



Secretary
Working Group on Arbitrary Detention
22 July 2022

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

Thank you for your letter dated 1 July 2022, transmitting the observations from the government of Poland in relation to the Petition and Urgent Appeal concerning our client, Mr. Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah), filed on 28 April 2022 (the petition).

The Polish government's observations do not address the violations alleged or the remedies sought by Abu Zubaydah in the petition. What they do instead is to provide selective 'information' in relation to 'criminal proceedings' in Poland and the execution of the European Court of Human Rights (ECtHR) 2014 judgment (*Husayn (Abu Zubaydah) v. Poland*).

We submit the following brief comments in response to the government observations.

First, the government submission supports the conclusion that there has been, and is, no effective investigation into Polish responsibility for arbitrary detention and torture on its soil, and no serious effort to ensure the accountability of those responsible.

- As the observations acknowledge, the investigation in Poland was formally closed on 30 November 2020. The observations do not provide reasons for this decision but information publicly available indicates that this was based on the remarkable finding that the alleged facts do not constitute a crime under domestic law.
- Poland notes the failure of the US to cooperate, which it has often cited in proceedings before the Committee of Ministers of the Council of Europe (COM) as precluding its own investigation. It refers to a request for cooperation of 2021 as remaining 'under consideration.' The fact that the Biden administration has failed to cooperate and delayed excessively in responding undoubtedly poses challenges, and is a matter on which we hope the UNWG will express serious concern. US non-cooperation cannot, however, excuse Polish failure to take all necessary measures within its control to conduct the thorough effective and independent investigation required of it under international law.
- The Polish state has not indicated, to this WG or any other international body, what concrete steps it is taking to overcome the challenges inevitably arising in the investigation of serious international crimes and to ensure accountability. As the COM noted it has still failed to indicate "how the investigation carried out so far has complied with their [...] obligation to adopt, insofar as feasible, timely, adequate, and sufficient measures to ensure the maximum possible reparation for the procedural violations."¹ As indicated by the

ECtHR in 2014, that continuing failure to investigate and hold to account is an ongoing violation (*Husayn (Abu Zubaydah) v. Poland*, §493)

- Even as regards efforts to obtain information and access witnesses within the US, the Polish state could undoubtedly do more. Considerable emphasis has been placed in recent US proceedings on secrecy commitments given by the US government to other states, as justifying blocking victim access to information about the rendition programme on 'state secrecy' grounds.² To facilitate information sharing, the Polish state (like other respondent states) could make clear to the US authorities that it waives any such commitments, and has no objection to information concerning the Polish role in the rendition and torture programme being disclosed. Indeed, if Poland admitted publicly that there was a site there, it would be difficult for the US to sustain that any information that might lead to such a revelation ought to be a state secret.

Second, there remains a stark lack of openness or transparency regarding both the underlying facts and the purported Polish investigation and the observations do nothing to suggest otherwise.

- This lack of transparency and failure to restore public confidence has been subject to criticism by among others, the ECtHR judgment and follow up COM reports. Broad references in the letter to providing answers to media queries 'so far as possible,' fall far short of the duty to investigate and give public account, and to indicate what measures are being taken to ensure non-repetition.
- One indication of the overreaching secrecy in Poland is the fact that the judicial proceedings challenging the decision to discontinue the investigation - to which the government refers - were entirely closed proceedings, and no reasons were provided publicly for upholding the closure. The COM expressed "deep concern at the lack of information on the details of the prosecutorial and court decisions partially discontinuing the investigation."³ The failure of the right to truth referred to in the ECtHR judgment (para 489) therefore continues.

Third, the observations refer to engagement with the ECtHR implementation process (COM), but it is noted that that process has given rise to persistent criticism by the COM of poor Polish implementation.⁴

- It is recognised that some steps have been taken by Poland (and by Lithuania) pursuant to the ECtHR judgments; specifically Poland recently paid the compensation awarded by the Court in 2014 (as did Lithuania in 2021). It is hoped that the other states will follow Poland and Lithuania in affording compensation.
- However, this is by no means the integral reparation required under international law to address our client's egregious ongoing arbitrary detention. The government should accompany that recent payment with recognition and apology to the victim and a commitment to take serious measures to prevent repetition in the future.

² [Abu Zubaydah v United States 2022](#). The case arose as access to the psychologists who designed and implemented the programme was sought by Abu Zubaydah for the purposes of the Polish investigation.

³ H46-21 [Al Nashiri group v. Poland](#) (Application No. 28761/11) March 2022 decision, para 7. This and other deficits are addressed in the joint submissions to the Council of Ministers on behalf of Mr Abu Zubaydah and Mr al Nashiri available on the Committee's website to which the government refers, or at www.rightsinpractice.org/rendition

⁴ for the latest in a line of such criticisms, see H46-21 [Al Nashiri group v. Poland](#) *ibid*.

Finally, there is no reference in the observations to Poland taking all possible measures to engage to bring to an end the arbitrary detention of our client. His current situation is a direct consequence of violations by Poland and other respondent states, as described by the COM in March 2022:

*‘[It is] recalled with the deepest concern, that the consequences of the violations of the Convention for the applicants have not been remedied, particularly as [...] Mr Abu Zubaydah continues to be detained indefinitely and without charge since 2002, without any safeguards against arbitrary detention’.*⁵

The COM called for a ‘clear and consistent strategy’ to make more effective representations individually, and collectively with other states, to bring to an end the applicant’s ‘flagrant denial of justice.’ The nature of the ‘representations’ Poland has made to the US have not been disclosed, nor are there indications of consistent and collective follow up interventions, or of any real efforts to facilitate release or resettlement in a suitable state.

We therefore reiterate the arguments regarding Polish responsibility, and the requests for relief set out in the petition, which are undiminished by the Polish states response.

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⁵ H46-21 Al Nashiri group v. Poland, para 2.