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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

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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 a non-United States citizen currently detained at the military detention facility at Guantanamo Bay, Mr. **Shaker Aamer**.

According to the information received:

Mr. Aamer is a British resident who was granted indefinite leave to remain in the United Kingdom of Great Britain and Northern Ireland ("UK") in January 2001 and married to a British citizen. He moved from London to Kabul in the first half of 2001, and his wife and their children followed in the summer of 2001. In October 2001, Mr. Aamer and his family reportedly fled Kabul due to the sustained bombing by United States of America ("US" or "United States") and UK forces, seeking refuge and living in their car for a month. Mr. Aamer's pregnant wife and their small children were given shelter by an Afghan village leader but Mr. Aamer was allegedly sold by Afghan bounty hunters to an Afghan warlord, who in turn sold him on to the Northern Alliance forces. The Northern Alliance forces brought Mr. Aamer to Kabul, at that time reportedly under joint US and UK control, where he was held for several weeks in an underground prison. In the Kabul prison, during December 2001, Mr. Aamer was allegedly starved, severely beaten and tortured, and was not provided with any bedding or blanket.

On or around 25 December 2001, Mr. Aamer was transferred from the Kabul prison to US forces at Bagram Airforce Base (“Bagram”). In the course of his transfer by US forces to Bagram, Mr. Aamer was allegedly forced, in the dead of winter, to remove his clothes, which were then tied around his head as a blindfold. Mr. Aamer was given thin, inadequate clothing to wear and then thrown into a helicopter and chained to the floor. Upon arrival at Bagram, Mr. Aamer was allegedly thrown off the helicopter on to the airport runway. He had no shoes and very thin clothes. He was reportedly left lying on the ground for a substantial period of time, and then again forced to strip naked and threatened with beating and being shot if he did not comply. According to the information received, he was kept awake for the next nine days and nights until he started hallucinating. He was barely fed and then only with cold food. He was forced to stand in stress positions – with his arms straight ahead of him – for 16 hours and hit if he let them fall. Sometimes he was allegedly hog tied with wires tied to his wrists and feet, which caused him to strangle himself if he moved. Other times he was hung ‘strappado’ by his wrists to the gate of his cage. The guards allegedly used a laser beam and pointed it at his joints which caused intense pain. They would pour freezing cold water over him and make him stand soaking wet, barefoot on the concrete floor for hours. As a result, his feet reportedly developed frostbite. Then the guards would beat his feet. He was allegedly periodically subjected to sexual abuse by the insertion of fingers in his anus and on one occasion, the barrel of a MI6 gun.

Whilst at Bagram Mr. Aamer was allegedly repeatedly interrogated by the US officials during the course of which he was frequently beaten.

According to the information received, prisoners at Bagram were detained in an open former aircraft hanger, separated only by barbed wire in small groups. The prisoners allegedly were wearing thin, inadequate clothes, they were forced to sit without moving or talking, they were required to remain in stressful positions on concrete floors with thin, if any, cover. Many prisoners suffered from frostbite by the time of their next transfer to Kandahar. The interrogation rooms were reportedly positioned on the higher walkway which allowed all to see and hear what transpired, including punishment of prisoners. Food was allegedly almost at starvation level; Mr. Aamer lost 65 pounds in one month at Bagram. He was reportedly forced to agree to propositions and statements which were false and which were thereafter relied upon to justify his continued detention.

After Mr. Aamer had been detained at Bagram for a number of weeks he was reportedly in particular interrogated at one session with the following key features: (i) it took place after Mr. Aamer had been subjected over a number of weeks to the torture, inhuman and degrading treatment outlined above; (ii) it was deliberately intimidating: ten or more people reportedly attended and they simultaneously shouted at him in a number of different languages including English, Arabic and French; (iii) one of those present allegedly grabbed Mr. Aamer’s head and beat it repeatedly and with great force against the back wall while others shouted that they would kill him and that he would die; (iv) those attending then left the room together, allegedly leaving a gun on the table.

According to the information received, Mr. Aamer was terrified and did not understand what their intention was in leaving the gun. He wondered whether they intended that he would use it to kill himself or did they want him to touch it so that they would have an excuse to shoot him.

On a date believed to be in January 2002, Mr. Aamer was reportedly transferred with a US aircraft to Kandahar Airforce Base in Afghanistan, under US control. During the flight, which lasted about two hours, Mr. Aamer allegedly suffered the following inhuman treatment: (i) before boarding the aircraft Mr. Aamer was hooded and shackled by the hands and feet in a painfully tight manner and all the prisoners were tied together like a 'train'. They were allegedly kept waiting for many hours outside in the freezing cold before boarding the airplane. They were forced to hold their hands up in the air above their heads for the entire time. If their hands waivered or fell they would be beaten around the head; (ii) whilst on the aircraft Mr. Aamer was hooded, his ears were blocked, his mouth was muzzled, his hands and feet were tightly shackled and he was further strapped to the floor of the airplane in a painful stress position; (iii) throughout the journey the soldiers allegedly beat them hard with their M16 rifle butts around the head and shoulders.

According to the information received, Mr. Aamer was interrogated by US officials during his stay at Kandahar Airforce Base.

On 13 February 2002, Mr. Aamer was reportedly rendered to Guantanamo Bay. The process of transfer was similar to his previous transfers. The journey allegedly took more than 20 hours under the following circumstances: (i) he was denied use of the toilet; (ii) he was not allowed to pray; (iii) he was force fed unidentified tablets; (iv) he was shackled in a stress position and secured to the floor of the aircraft and to a wooden board so severely that he could not move at all; (v) he was unable to see, hear or touch anything.

Upon arrival at Guantanamo, he was allegedly initially placed in an open air cage, where snakes, spiders and other venomous insects could enter. He was reportedly interrogated in a section of the camp called the "Gold Building"; in a sound proof room, with a freezer type door, without windows, and in which there was a powerful AC unit. Pornographic pictures were all over the walls and a stereo played loud music. He was interrogated in one of these rooms for up to 18 hours. Later he was transferred to Camp V where he was held in a cell measuring 6 x 8 feet, with a walking space of only 3 x 4 feet. According to the information received, the guards controlled everything; air, light, water, food and sleep; and allegedly used their control to try and break him.

Mr. Aamer was reportedly not brought before any tribunal or court until November 2004. Following the establishment of Combatant Status Review Tribunals ("CSRT") by the United States Government, Mr. Aamer was summoned to appear before a Guantanamo Bay CSRT for his classification as an enemy combatant to be reviewed. At the hearing Mr. Aamer was reportedly made aware that the United States authorities were relying upon confessions that he had made that he had attended training camps and had met Osama Bin Laden.

According to the information received, those confessions were false and were made by Mr. Aamer under conditions amounting to torture and coercion. In or around November 2004, the CSRT concluded that Mr. Aamer was an “enemy combatant” on the basis of these false confessions made under torture. He was allegedly not represented by any lawyers. Despite Mr. Aamer’s denials, his status as an “enemy combatant” was reportedly upheld before a CSRT on the same basis in or around October 2005, and in October 2006.

According to the information received, Mr. Aamer has never been charged with a criminal offence, either before an ordinary court or a military commission. He has reportedly been cleared for release from Guantanamo Bay since 2007. A Task Force established by the administration of President Obama reportedly confirmed again in 2009 that there would be no further legal action against him and that he was approved for transfer out of Guantanamo.

According to the information received, the UK government has indicated that it would accept Mr. Aamer in the UK, and the relevant UK authorities have reportedly entered into a written settlement agreement with Mr. Aamer to this effect. However, UK Foreign Office officials have reportedly informed Mr. Aamer’s legal team that the US National Defence Authorisation Acts (“NDAA”) requires the Secretary of State for Defence to give a personal guarantee in order to effect the release of a Guantanamo prisoner and that this has constituted an impassable obstacle to securing Mr. Aamer’s release (even though the requirement in 2012 was modified to allow for waivers). This claimed impediment to release is reportedly an executive discretion and neither courts nor lawyers have access to its application.

Mr. Aamer has allegedly never been able to meet with his British legal team, as non-US citizens are not eligible to be granted security clearance to visit Guantanamo Bay. His written communications produced with US security cleared lawyers reportedly have to go through censors as do his letters to his UK lawyers. These restricted communications allegedly include all statements forming the basis of legal proceedings as well as all statements provided already or to be provided in the near future to the UK police by Mr. Aamer.

According to the information received, Mr. Aamer has experienced forced (“enforced”) feeding administered by medical staff in response to his almost continuous hunger protests. This is reportedly a painful and humiliating procedure which involved Mr. Aamer being strapped to a chair while a feeding tube is roughly inserted through his nose into his stomach and roughly extracted. He allegedly remained strapped to the chair for several hours afterwards, in an attempt to prevent him from regurgitating the food.

For most of his ten plus years of detention, Mr. Aamer has allegedly been in isolation. For the last three years he has allegedly been detained in a steel cell which has caused complete sensory deprivation. The Emergency Removal Force (“ERF”) reportedly removed Mr. Aamer from his cell almost daily in response to his passive peaceful resistance to his detention which he manifested by refusing to

comply with the petty orders of his harsh regime. Each time he was removed by the ERF, he would allegedly receive blows and punches from the guards.

Over several years, Mr. Aamer has allegedly consistently expressed the concern that he has prostate cancer. He has now reportedly been examined by a doctor at Guantanamo. The provisional diagnosis (pending confirmation and further examination by a specialist urologist) is a very uncomfortable medical condition called Benign Prostatic Hyperplasia vs. Chronic Bacterial Prostatitis. However, due to his torture and abuse in detention, Mr. Aamer now finds himself unable to accept this diagnosis, or to trust the Guantanamo doctors' recommendations sufficiently to accept the treatment they have prescribed. Such recommendations include seeing a specialist urologist who would be able to confirm the diagnosis and confirm the absence of cancer. The extreme and continued stress suffered by Mr. Aamer in detention and as a result of his torture has reportedly been contributory, and continues to be an aggravating factor in respect of this serious medical condition.

Despite Mr. Aamer's medical condition and the fact that he has requested a medical examination, over one year later it has reportedly so far proved impossible for his legal team to actually facilitate an independent medical assessment by a nominated doctor with appropriate expertise or any other independent civilian physician.

As a result of his torture and ill-treatment in Bagram, Mr. Aamer has reportedly developed arthritis, kidney and stomach problems, a continuous headache, a swelling of his feet and a ringing in his ears all of which are still continuing many years later.

The Working Group on Arbitrary Detention 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 Mr. Aamer is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee his right not to be deprived arbitrarily of his 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 (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

Furthermore, we should like to appeal to your Excellency's Government to seek clarification of the circumstances regarding the case of the person named above. We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the UDHR, the ICCPR, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

In this context, we would like to draw the attention of your Excellency's Government to paragraph 1 of Human Rights Council Resolution 16/23 which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment."

We would further like to draw your Excellency's Government's attention to article 2(2) of the CAT, which provides that 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 this regard, we note that paragraph 2 of Resolution 8/8 of the Human Rights Council, which "Condemns in particular any action or attempt by States or public officials to legalize, authorize or acquiesce in torture under any circumstances, including on grounds of national security or through judicial decisions."

We would also like to draw the attention of your Excellency's Government to article 15 of the CAT, 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 also recall that paragraph 7c of Human Rights Council Resolution 16/23 urges States "To ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, and calls upon States to consider extending that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment, recognizing that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment".

In this respect, 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."

We would also like to draw your Excellency's Government's attention to article 12 of the CAT, which requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, and article 7 of the CAT, which requires State parties to prosecute suspected perpetrators of torture. We would also like to draw your Excellency's Government's attention to paragraph 6b of Human Rights Council Resolution 8/8, which urges States "To take persistent, determined and effective measures to have all

allegations of torture or other cruel, inhuman or degrading treatment or punishment promptly and impartially examined by the competent national authority, to hold those who encourage, order, tolerate or perpetrate acts of torture responsible, to have them brought to justice and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have been committed, and to take note in this respect of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Principles) as a useful tool in efforts to combat torture.”

Furthermore, we would like to refer your Excellency's Government to article 9(3) of the ICCPR, which states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”; and article 9(4) of the ICCPR, which states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

We would also 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).

In addition, we would like to refer your Excellency's Government to article 14(1) of the ICCPR, which states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

We would also like to refer your Excellency’s Government to the Bangalore Principles of Judicial Conduct, adopted in The Hague in 2002 (E/CN.4/2003/65), and in particular principle 5, which states: “Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.”

Moreover, we would like to refer your Excellency's Government to General Comment No. 32 of the Human Rights Committee, in which the Committee stated: “The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. [...] While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of

justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”

In this context, the Special Rapporteur on the promotion and protection of human rights while countering terrorism called in his report (A/63/223, para. 24) for caution in allocating terrorism cases to military, special or specialized courts, as this potentially raises issues under article 14 of the ICCPR. He notes as an additional factor speaking against such solutions that rulings of special or specialized courts may often not be subject to full review for the conviction and sentence, in respect of issues of law and fact, as required by the Covenant in article 14(5).

We would also like to draw the attention of your Excellency’s Government to principle 5 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, also states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

More specifically, we would like to refer your Excellency’s Government to article 14(3) of the ICCPR, which states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

The right to be assisted by a lawyer is also set forth in 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, in particular in principle 1, 5, 7, 8 and 22.

Regarding the fact that Mr. Aamer has been reportedly cleared for release from Guantanamo Bay since 2007 by the US authorities but is still being detained, we would like to refer your Excellency’s Government to article 2(3) of the ICCPR, which states: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his

right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”

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 above-mentioned person 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 victim?
3. 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.
4. Please provide the full details of any prosecutions which have been undertaken. Have penal, disciplinary or administrative sanctions been imposed on the alleged perpetrators?
5. Please provide information concerning the legal grounds for the continuous detention of Mr. Aamer and how these measures are compatible with international norms and standards as stated, inter alia, in the UDHR and the ICCPR.
6. Please provide detailed explanations as to why Mr. Aamer is still being detained in Guantanamo after he was cleared for release in 2007 by the US authorities and the UK authorities have indicated their willingness to receive him? Please also indicate if there exists any remedy that Mr. Aamer can appeal to with regard to the non-implementation of the decision of his release.
7. Please provide information concerning the reasons and the legal grounds for the placement of Mr. Aamer in solitary confinement for the last ten years and how such a prolonged application of solitary confinement is compatible with international norms and standards, inter alia, the ICCPR and the CAT. Please explain why Mr. Aamer has been detained in a steel cell which causes complete sensory deprivation for the last three years.
8. Please explain why Mr. Aamer does not have access to legal representation of his own choosing.
9. Please explain why Mr. Aamer does not have access to a civil medical doctor of his own choosing.

10. Please indicate whether compensation has been provided to the victim or the family of the victim.

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 person 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
Chair-Rapporteur of the Working Group on Arbitrary Detention

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