

**Mandates of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

REFERENCE:  
AL USA 5/2020

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/19, 42/22, 36/6, 34/18, 42/16 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the continued detention of Mr. **Ammar al Baluchi**, a former Central Intelligence Agency (CIA) detainee, at Guantanamo Bay. Mr. al Baluchi is being denied access to medical care and access to records of the torture he was subjected to during his initial enforced disappearance and his subsequent detention, necessary for preparation of his defence.

Concerns regarding the alleged torture and denial of rights of Mr. Al Baluchi have been the subject of previous communications (UA USA22/2017 and UA USA 31/2012). Mr. Al Baluchi was also the subject of an opinion by the Working Group on Arbitrary Detention (Opinion No. 89/2017 adopted on 24 November 2017) finding his deprivation of liberty to be arbitrary. The conditions of detention in Guantanamo Bay detention facility have been a continued concern of Special Procedures mandate holders. Over the years a number of these concerns have been raised with your Excellency's Government, including with regards to denial of access to adequate medical care (UA 5/2016 and UA USA 28/2012), torture and ill-treatment (UA USA 20/2013), denial of access to lawyers (UA USA 31/2012), and arbitrary detention (UA USA 32/2012).

According to the information received:

Mr. Ammar al Baluchi is a 42-year-old, Pakistani national born in Kuwait and who lived in Iran. Prior to 11 September 2001, Mr. al Baluchi worked as a computer specialist in Dubai. He has been in the custody of the CIA while in detention in several secret prisons, referred to in public reporting as "black sites".

Even after his transfer to the Guantanamo Bay detention facility in 2006, he remained under operational control of the CIA. Mr. al Baluchi has been subjected to physical and psychological torture throughout his detention.

Mr. al Baluchi is one of the defendants in *United States v. Khalid Sheikh Mohammad, et al.* (the “9/11 case”) before the Military Commission. The case is in its eighth year of pre-trial hearings. It has had three different judges<sup>1</sup> and is at a critical juncture given that it is undergoing a hearing on a motion by the defense to suppress statements by the defendants. It is reported that the current judge will be retiring effective 24 April 2020. The defense is concerned about judicial continuity in this case especially given that there are still a number of witnesses that have yet to take the stand in the current suppression hearing.

In December 2014, the Executive Summary of the Report of the Senate Select Committee on Intelligence (“SSCI”) on the CIA Detention and Interrogation Programme was released. The report contains information regarding detainee conditions of confinement in the “black sites” including the extent of the interrogation techniques involving physical and psychological torture that was used. The defense counsel still do not have the full report and their access is denied to most documents containing information about torture techniques and their application to detainees as it remains classified information. Despite defense counsel holding the same top secret security clearances as members of the prosecution, the prosecutors have reviewed the full SSCI report. The 2009 Military Commissions Act allows the prosecution to provide summaries or redacted versions of classified documents to the defense. The degraded quality of the summaries provided to the defense (often with material information redacted or stripped) has fueled much of the seven and a half years of pre-trial discovery process. The combined effect of this patchwork discovery makes it impossible to create a complete history of Mr. al Baluchi’s torture and to map its physical and psychological effects.

The ongoing discovery process revealed that Mr. al Baluchi was allegedly being used as a “training prop” for interrogator certifications, as he was repeatedly subjected to “walling”<sup>2</sup> by numerous interrogators. In connection to the walling used against him at the black sites, it took nearly seven years of litigation for medical access, for Mr. al Baluchi to receive an MRI assessment. In December 2017, an MRI machine was made available for detainee evaluation at Guantanamo Bay. The results of the volumetric analysis yielded conclusions regarding shrinkage of parts of Mr. al Baluchi’s brain as a result of brain damage caused by walling. Consequently, he was diagnosed with traumatic brain injury. Furthermore, following a psychiatric evaluation in October 2018, Mr. al Baluchi

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<sup>1</sup> Judge James Pohl (six years), Judge Keith Parrella (nine months), and Judge Shane Cohen presiding over the case for the past nine months.

<sup>2</sup> The use of “walling” involves creating a fulcrum wherein the head of the victim is moved forwards and backwards by an interrogator using a towel around the neck as a lever of sorts, with the victim’s head hitting the wall behind him.

was reported to be suffering from post-traumatic stress disorder and post-concussional syndrome which have decreased his psychological and social functioning.

The authors of the CIA Extraordinary Rendition and Secret Detention programme have published a book on the methodology of interrogation techniques used on Mr. al Baluchi. For the first time earlier this year, they testified in the suppression hearing publicly before the military commission, confirming the abusive and excessive nature of the techniques, as well as the potential long-term effects of such abuse. The psychiatric evaluation recommended more neuropsychological testing to determine if Mr. al Baluchi has mild or major neurocognitive disorder. However, the denial of complete medical histories for the detainees has created serious barriers of access to remote medical or psychological consultations which would effectively diagnose and treat Mr. al Baluchi. It is reported that further litigation will be launched during the pre-trial and trial proceedings to attempt to obtain further tests and treatments for Mr. al Baluchi.

Mr. al Baluchi has been creating art while in detention, however, authorities have restricted opportunities for him to create and share artwork as therapy. In the fall of 2017, Mr. al Baluchi's art piece, "vertigo", was featured in an exhibition and received wide press attention. Following this, the Department of Defense publicly stated that the United States Government "owns" detainee artwork and may destroy it. Mr. al Baluchi's artwork – as opposed to other detainee artists, who are so called "low value detainees" - is also subject to a recent protective order from the military judge that appears to prevent release of any mail or materials, even unclassified, for public viewing.

Mr. al Baluchi remains detained at Guantanamo Bay. Prosecutors intend to seek the death penalty if Mr. al Baluchi and the other defendants are convicted.

Without making any judgment as to the accuracy of the information made available to us, we reiterate our serious concern at the treatment and conditions which Mr. al Baluchi reportedly is being subjected to, including the denial of access to his medical records and to necessary and appropriate medical care; the undue delay in his trial because of lengthy discovery process; the denial of access to torture records relevant and central to his defence before the military commission, in particular to argue that the inculpatory statements from the bulk of the evidence gathered against him were acquired during his initial enforced disappearance and years of interrogations in the "black sites" through torture and the death penalty sought if convicted. We also express concern at the reported restrictions on his freedom of artistic expression.

We reiterate our grave concern at the continued failure of your Excellency's Government to prosecute, punish and redress widespread and systematic acts of torture committed by US officials in the aftermath of 11 September 2001, including against Mr. al Baluchi. We remind your Excellency's Government that, as reported, these acts would not only violate the absolute and non-derogable prohibition of torture and other ill-

treatment, but would also amount to war crimes under applicable treaty and customary law. The prosecution of these acts, their punishment and redress therefore is not at the political discretion of the Government, but constitutes an absolute obligation under international law.

Should the facts alleged above be confirmed, they would contravene the internationally-recognized rights protected under articles 7, 9, 14, and 19 of the International Covenant on Civil and Political Rights (ICCPR); articles 2, 4, 5, 6, 12, 13, 14 and 15 of the Convention against Torture (CAT); article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as articles 5, 11, 19 and 25 of the Universal Declaration of Human Rights (UDHR).

The Human Rights Committee has determined that the imposition of the death penalty in a manner that is contrary to another provision of the ICCPR also violates article 6 of the ICCPR. In this particular case, we are alarmed that the allegations of torture and ill-treatment and the use of forced confessions as evidence, if proven to be accurate, will unduly contribute to the death penalty being sought, in contravention of the highest international standards required for the lawfulness of the death penalty. Moreover, in our view, it is impossible to impose the death penalty without violating the inherent dignity of the human person and, specifically, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (A/67/279, para. 79).

We appeal to your Excellency's Government to permit defense counsel full access to the SSCI report and any other documentation that would ensure that counsel has all relevant information as well as adequate time and facilities to effectively prepare Mr. al Baluchi's defence before the military commission, as established by article 14 of the ICCPR and also in Principle 21 of the UN Basic Principles on the Role of Lawyers. Importantly, the "role and responsibility of judges, prosecutors and lawyers" in relation to torture, has been stressed by the UN Human Rights Council Resolution 13/19, which stated that they "play a critical role in safeguarding" the non-derogable right to freedom from torture (A/HRC/RES/13/19, Para 3). The trickling, redacted and piece-meal information being provided to defense counsel by the prosecution undermines the very principle of equality of arms, and the multiple changeover of judges is also unduly delaying Mr. al Baluchi's right to a fair trial.

We welcome the U.S District Court ruling in *Mohammed Al-Qahtani v Donald Trump, et al.* on 6 March 2020. The Court reiterated that Guantanamo Bay detainees are "vulnerable to further physical deterioration, and possibly death, by virtue of their custodial status at Guantanamo and weakened physical condition" and "where the health of a vulnerable person is at stake, irreparable harm can be established". Based on the information made available to us, Mr. al Baluchi is such a vulnerable person who has been made deliberately to suffer from both physical and mental conditions since his detention in US custody. In this regard, we urge your Excellency's Government to grant him access to specialized medical care, as recommended from his psychiatric evaluation. In light of the finding of mental suffering, we further urge your Excellency's Government to reinstate with utmost urgency, Mr. al Baluchi's access to art therapy, a long recognized

form of torture therapy to alleviate his current conditions of detention, and to guarantee him the ownership of his creation.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As 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, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide the details and, where available, the results of any investigation, medical examinations, and judicial or other inquiries which may have been carried out, or which are foreseen, in relation to the physical and psychological torture and other cruel, inhuman or degrading treatment or punishment that Mr. al Baluchi is alleged to have been subjected to, taking into account the serious medical condition that such alleged treatment has inflicted upon him. If no such investigation measures have been conducted, please explain why, and how this is compatible with the international human rights obligations of the United States of America under the conventions it has ratified.
3. Please also provide information as to any measures taken with regard to the prosecution, punishment and redress of widespread and systematic acts of torture and ill-treatment reportedly committed by US officials in the aftermath of 11 September 2001, including those described in the SSCI. If no such measures have been taken, please explain why, and how this is compatible with the international human rights obligations of the United States of America under the conventions it has ratified.
4. Please provide information regarding the legal proceedings against Mr. al Baluchi and explain how they comply with the right to due process and fair trial. In particular, please explain the restrictions imposed on Mr. al Baluchi's legal team in terms of access to information in the possession of the Prosecution that would enable him to properly prepare his defence on equal footing in court. Also, please provide information as to how the exclusionary clause of article 15 of the CAT is complied with in the context of the proceedings against Mr. al Baluchi.
5. Please provide the details of any measures which have been taken, or which are foreseen, for the purpose of ensuring that Mr. al Baluchi obtains redress for the harm inflicted on him, including fair and adequate compensation and the means for full physical, psychological and reputational rehabilitation. If no such measures have been taken, please

explain how this is compatible with the international human rights obligations of the United States of America under the conventions it has ratified.

We would appreciate receiving a response within 60 days. Thereafter, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Leigh Toomey

Vice-Chair of the Working Group on Arbitrary Detention

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## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as an international norm of *jus cogens*, is reflected inter alia, in article 5 of the Universal Declaration of Human Rights (UDHR), articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The United States of America became party to the CAT following ratification on 21 October 1994 and ICCPR ratified on 8 June 1992.

The UN Human Rights Committee General Comment Number 20 reiterates the link between the prohibition of torture and the exclusionary rule, it states that, "it is important for the discouragement of violations under article 7 [of the ICCPR] that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment"(para. 12). Furthermore, the exclusionary rule expressed in article 15 of the CAT is recalled in paragraph 7c of Human Rights Council Resolution 16/23, which 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".

We recall article 14 of the ICCPR, which provides that in the determination of any criminal charge, everyone shall be entitled to the minimum guarantees of fair trial and due process, including to have adequate time and facilities for the preparation of his defence, to be assisted by and to communicate with a lawyer of his own choosing, as also established by the UN Basic Principles on the Role of Lawyers.

We would also like to refer to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, which sets out the necessary protections with respect to the responsibility of the State; in particular that no State shall practice, permit or tolerate enforced disappearances (Article 2), that any person deprived of liberty shall be held in an officially recognized place of detention (Article 10.1) and that an official up-to date register of all persons deprived of their liberty shall be maintained in every place of detention (Article 10.3).

We also bring to the attention of your Excellency's Government the findings of the Joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), by a group of Special Procedures mandate holders. The report recalls, *inter alia*, that victims of secret detention should be provided with judicial remedies and reparation in accordance with relevant international norms. These international standards recognize the right of victims to adequate, effective and prompt reparation, which should be proportionate to the gravity of the violations and the harm suffered. As families of disappeared persons have been recognized as victims under international law, they should also benefit from rehabilitation and compensation (A/HRC/13/42 para. 292(H)).

We would also like to further draw the attention of your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – signed by the United States of America on 5 October 1977 – which recognizes the right to physical and mental health. While your Excellency's Government has not ratified the ICESCR, the United States Government agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification.

We also refer to the Standard Minimum Rules for the Treatment of Prisoners (the so-called “Mandela Rules,” adopted unanimously by the UN General Assembly (resolution 70/175 of Nov 2015) which, *inter alia*, establish States' responsibility to provide adequate access to health care for prisoners (Rules 24 to 35). In particular, Rule 27 stresses the responsibility to ensure prompt medical attention in urgent cases and transfers to specialized institutions or civil hospitals when prisoners require specialised treatment. Finally, Rule 109 stresses the importance of providing psychiatric treatment for all prisoners in need of such treatment and prompts for the observation and treatment of prisoners with mental health conditions in specialized facilities under the supervision of qualified health-care professionals.

We stress the Working Group on Arbitrary Detention observation that, “given the serious and ongoing violation of Mr. al Baluchi's right to be presumed innocent, as well as the psychological and physical trauma that he continues to suffer as a result of torture under the Agency programme, the Working Group considers that it is no longer possible for Mr. al Baluchi to receive a fair trial.” (Opinion No. 89/2017, para. 61) The Working Group recommended his immediate release as well as reparations, such as “appropriate physical and psychological rehabilitation for the torture he has suffered” (Opinion 89/2017, para 71). In its most recent opinion (Opinion No. 70/2019) on Guantanamo bay jurisprudence, the Working Group reiterated its conclusions apply to other detainees in similar situations and calls on your Excellency's Government to, “once again priorities putting an end to detention at that facility” (para 89), enforce detainees, “right to compensation and other reparations, in accordance with international law” (para 93) and “ensure a full and independent investigation...and to take appropriate measures against those responsible for the violation of...rights” (para 94).



Lastly, we recall article 19 of the ICCPR, which protects the right to freedom of opinion and expression. It grants the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. As highlighted by the Human Rights Committee, the scope of protection includes artistic expression, CCPR/C/GC/34 para 11. Any restrictions on the right protected in article 19 (2) must comply with the tripartite test in article 19 (3); that is, it must (1) be provided by law, (2) pursue a legitimate aim, and (3) be necessary and proportionate.