

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities and the Working Group on Enforced or Involuntary Disappearances

Ref.: UA USA 19/2023
(Please use this reference in your reply)

9 August 2023

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on the rights of persons with disabilities and Working Group on Enforced or Involuntary Disappearances, pursuant to Human Rights Council resolutions 49/10, 51/8, 44/10 and 45/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged arbitrary detention, torture, and ill-treatment of **Mr. Saeed Bakhouche**, who was cleared for release and transferred from the detention facility at the U.S. Naval Station Guantánamo Bay to Algeria on 20 April 2023. We are profoundly concerned that Mr. Bakhouche's ongoing detention is unfounded and will further aggravate his already tenuous mental and physical state and exposes him to human rights violations, including enforced disappearance.

According to the information received:

Mr. Saeed Bakhouche (also known as Mr. Said Bakush), is a 52-year-old man of Algerian nationality. He was captured by Pakistani security services in Faisalabad, Pakistan in March 2002 and rendered to Guantánamo Bay in June 2002, where he was held for over 20 years and never charged or tried for any crime. He has been represented by the same lawyer since early 2006, and during this time, he lodged a *habeas corpus* and appeals and was also subject to multiple rounds of administrative review.

On 13 April 2022, the Periodic Review Board (PRB) determined by consensus that Mr. Bakhouche's continued detention was unnecessary, considering his "lack of a leadership role in al Qaida," his "compliance while in detention," and also "the support available to the detainee upon transfer."¹ As part of the prior 2021 review process, Mr. Bakhouche's lawyer submitted a copy of a statement from a psychiatrist regarding his mental trauma and the diagnosis of post-traumatic stress disorder and depression stemming from past torture, as well as prolonged detention without trial.

¹ See Periodic Review Board Determination, 13 April 2022, Unclassified Summary of Final Determination, <https://int.nyt.com/data/documenttools/220413-upr-isn685-sh2-final-determination/cf7d78b8018adc2f/full.pdf>.

Mr. Bakhouche was thereafter eligible for transfer, subject to your Excellency's Government arranging the logistics of his release as well as all associated agreements to apply after his transfer in respect of the stated PRB requirements but also in respect of other considerations including the principle of *non-refoulement*, which applies as a matter of treaty and customary international law to any such transfer by your Excellency's Government. By mid-January 2023, Mr. Bakhouche's repatriation was reportedly imminent, with your Excellency's Government allegedly negotiating with the Algerian Government a bilateral agreement that stipulated, *inter alia*, humane treatment assurances. At this time, the Experts understand that Mr. Bakhouche's lawyer wrote on multiple occasions to your Excellency's Government reiterating Mr. Bakhouche's psychological trauma and the importance of preparing adequate and tailored healthcare to support him upon his return to Algeria. Mr. Bakhouche's lawyer also allegedly spoke with your Excellency's Government's Office of the Special Representative for Guantánamo Affairs both by phone and email, seeking assurances that there was a concrete plan for his return and rehabilitation.

It is alleged that in late February 2023, your Excellency's Government assured the lawyer that Mr. Bakhouche would be treated humanely by the Algerian Government and that his particular needs would be met. In March 2023, Mr. Bakhouche's lawyer sought further specificity from your Excellency's Government regarding the Algerian Government's post-transfer plans—expressing concern that has been shared with the Experts in writing that, without sufficient arrangements with the Algerian Government, Mr. Bakhouche “might become homeless - or worse - locked up.” Your Excellency's Government allegedly replied assuring the lawyer that the United States would work to ensure that Mr. Bakhouche is given appropriate and humane treatment upon return and that the standard diplomatic agreements with countries of repatriation or resettlement include reference to humane treatment and specificity in arrangements as to what those entails. The Experts understand that the lawyer was directed to reach out to human rights organizations in Algeria to seek assistance with Mr. Bakhouche's resettlement.

In further written exchanges shared with the Experts, in early April 2023, Mr. Bakhouche's lawyer expressed serious concerns, asserting that many of the civil society organizations that previously might have been able to help Mr. Bakhouche upon return were no longer in operation due to an alleged recent Government crackdown on civil society and civic space and that any services that Mr. Bakhouche needed would therefore need to come directly from the Algerian Government. The lawyer allegedly reiterated the importance of diplomatic assurances in this regard, as well as stressing that there would need to be a concrete way to independently monitor those assurances. In response, it is alleged that your Excellency's Government assured Mr. Bakhouche's lawyer that the U.S. Embassy in Algiers would work to ensure that the Algerian Government would respect the humane treatment assurances made and guidelines provided.

On 20 April 2023, the U.S. Government transferred Mr. Bakhouche by military plane to Algeria. His lawyer was not informed of his transfer before the fact and only learned about his return and experiences thereof from other sources. The Experts have not been able to ascertain the material conditions of travel for Mr. Bakhouche, including whether he was facilitated to bring any personal items back to Algeria with him. Since his arrival in Algeria, Mr. Bakhouche has been detained. He was allegedly subjected to continuous interrogations by two interrogations teams for two weeks upon arrival. Throughout, he was prohibited from seeing an attorney. It is further alleged that during the interrogations, Mr. Bakhouche's heel was broken by the interrogators seeking his confession to "terrorist crimes." Moreover, although your Excellency's Government allegedly transferred Mr. Bakhouche's medicines to the Algerian Government upon his repatriation, Mr. Bakhouche has reportedly not had any access to this medication since his detention in Algerian custody. Mr. Bakhouche's psychological state allegedly remains significantly vulnerable due to his ongoing struggles with post-traumatic stress disorder and depression. The Experts understand that his legal representative has received most of the information concerning his condition from family members and has not been able to receive full and substantial information concerning his detention, his legal status, or his medical condition from the U.S. Government, specifically from the Office of the Special Representative for Guantánamo Affairs, i.e., the office responsible for detainee transfers.

Around 5 May 2023, Mr. Bakhouche was brought before a judge at the Boufarik Court in Blida Province and allegedly told that his version of events did not match what your Excellency's Government had previously communicated to Algerian authorities, and that Mr. Bakhouche was therefore being "stripped of all of his rights." He was detained in Boufarik Prison and then reportedly transferred to the al-Chiffa Prison. The Experts note that both these prisons have been the subject of previous communications concerning the failure to comply with fundamental requirements of humane treatment, and concerns in the use of torture, cruel, inhuman, and degrading treatment. The police allegedly forcibly shaved Mr. Bakhouche's beard and head when he was transferred to prison. Since his detention, he has had two calls with a family member—for 15 minutes at a time.

On 7 May 2023, Mr. Bakhouche's lawyer notified your Excellency's Government of Mr. Bakhouche's detention in what appeared to be in violation of his transfer agreement and underscored that Mr. Bakhouche suffers from post-traumatic stress disorder and that his continued detention would only aggravate his tenuous mental health state. It is alleged that your Excellency's Government responded that every precaution was being taken to ensure that Mr. Bakhouche would be effectively rehabilitated upon return, but that the United States could not prevent the receiving State from acting according to their own laws and procedures.

As of the writing of this communication, Mr. Bakhouche's case was before a magistrate and he had not been formally charged after over 2.5 months of detention.

While we do not wish to prejudge the accuracy of these allegations, we are profoundly concerned about the undisclosed terms of Mr. Bakhouche's repatriation by your Excellency's Government. We understand that diplomatic assurances including with regard to the requisite humane treatment were entered into between your Excellency's Government and the Algerian Government. We underscore, however, the recognition of the UN General Assembly that "diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law" (A/RES/65/205, para. 16). We echo the observation of the Special Rapporteur on the promotion and protection of human rights while countering terrorism that there are "distinct and concrete international law obligations engaged for the U.S. Government *before, during, and after* the transfer of [Guantánamo Bay] detainees to other countries," comprising both negative and positive obligations that apply extraterritorially and entailing a "more specific and compelling form when the individual concerned has been tortured or ill-treated in the custody of the transferring State"²—as is allegedly the case at present. We further emphasize the importance of diplomatic assurances being written, specific, transparent, and subject to post-transfer oversight for veracity.³

We remind your Excellency's Government that its international law obligations include *jus cogen*, customary, and treaty law dimensions, particularly as regards *non-refoulement*, *i.e.*, the cornerstone principle whereby no one shall be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm, including enforced disappearance. We are gravely concerned by the serious allegations of torture and/or ill-treatment in the Algerian Government's custody, including the allegations of physical harm to Mr. Bakhouche's heel in the course of interrogations, the failure to provide Mr. Bakhouche with his medication from the Guantánamo Bay detention facility, and the continuing deterioration of his psychological state—all potentially inflicted for the purposes of confession, coercion, intimidation, and/or discrimination. In the current context, we are equally concerned that Mr Bakhouche could be subjected to enforced disappearance.

We would like to draw your Excellency's Government's attention to article 3 of the Convention against Torture, which your Excellency's Government ratified on 21 October 1994, provides that no State party shall expel, return ("refouler"), or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. In this regard, paragraph 9 of General Comment no. 20 on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, in which the Human Rights Committee states that State parties "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement." Furthermore, paragraph 9 of the Resolution A/RES/61/253 of the UN General Assembly urges States "not to expel, return ("refouler"), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."

² See U.S. & GTMO Technical Visit, para. 54 (emphasis added).

³ See U.S. & GTMO Technical Visit, para. 54.

We underscore the importance of a *non-refoulement* assessment that is implemented with individuated assessments specific to the detainee and in line with international human rights law. We note that the Convention against Torture stipulates that the competent authorities “shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights” (art. 3). We observe in the present context that Special Procedures mandate holders issued communications nearly a decade ago regarding the allegedly forced return of a former Guantánamo Bay detainee to Algeria and serious risks of persecution, torture, and ill-treatment (USA 20/2013; DZA 7/2013). More recently, Special Procedures mandate holders have also issued multiple communications to the Algerian Government, alleging arbitrary detention, torture and ill-treatment, and judicial harassment of detainees under the pretext of counter-terrorism (see, e.g., DZA 9/2021; DZA 4/2021; DZA 1/2021; DZA 5/2022).

In addition, we wish to recall that the prohibition of enforced disappearance has also attained the status of *jus cogens*, and article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance, which enshrines customary international law, establishes that no State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that this person would be in danger of enforced disappearance.

We are profoundly concerned that Mr. Bakhouche’s ongoing detention is unfounded and will further aggravate his already tenuous mental and physical state. We underscore in this regard your Excellency’s Government’s continuing international law obligations to Mr. Bakhouche and other former Guantánamo Bay detainees previously in your extended custody—obligations that apply extraterritorially and call for providing full reparation and remedy for serious violations of international human rights law and international humanitarian law, including the use of extraordinary rendition, torture, cruel, inhuman, and degrading treatment, enforced disappearance and arbitrary detention. We note in this regard 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, as well as the follow-up report by the Special Rapporteur on the promotion and protection of human rights while countering terrorism (A/HRC/49/45). We further echo the findings and recommendations of the Special Rapporteur on the promotion and protection of human rights while countering terrorism from her technical visit to the United States, particularly as regards the rights of former detainees who have been repatriated and/or resettled.⁴

We wish to further draw attention to your Excellency’s Government’s obligation not to repatriate detainees where there are substantial grounds to believe they could face persecution, torture, and/or or ill-treatment specifically due to status as a former Guantánamo Bay detainee. We note in this regard that the prolonged detention of Mr. Bakhouche without charge appears to stem directly from his status as

⁴ See Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 14 June 2023, paras. 52-65 [hereinafter U.S. & GTMO Technical Visit].

a former Guantánamo detainee. We find that the allegation that the Algerian court claimed that Mr. Bakhouche’s “version of events did not match what the United States Government had previously communicated” and stripped Mr. Bakhouche of his fundamental rights on this basis exemplifies the need for transparency and de-classification of the terms of bilateral arrangements for repatriation or resettlement. We emphasize that in the present case, Mr. Bakhouche was cleared by your Excellency’s Government for transfer and was never during his 20+ years in your Excellency’s Government’s custody charged with or tried for a single crime.

We emphasize upon clearance for transfer from Guantánamo Bay the importance of securing each individual’s informed consent when your Excellency’s Government negotiates arrangements for release, whether to a home country or third country—with full recognition of the international human rights law obligations adhering before, during, and after each transfer. We echo the finding of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, putting into question “the genuine nature of detainee consent to the countries selected for either resettlement or repatriation” and we reiterate the need for transparent transfer notification processes that honestly inform the detainee of the nature of the legal status, housing, health care, and other factors, including with regard to security measures, such as surveillance, to be expected upon arrival.⁵

We understand that a medical examination was likely undertaken within 30 days before Mr. Bakhouche’s transfer, but we are not aware of any medical examination that has been made upon his transfer to Algeria—and rather, the alleged failure to provide Mr. Bakhouche with his medications from Guantánamo Bay may indicate broader health treatment deficiencies. We further note that Mr. Bakhouche’s physical and mental health remains seriously vulnerable to deterioration and abuse, especially given his status as a torture victim and survivor stemming from his time in your Excellency’s Government’s custody. We underscore that the U.S. Government has an unequivocal legal obligation, including under article 14 of the Convention against Torture, to provide Mr. Bakhouche with redress and reparation, including full rehabilitation for the harm suffered

We underscore that where a transfer is made that is not compliant with the terms of the agreement made by your Excellency’s Government and international law, and where there can be no certainty in preventing ongoing ill-treatment, your Excellency’s Government must seek to find another second transfer solution for a victim of torture, cruel, inhuman, and degrading treatment.

We would like to draw the attention of your Excellency’s Government to States’ obligations to provide victims of human rights violations with effective remedies. International standards recognize the right of victims—including families—to adequate, effective and prompt reparation, which should be proportionate to the gravity of the violations and the harm suffered. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2006, provide that victims of

⁵ U.S. & GTMO Technical Visit, para. 56.

a gross violation of international human rights law or of a serious violation of international humanitarian law must be guaranteed equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

We also bring to the attention of your Excellency's Government the right to a remedy for victims pursuant to article 13 of the Convention Against Torture. We 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 and the updated set of principles for the protection of human rights through action to combat impunity as a useful tool in efforts to prevent and combat torture," and "(t)o ensure that victims of cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social, psychological, medical and other relevant specialized rehabilitation."

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 Mr. Bakhouche in compliance with international instruments.

We are issuing this appeal in order to safeguard the rights of Mr. Bakhouche's from irreparable harm and without prejudicing any eventual legal determination. It is relief *pendente lite*.⁶

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 any comment you may have on the above-mentioned allegations.
2. Please provide information on the measures undertaken to abide by the *non-refoulement* principle and any risk assessment carried out by the authorities to ascertain the risk of Mr. Bakhouche being subjected to torture and ill-treatment or enforced disappearance in Algeria, and how this decision is compatible with the applicable international law standards.
3. Please provide the details of the agreement concluded by your Excellency's Government to repatriate Mr. Bakhouche, including any diplomatic assurances obtained regarding mental and physical health care including torture rehabilitation, housing, education and employment, family unification, and security measures, including potential monitoring and surveillance—as well as any financial support provided by your Excellency's Government to support the provision of such basic guarantees.

⁶ Article 41 ICJ Statute 'Interim Protection': Part III, Section D (Incidental Proceedings), Subsection 1

4. Please indicate whether your Excellency's Government was notified in advance of the Algerian Government's intention to detain and potentially prosecute Mr. Bakhouche. Please provide any details in this regard.
5. Please provide the details of any measures which have been taken, or which are foreseen, for the purpose of protecting Mr. Bakhouche from further infliction of any form of ill-treatment, including consideration of resettlement and other alternative measures. This includes any information concerning the prospect to (re)settle Mr. Bakhouche in agreement with the Government of Algeria and any efforts made to locate a third country in which Mr. Bakhouche will be humanely treated in full respect of his human rights.

While awaiting a reply, we urge that all necessary interim measures be taken to prevent any irreparable harm to the life and personal integrity of Mr. Bakhouche, to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

We would like to inform your Excellency's Government that having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

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.

We would appreciate receiving a response within 60 days. Past this delay, 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 note that a related communication is being sent to the Algerian Government.

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

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

Matthew Gillett
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