

**Opinion No. 3/2009 (United States of America)****Communication addressed to the Government on 7 July 2009****Concerning Mr. Sanad Ali Yislam Al-Kazimi****The State is a party in the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it, on 21 November 2008, with information concerning the allegations of the source. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Mr. Sanad Ali Yislam Al-Kazimi (hereafter Mr. Al-Kazimi), is a citizen of Yemen, born on 17 February 1970; currently detained at the United States Naval Base at Guantánamo Bay, Cuba (hereafter Guantánamo). Mr. Al-Kazimi, married in 1994, has two daughters, aged 13 and 11, and two sons, aged 12 and 9. He left Yemen in May 2002 to find work in the United Arab Emirates.
5. Mr. Al-Kazimi was apprehended in Dubai in January 2003 and held at an undisclosed location in or near Dubai for two months. He was then transferred to a different

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<sup>20</sup> Working Group on Arbitrary Detention, Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add.1, p. 29, para. 36, concurring with the Human Rights Committee's general comment No. 29, on article 4: Derogations during a state of emergency, para. 15.

place about two hours away. He was kept naked for 22 days, at times shackled, and subjected to extreme climatic conditions and simulated drowning. After six months, he was then transferred to United States custody, allegedly pursuant to a United States Central Intelligence Agency (CIA) rendition programme, and taken to Kabul, Afghanistan, where he was held in the so-called “Prison of Darkness” for nine months. In this prison, he suffered severe physical and psychological torture by unidentified persons. He was then transferred to Bagram Airbase in Afghanistan where he was held for a further four months in United States custody. Again, he was allegedly subjected to severe physical and psychological torture by what he believed were the same unidentified persons he encountered in the “prison of darkness”.

6. On or around 18 September 2004, Mr. Al-Kazimi was transferred to Guantánamo, where he is currently held in incommunicado detention without charge. It is believed he has again suffered severe physical and psychological mistreatment.

7. There is information indicating that the continuation of Mr. Al-Kazimi’s detention constitutes a serious danger to his physical and psychological health. He has been diagnosed with adjustment disorder and a personality disorder and may additionally have clinical depression.

8. It was recalled that in 2004, following the judgment of the United States Supreme Court in the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the United States Department of Defense (US DoD) created the Combatant Status Review Tribunals (CSRTs) to review the “enemy combatant” status of detainees. It is alleged that CSRT procedures depart from basic requirements of due process; fair trial procedures, and fundamental human rights. During CSRT hearings, which are closed to the public, detainees are prohibited from rebutting evidence; denied legal counsel; required not to disprove their guilt; and are compelled to self-incrimination.

9. In addition, although the CSRT procedures require its personnel to collect exculpatory evidence from other government agencies, these agencies allow CSRT personnel access only to “pre-screened and filtered” information. Access to many intelligence databases, required to further search for relevant information, is also denied. CSRT procedures also create an unreliable body of evidence by permitting the panel to consider “hearsay” evidence and evidence allegedly procured by torture. Thus, the CSRT is permitted to rely on conclusions and evidence obtained through coercion and torture and is not required to conduct even cursory inquiries into the source of such information to assess its reliability and probative value. The vast majority of the CSRT panels’ decisions are based on classified evidence, which detainees are prohibited from accessing.

10. Virtually all of the evidence the Government presented to the CSRT was classified and therefore concealed from Mr. Al-Kazimi. The evidence that was presented to him was unreliable and one-sided, providing Mr. Al-Kazimi with no opportunity to fairly and effectively defend himself. Nor did Mr. Al-Kazimi have any real opportunity to introduce any evidence of his own. Coupled with the fact that all the Government’s evidence was presumed true, and his inability to have legal counsel, it was impossible to Mr. Kazimi to refute the charges against him.

11. The source adds that CSRT procedures provided Mr. Al-Kazimi with no meaningful notice of the alleged factual basis for his continued detention. At his CSRT hearing in 2004, Mr. Al-Kazimi was denied a fair and public hearing; he had no access to legal counsel; he was accused on the basis of unreliable and one-sided evidence which he could not contest; he was not brought before a judicial authority within a reasonable time; and he was never informed of his fundamental rights. The source claims that CSRT procedures in no way provided Mr. Al-Kazimi with the minimum international standards required by the

Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which the United States of America is a State party.

12. The CSRT procedures state that the “detainee shall not be represented by legal counsel” (Ex. 10, Implementation Procedures at Encl. 1, p. 4). The “personal representative” who is assigned to each detainee is not a lawyer and does not advocate for the detainee’s interests. The script for the personal representative’s first meeting with the detainee instructs that “I am neither a lawyer nor your advocate... None of the information you provide me shall be held in confidence, and I am obligated to divulgate it at the hearing” (Ex. 10, Implementation Procedures at Encl 3, p.3). The appointment of a “personal representative” to Mr. Al-Kazimi in no way satisfied his right to counsel as required by international law.

13. The CSRT rules require it to presume that the Government’s evidence of “enemy combatant status” is genuine and accurate (Ex. 10, Implementation Procedures at Encl. 1, p. 6). This presumption places the burden on the detainee to disprove his guilt.

14. CSRT proceedings are structurally biased against detainees, both because the CSRT panel is composed of military personnel (specifically three officers of the United States Armed Forces) who owe formal allegiance to the detaining authority and because the CSRT rules require a presumption in favor of the Government’s evidence. Mr. Al-Kazimi did not receive a hearing by an independent and impartial tribunal as required by international law.

15. The source adds that Mr. Al-Kazimi was not brought before a judicial authority within a reasonable amount of time. At no point during his detention in the United Arab Emirates, Afghanistan or at Guantánamo Bay was Mr. Al-Kazimi ever brought before any kind of judicial authority. He was never informed of his fundamental rights. Additionally, the United States Government never gave him the option of communicating with a Yemeni consular representative or the Yemeni Government in order to seek assistance from an official in his own country. He was denied communication with the outside world.

16. Although the Working Group does not consider itself in a position to determine whether detainees in Guantánamo are entitled to prisoner-of-war (POW) status under the Geneva Conventions, it is however competent to undertake the task of appreciating whether the absence of minimum guarantees provided under articles 9 and 14 of the International Covenant on Civil and Political Rights may give detention an arbitrary character. Furthermore, the source believes that the obligations of the United States under the International Covenant on Civil and Political Rights unequivocally apply since the State has not at any time discussed, let alone implemented, the procedural requirements for the derogation from the Covenant. Thus, the United States obligations under the International Covenant unequivocally apply.

17. The source concludes that Mr. Al-Kazimi’s detention is arbitrary because it fails to meet international standards relating to the right to a fair trial pursuant to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

18. The Government responded to the above allegations presenting its position on the case under three broad areas, i.e., detention of enemy combatants; treatment in detention and applicable international law.

19. Regarding the first point, the United States Government reiterates its stated position on the Guantánamo detainees by describing them as “enemy combatants” and thus possessing no right to a fair trial and other related rights accorded to accused persons. It argues that Mr. Al-Kazimi is an enemy combatant and deserves the detention and treatment meted out to him. Further, that the CSRT procedure, the Administrative Board Review and the recently permitted right to challenge their detention in the Federal court provides “an unprecedented protection to the detainees in the history of war”.

20. Regarding the treatment in detention of Mr. Kazami, the United States Government denies any acts of torture and/or abuse. It presents a detailed account of the medical facilities available and accessible to detainees as well as avenues for redress of any ill treatment by officers of the detention facility. The Government also offered some confidential details of the health condition of Mr. Al-Kazami which in its view has been dealt with adequately.

21. On the third and final point of applicable international law to Mr. Al-Kazami, the United States Government believes that he falls within the category of enemy combatant and therefore the rights to a fair trial and so on outlined under the International Covenant on Civil and Political Rights do not apply. Further, its interpretation of article 2, paragraph 1, of the International Covenant on Civil and Political Rights implies that the geographical location of Guantánamo falls outside its territory; hence detainees held in that facility are outside the protection of the relevant rights enumerated in the International Covenant.

22. As per the methods of work of the Working Group on Arbitrary Detention, the response of the Government was transmitted to the source for its comments, and are summarized below.

23. The source believes that the response of the Government does not fully address their initial submission. For instance, it asserts that while Mr. Al-Kazami's detention was reviewed through the CSRT in the case of *Boumediene v. Bush*, the United States Supreme Court concluded that the review provided by this tribunal was "inadequate". The CSRT procedures departed in numerous ways from the basic requirements of due process, fair trial procedures, and fundamental human rights. The source refers to its submission explaining how he was (a) not brought before a judicial authority within a reasonable amount time; (b) never informed of his rights; (c) required to disprove his presumed guilt; and, (d) denied legal counsel. The review was not conducted until almost two years after Mr. Al-Kazami was secretly detained, tortured and then transferred to Guantánamo.

24. The source argues that while the United States Government asserts that Mr. Al-Kazami is "being detained pursuant to the law of war", there has yet to be any proceeding that examines whether the detention is in fact justified pursuant to international humanitarian law. The CSRT proceedings were designed to confirm that the prisoners at Guantánamo were "enemy combatants", but the laws of war do not authorize indefinite military detention based on the United States Government's expansive definition of this designation.

25. According to the source, while the Government asserts that "the purpose of this detention is to prevent them from returning to the battlefield", there is no procedure in place that applies this factor in examining whether or not continued detention is necessary. The ARB that conducts annual post-CSRT reviews to determine the need for continued detention does not even consider this as a key factor in its decision making process; instead it looks at (a) whether the detainee poses any danger to the United States and its allies; (b) whether the detainee continues to have any intelligence value; and (c) whether there is any other reason to detain.<sup>21</sup>

26. The source further suspects that the Government continues to delay the meaningful review by Federal courts to which the detainee is now entitled by filing motion after motion thwarting the judges' efforts to further the speedy resolution of all habeas corpus cases

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<sup>21</sup> Memorandum from Department of Defense, Administrative Review Board Process, §3(f) "Standards and Factors to be Considered by the ARB" (Jul. 13, 2006) available at [www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf](http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf). Indefinite detention for the purpose of interrogation is not permissible under the Law of War. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2006).

before them. It also continues to use secret evidence and resist disclosure of exculpatory evidence. Such conduct demonstrates the Government's repeated failure to observe Principle 11, paragraph 1, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>22</sup> "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority".

27. The source also argues that the response of the Government does not address the secret detention of Mr. Al-Kazimi in the United Arab Emirates and Afghanistan; nor does it address the allegations of torture and abuse during this period of secret detention or the fact that it only applied Common article 3 of the Geneva Conventions after the United States Supreme Court held that it was mandatory to do so in *Hamdan v. Rumsfeld* at the end of June 2006. Finally, the source claimed insufficient attention in the Government response to harsh interrogation techniques as well as the health condition of Mr. Al-Kazami.

28. Based on the range of documentation and information received, the Working Group believes itself to be in a position to render an Opinion on this case.

29. The United States Government appears to adopt the position that the definition of what constitutes a state of war, an enemy combatant and other international laws governing armed conflict have undergone a modification in a post-September 11th world. This seems to be the main justification for detention of persons from any jurisdiction in the world, detaining them without a warrant or informing family of the detainee, as well as denying basic minimum rights under international humanitarian law and human rights law (such as the International Covenant on Civil and Political Rights, to which the United States of America is a State party).

30. The Working Group perceives a number of deficiencies in this position and stance of the United States Government and would like to recall its position adopted in its "Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay".<sup>23</sup> In an Opinion rendered the Working Group stated that it "would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complimentary and not mutually exclusive. In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied".<sup>24</sup>

31. The Working Group is unable to bring into the fold of legality the secretive methods of detention, interrogation and rendition adopted by the United States in its detention of Mr. Al-Kazimi, as it does not find support in national and international law to this effect. It does not find legal support for the act of arrest of Mr. Al-Kazimi in Dubai, removal to an unnamed location for six months, relocation to Afghanistan and being held there for nine months, followed by another four months before being removed to Guantánamo Bay on 18 September 2004, where he continues to be held.

32. The Working Group further notes that the United States Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process, fair trial, or any meaningful review in respect of both.

33. The Working Group would further like to recall here the joint report<sup>25</sup> of five special procedures mandates holders of the former Commission on Human Rights in which it was

<sup>22</sup> General Assembly resolution 43/173.

<sup>23</sup> E/CN.4/2003/8, p. 19, paras. 64 *et seq.*

<sup>24</sup> Opinion No. 44/2005 (Iraq and the United States of America), A/HRC/4/40/Add.1, p. 25, para. 13.

<sup>25</sup> E/CN.4/2006/120.

stated quite categorically that “The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of the International Covenant on Civil and Political Rights, and to obtain release if detention is found to lack a proper legal basis. This is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of the International Covenant on Civil and Political Rights”.<sup>26</sup>

34. The Working Group notes that the United States Government does not avail the opportunity of offering an explanation of the various facts related to the arrest, interrogation and detention either by acknowledging that these have indeed taken place as indicated by the source, or by denying the various detention periods.

35. The Working Group further notes that the Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process, fair trial, or any meaningful review in respect of both. Since 1991, the Working Group has adopted a clear position that it is not convinced that military tribunals and adjudicating processes offer the requisite protection of due process. To this end therefore, the CSRT and ARB are not adequate procedures to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.

36. It is relevant to note here that the United States has not derogated from substantive provisions of the International Covenant on Civil and Political Rights and thus remains bound by its provisions. Even if it had, the right to habeas corpus, although not explicitly enumerated in the catalogue contained in article 4 of the International Covenant on Civil and Political Rights, belongs to the non-derogable rights even in states of emergencies.<sup>27</sup>

37. In view of the above analysis, the Working Group renders the following Opinion:

The detention of Mr. Sanad Ali Yislam Al-Kazimi is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falls within Category III of the categories applicable to the consideration of cases submitted to the Working Group.

38. The Working Group requests the Government of the United States of America to remedy the situation of Mr. Sanad Ali Yislam Al-Kazimi and to bring it into conformity with applicable international human rights norms and standards as contained, *inter alia*, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Under the circumstances, the Working Group requests the Government of the United States to forthwith release Mr. Al-Kazimi from detention.

39. Finally, the Working Group welcomes the statement of the new United States Administration regarding its intention to shut down the detention facility at Guantánamo Bay and encourages it to implement this decision as soon as possible.

Adopted on 6 May 2009

<sup>26</sup> Ibid. at para. 84.

<sup>27</sup> Working Group on Arbitrary Detention, Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add.1, p. 29, para. 36, concurring with the Human Rights Committee’s general comment No. 29, on article 4: Derogations during a state of emergency, para. 15.