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Human Rights Council
Working Group on Arbitrary Detention

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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)

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

2. In accordance with its methods of work,¹ on 22 July 2022 the Working Group transmitted to the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States of America a communication concerning Abd al-Rahim Hussein al-Nashiri. Morocco, Poland and Romania submitted timely responses. Lithuania replied after the deadline. Afghanistan, Thailand, the United Arab Emirates and the United States did not reply. All of the above-mentioned States are parties to the International Covenant on Civil and Political Rights with the exception of the United Arab Emirates.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

¹ [A/HRC/36/38](#).

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Abd al-Rahim Hussein al-Nashiri is a Saudi Arabian national of Yemeni descent who was born in 1965 and is currently detained in Guantanamo Bay, Cuba.

5. In relation to opinion No. 29/2006 of the Working Group concerning Mr. al-Nashiri and 25 other individuals, the source claims that the circumstances of his detention have changed since 2006, in particular in relation to the detaining authority, the place of detention, the legal status according to the authorities and the physical and psychological state of confinement.

6. The source underlines that the facts reported arise from official documents of various authorities of the United States and from other sources that gathered direct testimonies or evidence:

(a) Central Intelligence Agency, Office of the Inspector General, Special Review of Counterterrorism Detention and Interrogation Activities (September 2001–October 2003), 7 May 2004;

(b) Central Intelligence Agency background paper on its combined use of interrogation techniques, 30 December 2004;

(c) International Committee of the Red Cross (ICRC) report following its visits to 14 high-value detainees in custody of the Central Intelligence Agency, including Mr. al-Nashiri, 14 February 2007;

(d) United States Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency Detention and Interrogation Program, 2014;

(e) Declaration of a medical expert appointed by the United States Department of Defense, October 2015.

7. According to the information received, Mr. al-Nashiri was captured in Dubai, United Arab Emirates, by local authorities in mid-October 2002. No warrant was presented. He was interrogated for one month by agents of the United Arab Emirates.

8. Mr. al-Nashiri was reportedly rendered to the Central Intelligence Agency, which transferred him incommunicado to a “black site” in Afghanistan in November 2002. Thereafter, he was held in solitary confinement and incommunicado for four years at other black sites, before being transferred to Guantanamo Bay between 4 to 6 September 2006.

9. Reportedly, on 8 December 2006, the United States Department of Defense assessed that Mr. al-Nashiri was a high-risk detainee, likely to pose a threat to the United States. He was detained by the Department of Defense as an “unlawful combatant” pursuant to the Government’s interpretation of international humanitarian law.

10. Mr. al-Nashiri was held pursuant to a secret detention and interrogation programme developed by Central Intelligence Agency after 11 September 2001. The programme, which was intended for “high-value detainees”, that is, captives suspected by the United States of terrorism, consisted of a network of clandestine overseas detention facilities.

11. The European Court of Human Rights has concluded that the rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the United States Constitution and international law against arbitrary detention. The whole scheme had to operate outside the jurisdiction of the United States courts and in conditions securing its

absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities.²

12. According to the source, on 10 November 2002, Mr. al-Nashiri was transferred to a secret Central Intelligence Agency prison in Afghanistan. On 15 November 2002, United States authorities took him to another secret prison, in Thailand. Between 4 and 5 December 2002, he was transferred to Poland, where he remained until 6 June 2003, when he was taken to a secret prison in Morocco. On 23 September 2003, the Central Intelligence Agency transported him to Guantanamo Bay for the first time, where he was held in secret until 12 April 2004, and then transferred to Romania, where he was held until 5 October 2005. Mr. al-Nashiri was reportedly kept in secret detention at a location in Lithuania for over five months, until it was closed in March 2006. He was transferred to secret detention in Afghanistan, between 25 and 26 March 2006. Between 4 and 6 September 2006, Mr. al-Nashiri was transferred to Guantanamo Bay, where he remains.³

13. Mr. al-Nashiri is currently being detained indefinitely by the United States Department of Defense as an “unlawful combatant”. On 10 October 2007, the Government stated that the law of war, and not the Covenant, was the applicable legal framework governing the detention of “enemy combatants”.⁴

14. The source indicates that the United States justifies the continued detention of Mr. al-Nashiri under the Authorization for Use of Military Force (United States Public Law 107-40) adopted in 2001.

15. According to the source, on 14 March 2007, Mr. al-Nashiri was heard by the Combatant Status Review Tribunal, which purported to review whether he met the criteria of an enemy combatant: an individual who was part of or supporting the Taliban, Al-Qaida or associated forces engaged in hostilities against the United States or its allies. The hearing was closed to the public and Mr. al-Nashiri was not afforded legal counsel. A personal representative was appointed, but the individual did not act as counsel and Mr. al-Nashiri’s statements to the representative were not privileged. He did not have access to any of the classified evidence introduced against him nor did he have the right to refute the accusations.

16. On 30 June 2008, the Government of the United States reportedly brought charges against Mr. al-Nashiri, including charges relating to the bombing of the *USS Cole* on 12 October 2000. These charges were withdrawn in 2009, removing Mr. al-Nashiri from the jurisdiction of the military judge, and were brought again in 2011, under the Military Commission Act.

17. On 2 October 2008, Mr. al-Nashiri filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia (Case No. 08-1207). That petition is still pending.

18. The military commission pretrial hearings began on 17 January 2012. The proceedings remain ongoing and no trial date has been set.

19. On several occasions, Mr. al-Nashiri petitioned the United States District Court for the District of Columbia to issue a writ of mandamus and prohibition. On 15 October 2021, Mr. al-Nashiri reportedly asked the Court of Appeals for the District of Columbia Circuit to issue a writ of mandamus and prohibition so that the use of torture and the evidence arising from the use of torture would remain categorically forbidden in any proceeding. This request is still pending.

Category I

20. The source underlines 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

² European Court of Human Rights, *Al Nashiri v. Romania*, Application No. 33234/12, Judgment, 31 May 2018, para. 690.

³ The Rendition Project, *CIA Torture Unredacted: An Investigation into the CIA Torture Programme*, 2019.

⁴ [CCPR/C/USA/CO/3/Rev.1/Add.1](#), p. 3.

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”.⁵

21. Even if international humanitarian law were applicable, the source claims it could never justify Mr. al-Nashiri’s indefinite detention during an endless war on an open-ended enemy.⁶ Mr. al-Nashiri’s detention cannot be justified under domestic law. The United States cannot purport to justify his continued detention under the Authorization for Use of Military Force since it does not explicitly allow for arrest or detention. It authorizes the 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, indefinite or incommunicado detention.⁷

22. Based on the above, the source claims that there is no legal basis for Mr. al-Nashiri’s detention, which makes it arbitrary under category I.

Category III

23. The source claims that rights to fair trial and due process have been repeatedly violated in Guantanamo Bay.⁸ Mr. al-Nashiri allegedly suffered the most egregious violations of human rights, of such gravity as to give the deprivation of liberty an arbitrary character under category III.

24. The Central Intelligence Agency used interrogation techniques to persuade high-value detainees to provide information. Pursuant to a document of the Central Intelligence Agency, effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence high-value detainees’ behaviour, to overcome detainees’ resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence.⁹

25. According to the source, the interrogation techniques were used in all Central Intelligence Agency facilities for high-value detainees and were intended to demonstrate to detainees that they had no control over their basic human needs.¹⁰

26. These “enhanced interrogation techniques” reportedly included:

- (a) Prolonged nudity, from several weeks to several months;
- (b) Sleep deprivation, through forced stress positions, cold water and repetitive loud noise, for 11 days;
- (c) “Walling” (violently banging the head and the body of the detainee against a wall, 20 to 30 times consecutively);
- (d) Beating, kicking, slapping and punching the face and body;
- (e) Waterboarding, consisting of binding the detainee to a bench, with a cloth over the mouth and nose while water is poured over, producing the sensation of drowning and suffocation, inducing convulsions and vomiting;
- (f) Prolonged standing position, naked, with the arms chained above the head for two or three days continuously, and for up to two or three months intermittently, with toilet sometimes denied, the detainee having to defecate and urinate on himself;
- (g) Confinement in a box, usually dark, to severely restrict movement; insects may also be placed in the box;

⁵ Opinion No. 89/2017, para. 42.

⁶ Ibid., para. 43.

⁷ Opinion No. 70/2019, para. 64.

⁸ Opinion No. 50/2014, para. 79.

⁹ Central Intelligence Agency background paper on its combined use of interrogation techniques, 30 December 2004, p. 2.

¹⁰ Ibid., p. 3 and 5.

(h) Deprivation or restriction of solid food and rectal feeding;

(i) Exposure to cold temperature, especially in cells and interrogation rooms, using cold water poured over the body or held around the body with a sheet.

27. The source claims that the use of these techniques amounted to torture and cruel, inhuman or degrading treatment.

28. It is alleged that Mr. al-Nashiri “was repeatedly subjected to the Central Intelligence Agency’s enhanced interrogation techniques.”¹¹ There is direct evidence that he was waterboarded multiple times. This form of suffocation induces a feeling of panic and the acute impression that the person is about to die.¹²

29. Interrogators reportedly employed potentially injurious stress positions on Mr. al-Nashiri, who was required to kneel on the floor and lean back. There was concern that his arms might be dislocated from his shoulders. He was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.¹³

30. In addition to enhanced interrogation techniques, Mr. al-Nashiri was reportedly subjected to other forms of torture and ill-treatment.¹⁴ Central Intelligence Agency interrogators reportedly subjected him to a mock execution.¹⁵ He was also threatened with sodomy.

31. According to the source, after having seen and having interviewed Mr. al-Nashiri, ICRC concluded that the totality of the circumstances in which he was “held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law”.¹⁶

32. The European Court of Human Rights found that, four and a half years after his initial detention, on 14 March 2007, Mr. al-Nashiri was heard by the Combatant Status Review Tribunal, which purported to review all the information related to the question whether he met the criteria to be designated as an “enemy combatant”. The hearing was closed to the public. The applicant was not afforded legal counsel at this hearing. A personal representative was appointed for him, but this person did not act as counsel and the applicant’s statements to this representative were not privileged. He did not have access to any classified evidence that was introduced against him, nor did he have the right to refute any of the accusations that were introduced at this hearing.¹⁷

33. United States authorities reportedly monitored Mr. al-Nashiri’s conversations with his lawyers; a secret judicial ruling limited his right to attorney-client confidentiality. The lack of access to counsel within a reasonable period and denial of private communication with counsel contributed to the arbitrariness of the detention.

34. Reportedly, on 7 March 2012, the United States Department of Defense appointed an expert in internal medicine and the treatment of victims of torture to conduct an evaluation of Mr. al-Nashiri. On 24 October 2015, the expert stated that Mr. al-Nashiri suffered from complex post-traumatic stress disorder as a result of extreme physical, psychological and sexual torture inflicted upon him by the United States. In the opinion of the expert, the Central Intelligence Agency had also succeeded in inducing “learned helplessness” in Mr. al-Nashiri. The result was that he was most likely irreversibly damaged by torture that was unusually cruel and designed to break him. In the expert’s many years of experience, Mr. Al-Nashiri

¹¹ Senate Select Committee on Intelligence, “Committee Study of the Central Intelligence Agency Detention and Interrogation Program”, Executive Summary, p. 472.

¹² International Committee of the Red Cross (ICRC), “Report on the treatment of 14 high-value detainees in CIA custody” (Geneva, February 2007), sect. 1.3.1.

¹³ Central Intelligence Agency, *Special Review of Counterterrorism Detention and Interrogation Activities*, 7 May 2004, p. 44.

¹⁴ Transcript of the hearing before the Combatant Status Review Tribunal on 14 March 2007, in European Court of Human Rights, *Al Nashiri v. Romania*, para. 123.

¹⁵ Central Intelligence Agency, *Special Review of Counterterrorism Detention and Interrogation Activities*, p. 42.

¹⁶ ICRC, “Report on the treatment of 14 high-value detainees”, p. 26.

¹⁷ European Court of Human Rights, *Al Nashiri v. Romania*, para. 142.

presented as one of the most severely traumatized individuals she had ever seen. To make matters worse, there was no evident effort to treat the damage and there appeared to be efforts to block others from giving him appropriate clinical care. The torture experienced by Mr. al-Nashiri had fractured his trust in humanity, which had damaged his ability to interact with all humans, including counsel, doctors, other detainees and even family. There was no question that Mr. Al-Nashiri was tortured at the hands of the Central Intelligence Agency and that his current symptoms and poor health directly relate to that torture. Despite the passage of time between Mr. al-Nashiri's direct torture in the custody of the Central Intelligence Agency and the present, he shows little sustained improvement. Although, even in the best of circumstances, the horrific and calculated nature of his torture would be expected to have long-lasting effects, there were multiple factors that unique to Guantanamo Bay and the military proceedings against him that were further exacerbating his symptoms and suffering. The environment in Guantanamo lacked stability or any sense of relative safety. This lack of stability profoundly had exacerbated Mr. al-Nashiri's complex post-traumatic stress disorder. From public court filings the expert gathered that the policies and procedures within the detention facilities were highly variable and unpredictable. The chronic uncertainty conspires to present him with ever-changing rules and procedures, whose rationales are obscure to the point of arbitrary. There is an almost daily retraumatization of Mr. al-Nashiri and no adequate mental health care to provide him the tools to deal with that. The military trial process was a principal driver of this instability. Rules governing hearings and how the issues will be dealt with were highly fluid and unpredictable.¹⁸

35. The source claims that this situation remains as described above. On 14 December 2021, the same expert testified before the Military Commission in Mr. al-Nashiri's case. He still gets nauseated and vomits from flashbacks to a period when agents confined him nude and shivering inside a chilled, cramped box. In these conditions, the journey to court is allegedly traumatic for Mr. al-Nashiri and interferes with his ability to concentrate on the death penalty proceedings and his defence.

36. The source states that the above confirms that the detention of Mr. al-Nashiri in Guantanamo Bay is arbitrary and falls within category III, due to a total non-observance of the international norms relating to the right to a fair trial.

37. According to article 9 (2) of the Covenant, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest, enabling the person to seek release if the legal basis for the detention is unfounded. An arrest is arbitrary when carried out without informing the arrested person of its reasons. According to article 14 (3) (a) of the Covenant, in the determination of any criminal charge, the accused shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charges. Although Mr. al-Nashiri was captured in October 2002, United States authorities brought charges against him for trial before a military commission only on 30 June 2008. He was therefore held without charge for almost six years.

38. Furthermore, all charges against him were dropped on 5 February 2009. He continued to be detained, however, without charges until 20 April 2011, when the Military Commission initiated prosecution again. He was therefore held without charge for a second period of over two years.

39. Considering the foregoing, the source claims that Mr. al-Nashiri's rights under articles 9 and 14 of the Covenant were violated, making his detention arbitrary under category III.

Category V

40. The source submits that Mr. al-Nashiri, a citizen of Saudi Arabia and a Muslim, is being held in indefinite detention on a discriminatory basis because of his status as a foreign national and his religious beliefs.

41. Guantanamo Bay is a military detention camp holding exclusively Muslim foreign nationals. The detention regime was created for the specific purpose of detaining "foreign

¹⁸ Declaration of an expert appointed by the United States Department of Defense on 7 March 2012, regarding the physical and mental evaluation of Mr. al-Nashiri, 24 October 2015 (<https://perma.cc/WNN5-YP3X>).

Muslim men” and “the existence of a particularly severe detention regime and a severely restrictive justice system exclusively designed to hold and try aliens, all of them Muslim, constitutes a violation of the non-discrimination clause (...)”.¹⁹

42. The Working Group has previously concluded that an individual in Guantanamo Bay had been subjected to prolonged detention on discriminatory grounds because of his status as a foreign national and his religious beliefs as a Muslim.²⁰ The deprivation of liberty of Mr. al-Nashiri appears to violate articles 2, 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 10 of the Universal Declaration of Human Rights, articles 14 and 26 of the Covenant and principle 5 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before Court.

Response from the Governments

43. On 22 July 2022, the Working Group transmitted the source’s allegations to the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States, requesting them to provide, by 20 September 2022, detailed information about the circumstances surrounding the detention and transfer of Mr. al-Nashiri, as well as to clarify the legal provisions justifying his deprivation of liberty and its compatibility with relevant obligations under international law.

44. Afghanistan, Thailand, the United Arab Emirates and the United States did not respond to the communication. Lithuania submitted its response on 28 September 2022, after the deadline, and it therefore could not be taken as if presented on time.

45. In its response of 19 September 2022, Poland notes that the Public Prosecution Service investigated officials exceeding their powers in various localities during the period from 2001 to 2005 by allowing places of isolation where persons suspected of terrorism were held to function. On 30 November 2020, the Public Prosecution Service partially discontinued this investigation, a decision that was upheld by the courts on 7 September 2021. The Public Prosecution Service made another request for international legal assistance to the United States, on 29 January 2021. While awaiting the implementation of the request, the investigation was suspended, on 26 February 2021. Poland is involved in the execution of the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Poland* (application No. 28761/11), in which a number of violations of the European Convention on Human Rights were identified. Poland notes that it paid the applicant the just satisfaction awarded by the European Court of Human Rights.

46. In its response of 20 September 2022, Romania refers to the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Romania* (application No. 33234/12) rendered on 31 May 2018. Romania contested the applicant’s version of the facts on all accounts, maintaining that there was no evidence demonstrating that they occurred. The Government referred to the findings of the Court that Mr. al-Nashiri had been transferred to and secretly detained in Romania, where he was subjected to treatment that could at a minimum amount to ill-treatment; such as blindfolding, incommunicado and solitary confinement, continuous noise or light and the use of leg shackles in all aspects of detainee management and movement. The European Court found a violation of article 5, pertaining to Mr. al-Nashiri’s secret detention in Romania and that Romania enabled the authorities of the United States to transfer him from its territory, in spite of a real risk that he would be subjected to further undisclosed detention.

47. In its response of 20 September 2022, Morocco states that its judicial investigations and inquiries concluded that Mr. al-Nashiri never registered a stay in Morocco. The authorities categorically reject the allegations.

¹⁹ Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo* (2015), paras. 221 and 226.

²⁰ Opinion No. 89/2017, para. 62.

Further comments from the source

48. The source stressed that the replies from Poland and Romania confirm that Mr. al-Nashiri was indeed transferred to and from and was detained in the territories of both countries, where he was also mistreated. This was possible due to the cooperation of the authorities of those Governments with the United States. The source notes that the reply from Morocco that no stay of Mr. al-Nashiri had been recorded represents an element of this extremely grave arbitrary detention.

Discussion

49. The Working Group thanks the Governments of Lithuania, Morocco, Poland and Romania for their replies. In determining whether Mr. al-Nashiri's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.²¹ In the absence of responses from the Governments of Afghanistan, Thailand, the United Arab Emirates and the United States, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

50. The Working Group notes that it previously adopted an opinion in relation to Mr. al-Nashiri and 25 other individuals. In opinion No. 29/2006, it found that the detention of Mr al-Nashiri, along with 25 others, was arbitrary, being in contravention of article 9 of the Covenant and falling under category I. When the opinion was adopted, Mr. al-Nashiri was detained by Central Intelligence Agency in its black sites. In early September 2006, he was transferred to Guantanamo Bay and is being held there by the Department of Defence.

51. In the present case, the Working Group considers it appropriate to adopt a new opinion, given that the circumstances have changed and there are new issues warranting consideration.²² While the initial petition focused on his detention in Central Intelligence Agency black sites, the current submission focuses on his detention in Guantanamo Bay and alleges new violations of Mr. al-Nashiri's rights.

52. In addition, his physical and mental health has reportedly deteriorated. The Working Group will consider whether these conditions might affect his ability to participate in his trial. Lastly, the Working Group added category V to its methods of work in 2010.²³ Given the allegations raised by the source, the Working Group will consider whether his detention is arbitrary under this category.

53. The source has submitted that Mr. al-Nashiri's detention is arbitrary under categories I, III and V. As detailed below, these categories are relevant to his treatment by the United States. For Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand and the United Arab Emirates only category I and category III (to the extent it concerns torture and cruel, inhuman or degrading treatment) are potentially relevant to their treatment of Mr. al-Nashiri.

54. Since 11 September 2001, the Working Group has developed a body of legal analysis and jurisprudence reaffirming that the prohibition of arbitrary detention is a peremptory norm (*jus cogens*) of international law from which no derogation is permitted²⁴ and that the prolonged and indefinite detention of individuals at Guantanamo Bay violates that prohibition.²⁵ The Working Group has set out key principles in this regard, including in

²¹ A/HRC/19/57, para. 68.

²² Opinions No. 46/2008, No. 12/2010, No. 89/2017, No. 42/2019, and No. 7/2022.

²³ A/HRC/36/38, para. 8 (e); and opinion No. 69/2019, para. 50.

²⁴ A/HRC/22/44, para. 51; opinions No. 10/2013, para. 32; No. 50/2014, para. 66; No. 89/2017, para. 36; and No. 70/2019, para. 53.

²⁵ Opinions No. 2/2009, No. 3/2009, No. 10/2013, No. 50/2014, No. 89/2017, and No. 70/2019.

relation to the States' obligations under human rights law,²⁶ habeas corpus²⁷ and fair trial rights,²⁸ as well as in relation to the applicability of international humanitarian law.²⁹ The Working Group has also stated relevant principles concerning the so-called extraordinary rendition programme, highlighting its incompatibility with international law.³⁰

Category I

United States of America

55. The source submits that Mr. al-Nashiri was transferred into the military custody of the United States in Guantanamo Bay between 4 and 6 of September 2006, where he is still detained. The source claims that there is no legal basis for Mr. al-Nashiri's detention under either domestic or international law, which makes it arbitrary under category I. The source submits that the United States authorities cannot justify his continued detention under the Authorization for Use of Military Force (domestic legislation) as it allegedly does not specifically authorize capture, indefinite or incommunicado detention.³¹ The source also submits that international humanitarian law was not applicable in relation to Mr. al-Nashiri's detention, and that even had it been applicable it could never justify his detention during an endless war on an open-ended enemy.

56. As the Working Group as previously stated, the global struggle against international terrorism does not constitute an armed conflict for the purpose of the applicability of international humanitarian law.³² Following reasoning developed in its previous opinions related to detainees in Guantanamo Bay, the Working Group concludes that Mr. al-Nashiri has been subjected to prolonged and indefinite detention at Guantanamo Bay, which the Working Group has previously found to be arbitrary.³³

57. Any form of detention or imprisonment should be ordered by or be subject to the effective control of a judicial or other authority, as required under article 9 (4) of the Covenant. Such an authority should enjoy a status and tenure affording the strongest possible guarantees of competence, impartiality and independence.³⁴ Mr. al-Nashiri was never granted a hearing while being transferred between black sites and was only brought before a Combatant Status Review Tribunal in 2007, five years after the commencement of his detention. The Combatant Status Review Tribunal did not meet the standards of review by a judicial authority since, *inter alia*, it could not review the lawfulness of detention.³⁵ The Working Group does not consider that Mr. al-Nashiri has been able to challenge the legality of this detention. The United States Supreme Court has also reached similar conclusions, concluding that hearings before the Combatant Status Review Tribunal do not satisfy the right to habeas corpus.³⁶ The source submits that on 2 October 2008, Mr. al-Nashiri filed a habeas corpus petition before the United States District Court for the District of Columbia (Case No. 08-1207), which is still pending. The Working Group concludes that the failure to ensure effective habeas corpus constitutes a denial of an effective remedy under article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.

²⁶ E/CN.4/2006/120, paras. 10–11; opinion No. 57/2013, para. 55; and Human Rights Committee, general comment No. 31 (2004), para. 10.

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

²⁸ A/HRC/36/37/Add.2, para. 78.

²⁹ Opinions No. 43/2006, para. 31; No. 11/2007, para. 11; and No. 89/2017, para. 43.

³⁰ A/HRC/48/55, para. 59; A/HRC/13/42, para. 36; and A/HRC/4/40, para. 49; opinions No. 47/2005, paras. 19–20; No. 53/2016, paras. 59–60; No. 11/2018, para. 54; and No. 15/2021, para. 94.

³¹ Opinions No. 10/2013, para. 34; No. 50/2014, para. 69; and No. 70/2019, para. 64.

³² Opinions No. 43/2006, para. 31; No. 11/2007, para. 11; No. 50/2014, para. 68; and No. 89/2017, para. 42; see also A/HRC/13/42, para. 51.

³³ Opinions No. 50/2014, No. 53/2016, No. 56/2016, No. 89/2017, and No. 70/2019.

³⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 4; and A/HRC/WGAD/2021/32, para. 40.

³⁵ Opinions No. 2/2009; No. 10/2013, and No. 50/2014; see also opinion No. 89/2017, para. 46.

³⁶ United States Supreme Court, *Boumediene v. Bush*, 553 U.S. 723 (2008), pp. 60 and 70.

58. After his capture in the United Arab Emirates, Mr. al-Nashiri was reportedly rendered to the Central Intelligence Agency, which transferred him incommunicado to a black site in Afghanistan in November 2002. Thereafter, he was held in solitary confinement and incommunicado for four years at other black sites before being transferred to Guantanamo Bay between 4 and 6 September 2006. According to the source, after having seen and interviewed Mr. al-Nashiri, ICRC concluded that the totality of the circumstances in which he was held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law. The apparent determination to prevent him from being in contact with the outside world while he has been subjected to the extraordinary rendition programme in various black sites throughout the world and his ongoing detention in Guantanamo exacerbate the arbitrariness of his detention as it has prevented him from seeking means to challenge the basis for it. His detention in essentially incommunicado conditions amounts to an enforced disappearance which has deprived him of a meaningful opportunity to communicate with his family and/or the outside world. This amounts to a violation of article 9 (3) of the Covenant.

59. The source submits that although Mr. al-Nashiri was captured more than 20 years ago, the United States Government brought charges against him only on 30 June 2008. Mr. al-Nashiri was therefore not informed of the reasons for his arrest and was held without charge for almost six years. All charges against Mr. al-Nashiri were dropped on 5 February 2009, thus removing his case from the military judge's jurisdiction. However, he continued to be detained without charges until 20 April 2011, when the Military Commission initiated prosecution against him again. Mr. al-Nashiri was therefore held without charge for a second period of detention for over two years. In the absence of a rebuttal from the Government, the Working Group thus finds that Mr. al-Nashiri's rights under articles 9 (2), and 14 (3) (a) of the Covenant were violated.³⁷

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

United Arab Emirates

61. The source submits that in mid-October 2002, Mr. al-Nashiri was captured in Dubai, United Arab Emirates, by the local authorities and that no warrant was presented. He was interrogated for the first month after the arrest by agents of the United Arab Emirates. The United Arab Emirates has not responded to these allegations.

62. The right to be presented with an arrest warrant or equivalent (except for arrests made in flagrante delicto) is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention under articles 3 and 9 of the Universal Declaration of Human Rights and principles 2, 4, 10 and 12 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³⁸ By failing to present an arrest warrant, the United Arab Emirates did not invoke a legal basis for Mr. al-Nashiri's detention.³⁹

63. In addition, Mr. al-Nashiri was denied the right to take proceedings before a court in the United Arab Emirates to challenge the legality of his detention, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁴⁰ Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.⁴¹ Given that Mr. al-Nashiri had no opportunity to challenge his detention, his right to an effective remedy under article 8 of the Universal

³⁷ A/HRC/49/45; A/HRC/36/37/Add.2; CCPR/C/USA/CO/4; opinions No. 89/2017, and No. 70/2019.

³⁸ Opinions No. 33/2020, para. 54; and No. 65/2020, para. 75.

³⁹ Opinions No. 45/2019, para. 51; and No. 4/2021, para. 83.

⁴⁰ Opinion No. 33/2020, para. 56.

⁴¹ A/HRC/30/37, para. 3.

Declaration of Human Rights was violated and his deprivation of liberty falls within category I.

64. The source further submits that Mr. al-Nashiri was rendered to the Central Intelligence Agency on 10 November 2002. This transfer lacked the procedural safeguards required under international law and constitutes an extraordinary rendition, in violation of article 9 of the Universal Declaration of Human Rights, and is arbitrary under category I.

Afghanistan

65. The source submits that Mr. al-Nashiri was detained twice in Afghanistan between 2002 and 2006. He was reportedly rendered to the Central Intelligence Agency, which, on 10 November 2002, transferred him to a secret prison in Afghanistan, where he was detained until 15 November 2002. Mr. al-Nashiri was then allegedly held in continuous solitary confinement and incommunicado detention for four years at several other Central Intelligence Agency black sites. Between 25 and 26 March 2006, he was transferred back to a secret detention site in Afghanistan, before being transferred to Guantanamo Bay in September 2006. It is sufficiently demonstrated that the Afghan authorities were aware of the arbitrariness of his detention, noting the lack of any demonstrated lawful basis for it, particularly in the light of the involvement of the Central Intelligence Agency.⁴² Consequently, absent any Government response, the Working Group considers that Afghanistan is responsible for complicity in the extraordinary rendition programme and for violating Mr. al-Nashiri's rights while he was on its territory and when he was transferred from its territory, as it was aware of the foreseeable risk of further violations against him. Because of the involvement of Afghanistan in Mr. al-Nashiri's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that Afghanistan participated in the violation of article 9 of the Covenant and thereby in Mr. al-Nashiri's arbitrary detention under category I.

Thailand

66. The source submits that on 15 November 2002, United States authorities took Mr. al-Nashiri to a secret prison in Thailand, where he was detained between 4 and 5 December 2002. It is sufficiently demonstrated that Thai authorities were aware of the arbitrariness of his detention, noting the lack of any demonstrated lawful basis for it, particularly in the light of the involvement of the Central Intelligence Agency.⁴³ In the absence of a response from the Government, the Working Group considers that Thailand is responsible for complicity in the extraordinary rendition programme and violating Mr. al-Nashiri's rights while he was on its territory and when he was transferred from its territory, as it was aware of the foreseeable risk of further violations against him. Because of the involvement of Thailand in Mr. al-Nashiri's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that Thailand participated in Mr. al-Nashiri's arbitrary detention under category I.

Poland

67. The source submits that between 4 and 5 December 2002, Mr. al-Nashiri was rendered to a black site in Poland where he was detained until 6 June 2003. Poland acknowledges being found to have violated Mr. al-Nashiri's rights and refers to paying just satisfaction to him as ordered by the European Court of Human Rights. However, Poland also notes that it has discontinued an investigation into public officials exceeding their powers concerning secret detention sites and has suspended another related investigation. The Working Group acknowledges the payment of just satisfaction, but also considers that this reaffirms the complicity of Poland in and its partial responsibility for Mr. al-Nashiri's arbitrary detention and rights violations. The Working Group thus considers that Poland is responsible for complicity in the extraordinary rendition programme and for violating Mr. al-Nashiri's rights

⁴² A/HRC/49/45, para. 37 (d).

⁴³ Ibid.

while he was on its territory and when he was transferred from its territory as it was aware of the foreseeable risk of further violations. In relation to the discontinuance of investigations into public officials, the Working Group considers that this constitutes a violation of Mr. Nashiri's right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. While the European Court has addressed the case, the Working Group does not consider that this deprives it of jurisdiction.⁴⁴ Because the involvement of Poland in Mr. al-Nashiri's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that Poland participated in Mr. al-Nashiri's arbitrary detention under category I.

Romania

68. The source submits that on 12 April 2004, Mr. al-Nashiri was rendered to a black site in Romania, where he was detained until 5 October 2005. While Romania contested the applicant's version of the facts, it refers to the findings of the European Court of Human Rights that Mr. al-Nashiri was transferred to and secretly detained in Romania, where he was subjected to treatment that, at a minimum, could amount to ill-treatment. The Working Group thus considers that Romania is responsible for complicity in the extraordinary rendition programme and for violating Mr. al-Nashiri's rights while he was on its territory and when he was transferred from its territory as it was aware of the foreseeable risk of further violations. While the European Court has addressed the case, the Working Group does not consider that this deprives it of jurisdiction.⁴⁵ Because the involvement of Romania in Mr. al-Nashiri's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that it participated in the violation of article 9 of the Covenant and thereby his arbitrary detention under category I.

Lithuania

69. The source submits that on 5 October 2002, Mr. al-Nashiri was transferred to Lithuania in a rendition operation and was held at a secret location for over five months, until March 2006. In its late reply, while Lithuania refers to the decision of the European Court of Human Rights in the case of *Abu Zubaydah v. Lithuania* (application No. 46454/11), which acknowledges the participation of Lithuania in the implementation of the Central Intelligence Agency high-value detainee programme in 2005–2006, it submits that there is no objective data demonstrating that Mr. al-Nashiri was detained in Lithuania through that programme. The Working Group concludes that it is sufficiently demonstrated that Lithuanian authorities were aware of the arbitrariness of his detention, noting the lack of any demonstrated lawful basis for it, particularly in the light of the involvement of the Central Intelligence Agency,⁴⁶ including Mr. al-Nashiri's reported status as a high-value detainee. Thus, Lithuania is responsible for complicity in the extraordinary rendition programme and for violating Mr. al-Nashiri's rights while he was on its territory and when he was transferred from its territory as it was aware of the foreseeable risk of further violations. Because the involvement of Lithuania in Mr. al-Nashiri's mistreatment concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that it participated in the violation of article 9 of the Covenant and thereby his arbitrary detention under category I.

Morocco

70. The source submits that on 6 June 2003, Mr. al-Nashiri was taken to a secret Central Intelligence Agency prison in Morocco and detained there until 23 September 2003, when he

⁴⁴ See [A/HRC/36/38](#) and opinion No. 89/2018, paras. 64–67.

⁴⁵ *Ibid.*

⁴⁶ [A/HRC/49/45](#), paras. 12 and 37 (d).

was transported to Guantanamo Bay for the first time. In its reply, the Government of Morocco states that his visit there was never “registered”. In the Working Group’s view, the fact that his visit was never registered is insufficient to undermine the source’s prima facie credible allegation that he was present in Morocco during that period. Indeed, a lack of registration of his visit would be expected in the case of extraordinary rendition and secret detention. The Working Group thus considers that Morocco is responsible for complicity in the extraordinary rendition programme and for violating Mr. al-Nashiri’s rights while he was on its territory and when he was transferred from its territory as it was aware of the foreseeable risk of further violations. Because the involvement of Morocco concerned the lack of any demonstrated lawful basis for his deprivation of liberty but did not concern the subsequent proceedings in the United States and Guantanamo Bay (and deficiencies therein), the Working Group considers that it participated in his arbitrary detention under category I, in violation of article 9 the Covenant and thereby his arbitrary detention under category I.

71. The Working Group recalls that the principle of joint responsibility applies to States that aid or assist other States in the commission of an internationally wrongful act, as elaborated, *inter alia*, in article 16 of the articles on responsibility of States for internationally wrongful acts. In the light of its findings above, the Working Group is satisfied that the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and United States played a role in the extraordinary rendition programme, whether through directly detaining persons subjected to it or through knowingly assisting the implementation of the programme through transport access and the provision of locations for unregistered detention sites. These States are all jointly responsible for the arrest, rendition and arbitrary detention of Mr. al-Nashiri,⁴⁷ which amount to violations of article 9 of the Covenant and render his detention arbitrary under category I.

72. The Working Group recalls that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recommended the establishment—or, where applicable, the reopening—by the Governments of Lithuania, Morocco, Poland, Romania and Thailand of effective independent judicial or quasi-judicial inquiries into credible allegations that secret Central Intelligence Agency “black sites” were established on their territories.⁴⁸

Category III

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

74. Individuals should not be expelled to another country when there are substantial grounds for believing that their lives would be at risk or that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment.⁴⁹ This is sometimes considered under the principle of non-refoulement. Torture itself is a peremptory norm of international law, article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁰ The prohibition of torture, which is non-derogable, including during the fight against terrorism because of its status as a *jus cogens* norm, encompasses the obligation to investigate alleged violations promptly and bring perpetrators to justice and the prohibition of the use of evidence obtained under torture in legal proceedings.⁵¹

⁴⁷ Opinion No. 84/2020, para. 72.

⁴⁸ A/HRC/49/45, para. 37 (d).

⁴⁹ A/HRC/48/55, para. 59; A/HRC/13/42, para. 36; and A/HRC/4/40, para. 49; see also opinions No. 47/2005, paras. 19–20; No. 53/2016, paras. 59–60; No. 11/2018, para. 54; and No. 15/2021, para. 94.

⁵⁰ The Working Group notes the reservations to article 7 of the Covenant and to the Convention against Torture. However, it considers that the alleged treatment of Mr. al-Nashiri is of such a grave nature that it would violate any internationally accepted definition of torture and cruel, inhuman or degrading treatment or punishment.

⁵¹ Opinion No. 89/2017, paras. 41–45.

75. The Working Group notes that Mr. al-Nashiri was transferred from the United States to the custody of (or under the control of or with the assistance of) Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand and the United Arab Emirates as part of the extraordinary rendition programme. Given that the whole extraordinary rendition programme system was established outside of the usual legal controls, and given the information set out above regarding the role of those States in carrying out mistreatment on behalf of the United States or participating in the programme with knowledge of its nature, the Working Group considers that, along with the United States, Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand and the United Arab Emirates had, at minimum, substantial grounds to believe that Mr. al-Nashiri would be subjected to torture or cruel, inhuman or degrading treatment as a result of his inclusion in the extraordinary rendition programme. The Working Group recalls the conclusion of the European Court of Human Rights that the rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the United States Constitution and international law against arbitrary detention. The whole scheme had to operate outside the jurisdiction of the United States courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities.

76. The Working Group notes with grave concern the allegations regarding the use of enhanced interrogation techniques by the Central Intelligence Agency on Mr. al-Nashiri. Considering the source's detailed submissions, and in the absence of a governmental response, the Working Group finds credible the source's allegations of extreme physical and psychological torture against Mr. al-Nashiri, in violation of the absolute prohibition of torture as a peremptory norm of international law, article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture.⁵² It is also cognizant of the determination of the European Court of Human Rights that he was tortured and ill-treated.⁵³ The Working Group further notes that the denial of medical care can constitute a form of torture.⁵⁴ The Working Group calls upon the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States to investigate the alleged torture and mistreatment of Mr. al-Nashiri, in accordance with their obligations under articles 4, 12 and 13 of the Convention against Torture, and to prosecute anyone found to have been involved.

77. Taking into account the severity of the alleged torture and its impact upon Mr. al-Nashiri, as detailed above, the Working Group considers it extremely unlikely that he would have been able to effectively participate in the legal proceedings that were conducted (or in any future legal proceedings), reinforcing the conclusion that his right to a fair trial was violated.⁵⁵ The Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

78. The Working Group recalls the articles on responsibility of States for internationally wrongful acts, particularly article 16, on aid or assistance. For the reasons set out above, it considers that the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States are jointly responsible for the torture and cruel, inhuman or degrading treatment of Mr. al-Nashiri, and that this deprives him of the meaningful ability to benefit from a fair trial, should a trial ever occur. These violations of article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2, 15 and 16 of the Convention against Torture result in serious violations of article 14 of the Covenant, which render the detention arbitrary under category III.

⁵² Opinion No. 89/2017, paras. 41–45.

⁵³ European Court of Human Rights, *Al-Nashiri v. Poland*, Application No. 28761/11, Judgment, 24 July 2014, paras. 511–516, and *Al-Nashiri v. Romania*, paras. 670–675.

⁵⁴ A/HRC/38/36, para. 18; opinions No. 20/2022, para. 103; No. 46/2022, para. 83; and No. 54/2022, para. 91.

⁵⁵ Opinions No. 29/2017, para. 63; No. 47/2017, para. 28; No. 52/2018, para. 79 (j); and No. 53/2018, para. 77 (c). See also E/CN.4/2004/3/Add.3, para. 33.

Additional category III

79. The source alleges that the United States failed to observe international fair trial guarantees. On procedural safeguards relevant to category III, while there is considerable overlap with the issues raised in category I, the analysis below builds on that discussion, with a specific focus on matters of fair trial and due process.

80. Mr. al-Nashiri has been deprived of his liberty for more than 20 years with no indication when, if ever, he will be brought to trial or released. Such a prolonged period with no resolution of proceedings is excessive, unfair and contrary to due process. It violates Mr. Nashiri's rights, under article 9 (3) of the Covenant, to be tried within a reasonable time, and under article 14 (3) (c) of the Covenant, to be tried without undue delay.⁵⁶ Such a long delay is particularly problematic as he will be significantly hampered in his ability to recall events and thus to present a defence, should any trial ever occur. Principles applicable to the deprivation of liberty of persons accused of acts of terrorism include the right to a fair trial.⁵⁷ Legal provisions under international humanitarian law allowing the United States to hold belligerents without charges or access to counsel for the duration of hostilities cannot be invoked to justify their detention.⁵⁸

81. The source alleges that Mr. al-Nashiri saw a lawyer for the first time in 2008, six years after being detained. All persons deprived of their liberty have the right to legal assistance by counsel at any time during detention, including immediately after apprehension.⁵⁹ Based on the source's unrefuted submissions, the Working Group thus concludes that Mr. al-Nashiri was not afforded this right under article 14 (3) (b) of the Covenant and principles 11 (2), 17 and 18 of the Body of Principles. Even when he was allowed access to lawyers, the United States authorities reportedly monitored Mr. al-Nashiri's conversations and limited attorney-client confidentiality. The confidentiality of lawyer-client communications must be respected as an essential fair trial guarantee.⁶⁰ Lack of access to counsel or the denial of the right to communicate privately with counsel contributes to the characterization of detention as arbitrary.

82. On Mr. al-Nashiri's hearing before the Combatant Status Review Tribunal in 2007, the Working Group considers that these proceedings did not meet the standards of article 14 (1) of the Covenant. The procedures of the Combatant Status Review Tribunal are not adequate to satisfy the right to a fair and independent trial.⁶¹ The source submits that the United States did not respect the equality of arms and failed to ensure that a lawyer was available. A personal representative, who did not act as counsel, was appointed for Mr. al-Nashiri. Mr. al-Nashiri was reportedly not permitted access to any classified evidence against him or allowed to refute the accusations made against him. Absent any Government response, the Working Group thus finds that Mr. al-Nashiri's rights under articles 14 (1), 14 (3) (b) and 14 (3) (e) of the Covenant were violated.⁶² The Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.

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

⁵⁶ Opinion No. 89/2017, para. 54.

⁵⁷ A/HRC/7/4, paras. 59–73.

⁵⁸ E/CN.4/2006/120, paras. 19 and 21.

⁵⁹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8.

⁶⁰ Ibid., principle 9, para. 15, and guideline 8, para. 69; the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 61 (1); see also opinions No. 89/2017, para. 53; and No. 83/2018, paras. 62–63.

⁶¹ Opinions No. 2/2009, para. 32; No. 10/2013, para. 35; No. 50/2014, para. 72; No. 89/2017, para. 46; No. 3/2018, para. 57; No. 73/2018, para. 61; No. 4/2019, para. 58; and No. 46/2019, para. 66. See also A/HRC/27/48, paras. 66–71 and 85–86.

⁶² Opinions No. 19/2005, para. 28 (b); No. 50/2014, para. 77; No. 89/2017, para. 56; No. 18/2018, para. 53; and No. 78/2018, paras. 78–79.

Category V

84. The source submits that Mr. al-Nashiri, a Muslim, is being held in indefinite detention on a discriminatory basis because of his status as a foreign national and his religious beliefs, noting that Guantanamo Bay is a military detention camp holding exclusively Muslim foreign nationals. The source notes that the Inter-American Commission on Human Rights concluded that the detention regime in Guantanamo was created for the specific purpose of detaining “foreign Muslim men” and “the existence of a particularly severe detention regime and a severely restrictive justice system exclusively designed to hold and try aliens, all of them Muslim, constitutes a violation of the non-discrimination clause in the American Declaration”. The Working Group has previously found the detention of individuals in Guantánamo to be discriminatory.⁶³

85. The Working Group thus finds that Mr. al-Nashiri has been deprived of the fair trial guarantees that would ordinarily apply within the judicial system of the United States. By discriminating on the basis of this status as a foreign national and his religion, the United States has denied Mr. al-Nashiri equality before the law in violation of articles 2, 5 (a) and (b) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,⁶⁴ articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant⁶⁵ and indicate arbitrary detention under category V.

Concluding remarks

86. The Working Group is concerned about the physical and mental well-being of Mr. al-Nashiri, who has been arbitrarily detained for more than 20 years. It recalls the findings in October 2015 by an expert medical doctor appointed by the Department of Defense, stating that he was a most severely traumatized individual, that there was no present effort to treat the damage done to him and that there appeared to be efforts to block others from giving him appropriate clinical care.

87. The submissions that Mr. al-Nashiri was tortured stand unrefuted, and the European Court of Human Rights has confirmed them. The Working Group notes that medical care at Guantanamo Bay has been and remains grossly deficient. The Working Group is obliged to remind the Government of the United States that all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person, in accordance with article 10 of the Covenant. Denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular rules 1, 24, 25, 27 and 30. The Working Group refers the case to the Special Rapporteur on the right to health.

88. While the Working Group has specifically addressed Mr. al-Nashiri’s case in this opinion, the conclusions reached here also apply to other detainees in similar situations at Guantanamo Bay. This is one of several cases brought before the Working Group concerning arbitrary detention in Guantanamo.⁶⁶ Under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty, in violation of international law, may constitute crimes against humanity.⁶⁷

89. The Special Rapporteur on counter-terrorism and human rights has underscored the evolution of practices from secret detention to transnational transfer in counter-terrorism contexts: an abject lack of adherence to fundamental human rights norms, thin lines of

⁶³ Opinions No. 10/2013, No. 50/2014, and No. 70/2019; see also [CERD/C/USA/CO/7-9](#), para. 22; and opinion No. 89/2017, para. 62.

⁶⁴ Committee on the Elimination of Racial Discrimination, general recommendation 30 (2004), paras. 19–21, and general recommendation 31 (2005).

⁶⁵ The United States Government has expressed its understanding of articles 2 and 26 of the Covenant that distinctions based on factors such as race or religion are permitted when such distinctions are rationally related to a legitimate government objective. However, the Government has not explained how military commissions, which have in practice only prosecuted Muslim men who are not United States nationals, are a proportionate means of achieving a legitimate objective. Declarations and reservations to the Covenant are available at <https://treaties.un.org>.

⁶⁶ Opinions No. 2/2009, No. 3/2009, No. 10/2013, No. 50/2014, and No. 89/2017.

⁶⁷ Opinion No. 47/2012, para. 22.

judicial oversight, meagre to non-existent legal and/or political accountability, targeting of religious and ethnic minorities, and a high degree of tolerance by democratic and non-democratic States alike for the subversion of the rule of law to enable persons to be rendered to jurisdictions where they have a high likelihood of being subjected to arbitrary detention, surveillance, and torture and other cruel, inhuman and degrading treatment or punishment.⁶⁸

90. As the Working Group stated during its visit to the United States in 2016, it remains deeply concerned about the ongoing operation of the detention facility at Guantanamo Bay. The closure of Guantanamo was previously an important priority of the Government. The Working Group urges the Government to once again prioritize the closing of that facility. In the meantime, the Working Group urges the Government to cooperate with United Nations human rights mechanisms.

91. The Working Group would welcome an invitation to undertake a follow-up visit to the United States, with specific authorization to visit Guantanamo Bay. According to the terms of reference for country visits by the Working Group, such a visit would need to be conducted under conditions that allow its members to have unrestricted full access to the facility and to hold private and confidential interviews with any detainee.⁶⁹

Disposition

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

Regarding the United States:

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

Regarding Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand and the United Arab Emirates:

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

93. The Working Group requests the Governments of Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States, found to be responsible for the violations of the rights of Mr. al-Nashiri, to take the steps necessary to remedy the situation of Mr. al-Nashiri without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

95. The Working Group urges the Governments found to be responsible for the violations of his rights, as detailed herein, to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. al-Nashiri, including an independent inquiry into his allegations of torture, and to take appropriate measures against those responsible for the violation of his rights.

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

⁶⁸ A/HRC/49/45, para. 5.

⁶⁹ See <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention>; see also the revised terms of reference for country visits by Special Procedures mandate holders of the Human Rights Council (www.ohchr.org/sites/default/files/Documents/HRBodies/SP/ToRs2016.pdf).

Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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

Follow-up procedure

98. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, United Arab Emirates and the United States to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. al-Nashiri has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. al-Nashiri;
- (c) Whether an investigation has been conducted into the violation of Mr. al-Nashiri's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the States concerned with their international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

99. Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States are invited to inform the Working Group of any difficulties that they may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

100. The Working Group requests the source and Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, the United Arab Emirates and the United States to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

101. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁷⁰

[Adopted on 15 November 2022]

⁷⁰ Human Rights Council resolution 51/8, paras. 6 and 9.