



Secretary
Working Group on Arbitrary Detention
30 August 2022

Re: Response to the observations of the United States in the matter of Mr. Zayn Al Abidin Muhammad Husayn (Abu Zubaydah)

Thank you for sharing the letter from the U.S. government dated 16 August 2022 in response to our petition to the Working Group on Arbitrary Detention (UNWGAD) regarding the arbitrary detention of our client, Mr. Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah).

At the outset, we wish to recognize with appreciation that the U.S. has responded to the UNWGAD, mindful of its failure to do so in the past. We hope this will herald more constructive engagement on the part of the US authorities to address the ongoing violations of our client's rights.

We note, however, that the content of the letter from the U.S. does not in any way address or refute the complaints lodged in Abu Zubaydah's petition. The government response does not contest that our client has been held for over 20 years without charge or trial, without any apparent intention to submit him to trial, and without there ever having been a judicial determination of the lawfulness of his detention. Acknowledging that habeas remains 'pending' at this stage can hardly mitigate the arbitrariness of his detention for two decades.

We appreciate that the U.S. stresses at the outset its "*ongoing efforts to responsibly reduce the detained population and close the detention facility at Guantánamo Bay, Cuba,*" and the implicit recognition of the importance of closing the prison. We find inconsistent and alarming however that the letter proceeds to purport to justify the lawfulness of detention at Guantanamo in general, and of our client's flagrantly arbitrary detention in particular.

We note that many of the arguments in the letter in support of the lawfulness of detention at Guantanamo are ones that have long been advanced by the U.S., and rejected by international authorities including this UNWGAD. We also recall the limitations on our ability to provide specific information in relation to our client due to the ongoing excessive presumptive classification referred to in our petition, which we note is not addressed in the US response.

Nonetheless we submit the following points in response to specific arguments made by the US, in the order in which they are raised in its letter.

1. Legal Basis for Mr. Abu Zubaydah's Continued Detention

The letter provides no tenable justification for our client's detention. It sustains that the applicant is currently detained as an "*enemy belligerent*" pursuant to the U.S. interpretation of International Humanitarian law (IHL), which it contends allows detention until the end of hostilities in the 'ongoing armed with Al Qaida and associated forces'. While the US takes

exception to the description of this as an endless war on an open-ended enemy, it does nothing to refute it, and the scope of the conflict it describes bears out such a characterization.

There is a large body of international doctrine challenging the existence of a global armed conflict with terrorist organisations such as al Qaeda and associated forces. Suffice to recall that the WGAD has itself addressed this issue on several occasions, stating for example in its opinion No. 89/2017, that:

“the struggle against international terrorism cannot be characterized as an armed conflict for the purposes of the applicability of international humanitarian law. That is, the global war on terrorism is not capable of conferring the status of combatant on persons detained for conduct outside of an armed conflict, and such acts of terrorism are treated as criminal offences rather than violations of the laws and customs of war” (Opinion of the Working Group on Arbitrary Detention No. 89/2017 (UN Doc. A/HRC/WGAD/2017/89), para. 42).

Moreover, even if IHL were applicable, it could not conceivably justify indefinite detention without basic due process for twenty years, which constitutes an arbitrariness antithetical to both IHL and IHRL. As the WGAD indicated in the Al-Baluchi’s case that IHL “*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*” (Opinion of the Working Group on Arbitrary Detention No. 89/2017 (UN Doc. A/HRC/WGAD/2017/89), para. 43). This applies with more force to our client’s detention since 2002, including since 2006 at Guantanamo Bay.

Moreover, the US continues to adopt an unduly restrictive approach to the applicability of IHRL, and an over-broad approach to IHL as ‘the *lex specialis*’ effectively displacing IHRL in respect of detention rights. As the UNWG and other courts and bodies have noted in the past, there can be no doubt that basic procedural safeguards in detention remain applicable and must be respected at all times. In any event, we reiterate that the arbitrariness that this case epitomises can find no justification in IHRL or in IHL, as the UNWG has confirmed.

As to domestic law, the US cites the 2001 Authorization for the Use of Military Force (AUMF). The WGAD has also previously addressed this issue. It stated that the AUMF authorizes the U.S. President 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*”, but does not specifically authorize capture and incommunicado indefinite detention (Opinion of the Working Group on Arbitrary Detention No. 70/2019 (UN Doc. A/HRC/WGAD/2019/70), para. 64 ; Opinion of the Working Group on Arbitrary Detention No. 50/2014 (UN Doc. A/HRC/WGAD/2014/50), para. 69 ; Opinion of the Working Group on Arbitrary Detention No. 10/2013 (UN Doc. A/HRC/WGAD/2013/10), para. 34).

2. Acknowledged applicability of Torture provisions

The US letter correctly acknowledges the applicability of CAT. CAT forbids the sort of treatment our client has been subject to both in the rendition programme, and still today at Guantanamo, as widely recognized in international authority.

In this respect it is noted that a recent UN report refers to the opinion of two UN Special Rapporteurs that detention at Guantanamo amounts to torture:

“The Special Rapporteur on torture, supported by this mandate [the Special Rapporteur on Terrorism and Human Rights] has determined that the ongoing conditions at Guantanamo Bay constitute circumstances that meet the threshold of torture, cruel, inhuman, and degrading treatment under international law.” (Human Rights Council, A/HRC/49/45, Follow-up report on the Joint Study (2010) on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 Feb - 1 April 2022.)

As regards the rendition programme which is also the subject of this complaint, there is no longer any plausible doubt that our client’s secret detention and treatment was torture, as multiple authorities have noted. These include the European Court of Human Rights and UN entities referred to in the petition, and the ICRC. The ICRC 2007 report (<https://www.therenditionproject.org.uk/pdf/PDF%20101%20%5BICRC%2C%20Feb%202007.%20Report%20on%20Treatment%20of%2014%20HVD%20in%20CIA%20Custody%5D.pdf>) referred to the treatment of Mr Abu Zubaydah and others as ‘*amount[ing] to torture and/or cruel, inhuman or degrading treatment*’ (p. 5 and 24). A recent ICRC statement of 18 January 2022 reiterates concerns regarding Guantanamo detention and calls for the urgent transfer of the remaining population: <https://www.icrc.org/en/document/icrc-calls-transfers-eligible-guantanamo-detainees>.

However, the US response fails to recognize the torture during the rendition programme, which continues in modified form today, or the need to address it in accordance with the international obligations set out in the petition.

3. Remedy, Reparation, Investigation and Accountability.

The US response implicitly acknowledges the failure to provide a remedy or reparation to our client, or to investigate and ensure accountability for the torture and arbitrary detention. The fact that no remedy has been provided by the US for the arbitrary detention and torture are crucial aspects of the current landscape and amount to ongoing violations. The US letter does not acknowledge the obligations set out in the application.

By contrast, recent UN reports - which explicitly refer to our client’s unlawful detention and torture – do underscore the importance of accountability, transparency and access to sites of secret detention. (See Follow-15th March 2022, up report on the Joint Study (2010) on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism” dated 28 February 2022 – UN Doc. A/HRC/49/45 page 7 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/292/51/PDF/G2229251.pdf?OpenElement>].

4. Mr Abu Zubaydah’s Habeas Case

According to the US government’s letter, “[a]ll *Guantànamo Bay detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus*”. It further states that “[t]he United States has the burden in these cases to establish its legal authority to hold the detainees”.

However, the U.S. does not contest the reality that the lawfulness of our client’s detention has never been subject to any judicial ruling. The letter states that since 2008 “*Mr. Husayn’s petition remains pending*”. This speaks for itself; 14 years after lodging habeas proceedings,

the case is still pending. A habeas case filed in August 2008 that is not yet resolved can hardly be considered effective.

5. Periodic Review Board Process

The problems with the PRB process and its application in our client's case, as set out in the petition, are not addressed in the Government's response.

The US does rely on the PRB process in its letter. It categorises detainees into various groups, with some being 'prosecuted by military commission', 'serving sentences', while our client falls into a category simply described as 'eligible for review by the PRB.' However, the letter acknowledges that "[a] PRB determination that a detainee is transfer-eligible is a discretionary measure and does not address the legality of detention". This confirms the arbitrary and discretionary nature of the PRB, and the system as a whole, which does not safeguard the legality of detention. The US response also recognized that Mr. Abu Zubaydah's hearing before the PRB was in July 2021 but more than one year later, "*a final determination remains pending*".

6. Medical Care at Guantánamo

According to the letter, "*the United States takes very seriously its responsibility to provide for the safe and humane treatment of detainees at Guantánamo Bay, including providing appropriate medical care and attention required by the detainee's condition*". This general assertion is completely at odds with the reality facing our client and other Guantanamo detainees.

The torture that our client and the seizures, trauma, and other repercussions have been publicly reported.¹ Yet nothing in the Government's Response speaks to the provision of adequate medical care to Guantánamo detainees by specialists in torture-related psychological and neurological damage.

The vague US assertion of 'appropriate medical care and attention' is flatly contradicted by multiple independent reports that lay bare the inadequacy of medical care at Guantanamo. Given the limits on our ability to provide specific information in relation to our client, the ample publicly available information and reports which contradict the US positions on various points assume particular importance. These include the following:

- Statement of Independent Medical Experts on "Closing Guantánamo: Ending 20 years of Injustice" before the Senate Judiciary Committee on 7 December 2021. According to this statement:
 - o Detainees lack meaningful access (and in many cases have no access at all) to independent medical experts.
 - o Guantánamo lacks the necessary medical-care capabilities to appropriately address detainees' medical needs
 - o Detainees lack meaningful access to their own medical records.

¹ Referred to publicly in Joe Margulies, *Gina Haspel, Trump's Pick for CIA Director, Ran the Prison Where My Client Was Tortured* (Time.com, 14 March 2018).

- Detainees medical records are devoid of physical and psychological trauma histories, which has led to misdiagnoses and improper treatment.
 - Security-related policies and/or practices at times supersede or constrain medical professionals' authority and decision-making.
- A 2019 report by medical experts published by Physicians for Human Rights (PHR) and the Center for Victims of Torture (CVT) "*Deprivation and Despair: The Crisis of Medical Care at Guantánamo*" similarly highlights multiple deficiencies in medical care at Guantánamo Bay of relevance to our client's situation. These include:
- medical needs being 'subordinated' to security functions; lack of independent doctors and distrust of detainees partly due to a history of medical complicity in torture; withholding of medical records, including through improper classification; lack of expertise and equipment being increasingly insufficient to address detainees' health needs; lack of access to essential surgery or excessive delays leading to permanent damage to detainees; selective access to medical care turning substantially on their involvement in litigation (with detainees not in active litigation having even greater difficulties addressing medical needs).
- Numerous press articles have also been written on medical abuses and the lack of medical care at Guantánamo Bay, including "*Defense Lawyers Move to Block Force-Feeding of Guantánamo Prisoner*" by Carol Rosenberg (New York Times, 12 July 2021).

In conclusion, in contrast to the position set out by the US, overwhelming evidence in the public domain points to the failure to provide the applicant and other Guantanamo detainees with the medical care and rehabilitation due to victims of torture and of decades of abusive, arbitrary detention. There is nothing in the US letter to refute this or other complaints concerning the egregious ongoing violations of Abu Zubaydah's rights. It is imperative that the Biden Administration treats this matter as a priority.

We remain willing to engage with the US authorities and other states to finally bring to an end the notorious arbitrary detention of our client and related violations of his rights as set out in the petition to the UNWG.

Helen Duffy
 Human Rights in Practice
 30 August 2022