

**Mandates of the Special Rapporteur in the field of cultural rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

Ref.: AL USA 22/2022  
(Please use this reference in your reply)

29 November 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur in the field of cultural rights and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 46/9 and 49/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning allegations of **undue impediments to accessibility and ownership of artwork produced by current and former detainees at the Guantánamo Bay detention facility** that appear to contravene the rights to free artistic expression, to take part in cultural life, and to benefit from the protection of moral and material benefits resulting from artistic production.

In particular, we have received information that **Mr. Ahmed Rabbani, Mr. Khalid Qassim, Mr. Moath al-Alwi, Mr. Omar Mohammed Ali al-Rammah, and Mr. Uthman Abdul Rahim Mohammed Uthman** have been unable to share their artistic creations with the public and may be unable to maintain ownership of their artworks upon their transfer from Guantánamo Bay.

Conditions of detention in Guantánamo Bay detention facility and the denial of detainees' fundamental rights have been a continued source of concern for Special Procedures mandate holders. Restrictions on detainees' freedom of artistic expression have been raised by Special Procedures especially on 15 April 2020 (ref. number USA 5/2020). We regret that, to this day, the concerns raised in that communication have not been answered by your Excellency's Government and we are looking forward to a discussion regarding the alleged violations.

We reiterate our serious concern at the ongoing and indefinite detention of individuals at the Guantánamo Bay detention facility,<sup>1</sup> including of the five alleged victims. Despite being cleared for release by the Periodic Review Board and eligible for immediate resettlement or repatriation, these men continue to be held without charge or trial, in contravention of fundamental fair trial guarantees and due process safeguards under international human rights law. We reaffirm the finding of the Special Rapporteur on torture that the ongoing conditions at Guantánamo Bay constitute circumstances that meet the threshold of torture and other cruel, inhuman and degrading treatment or punishment under international law (see A/HRC/49/45, para. 23). We underline the profound psychological and physical trauma of torture that these men have endured, while being held at the very site of profound human rights abuse, absent any adequate torture rehabilitation programme or support. We stand ready to provide any technical assistance in efforts to ensure full compliance of

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<sup>1</sup> See, e.g., A/HRC/13/42; A/HRC/49/45 and Annex: Names of the individuals identified in the joint study on global practices in relation to secret detention in the context of countering terrorism; see also U.S. Government replies.

your Excellency's Government's detention measures with your obligations under international law, including international human rights law, international humanitarian law and international refugee law.

According to the information received:

Individual detainees of the Guantánamo Bay detention facility have continuously created artwork, using for example tea leaves or other food as paint or etching into Styrofoam cups. Once they were allowed to write, some drew pictures or borders on their documents. It is alleged that all such artwork was initially considered “contraband” and either destroyed or deemed classified under the United States security classification applied to the detention facility and those detained within it.

As of 2008, the practice in Guantánamo Bay detention facility toward detainee artwork appeared to change. A formal arts program was established around 2009, with a dedicated teacher, regular classes, and art supplies provided by both the detention facility staff and detainees' lawyers. Detainees were not only permitted but also encouraged to create artworks. Camp commanders and staff noted the benefits of the art program for both detainees and staff, considering that the art program provided intellectual stimulation for the detainees and allowed them to express their creativity. Attorneys who attended the proceedings before the Periodic Review Board on behalf of their clients report that participation in the art program has been considered favourably in individual detainee reviews by the Periodic Review Board, which is tasked with determining whether detainees may be cleared for release and transferred from the detention facility.

The programme also provided space to share the artwork with the public. Some art productions were exhibited to visitors to the detention facility, and journalists were permitted to take photographs for publication. Detainees were able to have the originals of their artwork transferred out of the detention facility through their attorneys. Copies of the art could be sent to their families through the International Committee of the Red Cross. In October 2017, the John Jay College of Criminal Justice in Manhattan (New York, United States) hosted an art exhibition titled “Ode to the Sea: Art from Guantánamo”, featuring 36 original paintings, drawings, and sculptures made by eight men who were or had been held at the Guantánamo Bay detention facility. An expanded version of this exhibition with close to 100 pieces was featured at Old Dominion University in Norfolk, Virginia from 21 January to 7 May 2022 and then the Catamount Arts Center in St. Johnsbury, Vermont from 22 June to 21 August 2022.

Later in 2017, the Department of Defense suspended all transfers of artwork from the Guantánamo Bay detention facility. The reason reportedly given by the Department of Defense to the media was that “items produced by detainees at Guantánamo Bay remain the property of the U.S. government.” Concerned detainees were reportedly told directly that neither their artwork nor copies may be sent or taken out of the prison and that their artwork would not be released with them. It is alleged that no formal policy or information has been made public or communicated to the detainees' counsel, and that their efforts to transfer their clients' artwork out of the detention facility since have

remained unsuccessful.

Reportedly, requests for an “exception” to allow certain pieces of art to be taken by the detainees with them when they are released from the prison can be made. However, the attorneys of the concerned detainees are not aware of the conditions governing such requests. It is alleged that most requests to the Department of Defense, either for clarification about the process or to request exceptions for specific detainees, have remained unanswered. Attorneys of Guantánamo Bay detainees have also allegedly spoken with representatives of the Department of State, who referred them back to the Department of Defense. One recently released detainee—not one of the named victims—could have his art works released via his counsel. However, it is unclear whether this was through the application of any formal policy, or because his detention was declared unlawful by federal court<sup>2</sup>. According to the information received, the issue of custody of his artwork was mentioned before the federal judge in that case.

#### *Cases of the five alleged victims*

The five alleged victims—Mr. Mohammed Ahmed Ghulam Rabbani (Internment Serial Number, Mr. Khalid Ahmed Qassim, Mr. Moath Hamza Ahmed al-Alwi, Mr. Omar Mohammed Ali al-Rammah, and Mr. Uthman Abdul al-Rahim Mohammed Uthman—are presently detained at the Guantánamo Bay detention facility. None has ever been charged with a crime, and each has been recommended for release from Guantánamo Bay by the interagency Periodic Review Board.

Mr. Rabbani is a 53-year-old Pakistani national. He was captured when he was 32 years old, was held for approximately 550 days in the custody of the Central Intelligence Agency before being transferred to Guantánamo Bay in 2004.

Mr. Qassim is a 45-year-old Yemeni national. He was captured when he was 24 years old and transferred to Guantánamo Bay in 2003.

Mr. Alwi is a 44-year-old Yemeni national, who was turned over by Pakistani forces to U.S. custody in December 2001 and transferred to Guantánamo Bay in January 2002.

Mr. al-Rammah is a 47-year-old Yemeni national, who was captured when he was 24 years old. He was held in CIA custody for at least 360 days before being transferred to Guantánamo Bay in 2003.

Mr. Uthman is a 42-year-old Yemeni national, who was captured when he was 21 years old, turned over to U.S. custody in December 2001 and transferred to Guantánamo Bay in January 2002. All five men are Muslim.

Between 2020 and 2022, the alleged victims’ attorneys duly contacted relevant authorities at the Department of Defense and the Department of State, requesting guarantees that their clients will be permitted to leave with their artwork when they are transferred for resettlement or repatriation. It is

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<sup>2</sup> *Asadullah Haroon Gul v. Joseph R. Biden, JR. et al.*, District Court for the District of Columbia, Case No. 16-cv-01462 (APM) (9 November 2021).

reported that the list of each individual victim's artwork has been marked "For Official Use Only" by classification authorities, and the attorneys' notes from their meeting with their clients, describing the artwork, have been marked "Secret". The attorneys have informed the Department of Defense of their willingness to assist in transporting the artwork or taking custody of it, in order to remove any potential logistical or financial obstacle. To date, they have not received any response to these requests.

While we do not wish to prejudge the accuracy of the specific allegations, we are concerned about what seems to be disproportionate restrictions of the exercise of freedom of artistic expression of the above-mentioned detainees, of their right to share their creation with others and to benefit from the artistic works of which they are the authors. We are also concerned about the alleged lack of clear communication and information from your Excellency's Government's authorities regarding the policy that applies to artwork created by the detainees while in the facility and the process for the artwork to be sent out, preventing the alleged victims from taking the necessary steps for the defence of their cultural rights.

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 your observations 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 information about the applicable policy regarding the viewing, accessibility, and transfer of current and former detainee artwork, including vis-à-vis the artwork of the five alleged victims. Please indicate the legal basis for this policy, explain whether there have been any recent changes to this policy, and explain how this policy is compatible with international human rights law, including the requirements of legality, necessity, proportionality, and non-discrimination, as well as the rights to freedom of artistic expression and creativity, including the rights to share one's creation with others.
3. Please clarify, for each of the five victims, the status of their artwork as listed by their respective attorney. Please indicate if the artwork is to remain in your Excellency's Government's custody, whether it will be returned to the alleged victims, or any other decision that may have been taken.
4. Please provide information about the status of the request by the alleged victims' attorneys for information about the process to transfer the artwork out of the Guantánamo Bay detention facility and explain the reasons they have remained unanswered until now. Please also provide information concerning their offer for assistance in resolving any logistical and financial obstacle to such transfer and indicate how

the Government intends to fulfil its obligations and devote all available resources to solve this matter.

5. Please provide information about any existing appeals mechanism available to the alleged victims to challenge the existing policy for the viewing and transfer of their artwork, and whether that mechanism has been utilized to date.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issue/s in question.

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

Alexandra Xanthaki  
Special Rapporteur in the field of cultural rights

Fionnuala Ní Aoláin  
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

## Annex

### Reference to international human rights law

In connection with above alleged facts and concerns, the above allegations appear to be in contravention of provisions of international law, in particular the rights to freedom of artistic expression and creativity, to the protection of the moral and material interest of the authors, to freely take part in cultural life and to non-discrimination, in accordance with articles 2 and 27 of the Universal Declaration of Human Rights, articles 2 and 19 of the International Covenant on Civil and Political Rights (ICCPR), which your Excellency's Government ratified on 8 June 1992, and articles 2 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the United States of America has signed on 5 October 1977.

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The right to free artistic expression and creativity is firmly protected under international human rights law. Article 19 of the ICCPR guarantees the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The Human Rights Committee has clarified that free artistic and creative expression entails all forms of expression and the means of their dissemination, including non-verbal expression like images and objects of art (General Comment No. 34, paras. 11–12).

We would like to remind your Excellency's Government that any limitation to the right to freedom of expression must meet the criteria established by international human rights standards, such as article 19 (3) of the ICCPR. Under these standards, limitations must be determined by law and must conform to the strict test of necessity and proportionality, must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. The restrictions must be non-discriminatory. We wish to reiterate the principle enunciated in Human Rights Council Resolution 12/16, which calls on States to refrain from imposing restrictions which are not consistent with article 19 (3), including on discussion of government policies and political debate; reporting on human rights, engaging in peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups. Furthermore, we would like to remind your Excellency's Government that, as established by the Human Rights Committee, the open facilitation of freedom of expression, including the unhindered dissemination of all forms of expression is a "foundation stone for every free and democratic society" (CCPR, General Comment No. 34, para. 2).

Limitations to free artistic expression are strictly limited in international law: they must meet the high threshold set out in article 19 (3) of the ICCPR, be absolutely necessary, proportionate to a legitimate objective as determined by international law, established by legal rules that are transparent and consistently applied in a non-discriminatory way. The Human Rights Committee has highlighted that State's

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<sup>3</sup> While the United States Government has not ratified the ICESCR, by signing the Covenant, your Excellency's 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.

limitations to free artistic expression must include an “individualized justification ... of why the measures taken were necessary in the present case,” demonstrating “in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author’s conduct, as well as why seizure of the [artwork is]... necessary.” The confiscation of artwork on broad national security grounds absent sufficient precision tailored to the artwork at hand constitutes a violation of the right to freedom of expression under the ICCPR.<sup>4</sup> In his dedicated report, the Special Rapporteur on freedom of opinion and expression has called on States to refrain from restricting expression in the form of art, and only imposing narrow limitations pursuant to standards of legality, necessity and legitimacy and according to an order by an independent and impartial judicial authority, in accordance with due process and appellate review and to account for the nature of the right to artistic freedom of expression and the extraordinary role that art performs in society (A/HRC/44/49/Add.2, paras. 49 (c) and (e)).

As noted by the Special Rapporteur in the field of cultural rights, restrictions on artistic freedom are often implemented through unclear regulations or directives without legal basis and without consistency by non-transparent mechanisms with no possibility of appeal (A/HRC/23/24, para. 55). The Special Rapporteur also stresses that, when resorting to possible limitations to artistic freedoms, decision makers, including judges, should take into consideration the nature of artistic creativity (as opposed to its value or merit), as well as the right of artists to dissent, to use political, religious and economic symbols as a counter-discourse to dominant powers, and to express their own belief and world vision (A/HRC/23/34, paras. 85 and 89 d).

Articles 27 of the UDHR and 15 of the ICESCR guarantee the right to take part in cultural life. As stressed by the Committee on Economic, Social, and Cultural Rights, this right entails not only the right to act creatively and take part in creative activity, but also to share [cultural knowledge and expressions] with others (CESCR, General Comment No. 21, para. 15 (a)). The Special Rapporteur in the field of cultural rights stressed that all persons enjoy the right to freedom of artistic expression and creativity, which includes the right to freely experience and contribute to artistic expressions and creations, through individual or joint practice, to have access to and enjoy the arts, and to disseminate their expressions and creations.

Articles 27 of the UDHR and 15 of the ICESCR also guarantee the right of everyone to benefit from the protection of the moral and material benefits resulting from one’s artistic productions. This protection encompasses all forms of art, including, *inter alia*, paintings, sculptures, musical compositions, theatrical and cinematographic works (ICESCR, art. 16 (1)(c); CESCR, General Comment No. 17, para. 9). In realizing the right to the protection of the moral and material interests of authors of artistic production, States are obliged to take the necessary steps to the maximum of its available resources and where resource constraints render it impossible for a State to comply fully with its obligations... it has the burden of justifying that every effort has been made to use all available resources at its disposal to satisfy, as a matter of priority, [its] core obligations (CESCR, General Comment No. 17, para. 41). The right to benefit from the protection of the moral and material interests of authors also includes the positive obligation to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their productions that would be prejudicial to their honour or reputation (CESCR, General

<sup>4</sup> Human Rights Committee, Communication No. 926/2000, *Shin v. Republic of Korea* (views adopted on 16 March 2004, eightieth session), para. 7.3.

Comment No. 17, para. 30). This comports with the guarantee that no one shall be arbitrarily deprived of one's property (UDHR, art. 17).

The Special Rapporteur in the field of cultural rights recalled the interrelated nature of the rights to free artistic expression, protection of authorship and the right of others to access and enjoy the arts, regardless of frontiers, stressing that freedom of artistic expression and creativity cannot be dissociated from the right of all persons to enjoy the arts, as in many cases restrictions on artistic freedoms aim at denying people access to specific artworks. Hence, removing creative expressions from public access is a way to restrict artistic freedom (A/HRC/23/34, para. 5).

The capacity to take part in cultural life and engage in artistic work is to be practiced and upheld without discrimination (ICESCR arts. 2 (2), 3; CESCR General Comment No. 21, paras. 21–22; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) arts. 5 (e) (vi) and 1.1, highlighting the direct and indirect forms of discrimination). The Covenant prohibits any discrimination in the exercise of the right of everyone to take part in cultural life, including on the grounds of race, religion, political or other opinion, national or social origin, and other status, including in some cases, incarceration (see CESCR, General Comment No. 20, para. 27). Vulnerable and marginalized individuals and groups, including ethnic and religious minorities, are often at particular risk of being targeted by restrictions of artistic freedoms (CCPR, general comment No. 34, para. 43). Furthermore, the rights of persons belonging to minorities to enjoy their culture is also recognized in article 27 of the ICCPR.

We respectfully remind your Excellency's Government that every branch of the State and all public and governmental authorities are obligated to respect, protect, and fulfil all human rights and freedoms (see CCPR General Comment No. 34, para. 7). State human rights obligations encompass both negative and positive obligations, including to refrain from interfering directly or indirectly with the enjoyment of the right and to proactively adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of human rights (CESCR, General Comment No. 17, para. 28).

As the alleged victims are detainees, we would also like to recall your Excellency's Government of article 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, which stipulates that "[p]risoners of war<sup>5</sup> shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them"<sup>6</sup> and article 4 of the Annex to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, which stipulates that prisoners of war "must be humanely treated" and "[a]ll their personal belongings, except arms, horses, and military papers, remain their property." We also refer to rule 3 of the UN Standard Minimum Rules of the Treatment of Prisoners (the so-called "Mandela Rules," adopted unanimously by the UN General Assembly in

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<sup>5</sup> We stress the applicability of international humanitarian law and international human rights law protections to the detainees, notwithstanding the United States Government's continued lack of clarity regarding the legal status of the detainees and the basis for their continued detention. As the U.S. Department of Defense stipulates, "without regard to a detainee's legal status, at a minimum" Common article 3 to the Geneva Conventions applies, as do the "principles in articles 4-6 of the Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts during non-international armed conflict" and the "principles in article 75 of the Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts during international armed conflict and occupation." DoD Directive 2310.01E, DoD Detainee Program, art. 3.3 (15 March 2022); see also *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>6</sup> See also U.S. Army Regulation 190-8 §§ 3-11(h), 3-14(d).



resolution 70/175), which stipulates that imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation. Rule 5 of the Mandela Rules further provides: “[t]he prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings”.