



Submission to the Special Rapporteur on freedom of religion or belief for the thematic report on the manifestation of intolerance, hatred and discrimination against persons based on their religion or belief

ABOUT REPRIEVE

Reprieve is a charitable organization registered in the United Kingdom (No. 1114900), and in special consultative status with the United Nations Economic and Social Council (ECOSOC). Reprieve was one of the first human rights organizations to gain access to the prison at Guantánamo Bay after counsel for Reprieve brought a successful Supreme Court battle to establish that the detainees held there had the right to challenge their detention. Since that time, Reprieve has represented and successfully secured the release of 80 Guantánamo detainees and we currently represent seven of the remaining 40 men held there. In 2009, Reprieve established its Life after Guantánamo project which has supported 73 former Guantánamo detainees resettled or repatriated in 28 countries by facilitating the medical, psychological, social, legal and economic assistance that former detainees need to rebuild their lives.

SUMMARY

This submission provides information regarding discrimination on the basis of religion and belief that is manifest in the continued detention of 40 men at Guantánamo Bay. The prison's original creation and continued existence is premised on the discriminatory position adopted by the US in the aftermath of 9/11: that "Islamic terrorism" posed such an exceptional threat that existing human rights norms and safeguards could be jettisoned in the name of national security. This discrimination persists to the present date, and the 40 men who remain detained at Guantánamo continue to face systemic restrictions on practising their religion and are afforded far fewer rights than those suspected of domestic terrorism on the US mainland.

Guantánamo: A Muslim-only prison free of human rights protections

Since the prison at Guantánamo opened in 2002, 780 men and boys have been detained there, the vast majority without charge or trial. These men and boys all have one thing in common: every one of them was Muslim.

The establishment of what is effectively a Muslim-only prison with highly discriminatory rules is a direct and inevitable consequence of the US's catastrophic "war on terror", initiated in the aftermath of 9/11, which constructed Islamic ideology as the root cause of terrorism and justified violence against majority-Muslim countries on this basis.¹ Ever since, the US has treated so-called "Islamic terrorism" as an exceptional threat requiring an exceptional response. The rules and

¹ Mobashra Tazamal, "How Anti-Muslim Rhetoric Drives the Imperialist 'Global War on Terror'" (Bridge Initiative, June 4, 2018) <<https://bridge.georgetown.edu/research/how-anti-muslim-rhetoric-drives-the-imperialist-global-war-on-terror/>> accessed December 8, 2020.

values that the US had for decades espoused and championed – freedom from torture, the right to due process, the presumption of innocence — were disregarded in relation to “Islamic terror” suspects, whom the US both subjected to torture themselves and also rendered to states where despotic regimes were known to practise torture against dissidents.² This complete degradation of accepted human rights norms was uniquely applied to men suspected of “Islamic terrorism”.

The actions of a small number of people on 9/11 were used by the US as justification not only for inflicting grave human rights abuses upon those suspected of “Islamic terrorism”, but also the pursuance of a form of collective punishment against entire populations based on their religious beliefs. Firstly, bounties of around \$5,000 were offered by the US to those who aided in “the capture of Taliban or al-Qaida fighters”.³ These bounty fliers were widely distributed in Afghanistan and Pakistan, creating a huge incentive for local populations to turn over innocent men. US Department of Defense data confirms that 86% of Guantánamo detainees were arrested by either Pakistan or the Northern Alliance.⁴ Thus, the overwhelming majority of Guantánamo detainees – such as Chinese Uighur detainees, Ahmed Adil, Adil Abdul Hakim and Abu Bakr Qassim⁵ – were literally sold to the US and likely detained on little more than their captors seeking a payout.

The US at this time also approved a series of torture methods, euphemistically-termed “enhanced interrogation techniques” (EIT) for use on detainees. This torture included the use of waterboarding, extended sleep deprivation, and “stress positions” (e.g. shackling a detainee’s arms to the ceiling to prevent them from relaxing).⁶ The 2014 US Senate Torture Report detailed how “rectal rehydration and feeding” was used on at least five detainees, with at least another three seeing their families’ safety threatened.⁷ These EITs were understood at the time to be paradigmatic acts of torture, yet so-called intelligence gained as a result of their use was nonetheless relied upon to justify the indefinite detention without trial of the men sent to Guantánamo.

From the outset of the “war on terror”, the system established by the US was certain to see innocents imprisoned as part of the concerted and indiscriminate targeting of Muslim men. Detainees were indiscriminately sold to the US for bounties, with detention justified by “confessions” that were elicited through torture, before onward transfer to Guantánamo.

² Sam Raphael, Crofton Black and Ruth Blakeley, “CIA Torture Unredacted” (The Rendition Project 2019) <<https://www.therenditionproject.org.uk/prisoners/index.html>> accessed December 14, 2020.

³ Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data, Seton Hall University School of Law 23 (Feb. 8, 2006), http://law.shu.edu/publications/GuantánamoReports/Guantánamo_report_final_2_08_06.pdf.

⁴ Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data, Seton Hall University School of Law 2 (Feb. 8, 2006), http://law.shu.edu/publications/GuantánamoReports/Guantánamo_report_final_2_08_06.pdf.

⁵ Neil Arun, “Guantanamo Uighurs’ Strange Odyssey”, BBC (January 11, 2007) <<http://news.bbc.co.uk/1/hi/world/europe/6242891.stm>> accessed December 21, 2020

⁶ Jay S. Bybee, Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency Re: Interrogation of al Qaeda Operative, 1 August 2002.

⁷ Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Senate Select Committee on Intelligence (December 3, 2014) <https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf> accessed December 21, 2020

Crucially, none of this evidence would be admissible in a US criminal trial, so instead the vast majority of men detained at Guantánamo were simply not charged.

The US would not countenance operating a prison on its mainland that was both reserved for men belonging to one specific faith group but also subject to an alternative legal regime that saw the detainees' basic human rights discarded. This though is exactly the situation at Guantánamo, where 40 Muslim men remain detained indefinitely, 31 without charge and six even cleared for transfer by the US intelligence apparatus. This, despite the fact, that as early as April 2003, then Secretary of Defence, Donald Rumsfeld, conceded that Guantánamo was populated with "low-level enemy combatants", and not the "worst of the worst" as he had claimed the year prior.⁸

The religious persecution and humiliation the men have experienced whilst detained at Guantánamo

In addition to the inherent discrimination in creating a Muslim only prison and disregarding the detainees' basic human rights, religious and cultural humiliation is an intrinsic part of the psychological torture endured at Guantánamo. Former detainees report being forcibly shaved,⁹ guards desecrating the Islamic Qu'ran,¹⁰ prevention of prayer,¹¹ and female interrogators performing acts of sexual humiliation.¹²

These infringements on the right to freely practise one's religion continue at Guantánamo to date. Reprieve clients, for example, have detailed having Qur'ans thrown into buckets which were used as toilets.¹³ In 2020, one Reprieve client detailed the current food arrangements during Ramadan:

*'We constantly ask for them to change the food, to make something more enjoyable. It's even more important under Ramadan because we are effectively eating only once a day. Last year they promised there would be a change during Ramadan this year, but there was no change. They still bring us all three meals during the day while we are not eating. It's as if it's not Ramadan.'*¹⁴

⁸ Mark Denbeaux, Sean Camoni, Paul Taylor and Philip Taylor, "Rumsfeld Knew: DoD's "Worst of the Worst" and Recidivism Claims Refuted by Recently Declassified Memo", Seton Hall Public Law Research Paper No, 2003598, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2003598

⁹ Human Rights Watch, "U.S.: Religious Humiliation of Muslim Detainees Widespread" (*Human Rights Watch*, May 18, 2005) <<https://www.hrw.org/news/2005/05/18/us-religious-humiliation-muslim-detainees-widespread>> accessed December 8, 2020; Center for Constitutional Rights, "Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba" (2006) 1, 25.

¹⁰ Center for Constitutional Rights, "Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba" (2006) 1, 25.

¹¹ Center for Constitutional Rights, "Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba" (2006) 1,26

¹² Center for Constitutional Rights, "Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba" (2006) 1, 24-5.

¹³ Former prisoner, Reprieve source.

¹⁴ Current Guantánamo detainee, Reprieve source.

Fasting throughout the day is a crucial part of religious observance during Ramadan, and this failure to modify dining arrangements during this period results in the detainees being denied the basic right to partake in a significant Islamic celebration. This is typical of the undermining of the right to practise one's religion that has become synonymous with detention in Guantánamo. Such restrictions would not be placed on those practising other faiths and detained in prisons on the US mainland, and demonstrates the overt discrimination against those suspected of "Islamic terrorism" held in Guantánamo Bay detention facility.

US Policy on Guantánamo has been reshaped by Trump's own overt Islamophobia

Most recently, Guantánamo policy has effectively been shaped by President Trump's well-documented animus towards Muslims. He has stated that Muslims suffer from a "sickness" and suggested that Muslims suspected of terrorism "should be shot with bullets dipped in pig's blood".¹⁵

While campaigning in 2016, Trump delivered a speech on combating terrorism that focused solely on "radical Islamic terrorism",¹⁶ explicitly linking the religion with terrorism whilst disregarding any other threats facing the US or its allies. In relation to Guantánamo, Trump pledged to keep the prison open and "load it up with some bad dudes"¹⁷ – the last arrivals at Guantánamo were in 2007, so this reflected a significant departure from pre-existing US position.

In 2018, President Trump duly signed an executive order to keep Guantánamo open and spoke again in favor of transferring new prisoners there.¹⁸

While President Trump has not followed through on his pledge to send further prisoners to Guantánamo, he effectively ended any hope the remaining prisoners had of being transferred to their home countries or where necessary being resettled elsewhere. In the two preceding administrations, Presidents Bush and Obama transferred over 730 detainees. By contrast, President Trump has released just one, and this further to a plea deal agreed whilst Obama was in office.¹⁹

Trump's policy of keeping Guantánamo open and the remaining 31 uncharged men detained is not based on security concerns. He has refused to transfer five men cleared for release during

¹⁵ Baher Azmy, "Trump's Anti-Muslim Bigotry Clarifies Guantánamo Bay's Awfulness" (*Slate Magazine*, January 11, 2018) <<https://slate.com/news-and-politics/2018/01/trumps-anti-muslim-bigotry-clarifies-Guantánamo-bays-awfulness.html>> accessed December 4, 2020.

¹⁶ Full Text: Donald Trump's speech on fighting terrorism, (Politico, May 8, 2016) <<https://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025>> accessed December 21, 2020.

¹⁷ Baher Azmy, "Trump's Anti-Muslim Bigotry Clarifies Guantánamo Bay's Awfulness" (*Slate Magazine*, January 11, 2018) <<https://slate.com/news-and-politics/2018/01/trumps-anti-muslim-bigotry-clarifies-Guantánamo-bays-awfulness.html>> accessed December 4, 2020.

¹⁸ Julian Borger, "Donald Trump Signs Executive Order to Keep Guantánamo Bay Open" (*The Guardian*, January 31, 2018) <<https://www.theguardian.com/us-news/2018/jan/30/Guantánamo-bay-trump-signs-executive-order-to-keep-prison-open>> accessed December 4, 2020.

¹⁹ Charlie Savage, "U.S. Transfers First Guantánamo Detainee Under Trump, Who Vowed to Fill It" *The New York Times* (May 2, 2018) <<https://www.nytimes.com/2018/05/02/us/politics/Guantánamo-detainee-transferred-trump-al-darbi.html>>.

the Obama administration,²⁰ including Reprieve client Abdul Latif Nasser, a Moroccan national sent to Guantánamo in May 2002²¹ having been sold to US forces for a bounty payment in Afghanistan. Abdul Latif has now been detained for over 18 years without charge or trial, but in July 2016 was unanimously cleared for transfer to Morocco by six US intelligence agencies comprising the Periodic Review Board (PRB).²²

But for a bureaucratic delay, Abdul Latif would have been repatriated to Morocco ahead of then President Obama leaving office. Yet when authorization for his repatriation was not received until the dying days of Obama's tenure, the matter was deferred to the incoming Trump administration, who have refused to authorize Abdul Latif's release.

There also appears to have been a specific attempt during Trump's tenure to interfere with the inadequate rights of detention review that do exist. While it seemed that not a single detainee had been "cleared" for release under the PRB since Trump took office, this was recently exposed as false. Said Nashir's PRB was held on November 19, 2019, meaning that under the rules he should have received a decision by December 19, 2019. Eventually a "decision" allegedly entered on October 29, 2020, was released on December 1, 2020,²³ after the US election. This was clearly suppressed for political purposes, since Trump had no intention of releasing even someone who was cleared by the US's own procedures.

Detained without trial, denied the chance to contest allegations and prevented from even meaningfully challenging detention through the ancient writ of Habeas Corpus

Whilst detainees at Guantánamo have been subjected to egregious human rights abuses and continue to be detained without trial, the US' approach to domestic terror suspects, who are frequently members of far-right and white supremacist groups, is markedly more humane. This is despite the fact that such groups pose a greater risk to US security than Islamic terror groups.²⁴

The Center for Strategic and International Studies has found that white supremacists and right-wing extremists perpetrated over two-thirds of the terror plots and attacks in the US in 2020²⁵ and the US Department of Homeland Security's 2020 annual assessment concluded that white

²⁰ David Welna, "First Guantánamo Inmate Released Under Trump Administration" (NPR.org, May 2, 2018) <<https://www.npr.org/sections/thetwo-way/2018/05/02/607878827/first-Guantánamo-inmate-released-under-trump-administration>> accessed December 4, 2020.

²¹ Katie Taylor, "Free Man in a Cage" (Reprieve, February 16, 2018) <<https://reprieve.org/uk/2018/02/16/free-man-cage/>> accessed December 8, 2020.

²² Periodic Review Board, "ISN 244 Hearing Transcript Public Session" (July 2016) <https://www.prs.mil/Portals/60/Documents/ISN244/20160607_U_ISN_244_HEARING_TRANSCRIPT_PUBLIC_SESSION_PUBREL.pdf>

²³ See: <

https://www.prs.mil/Portals/60/Documents/ISN841/SubsequentHearing1/201029_UPR_ISN841_SH1_FINAL_DETERRMINATION_PRB.pdf> accessed December 23, 2020

²⁴ Seth Jones and others, "The War Comes Home: The Evolution of Domestic Terrorism in the United States" (www.csis.org, October 2020) <<https://www.csis.org/analysis/war-comes-home-evolution-domestic-terrorism-united-states>>.

²⁵ Seth Jones and others, "The War Comes Home: The Evolution of Domestic Terrorism in the United States" (www.csis.org, October 2020) <<https://www.csis.org/analysis/war-comes-home-evolution-domestic-terrorism-united-states>>.

supremacist extremists are the “most persistent and lethal threat” to the US.²⁶ Yet, even when they face far more serious allegations, the rights afforded to typically white domestic terror suspects and Muslim Guantánamo detainees are sharply divergent.

The men held at Guantánamo are denied the basic protections afforded to those accused of criminal conduct. While those accused of domestic terror are presumed innocent, Guantánamo detainees have never been granted the presumption of innocence: from its inception, the US government condemned the men held at Guantánamo as the “worst of the worst”²⁷, effectively handing down judgment and denying them access to any form of due process.

Domestic terror suspects, like anyone accused of a crime in the US, have the right to meaningfully challenge the legality of their detention in a court of law via writs of habeas corpus.²⁸ Habeas corpus – a legal norm dating back to the signing of the Magna Carta – is a central principle of law that requires the state to provide cause for the detention of an individual.²⁹ For Guantánamo detainees, this fundamental right was only found to be constitutionally required by the Supreme Court in 2008,³⁰ six years after many of the men were first detained. Whilst this victory was significant, in subsequent years, US courts have diluted the Guantánamo Habeas regime to such an extent that it has become entirely ineffective. Recently, the D.C. Circuit Court ruled that Guantánamo detainees lack the due process rights afforded to those charged with crimes within American borders,³¹ thereby depriving Guantánamo detainees of various procedural protections, such as full disclosure of the evidence against them, and effectively rendering the Habeas process meaningless.³²

Further, the few Guantánamo detainees who have been charged with crimes have stood trial in Military Commissions, an alternate legal structure created by the Bush administration in 2001.³³ Though the Military Commissions’ jurisdiction is not explicitly limited on the basis of gender or religion, only Muslim men have been prosecuted before such Commissions, which lack the independence and fairness of US federal courts and fail to protect detainees’ rights.³⁴ For

²⁶ Jenny Gross, “Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds” *The New York Times* (October 24, 2020) <<https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html>> accessed December 4, 2020.

²⁷ Jenny Gross, “Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds” *The New York Times* (October 24, 2020) <<https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html>> accessed December 4, 2020.

²⁸ Linda Greenhouse, “Justices, 5-4, Back Detainee Appeals for Guantánamo” *The New York Times* (June 13, 2008) <<https://www.nytimes.com/2008/06/13/washington/13scotus.html>> accessed December 4, 2020.

²⁹ Center for Constitutional Rights, “FAQs: What Is Habeas Corpus” (Center for Constitutional Rights, October 17, 2007) <<https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-habeas-corpus>> accessed December 15, 2020.

³⁰ Michael Boyd, “Constitutional Cases Resulting from the 9/11 Attacks” (*constitutioncenter.org*, September 11, 2020) <<https://constitutioncenter.org/interactive-constitution/blog/constitutional-cases-resulting-from-the-9-11-attacks>> accessed December 15, 2020.

³¹ Carol Rosenberg, “Court Rules Guantánamo Detainees Are Not Entitled to Due Process” *The New York Times* (September 2, 2020) <<https://www.nytimes.com/2020/09/02/us/politics/Guantánamo-detainees-due-process.html>> accessed December 4, 2020.

³² Sheren Khalel, “Guantánamo Prisoners: US Court Says Due Process Not for Them” (*Middle East Eye*, September 4, 2020) <<https://www.middleeasteye.net/news/defense-expected-ask-review-courts-ruling-against-due-process-gitmo-detainees>> accessed December 4, 2020.

³³ Human Rights Watch, “The Guantánamo Trials” (*Human Rights Watch*, January 13, 2009) <<https://www.hrw.org/Guantánamo-trials#>> accessed December 8, 2020.

³⁴ Human Rights Watch, “The Guantánamo Trials” (*Human Rights Watch*, January 13, 2009) <<https://www.hrw.org/Guantánamo-trials#>> accessed December 8, 2020.

example, despite rules designed to prohibit the introduction of evidence obtained through torture – which is never admissible in federal trials – it is still possible for such evidence to be used in Military Commissions.³⁵ Additionally, in Military Commissions, amongst other violations of due process rights, hearsay evidence is permitted, defense counsel lacks the right to subpoena witnesses, and the US military handpicks both the judge and the jury (called a “panel”) for cases.³⁶

Ultimately, even domestic terror suspects who have been convicted of crimes on the US mainland retain greater rights than the uncharged men at Guantánamo, knowing that there is a finite end date on their period of imprisonment.³⁷ By contrast, for the 31 Guantánamo detainees who have never been charged, detention is indefinite, despite the fact that as per customary international law they should be presumed innocent.

Conclusion

The disparate treatment of Guantánamo detainees and domestic terror suspects and the alternate legal structure that traps Guantánamo’s detainees was enabled by the US’s determination that Islamic terror suspects require a “separate system of justice...based on the premise that U.S. laws did not apply to prisons outside of the US mainland”.³⁸ In the wake of 9/11, this resulted in the implementation of a form of collective punishment that saw Muslim men in Afghanistan and Pakistan indiscriminately seized as a result of bounty payments and the widespread use and attempted legalization of torture in the name of “national security”.

Although created nearly 19 years ago, the continued detention of 40 men at Guantánamo, 31 without charge or trial, now largely reflects the current US administration’s open hostility to Muslims. The men detained at Guantánamo have suffered and continue to suffer religious humiliation and restrictions on their right to peacefully practise their religion. The construction of a secondary legal system has also resulted in an entirely different set of due process safeguards being applied to detainees at Guantánamo when contrasted with the legal rights afforded to domestic terror suspects. These differential standards result in the ongoing existence of Guantánamo and detention of the remaining Muslim men held there, despite the fact that 31 of them will almost certainly never face trial and could be safely and humanely repatriated or, where necessary, resettled in third countries.

³⁵ Human Rights First, “Some Key Facts on Military Commissions v. Federal Courts” (*Human Rights First*, November 22, 2016) <<https://www.humanrightsfirst.org/resource/some-key-facts-military-commissions-v-federal-courts>> accessed December 15, 2020.

³⁶ Human Rights First, “Some Key Facts on Military Commissions v. Federal Courts” (*Human Rights First*, November 22, 2016) <<https://www.humanrightsfirst.org/resource/some-key-facts-military-commissions-v-federal-courts>> accessed December 15, 2020.

³⁷ Legal Information Institute Staff, “Prisoners’ Rights” (*LII/Legal Information Institute*, June 20, 2017) <https://www.law.cornell.edu/wex/prisoners%27_rights> accessed December 7, 2020.

³⁸ Maha Hilal, “Guantánamo: An Enduring Symbol of US Islamophobia” (*Middle East Eye*, January 21, 2020) <<https://www.middleeasteye.net/opinion/Guantánamo-persistent-symbol-us-islamophobia>> accessed December 4, 2020.