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HIGH COMMISSIONER FOR HUMAN RIGHTS

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandate of the Special Rapporteur on torture and other cruel, inhuman, and degrading treatment or punishment.

October 28, 2013

Mr. Emilio Álvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
1889 F Street, NW Washington, DC 20006

Re: Hearing on the human rights situation of detainees at Guantánamo Naval Base, United States.

Dear Mr. Emilio Álvarez Icaza:

I would like to thank the Inter-American Commission on Human Rights for inviting me to participate as an expert witness, in my capacity as United Nations Special Rapporteur on torture and other cruel, inhuman, and degrading treatment or punishment, at this hearing, in which the Center for Justice and International Law (CEJIL) and the Center for Constitutional Rights (CCR) intervene as petitioners.

Pursuant to United Nations Human Rights Council Resolution 16/23, I act under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of my mandate and appear at these proceedings without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. The situation of the detainees in Guantánamo Bay, including alleged practices of torture, indefinite detention, use of solitary confinement, the lack of access to appropriate legal recourses and lack of accountability for actions by State actors, as well as issues such as the recent hunger strikes and forced feedings, is extremely relevant to my mandate and I have had the opportunity to express my concerns about it on several occasions, both in bilateral representations to the United States' government and publicly. I am disappointed that the United States' government has not closed Guantánamo, despite repeatedly committing itself to do so.

Under the rubric of fighting the war on terror States have, regrettably, attempted to dilute cardinal principles necessary to prevent and suppress torture and ill-treatment or have become complicit in acts of torture. During the past decade in particular, there has been a rise in the use of torture or ill-treatment and an increase in the practice of indefinite

detention, largely due to the extraction of intelligence information in the context of the global fight against terrorism and the deliberate undermining of the absolute prohibition of torture.

In this context, I have reiterated, on various occasions, the need to adopt concrete measures to end the indefinite detention of persons; provide for their release or prosecution, in accordance with due process and the principles and standards of international human rights law; allow for independent monitoring by international human rights bodies; and close the detention center at the Guantánamo Bay Naval Base.

In particular, I have reiterated my interest in visiting Guantánamo in order to assess the situation directly in accordance with the methods of work of my mandate. Regrettably, the United States' government, although agreeing to my visit, has not yet agreed to allow me to conduct it under conditions that I can accept; namely, with the possibility of visiting any and every part of the facilities and being able to interview, without supervision, any detainee of my choosing. These limitations were also imposed on my predecessor and three other mandate holders, who were granted access to the facilities by the previous administration in 2004, and they too declined to visit. Maintaining the principle of unfettered access to detainees is an important part of my responsibility as a UN independent expert. Limitations to this principle impair the ability of UN experts to conduct credible enquiries into allegations of torture and ill-treatment.

I would like to stress, however, that the government has invited me to Guantánamo to observe hearings before the military commission, which I am planning to do in the upcoming months in relation to hearings related to issues covered by my mandate. My upcoming visit to observe hearings about the exclusion of evidence allegedly obtained under torture should not be understood as a substitute for my insistence to visit the detention facility under The Terms of Reference for fact-finding missions by Special Rapporteurs/Representatives (E/CN.4/1998/45/Appendix V) as noted in Human Rights Council Resolution 5/2.

One of the main issues of concern for my mandate regarding the situation of detainees in Guantánamo is indefinite detention. As a general rule, I find that where the physical conditions and the prison regime fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment. In the particular situation of indefinite detention, the uncertainty regarding the length of time increases the risk of serious mental pain and suffering to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.

At Guantánamo, allegedly around half of the detainees still being held in detention have been cleared for transfer to either home countries or third countries for resettlement. Yet they remain indefinitely in detention. Others, reportedly, have been designated for further indefinite detention. Some of them have been held in this detention center for more than a decade, even though they have yet to be found guilty of any crime by a court of law. The regime applied at Guantánamo neither allows the guilty to be condemned nor ensures that the innocent will be released. This opens the door for serious human rights violations.

Furthermore, it severely undermines the United States' stance that it is an upholder of human rights, and weakens its position when addressing human rights violations elsewhere.

My mandate has publicly declared on various occasions, and most recently on 1 May 2013, that the indefinite detention of individuals in Guantánamo, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment. In agreement with the High Commissioner for Human Rights and the Inter-American Commission on Human Rights, I find that the continuing and indefinite detention of individuals, without the right to due process, is arbitrary and constitutes a clear violation of international law. This situation is particularly clear with respect to those prisoners who have been cleared for transfer by the government.

I am also concerned that the indefinite detention of detainees is sanctioned by Executive Order 13567, titled "Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force" which installed a periodic review system of Guantánamo detainees that makes it effectively possible for the US government to keep inmates detained indefinitely by executive decisions if it is determined that they pose a significant threat to the security of the United States. This Executive Order, along with sections 1021 and 1022 of the December 2011 National Defense Authorization Act for Fiscal Year 2012 (NDAA) that states the authority of the government to detain individuals without trial until the end of hostilities authorized by the Authorization for Use of Military Force, allow the US government to indefinitely detain persons suspected of terrorist activities, without establishing their individual culpability in any crime or their actual participation in hostilities.

The US government has an obligation under international human rights law to ensure that individuals deprived of their liberty can have the lawfulness of their detention reviewed before a court. Although the periodic review boards do not examine the legality of detention, the introduction of the writ of habeas corpus and other safeguards in the National Defense Authorization Act of 2013 -- which had already been established by the US Supreme Court -- is an important step forward. Moreover, those Guantánamo detainees who are accused of crimes need to be tried in civilian courts. The military commissions -- even after legislative amendments were introduced in the Military Commissions Act of 2009 -- simply maintain a substandard system of justice and do not meet international fair trial standards .

Detention until the end of hostilities is, of course, permissible under the law of armed conflict. But all detentions that take place away from the field of battle should be covered by the international law of human rights -- which prohibits prolonged arbitrary detention -- even if they are carried out under a rhetorical "war on terror." In this context, I would like to make reference to the 2006 joint report (E/CN.4/2006/120) submitted to the Human Rights Council by five Special Procedures mandate holders (Working Group on arbitrary detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, and the

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) on the situation of detainees at Guantánamo Bay, which, in its paragraph 23, states that the indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions (Third Geneva Convention, art. 17 (3), and Fourth Geneva Convention art. 31).

The United States' practice to hold detainees indefinitely if it is determined that they pose a significant threat to the security of the United States is a violation of the prohibition of torture and ill-treatment under article 7 of the International Covenant on Civil and Political Rights and article 1 and 16 of the Convention against Torture, as well as of relevant provisions of the American Declaration of the Rights and Duties of Man, incorporated into the Charter of the Organization of American States. Moreover, the authorization for indefinite detention made by the referred norms present severe obstacles for the ultimate closure of the detention facility, which is a declared goal of this Administration.

Additionally, I have called upon the government of the United States to respect and guarantee the life, health and personal integrity of detainees at Guantánamo, particularly in the context of the hunger strike that began in the spring of 2013 and that, according to information received, is still ongoing, although to a lesser scale.

My mandate has received information about the painful and humiliating procedure used for forced feeding, which involves detainees being strapped to a chair while a feeding tube is roughly inserted through the nose into the stomach and roughly extracted. This painful procedure lasts allegedly between 30 and 120 minutes. In addition, detainees reportedly remain strapped to the chair for several hours afterwards, in an attempt to prevent them from regurgitating the food.

In this context, I fully support the findings of the Inter-American Commission on Human Rights and the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which, according to the World Medical Assembly's Declaration of Malta, conclude that in cases involving people on hunger strike the duty of medical personnel to act ethically and the principle of respect for individuals' autonomy must be respected. Under these principles, it is unjustifiable to engage in forced feeding of individuals contrary to their informed and voluntary refusal of such a measure. Moreover, it is not acceptable to use threats of forced feeding or other types of physical or psychological coercion against individuals who have voluntarily decided to go on a hunger strike.

This is not to say, however, that the prison authorities should let inmates starve to death. Rather, authorities have a duty to look for other solutions to the crisis created by the hunger strike, including good faith dialogue with the inmates about their grievances.

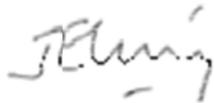
To conclude, I would like to stress that I consider the practice of indefinite detention, and other conditions applied to detainees in Guantánamo such as solitary confinement, as well as the use of forced feeding, as forms of ill-treatment that in some cases can amount

to torture.

Torture and ill-treatment are unacceptable and abhorrent from a moral and legal perspective, and its prohibition is absolute and non-derogable. Torture exists at the far end of a continuum of maltreatment and lesser forms of ill-treatment are often a gateway to torture. This is why the international law prohibition and its absolute nature are equally applicable to torture and to all forms of cruel, inhuman or degrading treatment or punishment. States cannot limit the application of this prohibition under their domestic law for reasons of public emergencies, anti-terrorism measures or in the context of armed conflicts.

While I welcome President Obama's announcement on 23 May 2013 that he was placing a high priority on closing Guantánamo during his second term in office, as well as his call on Congress to lift restrictions on transferring detainees to other countries, I remain concerned about the situation of detainees and the fact that human rights violations continue to take place. I therefore continue to urge the United States to: (a) adopt all legislative, administrative, judicial, and any other types of measures necessary to prosecute, with full respect for the right to due process, the individuals being held at Guantánamo Naval Base or, where appropriate, to provide for their immediate release or transfer to a third country, in accordance with international law; (b) expedite the process of release and transfer of those detainees who have been certified for release by the government itself; (c) conduct a serious, independent, and impartial investigation into the acts of forced feeding of inmates on hunger strike and the alleged violence being used in those procedures; (d) allow the Inter-American Commission on Human Rights and the United Nations Human Rights Council mechanisms, such as the relevant Working Groups and the UN Special Rapporteurs, to conduct monitoring visits to Guantánamo under conditions in which they can freely move about the installations and meet privately with the prisoners and without witnesses or surveillance; and (e) take concrete, decisive steps towards closing Guantánamo once and for all.

Sincerely,



Juan E. Méndez

United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment