

**Cour
Pénale
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**International
Criminal
Court**

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Date: 7 December 2020

TRIAL CHAMBER X

Before

**Judge Antoine Kesia-Mbe Mindua (Presiding judge)
Judge Tomoko Akane
Judge Kimberly Prost**

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD***

Public

Request for Leave to File *Amicus Curiae* Submission on Behalf of Ammar Al Baluchi

Source: Counsel for Ammar Al Baluchi

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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I. INTRODUCTION

1. Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence, Ammar Al Baluchi respectfully requests leave to make submission as *amicus curiae* regarding Trial Chamber X's consideration of the allegations of torture and CIDT and the related challenge under Article 69(7) to the contested items P-0620 and P-0655.

2. If granted leave, Ammar Al Baluchi will make submissions on the following issue to assist in the Chamber's decision: Evidence obtained following the torture of a suspect and/or while a suspect remains in prolonged incommunicado detention (as occurred with Mr. al Baluchi) is unreliable and inadmissible pursuant to Article 69(7) of the Rome Statute.

II. SUBMISSIONS

a. The proposed submissions will assist the Trial Chamber's evaluation of the reliability of allegedly "cleansed" statements through comparable facts and legal analysis.

3. Rule 103(1) of the Rome Statute provides as follows: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observations on any issue that the Chamber deems appropriate."

4. Mr. al Baluchi is a co-defendant before the military commission at Guantanamo Bay in the capital proceedings *United States v. Khalid Sheikh Mohammad et al* (the "9/11 case"). Mr. al Baluchi was first disappeared in Pakistan on April 29, 2003. Soon thereafter, he entered the Central Intelligence Agency's Rendition, Detention, and Interrogation ("RDI") program, and spent the next 3.5 years in prolonged arbitrary and incommunicado detention at the CIA's secret prisons,

referred to as “black sites”.¹ Mr. al Baluchi was subjected to numerous torture techniques at different points during his CIA custody, including water torture; beatings so brutal that he suffered a traumatic brain injury; years-long sleep restriction, and continuous threats of torture and death. During his prolonged arbitrary and incommunicado detention in CIA custody, Mr. al Baluchi was denied access to a lawyer or any contact with his family or the outside world, and was given no judicial process to justify his detention.

5. During Mr. al Baluchi’s 3.5 years in prolonged arbitrary and incommunicado CIA detention, he was interrogated hundreds of times by dozens of CIA personnel in five different black sites. The information provided by Mr. al Baluchi and other CIA detainees during their black site interrogations was used contemporaneously by the Federal Bureau of Investigation (“FBI”) in their investigation into the September 11 attacks, and by the National Commission On Terrorist Attacks Upon the United States in their report on the September 11th conspiracy and attacks (the “9/11 Commission Report”).² The highly redacted Executive Summary of the Report of the Senate

¹ United States Senate Select Committee on Intelligence, Executive Summary of the Report on the Central Intelligence Agency’s Rendition, Detention, and Interrogation Program, Dec. 9, 2014, *available at*

http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909 [“SSCI Redacted Executive Summary”]; United Nations Office of the High Commissioner on Human Rights, Working Group on Arbitrary Detention, Opinion 89/2017 Concerning Ammar al Baluchi, *available at* https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session80/A_HRC_WGAD_2017_89.pdf [“UNWGAD Opinion 89/2017”].

² *See, e.g.*, National Commission on Terrorist Attacks Upon the United States, “The 9/11 Commission Report,” at 146: “Chapters 5 and 7 rely heavily on international obtained from captured al Qaeda members. A number of these ‘detainees’ have firsthand knowledge of the 9/11 plot. Assessing the truth of statements by these witnesses – sworn enemies of the United States – is challenging. Our access to them has been limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place. We submitted questions for use in the interrogations, but had no control of whether, when, or how questions of particular interest would be asked. Nor were we allowed to talk to the interrogators so that we could better judge the credibility of the detainees and clarify ambiguities in the reporting. We were told that our requests might disrupt the sensitive interrogation process.”

Select Committee on Intelligence on the CIA's RDI program contains numerous examples of inaccurate information obtained from detainees during their prolonged arbitrary and incommunicado CIA detention.³

6. Between 2003-2006, Mr. al Baluchi suffered from an alleged "psychotic break" and CIA personnel noted his "major psychological issues" stemming from his prolonged arbitrary and incommunicado detention, including "anxiety symptoms due to the stress of being in custody," "intrusive thoughts of imagined potential mistreatment," and a diminished capacity to "cope with sustained confinement."⁴ Such psychological distress related to his torture and his prolonged incommunicado detention was evident within the first months of his detention. In the intervening 14 years, Mr. al Baluchi has been diagnosed with post-traumatic stress disorder, in addition to the traumatic brain injury and permanent sleep disturbances resulting from his physical torture.

7. Following his transfer to Guantanamo Bay in September 2006 and subsequent detention at Camp 7 (the most restrictive facility at Guantanamo), Mr. al Baluchi remained under the operational control of the CIA.⁵ Mr. al Baluchi's detention remained incommunicado (except for meetings with representatives of the International Committee of the Red Cross) until 2008, when he was finally granted legal representation.⁶

8. In January and February 2007, FBI agents questioned Mr. al Baluchi at "Camp Echo," a former black site at Guantanamo Bay in which two of his co-defendants had previously been detained. FBI agents advised Mr. al Baluchi of the "voluntary" nature of the questioning, and Mr.

³ See, e.g., SSCI Redacted Executive Summary at 83, 92.

⁴ Excerpt from the Report of the Office of the Inspector General Regarding Allegations of Torture made by Ammar al Baluchi (2008) at MEA-2C-00000468-469. Military commissions rules prohibit Mr. al Baluchi from attaching this document as an annex.

⁵ SSCI Redacted Executive Summary at 160.

⁶ UNWGAD Opinion 89/2017 at paras. 61-62.

al Baluchi was provided with meals and breaks during the FBI interrogations. The early 2007 interrogations have been referred to as the “clean team” interrogations by counsel for the United States government⁷, and now form the U.S. government’s primary evidence against Mr. al Baluchi in his pending capital prosecution in a military commission at Guantanamo Bay. Mr. al Baluchi remains detained in Camp 7 at Guantanamo Bay and the United Nations Working Group on Arbitrary Detention has determined that his detention constitutes prolonged arbitrary detention.⁸

b. The proposed submissions fall within the expertise of Mr. al Baluchi and his legal team.

9. Mr. al Baluchi is uniquely qualified to make the proposed factual and legal submissions as *amicus curiae*. Firstly, Mr. al Baluchi is currently litigating the government’s potential use of torture-tainted evidence in his upcoming capital prosecution. In May 2019, counsel for Mr. al Baluchi filed a 1205-page Motion to Suppress Alleged Statements as Involuntary and Obtained Through Torture. That motion is unavailable to the public due to the classification of certain facts in the documents, including the true locations of the black sites. However, Mr. al Baluchi utilized numerous unclassified expert declarations in addition to years of research regarding the physical and psychological (scientific) impact of torture on interrogations, including the use of arbitrary and incommunicado detention. As a result, Mr. al Baluchi and his counsel possess specialized and directly analogous information to Mr. Al Hassan’s case regarding the deleterious impact of prolonged arbitrary and incommunicado detention on the reliability of evidence taken from interrogations in such detention.

⁷ The New York Times, “Lawyers Press Case That 9/11 Confessions Given to FBI Are Tainted,” 29 July 2019, available at <https://www.nytimes.com/2019/07/29/us/politics/september-11-confessions-guantanamo.html>.

⁸ *Id.*

10. *Secondly*, since September 2019, the military commission at Guantanamo Bay has heard testimony from 12 witnesses, predominantly former FBI- or CIA-affiliated individuals, on the purpose of the RDI program, the impact of the torture techniques including incommunicado detention, and the conditions and procedures of the FBI's 2007 interrogations shortly following Mr. al Baluchi's transfer to Guantanamo Bay.⁹ Although much of the witness testimony and supporting documentary evidence are unclassified, the remoteness of the military commission and delay in public posting of commission documents and transcripts currently precludes independent public access to most information stemming from the suppression hearings. However, counsel for Mr. al Baluchi are able to provide relevant unclassified information to the Trial Chamber.

11. *Thirdly*, Mr. al Baluchi is being prosecuted in a military commission that the United States government claims to have convened pursuant to the laws of war applicable to a non-international armed conflict.¹⁰ In 2014, the United States Department of State also formally acknowledged the application of the Convention Against Torture to Guantanamo Bay.¹¹ The unique legal position of Guantanamo Bay means that counsel for Mr. al Baluchi has analyzed the United States' torture and interrogations of Guantanamo Bay detainees through applicable international human rights

⁹ For example, Dr. James Mitchell, a former psychologist who designed the CIA's "enhanced interrogation program," based on the instillation in detainees of a psychological condition called "learned helplessness," testified that Mr. al Baluchi was used as a "training prop" for torture techniques, in addition to details about the incommunicado detention of other CIA terror suspects. See National Public Radio, "CIA Used Prisoner as 'Training Prop' for Torture," January 23, 2020, available at <https://www.npr.org/2020/01/23/799130233/psychologist-who-helped-create-interrogation-methods-says-cia-may-have-gone-too>

¹⁰ Mr. al Baluchi's position that the United States' use of military commissions for the prosecution of acts related to the September 11 attacks is illegal, and the UN Working Group on Arbitrary Detention has agreed that the Guantanamo Bay military commission is convened solely for the prosecution of Muslim non-citizen males.

¹¹ U.S. Mission to International Organizations in Geneva," Acting Legal Adviser McLeod: U.S. Affirms Torture Is Prohibited at All Times in All Places," Nov. 12-13, 2014, available at <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>.

and humanitarian law. Counsel for Mr. al Baluchi can therefore offer legal analysis regarding the reliability of evidence obtained pursuant to incommunicado detention and other torture, in a similar situation to Mr. Al Hassan's, that are directly relevant to the Trial Chamber's evaluation.

III. RELIEF SOUGHT

12. Mr. al Baluchi's litigation to suppress torture-tainted evidence in the 9/11 case provides critical factual, scientific, and legal context to the specific issue of the reliability of so-called "clean" interrogations now at issue in Mr. Al Hassan's case before the Trial Chamber. Therefore, Mr. al Baluchi respectfully requests permission to file an *amicus curiae* brief.

Respectfully submitted,



Alka Pradhan, Defense Counsel
on behalf of
Ammar al Baluchi

Dated this 7th day of December, 2020

At Washington, DC

United States of America