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August 6, 2018

American Psychological Association  
Attn: Board of Directors and Council of Representatives  
750 First St., NE  
Washington, DC 20002

Dear Members of the Board of Directors and Council of Representatives,

I am writing to express my profound concern over the proposed amendment to the American Psychological Association's (APA) policy on the role of military and operational psychologists in detention facilities. The current policy dictates that only independent psychologists, who are working directly for the detainee or for an independent third party working to protect human rights, can provide assessment and treatment for detainees held in conditions that violate international human rights law, such as at the Guantánamo Bay detention facility or at CIA "black sites." Adoption of APA's New Business Item 35B (35B) would permit military psychologists, who must answer to the detaining State (i.e., who work for the Department of Defense or the intelligence agencies), to provide such treatment and assessment. Adopting 35B would be a disturbing reversal in the fight against torture and open the door to future abuse.

It is important to recall that at Guantánamo and at CIA "black sites," torture, cruel, inhuman or degrading treatment took place systematically under the watchful eye and with the participation of medical professionals, including psychologists.<sup>1</sup> In response to these verified reports, the APA membership and Council instituted the current policy, originally in 2008 and reaffirmed in 2009, 2013, and in 2015, precisely to guarantee that psychologists would not participate in a system of institutionalized torture or ill-treatment and to protect military psychologists from violations of international law. My predecessor at the United Nations, Manfred Nowak, at the time wrote to the President of the APA, imploring him to implement the policy:

"Every day that you delay the referendum is another day where psychologists are, by their presence and participation in these operations, acquiescing in human rights violations. Following the APA's own policy, on the other hand, would send a message that the health professionals maintain the highest ethical standards, refuse to participate in such violations, and do their part, with the support of their professional leadership, to bring these abuses and violations to an end."

Those representing APA's Military Psychology Division assert that amendments to APA's policy are required because that policy violates Chapter II, Article 15, of the Third Geneva Convention, and that the changes proposed are necessary to correct those violations. Speaking as an expert on international human rights law and the relevant jurisprudence, I can say unequivocally that this is an incorrect interpretation of the relevant international law, on two counts.

<sup>1</sup> See, e.g., S. REP. NO. 113-288, at 132 (2014) (noting that a psychologist at "DETENTION SITE BLACK" disregarded detainee Hassan Ghul's hallucinations after fifty-nine hours of sleep deprivation, telling Ghul that "his experiences are normal and will subside when he decides to be truthful").

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First, the policy proposal erroneously applies provisions of the of Third Geneva Convention (notably, the Chapter II, Article 15, and Chapter III, Article 30, of the Third Geneva Convention) to the circumstances at issue. Although Articles 15 and 30 of the Third Geneva Convention address medical treatment of detainees, Common Article Three of the Geneva Convention governs. Additionally, Article 130 of the Third Geneva Convention recognizes the non-derogable prohibition on torture or ill-treatment and states that any torture or ill-treatment—including willfully causing great suffering or serious injury to body or health—of detainees constitutes a grave breach of the Convention.<sup>2</sup> The prohibition against torture and ill-treatment is a non-derogable norm of international law that supersedes Articles 15 and 30 insofar as the medical treatment constitutes torture or ill-treatment. Therefore, although Article 15 and 30 of the Third Geneva Convention requires medical attention for detainees, Article 130 explicitly prohibits medical treatment administered by U.S. military psychologists if their treatment does or will constitute torture or ill-treatment—as it has in the past at Guantánamo and CIA “black sites.”

Furthermore, the new policy denies detainees rights under Article 5(2)(e) of the Additional Protocol II, which to U.S. military psychologists by analogy and principle. Article 5(2)(e) guarantees that the U.S. military, which is responsible for the internment or detention of the detainees, must not endanger the detainees “physical or mental health and integrity” by any unjustified act or omission.<sup>3</sup> Article 5(2)(e) specifically prohibit is subjecting detainees to “any medical procedure which is not indicated by the state of health of the [detainee] concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.”<sup>4</sup> Article 5(2) bars the presence of U.S. military psychologists who are members of the military responsible for the internment and detention of the detainees and have been shown to directly or indirectly participate in torture and ill-treatment that endangers the physical and mental health and integrity of detainees.

Second, the policy incorrectly assigns the U.S. government’s obligations as a State party to the APA. Article 129 of the Third Geneva Convention specifically obligates State parties to “take all measures necessary for the suppression of all acts contrary to the provisions” of the Convention.<sup>5</sup> When considered in light of the applicable and appropriate law, existing APA policy regarding the role of medical professionals conforms to humane treatment standards under Geneva Conventions, while the proposed amendments to that policy (as contained in both the original motion and the substitute motion) do not.

In my role as the United Nations Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment, I presented an [Interim Report](#) to the 71<sup>st</sup> Session of the General Assembly, which addressed the very issue being considered by the APA Council. One of the conclusions of the report is the following summary statement, representing State obligations under the relevant treaties and instruments, including the obligations under the Geneva Conventions:

International standards provide for prompt and regular access to medical care for persons deprived of liberty. **States are obligated to guarantee the availability of prompt, independent,**

<sup>2</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 75 U.N.T.S. 135.

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 5(2)(e), June 8, 1977.

<sup>4</sup> *Id.*

<sup>5</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135.



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**impartial, adequate and consensual medical examinations at the time of arrest and at regular intervals thereafter.** Medical examinations must also be provided as soon as a detainee enters a custodial or interview facility and upon each transfer. Prompt, independent, impartial and professional examinations in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must be carried out pursuant to allegations of mistreatment or any sign that mistreatment may have occurred (see A/68/295 and E/CN.4/2004/56). The well-established prohibition against medical personnel engaging, actively or passively, in acts that may constitute participation in, complicity or acquiescence in, incitement to or attempts to commit torture or ill-treatment (see CAT/C/51/4) merits recalling. (emphasis added)

I would like to highlight five additional points to further clarify these issues for Council members:

1. The relevant adjudicating bodies – the United Nations Committee against Torture (governing body of the UN Convention against Torture) and the Subcommittee for the Prevention of Torture (governing body of the Optional Protocol to the Convention against Torture) - are clear and consistent in the requirement that the evaluation and treatment of detainees and prisoners of war be independent and consensual. The freedom of medical professionals to objectively report indications of torture or abuse and to respect the confidentiality of the detainees is required under the relevant international instruments, including the legal interpretations of obligations under the Geneva Conventions. The current proposal attempts to pick out a single clause in the entire body of international law relevant to the treatment of detainees at Guantánamo and elsewhere, completely out of the context of the relevant body of law that applies to these conditions.
2. It is especially necessary for medical professionals to be independent in environments where the conditions under which the detainees are being held remain in violation of these international treaties and agreements. The detention center at Guantánamo Bay, for example, has been deemed in violation of international law, including the United Nations Convention against Torture. Among the systematic violations noted by the United Nations Committee against Torture are the forced-feeding of competent hunger strikers, indefinite detention without trial, and the denial of unrestricted access to detainees by international human rights monitors, including myself on several occasions during my mandate as Special Rapporteur. In such cases, the independence of medical personnel, who can provide such monitoring, is essential.
3. The current military restriction on access to independent psychologists at Guantánamo is itself a violation of international law. For the APA to weaken its ethical standards to accommodate this violation is to acquiesce in the continued violation of the rights of the detainees. Again, I must highlight that States must, under the relevant treaties and instruments (including the obligations under the Geneva Conventions) guarantee the availability of prompt, **independent**, impartial, adequate and consensual medical examinations at the time of arrest and at regular intervals thereafter. The current military restriction on access to independent psychologists explicitly violates this obligation and abridges the rights of detainees.
4. The notion that U.S. military psychologists are not capable of providing independent, impartial, and consensual mental health treatment to detainees is supported by the conflict of interest that confronts

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military psychologists. On one hand, military psychologists must respect detainees' rights to the "highest attainable standard of physically and mental health," which requires voluntarily given and sufficiently informed consent.<sup>6</sup> On the other hand, these psychologists are members of the military, which has its own objectives that it achieves that by ordering the priorities and conduct of its members, including psychologists—even if these orders do not fully respect detainees' rights. Therefore, military psychologists are highly unlikely to always prioritize the detainee's health and well-being over military duties. There have also been credible reports in the literature and the press that medical practitioners at Guantánamo have systematically ignored the effects of torture and ill-treatment and have permitted the violation of treatment confidentiality.<sup>7</sup>

5. There have also been credible reports in the literature and the press that medical practitioners at Guantánamo have systematically ignored the effects of torture and ill-treatment and have permitted the violation of treatment confidentiality.<sup>8</sup>

The APA's current policy includes a mechanism for the psychological treatment of detainees that is in keeping with international human rights law and standards. Amending this policy at this time—and risking a return to a situation where member psychologists participate in systematic human rights violations—would not only undermine the fundamental human rights of detainees but signal the APA's indifference to the protection of their rights. I therefore strongly urge you to reject 35B.

Thank you for considering my opinion. Please feel free to contact me should you have any questions or if you would like to discuss this further.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Méndez'.

Juan E. Méndez

Former UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2010 -2016)

Professor of Human Rights Law in Residence and Faculty Director of the Anti-Torture Initiative, American University Washington College of Law

<sup>6</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Juan E. Méndez, ¶ 28, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (citing Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, ¶ 18, U.N. Doc. A/63/272 (Aug. 10, 2009).

<sup>7</sup> See, e.g., Sheri Fink and James Risen, Psychologists Open a Window on Brutal C.I.A. Interrogations, N.Y. TIMES (JUNE 21, 2017), <https://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html>.

<sup>8</sup> *Id.*

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