
Advance Edited Version

Distr.: General
6 April 2023

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fifth session, 14–18 November 2022

Opinion No. 66/2022 concerning Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) (United States of America, Pakistan, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom of Great Britain and Northern Ireland)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,¹ on 28 April 2022 the Working Group transmitted to the Governments of the United States of America, Pakistan, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom of Great Britain and Northern Ireland, a communication concerning Zayn al-Abidin Muhammad Husayn (Abu Zubaydah). The Governments of Morocco, Poland and the United Kingdom submitted timely responses. The Governments of Lithuania, Thailand and the United States responded after the deadline. The Governments of Afghanistan and Pakistan did not respond. All States are parties 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);

¹ [A/HRC/36/38](#).

(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).

Submissions

Communication from the source

4. Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) is Palestinian and grew up in Saudi Arabia. Born on 12 March 1971, he was 31 years old at the time of his capture.

a. Arrest in Pakistan and secret detention by the United States Central Intelligence Agency

5. According to the source, Mr. Zubaydah was captured in Faisalabad, Pakistan, by United States authorities working with the police of Pakistan, on or about 28 March 2002.² He sustained bullet injuries. After a few days of medical attention in Pakistan under the supervision of the Central Intelligence Agency, he was flown by the Agency to a secret detention site in Thailand.

6. The source reports that, upon capture, the Government of the United States identified Mr. Zubaydah as a key terrorist threat and a “member of Usama bin Laden’s inner circle”.³ These assertions were allegedly based on torture-induced information, which was recanted in 2002. Documentation compiled by the Central Intelligence Agency did not support the claims,⁴ yet the information obtained was repeated and shared between departments.

7. Although the Central Intelligence Agency was informed on 10 August 2002 that it was highly unlikely that Mr. Zubaydah had the intelligence sought, the Agency responded that this was likely due to resistance training and continued his interrogation.

8. In February 2008, the Government of the United States conceded that Mr. Zubaydah was not a member of Al-Qaida.⁵ In 2017, he was removed from the Al-Qaida sanctions list. Despite the basis for his detention having been discredited, the Government continues to assert its right to detain him indefinitely.

9. The interrogation team of the Central Intelligence Agency considered, especially in light of the planned psychological pressure techniques to be implemented, that they needed to get reasonable assurances that Mr. Zubaydah would remain in isolation and incommunicado for the remainder of his life.⁶ The response allegedly confirmed that all the major players were in concurrence that he should remain incommunicado for the remainder of his life.⁷

10. In July 2002, the Central Intelligence Agency acquired approval for the use of 10 enhanced interrogation techniques on Mr. Zubaydah: attention grasp; walling; facial hold; insult slap; cramped confinement; exacerbating phobias; wall standing; stress positions; prolonged sleep deprivation; and the waterboard technique.⁸

11. Reportedly, between 4 and 23 August 2002, Mr. Zubaydah was subjected to combined enhanced interrogation techniques almost 24 hours a day. During this time, he spent 266 hours in a coffin-size confinement box and 29 hours in a small confinement box.⁹ He was threatened with death and waterboarded at least 83 times, on one occasion having to be

² United States, Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program: Executive Summary* (Washington, 2014), p. 21.

³ The White House, “[Statement by the Press Secretary](#)”, 2 April 2002.

⁴ Senate Select Committee on Intelligence, *Committee Study*, p. 410.

⁵ *Ibid.*, p. 410.

⁶ Central Intelligence Agency cable (151006Z JUL 02).

⁷ Central Intelligence Agency cable (182321Z JUL 02).

⁸ Central Intelligence Agency Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)* (Washington, 2004), p. 15.

⁹ Senate Select Committee on Intelligence, *Committee Study*, p. 42.

resuscitated. Prior to this, he had been kept in isolation for 47 days and subjected to sensory manipulation.¹⁰

12. He was reportedly also subjected to ice baths, rectal rehydration, forced nudity and sexual violence. Methods were tested on him that had never been discussed.

13. Mr. Zubaydah was reportedly held by the Central Intelligence Agency overseas for more than four years. He was also held in Guantanamo for six months from 22 September 2003, until a hearing at the Supreme Court led the Agency to fear that he would be granted habeas corpus and access to counsel. Then, they transferred him back to black sites.

b. Thailand (“Site Green”)

14. On 29 March 2002, Thai officials approved the creation of a secret detention facility of the Central Intelligence Agency.¹¹ Thai officers had knowledge of the presence of Mr. Zubaydah at Site Green and strategized with Agency’s officers about how to respond in the event of his death.

15. Mr. Zubaydah was brought to the facility on or around 31 March 2002 and was transferred out of Thailand on 4 December 2002 to Poland.

16. Reportedly, Mr. Zubaydah was tortured in Thailand, as concluded by the European Court of Human Rights.¹²

c. Poland (“Site Blue”)

17. Between 4 and 5 December 2002, Mr. Zubaydah was transferred to Poland, where he was detained until 22 September 2003.¹³ The European Court of Human Rights established that Poland had knowledge of, and actively supported, the extraordinary rendition programme, and it was responsible for torture, arbitrary detention and other violations.¹⁴

18. Poland has failed to investigate the mistreatment or to provide Mr. Zubaydah with a remedy.¹⁵ In August 2019, Poland was urged to complete the investigation into the extraordinary rendition programme but in 2021 it was partially discontinued.¹⁶

d. Morocco

19. Mr. Zubaydah was transferred to Morocco on 27 March 2004. He was detained there until 17 or 18 February 2005.¹⁷

20. The United States reportedly provided a multi-million dollar subsidy package to Morocco.¹⁸ The Senate Select Committee on Intelligence has confirmed that Mr. Zubaydah was interrogated in Morocco.¹⁹

¹⁰ Senate Select Committee on Intelligence, *Committee Study*, pp. 40–44.

¹¹ See also European Court of Human Rights, *Husayn (Abu Zubaydah) v. Poland*, application No. 7511/13, Judgment, 24 July 2014, para. 308; and *Abu Zubaydah v. Lithuania*, application No. 46454/11, Judgment, 31 May 2018, para. 91.

¹² *Husayn (Abu Zubaydah) v. Poland*, para. 86; Senate Select Committee on Intelligence, *Committee Study*, pp. 40–45.

¹³ Senate Select Committee on Intelligence, *Committee Study*, p. 67.

¹⁴ *Husayn (Abu Zubaydah) v. Poland*, paras. 444, 510 and 511.

¹⁵ *CCPR/C/POL/CO/6*, para. 15; and *Husayn (Abu Zubaydah) v. Poland*, paras. 481–493 and 544.

¹⁶ Council of Europe, decision H46-21 of the Ministers’ Deputies adopted at their 1428th meeting, CM/Del/Dec(2022)1428/H46-21, 9 March 2022. Available at https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5c38c.

¹⁷ *Abu Zubaydah v. Lithuania*, para. 497.

¹⁸ Sam Raphael, Crofton Black and Ruth Blakeley, *CIA Torture Unredacted: An Investigation into the CIA Torture Programme* (Rendition Project, 2019), p. 124; and Senate Select Committee on Intelligence, *Committee Study*, p. 139.

¹⁹ Senate Select Committee on Intelligence, *Committee Study*, p. 392, footnote 2208.

e. Lithuania

21. Lithuania hosted a Central Intelligence Agency detention centre from February 2005 to March 2006. Mr. Zubaydah was flown to Lithuania on 17 or 18 February 2005 and remained there until 25 March 2006.²⁰

22. The source alleges that Lithuania was an accomplice in the extraordinary rendition programme and in multiple violations of Mr. Zubaydah's rights, and in his transfer despite the foreseeable risk of further violations.

23. In 2009, a parliamentary investigation found that detention sites operated by the Central Intelligence Agency had been established and the Agency's flights had entered Lithuania, with the collaboration of national intelligence services. In 2010, Lithuanian prosecutors opened an investigation. However, it fell short of the necessary standards.

f. Afghanistan

24. Several detention sites operated by the Central Intelligence Agency existed in Afghanistan, codenamed by the Senate Select Committee on Intelligence as "Orange", "Brown", "Cobalt" and "Grey". There was also a secret prison at Bagram airbase. Mr. Zubaydah was transferred to Site Brown on 25 or 26 March 2006.²¹ He was detained in Afghanistan until September 2006, before being transferred to Guantanamo.

25. The Central Intelligence Agency had "unlimited access" to some prisoners in Afghanistan, while it was also allowed to use airports and airspace for flights connected to the rendition programme.²²

g. United Kingdom

26. In a 2010 United Nations joint study, the United Kingdom was identified as a State complicit in the extraordinary rendition programme that knowingly took advantage of it.²³ The Intelligence and Security Committee of Parliament (United Kingdom) found, in 2018, that the Government had sent questions to interrogators and received intelligence obtained from detainees who the authorities knew or should have known had been mistreated. The parliamentary inquiry found that the United Kingdom had been directly aware of Mr. Zubaydah's "extreme mistreatment", yet its intelligence agencies had provided questions for his interrogation.²⁴

27. A report of the European Parliament cites 170 stopovers by aircraft operated by the Central Intelligence Agency at airports in the United Kingdom.²⁵ The source indicates that Mr. Zubaydah's rendition flight stopped in London to refuel; the European Court of Human Rights confirmed that this had taken place on 6 December 2002.²⁶

h. Detention at Guantanamo

28. Mr. Zubaydah was transferred into United States military custody at Guantanamo on 5 September 2006.²⁷

²⁰ *Abu Zubaydah v. Lithuania*, paras. 532 and 548.

²¹ Senate Select Committee on Intelligence, *Committee Study*, p. 154; and *Abu Zubaydah v. Lithuania*, para. 548.

²² Raphael, Black and Blakeley, *CIA Torture Unredacted*, p. 104.

²³ [A/HRC/13/42](#), para. 159.

²⁴ United Kingdom, Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001–2010* (London, 2018), para. 85.

²⁵ European Parliament, "Report on the alleged use of European countries by the CIA for transportation and illegal detention of prisoners" (2007), para. 78.

²⁶ *Husayn (Abu Zubaydah) v. Poland*, paras. 93 and 94; and Raphael, Black and Blakeley, *CIA Torture Unredacted*, pp. 44 and 45.

²⁷ Senate Select Committee on Intelligence, *Committee Study*, p. 46.

i. Purported basis for detention

29. The Government of the United States asserts its right to detain Mr. Zubaydah pursuant to the “law of war” authority, under the Authorization for the Use of Military Force (2001) and the National Defense Authorization Act.

30. The Government continues to allege this “law of war” authority to detain Mr. Zubaydah until the cessation of hostilities, on the basis that the non-international armed conflict continues.²⁸

ii. Circumstances of detention

31. According to the source, between 2006 and March 2021, Mr. Zubaydah was detained at Camp 7, the most secretive and highest security camp within Guantanamo. Camp 7 was closed in May 2021.

32. Reports allege torture and abuse and unlawful killing during the period when he was detained there. Communication between inmates was prohibited, causing serious psychological effects. Medical care was grossly deficient.²⁹ Mr. Zubaydah’s serious health conditions, including from injuries sustained during torture, were exacerbated by the denial of medical attention.

33. Mr. Zubaydah has been repeatedly denied access to his records and to an independent medical evaluation and treatment, despite a United States court ruling to that effect in June 2020.³⁰

34. There are extreme secrecy measures. Any communication to or from Mr. Zubaydah must be declassified before being released. He is not allowed telecommunication with family and has extremely limited access to the outside world. He suffers distress due to his failing memories of his family.

35. Lawyer-client communication has been seriously impeded. Use of listening devices prompted the counsel of some other detainees to resign, but a judicial order prohibited them from explaining to their clients why. Privileged material has also been seized by the detaining authority, in a system in which lawyer-client privilege is not adequately respected.

iii. “Review” procedures and lack of safeguards in relation to detention

Combatant Status Review Tribunals

36. Between 2004 and 2011, Combatant Status Review Tribunals operated at Guantanamo. They could not review the lawfulness of detention and, as the Supreme Court of the United States acknowledged, were an inadequate substitute for habeas corpus.³¹ Mr. Zubaydah was brought before a Combatant Status Review Tribunal on 27 March 2007. He was not provided a lawyer, but a one-time “personal representative” – a military officer without legal training and with access only to unclassified evidence. The Government relied on inculpatory evidence that had been recanted.³²

Periodic Review Board

37. The Periodic Review Board, which replaced Combatant Status Review Tribunals in 2011, does not review the lawfulness of detention but a detainee’s “threat level”, which is a non-legal standard. Detainees have counsel and can present evidence, but, as Mr. Zubaydah’s hearings show, the process contributes to arbitrariness. Mr. Zubaydah’s first Periodic Review Board hearing was scheduled for 23 August 2016. Four attorneys with top-secret clearance represented him, but only one was allowed to appear. The lawyer’s request for a short

²⁸ District Court of Columbia, *Al-Bihani et al. v. Trump*.

²⁹ Scott Roehm and others, “Deprivation and despair: the crisis of medical care at Guantánamo”, Physicians for Human Rights, 26 June 2019; and Carol Rosenberg, “[Inside the most secret place at Guantánamo bay](#)”, *New York Times*, 15 March 2020.

³⁰ District Court of Columbia, *Husayn v. Esper*, docket No. 08-cv-1360 (EGS) (DDC), 6 June 2020.

³¹ Supreme Court, *Boumediene v. Bush* 553 US 723 (2008).

³² Senate Select Committee on Intelligence, *Committee Study*, p. 410.

adjournment or alternative counsel due to a relative dying was refused. The hearing proceeded with a personal representative, who was not a lawyer and was unfamiliar with the case. The Periodic Review Board declined to consider a report of the Senate Select Committee on Intelligence, which contained key information, such as the false nature of the allegations against Mr. Zubaydah. He was prevented from speaking during the 15-minute session. The Periodic Review Board found against him.

38. It took four years to secure another Periodic Review Board hearing, in February 2020. The Board included a member of the Central Intelligence Agency and a member of the Office of the Director of National Intelligence. The Board decided that Mr. Zubaydah continued to pose a threat to the United States, based on unsubstantiated claims that could not be contested.

Lack of habeas corpus

39. On 6 August 2008, Mr. Zubaydah filed a habeas corpus petition with the United States District Court of Columbia. Years passed with motion after motion remaining undecided. A motion to recuse the judge for nonfeasance was mooted by reassignment.

40. On 14 September 2009, Mr. Zubaydah filed a motion for discovery and memorandum of law in support, but comprehensive discovery has still not been provided. On 5 October 2018, he filed a notice to alert the Court that all pending motions were fully briefed and awaited action by the Court.³³ A petition for a writ of mandamus in the Court of Appeals for the District of Columbia Circuit seeking an order to attend to the case was rejected.

41. The Supreme Court held in the *Boumediene* case that Guantanamo detainees must have a meaningful opportunity to challenge the lawfulness of their detention. However, since *Al-Adahi v. Obama*,³⁴ a series of cases have raised the standard of review and, since 2010, no petition has been granted, and those previously allowed have been reversed.

42. On 11 January 2018, a collective habeas petition was lodged by 11 detainees, including Mr. Zubaydah. The Government responded that detention was not indefinite but indeterminate. The collective petition has been rejected, although Mr. Zubaydah's portion has to be ruled upon.

Military Commission

43. Mr. Zubaydah has reportedly implored the Convening Authority of the Military Commissions and the Chief Prosecutor of the Military Commission to commence proceedings against him, but to no avail. Mr. Zubaydah is effectively a "forever prisoner" with no forum to challenge, and seek to end, his arbitrary detention.

i. Legal analysis

i. No legal basis for detention

44. After 20 years, Mr. Zubaydah has still not been provided with a legal basis for his detention. The failure to provide a legal basis for detention is itself a violation of articles 9 (2) and 14 (3) (a) of the Covenant.

45. The source claims that the justification of the Government of the United States for the continued detention of Mr. Zubaydah has no basis in international humanitarian law:

(a) The United States has not demonstrated the existence of an armed conflict or that Mr. Zubaydah was taking an active part in hostilities;³⁵

(b) Even if international humanitarian law were applicable, it could never justify indefinite detention during an endless war on an indeterminate enemy on the basis of ill-defined "threats", or for interrogation;

³³ District Court of Columbia, *Husayn v. Gates*, case No. 1:08-cv-1360, Doc. 526.

³⁴ District Court of Columbia, *Al-Adahi v. Obama*, 613 F.3d 1102, 1111.

³⁵ Opinion No. 2017/89.

(c) If security detention can be justified outside an armed conflict, it is only under exceptional circumstances that require a present, direct and imperative threat, which has not been shown;

(d) Mr. Zubaydah had no opportunity to refute the presumptions of fact upon which the Periodic Review Board reached the conclusion that his detention was justified on security grounds.

46. The indefinite detention of Mr. Zubaydah is indicative of arbitrariness.

47. Detention for preventing embarrassment or accountability for torture or other crimes is arbitrary. The true basis for the detention of Mr. Zubaydah is unknown. However, the undertakings that he would never be released have held true.

ii. Grave lack of procedural safeguards

48. Since his arrest, Mr. Zubaydah has been denied a reasoned justification for his detention, in violation of principles 10, 12 and 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. He was denied consular access, in violation of article 36 of the Vienna Convention on Consular Relations, 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).

49. Mr. Zubaydah has had no judicial review of his detention, despite the Supreme Court ruling recognizing the right to habeas corpus. There has been no meaningful progress in Mr. Zubaydah's proceedings, in contravention of article 9 (3) and (4) of the Covenant and principles 4 and 11 of the Body of Principles. The summary military and administrative processes fall far short of the requirements of judicial review, which implies a denial of an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. Since his habeas corpus petition was lodged in 2008, he has had no hearing and has been deprived of the opportunity to challenge the Government's claims, in violation of article 14 (1) and (3) of the Covenant. The reliance on evidence obtained during torture carried out by the Central Intelligence Agency is prohibited under article 14 (3) (g) of the Covenant and article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

50. He was not afforded access to legal representation between 2002 and 2008, in violation of article 14 (3) of the Covenant and principles 11 (2), 17 and 18 of the Body of Principles. His subsequent access to counsel was hindered, including communication restrictions and infringements on lawyer-client privilege.

51. Mr. Zubaydah has always been detained without charge. The failure to lodge criminal charges, or to release him, amounts to arbitrariness. Indefinite and prolonged detention without charge violates article 14 (3) (c) of the Covenant.

52. There is no prospect of a fair trial. Misleading information made available publicly and selectively about Mr. Zubaydah is, at a minimum, highly prejudicial to his ability to obtain a fair trial. The failure to provide psychological support and rehabilitation to torture victims impedes the possibility of a fair trial.

iii. Discrimination based on nationality and religion

53. The source claims that the Guantanamo detention regime, and denial of rights ordinarily applicable within the United States judicial system, apply only to non-national Muslim men.

54. The facts reportedly indicate that differential approaches to nationalities have played a defining role in determining who has been released and who continues to be detained arbitrarily.

55. The failure to respond to serious violations of Mr. Zubaydah's rights amounts to discrimination on grounds of nationality and religion. The denial of rights, on a discriminatory basis, that would ordinarily apply within the United States judicial system is a violation of articles 2, 5 (a) and (b) and 6 of the International Convention on the Elimination

of All Forms of Racial Discrimination, articles 2, 7 and 10 of the Universal Declaration of Human Rights, articles 2, 14 and 26 of the Covenant and principle 5 of the Body of Principles.

iv. Prolonged detention, torture, disappearance and right to life

56. The European Court of Human Rights determined that Mr. Zubaydah had been tortured and that the nature and conditions of his detention amounted to torture or cruel, inhuman or degrading treatment. In this case, the excessive indefinite detention for 20 years to silence Mr. Zubaydah, in the absence of any due process, means that his ongoing arbitrary detention amounts to torture.

57. The restrictions on Mr. Zubaydah's contact with the outside world violate article 10 (1) of the Covenant, as well as the Nelson Mandela Rules and the Body of Principles.

58. Mr. Zubaydah's detention in the extraordinary rendition programme allegedly constituted enforced disappearance. The defining characteristic, and the purpose of the programme, was to remove individuals' protection of the law.

59. In the extreme circumstances of his indefinite detention without charge or trial, and with no apparent prospect of release, the source claims a violation of Mr. Zubaydah's right to life. In its general comment No. 36 (2018), the Human Rights Committee noted that extreme forms of arbitrary detention were incompatible with the right to life. There is a right to life with dignity. The lack of agency and autonomy, and his inability to seek to influence his fate, embody the hopelessness of his situation.

v. Investigation, truth, accountability and reparation

60. The source claims that States involved in the extraordinary rendition programme have failed in their obligations to complete thorough, independent and effective investigations, sanction those responsible, provide appropriate redress and reparation to victims, and ensure truth and transparency to restore public confidence.

vi. Responsibility

61. The source alleges that the arbitrary, prolonged and indefinite detention and torture of Mr. Zubaydah is directly attributable to the United States, pursuant to article 4 of the articles on responsibility of States for internationally wrongful acts. In addition, it is argued that each of the other seven States are legally responsible for their roles in the extraordinary rendition programme and for directly contributing to the ongoing arbitrary detention. They have failed their positive obligations to prevent and protect violations of his fundamental human rights on their territory and to respond appropriately.

62. In relation to the United Kingdom, it is responsible for aiding and assisting the United States, pursuant to article 16 of the articles on responsibility of States for internationally wrongful acts.

Response from the Governments

63. On 28 April 2022, the Working Group transmitted the allegations of the source to the Governments identified above, requesting detailed information about the arrest, transfer and current detention of Mr. Zubaydah. The Working Group called upon the Government of the United States to ensure Mr. Zubaydah's physical and mental integrity.

64. The Government of the United Kingdom responded on 21 June 2022. It referred to lessons learned from various independent examinations and noted its new and improved guidance in its principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees published in 2019. In relation to Mr. Zubaydah, it stated that he had never been on its territory while in detention, nor detained by its authorities overseas. It rejected the allegation that it had been unresponsive in civil proceedings, and argued that it had engaged with his solicitors, complied with requests from courts in the United Kingdom and attended all hearings.

65. The Government of Morocco responded on 27 June 2022, stating that Mr. Zubaydah had never registered a trip to Morocco and therefore his allegations were untrue.

66. The Government of Poland responded on 27 June 2022. It noted that the Public Prosecution Service had conducted an investigation concerning officials exceeding their powers, between 2001 and 2005, by allowing places of isolation to accommodate persons suspected of terrorist activity for more than seven days, in breach of the law. On 30 November 2020, the Public Prosecution Service partially discontinued this investigation. The Public Prosecution Service requested international legal assistance from the United States on 29 January 2021. The investigation was suspended on 26 February 2021, while awaiting the implementation of the request. On 9 May 2022, the United States indicated that the request was under examination. The Government noted that its authorities were involved in the execution process of the judgment of the European Court of Human Rights. Poland paid the applicant the just satisfaction awarded by the Court.

67. The Governments of Thailand and Lithuania submitted responses on 5 and 20 July 2022, respectively, that is, after the deadline given by the Working Group. The responses are therefore considered late and cannot be accepted as if they had been presented within the deadline.

68. On 4 May 2022, the Government of the United States requested an extension of time in which to provide its response. The Working Group granted the extension, setting 4 July 2022 as the new date. The Government of the United States submitted its response on 16 August 2022, that is, after the deadline. The response is therefore considered late and cannot be accepted as if it had been presented on time.

69. The Governments of Pakistan and Afghanistan did not respond.

Additional comments from the source

70. Regarding the United Kingdom, the source stated that the investigations had fallen short of its international obligations. The source noted the finding of the European Court of Human Rights that the aircraft contracted by the Central Intelligence Agency to transport Mr. Zubaydah had stopped in London on 6 December 2002 on its way back to the United States, and noted that a parliamentary report had found the United Kingdom to have supplied questions for Mr. Zubaydah despite knowledge that he would be tortured. Regarding the civil proceedings, the Government of the United Kingdom has delayed the legal process rather than engaging with it responsibly.

71. Regarding Poland, the source stated there had been no effective investigation into Mr. Zubaydah's detention and torture, and no serious effort to ensure accountability. The processes had lacked transparency. Despite the payment of just satisfaction, the Government should apologize to the victim and facilitate release or resettlement.

72. Regarding Morocco, the source regretted that the Government had reiterated its blanket denial of Mr. Zubaydah's detention and had failed to engage with the evidence to the contrary. The source provided the details of various inquiries that had found that he had been in Morocco. The fact that his presence may not have been registered was an inherent aspect of the arbitrariness of his detention.

Discussion

73. In determining whether Mr. Zubaydah's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations.³⁶

74. The source has submitted that Mr. Zubaydah's detention is arbitrary and falls under categories I, III and V. As detailed below, all of those categories are relevant to his treatment by the United States. Conversely, for Pakistan, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom only categories I and III (to the extent that Mr.

³⁶ A/HRC/19/57, para. 68.

Zubaydah's detention concerns torture and cruel, inhuman or degrading treatment) are potentially relevant to their treatment of Mr. Zubaydah.

75. Since the terrorist attacks upon the United States on 11 September 2001, the Working Group has developed a body of legal analysis and jurisprudence reaffirming that the prohibition of arbitrary detention is a peremptory norm (*jus cogens*) of international law from which no derogation is permitted³⁷ and that the prolonged and indefinite detention of individuals at Guantanamo violates that prohibition.³⁸ The Working Group has set out key principles in this regard, including in relation to the obligations of States under human rights law,³⁹ habeas corpus⁴⁰ and fair trial rights,⁴¹ as well as in relation to the applicability of international humanitarian law.⁴²

76. On the interrelated issue of so-called extraordinary rendition, the Working Group has also stated relevant principles in its jurisprudence, highlighting its incompatibility with international law.⁴³

a. Category I

i. Allegations against the United States

77. The allegations against the United States relate to the arrest and transfer of Mr. Zubaydah on or about 28 March 2002 and ongoing detention since then. The obligations of the Government of the United States extend to persons detained at Guantanamo, including Mr. Zubaydah.⁴⁴

78. The source notes that that United States authorities have asserted the right to detain Mr. Zubaydah on the basis that there is an ongoing non-international armed conflict. According to the source, this justification has no basis in international humanitarian law. In its late reply, the Government of the United States sets out its reliance on a "law of war" authority and claims that Mr. Zubaydah's detention is authorized under domestic law pursuant to the Authorization for the Use of Military Force.

79. In relation to the Government's claim regarding the Authorization for the Use of Military Force, the Working Group notes that it does not specifically authorize arrest or detention.⁴⁵ To the extent the Government is relying on international humanitarian law, it fails to show that there are ongoing circumstances justifying the detention of Mr. Zubaydah under the "law of war". In fact, according to the aforementioned report of the Senate Select Committee on Intelligence, the Government conceded, in 2008, that Mr. Zubaydah was not a member of Al-Qaida. Consequently, the Government has not satisfied the requirement of demonstrating an ongoing armed conflict, let alone shown the basis in international humanitarian law upon which Mr. Zubaydah can be detained indefinitely.

80. Whereas the Government has asserted that Mr. Zubaydah constitutes an ongoing security threat, as reportedly conveyed during the hearings at the Combatant Status Review Tribunal and Periodic Review Board, it has not substantiated this claim. Administrative detention to address a security threat will normally amount to arbitrary detention when other

³⁷ [A/HRC/22/44](#), para. 51; and opinions No. 10/2013, para. 32; No. 50/2014, para. 66; No. 89/2017, para. 36; and No. 70/2019, para. 53.

³⁸ Opinions No. 2/2009; No. 3/2009; No. 10/2013; No. 50/2014; No. 89/2017; and No. 70/2019.

³⁹ [E/CN.4/2006/120](#), paras. 10 and 11; opinion No. 57/2013, para. 55; and Human Rights Committee, general comment No. 31 (1980), para. 10.

⁴⁰ [E/CN.4/2003/8](#), paras. 61–64; [E/CN.4/2006/7](#), paras. 68–75; [A/HRC/4/40](#), paras. 14 and 15; opinions No. 44/2005, para. 13; No. 2/2009, para. 27; No. 3/2009, para. 30; No. 53/2016, para. 42; and No. 89/2017, para. 37 (a).

⁴¹ [A/HRC/36/37/Add.2](#), para. 78.

⁴² Opinions No. 43/2006, para. 31; No. 11/2007, para. 11; and No. 89/2017, para. 43.

⁴³ [A/HRC/4/40](#), p. 2 and para. 49; [A/HRC/13/42](#), para. 36; opinions No. 47/2005, paras. 19 and 20; and No. 53/2016, paras. 59 and 60. See also opinions No. 11/2018, para. 54; and No. 15/2021, para. 94; and [A/HRC/48/55](#), para. 59.

⁴⁴ Opinion No. 70/2019, para. 56.

⁴⁵ *Ibid.*, para. 64; opinions No. 10/2013, para. 34; and No. 50/2014, para. 69.

effective measures, such as the criminal justice system, are not utilized.⁴⁶ If, under the most exceptional circumstances, a present, direct and imperative threat is claimed to justify the detention of persons considered to present a threat, the burden of proof lies on States to demonstrate that it cannot be addressed by alternative measures, that the detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they respect the guarantees of article 9 of the Covenant. The Government of the United States has not shown that Mr. Zubaydah constitutes a security threat for which there is no option other than keeping him in detention for more than two decades without charges. The Working Group notes the observations of the Office of the Ombudsperson to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, in which the Ombudsperson considered the Government's arguments to be speculative and unsubstantiated. Since he was detained, he has not stood trial, he has not been convicted and he is not serving a sentence. The Working Group finds that Mr. Zubaydah has been held in prolonged and indefinite detention for more than 20 years, without a legal basis, in violation of article 9 (1) of the Covenant.

81. The source alleges that Mr. Zubaydah was not sufficiently informed of the reasons for his arrest and detention. According to article 9 (2) of the Covenant, anyone arrested should be informed, at the time of arrest, of the reasons for it.⁴⁷ Whereas the source submits that Mr. Zubaydah was not given any reasons for his arrest, his hearings at the Combatant Status Review Tribunal and the Periodic Review Board appear to confirm that he was being detained on security grounds. However, in the absence of further information from the Government, the Working Group does not consider that this is a sufficient explanation to meet the Government's obligations, and certainly not the prompt communication of the nature of the charges, particularly given that the hearings occurred 5 and 14 years after his initial detention.

82. The source submits that Mr. Zubaydah was not afforded an effective opportunity to be promptly heard by a judicial or other authority to challenge the legality of his detention. In its late reply, the Government contests that all Guantanamo detainees have the ability to challenge the lawfulness of their detention through a writ of habeas corpus.

83. Under article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge should be brought promptly before a judge or other officer authorized by law to exercise judicial power and should be entitled to trial within a reasonable time or to release. Under article 9 (4) of the Covenant, any form of detention or imprisonment should be ordered by, or be subjected to the effective control of, a judicial or other authority. The judicial or other authority should enjoy a status and tenure affording the strongest possible guarantees of competence, impartiality and independence.⁴⁸

84. With respect to criminal charges, Mr. Zubaydah has never been charged with a crime while being subjected to the extraordinary rendition programme and his counsel have reportedly implored the authorities to press charges and commence proceedings, but these requests have fallen on deaf ears. As a result, Mr. Zubaydah continues to be detained, without prospect of a trial and without a forum in which to meaningfully challenge his detention. This violation of article 9 (1) and (3) of the Covenant amounts to arbitrariness under category I.

85. Mr. Zubaydah was never granted a hearing while being transferred between black sites and was only brought before the Combatant Status Review Tribunal on 27 March 2007, five years after the commencement of his detention, and had limited, if any, access to the information on which his detention was based. The Tribunal did not meet the standards of review by a judicial authority as, inter alia, it could not review the lawfulness of detention. As the Supreme Court of the United States has also concluded, hearings before the Tribunal do not satisfy the right to habeas corpus under article 9 of the Covenant.⁴⁹

86. The Periodic Review Board that replaced the Combatant Status Review Tribunal in 2011 were similarly flawed, as it does not purport to review the lawfulness of detention. The

⁴⁶ Opinion No. 70/2019, para. 66.

⁴⁷ Human Rights Committee, general comment No. 35, para. 24.

⁴⁸ Principle 4 of the Body of Principles; and opinion No. 32/2021, para. 40.

⁴⁹ Opinions No. 2/2009; 10/2013; 50/2014; and No. 89/2017.

Board lacks sufficient independence to ensure a proper review since its panel is composed of members of the executive. The Working Group does not consider that Mr. Zubaydah enjoyed an effective right to challenge the legality of his detention. Additionally, Mr. Zubaydah also filed a petition for a writ of habeas corpus in the District Court of Columbia on 6 August 2008, however, according to the source, it has languished for years without being decided upon. On these bases, the Working Group concludes that the failure to ensure effective habeas corpus constitutes a denial of an effective remedy under article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.

87. The Working Group notes that Mr. Zubaydah was not allowed telecommunication (phone or video) with family, which has led to him losing memory of them, and his access to the outside world is extremely limited. While the harsh regime of preventing detainees from communicating with families or with each other is primarily detailed in relation to Guantanamo, Mr. Zubaydah's communications with the outside world during his rendition to black sites was also extremely limited. This exacerbates the arbitrariness of his detention, as it prevented him from seeking means to challenge the basis for it. His detention in essentially incommunicado conditions amounts to an enforced disappearance, at least during the period that he was deprived of a meaningful opportunity to communicate with his family and/or the outside world. This amounts to a further violation of article 9 of the Covenant under category I.

88. Finally, the Government violated Mr. Zubaydah's rights through its overarching role in the extraordinary rendition programme, which involved transferring him to or from the various countries listed herein, outside of the protection of the law. This amounts to a violation of article 9 (1). In addition to the violations of article 9 (2), (3) and (4), this makes his detention arbitrary under category I.

ii. Allegations against Pakistan

89. Although the source refers to the United States authorities working with the police of Pakistan during Mr Zubaydah's arrest and to the fact that he received medical attention immediately thereafter in Pakistan, it does not provide any further detail regarding the specific role of Pakistan in any violations of his rights.⁵⁰ Given that Mr. Zubaydah was reportedly arrested by United States authorities working with the police of Pakistan, and given that he was under the supervision of the Central Intelligence Agency while being given medical attention, before being flown by the Agency to a secret detention site in Thailand, and in light of the lack of information, it is not established that the Government of Pakistan was complicit in the subsequent process of arbitrary detentions committed against Mr. Zubaydah. Accordingly, the Working Group does not have a sufficient basis to conclude that the Government of Pakistan is responsible for the violations of Mr Zubaydah's rights.

iii. Allegations against Thailand

90. The source provides information showing that Thai officials approved the creation of a secret detention facility operated by the Central Intelligence Agency, which came to be called Site Green. They were aware of Mr. Zubaydah's presence there and planned with the Agency's officers how to respond in the event of his death. Given these unrefuted allegations, and the reference to extensive evidence of his torture during approximately six months in Thailand, the Working Group concludes that the Government of Thailand was complicit, and participated, in the arbitrary detention of Mr. Zubaydah. The Working Group recalls that transferring or receiving detainees outside the confines of any legal procedure, and thereby making it impossible to invoke any legal basis justifying the deprivation of liberty, has been considered arbitrary in the past. Because the Government's involvement in Mr. Zubaydah's mistreatment concerned an apparent lack of any lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in violations of article 9 of the Covenant and thereby his arbitrary detention under category I.

⁵⁰ Opinion No. 27/2022.

iv. Allegations against Poland

91. In relation to Mr. Zubaydah's detention for approximately 10 months in Poland, the source shows that Poland hosted a detention centre (Site Blue) in a military base operated by the Central Intelligence Agency and that the Government of Poland had knowledge of, and actively supported, Mr Zubaydah's torture, arbitrary detention and other violations. For its part, the Government acknowledges that it violated Mr. Zubaydah's rights and refers to paying just satisfaction to him as ordered by the European Court of Human Rights. However, the Government also notes that it has discontinued one related investigation and suspended another. The Working Group acknowledges the payment of just satisfaction, but also considers that this reaffirms the Government's complicity in and partial responsibility for Mr. Zubaydah's arbitrary detention and rights violations. Accordingly, it finds that the Government participated in the arbitrary detention of Mr. Zubaydah. In relation to the discontinuance of investigations into public officials, it considers that the Polish investigations have not been completed in a timely manner and that this constitutes a violation of Mr. Zubaydah's right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. While the European Court of Human Rights has addressed the case, the Working Group does not consider that this deprives it of jurisdiction.⁵¹ Because the Government's involvement in Mr. Zubaydah's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in the violations of article 9 of the Covenant and thereby his arbitrary detention under category I.

v. Allegations against Morocco

92. The source refers to Mr. Zubaydah's stay of approximately 11 months in Morocco, where he was interrogated and tortured. The Government of Morocco states that his visit there was never "registered". In the Working Group's view, the fact that his visit was never registered is insufficient to undermine the source's prima facie credible allegation that he was present in Morocco during that period. Indeed, a lack of registration of his visit would be expected in the case of extraordinary rendition and secret detention. The Working Group considers that Mr. Zubaydah was detained arbitrarily and subjected to mistreatment and torture in Morocco and that the Government participated in it. Because the involvement of the Government concerned the lack of any demonstrated lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in the violations of article 9 of the Covenant and thereby his arbitrary detention under category I.

vi. Allegations against Lithuania

93. In relation to Mr. Zubaydah's stay of approximately 13 months in Lithuania, the source shows that a detention centre operated by the Central Intelligence Agency called Site Violet was housed there. Although Lithuanian prosecutors opened an investigation in 2010, it failed to fulfil the necessary elements of effective investigation, truth-telling and accountability. Consequently, the Working Group considers that the Government of Lithuania is responsible for complicity in the extraordinary rendition programme and violating Mr. Zubaydah's rights while he was on its territory and when he was transferred from its territory, as it was aware of the foreseeable risk of further violations. While the European Court of Human Rights has addressed the case, the Working Group does not consider that this deprives it of jurisdiction.⁵² Because the Government's involvement in Mr. Zubaydah's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in his arbitrary detention under category I.

⁵¹ Opinion No. 89/2018 paras. 64–67.

⁵² *Ibid.*

vii. Allegations against Afghanistan

94. In relation to Mr. Zubaydah's stay of approximately six months in Afghanistan, the source shows that various detention centres operated by the Central Intelligence Agency were established there, including Site Brown, where he was detained from March 2006 until September 2006. Although the information regarding Mr. Zubaydah's treatment in Afghanistan is quite vague, it has been sufficiently demonstrated that the Afghan authorities were aware of the arbitrariness of his detention, particularly in light of the Agency's access to him. Consequently, the Working Group considers that the Government of Afghanistan is responsible for complicity in the extraordinary rendition programme and violating Mr. Zubaydah's rights while he was on its territory and when he was transferred from its territory, as it was aware of the foreseeable risk of further violations against him. Because the Government's involvement in Mr. Zubaydah's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in the violations of article 9 of the Covenant and thereby his arbitrary detention under category I.

viii. Allegations against the United Kingdom

95. The source argues that the provision of questions for interrogation by the Government of the United Kingdom amounts to complicity in torture.⁵³ It recalls that, when third States seek intelligence from a State known to engage in serious rights violations, they contribute to the occurrence of torture and fall afoul of their international obligations.⁵⁴ Moreover, the Government asserts that Mr. Zubaydah has never been in the country while in detention, nor detained by its authorities overseas.

96. Given that the European Parliament and the European Court of Human Rights have found evidence indicating that an aircraft operated by the Central Intelligence Agency to transport Mr. Zubaydah had stopped in London to refuel on 6 December 2002, and in light of the Government's failure to provide any detailed counter-narrative, the Working Group considers that it is responsible for complicity in his detentions. Because the Government's involvement in Mr. Zubaydah's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty, but did not concern the subsequent proceedings in the United States and Guantanamo, the Working Group considers that it participated in the violations of article 9 of the Covenant and thereby his arbitrary detention under category I.

97. The Working Group recalls that the principle of joint responsibility that applies to States when more than one of them was involved in the perpetration of a violation, as elaborated, *inter alia*, in article 16 of the articles on responsibility of States for internationally wrongful acts. In light of its findings above, the Working Group is satisfied that the Governments of the United States, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom played a role in the extraordinary rendition programme, whether through directly detaining persons subjected to it, or through knowingly assisting the implementation of the programme through transport access and the provision of locations for unregistered detention sites. These States are all jointly responsible for the arrest, rendition and arbitrary detention of Mr. Zubaydah,⁵⁵ which amount to violations of article 9 of the Covenant and render his detention arbitrary under category I.

b. Category III

98. Under category III, the first key issue is whether the government authorities played a role in the torture and cruel, inhuman or degrading treatment that the source alleges Mr. Zubaydah suffered or had substantial grounds to believe that the extraordinary rendition programme that they participated in involved torture or cruel, inhuman or degrading treatment.

⁵³ A/HRC/13/42, para. 159.

⁵⁴ A/HRC/10/3, para. 48.

⁵⁵ Opinion No. 84/2020, para. 72.

99. Individuals should not be expelled to another country when there are substantial grounds for believing that their lives would be at risk, or that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment. This is sometimes considered under the principle of non-refoulement. Torture itself is a peremptory norm of international law.⁵⁶ The prohibition of torture is non-derogable, including during the fight against terrorism, because of its status as a *jus cogens* norm, and encompasses the obligation to investigate alleged violations promptly and bring perpetrators to justice, as well as the prohibition of the use of evidence obtained under torture in legal proceedings.⁵⁷

100. The Working Group recalls that Mr. Zubaydah was first transferred into United States custody by Pakistan. Given the lack of information regarding the involvement of Pakistan in the subsequent programme, the Working Group reaches no further finding in respect of Pakistan.

101. In relation to the other Governments, it notes that Mr. Zubaydah was transferred from the United States to the custody of (or under the control of or with the assistance of) Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom as part of the extraordinary rendition programme. Given that the whole extraordinary rendition programme system was established outside of the usual legal controls, and given the information set out above regarding these respondent States' roles in carrying out mistreatment on behalf of the United States, or participating in the programme with knowledge of its nature, the Working Group considers that, along with the United States, the Governments of Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom all had at least substantial grounds to believe that Mr. Zubaydah would be subjected to torture or cruel, inhuman or degrading treatment as a result of his inclusion in the extraordinary rendition programme.

102. The Working Group notes with grave concern the allegations regarding the Central Intelligence Agency's use of enhanced interrogation techniques on Mr. Zubaydah, including on an almost 24-hour-a-day basis. The Working Group considers these allegations to be established, violating the absolute prohibition of torture as a peremptory norm of international law, article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture. It is also cognizant of the determination of the European Court of Human Rights that he was tortured. The Working Group calls on the Governments to investigate Mr. Zubaydah's alleged torture, in accordance with their obligations under articles 4, 12 and 13 of the Convention against Torture, and prosecute anyone found to have been involved.

103. Taking into account the severity of the alleged torture and its impact upon Mr. Zubaydah, the Working Group considers it extremely unlikely that he would have been able to effectively participate in the legal proceedings that were conducted (or any future legal proceedings), reinforcing the conclusion that his right to a fair trial was violated.⁵⁸ The source has established that torture-induced evidence was used against him. In light of this, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

104. The Working Group recalls the articles on responsibility of States for internationally wrongful acts, particularly article 16 on aid or assistance. For the reasons set out above, it considers that the Governments of the United States, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom are jointly responsible for the torture and cruel, inhuman or degrading treatment of Mr. Zubaydah and that this has deprived him of the meaningful ability to benefit from a fair trial, should a trial ever come to pass. These violations of article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant

⁵⁶ Universal Declaration of Human Rights, art. 5; the Covenant, art. 7; and the Convention against Torture, arts. 2 and 16. The Working Group notes the reservations to article 7 of the Covenant and to the Convention against Torture. However, it considers that the alleged treatment of Mr. Zubaydah is of such a grave nature that it would violate any internationally accepted definition of torture and other cruel, inhuman or degrading treatment or punishment.

⁵⁷ Opinion No. 89/2017, paras. 41–45.

⁵⁸ Opinion No. 29/2017, para. 63. See also opinions No. 47/2017, para. 28; No. 52/2018, para. 79 (j); and No. 53/2018, para. 77 (c). See also [E/CN.4/2004/3/Add.3](#), para. 33.

and articles 2, 15 and 16 of the Convention against Torture result in serious violations of article 14 of the Covenant, which render the detention arbitrary under category III.

c. Additional Category III and V complaints relevant to the United States

105. The source alleges that the Government of the United States failed to observe international fair trial guarantees. In its late reply, the Government did not present reasons for Mr. Zubaydah being detained so long without charges nor did it indicate that he was to be charged in the future. In relation to procedural safeguards relevant to category III laid against the Government, there is considerable overlap with the issues raised in the discussion of category I above. The analysis below builds on that discussion, with a specific focus on matters of fair trial and due process.

106. Mr. Zubaydah has been deprived of his liberty for approximately 20 years with no indication when, if ever, he will be brought to trial or released. Such a prolonged period with no resolution of proceedings is excessive, unfair and contrary to due process. It violates Mr. Zubaydah's rights under article 9 (3) of the Covenant to be tried within a reasonable time, and under article 14 (3) (c) to be tried without undue delay. Such a long delay is particularly problematic as he will be significantly hampered in his ability to recall events and thus present a defence, should any trial ever occur.

107. The source alleges various violations of due process rights, including access to evidence and legal representation. The Working Group considers that, based on the detailed submissions provided by the source, which have not been refuted in a timely manner, the hearings before the Combatant Status Review Tribunal do not satisfy the right to a fair and independent trial under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.⁵⁹ It notes that the Supreme Court of the United States has reached similar conclusions. Similarly, the procedures of the Periodic Review Board were insufficient with regard to Mr. Zubaydah, as he was not provided with access to the evidence purportedly supporting his detention. Although the Government asserts that the evidence it relied upon was provided to the defence, it acknowledges that this is not done in "rare instances of compelling security interests". The Government fails to clarify whether Mr. Zubaydah was provided with the evidence purportedly justifying his continued detention. The Working Group does not consider that Mr. Zubaydah enjoyed an effective right to challenge the legality of his detention. Additionally, Mr. Zubaydah also filed a petition for a writ of habeas corpus in the District Court of Columbia on 6 August 2008, however, according to the source, it has languished for years without being decided upon. On these bases, the Working Group concludes that the failure to ensure effective habeas corpus constitutes a denial of an effective remedy under article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant

108. Concerning legal representation, the source states that Mr. Zubaydah was not afforded proper access to counsel from 2002 to 2008, and this violated his right under article 14 (3) of the Covenant and principles 11 (2), 17 and 18 of the Body of Principles. The Working Group is satisfied that this amounted to a violation of the right to legal representation. The Working Group notes that, even when he obtained access, communication was restricted and followed by infringements on lawyer-client privilege. Lack of access to counsel or denial of the right to communicate privately with counsel contributes to the characterization of detention as arbitrary.

109. The Working Group also notes that Mr. Zubaydah was denied consular access upon arrest and during his detention, which violates, inter alia, article 36 of the Vienna Convention on Consular Relations, principle 16 (2) of the Body of Principles and rule 62 of the Nelson Mandela Rules.

110. The fair trial violations set out above violate articles 2, 9 and 14 of the Covenant and are of such gravity as to give the deprivation of liberty of Mr. Zubaydah an arbitrary character under category III.

⁵⁹ Opinions No. 2/2009; No. 10/2013; No. 50/2014; and No. 89/2017.

d. Category V

111. The source claims that the Guantanamo detention regime is discriminatory on intersecting grounds, based on detainees' status as foreign nationals and their religion.⁶⁰ That discrimination has denied Mr. Zubaydah 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,⁶¹ articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.⁶² The Working Group also notes that the various denials of, and restrictions on, rights that are ordinarily applicable within the United States apply exclusively to non-national Muslim men.⁶³

112. The Working Group finds that Mr. Zubaydah has been deprived of the fair trial guarantees that would ordinarily apply within the judicial system of the United States. By discriminating on the basis of his status as a foreign national and his religion, the Government has denied Mr. Zubaydah equality before the law, in violation of articles 2, 5 (a) and (b) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, indicating arbitrary detention under category V.

e. Concluding remarks

113. The Working Group is concerned about the physical and mental well-being of Mr. Zubaydah, who has been arbitrarily detained for more than 20 years. It notes that Mr. Zubaydah has serious medical conditions, including from injuries sustained during torture, which have been exacerbated by years of denial of medical attention.

114. The arguments that Mr. Zubaydah was tortured stand unrefuted and the European Court of Human Rights has confirmed them. The Working Group notes in this respect that medical care at Guantanamo has been, and remains, grossly deficient and for years, communication between inmates was prohibited, with serious psychological effects. The Working Group feels obliged to remind the Governments, in particular that of the United States, that in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person and that denial of medical assistance constitutes a violation of the Nelson Mandela Rules, in particular rules 1, 24, 25, 27, 30 and 32, along with principle 19 of the Body of Principles.

115. While the Working Group has specifically addressed Mr. Zubaydah's circumstances in this opinion, the conclusions reached here also apply to other detainees in similar situations at Guantanamo. Over the past 15 years, the Working Group has addressed several cases of detention at Guantanamo.⁶⁴ The Working Group expresses grave concern about the pattern that all these cases follow and recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.⁶⁵

116. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has underscored that the evolution of

⁶⁰ Opinions No. 10/2013; No. 50/2014; and No. 89/2017; and [CERD/C/USA/CO/7-9](#), para. 22.

⁶¹ Committee on the Elimination of Racial Discrimination, general recommendations No. 30 (2004), paras. 19–21; and No. 31 (2005).

⁶² The Working Group notes that the Government of the United States has expressed its understanding of articles 2 and 26 of the Covenant, namely that distinctions based on factors such as race or religion are permitted when such distinctions are rationally related to a legitimate government objective. However, the Government has not explained how military commissions, which have in practice only prosecuted Muslim men who are not United States nationals, are a proportionate means of achieving a legitimate objective. Mr. Zubaydah's deprivation of liberty is therefore arbitrary under category V.

⁶³ Opinions No. 10/2013; No. 50/2014; No. 89/2017; and No. 70/2019; and [CERD/C/USA/CO/7-9](#), para. 22. See also opinion No. 89/2017, para. 62 (the Working Group concluded that an individual in Guantanamo had been subjected to prolonged detention on discriminatory grounds because of his status as a foreign national and his religious beliefs as a Muslim).

⁶⁴ Opinions No. 2/2009; No. 3/2009; No. 10/2013; No. 50/2014; and No. 89/2017.

⁶⁵ Opinion No. 47/2012, para. 22.

practices from secret detention to transnational transfer in counter-terrorism contexts continue to be marked by an abject lack of adherence to fundamental human rights norms, thin lines of judicial oversight, meagre to non-existent legal and/or political accountability, targeting of religious and ethnic minorities, and a high degree of tolerance by States for the subversion of the rule of law to enable persons to be rendered to jurisdictions in which they have a high likelihood of being subjected to arbitrary detention, surveillance, torture and other cruel, inhuman and degrading treatment or punishment.⁶⁶

117. The Working Group recalls the findings of its 2016 visit to the United States, including in relation to Guantanamo.⁶⁷ The closure of Guantanamo was previously an important priority of the Government. The Working Group urges the Government to once again prioritize closing that facility. In the meantime, the Working Group urges the Government to cooperate with United Nations human rights mechanisms and allow them full access to it. It considers that an invitation to carry out a follow-up visit to the United States would be welcome, with specific authorization to visit Guantanamo.

Disposition

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

Regarding the United States:

The deprivation of liberty of Abu Zubaydah, being in contravention of articles 2, 5, 7, 9 and 10 of the Universal Declaration of Human Rights and articles 2, 7, 9, 10, 14, and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

Regarding Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom:

The deprivation of liberty of Abu Zubaydah, being in contravention of articles 5, 9 and 10 of the Universal Declaration of Human Rights and articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

119. The Working Group requests the Governments found to be responsible for the violations of the rights of Mr. Zubaydah, as detailed herein, to take the steps necessary to remedy the situation of Mr. Zubaydah without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

120. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Zubaydah immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

121. The Working Group urges the Governments found to be responsible for the violations of the rights of Mr. Zubaydah, as detailed herein, to ensure full and independent investigations of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Zubaydah and to take appropriate measures against those responsible for the violations of his rights.

122. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

123. The Working Group requests the Governments concerned to disseminate the present opinion through all available means and as widely as possible.

⁶⁶ A/HRC/49/45, para. 5.

⁶⁷ A/HRC/36/37/Add.2.

Follow-up procedure

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

- (a) Whether Mr. Zubaydah has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Zubaydah;
- (c) Whether an investigation has been conducted into the violation of Mr. Zubaydah'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 States concerned with their international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

125. The Governments found to be responsible for the violations of the rights of Mr. Zubaydah are invited to inform the Working Group of any difficulties they 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.

126. The Working Group requests the source and the Governments found to be responsible for the violations of the rights of Mr. Zubaydah to provide the above-mentioned information within six months of the date of 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.

127. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.⁶⁸

[Adopted on 14 November 2022]

⁶⁸ Human Rights Council resolution 51/8, paras. 6 and 9.