommendations:** **Initiate** a comprehensive audit of existing medical support (physical and psychological) for victims and survivors, which is human rights compliant and victim-focused and committed to comprehensive life-long holistic support for survivors;<sup>28</sup> **Enhance** existing communications and access to information for victims and families, including in ongoing litigation; **Improve** existing communications and access to information for victims and families by the DoD Victims/Witness Assistance Program, with regard to enrollment, frequency of communications, availability of the prosecution and the defense for questions, and immediate notification of ongoing processes and developments with regard to the military commission proceedings and potential plea bargains, as well as other legal processes and findings; **Fund** 9/11 memorial work that captures the multifaceted aspects of the 9/11 experience and its complex human rights legacy and meaningfully engages with victims and families; and **Advance** comprehensive federal legislation to protect the human rights of all victims of terrorism.

<sup>22</sup> Draft Articles of State Responsibility, arts. 30, 37.

<sup>23</sup> See, e.g., A/RES/72/165.

<sup>24</sup> She thanks the 9/11 Memorial Museum President & CEO and Staff for their support to her technical visit.

<sup>25</sup> She thanks the Department of Defence for facilitating her visit to the Pentagon Memorial.

<sup>26</sup> Tuesday's Children, 9/11 Advocates, September 11<sup>th</sup> Families for Peaceful Tomorrows, 9/11 Families United, 9/11 Justice, and the countless families of courage she met.

<sup>27</sup> The model legislative provision affirms the importance of comprehensive national legislation that addresses, *inter alia*, coordination for victims, victim registries, the right and availability of assistance, the right to reparation including compensation, the right to information, mutual legal assistance, the protection of physical and psychological integrity of victims including privacy, access to justice, consular protection, child victims, and training for officials.

<sup>28</sup> See UNODC, Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework (2015).

## PART II: GUANTÁNAMO DETENTION FACILITY

14. In the aftermath of 9/11 hundreds of Muslim men were rendered across borders, forcibly disappeared, held in secret detention, and subject to egregious human rights violations. Detainees were subject to waterboarding, walling, deprivation of food and water, extreme sleep deprivation, and continuous noises while in detention. Detainees were violently slapped, shaken, subject to mock executions, kicked, thrown to the ground, and held in solitary confinement for months. Detainees were told that multiple serious harms would befall their family members including physical violence, economic distress, and social shaming. Detainees were subject to sexual violence, including anal penetration. The U.S. Government authorized and justified, and personnel enabled and sustained their torture.<sup>29</sup>

15. The SR reaffirms the UN Special Procedures finding of structured, discriminatory, and systematic rendition, secret detention, and torture and ill-treatment at multiple (including black) sites and at Guantánamo Bay.<sup>30</sup> She acknowledges that the vast majority of the men rendered and detained there were brought without cause and had no relationship whatsoever with the events that took place on 9/11. Every one of the 780 Muslim men who was held at Guantánamo Bay—including the 30 men who remain—lives(/d) with their own distinct experiences of unrelenting psychological and physical trauma of withstanding profound human rights abuse. Detainee families have also suffered immeasurably. The remaining detainee population must be treated with humanity and respect for their inherent dignity in line with the U.S. Government’s international legal obligations.<sup>31</sup> The SR reiterates her position that international human rights law and international humanitarian law apply to the treatment of detainees at Guantánamo Bay.<sup>32</sup> She underscores that the prohibition of arbitrary detention and torture are *jus cogens* norms of international law, and that the U.S. Government is under a continuing obligation to complete thorough, independent, and effective investigations into alleged violations, sanction those responsible, provide appropriate redress and reparation to all victims and adopt effective guarantees of non-repetition, such as legislative, administrative, judicial, and other measures to prevent and punish such violations going forward.<sup>33</sup>

### A. Detention Facility and Operating Procedures

16. The SR acknowledges that all requested access was given to previous and current detention sites, including Camp X-Ray, Iguana (now dismantled), Echo 1 and 2, Delta Camps 1 to 4, Camps 5 and 6, and Camp 7. She notes that all “high-value” detainees are held in Camp 5 (having been moved from Camp 7 in 2021); and all “non-high value” detainees are held in Camp 6, which opened in 2006. She positively recognizes that the current conditions at Camps 5 and 6 include the requisite sleeping accommodations, sanitation, food service, recreational facilities and activities, and communal prayer under internationally accepted standards for the majority of detainees.<sup>34</sup> She finds that significant structural shortcomings remain, however, as described in this section and the thematic sections on the rights to health, family, and justice below. The SR finds that arbitrariness pervades the entirety of the Guantánamo detention infrastructure—rendering detainees vulnerable to human rights abuse and contributing to conditions, practices, or circumstances that lead to arbitrary detention. She underscores that arbitrariness goes beyond the fact of

<sup>29</sup> A/HRC/49/45, ¶¶ 7, 8.

<sup>30</sup> A/HRC/49/45; A/76/261; see also Report of the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (Dec. 9, 2014), S. Rept. 113–288 (SSCI Report). She reiterates her call for publication of the SSCI report. A/HRC/49/45, ¶ 37(c).

<sup>31</sup> The United States is party to the ICCPR, ICERD, and CAT (see also declarations and reservation) and has signed the CRPD and ICESCR (signature in good faith). The SR reaffirms the prior position of the Committee against Torture that the U.S. Government give further consideration to withdrawing its interpretative understandings and reservations to the Convention and recalls that under international law reservations contrary to the object and purpose of a treaty are not permissible. CAT/C/USA/CO/3-5, ¶ 9; see also CAT/C/USA/QPR/6, ¶ 2; U.S. Reply, ¶¶ 8-9.

<sup>32</sup> AL USA 26/2022; see generally A/75/337; see also CCPR/C/21/Rev.1/Add.13, ¶ 10 (requiring States parties to meet their treaty obligations with respect to all persons within their power or effective control, even if they are not situated within the territory of the State). She welcomes the unequivocal commitment by the U.S. Government to abide by the universal prohibition of torture and ill-treatment (CAT/C/USA/CO/3-5, ¶ 10) and notes the U.S. Government’s position that “at a minimum,” the following international humanitarian law provisions apply to all detainees: the standards established in Common Article 3 of the Geneva Conventions, the principles in Articles 4–6 of the Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, and the principles in Article 75 of AP1 to the Geneva Conventions. DoD Directive 2310.01E (Mar. 15, 2022), ¶ 3.

<sup>33</sup> See generally CAT; ICCPR; CCPR/C/GC/20, art. 8; A/HRC/30/42, ¶ 17; Draft Articles on State Responsibility; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Istanbul Protocol: Manual, No. 8/Rev.2 (Istanbul Protocol).

<sup>34</sup> Although these conditions appear to meet the minimum requirements under international standards, she encourages further improvements to be made, including by ensuring greater attention is paid to the climactic conditions (e.g., consistent temperature and humidity controls) and by offering additional recreational and educational opportunities and resources of equal quality for the “high-value” and “non-high value” detainees.

the detention itself and includes the elements of “injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>35</sup>

17. The SR understands that standard operating procedures (SOPs) are in place to regulate every aspect of detention operations, including detainee reception and transfer, restraints, cell block searches, mess operations, religious accommodations, and medication distribution, but notes that the existence of SOPs does not prevent a finding of arbitrariness both on their face and in implementation. She regrets that the SOPs for Camps 5 and 6 are unavailable to the detainees or their counsel without a court order,<sup>36</sup> in potential contravention of the right of persons detained and their legal counsel to know the rules which regulate their place of detention.<sup>37</sup> The SR was informed by the U.S. Government that detainees and their counsel are regularly briefed broadly on camp rules and procedures. However, detainees, counsel, and even guard force personnel voiced significant frustration at the arbitrariness, confusion, and inconsistency that characterizes implementation of the SOPs—and these assertions with the SR’s observations spotlight lack of training,<sup>38</sup> a desire for certain guard force personnel to “make their mark,” and/or certain guard force rotating back to Guantánamo after years away, in some cases having served during time periods when the conditions of detention and SOPs were significantly different and systematic torture, cruel, inhuman, or degrading treatment were sustained.<sup>39</sup> The reintroduction of guards associated with such times of abuse, even only through temporality, proximity, and/or culture, presents a serious concern, exacerbating the state of fear, anxiety, and despair among detainees. The SR also finds arbitrariness in the differences of SOPs for “high value” and “non-high value” detainees, particularly for the three men neither charged nor cleared for release. She underscores the obligation of the U.S. Government under the Convention against Torture to keep under systematic review its SOPs with a view to preventing torture and cruel, inhuman, and degrading treatment.<sup>40</sup>

18. The SR finds that several U.S. Government procedures establish a structural deprivation and non-fulfilment of rights necessary for a humane and dignified existence and constitute at a minimum, cruel, inhuman, and degrading treatment across all detention practices at Guantánamo Bay.<sup>41</sup> First, all Joint Task Force personnel are required to address detainees by their Internment Serial Number instead of their preferred names. The U.S. Government’s deliberate choice not to use the correct personal names for detainees for over twenty years undermines each detainee’s self-worth and dignity, particularly in the lived context of profound deprivation of liberty, communication, and relationship with the outside world.<sup>42</sup> Second, the instruments of restraints used for detainee transportation to/from and at attorney meetings, family calls, military commission and other legal proceedings, hospital visits, and the SR’s own meetings with detainees are inherently degrading. Based on interviews and on-site observations such restraints can be variably used and are not subject to any reasonable assessment. Such instruments should be prohibited and only used as a last resort, in exceptional circumstances, and in compliance with the principles of necessity and proportionality.<sup>43</sup> The SR finds that the U.S. Government’s restraint use inculcates an ongoing experience of helplessness and affirms domination, producing psychological distress for many. Third, based on her interviews with detainees, former detainees, and lawyers, the SR expresses serious concern that certain disciplinary measures like forced cell extractions and solitary confinement<sup>44</sup> continue to be implemented disproportionately and overexpansively, amounting to cruel, inhuman, and degrading treatment. She heard firsthand that such practices also trigger past traumatic experiences and inflict serious mental suffering. For some detainees the experience of past suffering and present conditions exist on a psychological continuum, and the present exists as a culmination of the totality of lived

<sup>35</sup> CCPR/C/GC/35, ¶ 12 (internal citations omitted).

<sup>36</sup> She notes that the SOPs for Camp Delta are marked unclassified.

<sup>37</sup> This is a derivative right stemming from the right to fair trial and effective counsel. Lack of access to the rules regulating the place of a client’s detention impairs these rights. See UDHR, art. 10; ICCPR, art. 14; see also Mandela Rules, Rule 54; CAT/C/KAZ/CO/2, ¶ 11.

<sup>38</sup> The incoming guard force spends two weeks shadowing the outgoing guard force as they perform their duties and implement the SOPs.

<sup>39</sup> See SSCI Report.

<sup>40</sup> CAT, arts. 11, 16. She notes the U.S. Government’s assurance that the SOPs are “regularly” reviewed including “to ensure safe, legal and humane detention operations that are, amongst other things, free from torture.”

<sup>41</sup> See generally A/68/295.

<sup>42</sup> See A/HRC/43/49, ¶ 56; Mandela Rules, Rules 1, 3; CCPR/C/52/D/453/1991, ¶ 10.2.

<sup>43</sup> Mandela Rules, Rule 47.

<sup>44</sup> She separately notes that one detainee—in a category of one, as the only “non-high value” detainee who has been convicted—is being held in isolation, raising serious concerns of solitary confinement in contravention of international law. Although the U.S. Government informed the SR that an accommodation has been made authorizing the detainee meaningful human contact including through socialization with the general detainee population for 4 hours per day, she is seriously concerned by reported inconsistencies and arbitrariness in implementation of this policy. She highlights that solitary confinement can amount to a breach of the torture prohibition established by international law, and that “[t]he imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures[.]” A/66/268, ¶¶ 70-78; CCPR/C/GC/20, ¶ 6; Mandela Rules, Rule 45. Further, the use of force should also only be used exceptionally as a measure of last resort. See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 4; see also Mandela Rules, Rule 76(1)(c).

psychological and physical harms. Fourth, the SR finds the U.S. Government’s near-constant surveillance of both “non-high value” and “high value” detainees through visual monitoring<sup>45</sup> to be excessive and amounts to humiliating and degrading treatment, especially for those who have never been charged with a single crime. All of these practices and procedures are experienced in overlapping and intersectional ways by the Guantánamo Bay detainee population. The cumulative psychological and physical pain and suffering resulting from the U.S. Government’s continuing use of these procedures for this unique detainee population—as normalized and embedded over time—are, in her view, reasonably foreseeable in the ordinary course of events.<sup>46</sup>

19. The SR determines that inadequate training is one of the root causes of the arbitrary implementation of the SOPs and related human rights violations. She is particularly concerned that the current state of guard force training on human rights, humanitarian law, cultural competence, and trauma is inadequately tailored to the rights, needs, and sensitivities of the present detainee population.<sup>47</sup> She finds that the U.S. Government has failed to mainstream human rights across these areas of training and cautions that an online, one-time human rights training session for the guard force is inadequate.<sup>48</sup> Inadequate training—and limited monitoring and assessment of the effectiveness of existing training modules including in torture prevention and human rights<sup>49</sup>—is a recurrent factor that leads to and increases the risk of serious violations of human rights in detention and arbitrariness in detention settings.<sup>50</sup> She recognizes that members of the guard force may also face acute challenges from continuing to operate in such an environment, including through the possibilities of vicarious trauma and other stress disorders given the deep despair, exhaustion, and anxiety of the detainee population, as well as the severity of some detainees’ mental health conditions.<sup>51</sup>

## B. Right to Health

20. The right to available, adequate, and acceptable health care of detainees is protected and directly linked to the State’s obligation to guarantee the right to life, the prohibition on torture and ill-treatment, the right to humane treatment of prisoners, right to effective remedy, right to the highest attainable standard of physical and mental health, and the obligation to provide reasonable accommodation for persons with disabilities.<sup>52</sup>

### *Availability, Adequacy, and Acceptability of Health Care*

21. The SR views the facilities, medical personnel, and treatment available as adequate in providing basic health care and services. The Detainee Medical Center houses, *inter alia*, inpatient rooms, treatment rooms, a radiology unit, a pharmacy, dental treatment suites, an optometry exam room, a nursing station, and a physical therapy area.<sup>53</sup> The SR was informed during her visit that the operating room is no longer operational, with surgeries carried out instead at the Naval Station Hospital.<sup>54</sup> Medical personnel available to detainees include two Senior Medical Officers, two psychiatrists, a pharmacist, an optometrist, nurses, technicians, and medical corpsmen.<sup>55</sup> Treatment provided includes primary care, acute medication, chronic pain treatment, diagnosis of new conditions, and dental care. Mental health treatment includes talk therapy, targeted cognitive behavioral therapy, including for insomnia, and cognitive

<sup>45</sup> This includes one-way glass, video cameras, and guard force in the line of sight, with the sole exception to such visual monitoring being the timed use of showers and the restroom.

<sup>46</sup> See A/HRC/43/49, ¶ 34.

<sup>47</sup> See Mandela Rules, Rule 76; see also OHCHR, Human Rights & Prisons: Trainer’s Guide on Human Rights Training for Prison Officials.

<sup>48</sup> She was informed by the U.S. Government that prior to deployment, guards receive online training on human rights law, combatting trafficking in persons, and special considerations within the U.S. Southern Command area of responsibility. But several personnel with whom she met were unable to recall whether any human rights training was provided or recall with any specificity when such training was completed or its contents. The SR was also informed by the U.S. Government that guard force and medical personnel recently received new cultural training by a U.S. Central Command Imam (May 10, 2023) and that a video recording of that session may be incorporated in the training curriculum for incoming personnel. She cautions that a virtual one-off training is unlikely to be sufficient in this regard. She also observes with concern that the on-site Cultural Advisor position was dissolved several years ago.

<sup>49</sup> See CAT, arts. 10, 16; CAT/C/USA/CO/3-5, ¶ 28; see also, e.g., CAT/C/USA/QPR/6, ¶¶ 16-18; U.S. Reply, ¶¶ 68-70.

<sup>50</sup> See, e.g., CAT/C/48/3, ¶ 67 (b) (addressing the ways in which lack of education/training can lead to torture).

<sup>51</sup> She was informed during her visit that U.S. service members have access to mental health services on island through JSMART and that concerted efforts were made in recent years to de-stigmatize the use of such resources.

<sup>52</sup> See ICCPR, arts. 2(3), 6, 7, 10; CAT, arts. 2, 14; ICESCR, art. 12; CRPD, art. 14; see also A/57/40, vol I(53), ¶ 78(7); CCPR/C/74/D/763/1997, ¶ 9.2; Mandela Rules, Rules 24-35, 46; Basic Principles for the Treatment of Prisoners, Principle 9; see generally Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>53</sup> U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 5.

<sup>54</sup> A general surgeon is attached to the Naval Station Hospital and may see detainees. The SR also understands that there are construction plans for a new base hospital. These plans provide for neither enhanced, specialized care nor torture rehabilitation.

<sup>55</sup> The Detainee Medical Center personnel include an officer in-charge, operating room nurse, respiratory technician, surgical technician, laboratory technician, two pharmacy technicians, and one radiology technician.

processing therapy and biofeedback in conjunction, medication management, psychiatric emergency response/management supportive therapy, and psychodynamic psychotherapy.<sup>56</sup>

22. It is the U.S. Government’s stated commitment to provide for “the safe and humane care of detainees at Guantánamo Bay, including providing appropriate medical care and attention required by the detainee’s condition, to the extent practicable.”<sup>57</sup> The SR is, however, gravely concerned by the failure of the U.S. Government to provide torture rehabilitation programs.<sup>58</sup> Although the U.S. Government informed the SR that the Joint Task Force provides psychological and psychiatric support, including cognitive processing therapy and cognitive behavioral therapy, the SR finds that this does not amount to the requisite holistic, independent, fully resourced, and designated torture rehabilitation.<sup>59</sup> She also finds that specialist care and facilities<sup>60</sup> are not adequate to meet the complex and urgent mental and physical health issues of detainees, including permanent disabilities, traumatic brain injuries, chronic pain including headaches and chest, stomach, back, rectal, and joint pains, gastrointestinal and urinary issues, complex and untreated post-traumatic stress disorder, and other current physical and psychological manifestations of torture and rendition after 9/11, as well as the cumulative and intersectional harms arising from continued detention, deep psychological distress,<sup>61</sup> deprivation of physical, social, and emotional support from family and community while living in a detention environment without trial for some and without charge for others for 21 years, hunger striking and force-feeding, self-harm and suicidal ideation, and accelerated aging.<sup>62</sup> She finds that many of the detainees she met evidenced deep psychological harm and distress—including profound anxiety, helplessness, hopelessness, stress and depression, and dependency. She underscores in this regard the U.S. Government’s obligations under the Convention against Torture to ensure training for medical personnel on the prohibition against torture and cruel, inhuman, and degrading treatment and to provide full redress and remedy to torture victims, including as full rehabilitation as possible.<sup>63</sup>

23. Although the SR was informed that detainees enjoy access to appropriate health care, and that, when a medical issue cannot be addressed on-island, that shortfall is immediately forwarded to U.S. Southern Command, who may quickly arrange for appropriate DoD medical professionals and equipment to be flown to Guantánamo Bay, regrettably she finds that in practice, the lack of available health care and equipment has unnecessarily delayed medical care. For instance, the medical history and deteriorating conditions of a detainee with spinal stenosis were allegedly disputed by medical personnel and only after legal representatives filed several emergency motions was a neurosurgeon brought in again.<sup>64</sup> She notes in this regard the U.S. Government’s assurance that detainees “receive the same quality of medical care that active duty service members receive”,<sup>65</sup> yet U.S. service members and families can be medevacked to a hospital on the mainland United States for complex medical interventions whereas detainees are limited to transfer to the Naval Station Hospital.<sup>66</sup> Additionally, the SR finds that some key equipment required for specialist care are wanting—e.g., the MRI machine was inoperable during her visit.<sup>67</sup> In some cases, the SR was told by detainees and lawyers that specialist recommendations for certain medical devices and treatments were denied by

<sup>56</sup> The SR was further informed that the Joint Task Force recently provided sleep studies to detainees who were clinically indicated to require this treatment.

<sup>57</sup> U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 4.

<sup>58</sup> CAT, art. 14; CAT/C/GC/3, ¶¶ 11-15; see A/HRC/49/45, ¶ 23. This obligation also implies that detainees should not be removed to a State where adequate medical services for their rehabilitation are not available or guaranteed. CAT/C/GC/4, ¶ 22.

<sup>59</sup> The U.S. Government informed the SR that GTMO physicians assume members of the detainee population have experienced previous traumas and will experience stresses associated with continued detention and that qualified psychiatrists provide “evidence-based psychotherapy and pharmacy to deal with all detainee health problems (including past trauma).” The SR notes, however, that the provision of such services does not amount to a comprehensive and tailored torture rehabilitation program (see also para. 26, *infra*). She further observes that the U.S. Government’s proposed remodeling to improve one mental health room in one camp is inadequate for fulsome torture rehabilitation. See also PHR & CVT, *Deprivation and Despair: The Crisis of Medical Care at Guantánamo* (June 2019), p. 23.

<sup>60</sup> CAT/C/GC/3, ¶¶ 13-14; Mandela Rules, Rule 27(1); see also GCIII, art. 30; CAT/C/JPN/CO/2, ¶ 13.

<sup>61</sup> A/HRC/43/49, ¶¶ 46-48.

<sup>62</sup> See A/HRC/49/45, ¶ 23; ICRC, *Guantánamo: Detaining Authorities Must Adapt to the Needs of a Rapidly Ageing Population* (Apr. 21, 2023).

<sup>63</sup> CAT, arts. 10, 14, 16.

<sup>64</sup> AL USA 26/2022.

<sup>65</sup> The U.S. Government informed the SR that it flies surgical teams and equipment to Guantanamo Bay when it deems necessary. U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 4.

<sup>66</sup> See AL USA 26/2022, p. 4. She observes that the adequacy of detainee health care has been heavily litigated. U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 6.

<sup>67</sup> The U.S. Government informed the SR that the prior MRI machine was deemed nonfunctional and beyond repair in March 2022 and it took 8 months (November 2022) until a new MRI machine became operational. The U.S. Government asserted that the new machine has since been fully functional, apart from February 6 to 18, 2023, however, numerous stakeholders informed the SR that the MRI machine was actually non-functional from sometime in early December 2022 through February 22, 2023.



the Joint Task Force, though such allegations were disputed by the Joint Task Force on the grounds that DoD experts in the relevant medical field did not determine such devices or treatments were warranted.

24. The SR was informed that examination by an independent, civilian medical professional not associated with the Government is available only in rare instances and only when directed to do so by the military commissions or courts.<sup>68</sup> She observes that the International Committee of the Red Cross (ICRC) engages in general medical discussions with Joint Task Force medical personnel, including in its quarterly visits, but does not provide any medical services or treatment. The SR is particularly concerned after speaking with detainees and counsel that detainees who are involved in legal proceedings appear to have increased access to independent health care/doctors. Further, the U.S. Government has yet to appoint Mixed Medical Commissions<sup>69</sup> or an equivalent body, and previously claimed that the army regulations implementing the Geneva Conventions and stipulating Mixed Medical Commissions are not applicable to detainees at Guantánamo. The SR underscores that the right to access an independent medical examination/doctor is a fundamental legal safeguard regardless of the detention regime.<sup>70</sup> Independent medical personnel play a particularly vital role in rehabilitating torture survivors, holding States accountable, and preventing future torture and ill treatment. The U.S. Government's failure to provide sufficiently independent care renders detainees vulnerable to arbitrary detention and torture, cruel, inhuman, and degrading treatment.

25. The SR also finds the present state of medical care inadequate in large part due to the lack of full clinical independence.<sup>71</sup> All medical personnel responsible for detainee medical care are DoD personnel. The SR expresses her profound disquiet that the current supervisory chain of command lacks clinical independence and compromises the ability of medical personnel to fully treat and document contemporary manifestations of past torture and ill-treatment in complete independence.<sup>72</sup> Even the Chief Medical Officer, who is responsible for overseeing the physical and mental health care of detainees, reports to the Assistant Secretary of Defense for Health Affairs within DoD.<sup>73</sup> The Joint Medical Group providers have a stated commitment to providing medical care “in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging participation of detained persons in medical treatment and prevention.”<sup>74</sup> However, multiple detainees expressed concern regarding the lack of trust between detainees and medical personnel. Detainees consistently told her of current difficulties trusting medical personnel due to past medical personnel being directly complicit in prior torture and ill-treatment<sup>75</sup> and/or due to broader ‘dual loyalty’ concerns. The SR observes that for some detainees, amid such pervasive distrust, the mere receipt of medical and psychological care under continuing U.S. custody at Guantánamo Bay may be triggering of past torture and traumatic experiences, specifically engaging severe psychological distress and anxiety.<sup>76</sup> Again, the U.S. Government's refusal to facilitate independent care for this unique detainee population, including through Mixed Medical Commissions, raises serious concerns under relevant international law standards.

26. The cumulative effects of past rendition, disappearance, incommunicado detention, systematic torture and ill treatment, and continued detention, in the context of the practices outlined here, have had severe and long-term psychological and physical consequences.<sup>77</sup> Detainees receive only symptomatic and disjunctive treatment for many of their current health conditions. The medical and psychological care thus fails to take into account the totality of the health needs of detainees. The SR observes that in the absence of adequate psychiatric care, the detainees themselves are a significant source of support to one another including for their mental health issues. While the SR is encouraged that medical personnel affirmed that if detainees raise the issue of torture and ill-treatment as the basis for current mental and psychological health needs,<sup>78</sup> they will take it into account in the treatment plan, this alone is insufficient to remedy serious structural and institutional deficiencies in present care, including the profound concern that the

<sup>68</sup> U.S. Response to SRCT&HR.

<sup>69</sup> See GCIII, arts. 110, 112, 113.

<sup>70</sup> See, e.g., CAT/C/TJK/CO/2, ¶ 8; CAT/C/KHM/CO/2, ¶ 14; CAT/C/51/4, ¶ 16.

<sup>71</sup> See CAT/C/51/14, ¶ 29; WMA Declaration of Tokyo, ¶ 7; Mandela Rules, Rule 32.

<sup>72</sup> See CAT/OP/ESP/1, ¶¶ 53-54 (CAT Committee finding medical staff employed by the ministry of interior may hinder their clinical independence and affect trust-based doctor-patient relations); A/HRC/42/20, ¶ 31 (SR Health finding decisions taken by penal-oriented personnel in detention facilities may contribute to finding of denial of the requisite healthcare services); see also, e.g., A/HRC/46/26/Add.1, ¶ 56; CAT/C/POL/CO/7, ¶ 29(e); CAT/C/BEL/CO/4, ¶ 20 (c); A/HRC/38/36, ¶ 36.

<sup>73</sup> DoDI 2310.08, § 2.2(d).

<sup>74</sup> U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 4.

<sup>75</sup> See SSCI Report (describing accounts where medical personnel enabled and sustained torture practices); see also AL USA 26/2022.

<sup>76</sup> See CAT/C/GC/3, ¶ 13.

<sup>77</sup> See, e.g., E/CN.4/2006/120, ¶ 71; CAT/C/USA/CO/3-5, ¶ 14.

<sup>78</sup> The U.S. Government clarified that “[t]here is no policy in place at Guantánamo preventing the medical staff from asking detainees, including HVDs [“high-value” detainees], about the origins of any injury or condition that may have arisen at any time prior to their detention at Guantánamo, including during CIA detention.” U.S. Response to SRCT&HR.

provision of medical and psychiatric care at Guantánamo Bay may trigger for some detainees previous experiences of torture, cruel, inhuman, and degrading treatment. She underscores the urgent need for comprehensive, evidence-based, trauma-focused torture rehabilitation, recognizing the detainees’ complex psychological, psychosocial, cognitive, and behavioral needs. The U.S. Government’s failure to provide such care exacerbates the impacts of the horrific treatment or punishment they previously suffered and prolongs the consequences, noting the reasonable foreseeability that its absence contributes continuing severe pain and suffering. She also finds that the existing modalities of psychological and medical treatment—performed out of hearing but within line of sight of guards—undermines privacy and confidentiality of medical information and contributes to an environment of humiliation and degradation.<sup>79</sup>

### ***Accessibility of Medical Information and Records***

27. On medical information and records, the SR notes that copies of detainee medical records can be requested by the detainee’s lawyer during military commission proceedings<sup>80</sup> or habeas corpus litigation, or by the detainee or their lawyer through a request under the Freedom of Information Act (FOIA).<sup>81</sup> DoD clarified that medical records *may* document the administration of prescribed medications, transportation to a medical appointment, refusal of treatment, or incidents resulting in detainee injury or request for treatment.<sup>82</sup> The SR finds that this has led to arbitrariness in practice. First, detainees, former detainees, and counsel expressed frustration that medical records—if provided—are often incomplete or even recomposed to omit past torture and ill-treatment.<sup>83</sup> She underscores in this context the continuing obligation of the U.S. Government under the Convention against Torture to ensure full access to medical records for torture victims.<sup>84</sup> Second, the SR was informed by detainees, defense lawyers, and medical personnel of multiple instances in the weeks preceding her visit when counsel was not notified of significant detainee health issues, including emergency hospitalization, surgery, urgent diagnoses, and a COVID-19 outbreak, in a timely manner, rather *post facto*. Third, for detainees not subject to legal proceedings, access to medical records is also inconsistent and ambiguous. In interviews with medical personnel, the SR was informed that some personnel do not provide detainees with their medical records—any request for access to medical records must be processed by Joint Task Force counsel. Other personnel reported showing medical records to detainees but would not give a physical copy of their records. The U.S. Government confirmed during the visit that detainees would only be able to access medical records directly without counsel through a FOIA request—raising caution as to actual accessibility.

28. As such, the SR finds that detainees have been denied timely access to complete and unclassified medical records, which creates serious barriers to health care and could affect diagnosis and treatment.<sup>85</sup> The SR further underscores that the failure to provide attorneys with timely notice and full access to detainee medical procedures or medications may impede their ability to prepare and mount a defense.<sup>86</sup> She also finds that the lack of transparent SOPs for medical appointments and emergencies, medication distribution, and related health matters further contributes to the entrenched arbitrariness of care.

### ***Conclusion***

29. The SR concludes that the foregoing conditions constitute a violation of the right to available, adequate, and acceptable health care—as part of the State’s obligation to guarantee the rights to life, freedom from torture and ill-

<sup>79</sup> See A/HRC/43/49, ¶ 51(a); CAT/C/GHA/CO/1, ¶ 10; CAT/C/MEX/CO/5-6, ¶ 17; see also CAT/C/GC/3, ¶ 13; CESCR Comment No. 14 (2000), E/C.12/2000/4, ¶ 12; A/HRC/38/36, ¶ 38. Security forces may be present only in exceptional and justifiable circumstances, i.e., risk of physical aggression.

<sup>80</sup> See U.S. Government Accountability Office, *Guantánamo Bay - Accessing Detainee Medical Records as Part of Military Commissions’ Proceedings* (June 2022), GAO-22-105810, p. 6. Medical records are also provided to the Office of the Prosecutor, who informs defense counsel if changes in detainee medical status affect the detainee’s ability to participate in his commission proceedings. U.S. Response to SRCT&HR.

<sup>81</sup> The Joint Task Force Joint Medical Group and Office of the Staff Judge Advocate coordinate production of medical records of detainees. See GAO-22-105810, pp. 3-4, see also *id.*, pp. 8-9, Figures 2-3.

<sup>82</sup> U.S. Response to SRCT&HR.

<sup>83</sup> DoD officials have acknowledged the designation and classification of some parts of medical records as “NOFORN” (Not Releasable to Foreign Nationals). GAO-22-105810, pp. 4, 9, 10. This may cause delay in the production of medical records. See AL USA 26/2022.

<sup>84</sup> See CAT/C/GC/3, ¶ 30 (“A State party’s failure to provide evidence and information, such as records of medical evaluations or treatment, can unduly impair victims’ ability to lodge complaints and to seek redress, compensation, and rehabilitation.”).

<sup>85</sup> Accessibility to health facilities, goods, and services includes information accessibility, i.e. the right to seek, receive, and impart information and ideas concerning health issues. E/C.12/2000/4, ¶ 12. States have obligations to ensure detainee medical files are accurate and up-to-date (Mandela Rule 26) and contain diagnostic information and ongoing records of a patient’s health (CAT/C/51/14, ¶ 30), including allegations and injuries indicative of torture or other cruel, inhuman, or degrading ill-treatment (Mandela Rule 8; CAT/C/PRT/CO/5-6, ¶ 9(e); see also A/HRC/42/20, ¶ 58).

<sup>86</sup> See AL USA 26/2022; see also ICCPR, art. 14(3)(b); CCPR/GC32 (principle of equality of arms, entitling a defendant to adequate time and facilities to prepare a defense, which includes access to documents and other materials required to prepare the case).

treatment, humane treatment of prisoners, and effective remedy—have resulted in the significant deterioration of the physical and mental health of detainees, compounding post-traumatic symptoms and other severe and persistent health consequences co-related to temporal continuities of healthcare provision at Guantánamo Bay. She finds that the cumulative effects of these structural deficiencies amount to, at minimum, cruel, inhuman, and degrading treatment under international law. Moreover, the U.S. Government’s failure to provide torture rehabilitation squarely contravenes its obligations under the Convention against Torture.

**Recommendations:** **Guarantee** specialized health care and facilities to provide torture and trauma rehabilitation (in consultation with external experts) and treat health concerns relating to torture and ill-treatment, aging, and disabilities, including through prompt, unconditional, and confidential access to medical personnel and examinations (in consultation with independent experts); **Ensure** that all detainees and their lawyers have timely, complete, and unconditional access (not contingent on any judicial order or legal proceeding) to detainee’s full medical records—comprising accurate, up-to-date, and comprehensive health and diagnostic information, including immediate notification where there is a health emergency or change in health status; **Institute** a mechanism that would allow detainees prompt access to independent medical examination/doctor, without it being conditional to permission of/request to officials and establish Mixed Medical Commissions or an equivalent independent body; **Transfer** the responsibility for the clinical independence of medical personnel at the Guantánamo detention facility to outside the DoD/penal administration; **Ensure** that all medical personnel assigned to the Guantánamo detention facility are trained to provide adequate assessment, documentation, and interpretation of torture and ill-treatment injuries.

### C. Right to Access to Family

30. The family is recognized as a fundamental unit of society entitled to protection and assistance under international law, including in the context of situations of deprivation of liberty and detention.<sup>87</sup> Access to family and the preservation of family ties is central to rights protections afforded to any individual deprived of liberty, within and outside the context of armed conflict, in addition to the protection of the human dignity of each individual detained.<sup>88</sup> The SR underscores that impingement on the right of access to family has devastating impacts on individuals and families beyond detention, depriving other rights and freedoms, including the right to bring their case before a competent authority, and enabling conditions contributing to torture and other cruel, inhuman, or degrading treatment or punishment.<sup>89</sup> The right of access to family applies to any context of detention and includes the right to notify family of the situation of detention, transfer, and place of detention; and the right to be visited by and correspond with family, “subject to reasonable conditions *as specified by law or lawful regulations*.”<sup>90</sup> The SR observes as an initial matter that the failure to make the regulatory basis of and SOPs for family calls available to detainees or their families precludes any finding of the requisite legal basis for the limitations and restrictions imposed.

31. Every detainee and family member that the SR met evidenced unrelenting grief and trauma related to the inadequate and arbitrary access to their family at Guantánamo,<sup>91</sup> compounded by their past enforced disappearances and secret detention at the facility. The SR finds that failures to ensure notification to family of the situation of detention, including legal status, transfer, and place of detention over time, as well as the ongoing suffering due to a lack of information (particularly for those with family living in conflict zones), the length of time without contact, and intervening family events, such as deaths and births, have prevented the meaningful realization of the right to family. Every detainee she met exhibited profound psychological distress and suffering when sharing their loss of family, their unrelenting anxiety for the welfare of their families, and their complete helplessness and lack of power to change their circumstances. Children have grown up without fathers, the most intimate parts of family life have been destroyed, and life rituals and cycles have been lost. She underscores that family members of persons detained in this context are also victims and afforded rights protections as such.<sup>92</sup> She further observes the great importance and sense of mutual support and community among the detainees as fellow “brothers,” particularly under the conditions of confinement that greatly limit meaningful familial contact.

<sup>87</sup> UDHR, art 16(3); ICCPR, arts. 17, 23(1); ICESCR, art. 10(1); Convention on Enforced Disappearances, arts. 17(2)(d), 24.

<sup>88</sup> See GCIV, art. 116.

<sup>89</sup> See generally A/HRC/49/45; see also A/HRC/27/49, ¶ 117; CCPR/C/114/D/2038/2011, ¶¶ 10.6-10.7; CAT/C/USA/CO/2, ¶¶ 17-18.

<sup>90</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19 (emphasis added); see also *id.*, Principles 15, 16, 33, 34; U.S. Federal Standards for Prisons and Jails (1980), § 12.12; DoDI 1325.07, ¶ 8(e)(2)(a); DoDI 1325.7 (further codifying these norms in national legislation and civilian and military prison rules and regulations).

<sup>91</sup> A/HRC/43/49, ¶¶ 56-60.

<sup>92</sup> A/HRC/49/45, ¶¶ 18, 24; see also A/HRC/13/42, ¶ 29; CCPR/C/OP/2, ¶ 14.

32. The SR recognizes the improvements in access to family through calls and video conferences over time, particularly through the support and cooperation of the ICRC. She underscores that through the perseverance of lawyers and the ICRC, family ties have been established for almost all detainees. In some cases, detainees' families only learned that their relatives were being held at Guantánamo after 15+ years.<sup>93</sup> Other detainees have avoided calls, expressing dire fear that identifying their family members may subject them to reprisals from both the U.S. Government and their home States. The decision to permit telephone and video calls constituted a necessary departure from previous wholesale withholding of family access apart from letter correspondence through the ICRC. The SR directly observed the positive impacts of these family calls during her visit. She was also made aware of developments in the frequency of calls between detainees and family members, which increased for “non-high value” detainees from quarterly to monthly calls for some. The SR welcomes the indication that technological equipment is being installed to improve the quality of calls for “high-value” detainees, though she understands these calls will still not be in real time. She also welcomes that a hearing accommodation was implemented in one instance. She underscores that standard protocols should be established to respond when accommodations for disabilities are required, in order to enable responsive, timely, and consistent implementation.

33. While the U.S. Government has now established some family access through the above changes in policy, the ability to *meaningfully* communicate with family is central to the fulfillment of the U.S. Government's obligations. Detainees, counsel, and military personnel identified several ongoing obstacles to meaningful family communication, including the lack of confidentiality of family calls,<sup>94</sup> calls that are not in real-time, poor or often last-minute communication with regard to call cancellations and delays, and limited frequency of calls at odds with the actual numbers of remaining detainees. A number of detainees and counsel also raised issues concerning the vetting process for family members to be added to the call list, as well as potential limitations placed on “extended” family participation in calls.<sup>95</sup> The SR finds that all of these conditions impede meaningful communication and contribute to an environment that produces severe psychological pain and suffering for detainees. She also regrets that despite requests, the U.S. Government has not allowed detainee family members to visit in-person apart from one exceptional example.<sup>96</sup> This absolute prohibition continues to breach the U.S. Government's obligations to detainees to promote and protect their rights to family access under international law. Meaningful relationship with family is essential for a life of dignity and provides the social and emotional rapport that is an inoculator against anxiety, despair, and subjugation. The opposite is also true that the absence of meaningful relationships for over two decades contributes to an environment of subjective harm and coercion for the detainee.

34. The SR finds the discrepancy in family access between categories of detainees to be arbitrary and asserts that there should be an equal right of family access for all detainees irrespective of category. In particular, she was told that the impact of the extended delays of the non-real-time video calls for “high-value” detainees makes normal conversations impossible. The SR was informed during interviews that these practices, in part, are used to justify the limitations of frequency and duration of calls given the added hours to otherwise normal conversations. She underscores the long-term psychological impact for the extended withholding of family access for “high-value” detainees who received first access in only 2015, and the continued limitations run contrary to the fundamental rights protections required in detention, particularly prolonged detention. She finds the U.S. Government's failure to significantly increase the frequency and quality of family calls for all remaining detainees disconcerting, especially given the exceedingly small number of men remaining at Guantánamo Bay today.

35. In addition, without accepting or privileging certain categories of detainees, the SR is also uniquely concerned about those individuals cleared for release and transfer eligible, who continue to be subject to limited access to family despite the recognition of their anticipated release. Reintegration may be positively impacted by increases in access and the SR highlights that relevant military practice supports such a procedure, noting that correspondence with family is often subject to individualized considerations, making the continued restrictions particularly arbitrary for those who

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<sup>93</sup> In one case, only the detainee's mother was able to recognize him by video call, whereas his siblings thought the detainee had been misidentified, finding him unrecognizable due to rapid aging.

<sup>94</sup> All family calls are screened by the guard force, and family members and detainees are told only to discuss family affairs; discussion of the conditions of confinement, detainee population, and the guard force is strictly prohibited, which contravenes the rationales for the right to family access.

<sup>95</sup> The U.S. Government confirmed that there may be differences in extended family access between “non-high value” and “high-value” detainees. Unlike the policy for “non-high value” detainees, the formal policy for “high-value” detainees excludes cousins. The U.S. Government asserted that this has not been raised as an issue by “high-value” detainees to date.

<sup>96</sup> The SR understands that the DoD may not “permit any person who is a family member of an individual detained at Guantánamo to visit the individual.” She notes that a father and sister were permitted to attend a recent military commission proceeding but only at the sentencing phase.

are cleared for release.<sup>97</sup> She welcomes the commitment from the U.S. Government to assess ways to increase the duration and frequency of calls at least for the detainees, who have been cleared for release, reiterating, however, that her concerns apply across the full detainee population.

**Recommendations:** **Equalize** the frequency and quality of family calls, to ensure that all detainees regardless of their categorization are provided with at least one call per month; **Facilitate** a practical dialogue with the ICRC to increase the frequency and quality of calls and address challenges associated with the vetting processes for family calls, including through the immediate scoping of alternative modalities for more meaningful communication, such as direct calls to families, in-person family visits, and real-time communication for “high-value” detainees; **Increase** the frequency of calls with family members for detainees now transfer eligible; **Expand** the level of “extended” family members included in family calls; **Recognize** the long-term impacts of the extended situation of detention and prolonged periods of lack of contact with family, and ensure that reunification with family is central to discussions with detainees and counsel in preparing for repatriation or resettlement.

#### D. Right to Access to Justice

##### *Right to Counsel*

36. The right to access to counsel is well settled under international human rights law and international humanitarian law and vital to ensuring that the rights of all persons deprived of their liberty are respected.<sup>98</sup> Access to counsel is fundamental to fair trial and due process guarantees and an application of the principle of equality of arms.<sup>99</sup> It also serves as a fundamental safeguard against torture and ill-treatment, arbitrary detention, and other breaches of fundamental freedoms and human rights.<sup>100</sup> It is an entitlement on the part of all detained persons that attaches from the moment a person is detained.<sup>101</sup>

37. The SR recognizes that positive strides have been made regarding access to counsel since Guantánamo Bay detainees were first rendered and endured prolonged periods—in many cases more than seven years—without any effective assistance of legal counsel. She observes the range of counsel presently available to detainees, whether for military commission proceedings, habeas corpus cases in federal court, administrative Periodic Review Board hearings, and other matters related to detention at Guantánamo. She commends these attorneys for forging significant trust and strong relationships with their clients, in many cases for over a decade. She underscores to the U.S. Government the importance of facilitating prompt, unrestricted, and confidential attorney-client relationships and communications—regardless of the category of counsel—not just because it is required as a matter of international human rights law norms and standards,<sup>102</sup> but also because it is necessary to protect the rule of law, the integrity of the detention review, habeas, and military commission proceedings, and at the most visceral level, the human dignity of men deprived of their liberty for whom meetings with their attorneys are the only external social contact they are granted aside from the time spent with their own “brothers” and the guard force.

38. The SR acknowledges that the different categories of legal representation may call for distinct operational procedures for selecting and appointing counsel and scheduling and facilitating attorney-client communications and meetings. She notes that the DoD Office of General Counsel—together with the Department of Justice, as needed—reviews habeas counsel requests, the Office of Military Commissions reviews military commission counsel requests, and the Periodic Review Secretariat reviews private counsel access. These different procedures are primarily governed by protective orders, and the visit policy is ultimately executed by the Undersecretary of Defense for Policy. During her visit, the SR was informed that while governance across these different categories of counsel may be different, it remains consistent and cohesive in practice.

39. The SR expresses concern, however, that an arbitrary hierarchy of counsel access has arisen from these distinct procedures. It is her understanding based on interviews with detainees and counsel that in practice, the scope

<sup>97</sup> DoDI 1325.07, ¶ 8(e)(2)(a); DoDI 1325.7 (further codifying these norms in national legislation and civilian and military prison rules and regulations).

<sup>98</sup> ICCPR, art. 14(3)(b); GCIII, art. 105; GCIV, art. 72; see also generally UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; Basic Principles on the Role of Lawyers; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>99</sup> CCPR/C/GC/32, ¶ 32 (citing CCPR jurisprudence).

<sup>100</sup> See CCPR/C/GC/20, ¶ 11; CAT/C/GC/2, ¶ 13.

<sup>101</sup> See CCPR/C/GC/32, ¶ 34; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17-18; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System, Principle 3(20).

<sup>102</sup> *Id.*; see also A/HRC/WGAD/2022/66, ¶ 108.

of what can be discussed with detainees, the scope of comfort and other essential items that can be provided to detainees, and the scope of access to information including about conditions of confinement and medical developments all depend on the category of counsel, and that guard force personnel invoke the applicable rules and protective orders to justify discrepancies.<sup>103</sup> She is deeply concerned that the idiosyncrasies of the various governing regimes have led to arbitrariness and unjustifiable inequities. By way of example, she was informed that military commission defense counsel for detainees who have been charged are permitted to bring their clients a far wider range of comfort items and even medicines than counsel for detainees who have not been charged; and military counsel often receives additional information and case updates that are not transmitted to civilian counsel. The SR underscores that all detainees—regardless of whether they have been charged or not or cleared for transfer or not—deserve equal, unhindered access to counsel, particularly given the torture and cruel, inhuman, or degrading treatment to which all detainees have been subject.

40. The SR further underscores that any meaningful access to counsel requires the U.S. Government’s reasonable facilitation of attorney-client communications and meetings.<sup>104</sup> In this regard, she notes with concern that detainees and attorneys alike repeatedly highlighted instances where the U.S. Government denied attorneys in-person and virtual access, often at the last minute while already on the island, without any stated grounds for the denial. Such restrained access to counsel has severe and persistent mental health consequences for detainees. Of particular concern to the SR are multiple reported instances whereby military commissions counsel with longstanding attorney-client relationships with detainees, including detainees who have previously testified as witnesses in ongoing cases and/or been named in witness lists by the prosecution or otherwise appointed for purposes of ongoing plea negotiations, were denied both virtual and in-person access to their clients, including on the basis that their clients did not have an “active case or controversy” before the military commissions, a policy that is currently under revision. The SR expresses serious concern at this novel justification and finds that the black box of applicable SOPs exacerbates this sense of arbitrariness. She was informed that the DoD accommodates counsel meeting requests based on availability, operational and logistical constraints, and the applicable governing regime, and that additional guidance will be implemented soon to clarify the types of attorney-client relationships for which the Joint Task Force will facilitate visits to include counsel visits for detainees that may be called as witnesses and for detainees whose military commission charges are not “active.” She warns the U.S. Government against asserting exigent circumstances to justify restrictions that functionally undermine the right to counsel access and puts at risk the entire integrity of the military commission system. The use of bureaucratic delays and opaque justifications to deny the right to counsel access squarely contravenes the right to access to counsel free from “restrictions, influence, pressure or undue interference from any quarter.”<sup>105</sup>

41. The right of access to counsel is about more than just physical access to legal representation. Rather, it encompasses various components including private communications and meetings, “without delay, interception or censorship and in full confidentiality.”<sup>106</sup> In this regard, the SR observes with concern the years-long history of litigation disputing the confidentiality of attorney-client meeting rooms at the Guantánamo Bay detention facility, including in spaces where the same detainees were previously subject to torture and other enhanced interrogation methods.<sup>107</sup> The SR underscores that according to international human rights law standards, “[i]nterviews between a detained or imprisoned person and his legal counsel may be within sight, *but not within the hearing*, of a law enforcement official.”<sup>108</sup>

42. Regarding the detainee’s right to choose their counsel,<sup>109</sup> the SR recognizes that national security/security clearance considerations considerably restrict the available pool of lawyers. This reality compounded by logistical hurdles to in-person visits,<sup>110</sup> significantly limits the availability of counsel of detainee’s choosing and can contribute

<sup>103</sup> The U.S. Government informed the SR that each category of legal proceeding is governed by specific rules and protective orders tailored to the proceeding.

<sup>104</sup> CCPR/C/GC/32, ¶ 34.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (citing CCPR/C/81/D/1117/2002, ¶ 6.4; CCPR/C/85/D/907/2000, ¶ 6.3; CCPR/C/69/D/770/1997, ¶ 8.5); see also Basic Principles on the Role of Lawyers, Principle 8.

<sup>107</sup> See, e.g., *U.S. v. KSM et al.*, AE 133QQ; *id.*, AE133GGG; *U.S. v. Nashiri*, AE 419J. She notes the military commission order finding no audio monitoring capability after a full technical surveillance countermeasures inspection of Joint Task Force-controlled attorney-client meeting locations (AE133BBB(GOV)), but also notes the continued assertions by counsel and detainees that audio monitoring capability remains, allegedly corroborated by specific instances of guard force intervention.

<sup>108</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(4) (emphasis added).

<sup>109</sup> ICCPR, art. 14(3)(b); CCPR/C/GC/32, ¶ 32.

<sup>110</sup> Approval required for in-person meetings and subject to the military rotator flight schedule mean that attorneys must undertake a one-day trip or a four-day minimum stay.

to a sense of helplessness and subjugation. The SR also recognizes the limited resources available to counsel and underscores the importance of fully equipping counsel with robust federal resourcing and independence in order to meet the urgent need to ensure the access of detainees to *effective* counsel.

### *Right to Fair Trial*

43. The SR reiterates that the U.S. Government is obligated to ensure that detainees are afforded the fair trial and due process procedural guarantees enshrined under international human rights law. This includes the right to a fair and public hearing by a competent, independent, and impartial tribunal, the presumption of innocence, the right to be informed promptly and in detail of the criminal charges brought against them and to be tried—at all stages, “whether in first instance or on appeal”—without “undue delay.”<sup>111</sup> When a trial does not occur within a reasonable time release must be considered.<sup>112</sup>

44. It is the U.S. Government’s position that all detainees who remain at the Guantánamo Bay detention facility are detained lawfully as a matter of international law because the United States is engaged in an ongoing non-international armed conflict with al-Qaida and associated forces and may detain enemy belligerents consistent with the law of armed conflict until the end of hostilities.<sup>113</sup> However, under international humanitarian law non-POW detention is based on an imperative threat to security and it is the SR’s position that detention on this basis is an exceptional measure to be sought only on an individuated basis and subject to procedural guarantees including regular, independent, and impartial review of their detention.<sup>114</sup> Under a law of war detention framework, internment must cease as soon as the reasons for it no longer exist.<sup>115</sup> Moreover, with the passage of time, the U.S. Government is under an increased burden as the detaining State to objectively demonstrate that each detainee continues to pose a serious security threat. The SR observes with profound concern that of the 30 men remaining at Guantánamo, 19 men have **never** been charged with a single crime—in some cases, after more than 20 years of detention in U.S. custody. The SR is concerned that the continued internment of certain detainees follows from the unwillingness of the authorities to face the consequences of the torture and other ill-treatment to which the detainees were subjected and not from any ongoing threat they are believed to pose.<sup>116</sup> Without making a factual designation of combatant status and the existence of an ongoing armed conflict, the SR stresses that neither international humanitarian law nor international human rights law countenances concealing evidence of prior misconduct by the detaining authority as a reason for continued detention. The SR has addressed the interplay of international humanitarian law and international human rights law in counter-terrorism contexts in prior reports and invites attention to those reports in this regard.<sup>117</sup>

45. Moreover, the SR finds that the Periodic Review Board process lacks the most basic procedural safeguards,<sup>118</sup> including because the process is a purely discretionary proceeding that is not independent and that is subject to veto by the political officials on the review committee. Further, the fact that 16 men have been cleared yet remain trapped in the Guantánamo detention facility is indicative of the Periodic Review Board process’ disconnect from any actual release and the arbitrariness of the cleared men’s ongoing detention. Regarding habeas remedies she finds it has been overwhelmingly ineffective both in efficiency of process and delivery of the remedy of actual release for detainees. Detainees have had access to habeas corpus since 2004, but most proceedings have languished in judicial pipelines undermining the requisite regularity of independent, impartial, review, and calling into question their effectiveness as a matter of international human rights law.<sup>119</sup> As one detainee explained, while the conditions of confinement may have improved, the legal conditions are worse than ever.

<sup>111</sup> ICCPR, art. 14; CCPR/C/GC/32, ¶ 35.

<sup>112</sup> ICCPR, arts. 14, 9; see also, e.g., A/HRC/WGAD/2022/66, ¶¶ 83, 120.

<sup>113</sup> See Authorization for Use of Military Force, U.S. Public Law 107-40; U.S. Response to SRCT&HR (citing, inter alia, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1562 (2012), § 1021; *Paracha v. Biden*, No. 04-cv-2022, 2022 WL 2952493, at \*3-\*4 (D.D.C. July 26, 2022); Response To Petition For A Writ Of Habeas Corpus & Motion To Dismiss Or For Judgment, *Hawsawi v. Biden*, No. 21-cv-2907 (D.D.C.), at 12-13 (filed Feb. 2, 2022, ECF 12)).

<sup>114</sup> See Jelena Pejic, The protective scope of Common Article 3: more than meets the eye, *International Review of the Red Cross (IRRC)* (2011), pp. 208-209; see generally Jelena Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, IRRC (2005).

<sup>115</sup> Pejic, *Procedural principles and safeguards*, IRRC (citing GCIV, art. 132; API, art. 75(3)).

<sup>116</sup> See ICRC, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, p. 380.

<sup>117</sup> See, e.g., A/75/337; A/73/361.

<sup>118</sup> See A/HRC/WGAD/2022/66, ¶ 86.

<sup>119</sup> See A/HRC/WGAD/2022/66, ¶¶ 86, 107.

46. The SR further finds fundamental fair trial and due process deficiencies in the military commission system.<sup>120</sup> She notes that nine men involved in the military commission process are still in the pretrial phase after experiencing countless delays. As one detainee interviewed expressed with exasperation, the system is paralyzed but their only option is to engage. The defendants in the September 11 case were arraigned in May 2012, with pre-trial hearings suspended through at least early 2023. The endless delays in their cases, and the U.S. Government's failure to even move past the pre-trial phase clearly fail to meet the "undue delay" threshold.<sup>121</sup> She further expresses serious concern that the military commission hearings have been inundated with an array of procedural obstacles and legitimacy challenges, ranging from issues with interpretation—including due to alleged bias and lack of independence and impartiality—and significant technological failures in the courtroom, to abrupt prosecutor and judge retirements and resignations and conflicts of interest. The SR observes that the constant exposure to judicial uncertainty and arbitrariness induces a growing sense of helplessness and hopelessness among many detainees and over time, leads to chronic anxiety and depression. Indeed, generally the longer a situation of detention lasts, the higher the likelihood that the prohibition of torture, cruel, inhuman, and degrading treatment has been breached.<sup>122</sup> Here, some detainees have been held in U.S. custody for over 21 years, with virtually nothing they can do to influence their own situation. The SR underscores that these cumulative and unrelenting exposures to uncertainty, powerlessness, and a lack of self-determination are immensely harmful for detainees. The SR recognizes the ongoing plea bargain negotiations. She urges their consistency with international human rights law requirements of due process and fairness, noting the specificity of plea bargains in the context of systematic torture and ill-treatment. She also urges full transparency and engagement with victims of terrorism, recognizing their rights noted above.

47. Lastly, the SR expresses concern at the extent of secrecy that pervades all of the available judicial and administrative proceedings. She is particularly concerned about the presumptive classification review of substantial information arising from Guantánamo. She emphasizes that the right to equality of arms includes "adequate time and facilities for the preparation of his defense," including access to documents and other evidence and all materials that the prosecution plans to offer in court.<sup>123</sup> She finds that where defense lawyers are unable to challenge whether evidence produced was derived from torture—e.g. when they receive only a summary of documents<sup>124</sup> that lacks vital information—the right to equality of arms is violated. She stresses that the U.S. Government has the burden of proving that a statement has not been made under torture.<sup>125</sup> The SR appreciates the U.S. Government's full commitment to the prohibition of any admission of statements (whether the accused or a third party) obtained through torture or cruel, inhuman, or degrading treatment at all phases of a military commission.<sup>126</sup> However, she has identified attempts to erode this fundamental principle by mounting arguments that this prohibition is not applicable to derivative evidence and non-military commission cases—thus weakening the stated commitment to prevent torture. She emphasizes that the U.S. Government's obligation to exclude any statements derived from torture<sup>127</sup> extends to indirect reliance of testimony extracted by torture and to "any proceedings," including pre- and post-trial proceedings and sentencing.<sup>128</sup>

**Recommendations:** **Guarantee** equal access to counsel to all detainees, including access to military defense counsel for detainees who may be listed as witnesses in ongoing military commission cases, even if they do not have an "active case or controversy"; **Standardize** and equalize the extent of counsel access regardless of the category of legal representation, including with respect to the scope of what can be discussed with detainees, the scope of essential items that can be provided, and the scope of access to information and evidence about the detainees' situation of confinement, including their medical condition; **Increase** financial resources and discretion on the part of the Chief Defense Counsel to allocate funding to defense lawyers, independent of external pressures from the Prosecution, Convening Authority, or other DoD stakeholders; **Safeguard** the prohibition of all torture-derived evidence from all proceedings, including pre-trial and post-trial and in plea bargains.

<sup>120</sup> It is the U.S. Government's position that "[a]ll current military commission proceedings at Guantánamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law and are consistent with those in Additional Protocol II to the 1949 Geneva Conventions." U.S. Response to Joint Communication regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2022), p. 6.

<sup>121</sup> See CCPR/C/GC/32, ¶ 35; CCPR/C/GC/35, ¶¶ 33-37 (citing CCPR jurisprudence); API, art. 74(4).

<sup>122</sup> See A/HRC/37/50, ¶ 27.

<sup>123</sup> ICCPR, art. 14(3)(b); CCPR/C/GC/32, ¶ 33.

<sup>124</sup> See Classified Information Procedures Act of 1980, 18 U.S.C. app. 3 § 4; Military Commission Act of 2009, 10 U.S.C. § 949p-4(b)(1).

<sup>125</sup> CAT, art. 15; A/HRC/25/60, ¶¶ 31-33.

<sup>126</sup> U.S. Response to SRCT&HR; see Title 10 U.S. Code § 948r(a); Military Commission Rule of Evidence 304.

<sup>127</sup> Article 15 of CAT states 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."

<sup>128</sup> See CAT/C/30/D/219/2002, ¶¶ 6.9-6.10; CCPR/C/GC/32, ¶ 6; CAT/C/29/D/193/2001, ¶ 6.3.



## E. Conclusion

48. The SR finds that the United States has failed to promote and protect fundamental fair trial guarantees and severely impeded the detainees’ access to justice. Based on the cumulative conditions of fair trial violations set out above—compounded by the lack of access to family, significant physical and mental health problems, and other conditions of confinement—the SR determines that it is highly unlikely that any detainee can effectively assist with and participate in their own defense. Moreover, she finds that the compounding effect of the abovementioned fair trial violations—with respect to *all* present detainees, regardless of their category of legal proceedings—are of such gravity as to give the deprivation of liberty an arbitrary character.<sup>129</sup> She also determines that the fact that all of the men detained are/have been Muslim men of foreign nationalities separately lends to a systematic finding of arbitrary deprivation of liberty on the grounds of discrimination.<sup>130</sup>

49. The SR recognizes that the material conditions of detention at Guantánamo Bay have improved substantially since the first detainees were transferred and in the following years when it was a place characterized by institutionalized and systematic brutality and enduring harm to all who were detained there. Every detainee she met confirmed this improvement. In the present report, the SR is called to both acknowledge substantial improvements to the material conditions of confinement and equally to address as a separate matter, if current detention practices are in compliance with international law. She underscores that for many of the detainees she spoke with, the dividing line between the past and the present is exceptionally thin—for some non-existent—and their past experiences of torture live with them in the present, without any obvious end in sight including because they have received no torture rehabilitation to date. Indeed, the U.S. Government has failed to provide any torture rehabilitation to detainees, despite having previously authorized and enabled torture practices and serious violations of international human rights and humanitarian law. Nor has the U.S. Government adequately investigated, remedied, and instituted robust legal and administrative safeguards to prevent future abuse, or issued a State apology.<sup>131</sup> After over two decades of custody, the U.S. Government is intimately aware of the depth and severity of many detainees’ current physical and psychological harms yet the Guantánamo Bay detention infrastructure remains constituted by, among other constituent elements, near-constant surveillance, forced cell extractions, undue use of restraints, and other arbitrary and problematic implementation of the SOPs stemming from inadequate training (section II.A); structural and entrenched physical and mental healthcare deficiencies (section II.B); inadequate access to family including the failure to facilitate meaningful familial calls and visits (section II.C); and ongoing, arbitrary detention characterized by fair trial and due process violations (section II.D). She finds that the severe mental and physical pain and suffering and the cumulative, compounding effects of these identified practices and omissions for the dignity and fundamental rights and freedoms of this detainee population, are reasonably foreseeable.<sup>132</sup> She concludes that the totality of these factors, without doubt, amounts to ongoing cruel, inhuman, and degrading treatment at the Guantánamo Bay detention facility, and may also meet the legal threshold for torture.<sup>133</sup> This is a structural determination. The SR acknowledges that further individualized determination would be needed to make the assessment of torture on a case-by-case basis with respect to each detainee remaining.<sup>134</sup>

50. The SR acknowledges the current administration’s stated and positive commitment to closing the Guantánamo Bay detention facility, including a review of all relevant developments and agencies “to develop an approach for responsibly reducing the detainee population and setting the conditions to close the facility”<sup>135</sup> and the

<sup>129</sup> See A/HRC/36/38, ¶ 8(c) (WGAD, Category III); see also A/HRC/WGAD/2022/66, ¶¶ 105-110; A/HRC/WGAD/2022/72, ¶¶ 79-83.

<sup>130</sup> See A/HRC/36/38, ¶ 8(e) (WGAD, Category V); see also A/HRC/WGAD/2022/66, ¶¶ 111-112; A/HRC/WGAD/2022/72, ¶ 84.

<sup>131</sup> See, e.g., SSCI Report Recommendations (Dec. 30, 2014); CAT/C/USA/QPR/6, ¶ 35; U.S. Reply, ¶¶ 138-139; see also generally CAT; ICCPR; Draft Articles on State Responsibility; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Istanbul Protocol.

<sup>132</sup> See A/HRC/43/49, ¶ 34.

<sup>133</sup> See A/HRC/43/49, ¶ 70 (constituent elements of a “torturous environment”); CAT/C/46/2, ¶ 105 (the totality of factors which relate to the prevention or likelihood of torture occurring); CAT/C/GC/3, ¶ 40 (affirming the ongoing harm of torture and the increase of the experience of harm due to post-traumatic stress, discussed in the context of the obligation of remedy); CAT/C/GC/2, ¶¶ 13-14, 19 (scope of basic guarantees in detention to prevent torture, plus obligations when a detainee is known to be in a place where torture has occurred); A/HRC/13/39/Add.5, ¶¶ 30-32 (encompassing omissions as the requisite State act; severe, ongoing mental and/or physical pain or suffering; and the purpose of, inter alia, extracting a confession, punishment, intimidation and coercion, or discrimination); A/HRC/43/49, ¶ 34 (intentionality does not require that the infliction of severe mental pain or suffering be subjectively desired by the perpetrator, but only that it be reasonably foreseeable as a result, in the ordinary course of events, of the purposeful conduct adopted by the perpetrator); see also Manfred Nowak (ed.), *The United Nations Convention against Torture and Its Optional Protocol: A Commentary* (2d ed. 2019), pp. 23-59, sections 3.1.1-3.1.5 (addressing issues of interpretation related to conduct, infliction of severe pain and suffering, intention, purpose, and powerlessness).

<sup>134</sup> See A/HRC/43/49, ¶ 30.

<sup>135</sup> U.S. Response to Joint Communication Regarding Guantanamo Bay Detainee al-Tamir (AL USA 26/2022) (May 5, 2023).

transfer of ten individuals from Guantánamo Bay during President Biden’s tenure. She restates her prior calls for the closure of the detention facility,<sup>136</sup> and urges the U.S. Government to consider immediate paths to closure, including by scoping transfer to U.S. military bases abroad or arrangements with foreign jurisdictions in compliance with international law for individuals presently involved or convicted in the military commission process.

51. Looking forward, the SR underscores that there is also an ongoing obligation to ensure the preservation and access to both prior and present detention sites, tied directly to Member State obligations to undertake prompt, independent, and effective investigation of torture under the Convention against Torture.<sup>137</sup> Without prompt and material preservation of sites, the inability to credibly establish facts, identify those responsible to facilitate prosecution or other measures to provide repair, redress, and protection to victims of torture are thwarted.<sup>138</sup> The SR underscores that the U.S. Government has an ongoing obligation to investigate the crimes committed at Guantánamo, including an assessment of whether they meet the threshold of war crimes and crimes against humanity. At a minimum, an investigator must be able to recover and preserve medical evidence, observe protocols regarding chains of custody, determine fact patterns, practices, and locations, and preserve physical evidence, which certainly includes detention centers and other alleged sites of violations.<sup>139</sup> The SR finds varying, fragmented, and delayed practices of preservation of previous detention sites that remain active issues today and raise questions related to long-term prospects for truth, justice, accountability, and memorialization. Various military commission preservation orders apply to Camps 1 to 4 and Camp 7, including digitalization of each camp by the FBI (Camp 7 in June 2021). The preservation orders applicable to Camp 7 are specific to ongoing litigation and vary: in one case, the order was automatically withdrawn after the completion of FBI digitalization and a tour by defense counsel, with the only remaining obligation to notify the Defense and Commission 30 days prior to demolition.<sup>140</sup> In other cases, preservation orders remain active until further notice of the Commission.<sup>141</sup> The SR is concerned that some digital records of preservation may remain either unavailable to counsel or incomplete, in potential contravention of the principle of equality of arms under international human rights law.<sup>142</sup> She is also concerned by the U.S. Government’s practices of “sanitizing” and “cleaning out” prior sites of detention that are of material relevance to continuing obligations to investigate past allegations of human rights abuse and the ability of individuals to mount a meaningful defense.<sup>143</sup> She underscores that immediate, proactive action is necessary to bring preservation measures into compliance with international law standards,<sup>144</sup> with consistency and transparency.

### PART III: REPATRIATION & RESETTLEMENT

52. Since the opening of the Guantánamo Bay detention facility, 741 men have been released (approximately 150 have been resettled to 29 countries, with the remaining repatriated), with 30 men having since died.<sup>145</sup> During the course of the SR’s technical visit, four men were repatriated or resettled. Sixteen men remaining at Guantánamo are cleared for transfer, and their timely repatriation and/or resettlement is urgent.<sup>146</sup>

53. During the technical visit, the SR met with, *inter alia*, men cleared for transfer, as well as a representative group of repatriated and resettled detainees across regions (European, African, Latin American, Central Asian, and Arab States) and their families—including through a formal working level visit to Slovakia, where she met with Guantánamo detainees resettled there, as well as government personnel and other relevant stakeholders. She encountered men whose repatriation or resettlement had been a positive experience, men whose situation has improved

<sup>136</sup> A/HRC/13/42; USA5/2016; USA 5/2020; USA 17/2020; USA 22/2017.

<sup>137</sup> CAT, art. 12; see also generally Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Istanbul Protocol.

<sup>138</sup> See e.g., CAT/C/20/D/59/1996, ¶¶ 8.2-8.5.

<sup>139</sup> Istanbul Protocol, ¶ 224.

<sup>140</sup> AE430C, 5(e).

<sup>141</sup> *Al-Baluchi*, AE819H (noting that the terms of the Government’s preservation efforts referenced in the Order are under classification review and unavailable to the SR).

<sup>142</sup> See e.g., AE 8191; *In re Al Baluchi v. U.S.*, 19-1146 (D.C. Cir. July 15, 2019), ECF No. 1797162; *In re Al Baluchi*, 952 F.3d 363, 367, 371-72 (D.C. Cir. 2020).

<sup>143</sup> See *Al-Nashiri*, AE430C, including the scope of obligations for the U.S. Government under its own Rule for Military Commission 701(c)(1).

<sup>144</sup> Istanbul Protocol, ¶ 227.

<sup>145</sup> Nine detainees also died in custody at the detention facility. The SR was informed that the U.S. Government conducted investigations into these deaths and transferred the bodies of these individuals to their countries of origin. She notes her ongoing concern, however, that certain family members never received the bodies of the deceased, and that no family has yet been compensated for the death in custody as required under international law. See, e.g., ICCPR, art. 6; CCPR/C/GC/36, ¶¶ 27-29; CCPR/C/114/D/2038/2011, ¶ 10.5.

<sup>146</sup> See ICRC, *After 20 years of visits, ICRC calls for transfers of eligible Guantánamo detainees* (2022).

over time, and men for whom return was and remains difficult, and whose rights were further violated following transfer.

54. The SR stresses that there are distinct and concrete international law obligations engaged for the U.S. Government before, during, and after the transfer of detainees to other countries, whether a country of citizenship or a country of resettlement.<sup>147</sup> Such obligations have both *jus cogens* and treaty law dimensions, particularly as regards *non-refoulement*, and encompass both negative and positive obligations that apply extraterritorially.<sup>148</sup> The SR holds that the obligations of States in transfer are of a more specific and compelling form when the individual concerned has been tortured or ill-treated in the custody of the transferring State. She emphasizes that any transfer processes implemented by the transferring State must be international law compliant, with individuated assessments specific to each detainee, transparency regarding conditions of the receiving State, and clear procedural guarantees in line with international human rights law.<sup>149</sup> Any diplomatic assurance must be written, specific, and provide for the transferring State to follow-up on the veracity of assurances post-transfer—and fundamentally, such assurances cannot override the objective *non-refoulement* determination. The SR also underscores the obligations of receiving States that must fully protect the rights of former detainees under the usual course of international human rights law and recognize the complex needs of this particular population of men. She stresses that supervision and accountability are required with respect to receiving States.<sup>150</sup>

55. The SR acknowledges that there is some positive evidence of international law and human rights-compliant practice in a number of these repatriation or resettlement contexts.<sup>151</sup> In some countries, former detainees have been provided from the moment of their transfer the essential means to live a dignified life. Such basic minimums include the right to a legal identity and the right to health care including meaningful access to mental health services and rehabilitation and the means/provision to pay for such services. Meaningful healthcare access for torture victim survivors also includes medical and psycho-social provision which can address or manage prior systematic torture as well as health support for family members as secondary victims. Other minimal essentials include the realization of access to education, training, and support to enable meaningful work, access to and capacity to pay for culturally and socially appropriate housing, access to food, the right to have a family life including reunification with family members in resettled countries, and the right to move freely within one’s country and to enter and leave one’s country. Good coordination between federal and local authorities is absolutely necessary to ensure these minimal standards are met. A very small number of countries of resettlement have offered former detainees a path to citizenship.

56. Regrettably, however the vast majority of detainees continue to experience sustained human rights violations beginning with the very process of transfer to the country of return or resettlement. The SR raises several inter-related concerns regarding transfer. She finds that there is little meaningful engagement with the detainees and their legal representatives concerning transfer, which appears to be viewed as an inter-governmental problem to be solved, rather than a rights-endowing process for persons who are torture victims and survivors. She notes that the Department of State’s newly created position of Special Representative for Guantánamo Affairs (September 2022) is not as senior position as the prior Special Envoy for Guantánamo Detention Closure, and that the Ambassador did not visit the men at Guantánamo until seven months into her tenure, bringing into question whether her office is undertaking an appropriately detainee-centered and comprehensive approach. The SR was informed that there is a general process managed where the Joint Task Force works with U.S. Southern Command, the Office of the Secretary of Defense, and the Department of State to identify detainee objections, fears, or concerns regarding a transfer. But she spoke with many former detainees who never formally consented to their transfer. She has deep concerns after speaking with former detainees regarding the genuine nature of detainee consent to the countries selected for either resettlement or repatriation. She observes in the transfer notification process significant variability in the information told to a detainee about what to expect when transferred. Assurances in these cases made with receiving governments must be human

<sup>147</sup> See CAT, art. 3; CAT/C/GC/1; ICCPR, arts. 6-7; CCPR/C/GC/36, ¶ 30; GCIV, art. 45; GCIII, art. 12.

<sup>148</sup> The SR observes in this respect the obligation of States to “ensure” respect both under international human rights law and international humanitarian law. See ICCPR, art. 2; CCPR/GC/3, ¶ 1; CCPR/C/GC/36, ¶¶ 30-31; Geneva Conventions, Common Article 1; see also UNHCR, Note on Diplomatic Assurances (2006); UNHCR, Statement on a draft Revised General Comment No. 1 on the implementation of article 3 of the Convention against Torture in the context of article 22 (Apr. 2017).

<sup>149</sup> See CAT/C/USA/CO/3-5, ¶ 16; *Khouzam v. Attorney General of the United States*, 549 F.3d 235 (3d Cir. 2008); *Saadi v. Italy*, ECtHR, App. No. 37201/06, Grand Chamber Judgment, ¶ 148; CAT/C/DEU/CO/5, ¶ 25; *Othman (Abu Qatada) v. The United Kingdom*, ECtHR, App. No. 81/39; see also generally E/CN.4/2006/6; UNHCR, Note on Diplomatic Assurances.

<sup>150</sup> Observing the relevance of the Universal Periodic Review process (<https://www.ohchr.org/en/hr-bodies/upr/upr-main>) and country reports to the UN Human Rights Committee (<https://www.ohchr.org/en/treaty-bodies/ccpr>).

<sup>151</sup> Positive practice has been identified in a small number of States including Ireland, Oman, Sweden, Portugal, Italy, and Uruguay, although the SR notes that there is no singular detainee resettlement or repatriation experience, and that even in these settings some challenges remain.

rights compliant and consistent with a core minimum of protection and rights advancement for torture-victim survivors. Whether the detainee is going to their home country or a third country, she emphasizes the human rights obligations that adhere to informing the detainee of the nature of the legal status, housing, education, physical and mental health care, employment, and other factors (e.g. surveillance) to be expected upon their arrival.<sup>152</sup>

57. She was informed that a *non-refoulement* assessment takes place pre-transfer but given the evidenced mistreatment and lack of support to former detainees in certain countries of resettlement or repatriation she is deeply concerned at the robustness of this assessment. She affirms that independent from the U.S. Government-led process, the ICRC also conducts pre-departure interviews confidentially with detainees subject to the latter's consent; any concerns so received from detainees are communicated to the authorities along with the ICRC's non-binding recommendations. She acknowledges that a medical examination is also undertaken 30 days before a transfer occurs and a "fit for flight" assessment is conducted within 24 hours pre-transfer. She was informed during her visit that medical capacity is among a number of factors and circumstances addressed in negotiation of transfer arrangements. However, she remains profoundly concerned that access to torture rehabilitation and adequate health care is not *primus inter pares* in negotiations related to transfer.<sup>153</sup> The SR urges the U.S. Government to refrain from seeking or relying upon diplomatic assurances "where there are substantial grounds to believe that [a person] would be in danger of being subject to torture."<sup>154</sup> She underscores the importance of ensuring individual assessments even where a group of detainees is being transferred at once, noting here that the risk assessment is personal by its very nature.<sup>155</sup> She holds that diplomatic assurances must be capable of reliance, and should for torture victims and survivors include binding elements for organs or agents of the State responsible for their implementation that eliminate risk and safeguard whether the assurance will in fact be complied with.<sup>156</sup> It is essential that assurances contain unequivocal guarantees that the person is free from danger, and that clear long-lasting procedures are established for effective monitoring and access to an effective remedy in the case of non-compliance. She finds the existing practice of diplomatic assurances in transfer are generally inadequate to address the economic, social, health, familial, and rehabilitation rights of former detainees, leaving them vulnerable to penury, social exclusion, and sustained governmental inference. She highlights that little or no preparation or support is given to family members prior to transfer, leaving them generally ill-equipped to manage the financial, medical, and psychological burdens of their returning family members. She regretfully finds that there are no remedies for the evidenced failures of assurances to protect the human rights of former detainees.

58. Regarding modalities of transfer the SR is profoundly concerned that men cleared for transfer, against whom no crime has been charged and who are security cleared, continue to be shackled, blindfolded, and have their sensory organs covered up during long airplane transports.<sup>157</sup> The SR was informed that during transfer from the detention facility to the aircraft, the detainee's hands and legs are restrained to ensure the safety of both U.S. Government personnel and the detainee. Once a detainee is transferred to the custody of the U.S. Air Force Air Mobility Command Detainee Movement Team, the team determines the restraints required for safety purposes. The SR finds such restraints and travel to be traumatic and retraumatizing and engages both inhuman and degrading treatment.<sup>158</sup> She is further concerned that the Detainee Movement Team may be ill-prepared to tailor their treatment of the men in full respect of their human rights. She underscores that the very fact of the detainee's transfer indicates the security of their release. She finds the current modalities of travel constitute inhuman and degrading treatment under international law and are unjustified given the status of individuals who have been released following long-term arbitrary detention, many for over two decades. Although she was informed that all detainee transfers are accompanied by a medical team and that detainees are free to use the restroom onboard and eat prepared meals absent a security risk, she expresses serious concern, that several former detainees with whom she spoke were not given such liberties during flight, opening the door to further human rights abuse. Moreover, she identifies significant gaps in the medical handover process: no former detainee the SR met with was given access to his full medical records or medical summary, leaving

<sup>152</sup> ICCPR, art. 19; CCPR/C/GC/34, ¶ 18; see also IACtHR, *Claude Reyes et al. v. Chile*, Judgment (Sept. 19, 2006), ¶¶ 88-103. She finds a difference between the culturally cognate repatriation where diplomatic assurance must attend to significant non-refoulement concerns including both right to life, and right to be free from torture, inhuman, and degrading treatment, and transfer to non-culturally or socially cognate sites where concerns about alienation and meaningful social integration arise.

<sup>153</sup> The U.S. Government explained that it considers among a number of factors the "existence or likely development of a domestic rehabilitation program in the onward country which employs a rigorous, stepwise approach to rehabilitation (including psychosocial support) on a case-specific basis." U.S. Response to SRCT&HR.

<sup>154</sup> CAT, art. 3.

<sup>155</sup> CCPR/C/GC/36, ¶¶ 30-31 (citing, inter alia, CCPR/C/96/D/1792/2008, ¶ 7.4).

<sup>156</sup> See UNHCR Note on Diplomatic Assurances (2006), ¶ 21.

<sup>157</sup> She highlights the findings of the CAT on sensory deprivation. CAT/C/USA/CO/3-5, ¶ 17.

<sup>158</sup> See CAT/C/KOR/CO/3-5, ¶ 22(c); CAT/C/CAN/CO/7 (2018), ¶ 13(g); E/CN.4/2006/6/Add. 6, ¶ 68; E/CN.4/2003/69, ¶ 9; E/CN.4/2004/56, ¶ 45; Mandela Rules, Rules 47-48.

acute gaps in subsequent medical treatment, particularly regarding torture rehabilitation.<sup>159</sup> In her interviews with former detainees, she found that the lack of such access caused great anxiety and continued suffering. She recommends that the detainee be directly provided a copy of his medical records upon transfer.

59. She positively acknowledges that the DoD has promulgated a policy regarding detainees' ability to transport a reasonable amount of detainee-produced items as "practicable" upon transfer.<sup>160</sup> Resultingly, she is aware that detainees have transported some artwork, clothing, their Qur'an, personal letters, and even a pet. She emphasizes the importance of generously interpreting the "practicability" of such transport of items given the immense emotional attachment the men have with these items after decades of confinement and the men's full ownership over such items. She underscores the importance of ensuring that former detainees who were transferred prior to this change in policy also receive their belongings.

60. Once the detainees are transferred, there does not appear to be any adequate system in place by the U.S. Government to address the health, welfare, employment, housing, or well-being of those transferred, including the failure of receiving governments to respect the rights of those transferred. Although the SR was informed that the Department of State periodically follows up with receiving governments via their U.S. embassies to check on the status of transferees and their integration into local communities, she spoke with many former detainees who had tried to contact the U.S. embassy for support or clarification of the baseline arrangement agreed to between the U.S. and foreign governments—to no avail. In one case where the former detainee asked to communicate with the U.S. Government, the host government punished him and placed him in incommunicado detention.

61. She observes that support to former detainees repatriated or resettled varies considerably by jurisdiction. Based on the SR's meetings with former detainees, detainee counsel, and government officials, in repatriation settings, U.S. officials often transferred responsibility for former detainees to their families, who were expected to "rally around" the detainee; the government accepting return might or might not be helpful to the detainee. Often there is a complete disconnect between the purported integration plan and assurances of the receiving government and practice. In some cases, financial arrangements are evidently made with governments to enable transfer. The SR has insufficient information to comment on the specifics of those arrangements, but she finds that in almost all cases assessed the financial benefits are not going directly to the former detainees. She observes that no comprehensive provision is made for health care, housing, food, transport, and family needs in U.S. practices of transfer. She found many former detainees and their families to be struggling on every minimal measure of health, employment, family life, and reintegration. Many are unable to work due to the long-term medical and psychological effects of past rendition and torture. Many suffer from severe mental and physical health challenges, and do not have the financial means to access adequate health care. Some men have been rendered homeless despite pleas with the receiving government for assistance. It is simply unacceptable that such men must rely on charity, the support of already overstretched international humanitarian organizations, or the fundraising of their lawyers to get by.<sup>161</sup> The legal obligations of the U.S. Government to victims of torture are unequivocal and are not being implemented in resettlement and return.<sup>162</sup> Equally, countries of nationality or resettlement must also uphold their obligations to former detainees and their families across the spectrum of political, civil, economic, social, and cultural rights.

62. For many former detainees, their current experience in their home or third country merely becomes an extension of arbitrary detention in Guantánamo, with some even expressing that they wish to return or describing their situation as "Camp 8." The SR spoke with former detainees and families of detainees who upon transfer were forcibly disappeared and arbitrarily detained; enrolled in supposed rehabilitation and reintegration programs but in fact subject to incommunicado detention and torture and ill-treatment; subject to severe deprivation of liberty through effective house arrest; forcibly repatriated after a period of resettlement; and voluntarily resettled or repatriated elsewhere after the initial transfer. The SR highlights in particular several egregious concerns in two countries previously addressed by UN Special Procedures: in Kazakhstan former detainees effectively remain under house arrest and are unable to live a normal and dignified life due to the secondary security measures put in place post transfer and in the United Arab Emirates, multiple former detainees were subject to arbitrary detention and torture and one remains detained in incommunicado detention.<sup>163</sup> In these harmful transfers, facilitated and supported by the United States, there is a legal

<sup>159</sup> The U.S. Government informed the SR that a medical summary may be provided to the foreign government officials, as well as the U.S. embassy in the receiving country.

<sup>160</sup> U.S. Response to letter dated November 29, 2022 (AL USA 22/2022) (May 1, 2023).

<sup>161</sup> She recognizes in particular the assistance efforts of, among others, the Guantanamo Survivors Fund, CAGE, Reprieve, ICRC, and the International Organization for Migration.

<sup>162</sup> See CAT/C/GC/3.

<sup>163</sup> See, e.g., UA ARE 5/2021; UA ARE 3/2020; A/HRC/43/46/Add.1, ¶ 54.

and moral obligation for the U.S. Government to use all of its diplomatic and legal resources to facilitate (re)transfer of these men, with meaningful assurance and support to other countries. More broadly, across resettlements and repatriations, the SR strongly recommends that a formal and effective follow-up system be established as part of the remedial obligations owed by the U.S. Government.

63. After never being charged or convicted and living in a legal black hole at Guantánamo for upwards of 20+ years, many men are met with a new legal limbo, with receiving governments refusing to provide them with formal legal identity. In about 30% of documented cases, former detainees have not been granted legal status for their residency in the country of resettlement.<sup>164</sup> In some, they have been granted exceptional identity documents with no real recognition under law, whereas in others they have not been granted any identification documents whatsoever. The SR underscores that the lack of legal status and identification risks precluding them and their families from access to certain public benefits, health care, education, as well as foreign travel, or a path to citizenship, all of which are fundamental entitlements under international human rights law.

64. Former detainee families also struggle. The family breadwinner may have returned but the lasting harm of extraordinary rendition, torture, cruel, inhuman, and degrading treatment, and arbitrary detention means that they are unable to work, struggle to adapt, and remain vulnerable. Moreover, resettled detainees have not in many cases been able to re-establish family ties. Despite commitments to enable meaningful family visits for up to 5 years post-transfer, visits have been irregular or unfacilitated for many. Because of restrictions on travel, or the lack of documentation, detainees are often ‘stuck’ in the country of resettlement, cut off indefinitely from their families.<sup>165</sup> In countries lacking large Muslim communities, integration has been especially hard, opportunities to marry constrained, and because the stain of Guantánamo lingers, finding and sustaining relationships and managing integration is challenging.

65. Surveillance and security burdens remain burdensome for many former detainees notwithstanding that they have never been charged with a crime and have been released and deemed no longer a threat to the United States—often seemingly on the basis of discrimination. Former detainees report over policing, monitoring locally by police, and living in constant fear of monitoring, arrest, detention, and ill-treatment. Family members, friends, and mere acquaintances have been questioned, intimidated, and in some cases interrogated with the use of force by security agencies and other government actors. This has had a chilling effect disincentivizing the very socialization and reintegration central to any purported protective security measures. Detainees and governments alike highlighted that the maintenance of former detainees’ names on national and international terrorist watchlists made living a normal life impossible.<sup>166</sup> In some cases, former detainees have been unable to travel and subject to bank transfer blockages, job terminations, and other measures due to their purported terrorist association. In many cases, intimidation and harassment are facilitated by pejorative and sensationalist media coverage, often instigated by politicians and government-led smear campaigns with Islamophobia agendas. The SR observes how the public narrative of terrorism and security threat have fundamentally undermined the capacity of former detainees to live a normal life, even as they have been released and in the near-majority of cases, never charged with a crime or any wrongdoing. She calls on the U.S. Government and receiving States to counteract such public misunderstanding.

**Recommendations: Formalize** the informed consent process for detainee transfers to stipulate at minimum sharing a comprehensive and transparent overview to the detainee of the proposed conditions and potential legal identification, stigma, and reintegration challenges; a clear procedure should the detainee refuse transfer; and an offer for counsel accompaniment throughout the entire transfer process including by plane and upon arrival in the home or third country; **Provide** effective oversight of diplomatic assurances and broader repatriation and resettlement practices for current and former detainees to ensure compliance with international human rights law; **Remove** former detainees from watchlists that prevent them from the resumption of normal life in society and full enjoyment of their human rights; **Provide** effective remedies and redress, including fair and adequate compensation, and as full rehabilitation as possible to the men who were detained at Guantánamo, as a direct co-relation to the obligations to prevent and remedy torture;<sup>167</sup> **Urgently** address the situation of men arbitrarily detained in Kazakhstan and the United Arab Emirates and any other countries where former detainees are being subject to serious violations of human rights, and subject to their informed consent, facilitate their human rights complaint (re)settlement; **Ensure** accountability to these victims of

<sup>164</sup> See *Many Resettled Guantánamo Detainees in Legal Limbo, Analysis Shows*, Reprieve (Jan. 2022).

<sup>165</sup> See UDHR, art. 16; ICCPR, arts. 17, 23(1); ICESCR, art. 10(1).

<sup>166</sup> The SR notes the recent settlements with former detainees for their wrongful listing on the World Check database. Several detainees report being transferred with identification bearing incorrect names and with governments refusing to correct their identification documents likely due to concern over incompatibility with such lists.

<sup>167</sup> See CAT/C/GC/3.

torture by holding accountable those who ordered, enabled, facilitated, carried out, suppressed knowledge of, and obscured torture.<sup>168</sup>

## CONCLUSION

66. The U.S. Government has greatly improved its compliance with international norms over the past ten years; however, challenging human rights work remains to be done. Every detainee and former detainee the SR met underscored the public perception of them as “the worst of the worst,” despite most never having been charged, let alone convicted of a single crime. These men rightly demand apology and are entitled to be treated with dignity and respect, so they and their families can fully start afresh. The SR agrees that the reputational harm done to these men must be remedied as the beginning of a process of meaningful repair and as a guarantee of non-repetition. But apology alone is insufficient. None of the former detainees have been compensated by the U.S. Government for the systematic crimes of extraordinary rendition, torture, cruel, inhuman, and degrading treatment, and arbitrary detention.<sup>169</sup> The SR reiterates that any violation of international law obligations gives rise to an obligation to make reparation, and that there is no statute of limitations for gross and systematic violations of international human rights law and serious violations of international humanitarian law.<sup>170</sup> The U.S. Government must ensure accountability for all violations of international law, for both victims of the counter-terrorism practices of extraordinary rendition, arbitrary detention, and systematic torture, cruel, inhuman, and degrading treatment or punishment, and victims of terrorism.

67. Finally, the SR concludes that the exceptionalism, discrimination, securitization, and anti-terror discourse perpetuated by the continuing existence of and justification for Guantánamo have pervaded well beyond its confines with enormous human rights consequences in multiple countries. These legacies, beyond the scope of this report, are recognized and she recommends that this report inform the broader political and legal discussions that are needed to undo and repair those legacies.

68. She closes by recognizing the enormous importance and value of this technical visit and the consequence it brings to the global elimination of the use of extraordinary rendition, torture, cruel, inhuman, and degrading treatment, and arbitrary detention with the recognition that such acts have no place in a rule of law-based society. She welcomes the openness and willingness of the U.S. Government to lead by example by agreeing to this visit and to be prepared to address the hardest human rights issues. Few States exhibit such courage. She affirms the singular importance of access to all sites of detention and affirms the U.S. Government’s positive role in advancing the protection of human rights in detention contexts globally by enabling this visit. She thanks all those including victims and survivors of terrorism, current and former detainees, their family members, and their counsel, as well as the many governmental officials who enabled and supported this visit.

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<sup>168</sup> Ensure that alleged perpetrators of and accomplices to torture, including persons in positions of command and those who provided legal cover, are duly prosecuted and, if found guilty, given penalties commensurate with the grave nature of their acts. See generally CAT/C/GC/3; CAT/C/USA/CO/3-5.

<sup>169</sup> But see, e.g., Canada and the United Kingdom’s settlements with former detainees.

<sup>170</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, § 4; Draft Articles on State Responsibility, art. 1.