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To whom it may concern in APA,

Re “Resolution to amend Council’s 2009, 2013, 2015 resolution to clarify that psychologists may provide treatment to detainees or military personnel in National Security Settings”

This letter is written with the aim of communicating concerns regarding the amendment that is proposed for discussion and adoption at the coming APA convention, namely “Resolution to amend Council’s 2009, 2013, 2015 resolution to clarify that psychologists may provide treatment to detainees or military personnel in National Security Settings (NBI #35B/Aug 2017)”.

The letter is written in my private capacity as a psychologist and colleague, and as a health professional engaged in human rights and in promoting the role of psychologists as human rights defenders. Among my activities with regard to human rights can be mentioned: I was a member and independent expert of the UN Committee Against Torture (2006 – 2013), presently I am member of the UN Subcommittee for the Prevention of Torture and I am chair of the Human Rights Committee in the Norwegian Psychological Association (NPF). But to reiterate – when I write this letter now, I do this as a colleague in my capacity as concerned psychologist wanting to express the importance of at all times keeping up high ethical and human rights standards in the profession of psychology. I will, further to this letter to APA, encourage the Norwegian Association and others to engage in this discussion should the resolution be adopted.

The proposal for amendment is, as I have understood, to add the following sentence to the resolution text from 2013/2015 - “or they are working in a health care role for the express purpose of providing treatment to detainees or military personnel” (lines 72-74). Furthermore there is a proposal to delete the following sentence “It is understood that the military clinical psychologists would still be available to provide treatment for military personnel” (line 86-87).

As I understand it, when “they” are referred to in the new sentence, this means military clinical psychologists. And as there is reference in the text to the fact that “only military psychologists were excluded because of APA policy (line 41-44), it seems that the addition will mean that military psychologists, that is, psychologists who are not independent, will be able to work “in settings where persons are held outside of, or in violation of, either international law (e.g. UN Convention Against Torture or the Geneva Conventions), or the US Constitution where appropriate” (lines 77-79).

I am also aware that the resolution also calls for the following: “Be it resolved that APA strongly encourages the Department of Defense to make independent psychologists working for the detainees or for a human rights organization available as health care providers to detainees at sites identified in the 2015 Council resolution as operating outside of, or in violation of, the U.S. Constitution or international law.” (lines 104-108). And further, that APA continues to “take strong action to oppose torture or cruel, inhuman or degrading treatment and punishment of detainees held in US custody and to safeguard their welfare” (lines 109-113). These are both very important statements. It is because of this that I am concerned at the amendment proposed

with regard to opening up for military psychologists providing health care in places of detention as part of national security, including in places outside of international law.

In the following I will argue for why it is so important that psychologists, as health care providers, particularly in places where legality and human rights compliance are questioned, are providing services from a fully independent position. The problem is that in these unlawful settings, those providing health care and those in charge of what the resolution itself defines as places of detention “outside of, or in violation of, either international law (e.g. UN Convention Against Torture or the Geneva Conventions)” belong to the same organization and find themselves under the same command, regulations and objectives. This precludes independence, including clinical independence. From this follows - should the last sentence to be included (lines 72 – 74), the whole paragraph is practically contradictory.

To summarize, the independent position is vital for the following reasons:

- Professional confidentiality
- The obligation to ensure that basic rights are respected
- The obligation to report on violations, in particular torture and ill-treatment (see in particular the Mandela Rules (SMR) and Istanbul protocol)
- The state obligation to ensure acceptable conditions, including health care Independence, reporting and risk of reprisals
- Independent monitoring and collaboration with such bodies

The following ‘fact sheet’ elaborates some of these arguments.

Independence

The question of independence of health care providers in places where persons are deprived of their liberty is one of essence both in the work of the UN Committee Against Torture (CAT) and in the Subcommittee for the Prevention of Torture (OPCAT). Both committees are, in their practice and jurisprudence clear in their recommendations regarding the need for full independence of health professionals working with persons who are deprived of their liberty (see Mandela Rules below). Independence is essential at all times, and it is of paramount importance when operating in places which are likely to be in violation of international law itself. Both committees have routinely called for health care services to be independent – including in lawful situations and to reiterate, when we are talking about places of unlawful nature and outside regular monitoring of independent bodies etc., it is of utmost importance that the presence of any health-care professionals must be from a fully independent position. In the following some of the reasons for why independence must be secured are briefly outlined. This is of importance for the safety and security both of the detained person and of those who provide the health services.

Professional confidentiality:

The problem as I see it, and this is supported by the work of the two anti-torture bodies in UN, is that being a health-care professional/psychologist in the military system, and as such with a loyalty to the system and under the command of military leadership, there is always the possibility that confidentiality may be a problematic issue. This means that due to this dual

loyalty, the military system on one hand, and professional ethics and loyalty to patient on the other, situations may occur where confidentiality is not respected as it should be, and would have been, if the affiliation had been different. This means that professionals who obtain contact with detainees for health care reasons, may be ordered to provide information availed to them in a context of psychological / medical confidentiality. There is also the possibility that patients/detainees will not feel they can trust a health care provider belonging to the same system, and with specific loyalties to a system which in fact keep them under forms of detention where lawfulness is contested without the rights that persons deprived of liberty should be enjoying.

The obligation to ensure that basic rights are respected:

One of the ethical obligations of psychologists working with detained persons, is to ensure that basic human rights principles are respected and to do the utmost to secure that persons in detention are provided with basic legal safeguards upon and during their arrest, and react and report when this does not happen. Being in the same line of command makes this difficult, if not impossible. This means that there is no room for blowing whistles at unacceptable conditions or even when acts in violation to the human right treaties are observed. Being in a non-dependent situation, and part of the system and under the direction of those responsible for conditions that violate or do comply with international standards is very problematic. The recommendations from the UN Committee Against Torture to the US in 2014 is of relevance here, see paras 11,12,13 & 14. In particular it is in this context worth noting the recommendations by CAT under para 11, on “Counter-terrorism measures”:

The Committee recalls the absolute prohibition of torture contained in article 2, paragraph 2, of the Convention: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” In that regard, the Committee draws the State party’s attention to its general comment No. 2 (2007), in which it states that exceptional circumstances include “any threat of terrorist acts or violent crime as well as armed conflict, international or non-international.”

The Committee urges the State party to:

(a) Ensure that no one is held in secret detention anywhere under its de facto effective control. The Committee reiterates that detaining individuals in such conditions constitutes, per se, a violation of the Convention (CAT/C/USA/CO/2, para. 17);

(b) Take all necessary measures to ensure that its legislative, administrative and other anti-terrorism measures are compatible with the provisions of the Convention, in particular the provisions of article 2;

(c) Adopt effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of the deprivation of their liberty, including the safeguards

mentioned in paragraphs 13 and 14 of the Committee's general comment No. 2 (2007).

The Committee calls for the declassification and prompt public release of the Senate Select Committee on Intelligence report on the CIA secret detention and interrogation programme, with minimal redaction.

The Committee also encourages the State party to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

The obligation to report on violations, in particular torture and ill-treatment:

Following the points above, there is an obligation for health-care professionals, including psychologists, to be particularly aware of any act of violence or ill-treatment against persons detained, observe and explore any sign of such violence and ensure that such breaches are reported, documented and investigated. In order to do this, the position must be an independent one, that is, a professional not being restrained from possibilities to report and call for investigations of injuries etc, should this seem necessary. As I understand it, the possibilities of non-independent personnel with regard to protesting against inhuman treatment, both concerning conditions in general and in particular concerning violent acts such as torture or CIDT, is naturally limited. My understanding and experience is that professionals working with health issues as part of the system in charge of the institution, and in fact, those that should be held to account if violations occur, have limited possibilities to do what ethics and human rights standards claim of them. Dual loyalty issues are therefore extremely relevant in these situations. The loyalty must always be to the patient/client, including when discussing ways of reporting ill-treatment etc. Below is a brief presentation of international resolutions and standards that are of relevance in this context.

Mandela Rules (SMR):

The claim of independence is clearly formulated in the revised UN Standard minimal rules (the Mandela Rules) see 24 - 46 on health and health care. These are highly important for this discussion. Furthermore, the need for health professionals to report ill-treatment or inhuman behavior or torture, is also something that one knows is not respected nor done in the way the situation requires, when the professional is part of the system in charge of the activities. In particular see Rules 33 and 34 of the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) providing guidance on the duty of health professionals to document health effects of torture and ill-treatment:

- Rule 33: The physician shall report to the director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
- Rule 34: If, in the course of examining a prisoner upon admission or providing medical care to the prisoner thereafter, health-care professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they shall

document and report such cases to the competent medical, administrative or judicial authority. Proper procedural safeguards shall be followed in order not to expose the prisoner or associated persons to foreseeable risk of harm.

Istanbul protocol:

The Istanbul protocol, manual for effective investigation and documentation of torture and ill-treatment (UN 2004), provides specific guidelines on how to conduct effective legal and medical investigations into allegations of torture and ill treatment. The Istanbul Protocol also contains a series of "Istanbul Principles" (Annex I), which represent minimum standards for States' adherence to ensure the effective investigation and documentation of torture and ill treatment and minimum standards for health professionals to follow during their medical evaluation and preparation of their written reports.

Other recommendations/observations:

The World Medical Association (WMA) Resolution on the Responsibility of Physicians in the Documentation and Denunciation of Acts of Torture or Cruel or Inhuman or Degrading Treatment (October, 2007) emphasize the importance of careful and consistent documentation and denunciation by physicians of cases of torture, and that "the absence of documenting and denouncing acts of torture may be considered as a form of tolerance thereof and of non-assistance to the victims". National medical associations, are called upon, inter alia, "to support the adoption in their country of ethical rules and legislative provisions, aimed at affirming the ethical obligation on physicians to report or denounce acts of torture or cruel, inhuman or degrading treatment of which they are aware; depending on the circumstances, the report or denunciation would be addressed to medical, legal, national or international authorities, to non-governmental organizations or to the International Criminal Court. Doctors should use their discretion in this matter, bearing in mind paragraph 68 of the Istanbul Protocol".

There is full agreement among international experts working on the strengthening of these principles that these same principles are relevant for psychologists.

The state obligation to ensure acceptable conditions, including health care

The obligation of states with regard to extraterritorial application of the UN Convention Against Torture is beyond doubt and has frequently been referred to by the CAT (see CAT/C/USA/CO/3-5, 14 December 2014, para 10), which includes respecting the universal prohibition of torture and ill-treatment everywhere, as well as the obligation to respect basic legal safeguards and, as stated in article 11 of the Convention, "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody". This also includes ensuring adequate prison conditions and health services, both somatic and mental health care.

Independence, reporting and risk of reprisals

Working in systems where violations of human rights may happen, either by direct action or by inaction or lack of due diligence, the possibilities to report on this, present complaints or in other ways inform the system itself or other responsible bodies, including independent monitoring mechanisms, may be problematic. This means that APA should ensure that good and professional

mental health services provided to the detainees, but that these must be organized and offered by independent service providers, and outside the command of the military system. The psychologists' work is to provide needed mental health care, aim at preventing ill-treatment and torture, and be sure that they have a position that enables them to observe and report on any incidence that violates the rights of the detainees. When there is a need to report on violations, by persons within the system itself, it is, based on knowledge from different places, there is always the risk of sanctions against such professionals, or even reprisals etc. For human rights advocacy and follow up it is important that those providing important information about forbidden acts or conditions in violation with international standards, are not exposed to any form of reprisals. This of course also includes those who are directly affected and who want to present complains, as well as those collaborating in complaint procedures or with monitoring systems or human rights bodies in order to secure respect and protection of human rights (see UNCAT art. 13; and OHCHR Guidelines against Intimidation or Reprisals (San José Guidelines, 2015)).

Independent monitoring and collaboration with such bodies

The system of independent monitoring in places of detention is an important one, and most states have developed bodies to do this form of independent monitoring, in addition to civil society organization having such duties as part of their work. States that have ratified the Optional Protocol to the Convention Against Torture are required to develop National Preventive Mechanisms, and these visit places of detention regularly, usually unannounced. The collaboration of these bodies with health professionals is of essence, and ways of dealing with abuses, violations, including lack of legal safeguards, and other rights for persons deprived of liberty, are discussed and dealt with. The independence of health professionals is argued strongly by these bodies, to reduce the problems related to dual loyalties and conflicting interests. Alternative independent monitoring bodies can be ombudspersons or national human rights institutions. It is important that all places of detention are regularly monitored by independent bodies. As I see it, a psychologist should not accept to use his or her profession in contexts not allowing for such unannounced and regular inspection and independent monitoring and reporting.

Conclusion

I hope that the change entailed in the resolutions will not be adopted. The APA should claim that their state should not operate with places of detention outside international law, but as long as these remain in operation, the claim must be that the health professionals' presence at these places is an independent one, ensuring health care and respect of human rights. This may be organizations working in an independent way, or also alternative ministries or department within the State itself, for instance health. It is the presence of military psychologists in work with detainees that raise concerns. They will continue, as the former decision also underlined, to have important roles for the needs of military personnel. Because even if their intentions are to provide health care, the military psychologists are integrated and form part of a system that has national security – and not individual health care - as primary objectives. So, as for the detainees, other solutions must be found.

I hope that the APA Convention, in particular on the background of the discussions in APA following the report on psychologists' involvement in national security issues, and the

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international reactions encouraging APA to have a clear stance on these issues, come to a decision on these matters in line with its present policies. It is very disheartening and disappointing, that proposals regarding resolutions to overturn sound decisions, are being put forward again and argued for in ways that seem to misinterpret internationally accepted human rights principles (see Fact sheet, above). It is my very deep wish that sound reflection, ethical thinking and a human rights informed discussion will prevail and that there will be a strong vote against proposals which may be both embarrassing and disgraceful to the profession of psychology.

Oslo, August 4, 2018.

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