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HIGH COMMISSIONER FOR HUMAN RIGHTS

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

REFERENCE: UA G/SO 218/2 G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24)
USA 31/2012

30 November 2012

Excellency,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 15/18, 17/2, 15/15, and 16/23.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the situation of five non-US citizens currently detained at the military detention facility at Guantanamo Bay, Mr. **Khalid Sheikh Mohammad**, Mr. **Walid Muhammad Salih Mubarak Bin Attash**, Mr. **Ramzi Binalshibh**, Mr. **Ali Abdul Aziz Ali** (also known as **Anmar al-Baluchi**) and Mr. **Mustafa Ahmed Adam Al Hawsawi**.

According to the information received:

Presumptive classification and accessibility to lawyers

On 31 May 2011 and 26 January 2012, charges in connection with the attacks of 11 September 2001 were brought by the United States Military Commission against the five individuals named above (henceforth referred to as the accused). They were each charged with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking an aircraft and terrorism.

On 26 April 2012, the United States government filed a motion to the Military Commissions Trial Judiciary with specific reference to this case in order to protect against disclosure of national security information. Among others, it requested, and was granted that all statements of the accused are to be treated as classified until an Original Classification Authority ("OCA") conducts a classification review. This is also called presumptive classification. On 17 April 2012, one of the accused, Mr. Ali Abdul Aziz Ali filed a motion to the

Military Commissions Trial Judiciary asking to end the practice of presumptive classification. This motion was joined by Mr. Walid Muhammad Salih Mubarak Bin Attash on 25 April 2012 and was addressed during a hearing of the Military Commission on 15 October 2012.

The practice of presumptive classification is controversial. According to statements made by officials of your Excellency's Government, its purpose is to prevent the accused from revealing classified information about where they were detained and their treatment in secret CIA prisons and in Guantanamo Bay. Effectively, it means that the defence lawyers of the accused are greatly impeded in their investigations. Traditionally, in normal criminal defence investigations, the primary source of information is the client. He or she provides information about possible witnesses, which the defence counsel can then locate and interview through the use of publicly available databases or other resources. By presumptively classifying the information provided by the client, it becomes almost impossible to locate and interview such possible witnesses as the databases are not authorized to handle classified information. Furthermore, the defence cannot ask other witnesses about information as they will not have been cleared to view classified information. This becomes even more difficult if the witnesses are located in a foreign country, as is the case here, as the defence is also prohibited from providing local investigators tasked with finding potential witnesses with classified information. Presumptive classification makes investigation practically impossible, as the defence needs to provide information before it can receive information, such as giving biographical information before receiving the location of the witness. Through presumptive classification this process is severely complicated.

In this context, we would like to draw the attention of your Excellency's Government to article 14(3)(b) of the International Covenant on Civil and Political Rights which provides that an accused must "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." In its General Comment No. 32, the Human Rights Committee further indicated that: "Adequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory." Furthermore, the Human Rights Committee has stated in its General Comment No. 32 that it "is an important element of the guarantee of a fair trial and an application of the principle of equality of arms." This provision has been reiterated by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his 2008 report to the United Nations General Assembly (A/63/223, para. 36).

In addition to the above, declassification of the information provided by the accused requires these individuals to waive their attorney-client privilege. In order to obtain declassification, the defence has to fully disclose in advance to the judge and to the government anything a defendant is about to say in court. This severely complicates defence investigations and violates attorney-client privileges as the defence is required to support their submission for declassification by providing

all relevant information, including that which has been confidentially communicated between the accused and his lawyer. Thus, in order to obtain declassification, the defence counsel must reveal the information provided by his or her client to the court and government responsible for the investigation of this client in the first place. We would like to refer your Excellency's Government to General Comment No. 32 of the Human Rights Committee whereby "the right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications."

In this context, we would also like to refer Your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular principle 8, which states: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." In addition, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stressed that "the decision to prosecute someone for a terrorist crime should never on its own have the consequence of excluding or limiting confidential communication with counsel" (A/63/223, para. 39).

In addition to the issue of presumptive classification, we are also concerned about the general issue of accessibility of the accused to legal representation. One of the other motions that had to be addressed at the hearing of the Military Commission which started on 15 October 2012 concerns the invasion of privileged attorney-client communications. This specifically refers to the practice of Guantanamo Bay security officials inspecting detainees' legal papers to ensure that they do not contain contraband. Defence counsel is prohibited from communicating with their clients through means other than visits and mail and should therefore receive the assurance that both of these types of communication are protected by attorney-client privileges. This is closely connected to the reported practice whereby lawyers of detainees whose habeas corpus requests have been denied or dismissed were forced to sign a "memorandum of understanding" in order to continue to be allowed to meet their clients. The implication of this document is that any meeting or communication between the defence counsel and client are "subject to the authority and discretion" of the Guantanamo Bay commanding officer.

Accountability for torture

Other than the issues of presumptive classification and accessibility to lawyers, which specifically relate to the five individuals named above, we are also concerned about the lack of accountability that the United States government has shown with regard to the abusive interrogation techniques used in its foreign detention facilities, and specifically in Guantanamo Bay.

United States government officials have on various occasions admitted that Guantanamo Bay detainees were tortured. On 13 January 2009, Susan J. Crawford, convening authority of military commissions, issued a statement confirming that Guantanamo Bay detention personnel had tortured one of its detainees, Mohammad Al-Qahtani. Various other officials, including former President George W. Bush, have admitted to have used waterboarding on detainees. This was also revealed in Justice Department memos written in 2002 and 2005. President Barack Obama condemned the use of these so-called “enhanced interrogation techniques” during his 2008 Presidential campaign and issued an Executive Order prohibiting the use of interrogation techniques that are not authorized by the American Army Field Manual shortly after his inauguration in January 2009.

However, we are concerned that your Excellency’s Government, as well as those of States that have allegedly been complicit, has failed to properly investigate and acknowledge that some of the interrogation techniques used in its detention facilities might constitute a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “Convention against Torture”). In 2006, the Committee against Torture called on the United States to “rescind any interrogation technique, including methods involving sexual humiliation, “waterboarding”, “short shackling” and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention” (CAT/C/USA/CO/2, para. 24).

Consequently, we would like to draw the attention of your Excellency’s Government to article 12 of the Convention against Torture, which requires the competent authorities to proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under the jurisdiction of the State party, and article 7 of the Convention against Torture, whereby a State party, if it does not extradite a suspected perpetrator of torture, shall submit the case to its competent authorities for the purpose of prosecution (the principle of *aut dedere aut judicare*). We would also like to remind your Excellency’s Government of article 15 of the Convention against Torture, which provides that “Each State Party shall ensure 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.” We further recall article 14(3)(g) of the International Covenant on Civil and Political Rights, which states that the accused “should not be compelled to testify against himself or to confess guilt.”

We would also like to draw the attention of your Excellency's Government to the concern expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223, para. 32) “that [...] in trial before the military commission at Guantanamo Bay, testimony obtained through abusive interrogation techniques that were used prior

to the Detainee Treatment Act of 2005 may be used as evidence if found to be "reliable" and its use in the "interest of justice" and that even though evidence obtained by torture is now categorically inadmissible, evidence obtained by other forms of coercion may, by determination of a military judge, be admitted into evidence."

Indefinite detention

Another issue related to the detainees in Guantanamo Bay that in our view has not been adequately addressed is that of indefinite detention. On 7 March 2011, President Barack Obama adopted Executive Order 13277, titled "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force". It installed a periodic review system of Guantanamo Bay detainees which made it effectively possible for the United States government to keep detainees detained indefinitely if it was determined they pose a significant threat to the security of the United States. On 31 December 2011, President Barack Obama signed the National Defense Authorization Act for Fiscal Year 2012 (NDAA), of which section 1021 and 1022 deal with the detention of people suspected of terrorist activities. It specifically notes that your Excellency's Government assumes its authority to detain individuals without trial until the end of hostilities authorized by the Authorization for Use of Military Force. Both the Executive Order and NDAA effectively confirm the possibility that persons suspected of terrorist activities, and particularly the five accused suspected of having planned the attacks of 11 September 2001, can be held in United States detention centres indefinitely. This is also in line with previous statements made by United States Government officials that, even if Khalid Sheikh Mohammad and his four co-accused would be acquitted after their trial, they would never be released.

We are also concerned that according to section 1023 of the NDAA, the objective of the NDAA periodic review of individuals held at Guantanamo Bay is not to determine the legality of any detainee's law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States. In this respect, we would like to refer your Excellency's Government to the recommendation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism following his 2007 country visit to the United States (A/HRC/6/17/Add.3, para. 63) to ensure that all detainees are held in accordance with international human rights standards, including that any form of detention is subject to accessible and effective court review, which entails the possibility of release. In addition, the recommendations made to your Excellency's Government during the Universal Periodic Review called on the authorities to ensure that all remaining detainees be tried without delay in accordance with international law or be released (A/HRC/16/11, paras. 92.156 and 92.160).

The Working Group on Arbitrary Detention also recalls its position adopted in its "Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay" (E/CN.4/2003/8, paras. 61-64). In addition, the Working Group has been seized of similar cases of detention in Guantánamo Bay for more than

ten years leading to a consistent analysis of the nature of detention at this facility and consequent Opinions being rendered, including Opinions Nos. 5/2003, 2/2009 and 3/2009.

Without expressing at this stage an opinion on the facts of the present case and on whether the detention of the abovementioned persons is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the abovementioned persons in compliance with the above international instruments.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary of the case accurate?
2. Has a complaint been lodged by or on behalf of the alleged victims?
3. Please provide information concerning the legal grounds for the arrest and detention of the above-mentioned individuals and how these measures are compatible with international norms and standards as stated, inter alia, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
4. Please provide the details, and where available the results, of any investigation, medical examinations, and judicial or other inquiries carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why.
5. Please provide the full details of any prosecutions which have been undertaken. Have penal, disciplinary or administrative sanctions been imposed on the alleged perpetrators?
6. Please indicate whether compensation has been provided to the victims or the families of the victim.
7. Please provide the legal definition of "presumptive classification" and detailed information on this proceeding, and also indicate how it complies with the requirements and guarantees of a fair trial as enshrined in article 14 of the International Covenant on Civil and Political Rights and principle 6 of the Basic Principles on the Independence of the Judiciary.

We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

El Hadji Malick Sow
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