

PETITION TO:

**UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION**

In the matter of

**Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah)**

*Palestinian*

v.

**Government of the United States of America**

**Government of the Kingdom of Thailand**

**Government of the Republic of Poland**

**Government of the Kingdom of Morocco**

**Government of the Republic of Lithuania**

**Government of the Islamic Republic of Afghanistan**

**Government of the United Kingdom**

Submitted by

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**Submitted: 29.04.2021**

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**Abu Zubaydah v. the United States and 6 others**  
**Individual Application and Request for Urgent Action under the procedures of the UN Working Group on Arbitrary Detention and**

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Name: Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah)

Sex: Male

Age: (31 at the time of detention; 50 today)

Nationality/Nationalities: Palestinian

Address of usual residence: Internment Facility at the US Guantánamo Bay Naval Base, Cuba

States against which this complaint is lodged: United States, Afghanistan, Lithuania, Morocco, Poland, Thailand and the United Kingdom.

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# 1 INTRODUCTION

## 1.1 Overview of Claim

1. The applicant in this case is Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah), currently detained in the United States (US) military detention facility at Guantánamo Bay (Guantánamo). Abu Zubaydah is a 50 year-old Palestinian who grew up in Saudi Arabia. He has now been held by the US in arbitrary detention, without review of the lawfulness of detention, charge or trial, for 19 years.
2. His arbitrary detention began in March 2002 when he was captured in Pakistan by US authorities with the collaboration of Pakistani counterparts.<sup>1</sup> Shortly thereafter he disappeared into secret incommunicado detention and torture in the Central Intelligence Agency (CIA)-led secret extraordinary rendition, detention and interrogation programme (ERP). From 2002 to 2006 he was held in secret CIA detention or ‘black sites’ on the territory of Thailand, Poland, Morocco, Lithuania, Afghanistan and at Guantánamo. As reflected in judgments and reports of other international judicial bodies, including notably the European Court of Human Rights (ECtHR), it is established ‘beyond reasonable doubt’ that he was victim of the most egregious violations of human rights, including torture, secret arbitrary detention and unlawful transfer (refoulement) during this period.<sup>2</sup>
3. Since 2006, he has been detained by the Department of Defense (DOD) at Guantánamo. He has never been charged or tried. No court has yet reviewed the lawfulness of his detention. The only process governing his detention is the Periodic Review Board (PRB), which has no mandate to review lawfulness, provides no independent or meaningful review and offers no opportunity to secure release. There is no commitment or apparent intention to try or release him. He is one of those dubbed ‘forever prisoners’ whom the US purports to detain indefinitely on supposed ‘law of war authority’ in relation to an endless war on terrorism.<sup>3</sup> The prolonged and egregious ongoing violations of his rights are, in the ECtHR’s words, ‘anathema to the rule of law’ and a ‘flagrant denial of justice’.<sup>4</sup>
4. His case epitomises arbitrary detention within the mandate of this UN Working Group on Arbitrary Detention (UNWGAD), under categories I (no lawful basis), III (lack of procedural fairness) and V (discrimination).
5. The first respondent state is the United States, responsible for the secret detention, torture and disappearance of the applicant by the CIA and others acting under its direction and control, for his ongoing arbitrary detention at Guantánamo and for the lack of investigation, truth and reparation. Multiple other states share responsibility for contributing to ongoing violations and for failing to provide reparation for their roles in his arbitrary detention since 2002. This application is therefore also brought against those states known to have allowed their territory to be used for his arbitrary detention, torture and transfer on to Guantánamo, or which aided and assisted in his torture and arbitrary detention. States which share responsibility for his arbitrary detention must now do everything in their power to bring the violations to an end and provide appropriate reparation.
6. This is the only opportunity Abu Zubaydah has had to bring a claim against the range of responsible states, including principally the United States. Given the nature and universal scope of the UNWGAD’s mandate, it is uniquely placed to recognise the ‘spider’s web’<sup>5</sup> of culpability that his case embodies, to call for an immediate end to his arbitrary detention at Guantanamo and respect for the obligations to ensure the truth, justice, reparation and guarantees of non-repetition.

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<sup>1</sup> ECtHR, *Abu Zubaydah v. Lithuania* (Application No 46454/11) [Judgment of 31 May 2018](#) (*‘Zubaydah v. Lithuania’*), para 467; insider accounts by John Kiriakou and Joseph Hickman, *The Convenient Terrorist, Two Whistleblowers’ Stories of Torture, Terror, Secret Wars, and CIA Lies* (Hot Books 2017).

<sup>2</sup> See e.g. *Zubaydah v. Lithuania*, para 635.

<sup>3</sup> US Senate Select Committee on Intelligence, [‘Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’](#), Executive Summary, (‘SSCI Report’), 35.

<sup>4</sup> *Zubaydah v. Lithuania*, para 583; ECtHR, *Husayn (Abu Zubaydah) v. Poland* (Application No 7511/13) [Judgment of 24 July 2014](#) (*‘Zubaydah v. Poland’*), para 559.

<sup>5</sup> CoE Parliamentary Assembly, [‘Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states’](#) (12 June 2006) Doc. 10957 (‘CoE 1<sup>st</sup> Report’), 1.

## 1.2 Relief Sought and Urgent Action

7. In line with international law on reparation and the UNWGAD's 2019 Guidance note, the UNWGAD is asked to find that:
- (a) The US has been, and is, responsible for Abu Zubaydah's arbitrary detention since 2002, including through CIA detention and his current arbitrary detention in Guantánamo. He is a victim of multiple violations of, among others, the right to liberty, freedom from torture and the right to life.
  - (b) The only appropriate remedy for on-going arbitrary detention at this point is release.
  - (c) The other respondent states identified in this brief share responsibility with the US for Abu Zubaydah's arbitrary detention, through the roles set out at 2.3. They must take all possible measures to bring his arbitrary detention to an end and facilitate release, including, with his consent, through offers of relocation and rehabilitation.
  - (d) States must acknowledge and apologise for their responsibility, investigate and ensure accountability, provide rehabilitation and reparation, including learning lessons to ensure non-repetition.<sup>6</sup>
8. **'Urgent action' procedure:** Where there are sufficiently reliable allegations that an individual's arbitrary detention is ongoing and constitutes a serious danger to health or life, the UNWGAD is empowered to send an urgent appeal to the State concerned.<sup>7</sup> We would urge the Committee to exercise this power in this case. As explained more fully below, the applicant's case is extreme in its nature and impact. He has suffered serious health implications as a result of years of egregious prolonged torture, arbitrary detention in extreme conditions of isolation and incommunicado detention. Access to rehabilitation due to a victim of systematic torture has been denied. Even access to medical records and to an independent medical review continue to be blocked. The extreme arbitrariness of his detention, his inability to communicate with the outside world, to be heard in his own defence and to seek his freedom, amount to ongoing torture posing serious threats to his health.<sup>8</sup> His US counsel have stated publicly their serious concerns for his health and welfare for a number of years, and in the context of the COVID-19 pandemic, these implications, and his vulnerability and isolation, have been seriously exacerbated.<sup>9</sup> The Government has refused to vaccinate the applicant and 39 other remaining prisoners despite the COVID related risks at Guantánamo.

## 2 FACTUAL INFORMATION

### 2.1 Sources of (and limitations on) Information

9. This application will draw on abundant publicly available evidence from multiple sources that demonstrates unequivocally the applicant's arbitrary detention from 2002 to the present day. Mindful of space limitations, and that many of the allegations concern well established historical facts, it sets out only a selection of the available evidence in relation to the responsibility of each state. All of the sources cited are publicly available and this application conforms to the onerous restrictions placed by the US authorities on the disclosure of information (see below).
10. **Sources of information** referred to in this application include:

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<sup>6</sup> See UNGA, Resolution adopted by the General Assembly on 16 December 2005, '[Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#)' (21 March 2006) UN Doc. A/RES/60/147 ('UN Basic Principles and Guidelines on Remedy and Reparation').

<sup>7</sup> WGAD, '[Fact Sheet No 26](#)', 6.

<sup>8</sup> As noted below, a court in [2020] ordered that he be given access but that has not been implemented to date.

<sup>9</sup> While the Pentagon initially planned to 'offer coronavirus vaccines to detainees at Guantánamo Bay' (see Carol Rosenberg, '[Prisoners at Guantánamo Bay will be offered vaccination, the Pentagon says](#)', The New York Times), John Kirby, Assistant to the Secretary of Defense for Public Affairs announced on Twitter the reversal of this decision (see [here](#) for the tweet, see also Carol Rosenberg, '[Pentagon Halts Plan to Vaccinate the 40 Prisoners at Guantánamo Bay](#)', The New York Times (30 January 2021)).

- (a) Official records of the US detaining authority: acknowledging the applicant’s detention without charge or trial, indicating the flawed PRB process and unresolved *habeas* claims and the failure to provide meaningful review of detention or opportunity to be released;
- (b) The US Senate Select Committee on Intelligence (SSCI) *Study of the [CIA’s] Detention and Interrogation Program* of December 2014 which had unprecedented access to classified CIA internal documentation.<sup>10</sup> Even the limited part of that study that has been published – the highly redacted 520-page ‘Conclusions and Executive Summary’<sup>11</sup> – refers to the applicant 1,001 times. It clarifies the purpose and brutality of his CIA detention and torture and the complicity of multiple states, the misinformation the government levelled against the applicant publicly to justify his detention and torture, and that his torture produced no actionable intelligence;
- (c) CIA cables and internal memoranda, made available through the SSCI process, which, clarify, *inter alia*, undertakings given before the applicant’s torture to detain him ‘incommunicado for the remainder of his life,’ with no opportunity to be released or have contact with others;<sup>12</sup>
- (d) Abundant public information from other parliamentary reports and internal inquiries from around the world, including the United Kingdom (UK) select committee,<sup>13</sup> the Lithuania Seimas report,<sup>14</sup> and, on the European level, Senator Marty’s reports to the Council of Europe<sup>15</sup> concerning the role of respondent states;
- (e) Information and documentation emerging from litigation including: civil litigation in US courts against psychologists engaged in CIA torture,<sup>16</sup> contractual disputes between CIA contractors *inter alia* identifying states related to the applicant’s rendition;<sup>17</sup> and proceedings before the International Criminal Court (ICC).<sup>18</sup>
- (f) Two lengthy judgments of the ECtHR in favour of the applicant against Poland and Lithuania<sup>19</sup> finding ‘beyond reasonable doubt’ that he was secretly detained by the CIA in those states.<sup>20</sup> The judgments *inter alia* confirm the CIA renditions flight route as taking him from Thailand to Poland (2002), Guantánamo (2003), Morocco (2004), Lithuania (2005), Afghanistan (2006).<sup>21</sup> The judgments unanimously find multiple violations arising from his secret detention and the failure to meaningfully investigate and provide a remedy;
- (g) Expert testimony provided in person to the ECtHR on the role of various states, and documentary evidence, such as flight data and contractual information, referred to in ECtHR judgments;

<sup>10</sup> SSCI Report.

<sup>11</sup> Senate Intelligence Committee, ‘[Study on CIA detention and interrogation program](#)’. The full Committee Study was 6,700 pages and remains classified.

<sup>12</sup> CIA cable, ‘[Eyes only – Additional operational and security considerations for the next phase of Abu Zubaydah interrogation](#)’, ALEC [REDACTED] (182321Z JUL 02) (15 July 2002), 5.

<sup>13</sup> UK Intelligence and Security Committee of Parliament, ‘[Detainee Mistreatment and Rendition: 2001-2010](#)’ (28 June 2018), Doc. HC 1113 (‘UK Parliamentary Report’).

<sup>14</sup> Seimas of the Republic of Lithuania, ‘[Annex to Resolution No. XI-659](#), Findings of the parliamentary investigation by the Seimas Committee on National Security and Defence concerning the alleged transportation and confinement of persons detained by the Central Intelligence Agency of the United States of America on the territory of the Republic of Lithuania’ (19 January 2010) Doc. XI-659.

<sup>15</sup> CoE 1<sup>st</sup> Report; CoE Parliamentary Assembly, ‘[Secret Detention and illegal transfers of detainees involving Council of Europe member states: second report](#)’ (11 June 2007) Doc. 11302 (‘CoE 2<sup>nd</sup> Report’).

<sup>16</sup> *Salim v. Mitchell*, 268 F. Supp 3d 1132 a lawsuit brought by the ACLU on behalf of the survivors and the family of a dead victim of the CIA torture program, led to a trove of documents and depositions on the applicant’s torture and Mitchell and Jessen’s roles in it. A database (torturedatabase.org) has been established which contains over 100,000 pages of government documents obtained primarily through this case and Freedom of Information Act litigation.

<sup>17</sup> *Sportsflight Air Inc. v. Richmor Aviation* cited in *Zubaydah v. Lithuania*, para 130; the ECtHR noting: ‘the docket of litigation in the United States between two contractors, both of them servicing the CIA’s rendition programme...’ revealed ‘a large tranche of documentation’ on states and non-state actors engaged in the applicant’s rendition.

<sup>18</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, ‘[Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan](#)’, (12 April 2019), ICC-02/17-33 (‘ICC Afghanistan Article 15 Decision’); ICC, *Situation in the Islamic Republic of Afghanistan*, ‘Public redacted version of “[Request for authorization of an investigation pursuant to article 15](#)”’, 20 November 2017, ICC-02/17-7-Conf-Exp’ (20 November 2017) Doc. ICC-02/17-7-Red (‘ICC Afghanistan Investigation’s request’).

<sup>19</sup> *Zubaydah v. Poland*; *Zubaydah v. Lithuania*.

<sup>20</sup> See e.g. *Zubaydah v. Lithuania*, para 497.

<sup>21</sup> See e.g. *Zubaydah v. Lithuania*, paras 117, 122-123, 125, 134.

- (h) The decision of the UN Ombudsperson of the UN Al Qaeda sanctions regime delisting Abu Zubaydah on the basis that he was not a member of al Qaeda, and noting the impossibility for the applicant to secure release from Guantánamo;<sup>22</sup>
- (i) Reports of multiple human rights bodies, including the UN Human Rights Council (UNHRC), UN Committee against Torture (UNCAT), the United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID), the Inter-American Commission of Human Rights (IACCommHR) criticising the ERP and Guantánamo detention; each of the named respondent states have been identified with the ERP by at least one such body;<sup>23</sup>
- (j) Selective research and documentation by civil society and investigative journalists.<sup>24</sup>

11. The UNWGAD has itself handed down several prior opinions on the arbitrary nature of the rendition programme and detention at Guantánamo Bay, to which we refer:

- (a) In Opinion No. 29/2006, the UNWGAD considered a group claim on behalf of 26 individuals, including Abu Zubaydah, held in secret ‘black-site’ detention as part of the ‘war on terror’.<sup>25</sup> The UNWGAD stated that the detention ‘*falls outside of all national and international legal regimes pertaining to the safeguards against arbitrary detention*’, noting also that the secrecy surrounding their detention and transfer likely exposed them to other human rights abuses.<sup>26</sup> It concluded that the detention fell into the Working Group’s category I arbitrary detention.<sup>27</sup>
- (b) In two instances the UNWGAD rendered a second opinion on individuals who had also been part of the 2006 application – this time in relation to their ongoing detention at Guantánamo Bay. The first opinion, in relation to Mr Mustafa al Hawsawi, found his ‘more than 10-year detention’<sup>28</sup> (including CIA detention and Guantánamo) was arbitrary under categories I, III and V.<sup>29</sup> The Working Group found that ‘*the obligations of the United States under international human rights law extend to persons detained at Guantánamo Bay*’ and that ‘*the gross violations of international law at Guantánamo are such that any State that has actively facilitated or in any way acquiesced in the detention must hold enquiries into the acts of its officials and provide remedies to individuals for any breaches of international law to which their facilitation or acquiescence may give rise*’.<sup>30</sup> It recalled that its conclusions applied to others in similar situations at Guantánamo Bay.<sup>31</sup> A subsequent opinion on Mr Ammar al Baluchi’s detention at Guantánamo Bay<sup>32</sup> established, among

<sup>22</sup> United Nations, Security Council Committee concerning ISIL (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities, Delisting Request – Zayn al-Abidin Muhammad Husayn (‘Abu Zubaydah’) (formerly listed as Zayn al-Abidin Muhammad Hussein (QDi.010), Annex – Summary of the analysis, observations, arguments and recommendations set out in the Ombudsperson’s report (24 January 2018), ref no. OMBP/1267/2016/78/Abu Zubaydah.

<sup>23</sup> HRC, ‘[Joint Study on Global Practices in relation to Secret Detention in the context of countering terrorism](#)’ of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism, Martin Scheinin; The Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; The Working Group on Arbitrary Detention represented by its vice-chair, Shaneen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its chair, Jeremy Sarkin’, (19 February 2010) UN Doc. A/HRC/13/42 (‘HRC Joint Study’); UNCAT, ‘Consideration of reports submitted by States parties under Article 19 of the Convention, [Concluding observations of the Committee against Torture](#)’, (21 December 2011) UN Doc. CAT/C/MAR/CO/4; UNCAT, ‘[Concluding observations on the seventh periodic report of Poland](#)’ (29 August 2019) UN Doc. CAT/C/POL/CO/7; WGEID, ‘[Report of the Working Group on Enforced or Involuntary Disappearances](#)’ (30 July 2019) UN Doc. A/HRC/42/40; IACCommHR, Report No 29/20 (Case 12.865) [Merits \(Publication\)](#) Djamel Ameziane, United States of America (22 April 2020) (‘IACCommHR Ameziane Report’).

<sup>24</sup> See e.g. [The Rendition Project](#); Crofton Black et al, ‘[CIA Torture Unredacted, An investigation into the CIA Rendition Programme](#)’, July 2019, accessed 20 November 2019 (‘CIA Torture Unredacted’); Open Society Justice Initiative, ‘[Globalizing torture, CIA Secret Detention and Extraordinary Rendition](#)’ (2013) (‘OSJI Globalizing torture’).

<sup>25</sup> WGAD, ‘[Opinion No. 29/2006 concerning the case of Mr Ibn al-Shaykh al-Libi and 25 other persons \(United States of America\)](#)’, (1 September 2006) UN Doc. A/HRC/4/40/Add.1 (‘WGAD al-Shaykh al-Libi opinion’), 103.

<sup>26</sup> WGAD al-Shaykh al-Libi opinion, para 21.

<sup>27</sup> WGAD al-Shaykh al-Libi opinion, para 22.

<sup>28</sup> WGAD, ‘[Opinion No. 50/2014 concerning Mustafa al Hawsawi \(United States of America and Cuba\)](#)’ (13 February 2015) UN Doc. A/HRC/WGAD/2014/50 (‘WGAD al Hawsawi opinion’), para 79. Al Hawsawi was captured in 2003 and transferred to Guantánamo in 2006, and the Working Group opinion was rendered in 2015.

<sup>29</sup> WGAD al Hawsawi opinion, para 87.

<sup>30</sup> WGAD al Hawsawi opinion, para 65.

<sup>31</sup> WGAD al Hawsawi opinion, para 84.

<sup>32</sup> WGAD, ‘[Opinion No 89/2017 concerning Ammar al Baluchi \(United States of America\)](#)’ (24 January 2018) UN Doc. A/HRC/WGAD/2017/89 (‘WGAD al Baluchi opinion’), para 34.

other things, that the ‘*psychological and physical trauma that he continues to suffer as a result of torture under the Agency programme*’ prevent any prospect of a fair trial.<sup>33</sup>

- (c) Several other Working Group opinions have also found violations by the US and partners in relation to rendition and torture outside of the ERP.<sup>34</sup>

12. **Restrictions:** Extreme restrictions on access to information continue to surround the ERP and Guantanamo, as recognised by other courts.<sup>35</sup> While this does not impede the UNWGAD’s ability to determine this matter based on public information, as other courts and bodies have, it does constrain the applicant’s ability to share evidence and fully state his case. These impediments are closely intertwined with the ongoing violations in the case and worthy of note at the outset.

- (a) The ERP was specifically designed and implemented to remain secret, and coupled with a ‘concerted cover-up’ by the US and other states.<sup>36</sup> Withholding evidence relating to the programme and refusal of the US administration to cooperate with national and international proceedings has been acknowledged as hampering access to evidence.<sup>37</sup> In addition, the US government continues to block his access to information concerning his arbitrary detention and torture, by invoking blanket state secrecy in respect of the now notorious CIA programme.<sup>38</sup>
- (b) There has been no serious investigation of the ERP by the US, or the host governments of the CIA ‘black sites’ where Abu Zubaydah was held, interrogated and tortured, despite them being obliged to do so and much information therefore remains in state hands.<sup>39</sup>
- (c) It has been acknowledged that relevant evidence, including video tapes of Abu Zubaydah’s interrogation, was destroyed on the orders of senior CIA officers.<sup>40</sup> Other evidence such as the full report of the SSCI is still not available publicly, even with necessary redactions (as for the summary) and is subject to excessive secrecy.<sup>41</sup> It should be made available to the UNWGAD.
- (d) Finally, information from, or about, the applicant continues to be subject to excessive secrecy and presumptive classification. Only US counsel with a Top Secret security clearance have personal access to Abu Zubaydah, and all information they obtain from him is then presumptively classified, and cannot be shared with international counsel or judicial bodies.<sup>42</sup> This led to his characterisation as a ‘man deprived of his voice’ in the ECtHR judgment.<sup>43</sup> In these circumstances the limited information on his detention that is not subject to classification or has been declassified, namely his own drawings depicting his torture, are annexed.

## 2.2 **Facts – Arrest**

13. The SSCI report and ECtHR judgements, among other sources, confirm that on or about 28 March, 2002, Abu Zubaydah was captured in Faisalabad, Pakistan, by US authorities working with

<sup>33</sup> WGAD al Baluchi opinion, para 57-61.

<sup>34</sup> WGAD, ‘[Opinion No. 47/2005 concerning Walid Muhammad Shahir Muhammad al-Qadasi et al \(Yemen\)](#)’ (30 November 2005) UN Doc. A/HRC/4/40/Add.1, 41: the WGAD found arbitrary detention in

WGAD, ‘[Opinion No. 19/2007 concerning Zhiya Kassem Khammam al Hussain \(Saudi Arabia\)](#)’ (22 November 2007) UN Doc. A/HRC/10/21/Add.1, 9.

<sup>35</sup> *Zubaydah v. Lithuania*, paras 486-487.

<sup>36</sup> ‘[Britain and European governments helped US commit “countless” crimes colluding with torture](#)’, The Telegraph (1 September 2011); *Zubaydah v. Lithuania*, para. 90.

<sup>37</sup> *Zubaydah v. Lithuania*, para 90.

<sup>38</sup> Where courts have found the need to distinguish information that is secret from that which is not, the government maintains a broad claim of state secrecy in respect of CIA programme, and has referred the case to the US Supreme Court. On this, see *United States v. Zubaydah*, [Petition for a Writ of Certiorari](#) (17 December 2020), at e.g. 9, the petition has been [granted](#) on 26 April 2021 and an hearing will be held.

<sup>39</sup> *Zubaydah v. Lithuania*, para 90; regarding the obligation to investigate see e.g. IACommHR Ameziane Report, paras 228 and following.

<sup>40</sup> Despite repeated orders from a US federal court judge to identify or produce 90 videotapes of Abu Zubaydah’s interrogation and torture in Thailand, the CIA destroyed the tapes. Then Chief of the CIA’s Counterterrorism Center (CTC) Jose Rodriguez confirmed he ordered the destruction as the ‘*heat from destroying (the tapes) is nothing compared to what it would be if the tapes ever got out into the public domain...; it would be devastating to us*’. Mark Mazzetti, Charlie Savage, ‘[No Criminal Charges Sought Over \[CIA\] Tapes](#)’, the New York Times (9 November 2010). This destruction prompted the SSCI to vote 14-1 to study the CIA’s detention and interrogation program. See SSCI Report, 455-6.

<sup>41</sup> SSCI Report, Foreword, 1.

<sup>42</sup> Courts in the US can in principle see evidence presumed ‘top secret’ but subject to special rules.

<sup>43</sup> *Zubaydah v. Poland*, para. 80.

Pakistani police.<sup>44</sup> He suffered serious injuries from multiple bullet wounds sustained during capture, such that a physician treating him described it as a ‘miracle’ he survived.<sup>45</sup> After a few days of medical attention in Pakistan under CIA supervision, he was flown out by the CIA and on to detention and interrogation at multiple secret ‘black sites,’ and eventually to Guantánamo Bay, where he remains in indefinite detention to the present day.<sup>46</sup>

### 2.3 **Facts – Detention I: CIA Secret Detention**

14. During the period from his arrest on 28 March 2002, until he was placed in military detention at Guantánamo Bay on 5 September 2006, Abu Zubaydah was held in CIA incommunicado detention, transferred between a number of different secret ‘black sites’ across the world and subjected to harsh conditions of detention and torturous ‘enhanced interrogation techniques’ (EITs). Many of the facts governing the CIA programme are now well established, so only key facts and characteristics with relevance to the applicant’s arbitrary detention are highlighted below.

#### 2.3.1 *CIA Claims and Misinformation to Justify Detention*

15. While Abu Zubaydah was not formally given reasons for his arrest or detention, internal documentation makes clear that the purpose was unfettered intelligence gathering. Detention in a manner that removed all legal and political oversight was intended to facilitate ‘enhanced interrogation,’ in other words torture.
16. In public statements following his arrest, the US Government identified the applicant publicly as ‘a key terrorist recruiter, an operational planner, and a member of Usama bin Laden’s inner circle,’<sup>47</sup> as ‘one of the top operatives plotting and planning death and destruction on the United States’<sup>48</sup> and the ‘third or fourth man in al Qaeda’.<sup>49</sup> A few months into his detention, a memo released by the US Department of Justice Office of Legal Counsel (OLC Memo), provided a panoply of assertions to support the detention and interrogation of Abu Zubaydah, such as: ‘As we understand it, [Abu Zubaydah] is one of the highest ranking members of the al Qaeda terrorist organization, with which the [US] is currently engaged in an international armed conflict following ...9/11.’<sup>50</sup> Other extravagant claims in government memoranda included that: ‘Zubaydah has been involved in every major terrorist operation carried out by al Qaeda... Moreover, he was one of the planners of the September 11 attacks.’<sup>51</sup>
17. These assertions transpired to be based on information allegedly obtained under torture/duress from one source, which was subsequently recanted as early as 2002.<sup>52</sup> The SSCI states specifically that relevant CIA documentation did not, and does not, support these assertions.<sup>53</sup> However, even once the

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<sup>44</sup> SSCI Report, 21.

<sup>45</sup> Office of the Inspector General, U.S. Department of Justice, ‘[A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq](#)’ (May 2008, rev Oct 2009) (redacted), ix; Tim McGirk, ‘[Anatomy Of A Raid](#)’, Time Magazine (15 April 2002). Former CIA agent John Kiriakou, co-leader of the U.S/Pakistani team that seized Zubaydah spoke to doctors: John Kiriakou and Joseph Hickman, *The Convenient Terrorist, Two Whistleblowers’ Stories of Torture, Terror, Secret Wars, and CIA Lies* (Hot Books 2017).

<sup>46</sup> *Zubaydah v. Lithuania*, para 257: ‘[The ERP] began with the capture of [Zubaydah] in Pakistan. After treatment there for gunshot wounds, he was whisked by the CIA to Thailand... Once healthy, he was slapped, grabbed, made to stand long hours in a cold cell, and finally handcuffed and strapped feet up to a water board ...’.

<sup>47</sup> The White House, Office of the Press Secretary, ‘[Statement by the Press Secretary](#)’ (2 April 2002).

<sup>48</sup> Remarks by President Bush, The White House, Office of the Press Secretary, ‘[Remarks by the President at Connecticut Republican Committee Luncheon](#)’ (9 April 2002).

<sup>49</sup> United States Department of Justice Office of Legal Counsel, Memorandum for John Rizzo ‘[Interrogation of al Qaeda Operative](#)’ (1 August 2002) (‘Bybee Memorandum’), 7. Kiriakou and Hickman, 22.

<sup>50</sup> Bybee Memorandum, 1.

<sup>51</sup> Bybee Memorandum, 7.

<sup>52</sup> SSCI Report, 410 ‘The OLC memorandum repeated the CIA’s representation that Abu Zubaydah was the “third or fourth man” in al-Qa’ida. This CIA assessment was based on single-source reporting that was recanted prior to the August 1, 2002, OLC legal memorandum. This retraction was provided to several senior CIA officers, including [redacted] CTC Legal, to whom the information was emailed on July 10, 2002, three weeks prior to the issuance of the ... OLC memorandum. The CIA later [in 2006] concluded that Abu Zubaydah was not a member of al-Qa’ida.’

<sup>53</sup> SSCI Report, 410.



‘CIA concluded that Abu Zubaydah was not a member of al Qaeda’ this was not communicated between departments, and misinformation continued to be shared after it was discredited.<sup>54</sup>

18. Evidence shows that his captors also realized, at an early stage, that he did not have the information they had been led to believe. On 10 August 2002, they set this out in cables informing CIA central offices that ‘it was “highly unlikely” that Abu Zubaydah possessed the information they were seeking,’<sup>55</sup> and that he was ‘compliant and totally submissive’ in cooperating within the limits of his ability.<sup>56</sup> CIA responded that this was likely due to resistance training, that they ‘believe[d] that Abu Zubaydah was withholding threat information’ and interrogation should continue.<sup>57</sup>
19. It was not until the applicant was first given access to counsel, in 2008 in anticipation of habeas litigation, that the CIA conceded that Abu Zubaydah was not a member of al Qaeda.<sup>58</sup> In 2017 Abu Zubaydah was delisted from the UN al Qaeda sanctions list, based on the recommendation of the UN Ombudsperson who also concluded that Abu Zubaydah was not a member of al Qaeda.<sup>59</sup>
20. Despite the purported bases for his original detention – his role in al Qaeda and information he was believed to possess – having been firmly debunked, the US nonetheless continues to assert the right to detain him under broad ‘law of war authority’ (see section 2.5.1 below).

### 2.3.2 Undertakings to detain incommunicado for life

21. The applicant’s ongoing detention corresponds to undertakings given by the CIA early in his interrogation. Before engaging in the torture of the applicant, records show that the CIA interrogation team in Thailand (SSCI ‘Detention Site Green’) sent a cable discussing plans if the applicant had a heart attack or died during interrogation, and seeking assurances that the arbitrary detention of the applicant would continue: ‘regardless which [disposition] option we follow however, and especially in light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life.’<sup>60</sup> The response received from superiors within the CIA was that:

*‘[t]here is a fairly unanimous sentiment within HQS that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.’<sup>61</sup>*

### 2.3.3 Secret Arbitrary Detention for the purpose of Torture

22. Prior to the capture of Abu Zubaydah in late March 2002, the CIA considered several options for his detention and interrogation. Internal documentation shows these included US military custody, which was rejected for potential loss of control by the CIA to the military or FBI, secrecy concerns and risk of his presence becoming known to the International Committee of the Red Cross.<sup>62</sup> This led to the decision to detain him in CIA run secret sites on the territory of cooperative states, which began

<sup>54</sup> E.g. SSCI Report, 410; CIA Intelligence Assessment, ‘[Countering Misconceptions about Training Camps in Afghanistan, 1990-2001](#)’ (16 August 2006), 2 (143 of the pdf document).

<sup>55</sup> CIA cable [redacted] 10607 (100335Z AUG 02) cited in SSCI Report, 42.

<sup>56</sup> CIA cable, ‘[Eyes only – \[redacted\] on Abu Zubaydah as of 2000 hours \(local time\) 18 August 2002](#)’ (18 August 2002), 1; SSCI Report, 43.

<sup>57</sup> SSCI Report, 43.

<sup>58</sup> He met counsel in February 2008. See also SSCI Report, 410 and US Govt’s position in US District Court for the District of Columbia, *Zayn Al Abidin Muhammad Husyan (Petitioner) vs. Robert Gates (Respondent)*, Civil Action No. 08-cv-1360 (RWR), [Respondent’s memorandum of points and authorities in opposition to petitioner’s motion for discovery and petitioner’s motion for sanctions](#), 36 (he was not a member of al Qaeda but that he substantially supported ‘hostile forces’) and 52: ‘the Government has already disclosed evidence suggesting that Petitioner was not affiliated with al-Qaida.’ This document was not filed until Oct. ‘09

<sup>59</sup> UN Security Council, Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee, ‘[Status of Cases](#)’ case 78; See Annex - summary of the analysis, observations, arguments and recommendations out? in the Ombudsperson’s report (attached as Annex), 4.

<sup>60</sup> CIA cable no. 10536 (151006Z JUL 02), ‘[Eyes only – Additional Operational and Security Considerations for the Next Phase of Abu Zubaydah Interrogation](#)’ (15 July 2002), 5; See also CIA Cable (182321Z JUL 02), ‘[Eyes Only – HQS feedback on issues pending for interrogations of Abu Zubaydah](#)’ (July 02), at 4; SSCI Report, 35.

<sup>61</sup> CIA cable no. ALEC [redacted] (182321Z JUL 02), *ibid.*; SSCI Report, 35.

<sup>62</sup> SSCI Report, 22.

with his rendition to the first ‘black site’ in Thailand on or around 31 March 2002,<sup>63</sup> followed by transfer to (at least)<sup>64</sup> five other such sites over the next four years, and to Guantánamo Bay in 2006.<sup>65</sup>

23. As the ECtHR concluded, ‘the rationale behind the programme was specifically to remove those persons from any legal protection’.<sup>66</sup> The CIA detention and transfer regime was designed and implemented to remain secret, according to the modus operandi set out *inter alia* by the SSCI or ECtHR.<sup>67</sup> This involved: the short term and cyclical nature of secret black sites, complex flight paths and false flight plans, use of CIA front companies, multi-layered contractual arrangements to disguise engaged actors, and the deliberate disorientation of detainees, some members of government and the public. Since then, the modus operandi of secrecy has continued, *inter alia* through non-cooperation with enquiries and the presumptive classification of information concerning the applicant and his detention by the CIA.<sup>68</sup>
24. The purpose of the secret detention was torture and ill-treatment. In July 2002, the CIA acquired formal approval for the use of 10 EITs to interrogate Abu Zubaydah.<sup>69</sup> A memorandum from the US Department of Justice Office of Legal Counsel on 1 August 2002 endorsed the legality of a series of interrogation techniques for ‘High Value Detainees’ including specifically Abu Zubaydah.<sup>70</sup>
25. As described in the 2004 CIA Report, they included: the ‘attention grasp’; ‘walling’ (holding by a collar and slamming head against wall); ‘facial hold’; ‘insult slapp[ing]’; ‘cramped confinement’; added stimuli to exacerbate phobias in confinement, such as insects; ‘wall standing’; ‘stress positions’, prolonged sleep deprivation up to 11 days at a time, and ‘the waterboard ... produc[ing] the sensation of drowning’.<sup>71</sup> Records show that in August 2002, Abu Zubaydah was subjected to combined EITs on an almost 24-hour-per-day basis.<sup>72</sup> During a 20-day period of ‘aggressive’ interrogations the SSCI confirms ‘*Abu Zubaydah spent a total of 266 hours (11 days, 2 hours) in the large (coffin size) confinement box and 29 hours in a small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet.*’<sup>73</sup> Prior to this, he had been kept in isolation for a total of 47 days.<sup>74</sup> He was threatened with death, informed by his captors that the only way he would leave the detention site was in a coffin-shaped box.<sup>75</sup> Records show intensive waterboarding<sup>76</sup> caused him to be ‘*completely unresponsive, with bubbles rising through his open, full mouth*’ and he had to be resuscitated through medical intervention.<sup>77</sup> The EITs compounded extreme conditions of detention and sensory deprivation, including constant noise, bright light and cold temperatures.<sup>78</sup>
26. Multiple sources confirm that Abu Zubaydah was the ‘guinea pig’ for whom the interrogation techniques were designed and on whom all of the techniques were tested,<sup>79</sup> separately and in combination. A former national security officer familiar with his treatment reportedly described Abu Zubaydah as ‘*an experiment. A guinea pig ... There were many enhanced interrogation [methods] tested on him that have never been discussed[.]*’<sup>80</sup>

<sup>63</sup> CIA Torture Unredacted, 156.

<sup>64</sup> See The Rendition Project, ‘[Prisoner Search](#)’: The possibility that Abu Zubaydah was held in still ‘other nations’ is mentioned since, as will be seen in the pages that follow, time gaps appear between his detentions and torture in the enumerated countries. See also CIA Torture Unredacted, 19, indicating he was rendered at least seven times.

<sup>65</sup> SSCI Report, 22-23. For a summary of the location of the black sites and their code names, see CIA Torture Unredacted, 36.

<sup>66</sup> *Zubaydah v. Lithuania*, para 656.

<sup>67</sup> *Zubaydah v. Lithuania*, para 90.

<sup>68</sup> CIA Torture Unredacted, 21; the applicant has been blocked from accessing facts in relation to his CIA detention

<sup>69</sup> Bybee Memorandum, 2.

<sup>70</sup> Bybee Memorandum, 2.

<sup>71</sup> Central Intelligence Agency Inspector General, ‘[Special review: Counterterrorism Detention and Interrogation Activities \(September 2001-October 2003\)](#)’ (7 May 2004), 15.

<sup>72</sup> SSCI Report, 40.

<sup>73</sup> SSCI Report, 42.

<sup>74</sup> SSCI Report, 40.

<sup>75</sup> SSCI Report, 42.

<sup>76</sup> SSCI Report, 42.

<sup>77</sup> SSCI Report, 43-44.

<sup>78</sup> SSCI Report, 29, 40-41, 100. *Zubaydah v. Poland*, e.g. paras 67, 496; *Zubaydah v. Lithuania* 640.

<sup>79</sup> Ali Soufan, Daniel Freedman, *The Black Banners – The Inside Story of 9/11 and the War Against al-Qaeda* (Norton, 2011).

<sup>80</sup> Jason Leopold, ‘[Torture Diaries, Drawings and the Special Prosecutor](#)’, Truthout (29 March 2010), 5, last accessed 25 March 2021.

27. The SSCI confirms that other methods were employed in addition to the approved EITs, including ice baths, rectal rehydration, forced nudity and sexual violence.<sup>81</sup> The applicant's experience of these are captured in his annexed drawings.
28. Early in his detention, half-way through this 20-day 'aggressive interrogation phase', CIA officers concluded it was unlikely he 'had actionable new information about current threats to the United States.'<sup>82</sup> One of the key architects of the EITs, psychologist James Mitchell, testified in 2020 that he objected to the continued torture of Abu Zubaydah as he had concluded that he no longer had any further actionable intelligence.<sup>83</sup> Despite this, the CIA ordered continued use of the EITs,<sup>84</sup> and confirmed that 'the interrogation process takes precedence over preventative medical procedures.'<sup>85</sup>
29. *Prolonged CIA secret detention:* Abu Zubaydah was held by the CIA for a period of 1619 days. Most of these were periods of secret detention on other states territories, as set out in the next section. Abu Zubaydah was also held for two periods in Guantánamo Bay. First, he was transferred to a secret site at Guantánamo on 22 September 2003, where he was detained for six months until the oral hearings in the Supreme Court case of *Rasul v. Bush* led the CIA to fear that 'high-value detainees' would be granted habeas corpus rights and access to counsel. He was transferred back into black site detention specifically to bypass the limited legal protections slowly being afforded to Guantánamo detainees. The second was on 5 September 2006, when he was transferred from Afghanistan to Guantánamo Bay where he remains in detention today.
30. Since 2002 he has been held by organs and agents of the United States, albeit with the active involvement of a range of other states whose roles are set out in summary below. The US is responsible for multiple ongoing violations of his rights during 19 years of arbitrary detention, and for its stark failure to investigate, make public the truth and ensure accountability and reparation.

#### ***2.3.4 Failure of investigation, accountability and reparation***

31. There has been no meaningful investigation, accountability or reparation by the US in respect of the facts set out in this application. Successive administrations have refused to even commit to investigate and hold accountable those responsible for crimes committed in the ERP or at Guantanamo.<sup>86</sup> Despite copious information on violation of the applicant's rights, he has received no acknowledgment, apology and commitment to bring the violations to an end and ensure they do not happen again. Although in 2011, the Department of Justice opened a criminal investigation into the death of two individuals in US custody in Afghanistan and Iraq,<sup>87</sup> no charges were pursued 'because the admissible evidence would not be sufficient ...'.<sup>88</sup> Several international human rights bodies, including the UNHRC, UNCAT and UN Special Rapporteur on torture,<sup>89</sup> have criticised this failure. The UNHRC noted '*with concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment committed in the context of the CIA secret rendition, interrogation and detention programmes were closed in 2012, resulting in only a meagre number of criminal charges being brought against low-level operatives. The Committee is concerned*

<sup>81</sup> SSCI Report, Finding #14, 12 and 99-100. SSCI Report p 12: 'the CIA routinely subjected detainees to nudity and dietary manipulation. The CIA also used abdominal slaps and cold water dousing on several detainees during that period. None of these techniques had been approved by the Department of Justice'.

<sup>82</sup> SSCI Report, 42. SSCI Report, 45; For more detail see *Salim v. Mitchell and Jessen* 2:15-CV-286-JLQ, [Complaint and Demand for Jury Trial](#) (13 October 2015).

<sup>83</sup> Elisa Epstein, '[CIA Contractor Details Torture of 9/11 Suspects](#)', Human Rights Watch (27 January 2020), accessed 4 July 2020.

<sup>84</sup> SSCI Report, 43.

<sup>85</sup> SSCI Report, 35.

<sup>86</sup> E.g. The White House, Office of the Press Secretary, '[Statement of President Barack Obama on Release of OLC Memos](#)' (16 April 2009): Barack Obama stating 'nothing will be gained by spending our time and energy laying blame for the past'.

<sup>87</sup> US Department of Justice, Office of Public Affairs, '[Statement of Attorney General Regarding Investigation into the Interrogation of Certain Detainees](#)' (30 June 2011).

<sup>88</sup> US Department of Justice, Office of Public Affairs, '[Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees](#)' (30 August 2012).

<sup>89</sup> Juan Méndez, UN Special Rapporteur on Torture, '[Enforcing the Absolute Prohibition Against Torture](#)', Chatham House (10 September 2012), 5-6.

that many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims....<sup>90</sup> The Committee called on the US to:

*“ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established. The State party should also consider the full incorporation of the doctrine of “command responsibility” in its criminal law and declassify and make public the report of the Senate Special Committee on Intelligence into the CIA secret detention programme.”<sup>91</sup>*

32. The IACCommHR has condemned US legislation enshrining wide-reaching defences in relation to ERP crimes,<sup>92</sup> as ‘amnesty laws [that] purport to prevent the effective prosecution and punishment of State agents who may be responsible for grave human rights violations, including torture, perpetrated against detainees in the framework of the “war on terror”’.<sup>93</sup> UNCAT also expressed concern regarding the ‘absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel’.<sup>94</sup>

33. The lack of investigation, accountability and reparation has also been emphasised in the course of the ICC proceedings regarding the situation in Afghanistan. In April 2019, the Pre-Trial Chamber concluded that ‘the information does not show that criminal investigations or prosecutions have been conducted’ in the US.<sup>95</sup> The Office of the Prosecutor’s submissions made clear the lack of information supporting proceedings having been taken against those responsible for ‘detainee abuse in Afghanistan’,<sup>96</sup> and that had been ‘no criminal investigation or prosecution of any person who devised, authorised, or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques constituting torture, cruel treatment or outrages upon personal dignity, whether in relation to those that were formally authorised by the OLC or those that went beyond the scope of the legal guidance’.<sup>97</sup>

## 2.4 **Facts – Detention II: Role of other Respondent States in Secret Detention of Abu Zubaydah**

### 2.4.1 ***Thailand (‘Detention Site Green’)***

34. The SSCI report indicates that on 29 March 2002, Thai officials approved the creation of a CIA secret detention facility, which the SSCI code named ‘Detention Site Green’.<sup>98</sup> Consistent analysis shows that the detention site code-named ‘Detention Site Green’, ‘Cat’s Eye’,<sup>99</sup> or ‘black site no. 1’<sup>100</sup> was in Thailand.<sup>101</sup> This was accepted by the ECtHR, which has twice found it established ‘beyond reasonable doubt’ that Abu Zubaydah was detained in Thailand from an unidentified date after his capture on 28 March 2002 to 4 December 2002.<sup>102</sup> A Council of Europe report as early as 2007

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<sup>90</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, UN Doc. CCPR/C/USA/CO/4, 23 April 2014 <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nnMFN O U O Q B x 7 X % 2 B I 5 5 y h I w l k D k 6 C F 0 O A d i q u 2 L 8 S N x D B 4 % 2 B V R P k f 5 g Z F b T Q O 3 y 9 d L r U e U a T b S 0 R r N O 7 V H z b y x G D J % i b i d .>>

<sup>91</sup> Ibid.

<sup>92</sup> The 2005 Detainee Treatment Act (DTA) and the 2006 Military Commission Act (MCA) provide defence for the US agents involved in extraordinary rendition activities and counterterrorism operations.

<sup>93</sup> IACCommHR Ameziane Report, para 244. See also paras 216-227.

<sup>94</sup> UNCAT, ‘[Concluding observations on the combined third to fifth periodic reports of the United States of America](#)’ (19 December 2014) UN Doc. CAT/C/USA/CO/3-5, para 12.

<sup>95</sup> ICC Afghanistan Article 15 Decision, para 79.

<sup>96</sup> ICC Afghanistan Investigation’s request, para 311.

<sup>97</sup> ICC Afghanistan Investigation’s request, para 328.

<sup>98</sup> SSCI Report, 22-23.

<sup>99</sup> *Zubaydah v. Lithuania*, para 91.

<sup>100</sup> *Zubaydah v. Poland*, para 308.

<sup>101</sup> The Rendition Project, ‘[Abu Zubaydah](#)’, CIA Torture Unredacted, 79, BBC News, ‘[CIA director Gina Haspel’s Thailand torture ties](#)’ (4 May 2018).

<sup>102</sup> *Zubaydah v. Poland*, para 404; *Zubaydah v. Lithuania*, para 166 and para 258.

indicated that ‘Thailand hosted the first CIA “black site,” and that Abu Zubaydah was held there after his capture in 2002’<sup>103</sup>, while a 2010 UN report of multiple special rapporteurs and working groups confirmed that the existence of a CIA black site in Thailand was ‘credible’.<sup>104</sup>

35. Thailand was reportedly chosen as the first country to host a CIA black site because of its special bond with the US,<sup>105</sup> and there being ‘no issues of possible US court jurisdiction’.<sup>106</sup>
36. While the precise number is unknown, reports indicate that several detainees were held in secret detention in Thailand, including at detention site Green, one of whom was Abu Zubaydah.<sup>107</sup>
37. Evidence from various sources suggests his transfer to the Thai facility was on or around 31 March 2002.<sup>108</sup> The ECtHR found that ‘after his arrest, the applicant was transferred to a secret CIA detention facility in Thailand [...], where he was interrogated by CIA agents and where a variety of EITs were tested on him’.<sup>109</sup> The Court referred to ‘[f]irst-hand CIA documentary evidence and clear and convincing expert evidence’<sup>110</sup> which demonstrates that the applicant was arbitrarily detained and tortured in Thailand. Internal memos and multiple disclosed cables between CIA officials at the Thai site and headquarters, demonstrate his ill-treatment in grotesque detail.<sup>111</sup> There were no less than 90 video tapes of his torture in Thailand, though these videos were destroyed by CIA officials.<sup>112</sup>
38. Abu Zubaydah’s conditions of detention and torture in Thailand, including EITs tested on him during this period, are well documented. He was ‘interrogated during April and May 2002, and then placed in isolation’ from 18 June to 1 August.<sup>113</sup> After this period, between 4 August 2002 and 23 August 2002, ‘enhanced interrogation techniques’ were used on an ‘almost 24-hour-per-day basis’,<sup>114</sup> There is direct evidence, from CIA memos, cables and FBI interrogators present at the time,<sup>115</sup> among others,<sup>116</sup> that in Thailand Abu Zubaydah was subject to waterboarding up to 83 times,<sup>117</sup> ‘slapped, grabbed, made to stand long hours in a cold cell, and finally handcuffed and strapped feet up to a water board’, that loud rock music or noise generators were used to enhance Abu Zubaydah’s “sense of hopelessness” round the clock,<sup>118</sup> and he ‘spent a total of more than 11 days in a coffin-sized box, and 29 hours in a box which measures just 75cm x 75cm x 55 cm’.<sup>119</sup> CIA cables confirm the ‘twelve potential physical and psychological pressures’ used against him during this time.<sup>120</sup>
39. There are also ample testimonies and reports of torture of other detainees who were also held in Thailand. Their conditions of detention and interrogations are consistent with Abu Zubaydah’s.<sup>121</sup>
40. There is clear evidence that Thai officials were, at a minimum, aware of and complicit in the construction of the detention facility for the arbitrary detention of detainees. Thai officials are reported

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<sup>103</sup> CoE 2<sup>nd</sup> Report, para 70.

<sup>104</sup> HRC Joint Study, para 111.

<sup>105</sup> CoE 2<sup>nd</sup> Report, para 70: These are said to date back at least to the Vietnam War.

<sup>106</sup> CIA Torture Unredacted, 79

<sup>107</sup> OSJI Globalizing torture, 111.

<sup>108</sup> SSCI Report, 21-24; *Zubaydah v. Poland*, paras 86-91; BBC News, ‘[CIA director Gina Haspel’s Thailand torture ties](#)’ (4 May 2018).

<sup>109</sup> *Zubaydah v. Poland*, para 86.

<sup>110</sup> *Zubaydah v. Poland*, para 404.

<sup>111</sup> See e.g. *Zubaydah v. Poland*, para 309; SSCI Report, 40-45.

<sup>112</sup> *Zubaydah v. Poland*, para 309: One of the experts appearing before the ECtHR described the ‘videotaping of interrogations’ of Abu Zubaydah was an ‘established judicial fact’; SSCI Report, 444; Jose Rodriguez, *Hard Measures: How Aggressive CIA Action after 9/11 Saved American Lives* (Simon & Schuster, 2012).

<sup>113</sup> CIA Torture Unredacted, 80.

<sup>114</sup> SSCI Report, 40; *Zubaydah v. Poland*, para 309; CIA Torture Unredacted 82.

<sup>115</sup> SSCI Report, 24-25 on Abu Zubaydah’s interrogation in Thailand reflects that Abu Zubaydah was ‘questioned by special agents from the Federal Bureau of Investigation (FBI) who spoke Arabic and had experience interrogating members of al-Qa’ida’.

<sup>116</sup> HRC Joint Study, para 108.

<sup>117</sup> SSCI Report, 118 footnote 698 indicating that ‘CIA records indicate that [...] Abu Zubaydah received at least 83 applications of the waterboard technique’.

<sup>118</sup> CIA cable, ‘[Eyes only – Updated interrogation plan for Abu Zubaydah](#)’ (25 April 2002), para 10; CIA Torture Unredacted, 80.

<sup>119</sup> CIA Torture Unredacted, 82.

<sup>120</sup> CIA cable, ‘[Description of Physical Pressure](#)’ (9 July 2002); CIA Torture Unredacted, 80.

<sup>121</sup> OSJI Globalizing torture, 112, stating that: Mohammed Nazir bin Lep ‘was held naked for three to four days while detained in Thailand and not provided any solid food until twelve days after his arrest’ before being transferred to Guantánamo; 43: likewise, Riduan Isamuddin ‘was subjected to stress positions while blindfolded with a sack over his head, kept naked, and deprived of solid food’.

as having given their ‘*approval*’ to the construction of the CIA facility.<sup>122</sup> The SSCI established that Thailand was aware of the presence of the CIA site, which it supported after ‘continued lobbying’ of the CIA Station Chief.<sup>123</sup> During its operation there were negotiations between the CIA and the Thai government, with the outcome that the latter ‘*allow[ed] DETENTION SITE GREEN to remain operational*’.<sup>124</sup> A study by multiple UN entities, including the UNWGAD, reported in 2010 on suspicions of political analysts and diplomats in Thailand regarding the detention facility.<sup>125</sup> More specifically, the SSCI Report appears to confirm that government officers ‘had knowledge of the presence of Abu Zubaydah’ at Site Green.<sup>126</sup>

41. Multiple sources, including the UNHRC Joint report, reflect that over time ‘local officials were said to be growing uneasy’ about the existence of a black site in Thailand.<sup>127</sup> Direct knowledge of the nature of the detention facility is reflected in a journalist’s report, cited by the ECtHR, that ‘*Thai government and intelligence officials became nervous about hosting a secret prison for Zubaydah*’.<sup>128</sup> The SSCI also indicates that in making plans to be put in place in the event of Abu Zubaydah’s death, CIA officers at the detention site had to ‘*keep[] in mind the liaison equities involving [their] hosts*’.<sup>129</sup>
42. Nonetheless the site remained operational until at least the end of 2002.<sup>130</sup> Ultimately, it was only when journalists<sup>131</sup> learned about the detention facility, that it was closed.<sup>132</sup> Experts heard by the ECtHR confirmed that Abu Zubaydah was transferred out of Thailand on 4 December 2002.<sup>133</sup> Contracts and flight data including from EuroControl indicated his transfer from Bangkok, Thailand, to Poland via Dubai on that date.<sup>134</sup> Contractual information referred to in the ECtHR proceedings shows the nature of the relevant flights as CIA rendition flights.<sup>135</sup>
43. Thailand’s failure to protect the applicant and others from arbitrary detention and torture on its soil led the UNWGAD and others recommending, in the Joint Study, that the Thai authorities ‘launch an independent investigation into the matter’.<sup>136</sup> However, despite the passage of years and growing information, Thailand continues to deny its involvement in the extraordinary rendition programme and its responsibility in the arbitrary detention and torture that occurred on its soil.<sup>137</sup> Thailand has failed to reckon with its role in the ERP. There has been no acknowledgment, investigation or accountability by Thailand in respect of the arbitrary detention and torture on its territory.<sup>138</sup>

#### 2.4.2 Poland (‘*Detention Site Blue*’)

44. It has been established by the ECtHR that Poland hosted a CIA detention centre located within a Polish military training base in Stare Kiejkuty,<sup>139</sup> code named by the SSCI ‘*Detention Site Blue*’,<sup>140</sup>

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<sup>122</sup> CIA Torture Unredacted, 79.

<sup>123</sup> CIA cable [redacted] 77281 cited in SSCI Report 24, footnote 80.

<sup>124</sup> SSCI Report, 24.

<sup>125</sup> HRC Joint Study, para 108.

<sup>126</sup> CIA cable [redacted] 69626 cited in SSCI Report, 24: ‘On April [redacted], 2002, the CIA Station in Country [redacted] attempted to list the number of Country [redacted] officers who, “[t]o the best of Station’s knowledge,” had knowledge of the presence of Abu Zubaydah” in a specific city in Country [redacted]. The list included eight individuals, references to “various” personnel [redacted] and the “staff” of [redacted], and concluded “[d]oubtless many others.”’

<sup>127</sup> HRC Joint Study, para 109.

<sup>128</sup> *Zubaydah v. Lithuania*, para. 258, citing Matthew Cole, “Lithuania Hosted Secret CIA Prison To Get ‘Our Ear.’”

<sup>129</sup> SSCI Report, 34. See also CIA cable, ‘[Eyes only – Additional operational and security considerations for the next phase of Abu Zubaydah Interrogation](#)’ (15 July 2002), 5; CIA Torture Unredacted, 81 stating that: ‘CIA personnel at the Thai site were also involved in these discussions, up to and including outlining their plan for dealing with Abu Zubaydah’s possible death under torture’.

<sup>130</sup> *Zubaydah v. Lithuania*, para 129: the exact date of this is unknown, the experts appearing before the ECtHR mention either December 2002 or mid 2002. What matters and is clearer was the transfer of the applicant in December 2002.

<sup>131</sup> CIA Torture Unredacted, 109 stating that: ‘By November, the New York Times was aware. Pressured by the CIA, neither outlet published the story, but the media’s knowledge resulted in the decision to close the facility’.

<sup>132</sup> SSCI Report, 24.

<sup>133</sup> See e.g. *Zubaydah v. Poland*, para 404.

<sup>134</sup> *Zubaydah v. Poland*, paras 93-94; The Rendition Project, ‘[Abu Zubaydah](#)’.

<sup>135</sup> *Zubaydah v. Poland*, para 93.

<sup>136</sup> HRC Joint Study, para 111.

<sup>137</sup> HRC Joint Study, para 111; CoE 2<sup>nd</sup> Report, para 70.

<sup>138</sup> OSJI Globalizing torture, 112.

<sup>139</sup> CoE 2<sup>nd</sup> Report, para 170. *Zubaydah v. Poland*, para 419(2).

<sup>140</sup> *Zubaydah v. Lithuania*, para 541.

‘Quartz’ or ‘black site no. 2’.<sup>141</sup> The site had been used during World War II by German military and intelligence officials,<sup>142</sup> and in the 1960s by the Soviet military.<sup>143</sup> Public sources suggest it held at least eight detainees.<sup>144</sup>

45. On the 4/5<sup>th</sup> December 2002 Abu Zubaydah was transferred from Thailand to Stare Kiejkuty, Poland, where he was detained until 22 September 2003.<sup>145</sup>
46. In its decision in *Husayn (Abu Zubaydah) v. Poland*, the ECtHR found it established beyond reasonable doubt that Poland was responsible for active complicity in the extraordinary rendition programme.<sup>146</sup> The Court found that:
- ‘abundant and coherent circumstantial evidence [] leads inevitably to the following conclusions: (a) that Poland knew of the nature and purpose of the CIA’s activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on the land, and the securing of the Stare Kiejkuty base for the CIA’s secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory’.*<sup>147</sup>
47. Polish authorities had cooperated in both the preparation and execution of the CIA’s extraordinary rendition programme, and *‘for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring’.*<sup>148</sup> Allowing the CIA to transfer Abu Zubaydah out of Poland exposed him to the foreseeable risk of further serious violations at other black sites and in Guantánamo.<sup>149</sup>
48. The knowledge and active involvement of Poland is also supported by the subsequent SSCI Report. It refers to a “Memorandum of Understanding” covering the relative roles and responsibilities’ of different states actors, which was reportedly rejected by the CIA.<sup>150</sup> After negotiations and ‘a multi-million dollar payment’, Poland is reported to have become ‘flexible with regard to the number of CIA detainees at the facility and when the facility would eventually be closed’.<sup>151</sup> The HRC Joint Study reports that ‘the head of the Polish Intelligence Agency in period 2002-2004, confirmed the landing of CIA flights’.<sup>152</sup>
49. The substantial role of Poland, authoritatively confirmed by the ECtHR and SSCI, has been described by investigators as follows: ‘Polish officials provided perimeter security for the site, as well as operational security during prisoner transfers to and from the airport [...]. They could visit the staff canteen, although they had no access to the prisoners’.<sup>153</sup> Likewise, an earlier European Parliament report reflects orders being given regarding the landing of ‘aircraft that have been shown to have been used by the CIA’ at Szymany airport to avoid ‘customs clearance’, people ‘approach[ing] the aircraft’, ‘landing fees’ and the provision of escort towards the ‘intelligence training centre at Stare Kiejkuty’.<sup>154</sup>

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<sup>141</sup> *Zubaydah v. Poland*, para 308.

<sup>142</sup> Kamil Majchrzak, ‘[Die polnische Unschuld ist unantastbar!](#)’, OstBlog (20 January 2006).

<sup>143</sup> See, e.g. Chris Kulczycki, ‘[Polish Intelligence Official Confirms CIA Use of Polish Facility](#)’, European Tribune (19 December 2005), last accessed 25 March 2021.

<sup>144</sup> See e.g. CIA Torture Unredacted, 110.

<sup>145</sup> SSCI Report, 67; The Rendition Project, ‘[Abu Zubaydah](#)’; *Zubaydah v. Poland*, para 415.

<sup>146</sup> *Zubaydah v. Poland*, para 444.

<sup>147</sup> *Zubaydah v. Poland*, para 444.

<sup>148</sup> *Zubaydah v. Poland*, para 512.

<sup>149</sup> *Zubaydah v. Poland*, para 513.

<sup>150</sup> SSCI Report, 74; CIA Torture Unredacted, 110-111.

<sup>151</sup> SSCI Report, 74; CIA Torture Unredacted, 111.

<sup>152</sup> HRC Joint Study, para 115.

<sup>153</sup> CIA Torture Unredacted, 109-110.

<sup>154</sup> European Parliament, ‘[Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners \(2006/2299\(INI\)\)](#)’ (14 February 2007) (‘2007 European Parliament Resolution’), paras 171, 176.

50. The ECtHR found that sufficient information was available, as early as 2002, of the nature of the US unlawful detention and prisoner ill-treatment.<sup>155</sup> It was ‘inconceivable’ that Polish cooperation was provided absent relevant knowledge; the state knew, and should have known in light of publicly available information, and rendered support notwithstanding.<sup>156</sup>
51. The UN Human Rights Committee in 2010<sup>157</sup> and the ECtHR in a binding judgment of 2014, recorded Polish failure to investigate and hold to account those responsible, to satisfy the right to truth, or to provide a remedy.<sup>158</sup> The ECtHR found that the investigative steps taken by Poland failed to meet the standard of an ‘effective investigation’ and constituted a violation of the ECHR.<sup>159</sup> Criminal investigations into the ERP in Poland have been pending without progress since 2008.<sup>160</sup> As part of the procedure for the implementation of the judgment, Poland has purported to hide behind the ongoing ‘pending’ investigation and its classified nature to avoid providing any details of investigative steps being taken.<sup>161</sup> In August 2019, the UNCAT urged Poland to ‘complete the investigation into allegations of its involvement in the high-value detainee rendition and secret detention programme’.<sup>162</sup> Around the same time, the Deputies of the Committee of Ministers of the Council of Europe noted that ‘there is still no tangible progress in the domestic investigation despite the fact that it has been pending for more than 11 years’.<sup>163</sup>

### 2.4.3 Morocco

52. The SSCI report makes extensive reference to a state which ‘detained individuals on the CIA’s behalf’.<sup>164</sup> This country has been identified since as Morocco.<sup>165</sup> The UN Joint Report refers to Morocco as a site of ‘proxy detention facilities’ where detainees were held at the behest of the CIA.<sup>166</sup> These descriptions suggest a particularly hands-on role by Morocco in arbitrary detention and torture.
53. Various sources support the conclusion that Morocco ran detention facilities itself and facilitated the construction of a CIA site. The UNCAT expressed deep concern regarding ‘*allegations that secret places of detention are also located within certain official detention facilities. According to allegations received by the Committee, these secret detention centres are not monitored or inspected by any independent body*’.<sup>167</sup> A main site at Témara prison was run by the Moroccan Internal Security Service (the National Surveillance Directorate).<sup>168</sup> In addition, an UNCAT concluding observation refers to ‘a new secret prison ... in the vicinity of Ain Aouda’ built by the CIA, though it is unclear whether it was operational.<sup>169</sup> A detailed report by investigative journalists indicates ‘*Moroccan officials were involved in surveying potential locations for a black site during 2003, and agreed on two separate occasions to hold CIA prisoners in their own facilities while the site was under construction*’.<sup>170</sup> What is clear is that detainees were held in secret detention on Moroccan soil, with the active participation of Moroccan officials.

<sup>155</sup> *Zubaydah v. Poland*, para 441.

<sup>156</sup> *Zubaydah v. Poland*, para 430.

<sup>157</sup> HRC, ‘[Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee](#)’ (15 November 2010) UN Doc. CCPR/C/POL/CO/6, para 15.

<sup>158</sup> *Zubaydah v. Poland*, paras 481-493, 544.

<sup>159</sup> *Zubaydah v. Poland*, para 544.

<sup>160</sup> CoE, ‘[Decision of the Ministers’ Deputies adopted at the 1348<sup>th</sup> meeting](#)’, (DH) June 2019 – H46-18 Al Nashiri group v. Poland (Application No. 28761/11), (6 June 2019) Doc. CM/Notes/1348/H46-18 (‘1348<sup>th</sup> meeting Decision’), para 6.

<sup>161</sup> CoE, ‘[Communication from Poland to the 1324<sup>th</sup> meeting](#)’, (DH) – Action Plan (21 June 2018) Al Nashiri group v. Poland (Application No. 28761/11) Doc. DH-DD(2018)648, 24.

<sup>162</sup> UNCAT, ‘[Concluding observations on the seventh periodic report of Poland](#)’ (29 August 2019) UN Doc. CAT/C/POL/CO/7, para 22.

<sup>163</sup> 1348<sup>th</sup> meeting Decision, para 6.

<sup>164</sup> SSCI Report, 139-142. See *Zubaydah v. Lithuania*, para 136: the site was not given a colour code in the SSCI report as it was not a CIA detention site as such.

<sup>165</sup> CIA Torture Unredacted, 123.

<sup>166</sup> HRC Joint Study, para 143.

<sup>167</sup> UNCAT, ‘Consideration of reports submitted by States parties under Article 19 of the Convention, [Concluding observations of the Committee against Torture](#)’, (21 December 2011) UN Doc. CAT/C/MAR/CO/4 (‘UNCAT Concluding observations Morocco’), para 15.

<sup>168</sup> CIA Torture Unredacted, 123.

<sup>169</sup> UNCAT Concluding observations Morocco, para 15.

<sup>170</sup> CIA Torture Unredacted, 37.



54. The SSCI and other sources indicate that the US provided a multi-million dollar ‘subsidy package’ to Morocco for its support.<sup>171</sup> The report by investigative journalists entitled CIA torture Unredacted report states that ‘*it is clear that elements of the political leadership in the country were aware of the cooperation, and provided approval of the construction of the black site*’.<sup>172</sup>
55. While the precise number of detainees held there is unknown, information is available on 11 detainees detained secretly in Morocco, including Abu Zubaydah.<sup>173</sup> Ample evidence now indicates that Abu Zubaydah was detained in a facility in Rabat for 11 months.<sup>174</sup>
56. The ECtHR has twice found it established ‘beyond reasonable doubt’ that he was detained in Morocco from 27 March 2004 to February 2005.<sup>175</sup> The Court refers to expert witness testimony to conclude that the evidence as a whole indicates ‘*there is only one place he could have been in the early part of 2005 and that that place was indeed Morocco*’.<sup>176</sup> CIA rendition contracts and EuroControl flight data support the finding that Abu Zubaydah was transferred out of Guantánamo Bay to Morocco on 27 March 2004.<sup>177</sup> The transfer was prompted by pending litigation in US courts challenging the denial of habeas corpus, and the CIA’s desire to avoid possible access to counsel or judicial oversight, and to bypass the effects of successful litigation.<sup>178</sup>
57. The SSCI report confirms that Abu Zubaydah continued to be interrogated and tortured during his detention in Morocco.<sup>179</sup> There are also ample testimonies and reports of torture of other detainees at that location at that time. These include detailed information on the torture of Mr Binyam Mohamed in Morocco, involving him being, inter alia, shackled, stripped naked, tied with a rope to the wall, subjected to constant loud noise, held in cold and unsanitary conditions, drugged, beaten, lacerated all over his body including genitals with a scalpel and a salt solution was poured into his wounds.<sup>180</sup> Other detainees, including Mr Abou Elkassim Britel has testified that, during repeated interrogation in Morocco: ‘*I was handcuffed, blindfolded, and severely beaten on all parts of my body. I was threatened with worse torture, including having my genitals cut off and “bottle torture” (a torture technique whereby a bottle is forced into the victim’s anus)*’.<sup>181</sup> Detainees report hearing the torture of fellow inmates.<sup>182</sup> CIA Torture Unredacted describes torture as ‘routine’ at the Moroccan secret site.<sup>183</sup>
58. Some reports also suggest that foreign (Canadian and British) officials visited detainees during their interrogation in Morocco.<sup>184</sup> Evidence suggests this torture ‘took place on the back on [sic] British questioning and intelligence, and that at least one US agent was involved in his interrogation’.<sup>185</sup>

<sup>171</sup> CIA Torture Unredacted, 124; SSCI Report, 139.

<sup>172</sup> CIA Torture Unredacted, 37.

<sup>173</sup> OSJI Globalizing torture, 97.

<sup>174</sup> *Zubaydah v. Lithuania*, paras 494-497; The Rendition Project, ‘[Rendition Circuit: 26-30 March 2004](#)’; The Rendition Project, ‘[Abu Zubaydah](#)’.

<sup>175</sup> *Zubaydah v. Lithuania*, para 497. See also para 105: ‘when Zubaydah left Guantánamo in March 2004 to avoid judicial oversight] can’t find open bracket he was taken back to the same site in Morocco at which he had previously been detained, Rabat – Morocco...’.

<sup>176</sup> *Zubaydah v. Lithuania*, para 137.

<sup>177</sup> *Zubaydah v. Lithuania*, para 106.

<sup>178</sup> *Zubaydah v. Lithuania*, para 99.

<sup>179</sup> SSCI Report, 392, footnote 2208, stating: ‘On July 7, 2003, and April 27, 2004, Abu Zubaydah was asked about “Abu Ahmed al-Kuwaiti” and denied knowing the name.’

<sup>180</sup> HRC Joint Study, para 151, stating: ‘On 21 July 2002, he [Binyam Mohamed] was rendered by the CIA to Morocco, where he was held for 18 months in three different unknown facilities. During that period, he was allegedly threatened, subjected to particularly severe torture and other forms of ill-treatment; deprived from sleep for up to 48 hours at a time; and his prayers were interrupted by turning up the volume of pornographic movies.’ International Bar Association, ‘[Extraordinary Rendition](#)’, January 2009, 58-59, states: Binyam Mohamed received threats of torture and rape, ‘he was given a Qur’an soaked in something like diesel’, he was beaten, heard others screaming, ‘was hung up against a wall, his clothes were cut off, and a small cut was made to his chest with a scalpel’, his penis was cut, he was subjected to ‘deafening music,’ and his captors ‘drugged his food and strapped him down to a mattress to insert IVs of heroin into him’.

<sup>181</sup> *Binyam Mohamed et al v. Jeppesen Dataplan*, [Declaration of Abou Elkassim Britel](#) (2 November 2007), para 17; CIA Torture Unredacted, 123.

<sup>182</sup> International Bar Association, ‘[Extraordinary Rendition](#)’ (January 2009), 59; Human Rights Watch, ‘[Delivered into Enemy Hands, US-led Abuse and Rendition of Opponents to Gaddafi’s Libya](#)’ (2012), 80.

<sup>183</sup> CIA Torture Unredacted, 123.

<sup>184</sup> See UK section below. HRC Joint Study, 180: A Canadian reportedly ‘threatened [Binyam Mohamed] that he would be tortured by Americans, including electrocution, beatings and rape ...’.

<sup>185</sup> CIA Torture Unredacted, 77 citing Binyam Mohamed’s testimony (#95).

59. ‘Tensions’<sup>186</sup> and ‘acrimonious relations’<sup>187</sup> between Morocco and the US contributed to the decision to close the site in August 2004, which materialised in February 2005. The SSCI alludes to Abu Zubaydah’s transfer out of Morocco on an unspecified date in 2005.<sup>188</sup> Analysis of contractual information and data from EuroControl, endorsed by the ECtHR’s findings, detail the routes of the flights out from Morocco and on to Lithuania on 17 and 18 February 2005.<sup>189</sup> Contractual information shows the nature of the flights as CIA rendition flights.<sup>190</sup>
60. Deep concern regarding the Moroccan role has been expressed by several international bodies.<sup>191</sup> Morocco has repeatedly been asked to investigate and to give account for its role.<sup>192</sup> The UNWGAD recommended investigation and prosecution in ‘all cases of extraordinary renditions in which [it] may have played a role’.<sup>193</sup> However, despite the passage of years, growing information and ample opportunity, Morocco continues a policy of denial.<sup>194</sup> There has been no acknowledgment, investigation or accountability by the Moroccan State in respect of the allegations of rendition committed on its territory and by its agents.<sup>195</sup>

#### 2.4.4 Lithuania (‘Detention Site Violet’)

61. It has been established by the ECtHR that Lithuania hosted a CIA detention centre, code named ‘Detention Site Violet’ from 17-18 February 2005 to 25 March 2006.<sup>196</sup>
62. On the 17/18<sup>th</sup> February 2005, Abu Zubaydah was flown from Morocco to Lithuania on one of two flights, N724CL or N787WH. He was detained there until 25 March 2006,<sup>197</sup> when all the remaining prisoners were transferred to Afghanistan.<sup>198</sup>
63. Lithuania was the last European site to remain open. By 2006, as one chief of another detention site noted, because of the length of their detention, ‘[the] detainees have been all but drained of actionable intelligence.’<sup>199</sup> The ECtHR ultimately held ‘*that during his detention in Lithuania the applicant was subjected to an extremely harsh detention regime including a virtually complete sensory isolation from the outside world and suffered from permanent emotional and psychological distress and anxiety also caused by the past experience of torture and cruel treatment in the CIA’s hands and fear of his future fate.*’<sup>200</sup> In addition, the site suffered a ‘lack of emergency medical care for detainees’.<sup>201</sup> The SSCI Report notes medical issues encountered (previously) by several ‘high value detainees’ in various detention site, such as broken bones, deteriorating wounds and the loss of an eye.<sup>202</sup> This eventually led to the closure of ‘Detention Site Violet’.<sup>203</sup>

<sup>186</sup> SSCI Report, 141.

<sup>187</sup> *Zubaydah v. Lithuania*, para 105.

<sup>188</sup> SSCI Report, 142 (date redacted).

<sup>189</sup> *Zubaydah v. Lithuania*, para 123 refers to two renditions flights ‘(N787WH and N724CL), one from Morocco and Amman, one from Morocco and Bucharest, arriving in Lithuania on 17 and 18 February 2005 respectively.’ Data from EuroControl shows N787WH’s progress from the USA to Morocco, Romania, Lithuania and back.

<sup>190</sup> Richmor litigation referred to by the ECtHR in *Zubaydah v. Lithuania*, para 130.

<sup>191</sup> HRC Joint Study, para 143; UNCAT Concluding observations Morocco, para 11; WGAD, ‘Report of the Working Group on Arbitrary Detention - Addendum - [Mission to Morocco](#)’, (4 August 2014) UN Doc. A/HRC/27/48/Add.5 (‘WGAD Mission to Morocco’), paras 27, 75.

<sup>192</sup> UNCAT Concluding observations Morocco, para 11; WGAD Mission to Morocco, para 83(j).

<sup>193</sup> UNCAT Concluding observations Morocco, para 11; WGAD Mission to Morocco, para 83(j).

<sup>194</sup> UNCAT Concluding observations Morocco, para 15, stating that: ‘The Committee takes note of the statements made by the State party during the interactive dialogue to the effect that there is no secret detention centre at DST headquarters in Témara, as confirmed by the three visits made by the Crown Prosecutor-General in 2004 and by several representatives of the National Human Rights Commission and Members of Parliament in 2011. However, the Committee regrets the lack of information on the way in which those visits were organized and the methodology used, since, in view of the many continuing allegations concerning the existence of such a secret detention centre, in the absence of such information, it is not possible to lay to rest the suspicion that such a centre may in fact exist’.

<sup>195</sup> OSJI Globalizing torture, 98.

<sup>196</sup> *Zubaydah v. Lithuania*, para 532.

<sup>197</sup> *Zubaydah v. Lithuania*, para 548.

<sup>198</sup> SSCI Report, 154, *Zubaydah v. Lithuania*, para 548.

<sup>199</sup> SSCI Report, 143.

<sup>200</sup> *Zubaydah v. Lithuania*, para 640.

<sup>201</sup> SSCI Report, 154-5.

<sup>202</sup> SSCI Report, 111-13. The eye was lost by Abu Zubaydah, likely in Thailand. *Id.*, 112, footnote 651.

<sup>203</sup> SSCI Report, 154.

64. The ECtHR found it established beyond reasonable doubt that Lithuania was responsible for complicity in the ERP and multiple violations of Abu Zubaydah’s rights.<sup>204</sup> It also noted that the very rationale and purpose behind the secretive rendition programme was to deny individuals the protection of legal safeguards against torture and enforced disappearance.<sup>205</sup> The ECtHR held that Lithuanian authorities knew of the character and purposes of CIA activities on its territory, yet cooperated in the preparation and execution of the extraordinary rendition programme and that ultimately Lithuania had ‘facilitated the whole process of the operation of the HVD [high value detainees] Programme on their territory, created the conditions for it to happen and made no attempt to prevent it from occurring’.<sup>206</sup> Allowing the CIA to transfer Abu Zubaydah out of Lithuania further exposed him to the foreseeable risk of further human rights violations, in violation of his rights under the ECHR.<sup>207</sup>
65. In 2010 Lithuanian prosecutors opened an investigation into illegal transportation and detention of CIA detainees in Lithuania on the basis of the Findings of the Parliamentary Investigation by the Committee on National Security and Defence (CNSD) of the Seimas.<sup>208</sup> The CNSD had found *inter alia* that CIA detention sites were established and CIA flights entered Lithuania unmonitored, with high level collaboration with members of the Lithuanian intelligence community.<sup>209</sup> It called for a thorough criminal investigation on ‘whether the acts of Mečys Laurinkus, Arvydas Pocius and Dainius Dabasinskas [Lithuanian intelligence officials] contained the elements of misuse of office or abuse of powers’.<sup>210</sup>
66. However, following a *pro forma* investigation, found lacking by the ECtHR,<sup>211</sup> in January 2011 the prosecutor terminated the investigation.<sup>212</sup> In January 2015, upon the release of the US SSCI Report, the decision was revoked and investigation reopened.<sup>213</sup> The investigation has remained theoretically pending for years.<sup>214</sup> Lithuania indicated it had broadened the scope of the investigation by deciding to conduct it under Article 100 of the Criminal Code in November 2018, providing for liability for any treatment of persons that is prohibited under international law.<sup>215</sup> In April 2019, Lithuanian authorities indicated that it is undertaking ‘pre-trial investigation... at the highest level of the law enforcement institutions’ but had failed to secure assistance and judicial cooperation from the US.<sup>216</sup> In June 2019 the Deputies of the Committee of Ministers of the Council of Europe expressed concern that there is a ‘lack of any tangible progress in the investigation despite the fact it has been pending for almost ten years’.<sup>217</sup> These concerns were reiterated in December 2020, ‘underlin[ing] again the crucial importance of completing [the domestic investigation] swiftly, while ensuring that a sufficient degree of public scrutiny is maintained in regard to it’.<sup>218</sup>

#### 2.4.5 Afghanistan (‘Detention Site Brown’)

67. The ECtHR referred to several ERP detention sites in Afghanistan, noting expert testimony that sites codenamed by the SSCI ‘Detention Site Orange’, ‘Brown’, ‘Cobalt’, and ‘Gray’ were located

<sup>204</sup> *Zubaydah v. Lithuania*, para 576.

<sup>205</sup> *Zubaydah v. Lithuania*, para 656.

<sup>206</sup> *Zubaydah v. Lithuania*, paras 641-642.

<sup>207</sup> *Zubaydah v. Lithuania*, para 643.

<sup>208</sup> *Zubaydah v. Lithuania*, para 179.

<sup>209</sup> Seimas Report, 13.

<sup>210</sup> Seimas Report, 10, 13.

<sup>211</sup> *Zubaydah v. Lithuania*, para 621.

<sup>212</sup> *Zubaydah v. Lithuania*, para 195.

<sup>213</sup> *Zubaydah v. Lithuania*, para 207.

<sup>214</sup> *Zubaydah v. Lithuania*, para 208; HRC, ‘[Concluding observations on the third periodic report of Lithuania](#)’; addendum, Information received from Lithuania on follow-up to the concluding observations (12 February 2016) UN Doc. CCPR/C/LTU/CO/3/Add.2, paras 33-34.

<sup>215</sup> CoE, ‘[Communication from Lithuania to the 1348<sup>th</sup> meeting](#)’, (DH) – Action Plan (9 April 2019) *Abu Zubaydah v. Lithuania* (Application No. 46454/11) Doc. DH-DD(2019)396, 4.

<sup>216</sup> CoE, ‘[Communication from Lithuania to the 1348<sup>th</sup> meeting](#)’, (DH) – Action Plan (9 April 2019) *Abu Zubaydah v. Lithuania* (Application No. 46454/11) Doc. DH-DD(2019)396, 3-4.

<sup>217</sup> CoE, ‘[Decision of the Ministers’ Deputies adopted at the 1348<sup>th</sup> meeting](#)’, (DH) (4-6 June 2019) – H46-15 *Abu Zubaydah v. Lithuania* (Application No. 46454/11), (6 June 2019) Doc. CM/Notes/1348/H46-14, para 6.

<sup>218</sup> CoE, ‘[Decision of the Ministers’ Deputies adopted at the 1390<sup>th</sup> meeting](#)’, (DH) (1-3 December 2020) – H46-15 *Abu Zubaydah v. Lithuania* (Application No. 46454/11), (3 December 2020) Doc. CM/Notes/1390/H46-15, para 6.

there.<sup>219</sup> Other sources confirm that ‘Detention Site Cobalt’ was also known as the ‘Salt Pit’<sup>220</sup> or ‘the Dark Prison’.<sup>221</sup> In addition to these sites, there was a ‘secret prison at Bagram airbase.’<sup>222</sup> While not all sites were operational at the same times, the CIA ran several secret sites in Afghanistan.<sup>223</sup> Some reports also suggest the CIA used Afghan-run facilities for secret detention.<sup>224</sup>

68. While precise numbers remain uncertain, CIA Unredacted report suggests that ‘102 prisoners were in CIA black sites in Afghanistan between September 2002 and 2004, and 42 after that time.’<sup>225</sup>

69. Following the closure of ‘Detention Site Violet’ in Lithuania, Abu Zubaydah was transferred to ‘Detention Site Brown’ in Afghanistan on 25-26 March 2006, as part of a transfer of all remaining CIA prisoners.<sup>226</sup> Flight data and contracts show this rendition took place on flights N733MA and N740EH.<sup>227</sup> Considerable evidence presented to the ICC and elsewhere confirms that all remaining CIA ‘high value detainees’ were held in Afghanistan at this time.<sup>228</sup>

70. Evidence indicates Abu Zubaydah was detained in Afghanistan until September 2006 when he was definitively transferred to Guantánamo Bay.<sup>229</sup>

71. The Office of the Prosecutor of the ICC described the treatment of detainees in ‘US-controlled facilities’ in Afghanistan as ‘*extremely cruel, brutal and gruesome*’, including ‘*cases of humiliating, degrading or inhumane treatments violating the victims’ dignity, among which the deprivation of fundamental material and spiritual needs, such as sleep, food and water and praying, as well as acts implying offence, distress and shame, including acts of a sexual nature*’.<sup>230</sup>

72. Afghani officials were complicit in CIA detention and themselves carried out detention and interrogation of CIA detainees. The UNWGAD itself, in an opinion concerning the detention of Mr Al-Bakry, asserted that ‘*the Government of Afghanistan is well aware of the fact that the United States Government [wa]s holding detainees in situations such as Mr Al-Bakry’s at Bagram Air Base*’ and recalled that Afghanistan nonetheless consented to detentions.<sup>231</sup> Experts appearing before the ECtHR likewise established that CIA secret sites were accepted by Afghanistan because of the ‘context’ and ‘military support’ from the US.<sup>232</sup> CIA cables indicate that Detention Site Cobalt was even initially intended to be run by the Afghani authorities.<sup>233</sup> Investigative journalists have reported that the CIA rendered prisoners to Afghani detention – and had ‘unlimited access’ – pending the construction of the CIA Detention Site Cobalt.<sup>234</sup> Some reports refer to the use of Afghan facilities and authorities was to solve the ‘overcrowding problem’ at certain stages, and that ‘there was no independent reason for Afghan forces to detain these individuals, who were held solely at the behest of the CIA’.<sup>235</sup>

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<sup>219</sup> *Zubaydah v. Lithuania*, para 166.

<sup>220</sup> SSCI Report, 61; ICC, *Situation in the Islamic Republic of Afghanistan*, ‘Public redacted version of “[Request for authorization of an investigation pursuant to article 15](#)”’, 20 November 2017, ICC-02/17-7-Conf-Exp’ (20 November 2017) Doc. ICC-02/17-7-Red (‘ICC Afghanistan Investigation’s request’), para 201.

<sup>221</sup> HRC Joint Study, para 132.

<sup>222</sup> HRC Joint Study, para 132.

<sup>223</sup> SSCI Report, 61.

<sup>224</sup> HRC Joint Study, para 132 these are identified as ‘Intelligence 2’, ‘Rissat’, and ‘Rissat 2’.

<sup>225</sup> CIA Torture Unredacted, 57. it notes some of the 42 were held across the time periods.

<sup>226</sup> SSCI Report, 154; *Zubaydah v. Lithuania*, para 548.

<sup>227</sup> CIA Torture Unredacted, 157. Two flights involved as there was a plane switch.

<sup>228</sup> SSCI Report, 154; CIA Torture Unredacted, 36, 61, 157; see also evidence presented in *Zubaydah v. Lithuania*, paras 122, 134-135, 139; ICC Afghanistan Investigation’s request, para 243.

<sup>229</sup> CIA Torture Unredacted, 157.

<sup>230</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, ‘[Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan](#)’, (12 April 2019), ICC-02/17-33 (‘ICC Afghanistan Article 15 Decision’), para 23.

<sup>231</sup> WGAD, ‘[Opinion 11/2007 concerning the case of Mr Amine Mohammad Al-Bakry \(Afghanistan, United States of America\)](#)’, (16 January 2008) UN Doc. A/HRC/7/4/Add.1 (‘WGAD Al-Bakry opinion’), para 14.

<sup>232</sup> *Zubaydah v. Lithuania*, para 129: ‘[...] in a country like Afghanistan, they [CIA secret detention sites] were able to last somewhat longer because of the context and often also because of the military support that they were able to draw upon [...]’.

<sup>233</sup> SSCI Report 51, fn. 250: ‘Although the plans at the time were for DETENTION SITE COBALT to be owned and operated by the Country [redacted] government, the detention site was controlled and overseen by the CIA and its officers from the day it became operational in September 2002’.

<sup>234</sup> CIA Torture Unredacted, 104: ‘While this new site was under construction, the CIA took custody of at least five prisoners captured outside Afghanistan and rendered them to Afghan-run facilities to which “the CIA had unlimited access”’.

<sup>235</sup> CIA Torture Unredacted, 118.

73. In addition to these forms of direct involvement, Afghanistan ‘allowed use of its airports and airspace for flights reportedly connected to the CIA extraordinary rendition program’.<sup>236</sup>
74. Afghanistan actively participated in arbitrary detention of ERP’s victims, and failed to take steps to ensure the protection of others. Despite the passage of years and undeniable information as to its role, it continues to deny involvement and shirk responsibility. In 2019, in the Decision authorizing an investigation into the Situation in Afghanistan, ICC Judges emphasized that ‘*the proceedings conducted so far in Afghanistan [against the Afghan Forces] are limited in scope and did not target those who may bear the main responsibility*’.<sup>237</sup> There has been no real acknowledgment, investigation or accountability by Afghanistan in respect of the allegations of rendition and arbitrary detention of the applicant and others on its territory.<sup>238</sup>

#### 2.4.6 United Kingdom

75. In addition to the states that housed black sites at which the applicant was held are others who participated in other ways in the ‘global spider’s web’ of complicity in rendition.<sup>239</sup> One such state which shares responsibility for the arbitrary detention and torture of the applicant is the United Kingdom (UK).<sup>240</sup>
76. In 2010, the UK was identified in the HRC joint Study as one of the states ‘complicit’ in the ERP, by ‘knowingly tak[ing] advantage of the situation of secret detention.’<sup>241</sup>
77. By 2019, more detailed information emerged through an inquiry by the United Kingdom Intelligence and Security Committee (ISC) of Parliament, which reached unequivocal findings regarding the role of the UK in US-led arbitrary detention. This includes estimates that UK personnel were involved in approximately 2,000-3,000 interviews of CIA detainees in the aftermath of 9/11.<sup>242</sup> UK agents conducted interviews themselves, joined interviews with the US, observed interviews conducted by others and/or supplied questions for victims of arbitrary detention and torture, in knowledge of the circumstances.<sup>243</sup> In various cases, the enquiry found UK officers verbally threatened detainees, were directly involved in mistreatment administered by others, witnessed mistreatment first hand, or were informed by detainees or foreign liaison officers of detainee mistreatment.<sup>244</sup>
78. Crucially for present purposes, in 232 cases the UK supplied questions to be posed during interrogation, and in 198 cases UK personnel received intelligence from liaison services obtained from detainees whom they knew or should have known had been mistreated.<sup>245</sup> One of those detainees was Abu Zubaydah.<sup>246</sup>
79. In relation to the detention of Abu Zubaydah specifically, the UK parliamentary enquiry found that between 2002-2006 the United Kingdom was directly aware of his ‘extreme mistreatment’ at the hands of the CIA. The enquiry established that as early as May 2002, two months after the capture of Abu Zubaydah, the UK Secret Intelligence Service received a message from US officials involved in the interrogation of Abu Zubaydah, indicating that enhanced interrogation techniques were applied to him and that ‘it was considered that 98 per cent of US Special Forces would have broken if subject to

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<sup>236</sup> OSJI, 63.

<sup>237</sup> ICC Afghanistan Article 15 Decision, para 77.

<sup>238</sup> ICC Afghanistan Article 15 Decision, para 77; OSJI Globalizing Torture, 64.

<sup>239</sup> CoE 1<sup>st</sup> Report, 13.

<sup>240</sup> UK Parliamentary Report, 1; CIA Torture Unredacted, 41.

<sup>241</sup> HRC Joint Study, para 159: ‘[...] the experts state that a country is complicit in the secret detention of a person in the following cases: [...] (b) When a State knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person or by soliciting or receiving information from persons who are being kept in secret detention. This includes at least the following States: The United Kingdom of Great Britain and Northern Ireland’.

<sup>242</sup> UK Parliamentary Report, 1; United Kingdom personnel from SIS, MI5 and MOD, including the armed force, participated in interviews of detainees undertaken primarily by the US in Afghanistan, Iraq and Guantánamo Bay.

<sup>243</sup> UK Parliamentary Report, 1; CIA Torture Unredacted, 43.

<sup>244</sup> UK Parliamentary Report, 2: ‘UK officers ma[de] verbal threats in nine cases’, and ‘were directly involved in detainee mistreatment administered by others’ in 2 cases, ‘UK personnel witnessed at first hand a detainee being mistreated by others’ in 13 cases, ‘UK personnel were told by detainees that they had been mistreated by others’ in 25 cases, ‘Agency officers were told by foreign liaison services (whether formally or informally) about instances of what appears to be detainee mistreatment’ in 128 cases.

<sup>245</sup> UK Parliamentary Report, 3.

<sup>246</sup> UK Parliamentary Report, 3.

the same conditions'.<sup>247</sup> British intelligence agencies provided intelligence and questions for the interrogation of Abu Zubaydah during his intensive torture in Thailand.<sup>248</sup> However, the UK continued to send questions until at least 2006. The Parliamentary inquiry found that despite '*direct awareness of the extreme mistreatment – and probable torture*', the UK continued to provide the CIA with questions to be used in these interrogations, without seeking assurances regarding his treatment, for at least 4 more years, until his transfer to Guantánamo in 2006.<sup>249</sup>

80. Additional evidence points to other forms of support provided by the UK to the ERP, including the use of British territory for refueling of rendition flights, including one that carried the applicant between black sites. A Report by the European Parliament noted in 2007 that '170 stopovers' have been '*made by CIA-operated aircrafts at UK airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees*'.<sup>250</sup> A Resolution from the European Parliament expressed the same concerns.<sup>251</sup>
81. According to an invoice from the company Capital Aviation to Dyncorp, the aircraft involved in the rendition operation between Thailand and Poland from 3 December 2002 to 6 December 2002, stopped in London to refuel.<sup>252</sup> An ECtHR judgement, relying on '*flight plan messages released by Eurocontrol, invoices, and responses to information disclosure requests*', reconstructed the route of the CIA contracted aircraft registered with the US Federal Aviation Authority as N63MU, which flew Abu Zubaydah to Poland black site and found that the flight stopped in London Luton airport on 6 December 2002.<sup>253</sup> The subsequent CIA Unredacted report confirms that after leaving Abu Zubaydah in Poland, this flight refueled at Luton airport in the UK.<sup>254</sup>
82. The UK has refused to acknowledge its role or to apologise for or provide reparation to the applicant.<sup>255</sup> Investigations thus far have been inadequate. An independent judge-led inquiry was stopped.<sup>256</sup> The Committee complained that it was unable to access officers who were involved at the time for interview.<sup>257</sup> The Metropolitan Police investigation have indicated that they intend to bring their investigation to an end, although a request has been made for that decision to be reviewed. There has been no individual accountability.<sup>258</sup>
83. Civil proceedings have been brought by Abu Zubaydah against the UK government following the ISC report. Those proceedings are ongoing. In February 2021, the High Court of England and Wales accepted the government's position that the applicant must argue his case against the UK government under 'the law of the Six Countries' where Abu Zubaydah was arbitrarily detained,<sup>259</sup> which risk causing delay and making the proceedings unduly burdensome for victims. The UK

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<sup>247</sup> UK Parliamentary Report, 42, footnote 156.

<sup>248</sup> UK Parliamentary Report, para 85: 'The case of Abu ZUBAYDAH shows direct awareness of extreme mistreatment – and probable torture, given the view that 98 per cent of US Special Forces would have broken. However, the Agencies continued to send the CIA questions to be used in interrogations without seeking any assurances regarding ZUBAYDAH's treatment in detention, until at least 2006.'

<sup>249</sup> UK Parliamentary Report, para 85.

<sup>250</sup> European Parliament, '[Report on the alleged use of European countries by the CIA for transportation and illegal detention of prisoners](#)' (30 January 2007), Doc. PE 382.246v02-00 ('2007 European Parliament Report'), para 78.

<sup>251</sup> 2007 European Parliament Resolution, para 80.

<sup>252</sup> CIA Torture Unredacted, 60.

<sup>253</sup> *Zubaydah v. Poland*, paras 93-94.

<sup>254</sup> See also 'rendition operations using UK territory for refuelling' in CIA Torture Unredacted, 44-45.

<sup>255</sup> Separate cases concerning rendition to Libya did result in settlement (See *Belhaj and another (Respondents) v. Straw and others (Appellants)*, [Judgment](#) [2017] UKSC 3) and apology (See Belhaj and Boudchar: Litigation Update, [Volume 640: debated on Thursday 10 May 2018](#), 12.21 pm). In particular, the UK Government recognized that its 'actions contributed to [their] detention, rendition and suffering', the Attorney General stating 'On Behalf of Her Majesty's Government, I apologise unreservedly. We are profoundly sorry for the ordeal that [Mr Belhaj and his wife] suffered and our role in it'.

<sup>256</sup> House of Commons, Wednesday 18 January 2012, '[Oral Answers to Questions](#)': 'The Government fully intends to hold a judge-led inquiry into these issues, once it is possible to do so and all related police investigations have been concluded. But there now appears no prospect of the Gibson inquiry being able to start in the foreseeable future. So, following consultation with Sir Peter Gibson, the chair of the inquiry, we have decided to bring the work of his inquiry to a conclusion. We have agreed with Sir Peter that the inquiry should provide the Government with a report on its preparatory work to date, highlighting particular themes or issues which might be the subject of further examination. The Government are clear that as much of this report as possible will be made public. We will continue to keep Parliament fully informed of progress. The Government fully intends to hold an independent, judge-led inquiry, once all police investigations have concluded, to establish the full facts and draw a line under these issues. Meanwhile, however, the police inquiries that have now commenced must obviously continue.'

<sup>257</sup> '[UK "knew US mistreated rendition detainees"](#)', *BBC* (28 June 2018).

<sup>259</sup> *Zubaydah v. The Foreign and Commonwealth Office and al.*, [Judgment in Preliminary Issue](#) [2021] EWHC 331 (QB), para 89.

Government has regrettably chosen to delay the legal process, rather than engaging with its responsibility and obligations of reparation.

## 2.5 **Fact – Detention III: Ongoing detention at Guantánamo Bay**

84. Abu Zubaydah was transferred into US military custody at Guantánamo Bay, Cuba, on 5 September 2006<sup>260</sup> when the last of the black sites, in Afghanistan, closed.

85. While at its height it housed circa 780 detainees, the applicant is one of 40 detainees remaining in detention today.<sup>261</sup> Detainees that have been released came from 49 nationalities across the globe,<sup>262</sup> those remaining come from a much narrower range of states with whom the US does not have strong diplomatic relations or are stateless.<sup>263</sup> He is one of a much smaller category of 22 that have been neither charged, tried, or cleared for release.<sup>264</sup>

### 2.5.1 ***Purported Basis for Detention***

86. The US authorities assert the right to detain the applicant pursuant to ‘law of war authority,’ under the broad Authorization for the Use of Military Force (2001) (AUMF) and the National Defense Appropriations Act (NDAA). The AUMF was adopted by US Congress in the aftermath of 9/11 authorising the use of force against those ‘nations organisations or persons’ the president deemed responsible for these events, so far as necessary to prevent future attack against the United States.<sup>265</sup> The NDAA purports to authorize ‘[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for the Use of Military Force.’<sup>266</sup>

87. The US position since 9/11 has been that there is an armed conflict of global reach against al Qaeda and associated forces (though the nature of that conflict has changed from when it started, and its participants have changed).<sup>267</sup> Until 2009 the detainees were detained on the basis that they were ‘enemy combatants’ in this conflict, a term criticised by a US judge for its ambiguity and the persistent failure of the authorities to provide a clarity as to definition and scope.<sup>268</sup> The judge relied on one definition in a memo by the Secretary of Defense in 2004 of ‘*an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act*

<sup>260</sup> SSCI Report, 46. It was a temporary closure, and would reopen for detention later.

<sup>261</sup> The New York Times, ‘[The Guantánamo Docket](#)’.

<sup>262</sup> The New York Times, ‘[The Guantánamo Docket](#)’ indicating that the 49 countries are: Afghanistan, Algeria, Australia, Azerbaijan, Bahrain, Bangladesh, Belgium, Bosnia, Canada, Chad, China, Denmark, Egypt, Ethiopia, France, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Libya, Mauritania, Malaysia, Maldives, Morocco, Pakistan, Palestine, Qatar, Russia, Saudi Arabia, Somalia, Spain, Sudan, Sweden, Syria, Tajikistan, Tanzania, Tunisia, Turkey, Turkmenistan, UAE, Uganda, United Kingdom, United States, Uzbekistan, Yemen.

<sup>263</sup> The New York Times, ‘[The Guantánamo Docket](#)’ indicates two Algerians, one Moroccan, one Tunisian, fourteen Yemenites, one Iraqi, six Pakistanis, four Saudi Arabians, one Indonesian, two Malaysians, two Afghans, one Kenyan, two Libyans, one Somali, and two Stateless persons are held in Guantánamo. Among them, 7 are currently charged by, and 2 convicted by, Military Commission.

<sup>264</sup> The New York Times ‘[The Guantánamo Docket](#)’ indicates that 22 have not been charged nor recommended for transfer, including the applicant.

<sup>265</sup> Adopted after 9/11, the AUMF authorized the president to ‘to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’ This still forms the legal basis for the majority of US military action in the Middle East, such as anti-ISIS operations in Syria, and for what the US refers to as ‘law of war’ detention. See e.g. US Government’s position *Al-Bihani et al v. Trump*, Case 1:09-cv-00745-RCL, ‘[Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus](#)’ (18 April 2018) (*Al-Bihani v. Trump*), 1-2, 7.

<sup>266</sup> [National Defense Authorization Act for Fiscal Year 2012](#), H.R. 1540 (31 December 2011), Section 1021 (c)(1), 265.

<sup>267</sup> Once considered an international conflict (Former US President Bush Memorandum, ‘[Humane Treatment of al Qaeda and Taliban Detainees](#)’ (7 February 2002) para 2(c)), it is now considered non-international (United States Supreme Court, [Hamdan v. Rumsfeld et al](#), 548 US 557 (2006) No. 05.184 (29 June 2006)). Though the conflict was sometimes asserted by the US as beginning on 9/11, it has been expanded in the context of war crimes trials where the US has argued retroactively that it actually started years before 9/11, when ‘enemies’ decided to engage in conflict with the US (see [In Re: Abd al-Rahim Hussein Muhammed al-Nashiri](#) 835 F.3d 110 (D.C. Cir. 2016) I(A): where Al-Nashiri is charged, inter alia, with violation of the law of war for events that occurred inter alia in 2000). It once focused on al Qaeda and Taleban ‘and associated forces’, it has expanded to cover other terrorist organisations e.g. ISIS and Al Shabaab. US State Department Legal Adviser Brian Egan, Speech at the American Society of International Law: Brian Egan, ‘[International Law, Legal Diplomacy and the Counter-ISIS Campaign](#)’ (1 April 2016); Charlie Savage, Eric Schmitt, Mark Mazzetti, ‘[Obama Expands War With Al Qaeda to Include Shabab in Somalia](#)’, The New York Times, 27 November 2016.

<sup>268</sup> Farah Stockman, ‘[Lawyers debate “enemy combatant”](#)’, The Boston Globe (24 October 2008): During a hearing on October 23, 2008, US District Court Judge Richard J. Leon commented on the ambiguity of the term ‘enemy combatant’ noting that ‘*We are here today, much to my dismay, I might add, to deal with a legal question that in my judgment should have been resolved a long time ago. I don’t understand, I really don’t, how the Supreme Court made the decision it made and left that question open. ... I don’t understand how the Congress could let it go this long without resolving.*’ The definition of ‘enemy combatant’ to be used was that set forth in the 2004 rules for Combatant Status Review Tribunals.

or has directly supported hostilities in aid of enemy armed forces.’<sup>269</sup> In 2009 the language changed and the enemy combatant justification dropped,<sup>270</sup> but the substance remained the same.

88. The US Government still alleges that law of war authority under the AUMF provides the authorisation to detain the applicant until the ‘cessation of hostilities,’ on the basis that the ‘*the non-international armed conflict between the United States and its coalition partners against al Qaeda, the Taliban, and associated forces ... continues.*’<sup>271</sup> It has argued, without substantiation, that the continued detention at Guantánamo ‘*still serves its permissible purpose: to prevent the return of members of enemy forces to the battlefield. Consequently, Petitioners’ detention is not arbitrary.*’<sup>272</sup>

### 2.5.2 Circumstances of detention

89. Between 2006 and March 2021, when he was moved to Camp 5, Abu Zubaydah was detained at Camp 7, the ‘most secretive’ and highest security camp within the Guantánamo compound, which housed only former CIA ‘high value detainee’ torture victims.<sup>273</sup> For many years the existence of the camp was classified, and heightened secrecy continues to surround its operation. Throughout the almost 20 years of its existence, international organisations, press and civil society have frequently sought, but been refused, access to Camp 7.<sup>274</sup> Information concerning detention at Camp 7 still remains limited. However, early reports covering the period when the applicant was first detained there indicated almost round the clock solitary confinement, cramped conditions, excessive shackling and even allegations of torture and killing.<sup>275</sup> For years communication between inmates was prohibited,<sup>276</sup> with serious psychological effects.<sup>277</sup> While conditions improved somewhat in recent years, to allow for increased communication and collective time between detainees, this remains extremely limited.<sup>278</sup> US military personnel acknowledged that the camp had deteriorated to the point that it was ‘dangerous for the guard force.’<sup>279</sup>
90. The applicant has serious, documented medical conditions, including from injuries sustained during captivity and CIA torture, and exacerbated by the denial of medical attention. Despite restrictions on information about the applicant, his counsel has been authorised to report they have

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<sup>269</sup> Deputy Secretary of Defense, ‘[Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal](#)’ (7 July 2004), 1.

<sup>270</sup> Guantánamo Bay Detainee Litigation, Misc. No. 08-442 (TFH), 05-0763 (JDB), 05-1646 (JDB), 05-2378 (JDB), ‘[Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay](#)’ (13 March 2009): noting the term would not be used.

<sup>271</sup> *Al-Bihani v. Trump*, 7.

<sup>272</sup> *Al-Bihani v. Trump*, 1-2.

<sup>273</sup> Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’, The New York Times (15 March 2020).

<sup>274</sup> Spencer Ackerman, ‘[Secret Area of Guantánamo could be opened to UN watchdog for first time](#)’, The Guardian (12 May 2016): A legal challenge by al Baluchi’s counsel sought to secure the UN Special Rapporteur’s access, without success.

<sup>275</sup> Joseph Hickman, *Murder at Camp Delta: A Staff Sergeant’s Pursuit of the Truth About Guantánamo Bay* (Simon & Schuster, 2015).

<sup>276</sup> ‘[Locked Up Alone. Detention Conditions and Mental Health at Guantánamo](#)’, Human Rights Watch (2008), 9-14. See also US Department of Defense, ‘[Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement](#)’, (2009) 46, recommending to ‘increase detainee-to-detainee contact in Camp 7, including the ability for detainees to communicate with each other from within their cells’. Joseph Hickman, *Murder at Camp Delta: A Staff Sergeant’s Pursuit of the Truth About Guantánamo Bay* (Simon & Schuster, 2015).

<sup>277</sup> Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’, The New York Times (15 March 2020); Sheri Fink, ‘[Where Even Nightmares Are Classified: Psychiatric Care at Guantánamo](#)’, The New York Times (12 November 2016); for an insider account on Guantánamo by a former guard see Joseph Hickman, *Murder at Camp Delta: A Staff Sergeant’s Pursuit of the Truth About Guantánamo Bay* (Simon & Schuster 2015).

<sup>278</sup> US Department of Defense, ‘[Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement](#)’, (2009), 73: ‘In sum, Camp 7 procedures and its physical plan need to be modified in accordance with USSOUTHCOM initiatives in order to increase detainee-to-detainee contact’. See also ‘[FY 2020 Military Construction Project Data](#)’ (1 March 2019), 7 requesting improvement of the Guantánamo’s facilities because of the safety risk faced by the guards: ‘As a result the guard force is required to move highly dangerous detainees back and forth between separate facilities. Each detainee movement places guard force members at risk’.

<sup>279</sup> Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’, The New York Times (15 March 2020): ‘A succession of commanders have sought funding from Congress to replace it, describing the structure as deteriorating and potentially dangerous for the guard force’.



been ‘very concerned’ about his health for some years.<sup>280</sup> Seizures, physical and psychological harm resulting from his treatment were recognised in the ECtHR judgments and elsewhere.<sup>281</sup>

91. However, medical care at Guantánamo remains grossly deficient.<sup>282</sup> US military documents acknowledge that ‘[t]he existing facility does not accommodate detainee medical needs’ as ‘facilities were not designed and constructed to provide detention, legal counsel and medical treatment in a consolidated and streamlined method’.<sup>283</sup> The US military’s refusal to provide him and other torture survivors physical or psychological support and rehabilitation has been widely reported.<sup>284</sup>
92. The applicant and his counsel have repeatedly sought and been denied access to his medical records, to an independent medical evaluation and to the treatment he requires.<sup>285</sup> A court recognised in June 2020 that he should have access to his medical records and an independent evaluation but for the most part these have not yet been forthcoming.<sup>286</sup>
93. Secrecy and restrictions on communication remain excessive. As a result of ‘presumptive classification’, any communication to or from Abu Zubaydah should be declassified before being released. This has led to the description of him as ‘a man deprived of his voice’.<sup>287</sup> He is not allowed telecommunication (phone or video) with family and has extremely limited access to the ‘outside world’.<sup>288</sup> The ECtHR recorded the distress he suffers from failing memory of his family.<sup>289</sup>
94. Lawyer-client communication has been seriously impeded at Guantánamo. On 14 June 2017 the chief defense counsel wrote to all defense counsel declaring a ‘loss of confidence’ in the integrity of ‘all potential attorney-client meeting locations’ after learning that some legal meetings were subject to ‘intrusive monitoring’.<sup>290</sup> When the use of listening devices prompted some counsel to other detainees to resign, a judicial order prohibited them explaining to their clients why. Privileged material has also been seized by the detaining authority. These examples are part of a broader dysfunctional client-attorney situation.<sup>291</sup> In Abu Zubaydah’s case, international counsel have no direct access, and US cleared counsel are subject to serious constraints on what they can communicate given the ‘presumptive classification’ referred to above. Since the outbreak of COVID, concerns regarding the lack of methods of communication between counsel and the outside world and their impact on the applicant have vastly increased, underscoring the urgency of ending his arbitrary detention.

### 2.5.3 ‘Review’ Procedures and Lack of Safeguards in relation to detention

95. The applicant has had no review of the lawfulness of his detention by any court or independent legal authority. The stark inadequacy of procedures in place, designed to disguise the arbitrariness of the detention, is illustrated below.

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<sup>280</sup> Joe Margulies, former US counsel to Abu Zubaydah in ‘[Gina Haspel, Trump’s Pick for CIA Director, Ran the Prison Where My Client Was Tortured. I Have Questions for Her](#)’, Time (14 March 2018): ‘Because of what he was made to endure, Abu Zubaydah suffers from frequent seizures, the origin of which cannot be determined. He is tormented by sounds that others do not hear, and cannot remember simple things that others cannot forget. Because his condition is classified, there is much about his welfare that the United States will not let me say. They have authorized me to report, however, that I am “very concerned” about his health’.

<sup>281</sup> [Redacted Verbatim Transcript](#) of [CSRT] Hearing for ISN 10016, 22; *Zubaydah v. Poland*, para. 121; *Zubaydah v. Lithuania*, para. 153 citing ‘partly declassified transcripts of hearings before the [CSRT] in Guantánamo held on 27 March 2007’, para. 165; Joe Margulies, ‘[Gina Haspel, Trump’s Pick for CIA Director, Ran the Prison Where My Client Was Tortured. I Have Questions for Her](#)’, Time (14 March 2018).

<sup>282</sup> ‘[Deprivation and Despair: The Crisis of Medical Care at Guantánamo](#)’, The Center for Victims of Torture, Physicians for Human Rights (June 2019), 4.

<sup>283</sup> ‘[FY 2020 Military Construction Project Data](#)’ (1 March 2019), 7.

<sup>284</sup> Sheri Fink, ‘[Where Even Nightmares Are Classified Psychiatric Care at Guantánamo](#)’, The New York Times (12 November 2016); Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’, The New York Times (15 March 2020).

<sup>285</sup> On the Applicant’s efforts since 2008 to obtain his medical records during the time he was held captive by the CIA; an in-person psychiatric and medical examination; and his medical records during the years he has been imprisoned at Guantánamo, see *Husayn v. Esper*, docket no. 1:08-cv-1360 (D.D.C.), Memorandum Opinion and Order, ECF No. 549 (June 6, 2020).

<sup>286</sup> *Husayn v. Esper*, [Memorandum Opinion and Order](#), US Court for the District of Columbia (6 June 2020), 20: encouragingly, a US court granted Petitioner’s Emergency Motion to Produce CIA Medical Records and Allow In-Person Medical Evaluation, but this has not been implemented.

<sup>287</sup> *Zubaydah v. Poland*, para. 80.

<sup>288</sup> *Zubaydah v. Lithuania*, paras 161, 486; *Zubaydah v. Poland*, paras 188, 368, 378, 397.

<sup>289</sup> *Zubaydah v. Lithuania*, paras 165, 486, 665; *Zubaydah v. Poland*, paras 532-533.

<sup>290</sup> Carol Rosenberg, ‘[Gitmo prisoners ‘unintentionally’ overheard talking to their lawyers](#)’, Miami Herald (3 July 2017); See also Carol Rosenberg, ‘[Guantánamo’s USS Cole death-penalty case in limbo after key defense lawyer quits](#)’, Miami Herald (13 Octobre 2017).

<sup>291</sup> Carol Rosenberg, ‘[Guantánamo’s USS Cole death-penalty case in limbo after key defense lawyer quits](#)’, Miami Herald (13 October 2017).

## 96. **Combatant Status Review Tribunal**

- (a) The Combatant Status Review Tribunals (CSRT) were established by the US government on 7 July 2004 to determine whether Guantánamo detainees were ‘unlawful enemy combatants’.<sup>292</sup> The CSRT tribunals operated until 2011 when they were replaced by the PRBs.
- (b) The CSRTs’ purpose was not to review the lawfulness of detention. In *Boumediene v. Bush*, the Supreme Court of the United States found that the CSRT ‘falls short of being a constitutionally adequate substitute’ for *habeas corpus* protections, to which detainees at Guantánamo Bay are entitled.<sup>293</sup> Myriad shortcomings surrounded the process, in which government evidence was considered presumptively correct, in practice placing an impossible burden on applicants.<sup>294</sup> Detainees were denied the right to counsel and the appointed ‘personal representative’ gave very limited assistance.<sup>295</sup> The government relied on evidence obtained through torture, on classified evidence which was generally not provided to the detainee and on hearsay evidence with no meaningful opportunity to challenge it.<sup>296</sup> Detainees had no opportunity to cross-examine witnesses or to gather or present evidence, in the vast majority of cases having to rely only on their own testimony.<sup>297</sup> In a majority of cases, Tribunal determinations were made within one day.<sup>298</sup>
- (c) Abu Zubaydah was brought before a CSRT on 27 March 2007, in a procedure that epitomised the system’s flaws. He was provided no lawyer,<sup>299</sup> but a one-time ‘personal representative’ – a military officer without legal training who was allowed to access only unclassified evidence.<sup>300</sup> The Unclassified Summary submitted by the government depended substantially on inculpatory evidence by Ahmad Ressay, <sup>301</sup> despite the fact that Ressay had recanted all accusations against Abu Zubaydah at his trial.<sup>302</sup> The hearing was cursory.<sup>303</sup> It predictably led to a finding, without reasoning, that the criteria of unlawful enemy combatant was met and he should remain in detention ‘to protect against a continuing significant threat to the security of the United States’.<sup>304</sup>

## 97. **Periodic Review Board hearing**

- (a) On 7 March 2011, President Obama signed Executive Order 13567, calling for periodic review of individuals detained at Guantánamo. While in some ways superior to the CSRTs, the PRBs remain ‘arbitrary and inherently flawed’.<sup>305</sup> ‘Under paragraph 2 of the order, the periodic review board (PRB) decides whether ‘[c]ontinued law of war detention is warranted for a detainee (which happens when) it is necessary to protect against a significant threat to the security of the’ US. Like the CSRTs, the PRB does not purport to review lawfulness of detention but the detainee’s ‘threat-level’, an inherently arbitrary, non-legal standard.<sup>306</sup>
- (b) In principle detainees have counsel and can present evidence.<sup>307</sup> However, in practice, as Abu Zubaydah’s own hearings show, the process is a chimera that contributes to arbitrariness rather

<sup>292</sup> US Department of Defense News Archive, ‘[Combatant Status Review Tribunals](#)’ (26 September 2006); see above on lack of definition.

<sup>293</sup> *Boumediene v. Bush* 553 US 723 (2008) 60, 70.

<sup>294</sup> WGAD al Hawsawi opinion, recounting his submission, para 8.

<sup>295</sup> Mark Denbeaux et al, ‘[No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo](#)’ (2011) 41 Seton Hall Law Review, 1231, 1233.

<sup>296</sup> Mark Denbeaux et al, ‘[No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo](#)’ (2011) 41 Seton Hall Law Review, 1234.

<sup>297</sup> Mark Denbeaux et al, ‘[No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo](#)’ (2011) 41 Seton Hall Law Review, 1234, 1236.

<sup>298</sup> Mark Denbeaux et al, ‘[No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo](#)’ (2011) 41 Seton Hall Law Review, 1236.

<sup>299</sup> [Redacted Verbatim Transcript](#) of [CSRT] Hearing for ISN 10016 (27 March 2007), 3.

<sup>300</sup> See [Redacted Verbatim Transcript](#) of [CSRT] Hearing for ISN 10016 (27 March 2007), 4.

<sup>301</sup> [Redacted Verbatim Transcript](#) of [CSRT] Hearing for ISN 10016 (27 March 2007), 4-5. see Katie Taylor, ‘[Justice Denied: No charge, no trial, no exit](#)’, Reprieve (14 January 2019), accessed 4 July 2020, 31.

<sup>302</sup> SSCI Report, 410: Mr Ressay recanted all allegations after being convicted, before sentencing.

<sup>303</sup> Abu Zubaydah’s open hearing commenced at 1341 hours, and closed at 1551 hours on the same day.

<sup>304</sup> ‘[Unclassified Summary of Final Determination](#)’, ISN 10016 (22 September 2016).

<sup>305</sup> For a detailed report on lack of independence see Katie Taylor, ‘[Justice Denied: No charge, no trial, no exit](#)’, Reprieve (14 January 2019), accessed 4 July 2020, 31.

<sup>306</sup> See Section 3.2 below on the arbitrariness of such broad security detention which has no place in international human rights law.

<sup>307</sup> Unlike the CSRT, under §3(a)(2) ‘in addition to the (personal) representative, the detainee may be assisted in proceedings before the PRB by private counsel, at no expense to the Government.’ Demonstrating the importance of personal counsel, per §3(a)(3), the detainee ‘shall be permitted

than mitigating it. This is borne out by the fact that during the Trump administration the PRB process did not find in favour of a single detainee.<sup>308</sup>

- (c) Abu Zubaydah's experience of the PRB process provides a graphic illustration of their arbitrariness. His first hearing was scheduled for 23 August 2016.<sup>309</sup> Though four attorneys with Top Secret clearance represented him at the time, the government would allow only one specific lawyer, Mark Denbeaux, to attend. Professor Denbeaux was not able to attend the hearing due to a family emergency, and submitted a personal statement explaining that his wife was on her death bed and requesting a short adjournment or alternative counsel.<sup>310</sup> The PRB refused. The hearing proceeded with the appointment of a non-lawyer personal representative who had only recently met the applicant and was unfamiliar with his case. The PRB also declined to read the annotated version of the authoritative SSCI report submitted by counsel, which referred to the applicant 1001 times and contained key information concerning false allegations against him, because it was 'too long.'<sup>311</sup> Abu Zubaydah was denied the opportunity to speak in his own defence, and his personal representative read his half-page statement instead. The session lasted a mere 15 minutes,<sup>312</sup> comprised primarily of the presentation by the government of error-laden allegations against him in the 21 March 2016 Detainee Profile.<sup>313</sup>
- (d) On 22 September 2016, the PRB handed down a perfunctory decision which, in one-third of a page, held that '*by consensus, [it] determined that continued law of war detention of [Abu Zubaydah] remains necessary to protect against a continuing significant threat to the security of the [US].*'<sup>314</sup> The PRB refused to respond to requests for a second hearing.
- (e) It took four years to secure for another PRB hearing for Abu Zubaydah, in February 2020.<sup>315</sup> The lack of independence was made clear by the fact that at this hearing, one of the members of the PRB was from the Office of the Director of National Intelligence (ODNI), which serves as the head of the US Intelligence community, including the CIA.<sup>316</sup> Serious questions as to the independence of the panel were raised, and cursorily rejected.
- (f) The PRB decided that he continued to represent a threat to the US and should be detained, by reference to brief and unsubstantiated claims. These included that '*Abu Zubaydah possibly had some advanced knowledge of bombing of the US Embassies in Kenya and Tanzania in 1998 and the USS Cole bombing in 2000*' and was '*generally aware of the impending 9/11 attacks and possibly coordinated the training at Khaldan camp of two of the hijackers.*'<sup>317</sup> Further vague claims of plots against Israel and 'sending' individuals to talk to terrorist suspects post 9/11 lacked clarity, specificity or evidentiary basis.<sup>318</sup> This public PRB decision is incriminating, despite being replete with unsupported allegations which are uncontestable by the applicant.
- (g) The conclusion nonetheless was that Abu Zubaydah '*probably retains an extremist mindset, judging from his earlier statements*' and that he '*has used his time in Guantánamo to hone his*

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to (i) present to the PRB a written or oral statement; (ii) introduce relevant information, including written declarations; (iii) answer any questions posed by the PRB, and (iv) call witnesses who are reasonably available and willing to provide information that is relevant and material to the standard set forth in', 2.

<sup>308</sup> Periodic Review Secretariat, '[Full Review](#)'.

<sup>309</sup> Sec. 3(a) of Exec. Order 13567 requires that, '[f]or each detainee, an initial review shall commence as soon as possible, but no later than 1 year from the date of this [7 March 2011] order.' In this case, the initial review was scheduled for 23 August 2016, more than 5 years later.

<sup>310</sup> See Statement of Mark P. Denbeaux, annexed as Ex. A.

<sup>311</sup> On 22 August 2016, the day before the hearing, Mr. Denbeaux wrote to the PRB that: the SSCI Executive Summary provides 'a long, accurate profile' of Abu Zubaydah 'and it provides the truth about him and the falsity of the detainee biographical profile. **It is discouraging that the panel would find the truth about [Abu Zubaydah] (in the annotated SSCI ES) too long.**', Mr. Denbeaux's Second Letter to the PRB, 2.

<sup>312</sup> See Periodic Review Secretariat, '[Unclassified Transcript](#)' (23 August 2016), 1, 8. A classified portion of the hearing evidently took far more time, but a redacted transcript of that proceeding has not been released.

<sup>313</sup> See Robert Burns, '[Abu Zubaydah appears at Gitmo hearing to review detention](#)', Associated Press (23 August 2016).

<sup>314</sup> '[Unclassified Summary of Final Determination](#)', ISN 10016 (22 September 2016).

<sup>315</sup> Sheren Khalel, '[Guantánamo parole board reviews case of "forever prisoner" Abu Zubaydah](#)', Middle East Eye (4 February 2020), accessed 4 July 2020.

<sup>316</sup> Sheren Khalel, '[Guantánamo parole board reviews case of "forever prisoner" Abu Zubaydah](#)', Middle East Eye (4 February 2020), accessed 4 July 2020.

<sup>317</sup> Periodic Review Secretariat, '[Unclassified Transcript](#)' (23 August 2016), 4 [emphasis added].

<sup>318</sup> Periodic Review Secretariat, '[Unclassified Transcript](#)' (23 August 2016), 4.

*organizational skills, assess US custodial and debriefing practices, and solidify his reputation as a leader of his peers, all of which would help him should he choose to reengage in terrorist activity*’.<sup>319</sup> As the UN Ombudsperson delisting report noted:

*‘The Ombudsperson was of the view that the assessment of the Petitioner in the March 2016 Detainee Profile was a totally unsubstantiated speculation as to the Petitioner’s current state of mind. In her view, steps that would be considered positive in any other environment are held against him based on unsubstantiated suspicions. The Ombudsperson found it difficult in these circumstances to imagine what he could possibly do to obtain a fully positive assessment.’*<sup>320</sup>

- (h) The PRB, far from meaningful legal review, is illustrative of the arbitrariness of the standards employed, the process and the impossible position for detainees unable to take measures to secure their release from indefinite detention.

## 98. **Lack of Habeas Corpus proceedings**

- (a) On 12 June 2008, the Supreme Court in *Boumediene v. Bush*<sup>321</sup> held that detainees are entitled to a ‘meaningful opportunity’ to challenge the lawfulness of their detentions before a regular independent court of law.<sup>322</sup>
- (b) On 6 August 2008, Abu Zubaydah filed his Petition for a Writ of *Habeas Corpus* in the US District Court for the federal district of the District of Columbia.<sup>323</sup> Years passed with motion after motion filed by petitioner, though fully briefed, remaining undecided by the then-presiding judge. This lack of attention prompted petitioner’s counsel to file with the Court Security Officer a ‘Notice of Filing Motion to Recuse Judge Roberts for Nonfeasance, including Protected Failure to Rule on More than a Dozen Fully Briefed Motions filed by a Man Imprisoned without Charge for Nearly Thirteen Years’.<sup>324</sup> Even that motion was not ruled on for over a year, when it was mooted by the reassignment of the case more than 5 years ago on 16 March 2016 to Judge Emmet G. Sullivan.<sup>325</sup>
- (c) On 14 September 2009, the petitioner had filed his Notice of Filing Motion for Discovery and his substantial Memorandum of Law in Support,<sup>326</sup> but comprehensive discovery has still not been supplied. On 5 October 2018 Abu Zubaydah’s *habeas* counsel felt compelled to take the unusual step of filing a notice ‘to alert the Court...that all pending motions are fully briefed and await action by the Court. Some have been fully briefed for several years.’<sup>327</sup> A Petition for a Writ of Mandamus seeking an order to attend to the case was rejected.
- (d) The case is a dramatic example of the dysfunctional and ineffective system of *habeas* review in respect of Guantánamo detainees today. Even if the applicant were to finally have access to court, practice to date in the D.C. Circuit Court of Appeals with jurisdiction over Guantánamo *habeas* claims, makes clear that it would provide no safeguard against the arbitrariness of his detention.
- (e) The dilution by of Guantánamo detainees’ *habeas* rights by the DC Circuit Court has been widely recognized, to the point where, as one judge of that Court put it, ‘*habeas proceedings afforded [to detainees] are functionally useless.*’<sup>328</sup> The judge noted that ‘members of [this] Court have

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<sup>319</sup> Periodic Review Secretariat, ‘[Unclassified Transcript](#)’ (23 August 2016), 5.

<sup>320</sup> UN Security Council ISIL and al Qaeda Sanctions Committee, ‘Annex—Summary of the analysis, observations, arguments and recommendations set out in the Ombudsperson’s report’ (24 January 2018), 6.

<sup>321</sup> *Boumediene v. Bush* 553 U.S. 723, 779 (2008)

<sup>322</sup> *Boumediene v. Bush*, 553 U.S. 723, 795 (2008). The right was to review by a neutral Article III judge; Article III refers to the third article of the U.S. Constitution which provides for the federal judicial power.

<sup>323</sup> *Husayn v. Gates*. 1:08-cv-1360, Doc.1 (D.D.C. 2008).

<sup>324</sup> ECF No. 311.

<sup>325</sup> ECF No. 314.

<sup>326</sup> Documents No. 212-3. Both documents were filed with the Court Security Officer, who would review them for any classified material.

<sup>327</sup> Case no. 1:08-cv-1360, Doc. no. 526.

<sup>328</sup> *Qassim v. Trump*, Case no. 1:04-cv-01194, [Order](#), United States Court of Appeals for The District Of Columbia Circuit (14 August 2018), 2: Judith Rogers noting that having ‘stretched the meaning of the [Authorizations for Use of Military Force (AUMF) and National Defense Authorization Act (NDAA)] so far beyond the terms of these statutory authorizations that habeas proceedings afforded ... are functionally useless.’

expressed concern that the law of this circuit has “compromised the Great Writ as a check on arbitrary detention.”<sup>329</sup>

- (f) Since *Boumediene*, the D.C. Circuit Court of Appeals has rendered a series of major decisions which have served to eviscerate the ‘meaningful opportunity’ to challenge detention that the Supreme Court required.<sup>330</sup> These cases have raised the standard of review, and created presumptions in favour of government claims and intelligence reports, in a way that effectively precludes the possibility of successful challenge.<sup>331</sup> This is compounded by the finding in other cases that detainees are not entitled to basic fair trial protections of the ‘due process’ clause in *habeas* litigation.<sup>332</sup> Following *Boumediene* but before these panel decisions, D.C. district courts had decided 53 *habeas* petitions, and granted *habeas* in 70% of cases.<sup>333</sup> Since 2010, when the approach to *habeas* for Guantánamo detainees was effectively modified in *Al-Adahi v. Obama*,<sup>334</sup> not a single petition has been granted and those previously allowed were reversed.<sup>335</sup> On these statistics there can be little doubt that *habeas corpus* no longer presents a meaningful safeguard against arbitrary detention at Guantánamo.

99. On 11 January 2018 a collective *habeas* claim was lodged by 11 detainees including Abu Zubaydah, in the face of massive dysfunction in the system of *habeas* review. Specifically, petitioners arguing that the 2001 AUMF no longer authorizes their detention, and that the Constitution prohibits their indefinite detention.<sup>336</sup> The government responded opaquely that detention was not indefinite but ‘indeterminate’ and when questioned as to whether the AUMF could justify detention for 116 years (in reference to the hundred year wars between France and England), affirmed that in the government’s opinion it could. The *habeas* claim was rejected by the court.

#### 100. **Military Commission’s refusal to charge or prosecute**

101. On several occasions, counsel for Abu Zubaydah have implored the Convening Authority of the Military Commissions at Guantánamo and the Chief Prosecutor of the Military Commissions to lay charges and commence proceedings against their client, but no adequate responses have been forthcoming.<sup>337</sup> Counsel went so far as to file an ethics change against the Chief Prosecutor for failing to do his job, without success. As the ECtHR made clear, there can be no justice before the US military commissions.<sup>338</sup> But the applicant, has been placed in an even more detrimental and disempowering position as a ‘forever prisoner’ who currently has no forum to challenge, and seek an end to, his arbitrary detention.

### 3 LEGAL ANALYSIS

#### 3.1 Admissibility/Procedural Requirements before the Working Group

<sup>329</sup> *Qassim v. Trump*, Case no. 1:04-cv-01194, [Order](#), United States Court of Appeals for The District of Columbia Circuit (14 August 2018), 2.

<sup>330</sup> See e.g. *Qassim v. Trump*, Case no. 1:04-cv-01194, Doc. no. 1131 filed on 02/22/18, at 2-3; *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 US 131 (2010), *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 563 US 954 (2011); *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010); *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-6 (D.C. Cir. 2010); *Latif v. Obama*, 677 F.3d 1175, 1179-82 (D.C. Cir. 2011). *Al Hela v. Trump*, Case no. 19-5079, [Appeal](#) (28 August 2020) ruled that *Kiyemba* foreclosed all application of the Due Process Clause at Guantánamo. Suggest a brief explanation of what each case did.

<sup>331</sup> *Latif v. Obama*, 677 F.3d 115, 1179-82 (D.C. Cir. 2012) finding e.g. that government intelligence reports on the detainees should be presumed to be regular and accurate, even if prepared in the fog of war pursuant to a secret process and based on unknown sources.

<sup>332</sup> *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009); *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010) and *Al Hela* reject the application of the due process clause to Guantánamo *habeas* cases.

<sup>333</sup> *Al Hardi et al. v. Obama*, ‘[Petition to hear and decide appeal en banc](#)’, Case no. 10-5217, Document no. 16025555 (4 March 2016), 5.

<sup>334</sup> *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010).

<sup>335</sup> Katie Taylor, ‘[Justice Denied: No charge, no trial, no exit](#)’, *Reprieve* (14 January 2019), accessed 4 July 2020, 31; *Qassim v. Trump*, Case no. 1:04-cv-01194, Doc. no. 1131 filed on 02/22/18, 7, n. 2

<sup>336</sup> *Tofiq Nasser Awad Al Bihani, Abdu Latif Nasser, Sharqawi Al Hajj, Sanad Al Kazimi, Suhail Sharabi, Said Nashir, Abdul Rabbani, Ahmed Rabbani, Abdul Razak, Abdul Malik, and Abu Zubaydah v. Trump*, Case no. 1:09-cv-00745-RCL, [Motion for Order Granting Writ of Habeas Corpus](#) (11 January 2018), 30.

<sup>337</sup> See Annex #.

<sup>338</sup> ECtHR, *Al Nashiri v. Poland* (Application No 28761/11) [Judgment of 24 July 2014](#) (‘*Al Nashiri v. Poland*’), paras 567-568. See also European Parliament, ‘[Resolution on Guantánamo: imminent death penalty decision](#)’ (9 June 2011), para 5.

102. All procedural requirements to bring a complaint before the Working Group have been met. The UNWGAD should find the case admissible, as it has done with comparable cases in the past.
103. **‘Arbitrary’ detention:** The mandate of the Working Group is to determine whether a deprivation of liberty is ‘arbitrary’, contrary to relevant provisions of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments.<sup>339</sup> It will be arbitrary, *inter alia*, if it lacks a lawful basis (‘category I’), and/or if it lacks procedural safeguards against arbitrariness (‘category III’). The following section sets out how Abu Zubaydah’s situation epitomises arbitrary detention on both grounds. The facts above reveal that there was and is no lawful basis for Abu Zubaydah’s indefinite detention, that his detention is discriminatory and that applicable safeguards were entirely set aside in the ERP and at Guantánamo Bay.
104. **Applicant’s Standing to bring the claim:** The complaint is brought to the attention of the Working Group by a direct victim of on-going arbitrary detention and his representative, entitled to bring legal action to the UNWGAD on his behalf (see cover letter re. Power of Attorney).<sup>340</sup>
105. **Complaint against multiple states:** The complaint against multiple states is justified by the exceptional coordinated nature of the violations, the role of many states in contributing to his current situation, and the need for them to engage with their responsibility and bringing violations to an end. The Working Group has previously rendered opinions against multiple States,<sup>341</sup> reflecting the emphasis on shared responsibility, including in the work of other UN special procedures such as the UNWGEID in 2019,<sup>342</sup> and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>343</sup>
106. **No Other impediments to admissibility:** This case concerns on-going violations for which the respondent States share responsibility. While some of the states’ active support and acquiescence in the ERP took place some time ago, they contributed to his detention at Guantánamo and have yet to take necessary steps to investigate and provide reparation for their roles in the ERP. In any event, the Working Group has reached findings of arbitrary detention even in cases where detention has come to an end and the complainant released, including in rendition cases.<sup>344</sup> Other cases, such as Mr al Hawsawi and al Baluchi’s cases, also involve very prolonged ongoing detention.<sup>345</sup>

<sup>339</sup> UN Commission of Human Rights, ‘[Question of arbitrary detention](#)’ (5 March 1991) UN Doc. E/CN.4/RES/1991/42; UN Commission of Human Rights, ‘[Question of arbitrary detention](#)’ (15 April 1997) UN Doc. E/CN.4/RES/1997/50.

<sup>340</sup> WGAD, ‘[Fact Sheet No 26](#)’, 5; WGAD, ‘[Methods of Work of the Working Group on Arbitrary Detention](#)’ (13 July 2017) UN Doc. A/HRC/36/38 (‘Methods of work’), paras 12-13.

<sup>341</sup> Including against Egypt and Kuwait in WGAD, ‘[Opinion No. 60/2016 concerning Omar Abdulrahman Ahmed Youssef Mabrouk \(Egypt and Kuwait\)](#)’ (24 January 2017) UN Doc. A/HRC/WGAD/2016/60; Afghanistan and USA in WGAD, ‘[Opinion No. 56/2016 concerning Abdul Fatah and Sa’id Jamaluddin \(Afghanistan and United States of America\)](#)’ (23 January 2017) UN Doc. A/HRC/WGAD/2016/56; Bhutan and India in WGAD, ‘[Opinion No. 2/2017 concerning Loknath Acharya \(Bhutan and India\)](#)’ (30 May 2017) UN Doc. A/HRC/WGAD/2017/2; Democratic People’s Republic of Korea and China in WGAD, ‘[Opinion No. 81/2017 concerning Mi Sook Kang and Ho Seok Kim \(Democratic People’s Republic of Korea and China\)](#)’ (26 December 2017) UN Doc. A/HRC/WGAD/2017/81; Colombia and Venezuela in WGAD, ‘[Opinion No. 24/2018 relative to? Lorent Gómez Saleh y Gabriel Vallés Sguerzi \(Colombia y República Bolivariana de Venezuela\)](#)’ (17 July 2018) UN Doc. A/HRC/WGAD/2018/24; Pakistan and Turkey in WGAD, ‘[Opinion No. 11/2018 concerning Mesut Kaçmaz, Meral Kaçmaz and two minors \(whose names are known by the Working Group\) \(Pakistan and Turkey\)](#)’ (25 May 2018) UN Doc. A/HRC/WGAD/2018/11.

<sup>342</sup> WGEID, ‘[Report of the Working Group on Enforced or Involuntary Disappearances](#)’ (30 July 2019) UN Doc. A/HRC/42/40, para 92: as to ‘the increasing use of extraterritorial abductions by a number of States with the cooperation of many others’..

<sup>343</sup> He has emphasised the relevance of joint responsibility in e.g. [Statement of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the representative of Sweden](#) (12 September 2019) Doc. AL SWE 4/2019, 14; HRC, ‘[Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#)’ (23 November 2018) UN Doc. A/HRC/37/50, para 58.

<sup>344</sup> WGAD al-Shaykh al-Libi opinion, 103; WGAD, ‘[Opinion No. 8/2019 concerning Duy Nguyen Huu Quoc \(Viet Nam\)](#)’ (19 June 2019) UN Doc. A/HRC/WGAD/2019/8; WGAD, ‘[Opinion No. 73/2018 concerning a minor whose name is known by the Working Group \(Israel\)](#)’ (18 February 2019) UN Doc. A/HRC/WGAD/2018/73. See also, WGAD, ‘[Opinion No. 55/2018 concerning Yamashiro Hiroji \(Japan\)](#)’ (27 December 2018) UN Doc. A/HRC/WGAD/2018/55, in which the complainant was released on conditional bail. In the inter-American system, see also IACCommHR, Report No 29/20 (Case 12.865) [Merits \(Publication\)](#) Djamel Ameziane, United States of America (22 April 2020) (‘IACCommHR Ameziane Report’), held incommunicado in Afghanistan, transferred and subsequently released before the IACCommHR found a violation of his right to liberty.

<sup>345</sup> WGAD, ‘[Opinion No. 50/2014 concerning Mustafa al Hawsawi \(United States of America and Cuba\)](#)’ (13 February 2015) UN Doc. A/HRC/WGAD/2014/50 (‘WGAD al Hawsawi opinion’); WGAD, ‘[Opinion No. 10/2013 concerning Mr Obaidullah \(United States of America\)](#)’ (23 July 2013) UN Doc. A/HRC/WGAD/2013/10 (‘WGAD Obaidullah opinion’); WGAD al Baluchi opinion; WGAD, ‘[Opinion No. 2/2009 concerning Mr Mohammed Abdul Rahman Al-Shimrani \(United States of America\)](#)’ (1 July 2008) UN Doc. A/HRC/13/30/Add.1 (‘WGAD Al-Shimrani opinion’); WGAD, ‘[Opinion No. 3/2009 concerning Mr Sanad Ali Yislam Al-Kazimi \(United States of America\)](#)’ (7 July 2009) UN

107. There is no requirement of exhaustion of domestic remedies before the UNWGAD. It is however also noted that, as made clear below, there have been, and are, no effective remedies available to the applicant in the almost 20 years of his arbitrary detention.<sup>346</sup> Effective remedies in a case such as this include criminal accountability and full reparation, which have been starkly lacking.
108. ***Applicability of International Human Rights Law (IHRL) to ERP and Guantánamo:*** The US has sought to bypass its human rights obligations by arguing that they do not apply beyond its borders. However, the UNWGAD, like other human rights courts and bodies, have consistently rejected this argument and held that human rights obligations were and are owed by the US to persons detained in the ERP<sup>347</sup> and at Guantánamo Bay.<sup>348</sup> Thus e.g. in the Opinion concerning Mr Baluchi it reiterated earlier findings that ‘*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*’.<sup>349</sup> While most of the other state rendered assistance on, or from, their own territories, there can be little doubt that sufficient control was exercised over the applicant and his rights by the relevant states at all material stages for their human rights obligations to apply.
109. As a victim of egregious arbitrary detention, he is entitled to immediate release, relocation, rehabilitation and reparation. The duration, gravity and circumstances of his case speak to the urgency of this request. This is heightened amidst a pandemic in which his life is again political fodder, as evidenced by the US Government reneging on earlier commitment to vaccinate detainees as a result of political pressure.<sup>350</sup> The applicant is now in a worsened situation of vulnerability and injustice requiring urgent intervention.

## 3.2 Legal Analysis: Arbitrary Nature of the Detention

### 3.2.1 *Grounds on which Abu Zubaydah’s detention amounts to an arbitrary deprivation of liberty*

110. The UNWGAD has previously called for the end of indefinite detention of those at Guantánamo Bay in general,<sup>351</sup> and in the context of individual complaints found that detentions at Guantánamo and in the ERP, violated the peremptory prohibition on arbitrary detention.<sup>352</sup> The reasoning in these cases applies with equal or greater force in the present case which is a particularly egregious and flagrant case of arbitrary detention, for which there has been no recognition or reparation by any of the states concerned.
111. The arbitrariness of Abu Zubaydah’s detention stems from three principal grounds, which reflect the categories set out in the UNWGAD’s report on its ‘Methods of Work’:<sup>353</sup>

Doc. A/HRC/13/30/Add.1 (‘WGAD Al-Kazimi opinion’). WGAD, [‘Opinion No. 22/2019 concerning Ahmad Khaled Mohammed Al Hossan \(Saudi Arabia\)’](#) (11 September 2019) UN Doc. A/HRC/WGAD/2019/22 re. ongoing arbitrary detention for 16 years since 2003 in Saudi Arabia.

<sup>346</sup> *Zubaydah v. Lithuania*, para 676.

<sup>347</sup> See e.g. Office of the High Commissioner of Human Rights, [‘Concluding Observations of the Human Rights Committee, United States of America’](#) (18 December 2006), UN Doc. CCPR/C/USA/CO/3/Rev.1, para 10.

<sup>348</sup> UNESC, ‘Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, [‘Situation of detainees at Guantánamo Bay’](#) (27 February 2006) UN Doc. E/CN.4/2006/120 (‘UN Joint Report on the Situation of detainees at Guantánamo’), paras 10-11.

<sup>349</sup> WGAD al Baluchi opinion, para 37, citing UN Joint Report on the Situation of detainees at Guantánamo’, paras 10–11.

<sup>350</sup> While the Pentagon had initially ‘decided to offer coronavirus vaccines to detainees at Guantánamo Bay’ (see Carol Rosenberg [‘Prisoners at Guantánamo Bay will be offered vaccination, the Pentagon says’](#), The New York Times), John Kirby, Assistant to the Secretary of Defense for Public Affairs, announced in a [tweet](#) that this would not be the case (see Carol Rosenberg, [‘Pentagon Halts Plan to Vaccinate the 40 Prisoners at Guantánamo Bay’](#), The New York Times (30 January 2021)).

<sup>351</sup> [‘Joint Statement from IACommHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health on the Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis \(1 May 2013\) Doc. 29/13 \(‘Joint Statement on the Need to End the Indefinite Detention at Guantánamo’\)](#), accessed 20 March 2019.

<sup>352</sup> See WGAD al Baluchi opinion, para 66. See also IACommHR Ameziane Report, para 123: finding that indefinite detention of those held at Guantánamo Bay for extended periods without charge ‘constitutes a serious violation of their right to personal liberty’.

<sup>353</sup> Methods of Work.

- (a) **Category I, No Lawful Basis:** It is ‘clearly impossible to invoke any legal basis justifying the deprivation of liberty’<sup>354</sup> in the context of the applicant’s indefinite deprivation of liberty at Guantánamo or secret CIA detention;
- (b) **Category III, Complete Lack of Procedural Fairness:** The lack of any international procedural safeguards relating to Abu Zubaydah’s detention amount to ‘total or partial non-observance of the international norms relating to the right to a fair trial, ... of such gravity as to give the deprivation of liberty an arbitrary character’;<sup>355</sup> and
- (c) **Category V, Discrimination:** The deprivation of Abu Zubaydah’s liberty ‘constitutes a violation of international law on the grounds of discrimination based on ... nationality, ethnic or social origin, ... religion, or any other status, that aims towards or can result in ignoring the equality of human beings’.<sup>356</sup>
- (d) **Arbitrary Detention as Torture, Disappearance and violation of the right to Life in this case**

112. In addition, it will be submitted that the arbitrary detention in this case amounts to other egregious violations of human rights. The UNWGAD has the mandate to consider violations of other rights, in so far as such allegations are relevant to and intertwined with arbitrary detention. In this case, the systematic torture of the applicant, secret detention amounting to enforced disappearance, and failure to respect his right to life, are essential to understanding the nature and implications of his arbitrary detention.

### 3.2.1.1 No legal basis for Abu Zubaydah’s detention (category I)

113. Articles 9 and 10 UDHR and Article 9 ICCPR prohibit detention other than on grounds provided for in law. Any arrest or detention that lacks a legal basis is arbitrary.<sup>357</sup> There was, and is, no legal basis for the detention of Abu Zubaydah in international law, or in any domestic law that complies with international law.<sup>358</sup> Abu Zubaydah has been held in such arbitrary detention for 19 years.

114. As the UNHRC has noted, it is *not sufficient that there is a basis in domestic law* if the grounds fall afoul of basic tenets of international law.<sup>359</sup> The Working Group has previously stated that where domestic laws are inconsistent with human rights guarantees, reliance on these laws to detain individuals will constitute arbitrary detention.<sup>360</sup> In the case of Guantánamo detainee Mr al Hawsawi, it found that this category ‘*embodies a principle of legality*’ and ‘*requires a legal basis for detention in domestic law that complies with international law*’.<sup>361</sup> The applicant has still not been provided with a reasoned legal basis for his detention. Vague assertions of ‘*law of war authority*,’ unsupported by concrete and specific facts, do not suffice. No effort has been made by the US administration to frame the justification for detention in terms that are compliant with the state’s international legal obligations under human rights law. Instead, the limited reasoning advanced by the state, in statements and ad hoc internal review proceedings, only serves to demonstrate the arbitrariness of detention on various grounds.

- (a) First, as the UNWGAD has noted, the failure to invoke and to justify a legal basis for detention is itself a gross violation of articles 9(2) and 14(3)(a) of the Covenant and principle 10 of the Body of Principles.<sup>362</sup> The lack of grounds for detention in Category I and the lack of due process in Category III are connected: as the UNWGAD noted in Mr al Baluchi’s case, ‘in the absence of a

<sup>354</sup> Methods of Work, para 8 (a).

<sup>355</sup> Methods of Work, para 8 (c).

<sup>356</sup> Methods of Work, para 8 (c).

<sup>357</sup> UNHRC, ‘[General Comment No 35, Article 9 \(Liberty and security of person\)](#)’ (16 December 2014), UN Doc. CCPR/C/GC/35 (‘General Comment No 35’), para 11.

<sup>358</sup> See WGAD al Hawsawi opinion, para 74; WGAD Obaidullah opinion, para 37.

<sup>359</sup> General Comment No 35, para 12.

<sup>360</sup> WGAD, ‘[Report of the Working Group on Arbitrary Detention](#)’ (24 December 2012) UN Doc. A/HRC/22/44 (‘WGAD 2012 Report’), para 65 citing WGAD, ‘[Opinion No 25/2012 concerning Agnés Uwimana Nkusi and Saïdati Mukakibibi \(Rwanda\)](#)’ (22 November 2012) UN Doc. A/HRC/WGAD/2012/25 and ‘[Opinion No 24/2011 concerning Cu Huy Ha Vu \(Viet Nam\)](#)’ (28 February 2012) UN Doc. A/HRC/WGAD/2011/24.

<sup>361</sup> See WGAD al Hawsawi opinion, para 74.

<sup>362</sup> See WGAD al Baluchi opinion, para 44.



ruling on the lawfulness of [] detention by a judicial authority, the Working Group concludes that no legal basis has been established for his detention.<sup>363</sup> The UNWGAD found detention for a period of 16 months after charges were dropped before he was re-charged amounted to a period of detention without legal basis.<sup>364</sup> This applies *a fortiori* to Mr Abu Zubaydah in respect of the 19 years during which he has been detained without charge (see section 3.2 below) and without justification for his detention being articulated, evidenced or subject to lawful challenge.

- (b) Second, the US purports to justify the continued detention of Abu Zubaydah at Guantánamo Bay under the AUMF, until ‘the cessation of active hostilities’<sup>365</sup> or the end of the putative armed conflict with al Qaeda, Taliban, and associated forces.<sup>366</sup> However, the ‘law of war’ rationale for indefinite detention of this type is incompatible with international law.
- (i) IHL permits detention of persons taking an active part in hostilities during armed conflict, where there is a security imperative for doing so.<sup>367</sup> The onus is on the state detaining<sup>368</sup> to demonstrate the existence of an armed conflict, which as noted above it has not done, that the individual was an active participant in a conflict involving the US pursuant to which he is detained, and that detention was required by security imperatives related to that conflict. The state has not discharged any element of this burden.
- (ii) As the UNWGAD and other international legal authorities have consistently held, ‘the *global struggle against international terrorism does not, as such, constitute an armed conflict* for the purposes of the applicability of international humanitarian law (IHL)’.<sup>369</sup> The UNWGAD notes that 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*’.<sup>370</sup>
- (iii) Moreover, even if IHL were applicable, the legal framework of IHL could never justify indefinite detention during an endless war on an open-ended enemy. As the Working Group indicated in the Mr al Baluchi Opinion, it ‘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.’<sup>371</sup> A fortiori it could not conceivably justify his detention which now reaches 19 years.<sup>372</sup> The UNWGAD has noted that any conceivable IHL rationale that existed in the aftermath of 9/11 would have come to an end in the ensuing decades. This is supported by the findings of the IACommHR, among others.<sup>373</sup>
- (c) Third, detention based on ill-defined ‘threats’ to the state, or previously for the purposes of interrogation, was and is inconsistent with international law and arbitrary.<sup>374</sup>
- (i) The UNWGAD makes clear that if security detention can ever be justified (outside a time limited genuine armed conflict), it is only ‘*under the most exceptional circumstances*’ which require ‘*a present, direct and imperative threat*’.<sup>375</sup> The burden of proof falls on the State to prove such a threat, and that it could not be addressed by alternative measures, which it has not

<sup>363</sup> WGAD al Baluchi opinion, para 47.

<sup>364</sup> See WGAD al Baluchi opinion, paras 44, 47.

<sup>365</sup> *Al-Bihani et al v. Trump*, ‘[Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus](#)’, (18 April 2018), 1-2.

<sup>366</sup> *Abdul Razak Ali v. Trump*, ‘[Respondents-Appellees’ Response to Petition for Initial Hearing en Banc](#)’ (17 January 2019).

<sup>367</sup> See e.g. Articles 42 and 78 Geneva Convention IV.

<sup>368</sup> See ICRC, ‘[International Humanitarian Law and the challenges of contemporary armed conflicts in 2015](#)’ (2015), last accessed 15-03-2021.

<sup>369</sup> WGAD, ‘[Opinion No. 43/2006 concerning the case of Mr Ali Saleh Kahlah Al-Marri \(United States of America\)](#)’, (16 January 2008) UN Doc. A/HRC/7/4/Add.1, para 31; See also UN Joint Report on the Situation of detainees at Guantánamo, para. 21.

<sup>370</sup> WGAD al Baluchi opinion, para 42.

<sup>371</sup> WGAD al Baluchi opinion, para 43.

<sup>372</sup> See WGAD al Hawsawi opinion, para 68.

<sup>373</sup> IACommHR Ameziane Report, para 123: *Prisoners detained in the context of non-international armed conflicts may only be held for security reasons and they cannot, therefore, be held indefinitely for purposes of interrogation*

<sup>374</sup> UN Joint Report on the Situation of detainees at Guantánamo, paras 23-24.

<sup>375</sup> General Comment No 35, para 15.

discharged.<sup>376</sup> The state has failed to provide compelling reasons, or evidence to support, its bald conclusions that he poses a significant threat to the US and can be detained on this basis.

- (ii) The PRB's findings make clear the extent of the arbitrariness. The applicant has had no opportunity to refute the 'presumptions' of fact upon which the PRB reaches its summary conclusions that his ongoing detention is justified on security grounds. It beggars belief that the applicant, detained for 19 years, could pose such an exceptional, direct and imperative operational threat to the US to justify detention at this point. The language used that he 'probably' or 'possibly' had information, contacts or still harbours an 'extremist mindset', underscores the flimsiness of any evidence and its stark unlawfulness as a basis for 19 years of detention. More preposterous and unjust, is the PRB suggestion that his 'organisational skills' have been honed by supporting fellow detainees articulate claims of mistreatment, and that this contributes to justifying his ongoing security detention. It was on this basis the UN Ombudsperson noted in her decision to delist the applicant from the al Qaeda sanctions list that: '*steps [e.g. Petitioner's cooperation] that would be considered positive in any other environment are held against him based on unsubstantiated suspicions. The Ombudsperson found it difficult in these circumstances to imagine what he could possibly do to obtain a fully positive statement*'.<sup>377</sup> There is effectively nothing the Applicant can do to secure his freedom and end his indefinite arbitrary detention.
- (iii) Moreover, the Working Group has made clear that security detention could only be permitted temporarily, for a limited time and no longer than is absolutely necessary, given the 'severe risks' involved.<sup>378</sup>
- (iv) The unlawful nature of prolonged detention purportedly on 'security' grounds is supported across human rights law. For example, the UN Special Rapporteur on Human Rights and Terrorism has indicated that prolonged detention '*on the basis of intelligence-gathering or on broad grounds in the name of prevention*' constitutes arbitrary detention.<sup>379</sup> The IACommHR has found the prolonged detention at Guantánamo Bay '*clearly goes beyond an exceptional and strictly necessary measure ordered for security reasons, and is arbitrary and unjust*'.<sup>380</sup> As the Commission found, even if there had been public security reasons that justified detention, the duration of the detention and the absence of due process protections put beyond doubt the arbitrariness of the detention at Guantánamo.
- (v) With regard to CIA detention, internal documentation makes clear that the original purpose of the secret detention was for unfettered intelligence gathering beyond the purview of the courts, torture and 'enhanced interrogation.' Detention on these grounds plainly has no legal basis in domestic or international law, and conflicts with the most basic principles of international human rights and rule of law.
- (d) Fourth and relatedly, the indefinite character of his detention is itself indicative of arbitrariness. As stated by the Working Group in the al Hawsawi opinion, '[t]he domestic law used by the United States Government to detain Mr al Hawsawi does not comply with international law and the requirements of human rights law and international humanitarian law on the further grounds that his detention is prolonged and indefinite.'<sup>381</sup> In a joint opinion, the IACommHR, the Working Group, and the Special Rapporteurs have underlined that, 'even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human

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<sup>376</sup> General Comment No 35, para 15.

<sup>377</sup> UN Security Council ISIL and al Qaeda Sanctions Committee, 'Annex—Summary of the analysis, observations, arguments and recommendations set out in the Ombudsperson's report' (24 January 2018), 6.

<sup>378</sup> General Comment No 35, para 15: as security detention 'presents severe risks of arbitrary deprivation of liberty'... '*States must demonstrate that the detention lasts no longer than is absolutely necessary, that the overall length is limited and that they act fully in accordance with guarantees in art 9.*'

<sup>379</sup> HRC, '[Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin](#)' (4 February 2009) UN Doc. A/HRC/10/3 ('Scheinin Report 2009'), para 38.

<sup>380</sup> IACommHR Ameziane Report, para 123.

<sup>381</sup> See WGAD al Hawsawi opinion, para 74.

rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment'.<sup>382</sup> The US Government's argument that the detention is not 'indefinite' only 'indeterminate' is unsupported by any evidence, and by the fact of Abu Zubaydah's 19-year ongoing detention without any charges or indication as to how he could potentially secure his release.<sup>383</sup>

- (e) Fifth, detention for the purpose of preventing embarrassment or accountability of states or individuals responsible for torture or other crimes is also arbitrary, as the UNWGAD has made clear.<sup>384</sup> The true basis for the ongoing detention of the applicant is a matter of speculation. However, as noted in the fact section, undertakings were given to his torturers and captors, before he was tortured, that he would never be released, have thus far held true.

### 3.2.1.2 Lack of Procedural Safeguards of such gravity to give the deprivation of his liberty an arbitrary character (category III)

115. The second ground of arbitrariness is the complete negation of procedural safeguards inherent in lawful detention, during the ERP and at Guantánamo Bay. Article 9 ICCPR requires that persons deprived of liberty are afforded basic procedural safeguards, including the right to be brought promptly before a court and to challenge and have reviewed the legality of detention by a court.<sup>385</sup> The ERP, and location of Guantánamo, were specifically designed and implemented to remove such safeguards. As the ECtHR noted of the ERP, 'the rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention'.<sup>386</sup> The ongoing arbitrariness at Guantánamo the ECtHR described as a 'flagrant denial of justice'.<sup>387</sup>
116. In relation to category III, the Working Group has previously found 'rights to fair trial and due process have been repeatedly violated' in the rendition programme and at Guantánamo Bay.<sup>388</sup> In 2002 when the Guantánamo detention site first opened, the UNWGAD cautioned that 'so long as a "competent tribunal" [...] has not issued a ruling on the contested issue, detainees enjoy "the protection of the [Third Geneva Convention]"' and 'the right to have the lawfulness of their detention reviewed' and 'the right to a fair trial' continue to apply.<sup>389</sup>
117. The present applicant's case stands out for the complete dearth of procedural safeguards and fair trial guarantees, given the lack of any habeas review or charges at all after 19 years. The lack of oversight of the lawfulness of detention, and denial of Abu Zubaydah's fair trial rights, are undoubtedly of 'such gravity to give his detention an arbitrary character' (category III).
118. Main features of the flagrant arbitrariness in his case include the following:
- (a) Since his arrest, Abu Zubaydah has been denied a *reasoned substantiated justification for his detention* and denied access to essential information and explanation of his rights, in violation of principles 10, 12 and 13 of the UN Body of Principles.<sup>390</sup> He has been denied information concerning his torture and detention.<sup>391</sup>
  - (b) Abu Zubaydah was *denied consular access* upon his arrest and detention, in violation of article 36 Vienna Convention on Consular Relations, principle 16(2) of the Body of Principles and rule 62 of the Nelson Mandela Rules.<sup>392</sup> Lack of consular access not only precludes effective support and

<sup>382</sup> Joint Statement on the Need to End the Indefinite Detention at Guantánamo'.

<sup>383</sup> Katie Taylor, '[Trump's response – Guantánamo detention not indefinite, just indeterminate](#)', Reprieve (19 February 2018).

<sup>384</sup> WGAD al Hawsawi opinion, para 44.

<sup>385</sup> General Comment No 35, paras 4, 15, 32.

<sup>386</sup> *Zubaydah v. Poland*, para 524.

<sup>387</sup> *Al Nashiri v. Poland*, para 566.

<sup>388</sup> See WGAD al Hawsawi opinion, para 79; WGAD Obaidullah Opinion, para 16.

<sup>389</sup> WGAD, 'Legal opinion regarding the deprivation of liberty of persons detained in Guantánamo Bay' in WGAD, '[Report of the Working Group on Arbitrary Detention](#)' (16 December 2002) UN Doc. E/CN.4/2003/8, paras 61-64.

<sup>390</sup> See WGAD al Hawsawi opinion, para 79; WGAD Obaidullah opinion, para 39.

<sup>391</sup> WGAD al Baluchi opinion, para 55.

<sup>392</sup> See WGAD al Baluchi opinion, para 50.

solutions to arbitrary detention, but placed Abu Zubaydah at risk of further human rights violations.<sup>393</sup>

- (c) Abu Zubaydah has *had no judicial review of his detention*:<sup>394</sup> despite the Supreme Court ruling of 2008 recognising that all detainees have such a right, he has still not been brought before a judicial authority for review of his detention. As the UNWGAD and numerous other international authorities make clear, the right to challenge the legality of detention before a court of law is a fundamental, non-derogable right under IHRL applicable at all times. The ‘minimum requirements’ for the remedy of habeas corpus to comply with international human rights law<sup>395</sup> ‘includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of 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).’<sup>396</sup> All of these elements of fairness and due process have been and remain absent in this case.
- (d) There has been no meaningful progress in Abu Zubaydah’s *habeas corpus* proceedings (see paras 97 *et seq.* above). The denial of the right 19 years after his arrest flouts the obligation to ensure such rights are guaranteed ‘within a reasonable time’, ‘without delay’ and ‘promptly’ pursuant to articles 9 (3) and (4) ICCPR and principles 4 and 11 of the Body of Principles.<sup>397</sup> The ‘review’ processes he has been subject to – Combatant Status Review Tribunal and Periodic Review Boards – have repeatedly been found by this UNWGAD to be military or administrative processes of a ‘summary’ nature that fall short of the requirements of judicial review.<sup>398</sup> This has also been the finding of the US judiciary.<sup>399</sup> The failure of any ‘meaningful progress’ in his *habeas* litigation means, as the working group previously found in relation to another detainee in less dramatic circumstances, that ‘he has therefore not been afforded his right to an effective remedy under article 8 of the UDHR and article 2 (3) of the Covenant.’<sup>400</sup>
- (e) Abu Zubaydah was not afforded access to *legal representation* from 2002-2008, in violation of his right to legal counsel under article 14(3) ICCPR and principles 11(2), 17 and 18 of the Body of Principles.<sup>401</sup> Once he *was* afforded access to counsel, its effectiveness was impeded in various ways, including communication restrictions, infringements on attorney-client privilege and the presumptive classification referred to at para 23.<sup>402</sup> The UNWGAD has noted the critical nature of free access to counsel to protect against arbitrariness.<sup>403</sup> On several occasions it has found that

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<sup>393</sup> See WGAD al Baluchi opinion, para 50.

<sup>394</sup> General Comment No 35, para 15: ‘[p]rompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice... and disclosure to the detainee of, at least the essence of the evidence on which the decision is taken’.

<sup>395</sup> HRC, ‘[Report of the Working Group on Arbitrary Detention](#)’ (26 December 2011) UN Doc. A/HRC/19/57, para 63.

<sup>396</sup> WGAD al Baluchi opinion, para 37(b)(ii).

<sup>397</sup> See WGAD al Hawsawi opinion, para 79; WGAD al Baluchi opinion, para 47; WGAD Obaidullah opinion, para 39.

<sup>398</sup> As the Working Group found in al Hawsawi opinion, Obaidullah opinion, Al-Shimrani opinion, and al Baluchi opinion, para 46: ‘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’.

<sup>399</sup> See *Boumediene et al v. Bush* 553 US (12 June 2008) in which the US Supreme Court found that detainees at Guantánamo Bay were entitled to habeas corpus review and that the CSRT and ARB did not provide for ‘meaningful’ judicial review. See also WGAD al Hawsawi opinion, para 72; WGAD Al-Kazimini opinion, paras 36-37; WGAD Al-Shimrani opinion, para 32.

<sup>400</sup> WGAD al Baluchi opinion, para 46: ‘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...’.

<sup>401</sup> See WGAD al Hawsawi opinion, para 79; WGAD al Baluchi opinion, para 52; WGAD Obaidullah opinion, para 39.

<sup>402</sup> *Zubaydah v. Poland*, para 80; *Zubaydah v. Lithuania*, para 90.

<sup>403</sup> Principle 9 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court developed by the Working Group WGAD, ‘[Report of the Working Group on Arbitrary Detention](#)’ (6 July 2015) UN Doc. A/HRC/30/37 (‘WGAD Basic Principles and Guidelines on Remedies and Procedures’), Annex and Guidelines 8 and 9 in the same document.

lack of access to counsel within a reasonable period<sup>404</sup> or denial of the right to communicate privately with counsel<sup>405</sup> contributed to the characterisation of detention as arbitrary.<sup>406</sup>

- (f) Though Abu Zubaydah filed his Motion for Discovery in 2009, much of the information sought – including what his counsel believes to be exculpatory information – has still not been provided more than a decade later. The US has consistently made *erroneous and deliberately misleading claims* in respect of the applicant, without affording him the opportunity to refute them. Applicant’s counsel, on account of everything he tells them being classified as presumptively top secret, are not able to tell the world what really happened, including details of his torture. Since the applicant’s *habeas* claim, though filed in 2008, has still not been called to a hearing, he has been deprived of the opportunity to challenge the Government’s claims in violation of articles 14(1) and 14(3) ICCPR.<sup>407</sup> The reliance on evidence obtained during CIA interrogation, is prohibited under customary international law and article 14(3)(g) ICCPR and article 15 of the Convention against Torture, and a further indication of arbitrariness.
- (g) The applicant has at all times been *detained without charge*. At this stage, the failure to lodge criminal charges, or to release the applicant, amounts to arbitrariness under Category III. There is no indication of real intention to bring charges, which led to his depiction as a ‘forever prisoner’.<sup>408</sup> Indefinite and prolonged detention without charge violates article 14(3)(c) ICCPR. As the UNWGAD made clear in other Guantánamo detainees’ cases, ‘under article 9 (3) of the Covenant, if [the detainee] cannot be tried within a reasonable time, he is entitled to release’.<sup>409</sup>
- (h) There is *no prospect of a fair trial* in his case. Misleading information made available publicly and selectively about Mr Abu Zubaydah is, at a minimum, ‘highly prejudicial’ to his ability to obtain a fair trial, in line with the working group’s previous conclusions.<sup>410</sup> These include public untruths as to his role or that the ‘enhanced interrogation techniques’ led to valuable information (all rejected by the SSCI). False information conveyed from the US authorities to filmmakers, and broadcast in the movie ‘Zero Dark Thirty,’ form part of the vilification of the applicant and compromise his right to fair trial. The UNWGAD has found the failure to provide psychological support and rehabilitation to torture victims as also impeding the possibility of a fair trial.<sup>411</sup>

119. In violation of article 14(3)(c) ICCPR, his detention has been excessive in length and continues to be indefinite and prolonged, with no indication that charges will be brought against him.<sup>412</sup>

### **3.2.1.3 The deprivation of Abu Zubaydah’s liberty constitutes a violation of international law on the grounds of discrimination based on nationality and religion (category V)**

<sup>404</sup> WGAD al Baluchi opinion, para 52; WGAD al Hawsawi opinion, para 79; WGAD Obaidullah opinion, para 39; more recently, see WGAD, [‘Preliminary Findings from its visit to Greece \(2-13 December 2019\)’](#); WGAD, [‘Opinion No. 44/2019 concerning Nguyễn Văn Hoá \(Viet Nam\)’](#), (10 September 2019) UN Doc. A/HRC/WGAD/2019/44 (‘WGAD Nguyễn Văn Hoá opinion’), para 73; WGAD, [‘Opinion No. 45/2019 concerning Le Dinh Luong \(Viet Nam\)’](#), (1 September 2019) UN Doc. A/HRC/WGAD/2019/45 (‘WGAD Le Dinh Luong opinion’), para 75.

<sup>405</sup> WGAD al Hawsawi opinion, para 78; WGAD Nguyễn Văn Hoá opinion, para 73; WGAD Le Dinh Luong opinion, para 75.

<sup>406</sup> WGAD al Baluchi opinion, para 16.

<sup>407</sup> WGAD 2012 Report, para 72, see also para 63.

<sup>408</sup> US Department of Justice; Department of Defense; Department of State; Department of Homeland Security; Office of the Director; of National Intelligence; Joint Chiefs of Staff; [‘Final Report Guantánamo Review Task Force’](#) (22 January 2010), ii: Stating that 48 of the detainees were ‘not feasible for prosecution’. The fact that his US counsel have pressed for charges and trial within the military commissions process, despite the serious due process violations, reflects their desperation to try to ensure that there is some sort of process in preference to his current legal limbo within which he is held, in this regard, see Section 2, in particular 2.4.

<sup>409</sup> WGAD al Baluchi opinion, para 54.

<sup>410</sup> WGAD al Baluchi opinion, para 51: on information being passed to filmmakers of Zero Dark Thirty; the WG noted that given the storyline concerned information leading allegedly to identifying the whereabouts of Osama bin Laden, the material portrayed in the film was highly prejudicial to Mr al Baluchi’s right to fair trial; Zero Dark Thirty also included the story of Abu Zubaydah, giving false impression of the effectiveness and usefulness of the torture/interrogation techniques used by the CIA, see Human Rights Watch, [‘US: Zero Dark Thirty and the Truth About Torture’](#) (11 January 2013), last accessed 16 March 2021.

<sup>411</sup> WGAD al Baluchi opinion, paras 58-61.

<sup>412</sup> In the WGAD al Baluchi opinion, para 54, the Working Group indicated that the protracted pretrial litigation phase of proceedings at the Military Commission against al Baluchi in addition to the fact that he had been held in prolonged and indefinite detention for 11 years, with no indication of when his trial would proceed contributed to giving his detention an arbitrary character. In the Inter-American system, indefinite detention has been considered to constitute ‘a flagrant violation of international human rights law’ even in exceptional circumstances, amounting to cruel, inhuman or degrading treatment: IACommHR Ameziane Report, para 154.

120. Arrest or detention on discriminatory grounds is ‘in principle arbitrary.’<sup>413</sup> As reflected in the UNWGAD’s rules, deprivation of liberty may be discriminatory where it is ‘based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status’ or where it ‘aims towards or can result in ignoring the equality of human rights’.<sup>414</sup> Discrimination can be direct or indirect, intentional or inadvertent; rules may be facially discriminatory or apply disproportionately to members of a group. Both issues arise in relation to the Guantánamo and ERP violations.
121. The Guantánamo detention regime, and denial of rights ordinarily applicable within the US judicial system, apply only to non-nationals. They have been applied exclusively to Muslims. The UNWGAD and the IACommHR have found them discriminatory on intersecting grounds, based on detainees’ status as foreign nationals, and their religion.<sup>415</sup>
122. As noted above, the Working Group has previously made findings of arbitrary detention based on discrimination in a range of cases,<sup>416</sup> including several in relation to Guantánamo detainees. The most recent finding in Mr al Baluchi’s case goes further than others in noting as follows:
- 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 (emphasis added).<sup>417</sup>*
123. The IACommHR has likewise expressed concerns that the detention regime at Guantánamo Bay was created for the specific purpose of detaining ‘foreign Muslim men’, that all 779 detainees were non-US citizens and Muslim.<sup>418</sup> And that their ‘indefinite detention, limited or no access to judicial protection, and trial absent basic elements of due process’ breached the non-discrimination clause contained within the American Declaration.<sup>419</sup> An amicus curiae brief submitted by 13 Muslim, faith-based, and civil rights organisations in support of the *habeas corpus* petitions of Guantánamo detainees have similarly drawn attention to the refusal of the (former) US administration to make individualised assessments of the detainees as required by law, reflecting ‘anti-Muslim animus.’<sup>420</sup>
124. Equality rights have been neglected in much of the analysis surrounding Guantánamo and the war on terror more broadly. The inadequacy of responses to violations, including the failure of US administration and other states to deal with the historic injustice of cases such as this and to acknowledge victimhood and apologise, also raise questions regarding equality before the law.

<sup>413</sup> General Comment No 35, para 17.

<sup>414</sup> See WGAD al Hawsawi opinion, para 81.

<sup>415</sup> IACommHR, ‘[Towards the Closure of Guantánamo](#)’, (3 June 2015), OAS/Ser.L/V/II. Doc. 20/15 (‘IACommHR, ‘Towards the Closure of Guantánamo’), para 221; WGAD al Hawsawi opinion, para 82.

<sup>416</sup> See WGAD al Hawsawi opinion, para 82; WGAD al Baluchi opinion, para 62; WGAD Obaidullah opinion, para 42. WGAD, ‘[Report of the Working Group on Arbitrary Detention](#)’ (19 July 2017) UN Doc. A/HRC/36/37, para 48.

<sup>417</sup> WGAD al Baluchi opinion, para 62 citing [National Defense Authorization Act for Fiscal Year 2010](#), 123 STAT 2190, Section 1802, Military Commissions, §948b. Military commissions generally, Public Law 111-84-Oct. 28, 2009 (28 October 2009), 387.

<sup>418</sup> IACommHR, ‘Towards the Closure of Guantánamo’, para 221.

<sup>419</sup> IACommHR, Towards the Closure of Guantánamo, paras 224-226. Scholar Fiona de Londras has also suggested that the detention of non-US citizen Muslims at Guantánamo Bay is illegitimate in part because it does not meet standards of non-discrimination, see Fiona de Londras, ‘[Can Counter-Terrorist Internment Ever Be Legitimate?](#)’ (2011) 33 Human Rights Quarterly 593, 617.

<sup>420</sup> ‘[Brief of Amici Curiae Muslim, Faith-Based, and Civil Rights Community Organizations in Support of Petitioners’ Motion For Order Granting Writ Of Habeas Corpus](#)’, (22 January 2018), 27-28.

125. Finally, violations are exacerbated by the applicant's statelessness. Indeed, the facts indicate that differential approaches to different foreign nationalities have played a defining role in determining who was released, and who continues to be held arbitrarily. While European and western states' citizens were among the first to leave Guantánamo, others such as Yemenis, citizens from the Maghreb, and in this case a stateless Palestinian who grew up in Saudi Arabia, remain.
126. Abu Zubaydah's continued arbitrary detention at Guantánamo Bay, and the failure to respond to serious violations of his rights, amount to discrimination on grounds of nationality and religious belief. The denial of detention rights that would ordinarily apply within the US judicial system on a discriminatory basis, is 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, 7 and 10 UDHR and articles 2, 14 and 26 ICCPR and principle 5 of the Body of Principles.<sup>421</sup>

#### 3.2.1.4 Prolonged arbitrary detention as torture, disappearance and violation of right to life

127. In the extreme circumstances of the applicant's case, his arbitrary detention constitutes a violations of several other core human rights.
128. ***Torture, Ill-treatment and Dignity:*** As the ECtHR and others have determined, there is no doubt not only that the applicant was tortured in detention, but that the nature and conditions of detention themselves amount to torture or cruel inhuman and degrading treatment (TCIDT).<sup>422</sup> In extreme circumstances, as the UNWGAD and others have noted in the context of secret detention in the ERP and Guantánamo, '*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.*'<sup>423</sup> Other human rights bodies and experts have affirmed that prolonged incommunicado detention can in itself constitute TCIDT.<sup>424</sup> In January 2021, several UN Special Rapporteurs called for the release of Guantánamo detainees, arguing that '[t]he prolonged and indefinite detention of individuals, who have not been convicted of any crime by a competent and independent judicial authority operating under due process of law, is arbitrary and constitutes a form of cruel, inhuman and degrading treatment or even torture.'<sup>425</sup>
129. Severe limitations on contact from the outside world, contribute to a situation in which the right to dignity and autonomy are eviscerated. In Mr al Baluchi's case, the UNWGAD found severe restrictions to 'violate... 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.'<sup>426</sup> The extreme restrictions on the applicant's communication with the outside world have been recognised, for example, in ECtHR judgments which describe him as a 'man deprived of his voice.'<sup>427</sup>
130. In the context of the present case, of indefinite detention, no due process whatever – neither habeas review, charge nor trial – and the loss of control over his own fate or ability to secure release, the UNWGAD should conclude that his ongoing detention amounts to torture.

<sup>421</sup> See WGAD al Baluchi opinion, para 63.

<sup>422</sup> *Zubaydah v. Poland*, para 496. The Court noted that 'there could be little doubt that the [EITs], used in combination and in pursuant of the aim of causing severe pain or suffering in order to obtain information, amounted to torture'.

<sup>423</sup> WGAD al Baluchi opinion, para 37 (c); Joint Statement on the Need to End the Indefinite Detention at Guantánamo: 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, and that detention beyond a reasonable time can be cruel and inhuman.

<sup>424</sup> See e.g. HRC, *Youssef El Megreisi v. The Libyan Arab Jamahiriya*, Communication No 440/1990, [Views adopted on 23 March 1994](#) (1994) UN Doc. A/49/40 (Vol II), para 5.4; UN Commission on Human Rights, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', [Resolution 2003/32](#) (23 April 2003), UN Doc. E/CN.4/RES/2003/32, para. 14; UN Joint Report on the Situation of detainees at Guantánamo, para. 44; UN Office of the High Commissioner for Human Rights, "["Disgraceful" Guantánamo Bay detention facility must be closed now, say UN experts](#)" (11 January 2021), last accessed 11 March 2021.

<sup>425</sup> UN Office of the High Commissioner for Human Rights, "["Disgraceful" Guantánamo Bay detention facility must be closed now, say UN experts](#)" (11 January 2021), last accessed 11 March 2021.

<sup>426</sup> WGAD al Baluchi opinion, para 58: referring to him being 'only allowed infrequent letters from his family and occasional opportunities for video-messaging through ICRC'.

<sup>427</sup> *Zubaydah v. Poland*, para. 80.

131. **Enforced Disappearance:** Abu Zubaydah’s arbitrary detention in the ERP also amounted to enforced disappearance of persons. Enforced disappearance involves a ‘unique and integrated series of acts and omissions’<sup>428</sup> whereby an individual is removed from the protection of the law.<sup>429</sup> This was precisely the defining characteristic, and the purpose, of the rendition programme; ECtHR judgments note that the rationale of the programme was ‘specifically to remove [the detainees] from any legal protection against torture and enforced disappearance.’<sup>430</sup> Among those identifying the rendition programme as enforced disappearance are the ICRC<sup>431</sup> and the UN Joint Study on secret detention which noted that ‘*Every instance of secret detention also amounts to a case of enforced disappearance.*’<sup>432</sup>
132. **Violation of the right to Life:** In the extreme circumstances of the indefinite arbitrary detention of the applicant, without review, charge or trial for almost twenty years and no prospect of release, the UNWGAD is asked to recognise that the arbitrary detention entails a violation of his right to life. UNHRC General Comment 36 notes that ‘extreme forms of arbitrary detention’ may be incompatible with the right to life, and that there is a ‘right to a [dignified] life.’<sup>433</sup> Dignity entails an element of autonomy, ability to communicate with the outside world,<sup>434</sup> to challenge the lawfulness of detention and have some ability to influence one’s own fate. Other courts and bodies, including the ECtHR and some states in the Inter-American system, have found life imprisonment with no prospect for parole to be contrary to the requirements of respect for dignity in IHRL.<sup>435</sup> This rationale applies *a fortiori* in this context where individuals like Abu Zubaydah are designated ‘forever’ prisoners in the context of commitments given (and upheld) to detain him ‘incommunicado for the remainder of his life.’
133. By reference to a moving target of nonspecific allegations, as to Abu Zubaydah and the abstract danger to security he is deemed to represent, the detaining authorities seek to justify the obliteration of his legal rights for life, tantamount to ‘civil death’.<sup>436</sup>

### 3.2.1.5 Investigation, Truth, Accountability and Reparation for prolonged arbitrary detention

134. The duty to respond to credible allegations of serious violations, is well established as dimensions of states positive obligations under human rights law binding on all respondent states. States are obliged to investigate the violations – in a manner that meets the benchmarks of promptness, independence, thoroughness, and effectiveness recognised across human rights systems – to ensure accountability and provide adequate reparation.
- (a) Multiple human rights bodies, including the UN Committee on Enforced Disappearances, the Committee against Torture and the Human Rights Committee, have stated that states involved in the ERP should ‘*complete the investigation into allegations of [] involvement in the rendition and*

<sup>428</sup> HRC, ‘[General Comment No 36: The Right to Life](#)’ (3 September 2019) UN Doc. CCPR/C/GC/36 (‘General Comment No 36’), para 58.

<sup>429</sup> Article 2 International Convention for the Protection of All Persons from Enforced Disappearance: ‘*For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*’

<sup>430</sup> The ECtHR concluded that ‘secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme’, *Zubaydah v. Poland*, para 524.

<sup>431</sup> ICRC HVD Report, 24.

<sup>432</sup> HRC Joint Study, para 28.

<sup>433</sup> General Comment No 36, para 57. This is reflected in the jurisprudence of the Inter-American system and Indian Supreme Court for example.

<sup>434</sup> Severe limitations on contact from the outside world were considered by the UNWGAD in Mr al Baluchi’s case to ‘violate[] ... 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.’ WGAD al Baluchi opinion, para 58: referring to him being ‘only allowed infrequent letters from his family and occasional opportunities for video-messaging through ICRC’.

<sup>435</sup> ECtHR, *Vinter and Others v. United Kingdom* (Application Nos 66069/09, 130/10, 3896/10), [Judgment of 9 July 2013](#), paras 15-28, 110, 113; ECtHR, *Kafkaris v. Cyprus* (Application No 21906/04), [Judgment of 12 February 2008](#), para 97; See also ECtHR, *Trabelsi v. Belgium* (Application No 140/10), [Judgment of 4 September 2014](#), paras 112-115, 137, stating that ‘the imposition of an irreducible life sentence’ may violate Article 3, depending upon ‘whether a life prisoner can be said to have any prospect of release’ ... including processes to establish whether ‘progress’ had been made ‘towards rehabilitation’. See also IACtHR, *Mendoza et al. v. Argentina* (Serie C No 260) [Judgment of 14 May 2013](#), para 315.

<sup>436</sup> The pre-enlightenment inquisitorial concept of ‘civil death’ denoted where individuals are deprived of all civil rights, and could be detained, wronged or killed with impunity, as they were ‘outside the law.’ The assertion of individuals as subjects of law, not its mere objects, was a defining feature of enlightenment legal thinkers such as Cesare Beccaria’s famous treatise *On Crimes and Punishment* in 1764 (Hackett Publishing Company 1986).



*secret detention programmes within a reasonable time, that those responsible be held accountable, and that victims be duly recognized and provided with appropriate redress and reparation; ... inform the public and ensure that its investigation process is transparent; provide it with updated information on the findings of such investigation and, if appropriate, sanctions for those responsible.*<sup>437</sup> The ECtHR and IACtHR have followed suit.<sup>438</sup>

- (b) States such as Poland and Lithuania have relied upon US non-cooperation as precluding effective investigation and accountability. However, the ECtHR noted that even in face of impediments, investigation remains feasible, there were ‘no insurmountable practical obstacles’<sup>439</sup> and ‘ongoing failure to provide the requisite investigation will be regarded as a continuing violation.’<sup>440</sup>
- (c) The UNWGAD has recognised that the ERP and Guantánamo detention involves serious criminality: ‘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.’<sup>441</sup> There is a heightened duty of investigation and accountability in this context.
- (d) Each of the States identified in this application contributed to the applicant’s torture and arbitrary detention. They have an obligation to ensure full and adequate reparation. This includes taking all feasible measures to bring to an end the ongoing human rights violations. The lack of investigation, truth telling, reparation or accountability in respect of rendition, is an affront to the victim’s rights, and an impediment to ‘guarantees of non-repetition’ – a dimension of reparation under international law.<sup>442</sup>

## **4 RESPONSIBILITY**

### **4.1 US responsibility**

135. The arbitrary, prolonged and indefinite detention and torture of Abu Zubaydah by the CIA and Department of Defence is directly attributable to the US, pursuant to article 4 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA).<sup>443</sup>

### **4.2 Responsibility of States where ‘black sites’ were hosted**

136. A number of other States which hosted CIA black sites, including Afghanistan, Lithuania, Morocco, Poland and Thailand are also directly responsible for the harm subjected to Abu Zubaydah.

137. States are responsible for their failure to meet the positive obligations international human rights law places on States in respect of the prevention of, and response to, arbitrary detention and related serious violations highlighted above. As the ECtHR and others have made clear, there is no need to prove that state agents were themselves the detaining authority, directly involved in violations, as states must protect individuals from human rights violations by other third parties.<sup>444</sup> Nor is it necessary to show exactly what happened on their territories (which is predictably secret in light of the clandestine nature of operations and the ‘concerted cover-up’ thereafter).<sup>445</sup> States’ positive obligations of prevention are contravened when they fail ‘to take appropriate measures or to exercise due diligence

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<sup>437</sup> UN Committee on Enforced Disappearances, ‘[Concluding observations on the report submitted by Lithuania under article 29\(1\) of the Convention](#)’, Addendum, Information received from Lithuania on follow-up to the concluding observations (25 January 2019) UN Doc. CED/C/LTU/CO/1/Add.1, para 22(a).

<sup>438</sup> IACtHR, *Goiburú et al. v. Paraguay* (Series C, No. 153) [Judgment of 22 September 2006](#), para 10; *Zubaydah v. Poland*, para. 544; *Zubaydah v. Lithuania*, para. 676.

<sup>439</sup> *Zubaydah v. Lithuania*, para 683.

<sup>440</sup> *Zubaydah v. Lithuania*, para 682.

<sup>441</sup> WGAD al Baluchi opinion, para 67.

<sup>442</sup> See UN Basic Principles and Guidelines on Remedy and Reparation, para 23.

<sup>443</sup> [Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#) (2001).

<sup>444</sup> HRC, ‘[General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#)’ (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 (‘General Comment No 31’), para 8; HRC, *Krasovskaya v. Belarus* (Communication No 1820/2008) [Views adopted on 26 March 2012](#), UN Doc. CCPR/C/104/D/1820/2008 (‘*Krasovskaya v. Belarus*’), para 8.3.

<sup>445</sup> *Zubaydah v. Lithuania*, para. 90.

to prevent, punish, investigate or redress' these violations of individuals' rights on their territory or subject to their jurisdiction.<sup>446</sup> This obligation to 'take reasonable measures' or 'exercise due diligence' is triggered where States were aware, or ought to have been aware, that violations would ensue.<sup>447</sup>

138. As set out above, all of the States that hosted 'black site' detention centres were aware of the CIA operations occurring and took part in the extraordinary rendition programme.<sup>448</sup> These States gave logistical support in the establishment of the black sites on their territory and transfer of detainees to and from the sites. Indeed, although the full extent of the cooperation and participation of these States in facilitating the black sites is not known, it has been described by the ECtHR as 'inconceivable' that this cooperation was given without 'the necessary authorisation being given at the appropriate level of the State authorities'.<sup>449</sup> The ECtHR found sufficient public information on the nature of the torture and arbitrary detention as early as 2002.<sup>450</sup>
139. This failure to protect from arbitrary detention is also manifest in the transfer of Abu Zubaydah out of black sites and the territory of each State, which clearly causally contributed to his current state of prolonged, indefinite detention. The ECtHR therefore found the black-site states responsible for 'refoulement' to, inter alia, ongoing arbitrary detention in CIA detention and at Guantánamo Bay.<sup>451</sup> It found the risk of on-going arbitrary detention in Guantánamo foreseeable, noting that '*by enabling the transfer of the applicant to another CIA detention site, the Lithuanian authorities exposed him to a foreseeable risk of continued secret, incommunicado and otherwise arbitrary detention, liable, in his case, to continue for the rest of his life, in breach of Article 5 [...] as well as to further ill-treatment and conditions of detention, in breach of Article 3 [...]*'.<sup>452</sup>
140. Moreover, in light of allegations of human rights abuses in relation to the extraordinary rendition programme, each of these States has a positive obligation to undertake effective investigations and bring those responsible to account, as set out above.<sup>453</sup> The ongoing failure of each state to meet these positive obligations to investigate, prosecute and offer effective remedies for these harms are highlighted above.

### 4.3 Responsibility for Aiding and Assisting

141. States that 'aided or assisted' the United States in the arbitrary detention and ill-treatment of Abu Zubaydah are responsible pursuant to Article 16 ARSIWA. This includes states on whose territory black site centres were established (identified above, who also have primary responsibility), and states that contributed to the violations of the applicant's rights by facilitating their unlawful detention.
142. Responsibility for aiding and assisting requires that assistance is given with knowledge of the circumstances of the internationally wrongful act of that state, and a 'close connection' and 'causal link' between the conduct and the wrong.<sup>454</sup> In a UN Joint Study on Secret Detention, it was highlighted that a State will be complicit in secret detention when it, *inter alia*, 'knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person, or solicits or receives information from persons kept in secret detention' referring to countries

<sup>446</sup> General Comment No 31, para 8. See also IACtHR, *Velásquez Rodríguez v. Honduras* (Serie C No 4) [Judgment of 29 July 1988](#), para 172.

<sup>447</sup> In the European system, see ECtHR, *O'Keefe v. Ireland* [GC] (Application No 35810/09) [Judgment of 28 January 2014](#), para 152, in relation to torture and ill-treatment; and ECtHR, *Mastromatteo v. Italy* [GC] (Application No 37703/97) [Judgment of 24 October 2002](#), para 68, in relation to the right to life.

<sup>448</sup> CIA Torture Unredacted, 37.

<sup>449</sup> *Zubaydah v. Poland*, para. 443; that states were deemed to have such knowledge based on publicly available information as early as 2002.

<sup>450</sup> *Zubaydah v. Poland*, para. 443.

<sup>451</sup> Article 5 and refoulement see *Zubaydah v. Poland*, para 525; *Zubaydah v. Lithuania*, para 657; Article 6 'flagrant denial of justice' see *Zubaydah v. Poland*, para 557.

<sup>452</sup> *Zubaydah v. Lithuania*, para 681.

<sup>453</sup> Article 2(3) ICCPR; *Krasovskaya v. Belarus*, paras 8.3-8.4; HRC, *Sathasivam v. Sri Lanka* (Communication No 1436/2005) [Views adopted on 8 July 2008](#), UN Doc. CCPR/C/93/D/1436/2005, para 6.4; HRC, *Bhandari v. Nepal* (Communication No 2031/2011) [Views adopted on 29 October 2014](#), UN Doc. CCPR/112/D/2031/2011, para 8.9; HRC, *Guneththige v. Sri Lanka* (Communication No 2087/2011) [Views adopted on 30 March 2015](#), UN Doc. CCPR/C/113/D/2087/2011, para 6.3; General Comment No 31, paras 15-18.

<sup>454</sup> [Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#) (2001), 'Responsibility of a State in connection with the act of another state', Chapter IV, Responsibility of a State in connection with the Act of another State, para 8.

including UK, Germany, Australia and Canada.<sup>455</sup> The former Special Rapporteur has noted that where 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.<sup>456</sup>

143. As noted above, a UK parliamentary enquiry found it established that the UK had engaged in and supported the rendition programme in various ways, including by ‘*shar[ing] an unprecedented amount of intelligence with foreign liaison services to facilitate the capture of detainees*,’<sup>457</sup> by participating in and facilitating interrogations, as well as by providing questions specifically for the applicant, despite knowledge of his arbitrary detention and torture.<sup>458</sup> At a minimum, in the present case the United Kingdom is responsible under article 16, for supplying interrogation questions, despite awareness of the ‘harsh treatment’ or ‘torture’ to which Abu Zubaydah was being subjected.

## 5 REMEDY

144. In the face of arbitrary detention, States are obliged to provide effective remedies for victims. The Working Group has indicated that the right to a remedy constitutes a customary norm and general principle of international law, enshrined in Article 8 of the UDHR and Article 9(5) ICCPR.<sup>459</sup> The UNHRC makes clear that ‘*without reparation ... the obligation to provide an effective remedy ... is not discharged*’.<sup>460</sup>
145. The respondent States, that share responsibility for violations of his rights, now share responsibility to provide *full and adequate reparation*.<sup>461</sup> According to Principle 15 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court developed by the UNWGAD, ‘[a]ny person arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations capable of providing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.’<sup>462</sup>
146. The first dimension of remedy and reparation under international law is *cessation*.<sup>463</sup> The US must immediately bring Abu Zubaydah’s arbitrary detention to an end.<sup>464</sup> The urgency of this application, for the physical and mental health of the applicant, has been noted. Counsel have repeatedly called for his trial or release. The UN High Commissioner’s open letter in 2016 states that the US Government should ‘*end the prolonged arbitrary detention of all persons held at Guantánamo Bay by promptly releasing them to their home country or to a third country should they be at risk of persecution, or by transferring them to regular detention centers on the United States mainland, in order to promptly try them before ordinary courts in full compliance with all guarantees against arbitrary detention and of due process and fair trial*’.<sup>465</sup>
147. For Abu Zubaydah who remains in arbitrary detention after 19 years, in the extreme circumstances set out in this brief, the only appropriate remedy is *immediate release*.<sup>466</sup> The right to release of victims of detention that is established as arbitrary is reflected in Principle 15 of the Basic

<sup>455</sup> HRC Joint Study, 82.

<sup>456</sup> Scheinin Report 2009, para 47 and following; see also ICJ Eminent Jurists Panel ‘[Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights](#)’ (2009), 85: refers to states becoming responsible as “consumers” of torture’.

<sup>457</sup> Nadia O’Mara, ‘[The UK Government’s Weak Response to Torture Reports](#)’ (Just Security, 11 December 2018), last accessed 16 March 2021.

<sup>458</sup> ‘[Government response to the Intelligence and Security Committee of Parliament Reports into Detainee Mistreatment and Rendition](#)’ (November 2018).

<sup>459</sup> HRC, ‘[Report of the Working Group on Arbitrary Detention](#)’ (10 July 2015), A/HRC/30/36, paras 64-66.

<sup>460</sup> General Comment No 31, para 16.

<sup>461</sup> UN Basic Principles and Guidelines on Remedy and Reparation, para 18. Reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

<sup>462</sup> WGAD Basic Principles and Guidelines on Remedies and Procedures, Principle 15, para 25.

<sup>463</sup> UN Basic Principles and Guidelines on Remedy and Reparation, para 22(a): ‘Satisfaction’ includes ‘[e]ffective measures aimed at the cessation of continuing violations’.

<sup>464</sup> See Article 9(4) ICCPR; UN Office of the High Commissioner for Human Rights, ‘[“Disgraceful” Guantánamo Bay detention facility must be closed now, say UN experts](#)’ (11 January 2021), last accessed 11 March 2021.

<sup>465</sup> UN Office of the High Commissioner for Human Rights, OSCE, ‘[Open Letter to the Government of the United States of America on the occasion of the 14<sup>th</sup> anniversary of the opening of the Guantánamo Bay detention facility](#)’ (11 January 2016), 3 last accessed 12 March 2021.

<sup>466</sup> Article 9(4) ICCPR; See for e.g. WGAD al Hawsawi opinion, para 85; WGAD al Baluchi opinion, para 71; WGAD Obaidullah opinion, para 46; WGAD Al-Shimrani opinion, para 35; WGAD Al-Kazimi opinion, para 38.

Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court developed by the UNWGAD.<sup>467</sup> The UNWGAD's reports confirm that in case of ongoing arbitrary detention such as this, immediate release and compensation are essential aspects of the remedy due.<sup>468</sup> International law is clear on the right to a fair trial within a reasonable time or to release, reflected in Article 9(3) ICCPR.<sup>469</sup> As Abu Zubaydah has not been tried within a reasonable time, and there is no prospect of a fair trial at this point as explained above (see Section 3.2.1), he must be released by the US authorities.

148. The other respondent states whose role in the ERP contributed to Abu Zubaydah's current situation must take *all possible measures of intervention*, individually and collectively, to bring his arbitrary detention to an end. This includes making effective representations, negotiating with and applying appropriate pressure to the US administration to ensure his release. Cooperation with the new administration should be dependent on it meeting basic rule of law standards in respect of the applicant.

149. The obligation on states to take all possible measures is reflected in the ECtHR findings that states that exposed him to a '*foreseeable risk of continued secret, incommunicado and otherwise arbitrary detention ... for the rest of his life,*' should take all '*necessary individual measures to redress as far as possible the violation found by the Court, require[ing...] further representations to the US authorities with a view to removing or, at the very least seeking to limit, as far as possible, the effects of the Convention violations suffered by the applicant.*'<sup>470</sup> As the Court reflected, it is insufficient that (some) states have made representations or sought cooperation in the past which have failed if further representations and efforts can be made.<sup>471</sup> The Court found that responsible states:

*'should secure, through diplomatic or other means, the cooperation and assistance of the United States Government in order to establish the full and precise details of the applicant's treatment at the hands of the CIA, and it should make such representations and interventions, individually or collectively, as were necessary to bring an end to the on-going violations of his rights.'*<sup>472</sup>

150. The Committee of Ministers of the Council of Europe has, by way of follow up, recalled '*that the consequences for the applicant of the violations of the Convention found by the European Court have not been remedied as he remains in "indefinite detention" and at risk of further inhuman treatment*'.<sup>473</sup> It expressed deep regret at the United States authorities' refusal to respond cooperatively<sup>474</sup> but insisted that other states '*continue actively their efforts at a higher political level and pursue all possible means to seek to put an end to the applicant's continued arbitrary detention...pursuing and intensifying the diplomatic efforts, to consider exploring other avenues that would enable them to seek to remove the risks facing the applicant...*'.<sup>475</sup> Other Council of Europe member States were called on to provide 'all possible assistance' to one another in the effort to bring these violations to an end.<sup>476</sup>

151. Among the measures states should take are the offer and negotiation of *suitable relocation* to the applicant following his release. This is particularly pertinent as the PRB review board, purporting to justify his continued detention, has noted the lack of information as to 'potential receiving

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<sup>467</sup> WGAD Basic Principles and Guidelines on Remedies and Procedures, Principle 15, para 26

<sup>468</sup> HRC, '[Report of the Working Group on Arbitrary Detention](#)' (10 July 2015), A/HRC/30/36, para 64.

<sup>469</sup> General Comment No 35 at para. 37; UN Joint Report on the Situation of detainees at Guantánamo, para 26.

<sup>470</sup> *Zubaydah v. Lithuania*, para 681.

<sup>471</sup> *Zubaydah v. Lithuania*, para 681 on 'further representations'. States have responded relying on US non-cooperation.

<sup>472</sup> *Zubaydah v. Lithuania*, para 678 (d).

<sup>473</sup> CoE, '[Decision of the Ministers' Deputies adopted at the 1369<sup>th</sup> meeting](#)', (DH) (3-5 March 2020) – H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), (5 March 2020) Doc. CM/Notes/1369/H46-15, para 2.

<sup>474</sup> CoE, '[Decision of the Ministers' Deputies adopted at the 1369<sup>th</sup> meeting](#)', (DH) (3-5 March 2020) – H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), (5 March 2020) Doc. CM/Notes/1369/H46-15, para 3; the CoE Committee of Ministers regretted US non-cooperation in this and other cases.

<sup>475</sup> CoE, '[Decision of the Ministers' Deputies adopted at the 1369<sup>th</sup> meeting](#)', (DH) (3-5 March 2020) – H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), (5 March 2020) Doc. CM/Notes/1369/H46-15, para 3.

<sup>476</sup> CoE, '[Decision of the Ministers' Deputies adopted at the 1369<sup>th</sup> meeting](#)', (DH) (3-5 March 2020) – H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), (5 March 2020) Doc. CM/Notes/1369/H46-15, para 4.

countries'.<sup>477</sup> While all states should take measures to bring his arbitrary detention at Guantánamo to an end, the respondent states carry particular legal responsibility for doing so as part of their obligation to end arbitrary detention to which they contributed and to ensure effective reparation.

152. The end of the applicant's arbitrary detention and *closure of the Guantánamo facility* are also required by the 'guarantees of non-repetition' which are a dimension of reparation.<sup>478</sup> The Working Group has repeatedly states that it is '*deeply concerned regarding the ongoing operation of the detention facility at Guantánamo Bay, the closure of which should remain a priority.*'<sup>479</sup> Others have noted the role Guantánamo plays in fostering violent extremism and as a symbol of impunity and arbitrariness 'antithetical' to human rights.<sup>480</sup> Effectively addressing rendition and Guantánamo violations is inherently linked to guarantees of non-repetition.
153. Abu Zubaydah should also be accorded an *enforceable right to compensation* for the serious violation of his human rights in accordance with art 9(5) ICCPR.<sup>481</sup> This is supported by the UNWGAD's approach in other cases.<sup>482</sup>
154. As a torture survivor the applicant should be afforded immediate *rehabilitation and support*.<sup>483</sup> He needs a complete medical and psychological examination at an equipped facility, to determine which health issues can be addressed, and then for this remediation to be provided. Rehabilitation services are not available at Guantánamo Bay.<sup>484</sup> As the UNWGAD has noted, where a detainee is 'suffering psychological and physical effects from the previous torture', he must be provided with 'torture rehabilitation and ... redress, as required by article 8 of the UDHR and article 14 of the Convention against Torture, to which the United States is party.'<sup>485</sup>
155. The US Government should also immediately cooperate with United Nations human rights mechanisms and allow them *full access to the applicant* and all Guantanamo detainees.<sup>486</sup> The fact that persistent efforts by UN Special Rapporteurs to access prisoners including the applicant have been denied is telling on the nature of the violations.
156. The UNWGAD is asked to reach *conclusions that reflect the nature of the egregious wrongs* at the heart of this case, including declaring that: the ongoing detention of Abu Zubaydah is arbitrary, as it lacks any legal basis and essential due process guarantees, and is discriminatory; that his secret detention in the ERP was a form torture and amounted to enforced disappearance of persons, both of which are crimes against humanity; and that his ongoing detention without hope of liberation amounts, in all the circumstances, to torture and a violation of the right to a life with dignity.
157. The egregious mistreatment of Abu Zubaydah requires the *acknowledgement and apology* of all States involved for their role in the grave human rights violations to which he has been subjected.<sup>487</sup>
158. It requires dedicated attention to investigating and revealing the *truth concerning rendition and Guantánamo violations*, of which the applicant's case is emblematic. This entails lifting excessive security classifications surrounding the applicant and the abuses. It includes making available publicly

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<sup>477</sup> '[Unclassified Summary of Final Determination](#)', ISN 10016 (22 September 2016): 'the Board noted that it received no information regarding whether there are any potential receiving countries that could sufficiently mitigate his threat, and looks forward to such information being presented in future reviews'.

<sup>478</sup> UN Basic Principles and Guidelines on Remedy and Reparation', paras 22-23.

<sup>479</sup> WGAD al Baluchi opinion, para 67.

<sup>480</sup> See e.g. *Zubaydah v. Lithuania*, para 662; *Zubaydah v. Poland*, para 530.

<sup>481</sup> See e.g. WGAD Obaidullah opinion, para 46.

<sup>482</sup> WGAD al Baluchi opinion, para. 71; WGAD Obaidullah opinion, para 46; WGAD al Hawsawi opinion, para 85.

<sup>483</sup> Article 14 CAT; Rehabilitation 'should be holistic and include medical and psychological care as well as legal and social services' see CAT, '[General Comment No 3: Implementation of article 14 by States parties](#)' (13 December 2012) UN Doc. CAT/C/GC/3.

<sup>484</sup> OSCE, '[Report Human Rights Situation of Detainees at Guantánamo](#)' (2015), para 583; Center for Victims of Torture, '[Deprivation and Despair: The Crisis of Medical Care at Guantánamo](#)' (2019), 23.

<sup>485</sup> WGAD al Baluchi opinion, para 58.

<sup>486</sup> WGAD al Baluchi opinion, para 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... under conditions which allow its members to have unrestricted access to the facility, and to hold private and confidential interviews with any detainee'.

<sup>487</sup> General Comment No 31, para 16, indicates that 'reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.

– subject to genuine security imperatives as enshrined in human rights law – information gathered including through the SSCI and other internal enquiries.

159. There should be suitable *accountability* at all levels – state, corporate and individual – for the arbitrary, prolonged and indefinite detention and torture of Abu Zubaydah. This must be remedied through transparent investigation and prosecution of those responsible.<sup>488</sup>

160. As described by the ECtHR, Abu Zubaydah’s case is an ‘anathema to the rule of law’.<sup>489</sup> His detention is arbitrary on multiple grounds. It offends all of the basic precepts of rule of law as set down by the UN Secretary General (UNSG).<sup>490</sup> The UNWGAD is asked to take all possible measures to ensure that the applicant receive the urgent protection he requires, and that the United States, and all states responsible for those violations, take all measures within their power to bring them to an end and secure appropriate reparation.

Respectfully submitted

xxxx signature

Helen Duffy *international representative of the applicant*  
Human Rights in Practice

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<sup>488</sup> General Comment No 31, paras 16, 18.

<sup>489</sup> *Zubaydah v. Lithuania*, para 583; *Zubaydah v. Poland*, paras 452, 559.

<sup>490</sup> UNSG, ‘[Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies](#)’ (23 August 2004) UN Doc. S/2004/616, para 6. The ‘rule of law’ [...] requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.