



**SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE CONCERNING  
ARBITRARY DETENTION & TORTURE BY THE UNITED STATES AGAINST  
DETAINEES AT GUANTANAMO BAY**

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**Submitted by:**

Prof. Helen Duffy  
Human Rights *in Practice*  
and International Counsel for Mr. Zayn Al Abidin Muhammad Husayn (Abu Zubaydah)  
[helen@rightsinpractice.org](mailto:helen@rightsinpractice.org)

Prof. Hannah R. Garry  
Executive Director,  
UCLA Law Promise Institute for Human Rights  
Counsel for Mr. Zayn Al Abidin Muhammad Husayn (Abu Zubaydah)  
[garry@law.ucla.edu](mailto:garry@law.ucla.edu)

## **I. Introduction**

This shadow report is submitted in anticipation of the appearance of the United States before the UN Human Rights Committee (“UNHRC”) at its 139th session in October 2023. It focuses on the ongoing egregious violations of human rights at the Guantanamo Bay detention center and the striking failure of the U.S. to take meaningful steps towards recognition and reparation for the CIA-led rendition and torture programme. It respectfully urges the UNHRC to engage robustly with the United States Government (“USG”) on the need to ensure that serious ongoing violations are brought to an end, and that detainees whose rights are violated have effective remedies.

Part II of this submission details relevant facts in relation to 1) the extreme arbitrary detention at Guantanamo Bay today, including specifically of our client Mr. Zayn Al Abidin Muhammad Husayn Abu Zubaydah (“Abu Zubaydah”); 2) the torture of detainees including Mr. Abu Zubaydah, during the United States-led so-called “enhanced interrogation” program, and through his extreme ongoing detention; and 3) the United States’ refusal to even officially acknowledge and apologise for notorious wrongs, and respect the rights to truth, reparation or accountability. Part III recalls that these issues involve multiple serious violations of the International Covenant on Civil and Political Rights (“ICCPR”), including articles 2, 4, 6, 7, 9, 10 and 26, and demand the urgent attention of the UNHRC and of this U.S. administration.

The UNHRC is urged to engage with the US authorities as to its commitment to address these pressing issues, and concrete measures to redress the wrongs including by: 1) releasing Mr. Abu Zubaydah, facilitating his and other detainees’ relocation to suitable destinations where their rights can be protected as indicated in the UN Working Group on Arbitrary Detention (“UNWGAD”) decision of 6 April 2023<sup>1</sup>; 2) providing an official acknowledgement and apology for torture to current and former detainees at Guantanamo Bay, as part of engaging meaningfully with the obligation to provide reparation for wrongs and allow access to effective remedies; and 3) implementing the recent decisions and recommendations of UN bodies, including the UNWGAD and Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (“Special Rapporteur on Terrorism and Human Rights”).

The authors make this submission to the UNHRC in their capacity as counsel representing Mr. Abu Zubaydah. This submission is not based upon classified information, and should not be read to confirm or deny any information the United States considers to be classified. While this submission focuses mainly on the extreme and notorious case of our client’s arbitrary detention, torture and denial of justice, it addresses also the broader human rights issues relevant to other detainees similarly situated at Guantanamo Bay and former detainees. It raises issues of fundamental importance to the human rights record and reputation of the United States, and to respect for the ICCPR and international rule of law.

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<sup>1</sup> Working Group on Arbitrary Detention, Opinion No. 66/2022 concerning Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) (United States of America, Pakistan, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom of Great Britain and Northern Ireland), 26 April 2023, A/HRC/WGAD/2022/66, 78 (‘UNWGAD Opinion 2023’).

## II. Facts

### II.1 CIA-led Torture

The facts in relation to Mr. Abu Zubaydah's torture have now been well established by multiple national and international authorities and are set out here in brief.<sup>2</sup> Following the attacks on the U.S. on September 11, 2001, he was captured in March 2002 by Pakistani authorities and American intelligence officers in Faisalabad, Pakistan and transferred to CIA custody. He was held at multiple secret 'black' sites in Thailand, Poland, Morocco, Lithuania and Afghanistan where he was brutally tortured. CIA-hired contractors developed techniques that constitute torture for its so-called "enhanced interrogation" program, all of which were used against Mr. Abu Zubaydah. As outlined in, among other sources, the U.S. Senate Select Committee on Intelligence ("SSCI") report of 2014, the techniques included: waterboarding; sleep deprivation; "walling"; solitary confinement; constant, intense light, cold, and noise; painful stress positions; starvation; confinement in small coffin-like boxes; and proximity to dangerous insects—often used in combination and for prolonged periods of time.<sup>3</sup> These techniques were developed using Mr. Abu Zubaydah as a test case and were designed to force detainees into a state of "learned helplessness" or complete submission under the unproven and scientifically incorrect theory that the subject would be unable to resist the interrogator's demand for information. Mr. Abu Zubaydah was the first victim subjected to this torture program and, while the exact number is unknown, it is estimated that at least over 100 were similarly tortured.<sup>4</sup>

In 2006, upon the closure of the last black site, Abu Zubaydah was transferred to U.S. military custody at Guantanamo Bay, where he remains today without any charges brought against him, or any review of the lawfulness of his detention by a court of law - over 21 years since his capture. Despite allegations at that time that he was "number three" in al Qaeda, involved in all the organisation's major plots including 9/11, the CIA has since conceded that he did not plan the September 11 attacks, did not have any participation in them and was not a member of Al Qaeda.<sup>5</sup> The SSCI report makes clear the lies and misinformation that was propagated about Abu Zubaydah to justify his torture and detention. It also makes clear that guarantees were provided by the CIA

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<sup>2</sup> Eg. U.S. Senate Select Committee on Intelligence ("SSCI") report of 2014; UNWGAD Opinion 2023; *Abu Zubaydah v. Lithuania* (Application No 46454/11) [Judgment of 31 May 2018](#) ('Zubaydah v. Lithuania'); *Husayn (Abu Zubaydah) v. Poland* (Application No 7511/13) [Judgment of 24 July 2014](#) ('Zubaydah v. Poland'), among others.

<sup>3</sup> Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, 3 December 2014, [https://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/?itid=lk\\_inline\\_manual\\_4](https://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/?itid=lk_inline_manual_4).

<sup>4</sup> Greg Miller; Karen de Young & Julie Tate, "Newly released CIA files expose grim details of agency interrogation program". *The Washington Post*, 14 June 2016, [https://www.washingtonpost.com/world/national-security/newly-released-cia-files-expose-grim-details-of-agency-interrogation-program/2016/06/14/6d04a01e-326a-11e6-95c0-2a6873031302\\_story.html](https://www.washingtonpost.com/world/national-security/newly-released-cia-files-expose-grim-details-of-agency-interrogation-program/2016/06/14/6d04a01e-326a-11e6-95c0-2a6873031302_story.html); Glenn Greenwald "The suppressed fact: Deaths by U.S. torture", *Salon.com*, 20 June 2009, [https://www.salon.com/2009/06/30/accountability\\_7/](https://www.salon.com/2009/06/30/accountability_7/).

<sup>5</sup> UNWGAD Opinion 2023.

to the interrogation team prior to his torture<sup>6</sup> that ‘*all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.*’<sup>7</sup>

As a result of Mr. Abu Zubaydah’s subjection to the U.S. enhanced interrogation program, he and other detainees similarly tortured have suffered lasting physical and psychological injuries, which persist to this day, exacerbated by lack of adequate medical and psychological care at Guantanamo. Following his interrogation, Mr. Abu Zubaydah permanently lost use of his left eye and damage to internal organs due to lack of adequate medical attention. He has blinding headaches, suffers seizures, has permanent brain damage and memory loss as a result of trauma during interrogation. He has frequently lost consciousness at Guantanamo, experienced unbearable sensitivity to the slightest noise. His amnesia is compounded by being held nearly incommunicado for over 20 years. While extreme, the physical and psychological effects of torture that Mr. Abu Zubaydah suffered and continues to suffer are not unique and the experience is shared by other detainees and rendition torture victims.<sup>8</sup>

U.S. courts, including some justices of the U.S. Supreme Court in 2022,<sup>9</sup> the U.S. Senate<sup>10</sup> and U.S. President Barack Obama<sup>11</sup> have all acknowledged over the years that techniques in the CIA’s enhanced interrogation program against detainees constitute torture. Likewise, the United Nations Committee against Torture, the UN Special Rapporteur on Torture, the UN Working Group on Arbitrary Detention and the European Court of Human Rights,<sup>12</sup> among other human rights authorities, have categorised these techniques against Mr. Abu Zubaydah and other detainees as torture.<sup>13</sup>

Despite this, to this day, the U.S. government has never officially acknowledged this torture, offered apology, or provided any effective remedies to Mr. Abu Zubaydah and other detainees subjected to its enhanced interrogation program. (See II.3 below).

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<sup>6</sup> The interrogation team sent a cable seeking assurances that “*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*” 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>7</sup> CIA cable no. ALEC [redacted] (182321Z JUL 02), *ibid.*; SSCI Report, 35.

<sup>8</sup> In one study of former detainees subjected to torture through detention and interrogation methods described above, Physicians for Human Rights found that they all suffered from ongoing musculoskeletal pain and chronic headaches. Further, many suffered from hearing loss, vision problems and memory loss as well as anxiety, depression, insomnia, feelings of hopeless and isolation, panic attacks and night terrors. Physicians for Human Rights, *Broken Laws, Broken Lives*, 1 June 2008, <https://phr.org/our-work/resources/broken-laws-broken-lives/>,

<sup>9</sup> Supreme Court of the United States, *United States v. Husayn, aka Zubaydah, et al.*, No. 20-827, 22 March 2022.

<sup>10</sup> SSCI Report.

<sup>11</sup> “Obama: ‘We Tortured Some Folks’ after 9/11,” *CBS News* (1 August 2014), <http://www.cbsnews.com/news/obama-we-tortured-some-folks-after-911/>

<sup>12</sup> UNWGAD Opinion 2013, para. 114.

<sup>13</sup> Human Rights Watch, *Getting Away with Torture*, 12 July 2011, [https://www.hrw.org/sites/default/files/reports/us0711webwcover\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf); Human Rights Watch, *USA and Torture: a History of Hypocrisy*, 19 December 2014, <https://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy>.

Instead, violations are ongoing. Mr. Abu Zubaydah and others remain detained at Guantanamo Bay, the conditions of which, as detailed below, constitute arbitrary detention, torture and a violation of the right to a life with dignity (Sections III and IV).

## II.2 Guantanamo Bay Detention Today

At its height, Guantánamo housed circa 780 detainees, but Mr. Abu Zubaydah is now one of only 30 detainees remaining.<sup>14</sup> The released prisoners came from 49 nationalities, while those remaining are from States with whom the U.S. does not have strong diplomatic relations or who, like the Mr. Abu Zubaydah, are stateless.<sup>15</sup> It is recognised that upon taking office, the Biden administration released or repatriated ten detainees, including six released within the six-month period of October 2022 to April 2023.<sup>16</sup> (This contrasts to the Trump administration which repatriated only one.<sup>17</sup>) However, since 2023, there have not been any additional releases, which is troubling.

The situation of those detainees that have been released also raises serious human rights concerns. Some released detainees have reportedly been given support to reestablish their lives—such as Majid Khan’s resettlement in Belize pursuant to a plea agreement<sup>18</sup>—while others find themselves in circumstances that are effectively a continuation of arbitrary detention, inhumane treatment or other violations. The recent report of the UN Special Rapporteur on Terrorism and Human Rights refers to cases of detainees having been re-detained, tortured and mistreated, forced into house arrest, and forcibly repatriated after resettlement.<sup>19</sup> In many cases, their legal status remains unresolved and they are unable to access public benefits or travel.<sup>20</sup> The U.S. has no permanent and formal mechanism for addressing and supporting the detainees in “health, welfare, employment, housing, or well-being.”<sup>21</sup>

Of the 30 detainees remaining at Guantanamo, 10 are charged before the military commissions system and 1 has been convicted and is serving his sentence. 16 detainees who have been cleared for release are still languishing in Guantanamo, particularly those from Yemen who cannot be repatriated to that State.<sup>22</sup>

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<sup>14</sup> The New York Times, ‘[The Guantánamo Docket](#)’.

<sup>15</sup> Ibid.

<sup>16</sup> See The Guantánamo Docket.

<sup>17</sup> U.S. Department of Defense, Release: Detainee Transfer Announced, 2 May 2018, <https://www.defense.gov/News/Releases/Release/Article/1510878/detainee-transfer-announced/#:~:text=The%20Department%20of%20Defense%20announced,guilty%20at%20a%20military%20commission>.

<sup>18</sup> Carol Rosenberg, *Tortured Guantanamo Detainee Is Freed in Belize*, New York Times (2 February 2023), <https://www.nytimes.com/2023/02/02/us/politics/tortured-guantanamo-detainee-freed.html>.

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Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, United Nations Human Rights Special Procedures, 14 June 2023, ¶62 <https://int.nyt.com/data/documenttools/2023-06-26-sr-terrorism-technical-visit-us-guantanamo-detention-facility/1874fc8b8302dce5/full.pdf> (‘UN SR technical visit’).

<sup>20</sup> Ibid. at ¶63.

<sup>21</sup> Ibid. at ¶60.

<sup>22</sup> Steve Holland, *U.S. suspends Guantanamo prisoner transfer to Yemen*, Reuters (5 January 2010), <https://www.reuters.com/article/us-yemen-guantanamo-usa/u-s-suspends-guantanamo-prisoner-transfer-to-yemen-idUSTR6044MI20100105>.

Mr. Abu Zubaydah and two others are neither facing charges nor have been cleared for release and so have been labeled “forever prisoners.”<sup>23</sup> The UNWGAD made clear that as Mr. Abu Zubaydah’s detention is arbitrary and an ongoing violation of multiple rights under the ICCPR, he should therefore be immediately released (See Section IV). However, consistent efforts by counsel to engage the USG regarding his release and repatriation, and to have clarity regarding his situation, have not borne fruit.

Mr. Abu Zubaydah’s confinement epitomizes the arbitrariness that is detention at Guantanamo today. This section identifies several dimensions of that arbitrariness - in the detention facility in general, with particular reference to our client’s case. It will address: i) the lack of any lawful grounds for detention; ii) the complete lack of due process and fair procedures; iii) arbitrariness in the circumstances and conditions of confinement; iv) overclassification and impediments to communication; v) medical care and vi) restrictions on artwork and expression by detainees.

*i) No lawful basis for detention*

The United States continues to maintain that it can detain Abu Zubaydah and the other Guantanamo Bay detainees under international humanitarian law (IHL) based on a putative ongoing global non-international armed conflict against Al-Qaeda and associated forces.<sup>24</sup> It relies on its “law of war authority” purportedly codified in the Authorization for the Use of Military Force from 2001 (“AUMF”) and yearly National Defense Appropriations Acts.<sup>25</sup> As the UNWGAD recently made clear this argument has become implausible and his detention is plainly arbitrary and unlawful. The AUMF ‘*does not specifically authorize arrest or detention,*’ as noted by the UNWGAD<sup>26</sup> and Mr. Abu Zubaydah is not part of Al Qaeda or an associated force, hence not subject to the 2001 AUMF, even under USG’s interpretation.<sup>27</sup> Moreover, as a matter of international law, indefinite detention for life of this type is a flagrant violation. The UNWGAD noted as follows:

*To the extent the USA is relying on IHL, it fails to show that there are ongoing circumstances justifying his detention under the “law of war”. In fact, according to the SCCI report, the USA conceded in 2008, that Mr. Zubaydah was not a member of al Qaeda. Consequently, the Government of the USA has not satisfied the requirement of demonstrating an ongoing armed conflict, let alone shown the basis in international humanitarian law to detain Mr. Zubaydah indefinitely. Whereas the USA has asserted that Mr. Zubaydah constitutes an ongoing security threat, as reportedly conveyed at his 2007 CSRT and 2016 PRB hearings, the Government has not substantiated this claim.*

The UNHRC should reject in similarly emphatic terms efforts to rely on a dangerous and implausible concept of endless and amorphous global armed conflict, and reference to IHL, as a cover for arbitrary detention.

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<sup>23</sup> See The Guantanamo Docket.

<sup>24</sup> UNWGAD Opinion 2023.

<sup>25</sup> [National Defense Authorization Act for Fiscal Year 2012](#), H.R. 1540 (31 December 2011), Section 1021 (c)(1), 265.

<sup>26</sup> UNWGAD Opinion 2023, para. 78.

<sup>27</sup> Opinion of the UN Ombudsperson delisting our client from the UN Security Council al Qaeda sanctions list as he is not a member of the group.

ii) **Complete Lack of Procedural Safeguards**

There are no procedures in place for Mr. Abu Zubaydah to challenge the lawfulness of his detention.

**No Habeas Corpus review:** Attempts by our client to challenge his detention before federal courts by way of a writ of habeas corpus illustrate the broader “dysfunction” in the habeas system for Guantanamo detainees.<sup>28</sup> Despite originally filing the petition on 6 August 2008 before the U.S. District Court for the District of Columbia,<sup>29</sup> years have passed with motion after motion filed by petitioner and remaining undecided. Recently, petitioners sought to have the presiding Judge recused.<sup>30</sup> Even that motion was not ruled on for over a year, until it was mooted by the reassignment of the case.<sup>31</sup> While counsel for Mr. Abu Zubaydah continue to seek to make the habeas process work, multiple motions for discovery remained unanswered.<sup>32</sup> The fact is that 21.5 years after being taken into detention, he has still not had any review of the lawfulness of his detention by a court of law.

Despite the U.S. Supreme Court in *Boumediene v. Bush* famously holding that Guantánamo detainees must have a “meaningful opportunity” to challenge the lawfulness of their detention,<sup>33</sup> there has been no such opportunity in our client’s case. His case is not unique. Since 2010, not a single habeas petition has been granted, and those previously allowed have been reversed.<sup>34</sup> Moreover, there has still not been any determination whether the “due process” clause applies to Guantanamo. In what may be the only habeas petition to reach a decision since 2010 (the case of Abd al-Salam al-Hilah), the Court of Appeals for the D.C. Circuit evaded deciding whether the due process clause of the U.S. Constitution applies to Guantanamo Bay, but “assum[ing] without deciding” that it applied, nevertheless found that neither Mr. Al Hela’s detention nor the review process violated due process.<sup>35</sup>

**Periodic Review Board:** The USG seeks to hide behind the existence of a “detention review” process in Guantanamo which can provide no more than a chimera of legitimacy to the detention regime. However, the Periodic Review Board (“PRB”) – like the Combatant Status Review Tribunal (“CSRT”) which it replaced in 2011 – is so inadequate as to be inherently arbitrary.

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<sup>28</sup> In other cases that have proceeded, judges have made it impossible for detainees to win with evidentiary and procedural obstacles; they have also refused to look at whether they pose a continuing threat to justify detention.

<sup>29</sup> *Husayn v. Gates*, 1:08-cv-1360, Doc.1 (D.D.C. 2008).

<sup>30</sup> The lack of judicial engagement prompted counsel to file a ‘Notice of Filing Motion to Recuse Judge Roberts for Nonfeasance’ ECF No. 311.

<sup>31</sup> On 16 March 2016 it was reassigned to Judge Emmet G. Sullivan ECF No. 314, but there has still been no notable progress.

<sup>32</sup> On 14 September 2009, Mr. Abu Zubaydah filed his Motion for Discovery and Memorandum of Law in Support of comprehensive discovery has still not been provided. On 5 October 2018, he took 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.’ Documents No. 212-3 and Case no. 1:08-cv-1360, Doc. No. 526.

<sup>33</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>34</sup> Katie Taylor, ‘[Justice Denied: No charge, no trial, no exit](#)’, Reprieve (14 January 2019), pg. 31.

<sup>35</sup> Rachel Weiner and Spencer S. Hsu, *Divided court leaves constitutional issue at Guantanamo unresolved*, The Washington Post (12 April 2023), <https://www.washingtonpost.com/dc-md-va/2023/04/12/guantanamo-alhela-due-process/>.



The PRB like its predecessor has no powers to consider the fundamental question of lawfulness of detention. It is not judicial in nature or independent. It lacks any semblance of fairness or due process. Mr. Abu Zubaydah's experiences before the PRB epitomize its arbitrariness.

His first appearance was in 2016 when, despite finally having four attorneys with Top Secret clearance representing him at the time, the government authorized only one to appear. When that attorney had a serious family emergency, a request for a short adjournment or alternative counsel was denied. Mr. Abu Zubaydah was represented by a non-lawyer military officer unfamiliar with his case, and the hearing consisted of a 15-minute session at which the government made error-laden allegations against him<sup>36</sup> and Mr. Abu Zubaydah was denied the opportunity to speak.<sup>37</sup> It took four years to secure another PRB hearing, in February 2020.<sup>38</sup> The panel on this occasion included a member of the CIA and of the Office of the Director of National Intelligence ("ODNI"), who serves as the head of the US intelligence community.<sup>39</sup> Serious questions as to the independence of the panel were raised, and cursorily rejected. The PRB decided he may pose a threat to the U.S., based on speculation and paradoxical rationale as to how he could potentially use his experience at Guantanamo.<sup>40</sup>

As the UN Ombudsperson on al Qaeda sanctions noted, in a report that led to Mr. Abu Zubaydah being delisted from the UN Sanctions list as he was not a member of al Qaeda:

*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>41</sup>

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<sup>36</sup> These are contained in the 21 March 2016 Detainee Profile. See Robert Burns, '[Abu Zubaydah appears at Gitmo hearing to review detention](#)', Associated Press (23 August 2016).

<sup>37</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>38</sup> Sheren Khaleel, '[Guantánamo parole board reviews case of "forever prisoner" Abu Zubaydah](#)', Middle East Eye (4 February 2020).

<sup>39</sup> Ibid.

<sup>40</sup> '[Unclassified Summary of Final Determination](#)', ISN 10016 (22 September 2016); Periodic Review Secretariat, '[Unclassified Transcript](#)' (23 August 2016), 5. It includes "Zubaydah '*probably retains an extremist mindset, judging from his earlier statements*' and that he '*has used his time in Guantánamo to hone his 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>41</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.



The only other PRB hearing took place in 2021 and a decision was not handed down until August 2023. The PRB again held there remained a significant threat, but instead of citing to the spurious reasons it had given before, it declined to cite any reasons at all.<sup>42</sup>

### ***iii) Conditions of Confinement***

Between 2006 and March 2021, Mr. Abu Zubaydah was detained at Camp 7, the “most secretive” and highest security camp within Guantánamo, which housed former CIA torture victims.<sup>43</sup> For many years, the location of the camp was classified, and during almost 20 years of its existence, international organisations, press and civil society frequently sought, but were refused, access.<sup>44</sup> US military personnel acknowledged conditions at Camp 7 deteriorated until it was “dangerous for the guard force”<sup>45</sup>, and it was closed in March 2021.<sup>46</sup> Detainees were moved to high security Camp 5.<sup>47</sup>

Although information on specific conditions of detention today<sup>48</sup> remains limited, and Mr. Abu Zubaydah is silenced therefore unable to provide his own account (see below), the U.S. did – to its credit – eventually allow the UN Special Rapporteur on Terrorism and Human Rights to conduct a technical visit to the detention facility – the first of its kind by any UN official to Guantanamo Bay. The Special Rapporteur documented numerous significant and ongoing violations of human rights, including the rights to health, family, and access to justice. She concluded that current conditions, “without doubt, amount[] to ongoing cruel, inhuman, and degrading treatment at the Guantanamo Bay detention facility, and may also meet the legal threshold for torture.”<sup>49</sup>

### ***iv) Over-Classification and Communication***

One aspect of the national security paradigm which surrounds Guantanamo Bay is the problem of excessive security classification. This manifests in several ways and has profound human rights implications.

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<sup>42</sup> See post on Carol Rosenberg’s feed at [https://www.linkedin.com/posts/carolrosenberg\\_disclosed-the-guantanamo-review-panel-upheld-activity-7095546623342075904-HgTW?utm\\_source=share&utm\\_medium=member\\_desktop](https://www.linkedin.com/posts/carolrosenberg_disclosed-the-guantanamo-review-panel-upheld-activity-7095546623342075904-HgTW?utm_source=share&utm_medium=member_desktop).

<sup>43</sup> Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’, The New York Times (15 March 2020).

<sup>44</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>45</sup> Carol Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’ The Pulitzer Center (14 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’.

<sup>46</sup> Shweta Sharma, ‘[US closes secretive “Camp 7” at Guantánamo Bay](#)’, The Independent (5 April 2020).

<sup>47</sup> US Department of Defense, ‘[Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement](#)’, (2009), 73 on improvements. 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.

<sup>48</sup> Reports and insider testimony allege torture and abuse, and unlawful killing during the period; see eg Joseph Hickman, *Murder at Camp Delta: A Staff Sergeant’s Pursuit of the Truth About Guantánamo Bay* (Simon & Schuster, 2015). ‘[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’.

<sup>49</sup> UN SR technical visit, para. 49.

One of the most important of these is the restrictions on communication. For years, communication between inmates was prohibited with serious psychological effects, though reportedly there have been some improvements in that respect.<sup>50</sup>

However, as a result of “presumptive classification”, any communication to or from Mr. Abu Zubaydah must be declassified before being released. This led to the description of him as “a man deprived of his voice.”<sup>51</sup> While there has been some opening of communications with family in recent years, it remains the case that he has extremely limited access to the outside world.<sup>52</sup> Hampered communications has also impacted attorney-client relationships and confidential communications. In June 2017, the then-Chief Defense Counsel declared a “loss of confidence” in the integrity of “all potential attorney-client meeting locations” after learning that legal meetings had been subject to “intrusive monitoring.”<sup>53</sup> Use of listening devices prompted some counsel to other detainees to resign, but a judicial order prohibited them from explaining to their clients why. Privileged material has also been seized by the detaining authority, in a system in which client-attorney privilege is not adequately respected.<sup>54</sup>

Likewise, although our client is not subject to the military commissions process, and this issue is therefore best addressed by others, it is noted that over-classification, inconsistent classification and abundant confusion in this respect, has been reported as a perpetually recurring issue in the process. Excessive classification and lack of transparency impacts on media access and public information and the measure of accountability that this brings. Media access to Guantanamo has always been very restrictive but recent reporting suggest that in some respects these restrictions are tightening and ‘censorship has never been worse at Guantanamo’.<sup>55</sup>

v) **Lack of Medical Care**

Questions of adequate medical care, for both physical and mental ailments, have long dogged the detention facility. In the 2020 National Defense Authorization Act, a Chief Medical Officer (“CMO”) position was established to serve as an independent voice from the other military medical officers.<sup>56</sup> While there is some internal debate as to the true objectivity of the CMO, at

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<sup>50</sup> While conditions have improved, communication and socialization remains limited. Rosenberg, ‘[Inside the Most Secret Place at Guantánamo Bay](#)’; 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 Hickman, *Murder at Camp Delta*.

<sup>51</sup> *Zubaydah v. Poland*, para. 80.

<sup>52</sup> *Zubaydah v. Lithuania*, paras 161, 486; *Zubaydah v. Poland*, paras 188, 368, 378, 397.

<sup>53</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 October 2017).

<sup>54</sup> Rosenberg, ‘[Guantánamo’s USS Cole death-penalty case in limbo after key defense lawyer quits](#)’.

<sup>55</sup> Elise Swain, *What Prison? Censorship Has Never Been Worse at Guantanamo Bay*, The Intercept (27 August 2023), <https://theintercept.com/2023/08/27/guantanamo-bay-photo-essay/>.

<sup>56</sup> See Biography of Captain Corry “Jeb” Kucik, United States Marines, <https://www.marforres.marines.mil/Marine-Forces-Reserve-Leaders/Biography-View/Article/3423041/force-surgeon/>; and DoD Instruction 2310.08, Medical Program Support for Detainee Operations, 5 Sept. 2019, Change 1 on 25 Aug. 2021, pg. 15, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/231008p.pdf>.

least on one occasion the CMO himself testified that the current medical facilities were insufficient to conduct certain surgical operations.<sup>57</sup>

Concerns about the inadequacy of medical treatment have repeatedly been raised by several UN Special Rapporteurs as well as the International Committee of the Red Cross (“ICRC”). The rapporteurs have expressed great concern over the health of particular detainees and raised numerous concerns about medical facilities more generally. Specific shortcomings highlighted included: the base hospital’s lack of staff and resources; the inability to conduct surgery (specifically neurosurgery); lack of access to independent therapists or specialists; lack of appropriate and reasonable accommodation (such as a beside commode or medical bed), medications, and treatments; “lack of timely, complete, and unclassified medical records” and of information about medical appointments; perceived dual loyalty of military medical staff impeding a detainee from participating in his own medical care.<sup>58</sup>

Shortly thereafter, the head of the Washington delegation of the ICRC likewise issued a rare statement following a visit to Guantanamo highlighting that detainees are “experiencing the symptoms of accelerated aging” exacerbated by their ill-treatment and long detention. He warned of the urgent need for “adequate and sustainable solutions”.<sup>59</sup>

One flagrant example of the inadequacy of the healthcare system in Guantanamo Bay is the complete absence of any torture rehabilitation. The UN Special Rapporteur on terrorism and human rights in her 2023 report noted that medical facilities:

*are not adequate to meet the complex and urgent mental and physical health issues of detainees, including permanent disabilities, traumatic brain injuries, chronic pain including headaches and chest, stomach, back, rectal, and joint pains, gastrointestinal and urinary issues, complex and untreated post-traumatic stress disorder, and other current physical and psychological manifestations of torture and rendition after 9/11, as well as the cumulative and intersectional harms arising from continued detention, deep psychological distress, deprivation of physical, social, and emotional support from family and community while living in a detention environment without trial for some and without charge for others for 21 years, hunger striking and force-feeding, self-harm and suicidal ideation, and accelerated aging.*<sup>60</sup>

#### **vi) Art and Expression**

A number of detainees have sought to survive the cruelty of Guantanamo through art. Although the U.S. government’s policy regarding artwork created by the detainees has evolved,

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<sup>57</sup> Carol Rosenberg, *Surgeons Rush to Guantanamo as Prisoner’s Condition Deteriorates*, New York Times (12 November 2022), <https://www.nytimes.com/2022/11/12/us/politics/guantanamo-iraqi-prisoner-surgery.html>.

<sup>58</sup> Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the independence of judges and lawyers and the Independent Expert on the enjoyment of all human rights by older persons, Letter to the United States, AL USA 26/2002, 11 Jan. 2023, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27797>.

<sup>59</sup> Carol Rosenberg, *Red Cross Expresses Alarm Over Detainee Health at Guantanamo Bay*, New York Times (12 April 2023), <https://www.nytimes.com/2023/04/21/us/politics/red-cross-gitmo-health.html>.

<sup>60</sup> UN SR technical report, para. 22.

its practical application reflects concerns with over-classification and arbitrariness. In 2017, the Department of Defense declared such artwork to be the property of the United States government and prohibited its dissemination in any form.<sup>61</sup> The issue caught the attention of two UN Special Rapporteurs who sent a letter to the U.S. government.<sup>62</sup> The Biden administration has since formally reversed that position, and reports suggest one detainee was allowed to take most of his artwork with him upon release – but not those pieces showing torture and suffering.<sup>63</sup>

For those in continuing detention, the control of their art is far-reaching and unjustifiable. While Mr. Abu Zubaydah, a talented and prolific artist, has been able to have some of his drawings declassified, others have not been released and the original drawings cannot be removed from Guantanamo.<sup>64</sup> Detainees’ art and writings (subject to genuine security restrictions) should be allowed in the public domain. The USG should commit to a process for securing release that is prompt, fair and transparent.

### **II.3. Denial of Access to Justice and Impunity**

The failings of the PRB and habeas process are but one dimension of the denial of justice for torture victims and Guantanamo detainees like Mr. Abu Zubaydah. There has been no meaningful investigation, accountability or reparation by the U.S. in respect of the facts set out in this complaint, in striking violation of the United States obligations under the ICCPR.

Various obstacles have thwarted access to justice in U.S. courts, including ‘state secrecy’ doctrine, asserted by the USG and upheld by the courts which has precluded damages claims by victims. To our knowledge, only one civil case brought against any participants in the U.S. torture program was allowed to proceed, against the CIA contractor psychologists that have reportedly spoken publicly about having designed and implemented the programme, and settled a week before going to trial.<sup>65</sup> Mr. Abu Zubaydah continues to seek damages from those responsible, including the contractors. It will be important that the USG does not impose obstacles to his pursuit of justice but allows him to “follow suit” as the UNHRC called on the US to do some 15 years ago.

Further, there has been no investigation or individual accountability and impunity surrounds the rendition programme and Guantanamo. Successive administrations have refused to investigate

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<sup>61</sup> Carol Rosenberg, *Pentagon Lifts Trump-Era Ban on Release of Guantanamo Prisoners’ Art*, New York Times (7 Feb. 2023), <https://www.nytimes.com/2023/02/07/us/politics/guantanamo-art.html>.

<sup>62</sup> Mandates of the Special Rapporteur in the field of cultural rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Letter to the United States, AL USA 22/2022, 29 Nov. 2022, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27554>.

<sup>63</sup> Feliz Solomon, *540 Days at CIA Black Sites. 18 Years at Guantanamo Without Charge. Hundreds of Paintings, Now Out in the World.*, Wall Street Journal (12 August 2023), <https://www.wsj.com/articles/540-days-at-cia-black-sites-18-years-at-guantanamo-without-charge-hundreds-of-paintings-now-out-in-the-world-4f121799>.

<sup>64</sup> Eg. Ed Pilkington, *‘The forever prisoner’: Abu Zubaydah’s drawings expose the US’s depraved torture policy*, The Guardian (11 May 2023), <https://www.theguardian.com/law/2023/may/11/abu-zubaydah-drawings-guantanamo-bay-us-torture-policy>.

<sup>65</sup> Larry Siems, *CIA torture: lawsuit settled against psychologists who designed techniques*, The Guardian, 17 Aug. 2017, <https://www.theguardian.com/us-news/2017/aug/17/cia-torture-lawsuit-settled-against-psychologists-who-designed-techniques>.

and hold accountable those responsible for crimes under national and international law.<sup>66</sup> A criminal investigation was briefly opened by the Department of Justice in 2011 into the death of two individuals in US custody in Afghanistan and Iraq,<sup>67</sup> but no charges were pursued.<sup>68</sup> Several international human rights bodies, including the UNHRC, UNCAT and UN Special Rapporteur on Torture,<sup>69</sup> have criticised this failure.

This Committee has previously 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 that many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims...’*<sup>70</sup> The Inter-American Commission on Human Rights condemned U.S. legislation enshrining wide-reaching defences in relation to rendition crimes,<sup>71</sup> as *‘amnesty laws [that] purport to prevent the effective prosecution and punishment of State agents ...’*<sup>72</sup> while the UNCAT expressed concern regarding the *‘absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel.’*<sup>73</sup>

In April 2019, the ICC Pre-Trial Chamber concluded that *‘the information does not show that criminal investigations or prosecutions have been conducted’* in the US.<sup>74</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’*, and that there 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>75</sup>

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<sup>66</sup> See eg UNWGAD on ‘crimes against humanity’ at Guantanamo, among others.

<sup>67</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>68</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>69</sup> Juan Méndez, UN Special Rapporteur on Torture, [‘Enforcing the Absolute Prohibition Against Torture’](#), Chatham House (10 September 2012), 5-6.

<sup>70</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%2FPPrICAqhKb7yhsijKy20sgGcLSyqccX0g1nnMFNOUOQBx7X%2BI55yhIwlkDk6CF00Adiqu2L8SNxDB4%2BVRPkf5gZFbTQO3y9dLrUeUaTbS0RrNO7VHzbyxGDJ%ibid>>.

<sup>71</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>72</sup> IACommHR Ameziane Report, para. 244. See also paras. 216-227.

<sup>73</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>74</sup> ICC, Pre-Trial Chamber II, [‘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), para 79.

<sup>75</sup> ICC, Office of the Prosecutor, [‘Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15.’’](#) (20 November 2017), para. 328.



The U.S. has also impeded justice efforts internationally, *inter alia* by adamantly refusing to cooperate in any way with foreign investigations. Poland and Lithuania have repeatedly reported the inability to secure U.S. cooperation as major impediments to their investigations as ordered by the ECHR.<sup>76</sup> In March 2022, the U.S. Supreme Court ruled on Mr. Abu Zubaydah’s request to serve two participants in the CIA torture program with subpoenas to aid the Polish government in obtaining information for this purpose, which the USG opposed on grounds of state secrets/national security. During a lively oral argument, justices questioned the ongoing necessity for secrecy and asked why Mr. Abu Zubaydah could not himself testify instead,<sup>77</sup> before finding the state secrets privilege applied to his discovery request and dismissing his application.<sup>78</sup> Following the hearing, the U.S. Department of Justice allowed a statement to be taken from our client and translated, yet it has since languished in the declassification process. The U.S. stance on obstruction of justice and non-cooperation has therefore blocked justice at home and inhibited even the narrow prospect of justice abroad.

### III. Violations of the ICCPR

#### III.1 Arbitrary Detention at Guantanamo Bay in Violation of Articles 9, 10 and 26 of the ICCPR

The UN Special Rapporteur on terrorism and human rights has recently noted that “arbitrariness pervades the entirety of the Guantanamo detention infrastructure.”<sup>79</sup> Indeed the facility at Guantanamo has become a global symbol of injustice and arbitrariness, with the case of “forever prisoner” Mr. Abu Zubaydah epitomizing various dimensions of this arbitrariness.

In April 2023, the UNWGAD decision in *Abu Zubaydah v. US & 6 other States* (2023) found that Mr. Abu Zubaydah’s detention both in Guantanamo Bay since 2006 and in the black sites from 2002 to 2006 violates all three dimensions of the prohibition on arbitrary detention as delineated in the UNWGAD’s Methods of Work: the detention has no lawful basis, lacks procedural safeguards, and is discriminatory.<sup>80</sup>

Firstly, as the UNWGAD recognized, there is no legal basis for the detention. When there is no legal basis under international law—or under domestic law that is compliant with international law—any such arrest or detention is arbitrary.<sup>81</sup> As noted previously, in Mr. Abu Zubaydah’s case, the United States purports to justify his continued detention at Guantanamo Bay under the Authorization for Use of Military Force until “the cessation of active hostilities”<sup>82</sup> or the end of

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<sup>76</sup> *Abu Zubaydah v. Lithuania* (2018); *Abu Zubaydah v. Poland* (2014).

<sup>77</sup> Adam Liptak, *Supreme Court Justices Make a Surprising Proposal in Torture Case*, New York Times, 6 Oct. 2021, <https://www.nytimes.com/2021/10/06/us/politics/supreme-court-torture-abu-zubaydah.html>.us

<sup>78</sup> *United States v. Husayn*, 595 U.S. \_\_\_ (2022), see syllabus.

<sup>79</sup> UN SR technical visit, ¶16.

<sup>80</sup> Methods of Work; UNWGAD Opinion 2023..

<sup>81</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; see 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. 74.

<sup>82</sup> *Al-Bihani et al v. Trump*, ‘[Respondents’ opposition to petitioners’ motion for order granting writ of habeas corpus](#)’, (18 April 2018), 1-2.



the putative armed conflict with al Qaeda, Taliban, and associated forces.<sup>83</sup> However, the “law of war” rationale for indefinite detention of this nature is incompatible with international law, as underscored by the UNWGAD. The United States has not demonstrated the existence of an armed conflict or that Mr. Abu Zubaydah was taking an active part in hostilities. Further, even if international humanitarian law were applicable, “it could never justify indefinite detention during an endless war on an indeterminate enemy on the basis of ill defined ‘threats’ or for interrogation.”<sup>84</sup> The UN Human Rights Committee should unequivocally reject any ongoing attempt to justify indefinite detention without charge for Abu Zubaydah based on a non-existent armed conflict and a “law of war” that does not substantiate arbitrary detention for life.

Secondly, detention at Guantanamo is devoid of core procedural safeguards mandated by the ICCPR and other applicable international obligations, which renders the deprivation of liberty arbitrary.<sup>85</sup> Mr. Abu Zubaydah has been held without charge, trial, or even a habeas hearing for an astonishing 21.5 years. The UNWGAD underscores that Abu Zubaydah continues to be deprived of “a forum in which to meaningfully challenge his detention” even as the U.S. has never “shown that Mr. Zubaydah constitutes a security threat for which there is no other option than keeping him in detention for more than two decades without charges.”<sup>86</sup> The PRB merely assesses detainees’ “threat level,” rather than the lawfulness of detention, and as demonstrated in Abu Zubaydah’s case, the process is marred by arbitrary decisions, lack of effective representation, and refusal to consider crucial evidence. The PRB process epitomizes arbitrariness and serves no meaningful purpose, as exemplified by the spurious penultimate decision and recent decision in 2023 which lacked adequate explanations.

The denial of due process has resulted in the erosion of the fundamental procedural right to access legal counsel. For over a year, Mr. Abu Zubaydah has been unable to meet with counsel because his military counsel’s access to the site was restricted for detainees not designated for trial. This paradoxical cycle, where the absence of any charges against the detainee leads to further denial of detainees’ rights, underscores the systemic arbitrariness inherent in the detention framework at Guantanamo.

Thirdly, the UNWGAD found detention to also be arbitrary as it violates the international prohibition on discrimination based on characteristics such as nationality and religion, as further emphasized by the UNWGAD’s decision.<sup>87</sup> Abu Zubaydah’s detention amounts to discrimination based on nationality and religion because the denial of rights that would normally apply within the United States legal framework are selectively aimed at non-national individuals of the Muslim faith. Moreover, the differential treatment of detainees of various nationalities plays a significant role in determining who remains arbitrarily detained, constituting a clear violation of international conventions and principles against discrimination.

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<sup>83</sup> *Abdul Razak Ali v. Trump*, ‘[Respondents-Appellees’ Response to Petition for Initial Hearing en Banc](#)’ (17 January 2019).

<sup>84</sup> UNWGAD Opinion 2023, paras. 115, 118.

<sup>85</sup> General Comment No 35, paras. 4, 15, 32.

<sup>86</sup> UNWGAD Opinion 2023, paras. 80, 84.

<sup>87</sup> General Comment No 35, para. 17; *see* UNWGAD al Hawsawi opinion, para 81.

Fourthly, the facts above also make clear that arbitrariness plagues every aspect of the detainees' confinement. The facility, its regulations, and its personnel create an infrastructure that operates based on arbitrary distinctions such as “high value” versus “non-high value” detainees and those subject to military commissions or not, based on unpredictable processes and decisions rendered without reason or accountability, with arbitrariness extending to the provision of healthcare or the ability to communicate with the outside world, families and counsel. Collectively, these factors compound the detainees' sense of powerlessness within a system that is inherently arbitrary.

As the UNWGAD recently found, Abu Zubaydah’s ongoing deprivation of liberty violates articles 2, 5, 7, 9, and 10 of the Universal Declaration of Human Rights and articles 2, 7, 9, 10, 14, and 26 of the International Covenant on Civil and Political Rights. The UNWGAD also made a point of specifying that its conclusions apply equally to other detainees held at Guantanamo under similar circumstances.<sup>88</sup> The UNHRC should underscore the arbitrariness of Guantanamo and the plight of forever prisoners such as Abu Zubaydah in particular.

### **III.2 Ongoing Arbitrary Detention at Guantanamo Bay & Treatment under the U.S. Enhanced Interrogation Program as Torture in Violation of Articles 4, 6 and 7 of the ICCPR**

The torture that Mr. Abu Zubaydah and other current and former detainees suffered under the U.S. enhanced interrogation program and continue to suffer through arbitrary detention in Guantanamo Bay is prohibited under Article 7 of the ICCPR and customary international law, binding on the United States. Torture is also prohibited under U.S. law.<sup>89</sup> The prohibition against torture is grounded in the recognition of the inherent right to a life with dignity of all persons<sup>90</sup> under Article 6 of the ICCPR. It constitutes a *jus cogens* norm and, as such, the right to be free from torture is absolute under Article 4(2) of the ICCPR.<sup>91</sup> Combatting terrorism – engaging in a so-called “war on terror” – or public emergencies that threaten the life of the nation therefore provide no legal basis for employing acts of torture.<sup>92</sup> Further, detainees may not be transferred or returned to countries where there are substantial grounds for believing they face a risk of being subjected to torture – or indeed, as relevant to Mr. Abu Zubaydah and other detainees subjected to “extraordinary rendition” as established above – where they were intended to be tortured.<sup>93</sup>

Torture is defined under international law as:

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information*

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<sup>88</sup> UNWGAD Opinion 2023, paras. 115, 118.

<sup>89</sup> Torture Act, 18 U.S.C. §§ 2340-2340A (2004).

<sup>90</sup> 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Preamble.

<sup>91</sup> According to the Vienna Convention on the Law of Treaties, a *jus cogens* norm (or peremptory norm) of international law is a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, Art. 53, 23 May 1969, 1155 U.N.T.S. 331.

<sup>92</sup> Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* 2, 91 (Oxford University Press 2008).

<sup>93</sup> 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3(1).

*or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*<sup>94</sup>

Torture arises not only from the rendering of severe physical pain, but also from severe mental harm that detainees such as our client continue to endure at Guantanamo.<sup>95</sup> Courts and human rights bodies assess whether the totality of treatment meets the “severe pain” threshold. Clearly, the horrific interrogation methods perpetrated against Mr. Abu Zubaydah and dozens of other detainees from 2002-2006 under the U.S. enhanced interrogation program as detailed previously constitute universally recognized conduct that constitutes torture.<sup>96</sup> The extremely harmful physical and psychological effects of torture from that period persist and plague Mr. Abu Zubaydah and other detainees, and must be addressed.

### **III.3 Detention at Guantanamo as Torture and a violation of Right to a Life under articles 6 and 7 ICCPR**

Further, when examining holistically the ongoing conditions of detention and treatment of Mr. Abu Zubaydah and other detainees, it becomes evident that the detention regime at Guantanamo is not only arbitrary but also marked by inhumane and degrading treatment and torture. This assertion is supported by the UN Committee Against Torture, which as early as 2006 expressed concerns that the detention of individuals at Guantanamo without charge, devoid of adequate procedural safeguards, and without access to a court to challenge their detention, constitutes a *per se* violation of the Convention Against Torture.<sup>97</sup> In 2013, the UN Special Rapporteur on torture reaffirmed that indefinite detention is a clear breach of international law, a position echoed by the High Commissioner for Human Rights and the Inter-American Commission on Human Rights. Further, the Special Rapporteur underscored that the “suffering, stress, fear, and anxiety” induced by detention without charge for an unreasonable duration can itself amount to cruel, inhuman, and degrading treatment.<sup>98</sup>

Most recently, in 2023, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, upon visiting the detention facility,

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<sup>94</sup> 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1(1). The U.S. is also States Party to the Convention Against Torture.

<sup>95</sup> 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1(1); 18 U.S.C. § 2340(1) (“severe physical *or* mental pain or suffering”) (emphasis added).

<sup>96</sup> 22 U.S.C.A. § 2152, note (West 1999) (Sec. 3. definition). *See also Prosecutor v. Kvočka*, Case No. IT-98-30-T, Trial Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives . . .” held to constitute torture); U. N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 24, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) [hereinafter Committee Against Torture Conclusions] (finding acts “involving sexual humiliation, ‘waterboarding’, ‘short shackling’ and using dogs to induce fear, [. . .] constitutes torture or cruel, inhuman or degrading treatment or punishment”).

<sup>97</sup> Committee Against Torture, *Conclusions and Recommendations for the United States of America*, CAT/C/USA/CO/2, 25 July 2006, para. 22.

<sup>98</sup> Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, 3 Oct. 2013, <https://www.ohchr.org/en/statements/2013/10/statement-united-nations-special-rapporteur-torture-expert-meeting-situation>.

asserted that “the cumulative effects of these structural deficiencies amount to, at minimum, cruel, inhuman, and degrading treatment under international law.”<sup>99</sup> This underscores the gravity of the suffering inflicted by prolonged arbitrary detention at Guantanamo.

The UNHRC is urged to find that arbitrary detention in the unusual and extreme circumstances of Abu Zubaydah’s case also represents a violation of the fundamental right to life, in line with the important developments in the UNHRC’s jurisprudence. In its general comment No. 36 (2018), the UNHRC noted that extreme forms of arbitrary detention, in particular enforced disappearances, were incompatible with the right to life.<sup>100</sup> In Mr. Abu Zubaydah’s case, his lack of agency and autonomy, and his inability to influence his fate, epitomize a life devoid of dignity. The excessive over-securitisation and classification and denial of the opportunity to share artistic and written expressions further constitute blatant violations of the right to free expression, and of the autonomy and agency linked to the right to human dignity. It was the culmination of these extreme circumstances that recently prompted the UNWGAD to conclude that the detention of Abu Zubaydah not only violates all aspects of Article 9 of the ICCPR, but also raised the possibility that “*widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.*”<sup>101</sup> The UNWGAD has reached similar conclusions in subsequent cases, again noting that its findings “apply to other detainees in similar situations at Guantanamo.”<sup>102</sup>

#### **IV. Conclusion and Recommendations - towards Effective Remedy for Arbitrary Detention and Torture Pursuant to Article 2(3) of the ICCPR**

The international community has a responsibility to hold the United States accountable for double standards in its commitment to justice and human rights. While the U.S. often champions international justice on the global stage, its failure to address impunity and violations within its own jurisdiction undermines its credibility and standing. The UNHRC must engage in a constructive dialogue with the U.S. to address these concerns and formulate plans to rectify its ongoing role in such egregious violations. Promoting consistency and accountability is essential to upholding international justice and the principles the UNHRC represents.

Under Article 2(3)(a) of the ICCPR, all States Parties must “ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Remedies must not just be available in theory but they must be ‘accessible and effective’ in practice, to enable victims to vindicate their rights.<sup>103</sup> The right to a remedy likewise includes the right to truth.<sup>104</sup> States Parties

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<sup>99</sup> UN SR technical visit, para. 29.

<sup>100</sup> General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, para. 27.

<sup>101</sup> UNWGAD Opinion 2023, paras. 115, 118.

<sup>102</sup> *Id.* at 115; see Working Group on Arbitrary Detention, Opinion No. 72/2022 concerning Abd al-Rahim Hussein al-Nashiri (Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, United Arab Emirates and United States of America), 30 May 2023, A/HRC/WGAD/2022/72, para. 88.

<sup>103</sup> U.N. Human Rights Comm., *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (29 March 2004).

<sup>104</sup> U.N. Comm’n on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy*, paras. 14-39, U.N. Doc. E/CN.4/2006/52 (23 January 2006) (on the administration of justice and

must enforce such remedies where granted.<sup>105</sup> More broadly, the right of all victims to reparation, reflected *inter alia* in the U.N. Basic Principles and this Committee’s own standards, recognize that victims of gross violations of international human rights law are entitled to “equal and effective access to justice;” “access to relevant information concerning violations and reparation mechanisms;” and “adequate, effective and prompt reparation for harm suffered.”<sup>106</sup> As the UN Principles reflect, reparation “entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”<sup>107</sup>

The failure to provide a remedy, and the stark impunity surrounding the egregious violations in his case, in turn leads to further human rights abuses. Respect for and realization of the right to a remedy can thus be understood as a linchpin for upholding the international legal order. In the absence of such remedies, the purposes of the ICCPR specifically with respect to the prohibition against torture would be defeated.<sup>108</sup>

As established by the UNWGAD, the United States has an obligation to provide a remedy to Mr. Abu Zubaydah and other current and former detainees at Guantanamo Bay as victims of torture and prolonged arbitrary detention, and that it has wholly failed to do so.<sup>109</sup>

Co-Counsel respectfully reiterate their request that the ICCPR HRC engage robustly with the United States Government on its commitment to – and concrete steps to realise – effective remedy and reparation for detainees such as Abu Zubaydah. The remedies recognized in international law, and essential in this case, include the following:

Immediate Release: The U.S. should be urged to take immediate action to release Mr. Abu Zubaydah and bring to an end the prolonged arbitrary detention he has endured. Cessation is the first element in reparation under international law.<sup>110</sup> The UNWGAD, in its 2023 findings, explicitly affirmed that “the appropriate remedy would be to release Mr. Zubaydah immediately and accord him an enforceable right to compensation and other reparations.”<sup>111</sup> Given the absence of any foreseeable prospect of a fair trial for Abu Zubaydah, in compliance with Article 9(3) of the ICCPR, he must be released by the U.S. authorities without delay.<sup>112</sup>

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the right to truth); G.A. Res. 68/165 (18 December 2013) (calling on States *inter alia* to preserve evidence of gross human rights violations to facilitate knowledge of such violations, their investigation and access to effective remedy); Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/9/11 (18 September 2008).

<sup>105</sup> ICCPR, Art. 2(3)(c).

<sup>106</sup> U.N. General Assembly, 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, U.N. Doc. A/RES/60/147 (16 December 2005), para. 11.

<sup>107</sup> U.N. General Assembly, 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, U.N. Doc. A/RES/60/147 (16 December 2005), para. 18; ICCPR, Art. 16.

<sup>108</sup> U.N. Human Rights Comm., *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (29 March 2004), para. 17.

<sup>109</sup> UNWGAD Opinion 2023 para 118-121.

<sup>110</sup> UN Basic Principles; Article 9(4) ICCPR; See e.g. UNWGAD al Hawsawi opinion, para. 85; UNWGAD al Baluchi opinion, para. 71; UNWGAD Obaidullah opinion, para. 46; UNWGAD Al-Shimrani opinion, para. 35; UNWGAD Al-Kazimi opinion, para. 38.

<sup>111</sup> UNWGAD Opinion 2023. para 120.

<sup>112</sup> HRC General Comment No 35, at para. 37; UN Joint Report on the Situation of detainees at Guantánamo, para. 26.

Relocation: The UNWGAD has called upon the U.S. and other states to facilitate the relocation of Mr. Abu Zubaydah. Judgments of the ECtHR<sup>113</sup> and implementation decisions of the Committee of Ministers of the Council of Europe have underscored the need for other states to collectively intervene to end the “flagrant denial of justice” of his current situation. Among others, the European Parliament has taken a proactive stance by adopting a resolution that urges EU member states to begin accepting Guantanamo inmates for resettlement.<sup>114</sup> It is imperative for states, especially those implicated in the extraordinary rendition program, to extend their support in facilitating the relocation and successful reintegration of Mr. Abu Zubaydah and other detainees facing similar circumstances. But it is the responsibility of the US to take proactive steps, in consultation with victims and counsel, to find appropriate solutions.

Damages and Rehabilitation: Article 9(5) of the ICCPR<sup>115</sup> establishes an enforceable right to compensation, in line with the approach consistently taken by the UNWGAD in similar cases.<sup>116</sup> The U.S. should provide compensation, as other states that share responsibility have done.<sup>117</sup> It must allow Mr. Abu Zubaydah and the other detainees or former detainees to pursue effective remedies before competent judicial authorities within the U.S. legal system.

Further, as the UNWGAD has noted, a detainee “suffering psychological and physical effects from the previous torture,” must be provided with “torture rehabilitation and...redress, as required by Article 8 of the UDHR and Article 14 of the Convention Against Torture.<sup>118</sup> Mr. Abu Zubaydah, who continues to suffer the psychological and physical consequences of extreme torture, deserves comprehensive medical and psychological care, which is unavailable at Guantanamo.<sup>119</sup> The U.S. is obliged to ensure this forms part of any relocation arrangement.

Investigation, Truth, and Accountability: Recognition of the grave human rights violations to which Mr. Abu Zubaydah has been subjected constitutes a crucial aspect of achieving justice.<sup>120</sup> The U.S. should be asked to acknowledge its responsibility for violations and issue a formal apology. It should reckon with the past, investigating violations and ensuring the rights to truth, justice, and reparation are not set aside.<sup>121</sup> Accountability —state, corporate, and individual—are indispensable to address the arbitrary and indefinite detention and torture suffered by Mr. Abu Zubaydah, and to counter the negative effects of the present impunity and exceptionalism around

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<sup>113</sup> *Zubaydah v. Lithuania*, para. 681. CoE, ‘[Decision of the Ministers’ Deputies adopted at the 1369th 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>114</sup> European Parliament Press Release, [Guantánamo: European Parliament calls on EU Member States to accept inmates](#) (2009).

<sup>115</sup> See e.g. UNWGAD Obaidullah opinion, para 46.

<sup>116</sup> UNWGAD al Baluchi opinion, para. 71 Obaidullah opinion, para. 46; al Hawsawi opinion, para 85.

<sup>117</sup> see the UNWGAD decision and the ECHR cases cited above; Lithuania and Poland have now paid compensation pursuant to the ECHR judgments.

<sup>118</sup> UNWGAD al Baluchi opinion, para. 58.

<sup>119</sup> OSCE, ‘[Report Human Rights Situation of Detainees at Guantánamo](#)’ (2015), para. 583

<sup>120</sup> HRC General Comment No. 31 para 16: ‘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.’

<sup>121</sup> UNWGAD Opinion2023, para. 121.



the globe. The U.S. should provide information on measures taken to engage with these critical issues, learn from past mistakes, and guarantee non-repetition of such violations.<sup>122</sup>

Implementation of UNWGAD decision and Special Rapporteur report: The US should be urged to engage constructively with the recommendations of the UNWGAD and the UN Special Rapporteur on Terrorism.<sup>123</sup> Counsel has not seen any response to the UNWGAD’s report by the US but notes that it was requested to report within 6 months (by 6 October 2023). With regard to the Special Rapporteur’s recommendations, the US noted that it “disagree[d] in significant respect.”<sup>124</sup> The cooperation extended by the US to facilitate the Special Rapporteur’s visit and submissions, should translate into meaningful engagement with her recommendations.

The UNWGAD and other UN experts have consistently called for the closure of the detention facility at Guantanamo Bay in accordance with international law.<sup>125</sup> Despite the United States’ commitment to closing the facility in 2009,<sup>126</sup> it remains open. The UNHRC should seek clarification from the United States regarding its commitment to closure, and meaningful steps undertaken to align with these and other UNWGAD recommendations.

In conclusion, the UNHRC is asked to reflect the nature of the grievous injustices at the heart of this case. This includes acknowledging that Mr. Abu Zubaydah’s detention as a ‘forever prisoner’ - without charge, trial or lawfulness review, without the prospect of release or ability to influence his fate, in conditions of complete arbitrariness, amounts to unlawful detention, torture and a violation of his right to a life with dignity. The ECtHR has aptly characterized Mr. Abu Zubaydah’s case as an “anathema to the rule of law,”<sup>127</sup> transgressing the fundamental principles that underpin it.<sup>128</sup> The UNHRC is implored to take all possible measures to bring an end to his arbitrary detention without further delay, and to ensure that he and other detainees receive the protection of the law and the reparation required by it.

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<sup>122</sup> See [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 on Reparation’).

<sup>123</sup> See [UN SR technical visit](#).

<sup>124</sup> United States Submission, 22 June 2023, <https://int.nyt.com/data/documenttools/2023-06/4afabf1a43cb36a7/full.pdf>.

<sup>125</sup> See Article 9(4) ICCPR; OHCHR Press Release January 2021 on Guantánamo Bay; 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 14th anniversary of the opening of the Guantánamo Bay detention facility](#)’ (11 January 2016), last accessed 12 March 2021.

<sup>126</sup> Executive Order 13492—Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities (22 January 2009).

<sup>127</sup> *Zubaydah v. Lithuania*, para. 583; *Zubaydah v. Poland*, paras. 452, 559.

<sup>128</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 ... avoidance of arbitrariness and procedural and legal transparency.