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Working Group on Arbitrary Detention

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Opinion No. 89/2017 concerning Ammar al Baluchi (United States of America)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 11 May 2017 the Working Group transmitted to the Government of the United States of America a communication concerning Ammar al Baluchi. The Government replied to the communication on 6 June 2017. The United States of America is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

* The annex to the present report is circulated as received, in the language of submission only.

Submissions

Communication from the source

4. Ali Abdul Aziz Ali, also known as Ammar al Baluchi, is a 40-year-old national of Pakistan. He was arrested on 29 April 2003 in Karachi, Pakistan.

5. The circumstances surrounding Mr. al Baluchi's arrest and subsequent custody were considered by the Working Group in its opinion No. 29/2006. The Working Group found that Mr. al Baluchi's deprivation of liberty under the rendition programme of the Central Intelligence Agency was arbitrary under category I. In the opinion, the Working Group also considered the situation of 25 other individuals deprived of their liberty under the Agency's programme.

6. On or about 6 September 2006, Mr. al Baluchi was transferred to the top secret and maximum security prison located at Guantánamo Bay Naval Base, Cuba (camp 7). The source's current submission addresses the situation of Mr. al Baluchi after his transfer to Guantánamo Bay.

7. The source reports that Mr. al Baluchi is currently being detained indefinitely by the United States Department of Defense as an "alien unlawful enemy combatant", pursuant to the Government's interpretation of the laws of war, and he is no longer under the custody of the Agency. According to the source, the Government has previously stated its intention to detain other former Agency detainees, even if they are acquitted of all charges by a military commission. Mr. al Baluchi faces capital charges on allegations related to the attacks of 11 September 2001.

8. On 30 March 2007, the Combatant Status Review Tribunal conducted a hearing which resulted in categorizing Mr. al Baluchi as an "enemy combatant" who could be detained pursuant to the laws of war for his alleged association with Al-Qaida. This hearing lasted for 1 hour and 20 minutes. The source alleges that the Tribunal failed to provide Mr. al Baluchi with basic procedural protections, such as the exclusion of coerced statements and unreliable hearsay evidence, and denied him the ability to cross-examine witnesses. The source states that the Government's evidence was considered by the Tribunal to be presumptively correct.

9. In 2008, the United States Supreme Court held in the case of *Boumediene v. Bush* that Combatant Status Review Tribunal hearings were an inadequate and ineffective substitute for habeas corpus guaranteed by the United States Constitution. Nevertheless, the source reports that the Government continues to cite Mr. al Baluchi's Tribunal status as a basis for his detention. Mr. al Baluchi has never been given a status review hearing pursuant to article 5 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention).

10. According to the source, Mr. al Baluchi was held without charge or legal representation until April 2008, when he was assigned a military lawyer, not of his own choice.

11. The source further reports that, more than five years after Mr. al Baluchi's arrest, the Government charged him with numerous counts of violating the laws of war, even though several of the charges (notably conspiracy) do not traditionally fall under the laws of war. Mr. al Baluchi's alleged crimes included murder, conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hijacking or causing hazard to a vessel or aircraft, terrorism and providing material support for terrorism. According to the source, a military commission was established for the purpose of trying Mr. al Baluchi and his four co-defendants.

12. On 29 January 2009, Mr. al Baluchi's military commission proceedings ceased following the issuance of Presidential Executive Order 13492, which directed the review and disposition of individuals detained at Guantánamo Bay and the closure of the detention facility. Meanwhile, Mr. al Baluchi remained in detention at Guantánamo Bay. The source states that the military commission judge ruled that Mr. al Baluchi has no independent right to consular access, and he has been denied communication with any consular officials since his detention began in 2003.

13. On 21 January 2010, all charges against Mr. al Baluchi and his four co-defendants were dropped. However, Mr. al Baluchi continued to be detained without charges until May 2011, when military commission prosecution was again initiated against him and his four co-defendants. Mr. al Baluchi is currently charged with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or causing hazard to a vessel or aircraft and terrorism. The source emphasizes that conspiracy, hijacking, material support for terrorism and terrorism are not, and have never been, considered crimes under the laws of war.

14. The source submits that Mr. al Baluchi's deprivation of liberty is arbitrary according to categories I, III and V of the categories applied by the Working Group.

15. In relation to category I, the source submits that Mr. al Baluchi's deprivation of liberty has no legal basis because Mr. al Baluchi is a civilian not subject to military jurisdiction. Moreover, despite having been in the custody of the United States for more than 13 years, Mr. al Baluchi has never received a status hearing as required by article 5 of the Third Geneva Convention and his continued detention and trial by military commission is therefore illegal under international humanitarian law. Accordingly, his deprivation of liberty violates article 9 of the Universal Declaration of Human Rights, article 9 of the Covenant, as well as principles 4, 10, 11, 12, 32, 36 and 37 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

16. In relation to category III, the source submits that Mr. al Baluchi's right to attorney-client privileged communications has been repeatedly violated. His legal material has been improperly seized from his cell and reviewed by guards in camp 7, despite being clearly marked as attorney-client privileged. In addition, Mr. al Baluchi does not have access to much of the evidence that is used against him due to overclassification of that information by the Government. The source claims that Mr. al Baluchi is being denied the ability to know his rights, given that under the military commissions system, even the judge and prosecution are unclear as to what rights accused persons retain.

17. In addition, the source reports that Mr. al Baluchi was brutally tortured by Agency personnel and continues to be subjected to cruel, inhuman and degrading treatment by the Government while in pretrial detention at the Guantánamo Bay facility. The source submits that such treatment is a violation of the Fifth and Eighth Amendments to the United States Constitution, which incorporate what is now the international prohibition of torture and other cruel, inhuman or degrading treatment.

18. The source further reports that, upon their transfer to Guantánamo Bay, defendants were placed directly in isolation at camp 7, where they have remained to this day, nearly 10 years later. Camp 7 is known to be the most restrictive area at the Guantánamo Bay facility. Until 2013, the military commission treated defendants' memories of having been tortured as classified, while other information about their confinement was classified until 2015, and the information necessary for determining accountability is still classified. It was only in 2015 that those memories began to be specifically declassified. The men are only allowed infrequent letters from their families, and occasional opportunities for non-simultaneous video messaging are available through the International Committee of the Red Cross (ICRC). As a result, Mr. al Baluchi's deprivation of liberty violates the international norms relating to a fair trial guaranteed by article 10 of the Universal Declaration of Human Rights, article 14 of the Covenant and principles 15–19 of the Body of Principles.

19. In relation to category V, the source submits that Mr. al Baluchi has been deprived of his liberty on the discriminatory grounds of birth, national, ethnic or social origin, language, religion and gender. The source alleges that the military commissions intentionally target men for harsher treatment based on their religion and nationality. While the United States prosecutes men and women of all religions and nationalities in its state, federal, territorial and tribal courts, as well as in court-martial proceedings, it reserves military commissions for Muslims who do not hold United States citizenship. The source states that the United States has never prosecuted any Christian, Jew, Buddhist, Sikh, Hindu, Jain, Zoroastrian, Rastafarian or atheist in a Guantánamo Bay military commission. Mr. al Baluchi's deprivation of liberty therefore violates articles 2, 5 and 6 of the International Convention on

the Elimination of All Forms of Racial Discrimination, article 10 of the Universal Declaration of Human Rights, articles 14 and 26 of the Covenant and principle 5 of the Body of Principles.

20. Mr. al Baluchi and his four co-defendants were the subject of an urgent appeal addressed by the Working Group and several other special procedure mandate holders to the Government on 30 November 2012.[1] In the communication, the mandate holders expressed concern regarding a range of topics including access to legal representation, attorney-client privilege, failure to investigate and acknowledge the use of torture, the use of testimony obtained through abusive interrogation techniques and indefinite detention. The Government replied on 20 December 2013 with responses similar to those outlined below in its replies to the Working Group's regular communication in the present case.

Response from the Government

21. On 11 May 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 10 July 2017 about the current situation of Mr. al Baluchi, including any comments on the allegations made by the source. The Working Group also requested the Government to clarify the factual and legal grounds justifying the continued deprivation of liberty of Mr. al Baluchi, and how this is compatible with the obligations of the United States under international human rights law, including with regard to the Covenant and other treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure Mr. al Baluchi's physical and mental integrity.

22. The Government submitted its response on 6 June 2017, stating that Mr. al Baluchi is detained lawfully under the Authorization for Use of Military Force (U.S. Public Law 107-40), as informed by the laws of war, in the ongoing armed conflict with Al-Qaida, the Taliban and associated forces. Under the law, the President of the United States is authorized to "use all necessary and appropriate force against those ... organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001", including the authority to detain persons who are part of Al-Qaida, the Taliban or associated forces.[2]

23. According to the Government, all Guantánamo Bay detainees have the ability to challenge the lawfulness of their detention in the United States Federal Court through a petition for a writ of habeas corpus. Detainees may also challenge certain types of conditions of their confinement through a habeas corpus writ. Detainees have access to counsel and to appropriate evidence to mount a challenge before an independent court. Except in rare instances required by compelling security interests, all of the evidence relied upon by the Government in habeas corpus proceedings to justify detention is disclosed to the detainees' counsels, who have been granted security clearances to view the classified evidence, and detainees may submit written statements and provide live testimony at their hearings via video link. The Government has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose habeas corpus petitions have been denied or dismissed continue to have access to counsel. Mr. al Baluchi has filed a habeas corpus petition challenging his detention, which is currently pending.

24. The Government notes that Mr. al Baluchi has been charged with crimes in relation to his alleged role in the planning and execution of the 11 September 2001 attacks. He has been charged with eight offences before a military commission: conspiracy; murder in violation of the law of war; attacking civilians; attacking civilian objects; destruction of

[1] See case No. JUA USA 31/2012, in A/HRC/22/67 and Corr.1 and 2.

[2] The Government states that international humanitarian law and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing, and that certain provisions of human rights treaties may apply in armed conflicts. For example, the obligations to prevent torture and cruel, inhuman or degrading treatment or punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. However, with respect to situations of armed conflict, international humanitarian law is the *lex specialis*; as such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

property in violation of the law of war; intentionally causing serious bodily injury; hijacking aircraft; and terrorism. Mr. al Baluchi is presumed innocent unless proven guilty beyond a reasonable doubt.

25. Moreover, the Government states that, pursuant to the requirements of the 2009 Military Commissions Act, Mr. al Baluchi has been provided defence counsel with specialized knowledge and experience in death penalty cases. These proceedings are currently in the pretrial litigation phase. In Mr. al Baluchi's case, the parties have submitted 287 substantive motions in writing and have orally argued 136 motions. Of the 287 substantive motions, 20 have been mooted, dismissed or withdrawn; more than 200 have been ruled on by the judge; and 38 have been submitted for and are pending decision. The Commission has received testimony from 37 witnesses during more than 93 hours of testimony, with all witnesses subject to cross-examination to assist in deciding pretrial motions. The Government emphasizes that this progress represents methodical movement towards trial, but the seriousness of criminal proceedings and accountability under law require that the defence be given a full and fair opportunity to raise such legal challenges, and each one must be taken up methodically, and without resorting to perceived shortcuts, in order to pursue a justice that is truly sustainable.

26. According to the Government, military commissions are a lawful and appropriate forum for trying violations of the law of war and other offences triable by military commission. All current military commission proceedings at Guantánamo Bay are governed by the 2009 Military Commissions Act. Under the Act, military commissions are available to try alien unprivileged enemy belligerents, who are defined as non-United States citizens who have engaged in hostilities against the United States or its coalition partners; who have purposefully and materially supported hostilities against the United States or its coalition partners; or who were part of Al-Qaida at the time of the alleged offence under the Act. The military commissions are not reserved for followers of Islam or any other particular religion.

27. The Government notes that the 2009 Act instituted significant reforms to the system of military commissions. These reforms include prohibiting the admission at trial of statements obtained through cruel, inhuman or degrading treatment, in addition to torture, except for statements by individuals alleging that they were subjected to torture or such treatment as evidence against a person accused of committing the torture or mistreatment (10 United States Code, sect. 948r).

28. The Government further notes that all military commissions under the Act incorporate fundamental procedural guarantees, including the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; prohibitions on the use of coerced evidence; additional evidentiary requirements for the admission of hearsay evidence; a requirement that an accused in a capital case be provided with counsel "learned in applicable law relating to capital cases"; the provision of latitude to the accused in selecting his or her own military defence counsel; and enhancements to the accused's right to discovery of evidence. If an accused person is convicted by a military commission, the conviction is subject to multiple layers of review, including judicial review in the United States Court of Appeals for the District of Columbia Circuit, a federal civilian court consisting of life-tenured judges and, ultimately, by petition to the United States Supreme Court.

29. Furthermore, the Government stresses that it is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are now transmitted via live video feed to locations at Guantánamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings and other materials are also available to the public online via the website of the Office of Military Commissions.

30. The Government has a strong interest in ensuring that the detainees at the Guantánamo Bay detention facility have meaningful access to counsel in habeas corpus and military commission proceedings. The Government respects the critical role of detainees' counsel in these proceedings and the fundamental importance of that role in the United States system of justice, and will continue to make every reasonable effort to ensure that counsels can communicate effectively and meaningfully with their clients. Additionally, the procedures governing the military commissions provide for robust attorney-client privilege.

31. The Government asserts that all United States military detention operations, including those at Guantánamo Bay, comply with common article 3 of the Geneva Conventions of 12 August 1949 on the protection of war victims and other applicable international laws. The Government takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantánamo Bay. The Government reaffirms that torture and cruel, inhuman or degrading treatment or punishment are categorically prohibited under United States domestic law and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.

32. Finally, the Government refers to Executive Order 13491 (Ensuring Lawful Interrogations), which provides that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with United States domestic law, treaty obligations and United States policy. Such individuals shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever they are in the custody or under the effective control of an officer, employee or other agent of the Government or detained within a facility owned, operated or controlled by a department or agency of the United States. The Executive Order further provides that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The Field Manual explicitly prohibits threats, coercion and physical abuse. The National Defense Authorization Act for Fiscal Year 2016 codified many of the key interrogation-related provisions of the Executive Order. It also imposed new legal requirements, including that the Army Field Manual remain publicly available and that any revisions be made publicly available 30 days in advance of their taking effect.

Further comments from the source and the Government

33. The Working Group has considered all the submissions (see annex) made by the source and the responses provided by the Government.

Discussion

34. This is not the first time that the Working Group has issued an opinion in relation to Mr. al Baluchi. In its opinion No. 29/2006, the Working Group found that Mr. al Baluchi and 25 other individuals were arbitrarily deprived of their liberty under the Central Intelligence Agency rendition programme. Opinion No. 29/2006 was adopted on 1 September 2006, five days before Mr. al Baluchi was transferred to the Guantánamo Bay Naval Base. The source seeks a new opinion based on the change in Mr. al Baluchi's circumstances.

35. The Working Group considers that it is appropriate to adopt a new opinion because the circumstances of Mr. al Baluchi's detention have changed significantly since it adopted opinion No. 29/2006,[3] particularly in relation to the detaining authority, the place of detention and Mr. al Baluchi's legal status. In reaching this conclusion, the Working Group has taken into account the following factors:

(a) When the Working Group considered Mr. al Baluchi's circumstances in 2006, he was being detained by the Central Intelligence Agency in secret prisons and "black sites". The Working Group considered that detention in these circumstances fell "outside of all national and international legal regimes pertaining to the safeguards against arbitrary detention".[4] Since being transferred to Guantánamo Bay more than 11 years ago, Mr. al Baluchi has been in the custody of the United States Department of Defense and is being detained under a different legal regime, including the 2009 Military Commissions Act;

(b) While Mr. al Baluchi was held under the Agency programme, no charges or proceedings had been initiated against him, and the Working Group did not consider, in opinion No. 29/2006, whether his right to a fair trial had been observed. Since Mr. al Baluchi's transfer to Guantánamo Bay, charges have been brought against him on two

[3] See also opinion No. 50/2014.

[4] See opinion No. 29/2006, para. 21.

occasions and new violations of his right to a fair trial before the military commission have allegedly occurred;

(c) The source alleges that the Government has not provided adequate medical care or torture rehabilitation to Mr. al Baluchi, who continues to suffer the effects of being tortured under the Agency programme. In accordance with its mandate, the Working Group wishes to consider whether detention under these circumstances is affecting Mr. al Baluchi's ability to participate in, and be an asset to, his current proceedings before the military commission.

36. It is also not the first time that the Working Group has considered detention at Guantánamo Bay. Over the last 15 years, the Working Group has developed a considerable body of legal analysis and jurisprudence reaffirming that the prohibition of arbitrary deprivation of liberty is a peremptory norm (*jus cogens*) of international law from which no derogation is permitted,[5] and that the prolonged and indefinite detention of individuals at Guantánamo Bay violates that prohibition.

37. The Working Group considers it timely to briefly restate the key principles relevant to the present opinion based on its previous analyses of detention at Guantánamo Bay:

(a) In its 2002 annual report, the Working Group published its "Legal opinion regarding the deprivation of liberty of persons detained in Guantánamo Bay".[6] The Working Group considered that the Third Geneva Convention and the Covenant were both part of the legal framework applicable to detainees at Guantánamo Bay. If a detainee is not recognized by a competent court as having prisoner of war status under the Third Geneva Convention, the right to have the lawfulness of detention reviewed and the right to a fair trial under articles 9 and 14 of the Covenant still apply;[7]

(b) In 2006, the Working Group joined four other mandate holders to present a report to the former Commission on Human Rights on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120). The report includes a number of important conclusions:

(i) Given consistent findings by the Human Rights Committee that a State party to the Covenant must ensure the rights under the Covenant to anyone within its power or effective control, the obligations of the United States under international human rights law extend to persons detained at Guantánamo Bay (paras. 10–11);[8]

(ii) The global struggle against international terrorism does not constitute an armed conflict for the purposes of the applicability of international humanitarian law.[9] Legal provisions under international humanitarian law allowing the United States to hold belligerents without charges or access to counsel for the duration of hostilities can therefore not be invoked to justify their detention. Such deprivation of liberty is, however, governed by human rights law, specifically articles 9 and 14 of the Covenant.[10] This includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of

[5] See A/HRC/22/44, para. 51; and opinions No. 10/2013, para. 32 and No. 50/2014, para. 66.

[6] See E/CN.4/2003/8, paras. 61–64.

[7] The Working Group noted that "the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are complementary and not mutually exclusive." See E/CN.4/2006/7, paras. 68–75, in particular para. 70; and A/HRC/4/40, paras. 14–15, in particular para. 14. See also opinions No. 44/2005, para. 13; No. 2/2009, para. 27; No. 3/2009, para. 30 and No. 53/2016, para. 42. See further Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights, *Human Rights Situation of Detainees at Guantánamo* (Warsaw, 2015), paras. 8–9 and 111, available at www.osce.org/odihr/198721?download=true.

[8] See opinion No. 57/2013, para. 55; and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10. See also *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[9] See opinions No. 43/2006, para. 31; and No. 11/2007, para. 11. See also A/HRC/13/42, para. 51.

[10] The United States has not notified the Secretary-General of any derogation from the Covenant.

independence and impartiality, the right to be informed of the reasons for arrest, the right to be informed about the evidence underlying these reasons, the right to assistance by counsel and the right to a trial within a reasonable time or to release. Any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations on this right should be viewed with utmost concern (paras. 21, 25–26);

(iii) Torture is prohibited under article 7 of the Covenant and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture is non-derogable, including during the fight against terrorism, because of its status as a *jus cogens* norm. The prohibition of torture encompasses the obligation to investigate alleged violations promptly and bring perpetrators to justice, and the prohibition of the use of evidence obtained under torture in legal proceedings (paras. 41–45);

(c) In 2013, the Working Group, together with the Inter-American Commission on Human Rights and three other United Nations special procedure mandate holders, reiterated the need to end indefinite detention at Guantánamo Bay.[11] The authors of the joint statement emphasized that, even in extraordinary circumstances, the indefinite detention of individuals beyond a minimal and reasonable period of time constitutes a flagrant violation of international human rights law, which in itself constitutes a form of cruel, inhuman and degrading treatment. The continuing and indefinite detention of individuals without the right to due process is arbitrary. The authors of the joint statement urged the United States to adopt all legislative, administrative, judicial and other measures to prosecute, with full respect for the right to due process, individuals held at Guantánamo Bay or, where appropriate, provide for their immediate release or transfer to a third country in accordance with international law;

(d) The Working Group's jurisprudence has consistently determined that prolonged and indefinite detention at Guantánamo Bay is arbitrary. The Working Group considered the cases of detainees held at Guantánamo Bay for periods of 6 1/2 years (opinion No. 2/2009); almost 5 years (opinion No. 3/2009); more than 10 years (opinion No. 10/2013) and 8 years (opinion No. 50/2014). In each of these cases, the detainees had not been afforded due process, such as the right to prompt review of the lawfulness of their detention before a judicial authority and other fair trial rights, which resulted in prolonged and indefinite detention.[12] Following its visit to the United States in 2016, the Working Group expressed concern that detainees at Guantánamo Bay had not been tried by an independent and impartial court after many years of arbitrary deprivation of liberty.[13]

38. Several other prominent human rights mechanisms have also expressed concern about the arbitrary deprivation of liberty, lack of due process and ill-treatment of detainees at Guantánamo Bay. These include United Nations mechanisms, such as the Human Rights Committee,[14] the Committee against Torture[15] and special procedure mandate holders,[16] as well as other regional bodies such as the Inter-American Commission on Human Rights[17] and the Organization for Security and Cooperation in Europe.[18] Moreover, during the universal periodic review of the United States in May 2015, 16 delegations expressed concern and/or made recommendations in relation to Guantánamo Bay, including providing due

[11] See www.oas.org/en/iachr/media_center/PReleases/2013/029.asp.

[12] In an earlier case involving four detainees held without charge at Guantánamo Bay, the Working Group found that there was no legal basis for their detention (opinion No. 5/2003).

[13] See A/HRC/36/37/Add.2, para. 78.

[14] See, for example, CCPR/C/USA/CO/4, para. 21.

[15] See, for example, CAT/C/USA/CO/3-5.

[16] Since 2012, eight joint urgent appeals and allegation letters have been sent by several special procedure mandate holders in relation to detainees at Guantánamo Bay. See www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

[17] For example, *Towards the Closure of Guantánamo* (2015), particularly para. 23. Available at www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf.

[18] See OSCE, *Human Rights Situation of Detainees at Guantánamo*. See also www.osce.org/odihr/215276.

process to detainees, allowing independent monitoring and investigation of allegations of human rights violations and closing the facility.[19]

39. Turning now to the application of the above principles to the circumstances of the present case, it is clear from the Working Group's jurisprudence that the obligations of the United States under international human rights law extend to persons, including Mr. al Baluchi, who are detained at Guantánamo Bay. The Working Group must determine whether the Government has violated those obligations in Mr. al Baluchi's case. The Working Group has established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for a breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.[20] However, mere assertions by the Government that lawful procedures have been followed, without such evidence, are not sufficient to rebut the source's allegations.[21]

40. The source alleges that Mr. al Baluchi's deprivation of liberty is arbitrary according to categories I, III and V.

41. Category I applies when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The source submits that the Government has failed to establish a legal basis for Mr. al Baluchi's detention at Guantánamo Bay. According to the source, the 2009 Military Commissions Act requires proof of existing hostilities on 11 September 2001 in order to establish the military commission's jurisdiction over Mr. al Baluchi. If the Government cannot prove that an armed conflict existed on 11 September 2001 and that Mr. al Baluchi participated in those hostilities, the laws of war do not apply, and the Government can no longer rely upon the Authorization for Use of Military Force as justification for Mr. al Baluchi's detention. The military judge ordered a special personal jurisdiction hearing to be held for Mr. al Baluchi in 2017.

42. The Working Group has stated on several occasions, most recently in its opinion No. 50/2014 (at para. 68), that the struggle against international terrorism cannot be characterized as an armed conflict for the purposes of the applicability of international humanitarian law. That is, the global war on terrorism is not capable of conferring the status of combatant on persons detained for conduct outside of an armed conflict, and such acts of terrorism are treated as criminal offences rather than violations of the laws and customs of war. The Working Group considers that it is a question of fact whether an armed conflict existed on 11 September 2001 (apart from any broadly alleged war on terror), and whether there is evidence that Mr. al Baluchi participated in that armed conflict. The Working Group does not consider itself competent to resolve these questions of fact, and it is for a domestic tribunal (in the present case, the military commission) to consider in determining its jurisdiction over Mr. al Baluchi.[22]

43. However, the Working Group reiterates its finding in opinion No. 50/2014 that, even if an armed conflict existed on 11 September 2001, the Geneva Conventions require that enemy belligerents and civilians who are detained as threats to security be released at the end of the armed conflict or hostilities. At the current point in time, whether the war on terror is considered an international or non-international armed conflict, any of the procedures for detention regimes under international humanitarian law as the *lex specialis* have ceased to apply, if they ever did, to Mr. al Baluchi. International humanitarian law was never conceived to apply to detention of the length of that of Mr. al Baluchi, who has now been detained at Guantánamo Bay for more than 11 years. Procedures for detention regimes under international humanitarian law do not provide any support for the prolonged and indefinite

[19] See A/HRC/30/12, paras. 41, 72, 84, 99, 176.239–176.250 and 176.288.

[20] See opinion No. 41/2013 quoting *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 661, para. 55.

[21] See A/HRC/19/57, para. 68.

[22] Similarly, the Working Group does not consider that it falls within its mandate to resolve whether the offences with which Mr. al Baluchi has been charged are considered crimes under the laws of war.

detention of individuals at Guantánamo Bay, and such cases must be considered with reference to international human rights law.

44. According to the source, Mr. al Baluchi was held without charge for a period of over 18 months from the beginning of his detention at Guantánamo Bay on or about 6 September 2006 until April 2008. The Government did not contest this allegation. This amounts to a violation of Mr. al Baluchi's right under articles 9 (2) and 14 (3) (a) of the Covenant to be promptly informed of the charges against him, as well as a failure to invoke a legal basis to justify his detention. Moreover, the source alleges, and the Government does not dispute,[23] that all charges against Mr. al Baluchi were dropped on 21 January 2010 and he continued to be detained without charges until May 2011, when military commission prosecution was again initiated against him. Mr. al Baluchi was therefore held for a second period of detention without legal basis for approximately 16 months.

45. Further, Mr. al Baluchi first received a hearing before the Combatant Status Review Tribunal on 30 March 2007, more than six months after he was transferred to Guantánamo Bay. This hearing resulted in his categorization as an "enemy combatant" who could be detained pursuant to the laws of war for his alleged association with Al-Qaida. The source alleges, and the Government does not contest, that this hearing lasted for 1 hour and 20 minutes, and the Tribunal failed to provide Mr. al Baluchi (who had no legal representation until April 2008) with procedural protections, such as the exclusion of coerced statements and unreliable hearsay evidence, and the ability to cross-examine witnesses. The Government's evidence was also considered by the Tribunal to be presumptively correct.

46. As the Working Group found in its opinions No. 50/2014, No. 10/2013 and No. 2/2009, hearings before the Combatant Status Review Tribunal do not satisfy the right to habeas corpus or to a fair and independent trial under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant, as they are military tribunals of a summary nature. The United States Supreme Court has reached a similar conclusion, having ruled in the case of *Boumediene v. Bush* that hearings before the Tribunal are an inadequate and ineffective substitute for habeas corpus proceedings. While the Government asserts in its response that all Guantánamo Bay detainees have the ability to challenge the lawfulness of their detention in the United States Federal Court through a petition for a writ of habeas corpus, Mr. al Baluchi has seen no meaningful progress over the last two years in his habeas petition, which was first filed in December 2008. He has therefore not been afforded his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

47. The Working Group finds that Mr. al Baluchi was not afforded his right to be brought promptly before a judge or other judicial authority for review of his detention under article 9 (3) of the Covenant, or his right to take proceedings before a court to determine the lawfulness of his detention without delay under article 9 (4) of the Covenant.[24] In the absence of a ruling on the lawfulness of Mr. al Baluchi's detention by a judicial authority, the Working Group concludes that no legal basis has been established for his detention.

48. For these reasons, the Working Group considers that there was no legal basis invoked to justify the detention of Mr. al Baluchi, and his deprivation of liberty falls within category I.

49. Category III applies when the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character. The source alleges that there were several grave violations of Mr. al Baluchi's fair trial rights.

[23] If the Government had sought to challenge these allegations, it could have provided charge sheets or other records (with redactions necessary for security purposes) to show that Mr. al Baluchi was charged earlier than claimed by the source.

[24] See Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 4. See also guideline 4, paragraph 55, of the Basic Principles and Guidelines, on the review of detention of civilians by military tribunals.

50. The source alleges, and the Government does not contest, that the military commission judge ruled that Mr. al Baluchi has no right to consular access, and that Mr. al Baluchi has been denied communication with any consular officials since his detention began. As a national of Pakistan, Mr. al Baluchi has the right under article 36 of the 1963 Vienna Convention on Consular Relations,[25] principle 16 (2) of the Body of Principles and rule 62 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) to communicate with consular authorities of Pakistan. The failure by the Government to afford Mr. al Baluchi this right is serious given that he is facing capital charges, and had no access to legal representation for more than 18 months after he was transferred to Guantánamo Bay. Mr. al Baluchi's inability to communicate with consular authorities has potentially precluded effective solutions to his prolonged and indefinite detention, such as being able to challenge the lawfulness of his detention before a court and obtain a remedy without delay under article 9 (4) of the Covenant.[26] It has also placed Mr. al Baluchi at risk of further human rights violations, including torture and other ill-treatment.

51. Further, the source contends that the Government, specifically the Central Intelligence Agency, provided the director of the 2012 film *Zero Dark Thirty* with information regarding the torture of Mr. al Baluchi at the Agency's "black sites", and that this information, which has been denied to Mr. al Baluchi's lawyers, was subsequently used in producing the film. The source alleges that the first 25 minutes of the film involved a character named "Ammar", who was beaten, water-doused, held with his wrists bound above his head, and kept awake for 96 consecutive hours, and that all of these techniques were used on Mr. al Baluchi. In its response, the Government asserts that Mr. al Baluchi is presumed innocent unless proven guilty beyond a reasonable doubt, but did not address these specific allegations. Given that the storyline of the film involves the investigations that led to identifying the whereabouts of Osama bin Laden, the material portrayed in the film is highly prejudicial to Mr. al Baluchi's ability to obtain a fair trial. As the Human Rights Committee has noted, information placed in the public domain about a criminal matter must not undermine the presumption of innocence.[27] Moreover, the pretrial categorization of Mr. al Baluchi by the Combatant Status Review Tribunal as an "enemy combatant" presupposes his guilt. He has also been held in punitive conditions (discussed further below) for over 11 years, despite not having been convicted of any crime. In these circumstances, the Working Group considers that there is a serious and ongoing violation of Mr. al Baluchi's right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

52. In addition, the source alleges that Mr. al Baluchi had no legal representation from the date of his transfer to Guantánamo Bay on or about 6 September 2006 until April 2008. The Government asserts in its response that all Guantánamo Bay detainees have access to counsel (including, in Mr. al Baluchi's case, counsel experienced in death penalty cases) to file a habeas corpus challenge and to assist throughout their proceedings. However, it does not deny that Mr. al Baluchi had no legal assistance for over 18 months after his transfer to Guantánamo Bay.[28] This amounts to a violation of Mr. al Baluchi's right to legal assistance under article 14 (3) (b) of the Covenant. As the Working Group stated in principle 9 of the

[25] The United States is a State party to the Convention. The ability of a foreign defendant in a capital case to communicate with his or her consular authorities has been recognized as an individual right in international law: *LaGrand* (*Germany v. United States of America*), *Judgment, I.C.J. Reports 2001*, p. 466; and *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), *Judgment, I.C.J. Reports 2004*, p. 12. Consular access has also been recognized as a human right that informs the right to a fair trial under article 14 of the Covenant: Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, adopted on 1 October 1999. See also General Assembly resolution 40/144, annex, art. 10.

[26] See the Basic Principles and Guidelines (para. 110) in relation to immigration detention, but it is equally applicable to the criminal justice context.

[27] See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30.

[28] Examples of documentary evidence that the Government could have provided include visitor logs for lawyers meeting with Mr. al Baluchi or a transcript of the Tribunal proceedings showing that he was legally represented.

Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, all persons deprived of their liberty have the right to legal assistance at any time during their detention, including immediately after the moment of apprehension (para. 12).[29]

53. The source also alleges that, even after legal representation was assigned to Mr. al Baluchi in April 2008, the ability to represent Mr. al Baluchi has been impeded by repeated violation of the right to attorney-client privilege. Specifically, Mr. al Baluchi's legal material has been seized and reviewed by guards, despite being clearly marked as attorney-client privileged. Moreover, the source refers to instances in 2013 to 2015, and again in 2017, in which listening devices were allegedly found in attorney-client meeting rooms, as well as alleged attempts by the Government to place informants on the defence teams. In its response, the Government states that it respects the critical role of detainees' counsel and will continue to make every reasonable effort to ensure that counsel can communicate effectively with clients. The Government also asserts that the procedures governing the military commissions provide for "robust" attorney-client privilege, though it did not offer any examples. While the source does not appear to suggest that the use of listening devices and attempts to place informants on the defence teams directly affected Mr. al Baluchi, these allegations raise doubt as to whether Mr. al Baluchi and his legal team have been able to communicate confidentially at all times at Guantánamo Bay. As the Human Rights Committee noted in general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the ability to hold private and confidential discussions is an important element of the right to communicate with counsel under article 14 (3) (b) of the Covenant (para. 34).

54. Mr. al Baluchi has been deprived of his liberty for more than 11 years at Guantánamo Bay. His matter is still only in the pretrial litigation phase, with pretrial proceedings having continued for over six years. The Working Group takes note of the Government's statement in its response that 287 substantive motions have been filed in Mr. al Baluchi's case, and agrees with the Government that it is important to give the defence a full and fair opportunity to raise such challenges. However, notwithstanding the complexity of Mr. al Baluchi's case and the number of motions filed by his legal team, the Working Group considers that 11 years of pretrial detention is both prolonged (excessive in duration) and indefinite. There is no indication of when Mr. al Baluchi will be brought to trial. The Government has indicated that it will continue to detain former Central Intelligence Agency detainees even if they are acquitted by the military commission, so that even acquittal is not a remedy for indefinite detention at Guantánamo Bay. According to article 9 (3) of the Covenant, if Mr. al Baluchi cannot be tried within a reasonable time, he is entitled to release. He is also entitled, under article 14 (3) (c) of the Covenant, to be tried without undue delay. Both provisions have been violated in the present case.

55. Furthermore, the source alleges that Mr. al Baluchi does not have access to all of the evidence that is used against him due to overclassification of that information by the Government. The source claims that information provided to the director of *Zero Dark Thirty* regarding Mr. al Baluchi's torture under the Agency programme is among the material that has not been provided to his legal team. Mr. al Baluchi has also requested that 131 witnesses be called for his personal jurisdiction hearing before the military commission, but the Government has refused all but 10 of these witnesses. In its response, the Government asserts that: "Except in rare instances required by compelling security interests, all of the evidence relied upon by the government in habeas proceedings to justify detention is disclosed to the detainees' counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their

[29] Although the source states that the military lawyer appointed for Mr. al Baluchi in April 2008 was not of his choice, as required by article 14 (3) (b) and (d) of the Covenant, the United States has stated "that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed". See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter= 4&lang=en#EndDec. See also guideline 17, para. 93 (d), of the Basic Principles and Guidelines.

hearings via video link." The Government did not address the specific allegations by the source and did not elaborate on what constitutes a "compelling security interest".

56. The Working Group concludes that Mr. al Baluchi has not been afforded equality of arms in terms of having adequate facilities for the preparation of his defence, including access to evidence, under the same conditions as the prosecution. This amounts to a violation of article 14 (1) and 14 (3) (b) of the Covenant.[30] The Working Group is particularly concerned that information regarding the alleged torture of Mr. al Baluchi under the Agency programme has not been provided to his lawyers. This is potentially exculpatory material in the capital charges against Mr. al Baluchi if it indicates that statements made by him were not voluntary.[31] This information is also necessary for the investigation of alleged acts of torture upon Mr. al Baluchi and for the provision of physical and psychological rehabilitation to him for those acts.

57. The source has provided credible information, which was not challenged by the Government, that Mr. al Baluchi was subjected to torture while detained by the Central Intelligence Agency. It is clear from that information that the previous torture by the Agency, and the punitive conditions in which Mr. al Baluchi is currently being held, continues to have an impact upon the fairness of the current military commission proceedings against him.

58. Mr. al Baluchi is suffering psychological and physical effects from the previous torture and his health is in severe decline. Despite his ongoing suffering, he has not been provided with torture rehabilitation or any other redress, as required by article 8 of the Universal Declaration of Human Rights and article 14 of the Convention against Torture,[32] to which the United States is party. Mr. al Baluchi has also been denied adequate medical treatment, having been told by a doctor at Guantánamo Bay that he could not access a treatment plan beyond painkillers due to the political nature of his case. Mr. al Baluchi's contact with the outside world is extremely limited, as he is only allowed infrequent letters from his family and occasional opportunities for video-messaging through ICRC. He is also subject to indefinite detention, itself a form of cruel, inhuman and degrading treatment under international law that may amount to torture.[33] This treatment violates Mr. al Baluchi's right under article 10 (1) of the Covenant to be treated with humanity and respect for his inherent dignity, as well as the standards found in rules 1, 3, 24, 30, 31, 34 and 58 of the Nelson Mandela Rules and principles 1, 6, 15, 16, 19, 24 and 33 of the Body of Principles. In these circumstances, the Working Group considers that it is very unlikely that Mr. al Baluchi can effectively assist with, and participate in, his own defence, contrary to article 14 (3) (b) of the Covenant.[34]

59. In addition, the source alleges that previous involuntary statements made by Mr. al Baluchi under torture by the Agency will be used during his personal jurisdiction hearing before the military commission. The source cited provisions in the 2009 Military Commissions Act that allow for the use of such statements, and a recent case involving another Guantánamo Bay detainee in which the Government argued that the inadmissibility of evidence obtained through torture only applies when the defendant was tortured at the same time as an incriminating statement was made. The Government emphasized that the 2009 Act, Executive Order 13491 and Army Field Manual 2-22.3 prohibit torture and ill-

[30] The Working Group does not have sufficient information to determine whether Mr. al Baluchi has had a proper opportunity to call witnesses under article 14 (3) (e) of the Covenant. That provision allows for the calling of relevant witnesses, and does not provide an unlimited right to call all of the 131 witnesses requested for the personal jurisdiction hearing if they are not all relevant. In any event, the United States has stated "that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence". See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter= 4&lang=en#EndDec.

[31] See Human Rights Committee, general comment No. 32, para. 33.

[32] See Committee against Torture, general comment No. 3 (2012) on the implementation of article 14.

[33] See also http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E.

[34] See opinion No. 29/2017, para. 63. See also E/CN.4/2004/3/Add.3, para. 33.

treatment and the use of statements at trial obtained through such treatment, and that torture and ill-treatment are prohibited under United States law.

60. The Working Group reaffirms the absolute prohibition of torture under customary international law, article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and the Convention against Torture.[35] Statements made by Mr. al Baluchi under torture, regardless of when or where they were made, cannot be used as evidence against him, as this would be a violation of article 14 (3) (g) of the Covenant and article 15 of the Convention.[36] In opinion No. 57/2013, the Working Group found that evidence obtained in violation of a suspect's rights during a previous period of detention was not admissible and could compromise subsequent proceedings. The Working Group calls on the Government to investigate Mr. al Baluchi's allegation of torture under the Agency programme, in accordance with its obligations under articles 4, 12 and 13 of the Convention, and prosecute anyone found to have been involved. Any lack of accountability for such acts would only serve to undermine the moral authority with which terrorism must be fought.

61. The Working Group therefore concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. al Baluchi an arbitrary character according to category III. 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.

62. Further, the Working Group finds that Mr. al Baluchi has been subjected to prolonged detention on discriminatory grounds because of his status as a foreign national and his religious beliefs as a Muslim. In its response, the Government asserted that the Guantánamo Bay military commissions are not reserved for followers of Islam or any other particular religion. However, it did not present any information to challenge the source's claims that in practice: (a) Guantánamo Bay military commissions are held solely for defendants who are not citizens of the United States; and (b) the Government has never prosecuted any person of any religious faith, other than Muslim men, before a Guantánamo Bay military commission. Indeed, the Government stated in its response that, under the 2009 Military Commissions Act, military commissions are available to try "alien unprivileged enemy belligerents", who are defined as non-United States citizens who have engaged in or supported hostilities against the United States.

63. In the proceedings before the military commission, Mr. al Baluchi has been deprived of due process and the fair trial guarantees that would ordinarily apply within the judicial system of the United States. This act of discrimination on the basis of his status as a foreign national[37] and his religion has denied Mr. al Baluchi equality before the law and violates articles 2, 5 (a) and (b) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,[38] articles 2 and 7 of the Universal Declaration of Human Rights, and articles 2 and 26 of the Covenant.

64. The Working Group takes note that the Government has expressed its understanding of articles 2 and 26 of the Covenant as follows: "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour,

[35] The Working Group notes the reservations to article 7 of the Covenant and the Convention against Torture made by the United States, particularly that it considers itself bound by the prohibition of cruel, inhuman or degrading treatment or punishment only to the extent that it means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution.

[36] See also guideline 12, pargraph.77, of the Basic Principles and Guidelines.

[37] According to the joint study on global practices in relation to secret detention in the context of counter-terrorism, none of the 14 people transferred from Agency custody to Guantánamo Bay on 6 September 2006, including Mr. al Baluchi, were United States citizens (see A/HRC/13/42, para. 105).

[38] See Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens, paras. 19–21, and general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

sex, language, religion, political or other opinion, national or social origin, property, birth or any other status — as those terms are used in article 2, paragraph 1 and article 26 — to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."[39] However, the Government did not make any submissions to the Working Group as to how the establishment of military commissions, which have in practice only prosecuted a select group of Muslim men who are not nationals of the United States, would be a proportionate means of achieving a legitimate objective.

65. The Working Group concludes that Mr. al Baluchi's case falls within category V.[40]

66. The Working Group has clarified many issues of international law in its Guantánamo Bay jurisprudence, to which the present opinion is the most recent addition. In the present opinion, the Working Group has restated principles of general application regarding the law on the arbitrary deprivation of liberty and applied them to Mr. al Baluchi's circumstances. To avoid any ambiguity, the Working Group wishes to clarify that, while it has specifically addressed Mr. al Baluchi's case, the conclusions reached by the Working Group in this opinion also apply to other detainees in similar situations at Guantánamo Bay. No *a contrario* argument can be made in respect of any of the findings in the present opinion.

67. Moreover, the present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons at Guantánamo Bay.[41] The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.[42] As the Working Group stated in relation to its visit to the United States in October 2016, it remains deeply concerned regarding the ongoing operation of the detention facility at Guantánamo Bay, the closure of which should remain a priority. In the meantime, the Working Group urges the Government to cooperate with United Nations human rights mechanisms and allow them full access to the facility.[43]

68. The Working Group would welcome an invitation from the Government to undertake a follow-up visit to the United States, with specific authorization to visit the entire detention facility at Guantánamo Bay Naval Base, including camp 7, where Mr. al Baluchi is detained. According to the terms of reference for country visits by the Working Group,[44] such a visit would need to be conducted under conditions which allow its members to have unrestricted access to the facility, and to hold private and confidential interviews with any detainee.

Disposition

69. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ammar al Baluchi, being in contravention of articles 2, 5, 7, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and of articles 2, 7, 9, 10 (1), 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

70. The Working Group requests the Government of the United States of America to take the steps necessary to remedy the situation of Mr. al Baluchi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

71. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. al Baluchi immediately and accord him

[39] See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

[40] See also opinions No. 50/2014 and No. 10/2013. See further CERD/C/USA/CO/7-9, para. 22.

[41] See opinions No. 50/2014, No. 10/2013, No. 3/2009 and No. 2/2009.

[42] See, for example, opinion No. 47/2012, para. 22.

[43] See A/HRC/36/37/Add.2, para. 90.

[44] See www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx. See also www.ohchr.org/Documents/HRBodies/SP/ToRs2016.pdf.

an enforceable right to compensation[45] and other reparations, such as appropriate physical and psychological rehabilitation for the torture he has suffered, in accordance with international law.

72. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. al Baluchi, including an independent inquiry into his allegations of torture, and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

73. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. al Baluchi has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. al Baluchi;

(c) Whether an investigation has been conducted into the violation of Mr. al Baluchi's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United States of America with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

74. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

75. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

76. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[46]

[*Adopted on 24 November 2017*]

[45] The United States understands that "the right to compensation referred to in articles 9 (5) and 14 (6) requires the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law." See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

[46] See Human Rights Council resolution 33/30, paras. 3 and 7.

Annex

Additional information submitted by the parties

Further comments from the source

1. On 7 July 2017, the response from the Government was sent to the source for further comment. The Working Group requested the source to respond by 21 July 2017. The source responded on 18 July 2017.

2. The source submits that the Government has not established personal jurisdiction over Mr. al Baluchi after 14.5 years of detention and 6 years of pretrial hearings. The source refers to the Government's argument that Mr. al Baluchi is detained lawfully under the Authorization for Use of Military Force, and submits that this response retroactively proffers a legal justification for Mr. al Baluchi's unlawful and arbitrary detention. According to the source, the Government ignores the fact that in order to both detain and prosecute Mr. al Baluchi, the 2009 Military Commissions Act (MCA) explicitly requires proof of hostilities to establish the military commission's personal jurisdiction over him (10 U.S.C.§ 948 (a) (7)). In May 2017, the Government was asked to prove for the first time that there were existing hostilities on 11 September 2001, and that Mr. al Baluchi participated in those hostilities. This position was argued and won by Mr. al Baluchi, and the military judge has now ordered a special personal jurisdiction hearing to be held for Mr. al Baluchi later in 2017. This hearing will take place over 14.5 years since Mr. al Baluchi first entered United States custody through the Central Intelligence Agency (CIA), over 11 years since he was transferred to Guantánamo Bay, and over six years since charges were brought against him for the second time. If the Government cannot prove that an armed conflict existed on 11 September 2001, the laws of war do not apply, and the Government can no longer rely upon the Authorization for Use of Military Force as justification for Mr. al Baluchi's unlawful and arbitrary detention.

3. In addition, the source refers to the Government's argument that detainees are able to file habeas petitions, and notes that those proceedings are largely stalled in Mr. al Baluchi's case. According to the source, the Government fails to mention that government evidence in habeas proceedings is treated with a presumption of "regularity", despite documented translation and other errors demonstrated by habeas counsel. Mr. al Baluchi's habeas petition, first filed in December 2008, has seen no meaningful action in the District of Columbia District Court since September 2015.

4. The source further submits that the Government does not observe fair trial rights at the military commissions. In listing the crimes with which Mr. al Baluchi has been charged, the Government ignores the fact that three of those crimes — conspiracy, terrorism and hijacking — were not war crimes on 11 September 2001, and therefore may not be charged before a military commission. In support of its argument, the source annexed to its submission the opinions of two international experts in international humanitarian law and war crimes.

5. The source refers to the Government's assertion that Mr. al Baluchi is presumed innocent unless proven guilty beyond a reasonable doubt. However, the Government's argument does not address the fact that Mr. al Baluchi's continued designation as a "High Value Detainee", without justification, is extremely prejudicial to the lay public. The source also alleges that the Government collaborated with the filmmakers of the 2012 Hollywood movie *Zero Dark Thirty*, which provides a fictionalized link — disproven by the Senate Select Committee on Intelligence in its report — between the torture of Mr. al Baluchi at the CIA black sites, and information leading to the discovery of Osama bin Laden. According to the source, several examples of Mr. al Baluchi's real-life torture were depicted in this film. The first 25 minutes of the film are largely composed of a character named "Ammar" who was beaten, water-doused, held up off the floor with his wrists bound above his head and kept awake for 96 consecutive hours. The source alleges that all of these techniques were used on Mr. al Baluchi, along with many others. The source also alleges that the CIA provided

the director of the film with information regarding Mr. al Baluchi's torture, and that this information has been denied to Mr. al Baluchi's counsel, who hold security clearances.

6. According to the source, the Government continues to violate Mr. al Baluchi's due process rights. While the Government correctly notes that the military commission proceedings are in the pretrial litigation phase, it fails to explain that the pretrial proceedings have continued for over six years. The Government also does not address the reasons for the slow movement of the military commissions, including the fact that it created an entirely new legal system for a specific group of individuals (that is, non-citizen Muslim males) that has required hundreds of motions to clarify.

7. Moreover, the source alleges that there have been repeated and continuous intrusions into the attorney-client privilege belonging to Mr. al Baluchi and other defendants before the military commission that require investigation. For example, the source alleges that in March 2013, defence counsel discovered listening devices disguised as smoke detectors in the attorney-client meeting rooms where case strategy and other privileged discussions take place, despite previous denials by the Government that it had not installed any such devices. In April 2014, the Federal Bureau of Investigation (FBI), which is involved in the prosecution of Mr. al Baluchi and the other four defendants, tried to place an informant on one of the defence teams. In February 2015, one of Mr. al Baluchi's co-defendants identified, while in the courtroom, a CIA translator who had been with the men at the black sites, who had been placed on a defence team. This kind of egregious violation of the attorney-client privilege further delays military commission proceedings and undermines any proffered rationale for Mr. al Baluchi's continued arbitrary detention.

8. The source asserts that, despite the Government's statements that the 2009 MCA prohibits the admission of evidence obtained through torture or cruel, inhuman or degrading treatment, the 2009 MCA does allow for the use of evidence obtained through coercion and derived from torture. The source refers to section 949 of the 2009 MCA, which states that:

> "A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title."

9. The source also refers to section 948r (c), which provides that:

> "A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds--
>
> (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (2) that--
>
> (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
>
> (B) the statement was voluntarily given."

10. According to the source, the section further provides:

> "(d) Determination of Voluntariness — In determining for purposes of subsection (c) (2) (B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:
>
> (1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.
>
> (2) The characteristics of the accused, such as military training, age, and education level.
>
> (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused."

11. The source notes that the reason for the specific inclusion of this language in the 2009 MCA is that, following their extended torture and interrogation by the CIA, the defendants were reinterrogated by the FBI in 2007 after their transfer to Guantánamo Bay, and the resulting statements have been publicly called the "clean team" statements. The source alleges that it is these statements, obtained as the result of years of torture, that the Government seeks to rely upon in death penalty proceedings against Mr. al Baluchi.

12. In addition, the source argues that the military commission proceedings lack transparency because the Government actively withholds potentially exculpatory and mitigating information regarding the torture of the defendants by the CIA, on the basis that such information is not relevant to their eventual trial. For example, in February 2016, counsel for Mr. al Baluchi argued that all communications between the CIA and the filmmakers of *Zero Dark Thirty* should be released to counsel, but the Government responded that such information was not relevant.

13. Finally, the source asserts that Mr. al Baluchi has not been provided with torture rehabilitation. The source refers to the Government's summary of Executive Order 13491, which prohibits torture or cruel, inhuman or degrading treatment, consistent with United States law and treaty obligations. However, the Government has provided no remedy or treatment for the prolonged torture inflicted upon the defendants while in CIA custody. The withholding of torture rehabilitation constitutes an active violation of article 14 of the Convention against Torture. Without such treatment, the victims continue to suffer the effects of their torture.

14. On 13 August 2017, the source provided a further update to the Working Group. The source reports that Mr. al Baluchi has recently experienced a severe decline in his physical and mental health. He has constant numbness, which may indicate permanent nerve damage, on his body where he was shackled for months while in CIA custody. The source alleges that when Mr. al Baluchi tried to speak about his symptoms with the Joint Medical Group doctor at Guantánamo Bay, he was told that prescribing a treatment plan beyond painkillers was not possible due to the political nature of his case.

15. Furthermore, the source reports that the Government explained its favourable position towards torture-derived statements in a recent case,[1] characterizing the prohibition of torture-acquired evidence as "temporal", prohibiting only evidence obtained when the defendant was tortured at the same time as an incriminating statement was made. The source further reports that in Mr. al Baluchi's upcoming personal jurisdiction hearing, the Government has already indicated that it will rely almost exclusively on similarly tainted statements made by Mr. al Baluchi, following the same reasoning offered in this recent case.

16. The source refers to the Government's response to the Working Group in which it stated that "the procedures governing the military commissions provide for robust attorney-client privilege". According to the source, in June 2017, the Government acknowledged that it had "unintentionally" eavesdropped on attorney-client communications at Guantánamo Bay after a specific order prohibiting monitoring had been made following the 2013 discovery of listening devices in meeting rooms.

17. The source also refers to the Government's statement in its response that "proceedings are now transmitted via live video feed to locations at Guantánamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information". The source reports that, during the past two military commission hearings, the live video feed to the United States has been cancelled, and it is unclear whether it will be reinstated.

18. Finally, the source notes that the Government's response detailed the procedural rigour of the military commissions, including the provision of witnesses. According to the source, the personal jurisdiction hearing for Mr. al Baluchi in 2017 will examine two major questions: (a) whether hostilities existed on 11 September 2001 such that a military

[1] The name of the defendant was disclosed to the Working Group and to the Government, but is withheld in the present opinion in order to preserve the integrity of those separate ongoing proceedings.

commission has jurisdiction over the attacks and associated acts, and (b) whether coerced statements made after 3.5 years of CIA detention by Mr. al Baluchi are admissible to establish personal jurisdiction. Given the breadth of both questions, Mr. al Baluchi has requested 131 witnesses for the personal jurisdiction hearing. The source reports that all but 10 of these witnesses have been refused by the Government.

Further comments from the Government

19. Given that the source provided additional information, the Working Group took the exceptional step of forwarding relevant information from the source's response to the Government on 28 August 2017 for its final comments. The Government was requested to respond by 31 October 2017. The Government responded on 1 November 2017, requesting an extension of time within which to reply. However, this request was made after the expiry of the deadline. In accordance with its established practice, the Working Group declined the request for an extension of time (see, for example, opinion No. 1/2017).