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No. 50/2014 (United States of America and Cuba)

Communication addressed to the Government of the United States of America on 25 August 2014 and to the Government of Cuba on 15 September 2014

concerning Mustafa al Hawsawi

The Government of the United States of America replied to the communication of 25 August 2014 on 29 September and 14 November 2014. The Government of Cuba has not responded to the communication of 15 September 2014.

The United States of America is a party to the International Covenant on Civil and Political Rights, by accession on 8 June 1992.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 International Covenant on Civil and Political Rights (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);

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

Submissions

Communication from the source

3. The case has been reported to the Working Group on Arbitrary Detention as follows:

4. Mustafa al Hawsawi, aged 45, is a native of Jeddah, Saudi Arabia. It is reported that on 1 March 2003, Mr. al Hawsawi was arrested during a raid in Rawalpindi, Pakistan. He was then imprisoned by government agents of the United States of America at undisclosed and classified locations, until his transfer to a top-secret prison at the United States Naval Base at Guantanamo Bay, Cuba, on 6 September 2006.

5. According to the source, the Government of the United States has acknowledged that, prior to his arrival at Guantanamo, Mr. al Hawsawi was part of the Central Intelligence Agency rendition, detention, and interrogation programme, which has now become known as the torture programme. Given that the Government of the United States has classified the details of the programme, Mr. al Hawsawi and his legal representatives are prohibited from revealing any circumstances of Mr. al Hawsawi's capture, including the identities of the personnel who carried out the arrest and subsequent detention, and any details of torture or other cruel, degrading or inhuman treatment to which he may have been subjected during that time.

6. Mr. al Hawsawi's legal representatives have been prohibited from meeting with him at his place of detention.

7. On 21 March 2007, Mr. al Hawsawi was brought before a Combatant Status Review Tribunal (CSRT). The Tribunal met for the purpose of determining whether Mr. al Hawsawi met the criteria to be designated as an enemy combatant against the United States of America or its coalition partners. The source reports that, instead of being assigned an attorney, Mr. al Hawsawi was assigned a one-time personal representative who was a military officer without any legal training.

8. The tribunal hearing lasted one hour and nine minutes, after which time it concluded that Mr. al Hawsawi met the definition of an unlawful enemy combatant, and that he should remain in detention. The source states that the tribunal failed to provide basic procedural protections, such as the exclusion of coerced statements and unreliable hearsay evidence and the ability to cross-examine witnesses, and that the Government's evidence was considered to be presumptively correct.

9. The source reports that Mr. al Hawsawi continued to be held without charges or legal representation until April 2008, when he was assigned a military lawyer not of his own choosing. Over five years after Mr. al Hawsawi's arrest, the Government of the United States provided notice of its intention to seek the death penalty against Mr. al Hawsawi, and charged him on numerous counts of violating the law of war. The violations included: murder, conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hijacking or hazarding a vessel or aircraft, terrorism, and providing material support for terrorism. A military commission was established for the purpose of trying Mr. al Hawsawi and four co-accused.

10. On 29 January 2009, all proceedings related to Mr. al Hawsawi's military commission ceased before a resolution was reached or before the case was brought before a jury, following the issuance of Presidential Executive Order 13492, directing the review and disposition of individuals detained at the Guantanamo Bay Naval Base and the closure of detention facilities there. Meanwhile, Mr. al Hawsawi remained in detention at the top-secret prison in Guantanamo Bay.

11. On 21 January 2010, all charges against Mr. al Hawsawi and the four co-accused were dropped. The source reports that Mr. al Hawsawi continued to be detained without charges until 31 May 2011, when the prosecution process was again initiated against Mr. al Hawsawi and the four co-accused. Currently, Mr. al Hawsawi is charged with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or causing hazard to a vessel or aircraft, and terrorism.

12. The source submits that the deprivation of liberty of Mr. al Hawsawi is considered arbitrary and falls within category I of the Working Group's defined categories of arbitrary detention. The domestic law utilized by the Government of the United States for detention does not conform to international human rights law and international humanitarian law, in particular article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, and principles 4, 10, 11, 12, 32, 36 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

13. The source reports that Mr. al Hawsawi has been subjected to prolonged and indefinite detention, without any legal basis or known charges against him for the five years following the date of his arrest. It argues that the arrest of Mr. al Hawsawi by unidentified government agents and his subsequent detention at undisclosed locations violate his right to be brought promptly before a judicial authority to challenge the legality of his detention. He has also been imprisoned for over 10 years without trial, and without the reasonable means to prepare for a trial. Further, as a result of the public statements of his guilt made by the authorities, his presumption of innocence has been compromised, in breach of article 11, paragraph 1, of the Universal Declaration of Human Rights, and principle 36 of the above-mentioned Body of Principles.

14. According to the source, Mr. al Hawsawi has been charged for acts which the international law of war does not recognize as a legitimate crime, that is, providing material support for terrorism, conspiracy and terrorism. The source submits that that is in contravention of article 11, paragraph 2, of the Universal Declaration of Human Rights, and the jurisprudence of the United States Court of Appeals for the District of Columbia.

15. The source also submits that Mr. al Hawsawi's deprivation of liberty falls within category III of the Working Group's defined categories of arbitrary detention. The detention of Mr. al Hawsawi is in total or partial non-observance of the international norms relating to a fair trial, enshrined in article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, and principles 15, 16,

17, 18 and 19 of the Body of Principles. The source highlights the fact that Mr. al Hawsawi was held without consular access, access to his family or access to legal counsel. Furthermore, Mr. al Hawsawi's CSRT hearing has been deemed defective by the Supreme Court of the United States as the hearing was reportedly conducted in secret, on the basis of unreliable evidence, and without Mr. al Hawsawi being permitted representation by qualified legal counsel.

16. According to the source, Mr. al Hawsawi's detention infringes principles 1, 6 and 33 of the Body of Principles, because he was detained as part of the Central Intelligence Agency's rendition, detention and interrogation programme, and no justification may be invoked for subjecting a detained individual to torture or to cruel, inhuman or degrading treatment or punishment. Further, Mr. al Hawsawi's detention contravenes principles 2, 13, 14, 21 and 23 of the Body of Principles, as it is not consistent with the legally recognized protocols for detention and interrogation. Mr. al Hawsawi was allegedly not entitled to an explanation of his legal rights during interrogations, and has also been deprived of the services of an Arabic translator dedicated to his case.

17. The source further submits that Mr. al Hawsawi's deprivation of liberty falls within category V of the Working Group's defined categories of arbitrary detention for reasons of discrimination based on his status as a foreign national. It argues that Mr. al Hawsawi is deprived of the due process and fair trial protections of legitimate criminal justice systems because of that status. Instead, he is subjected to the inadequate and inferior protections of the military commissions system. The source argues that that contravenes article 10 of the Universal Declaration of Human Rights, articles 14 and 26 of the International Covenant on Civil and Political Rights, and principle 5 of the Body of Principles.

Response from the Government of the United States of America

18. In the communications addressed to the Government of the United States of America on 25 August 2015 and to the Government of Cuba on 15 September 2014, the Working Group transmitted the allegations made by the source. The Working Group stated that it would appreciate it if the Governments could, in their replies, provide it with detailed information about the current situation of Mr. al Hawsawi and clarify the legal provisions justifying his continued detention. The Government of the United States of America replied to the communication of 25 August 2014 on 29 September and 14 November 2014. The Government of Cuba has not responded to the communication of 15 September 2014, which the Working Group regrets.

19. According to the Government of the United States, Mr. al Hawsawi continues to be detained lawfully under the Authorization for Use of Military Force (United States Public Law 107-40), which is informed by the laws of war, in the ongoing armed conflict with Al-Qaida, the Taliban and associated forces. That law authorizes the President of the United States to use all necessary and appropriate force against those organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on 11 September 2001, and includes the authority to detain persons who are part of Al-Qaida, the Taliban or associated forces.

20. All Guantanamo Bay detainees have the ability to challenge the lawfulness of their detention in a United States federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare instances required by compelling security interests, all of the evidence relied upon by the Government in habeas corpus proceedings to justify detention is disclosed to the detainees' counsel, who have been granted security clearance to view classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in those cases to establish its legal authority to hold the detainees. Detainees whose habeas

corpus petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the habeas corpus proceedings.

21. The Government notes that an attorney filed a habeas corpus petition on behalf of Mr. al Hawsawi in 2008 without Mr. al Hawsawi's authorization, leading to the dismissal of the petition in 2009. Mr. al Hawsawi has made no response to the filing of that petition.

22. Mr. al Hawsawi has been charged with crimes in relation to his alleged role in the planning and execution of the 11 September 2001 attacks. The charges have subsequently been referred to a military commission for trial. Eight charges were referred: conspiracy; murder in violation of the law of war; attacking civilians; attacking civilian objects; destruction of property in violation of the law of war; intentionally causing serious bodily injury; hijacking aircraft; and terrorism. Mr. al Hawsawi is presumed innocent unless proven guilty beyond a reasonable doubt. Pursuant to the requirements of the 2009 Military Commissions Act, Mr. al Hawsawi has been provided defence counsel with specialized knowledge and experience in death penalty cases. The proceedings are currently in the pretrial litigation phase.

23. Military commissions are a lawful and appropriate forum for trying violations of the law of war and other offences triable by military commission. All current military commission proceedings at Guantanamo Bay are governed by the 2009 Military Commissions Act, which instituted significant reforms to the system of military commissions. The reforms include prohibiting the admission at trial of statements obtained through cruel, inhuman or degrading treatment, in addition to torture, except for statements by individuals alleging that they were subject to torture or such treatment as evidence against a person accused of committing the torture or ill-treatment. All military commissions under the Military Commissions Act incorporate fundamental procedural guarantees, including: the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; prohibitions on the use of coerced evidence; additional evidentiary requirements for the admission of hearsay evidence; a requirement that an accused in a capital case be provided with counsel "learned in applicable law relating to capital cases"; the provision of latitude to the accused in selecting his or her own military defence counsel; and enhancements to the accused's right to discovery of evidence. The accused is convicted by a military commission and the conviction is subject to multiple layers of review, including judicial review in the United States Court of Appeals for the District of Columbia Circuit, a federal civilian court consisting of life-tenured judges, and ultimately by petition to the Supreme Court of the United States.

24. Further, the United States is committed to ensuring the transparency of commission proceedings. To that end, proceedings are now transmitted via live video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings and other materials are also available to the public online via the website of the Office of Military Commissions: www.mc.mil.

25. The United States has a strong interest in ensuring the detainees at the Guantanamo Bay detention facility have meaningful access to counsel in both habeas corpus and military commission proceedings. The Government respects the critical role of detainees' counsel in those proceedings and the fundamental importance of that role in the United States system of justice, and will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients. Presumptive classification has been a handling procedure to enable counsel to use information obtained from their clients while also safeguarding classified information. In response to defence concerns that that handling procedure unfairly burdens the attorney-client relationship, in September 2012, the Government of the United States requested a modification of the protective order

applicable to the military commission proceedings for Mr. al Hawsawi. That modification, which was granted by the military commission judge and reflected in the revised protective order issued in December 2012, removes the presumption of classification from statements made by Mr. al Hawsawi and is intended to clarify that defence counsel, who have always had the ability to discuss with their client a broad range of topics directly related to the military commission proceeding, may now publicly discuss information unless they have reason to know it is classified. Additionally, the military commission procedures provide for a robust attorney-client privilege, which is not waived by any application of the handling procedures required by the protective order.

26. According to the applicable counsel access procedures, defence counsel must hold a valid, current United States security clearance at the appropriate level in order to have in-person access to detainees at Guantanamo Bay. The counsel access procedures governing prosecutions by military commissions are modelled on the counsel access procedures applicable to counsel representing detainees in habeas corpus cases, which were issued by a United States federal court. The procedures balance the strong interest in counsel access with the need to comply with United States law and regulations regarding the protection of classified national security information.

27. As holders of a valid United States security clearance, detainees' defence lawyers are obliged to protect classified information acquired in the course of their representation of individuals detained at Guantanamo Bay according to applicable United States law and regulations, and signed agreements between the holder of the clearance and the Government of the United States. All holders of United States security clearances are subject to those same obligations.

28. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay. On one of his first days in office, 22 January 2009, President Obama issued Executive Order 13491, Ensuring Lawful Interrogations. The Executive Order directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with United States domestic law, treaty obligations, and United States policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee or other agent of the Government of the United States or detained within a facility owned, operated or controlled by a department or agency of the United States. It also ordered that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The Executive Order revoked all previous executive directives, orders and regulations that were inconsistent with that Order. All United States military detention operations, including those at Guantanamo Bay, comply with article 3 common to the four Geneva Conventions, and other applicable international laws.

29. Regarding the former detention and interrogation programme referenced in the Working Group's letter, President Obama has made clear that certain aspects of that programme were inconsistent with the values of the United States as a nation. One of the President's first acts in office was to sign Executive Order 13491, which brought an end to that programme.

30. For some time, the Obama Administration has made clear that the 500-page document containing the findings and conclusions and the executive summary of the final report of the Senate Select Committee on Intelligence on the former detention and interrogation programme should be declassified and released by the Senate Committee, with appropriate redactions necessary to protect national security.

Comments from the source

31. On 19 November 2014, the source submitted its comments on the response of the Government of the United States.

32. According to the source, the Government's response is based on policy statements which do not reflect the actual practices at Guantanamo Bay. The petitioner respectfully directs the Working Group's attention to concrete facts which conclusively demonstrate the arbitrary character of the detention scheme currently in place at Guantanamo Bay. Arbitrary and prolonged detention at Guantanamo Bay is affecting not only Mr. al Hawsawi, but all Guantanamo Bay detainees who are in a similar situation.

33. As previously observed, Guantanamo Bay detention policies continue to be arbitrary because the Government of the United States justifies the detentions with domestic policies that do not actually conform to human rights law and international humanitarian law, and which instead allow and promote prolonged and indefinite detention. Mr. al Hawsawi's detention and that of Guantanamo detainees in a similar situation are also arbitrary because the Government's military commission system violates international norms recognizing the right to a fair trial, as spelled out in the Universal Declaration of Human Rights and other international instruments accepted by the States concerned. Those violations are of such gravity that they constitute arbitrary detention.

34. Nothing in the Government's response negates the fact that its detention scheme at Guantanamo Bay continues to violate international law by discriminating against detainees based on their status as foreign nationals.

35. The following facts conclusively rebut the Government's response and demonstrate the arbitrary character of the detention scheme at Guantanamo Bay.

36. The Authorization for Use of Military Force (Public Law 107-40) sets forth absolutely no definition of what an "ongoing armed conflict with Al-Qaida, the Taliban or associated forces" means, nor any timeline. The blanket authorization apparently authorizes detention in perpetuity. Additionally, prosecutors from the Government of the United States at Guantanamo Bay have indicated that, even if a Guantanamo detainee is acquitted by a military commission, the Authorization for Use of Military Force still authorizes his indefinite detention. Therefore, justice is impossible at Guantanamo Bay. Even an acquittal would not provide meaningful redress.

37. The Government asserts that all Guantanamo detainees can challenge their detention in a United States federal court through a writ of habeas corpus. That is a hollow promise. United States courts treat habeas corpus petitions by Guantanamo detainees differently from those submitted by United States prisoners. All Guantanamo petitions are handled by the Federal Court for the District of Columbia Circuit, which has created a separate body of law specifically for Guantanamo habeas corpus petitions. That body of law has ensured that all Guantanamo habeas corpus petitions since 2009 have been denied except one, and in that case the Government itself recommended the detainee's release.

38. The Government affirms that Mr. al Hawsawi has been provided with one counsel with specialized knowledge and experience in death penalty cases. That is true, but the appropriate representation standards for death penalty cases, as set forth by the American Bar Association, require at least two attorneys with significant knowledge and experience in the defence of death penalty cases. The Government has consistently opposed ethical resourcing for death penalty cases at Guantanamo Bay. Counsels at Guantanamo Bay have been denied access to classified evidence even though they possess the requisite security clearances. Ethical death penalty defence requires adequate resourcing and access to evidence. They are non-existent at Guantanamo Bay.

39. The Government continues to affirm that proceedings at Guantanamo Bay are governed by the 2009 Military Commissions Act, which purportedly introduced significant procedural protections and reforms. The Government claims that they include the prohibition of evidence obtained through torture, coercion or cruel, inhuman or degrading treatment. It also claims "additional evidentiary requirements" to protect against the introduction of hearsay evidence, and "enhancements to the accused's right to discovery of evidence". In reality, the military commission system lacks adequate procedural safeguards and meaningful mechanisms for redress for the indefinite and prolonged detention to which men in Guantanamo Bay are currently subjected. The facts are as follows.

40. The Military Commission Rules of Evidence (MCRE) provide:

- That evidence derived from torture is admissible under MCRE 304(5)(A)(ii);
- That evidence derived from coerced statements is admissible under MCRE 304(5)(B)(i)(ii);
- Lowered standards of admissibility for hearsay evidence, in that hearsay evidence is broadly admissible under MCRE 803(b). That rule states that hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts martial may be admitted in trials by military commission.

41. Furthermore:

- Anyone who represents Guantanamo Bay detainees must be approved by the United States Department of Defense. Foreign legal representatives of the detainee's choosing may not appear in military commission proceedings. The Government has denied Mr. al Hawsawi the opportunity to meet personally with international legal representatives willing to act on his behalf and challenge his arbitrary detention in international human rights courts;
- The Government of the United States continues to prohibit Guantanamo detainees from meeting with representatives of their Government. For instance, the Government of Saudi Arabia has been prohibited from meeting with Mr. al Hawsawi, who is a Saudi Arabian national;
- There are no enhanced rights to discovery of evidence. To date, prosecutors from the Government of the United States at Guantanamo Bay continue to deny access to evidence. Large amounts of necessary evidence may never be disclosed to Guantanamo Bay detainees.

42. The United States alleges that the Government remains committed to ensuring the transparency of commissions proceedings. However, Government prosecutors in Guantanamo Bay have consistently opposed requests by media organizations and defence representatives to open the proceedings to the general public beyond a few sites on largely inaccessible military installations. United States intelligence agencies have interfered with judicial proceedings, for example by shutting off the sound broadcast of a public hearing without the knowledge or approval of the Military Judge. The Federal Bureau of Investigation recently infiltrated defence teams by recruiting members as confidential informants. Those concrete examples of external governmental manipulation demonstrate that, while the Government may say it is committed to transparency, its current practices contradict such claims.

43. Since February 2014, no substantive legal challenges by Mr. al Hawsawi have been addressed by the military law of war court. That is due to interference by the Federal Bureau of Investigation and the repercussions thereof. While Mr. al Hawsawi has repeatedly asked the military law of war court to address his legal challenges, the military

court has been unwilling to entertain any substantive legal challenges and will not do so anytime in the near future.

44. The Government's practice of over-classification of evidence undermines any claims that it is committed to transparency. The practice shields government agents from embarrassment and criminal accountability based on their flagrant violations of human rights law. Rather than promoting open and confidential communications between detainees and counsel, new policies ensure that detainees such as Mr. al Hawsawi are effectively silenced and prohibited from exercising their independent right of action before international tribunals as victims of torture.

45. According to the source, the Government of the United States has extended the practice of over-classification to classify the wish of Guantanamo Bay detainees to disclose their own life experiences and observations, particularly their experience of torture at the hands of the Government. Thus, in October 2013, the Military Judge questioned United States Prosecutor Clayton Trivett, the Managing Deputy Trial Counsel for the Chief Prosecutor. The colloquy went as follows:

> Military Judge: The question becomes, "Is the Government's position on life experiences — I'm going to use that term — of the accused, that they know personally, would that be classified information?"
>
> Mr. Trivett: Yes.
>
> Judge Pohl: Okay. Then I come back to the executive order about being in control of the United States Government, I'm not paraphrasing it.
>
> Mr. Trivett: Yes.
>
> Judge Pohl: Is that considered in control of the United States Government, if it's in the accused's brain?
>
> Mr. Trivett: The accused are currently in control of the United States Government. That's one part of the analysis.
>
> Judge Pohl: Okay.
>
> Mr. Trivett: The second part of the analysis is the fact that the accused were exposed to sensitive sources and methods[1] that were produced by the Government of the United States.

46. The practices in place reveal not a commitment to transparency, but rather a commitment to secrecy and unaccountability. For instance, the identities of government agents who tortured men is deemed classified and their identities have not been provided even to defence counsel who possess the requisite security clearances. The names of countries and locations where men were held and tortured remain classified. The details of the agreements between the United States and liaison countries remain classified.

47. United States Prosecutors, led by Chief Prosecutor Brigadier General Mark Martins, refuse to turn over classified evidence to defence teams unless they sign an agreement (a Memorandum of Understanding) that would essentially make the attorneys complicit in the denial of the torture victims' rights by compelling defence counsel to police their own clients and prevent them from speaking about the torture they endured. Thus:

[1] According to the source of the submission, "sources and methods" is a government euphemism. "Sources" refers to the identities of the torturers. "Methods" refers to the torture techniques themselves.

- Recently, the name of a specific non-governmental organization advocating on behalf of a Guantanamo detainee has been deemed classified;
- References to specific geographical continents have been classified;
- The names of specific legal cases brought on behalf of Guantanamo detainees in international forums have been classified;
- The name of a specific international human rights court has been classified.

48. The response of the Government was that "The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay ... The Executive Order directed that all individuals detained ... shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. Policy".

49. The facts show otherwise. Mr. al Hawsawi is held in a secret detention camp, where a government investigation has acknowledged that the conditions are the worst in the Guantanamo prison. In 2012, another detainee in the same camp agreed to plead guilty. Part of his agreement was that, "as long as I am fully and truthfully cooperating with the Government as required by this agreement, I should not be detained in [this camp] and should be detained at a facility consistent with the detention conditions appropriate for law of war detainees".

50. Thus, whatever its executive orders may say in theory, in practice the Government reserves humane treatment consistent with its treaty obligations for those who agree to "cooperate" and work with it. Thus, the conditions of arbitrary and prolonged detention are used as a spur to coerce guilty pleas and "cooperation", while the humane conditions to which the detainees have a right are withheld as a reward for guilty pleas and forfeiture of rights.

51. Accordingly, the current practices and procedures of the Government of the United States contradict the policy statements with which it responded to the Working Group. The current detention scheme at Guantanamo Bay violates international law and conflicts with the public policy statements of the Government of the United States, which purport to repudiate torture and affirm the need for accountability.

52. The Guantanamo Bay detention policies continue to be arbitrary because current practices do not conform to human rights law and international humanitarian law. Rather, current practices allow and promote prolonged and indefinite detention. The United States military commission system, which permits external manipulation, allows the introduction of derivative evidence obtained through torture and coercion, suppresses evidence and denies meaningful redress, and violates international norms requiring fair and impartial tribunals and the right to a fair trial, as spelled out in the Universal Declaration of Human Rights and other international instruments accepted by the State concerned. Those violations are of such gravity as to constitute arbitrary detention.

Government of Cuba

53. The United States of America and the Republic of Cuba signed an agreement on 16 and 23 February 1903 for the lease of some lands within Cuban territory,[2] including the location of the United States Naval Base at Guantanamo Bay. That agreement was complemented by an additional agreement signed in July 1903. In 1934, the agreement was

[2] "Agreement for the lease to the United States of lands in Cuba for coaling and naval stations", T.S. 418; 6 Bevans 1113, in United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, p. 67. Available from www.state.gov/documents/organization/218912.pdf.

revised.[3] There is no doubt that it is a lease agreement because the agreement provides for the United States to pay a certain amount on an annual basis to Cuba. In principle, a lease agreement would not imply any transfer of sovereignty. However, the set of agreements here provides for the United States to exercise complete sovereignty over the areas covered by the lease.[4] In addition, the lease is indefinite and can only be terminated if the United States decides to vacate the naval base or if the two States, namely the United States and Cuba, agree.[5] The circumstances of the lease imply an effective transfer of sovereignty from Cuba to the United States for the period of the lease, even though that period is not limited in time. The February 1903 agreement does state that Cuba remains sovereign, but that sovereignty is only theoretical and is suspended while the effective sovereignty is exercised by the United States of America.

54. That analysis could be challenged when one considers the arguments presented by the Government of the United States before the United States Supreme Court in *Rasul* v. *Bush*.[6] Indeed, the Government of the United States argued in that case that its jurisdiction did not extend to foreigners at Guantanamo Bay, which was outside of its territory. However, the Working Group here bears in mind the specific circumstances of that argument and does not view it as a unilateral act that should be given any legal value. As a result, only the United States of America currently exercises sovereignty over Guantanamo Bay and the Working Group has based its decision on the understanding that the alleged violations at Guantanamo Bay are the responsibility of the Government of the United States. The Working Group has thus limited its analysis of the case to the responsibility of United States of America.

Discussion

55. The Working Group recalls that the International Court of Justice, in its judgment in the case concerning United States diplomatic and consular staff in Tehran, emphasized that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles

[3] "Treaty of relations", signed on May 29, 1934. 48 Stat. 1682; TS 866; 6 Bevans 1161, in United States Department of State, *Treaties in Force*, p. 64.

[4] Article III of the February 1903 Agreement reads: "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof."

[5] Article III of the May 1934 Agreement reads: "Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23rd day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty."

[6] *Rasul et al.* v. *Bush, President of the United States, et al.*, Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Case No. 03-334, 542 U.S. 466 (2004).

of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".[7]

56. In a joint statement of 1 May 2013, the Working Group, together with the Inter-American Commission on Human Rights (IACHR), the Special Rapporteur on the question of torture, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and the Special Rapporteur on the right to health, reiterated the need to end the indefinite detention of individuals at the Naval Base in Guantanamo Bay.

57. In Opinion No. 10/2013 (United States of America), the Working Group requested the release of another Guantanamo Bay detainee, and referred to the 2013 joint statement and the jurisprudence of the Working Group. It also referred to statements by the United Nations High Commissioner for Human Rights and the International Committee of the Red Cross expressing with utmost concern that the Guantanamo detainees' lack of legal protection and the resulting anguish caused by the uncertainty regarding their future had led them to take the extreme step of going on hunger strike to demand a real change to their situation. The 2013 joint statement, the jurisprudence of the Working Group and statements by the United Nations High Commissioner for Human Rights underlined that, even in extraordinary circumstances, the indefinite detention of individuals goes beyond a minimal and reasonable period of time and constitutes a flagrant violation of international human rights law which in itself constitutes a form of cruel, inhuman and degrading treatment. Those international bodies have also confirmed that the continuing and indefinite detention of individuals without the right to due process is arbitrary and constitutes a clear violation of international law.

58. In the 2013 joint statement, the Working Group repeated the request it had made to the Government of the United States of America on 22 January 2002 and had reiterated on 25 June 2004, along with the Special Rapporteurs and other United Nations human rights mechanisms, to be allowed to visit the Guantanamo detention centre and hold private, confidential interviews with the detainees as soon as possible.

59. Furthermore, IACHR, the Working Group and the Special Rapporteurs urged the United States of America to: (a) adopt all legislative, administrative, judicial and any other types of measures necessary to prosecute, with full respect for the right to due process, the individuals being held at Guantanamo Naval Base or, where appropriate, to provide for their immediate release or transfer to a third country, in accordance with international law; (b) expedite the process of release and transfer of those detainees who had been certified for release by the Government itself; (c) conduct a serious, independent and impartial investigation into acts of forced feeding of inmates on hunger strike and the alleged violence being used in those procedures; (d) allow IACHR and the United Nations Human Rights Council mechanisms, such as the Working Group and the Special Rapporteurs, to conduct monitoring visits to the Guantanamo detention centre under conditions in which they could freely move about the installations and meet freely and privately with the prisoners; and (e) take concrete, decisive steps towards closing the detention centre at the Guantanamo Naval Base once and for all. They urged the Government to state clearly and unequivocally what specific measures it would implement towards that end.

60. In its 2008 annual report, the Working Group included a list of principles for the deprivation of liberty of persons accused of acts of terrorism in accordance of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International

[7] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 42.

Covenant on Civil and Political Rights (A/HRC/10/21, paras. 53–54). They were set out as follows:

(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant criminal and penal procedure laws according to the different legal systems;

(b) Resort to administrative detention against suspects of such criminal activities is inadmissible;

(c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;

(d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;

(f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention to present the detained person before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(g) In the development of judgements against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process;

(h) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.

61. In several of its opinions and reports, the Working Group has addressed detention at the Naval Base at Guantanamo Bay. Already in its 2002 annual report (E/CN.4/2003/8), the Working Group published its "Legal Opinion regarding the deprivation of liberty of persons detained in Guantanamo Bay". In its 2006 annual report (A/HRC/4/40), the Working Group responded to the submissions of the Government of the United States concerning the Working Group's Opinion No. 29/2006 (United States of America). The Government had referred to the United States Supreme Court ruling in *Hamdan* v. *Rumsfeld*, and asserted that the law of armed conflicts governed the armed conflict with Al-Qaida. In paragraph 14 of the 2006 annual report, the Working Group reiterated the point made in its 2005 annual report (E/CN.4/2006/7) that "the application of international humanitarian law ... does not exclude the application of international human rights law". That was also restated in the Working Group's "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", set out in its 2012 annual report (A/HRC/22/44, paras. 37–75).

62. According to a joint report of five special procedures mandate holders concerning the situation of detainees at Guantanamo Bay, international armed conflicts, including situations of occupation, imply the full applicability of relevant provisions of international humanitarian law and of international human rights law, with the exception of guarantees derogated from, provided such derogations have been declared in accordance with article 4 of the International Covenant on Civil and Political Rights by the State party. The United

States has not notified the Secretary-General of the United Nations of any derogation from the Covenant (E/CN.4/2006/120, para. 83).

63. In its 2006 annual report, the Working Group repeated that a State's jurisdiction and responsibility extend beyond its territorial boundaries, referring to the consistent jurisprudence of the Human Rights Committee on the International Covenant on Civil and Political Rights (para. 15). The Working Group and the Human Rights Committee apply general principles in that regard as they have been clarified by the International Court of Justice and have gradually also entered into the jurisprudence of the regional human rights courts, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Of note are the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,*[8] and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation),*[9] in which the Court stated that "these provisions of the Committee on the Elimination of Racial Discrimination generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory". The nature of human rights treaties and their foundation in universality require a justification for a territorial limit on their scope, and that is a consequence of the object and purpose of human rights treaties.

64. The Working Group recalls that in 1986, in the *López* and *Celiberti* cases, the Human Rights Committee held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".[10] The Human Rights Committee referred to article 5, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". The Working Group has consistently adopted the same approach in its jurisprudence, notably in its Opinions No. 10/2013 (United States of America) and No. 57/2013 (Djibouti, Sweden and the United States of America).

65. It is at the core of that general rule that a State's international law obligations apply equally to its acts abroad and those of its agents abroad, and it is clear that the rule applies when individuals are held in detention. Adopting a contextual and purposive interpretation of article 2 of the International Covenant on Civil and Political Rights, the Human Rights Committee has confirmed that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party".[11] It is widely accepted that persons incarcerated by State authorities in detention facilities located outside the State's territory are subject to the effective control of that State. To that end, the joint report of the five special procedures mandate holders of the former Commission on Human Rights,[12] and the Opinions rendered by the Working Group have confirmed that the obligations of the United States under international human rights law extend to persons detained at Guantanamo Bay. The gross violations of international law at Guantanamo are such that any State that has

[8] *Advisory Opinion*, I.C.J. Reports 2004, p. 136.

[9] Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353.

[10] Communication No. 52/79, *López Burgos* v. *Uruguay*, Views adopted on 29 July 1981, para. 12.3; Communication No. 56/79, *Celiberti de Casariego* v. *Uruguay*, Views adopted on 29 July 1981, para. 10.3.

[11] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10.

[12] See E/CN.4/2006/120, para. 11.

actively facilitated or in any way acquiesced in the detention must hold enquiries into the acts of its officials and provide remedies to individuals for any breaches of international law to which their facilitation or acquiescence may give rise.

66. The United States is bound by international law and its international human rights obligations regarding its detention of Mr. al Hawsawi. The International Court of Justice in its 2010 *Diallo* judgment stated that article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights apply in principle to any form of detention, "whatever its legal basis and the objective being pursued".[13] The Working Group has emphasized 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 complementary and not mutually exclusive".[14] Customary international law prohibits arbitrary detention and arbitrary detention is confirmed as a peremptory norm (*jus cogens*) in the constant jurisprudence of the Working Group.[15]

67. The prohibition of arbitrary detention provides for clear and precise rights and guarantees from which there is no scope for derogations or restrictions under international humanitarian law. Neither can international humanitarian law operate as a principle of interpretation, and it is not *lex specialis* even in the present context of interpretation. The rules and procedures of international humanitarian law must comply with the prohibition of arbitrary detention in international law, and authorities are always subject to review by international and domestic courts for their compliance.

68. The Working Group has stated that "the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept".[16] In the present case, the Working Group points out that the detention of Mr. al Hawsawi is also in direct contravention of the protection provided by international humanitarian law. With no concrete evidence that Mr. al Hawsawi has committed any belligerent activity or directly participated in hostilities, the United States cannot rely on international humanitarian law to argue that the detention of Mr. al Hawsawi serves the purpose of preventing a combatant from continuing to take up arms against the United States. The Working Group also points out that the Geneva Conventions require that enemy belligerents and civilians who are detained as threats to security be released at the end of the armed conflict or hostilities. At the current point in time, whether the war on terror is considered an international or non-international armed conflict, any of the procedures for detention regimes under international humanitarian law cease to operate. International humanitarian law has never been conceived to apply to a detention of the length of that of Mr. al Hawsawi and procedures for detention regimes under international humanitarian law cease to provide any support, if they ever did, for the detention of individuals at Guantanamo Bay.

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[13] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment,* I.C.J. Reports 2010, para. 77.

[14] Opinion No. 44/2005, para. 13; also quoted in Opinion No. 2/2009, para. 27. See also Human Rights Committee, general comment No. 31, para. 11; general comment No. 35 (2014) on article 9: Liberty and security of person, para. 64, and *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, para. 25.

[15] See also the clarification by the International Court of Justice of the prohibition of torture as a peremptory norm of international law (*jus cogens*) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal),* Judgment, I.C.J. Reports 2012, para. 99.

[16] Opinion No. 43/2006, para. 31. See also E/CN.4/2006/120, para. 21, in which it is noted that "the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law".

69. Among the several other issues relating to the legality of the detention, even if it had not otherwise been in contravention of international law, the Working Group points to the absence of any express legal domestic authority for detention. The Authorization for Use of Military Force, which 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",[17] does not specifically authorize arrest or detention.

70. Article 9, paragraph 4, of the International Covenant on Civil and Political Rights entitles any individual deprived of liberty by arrest or detention to take proceedings before a court without delay to challenge the legality of detention. That right is non-derogable under both treaty law and customary international law, as confirmed in the constant jurisprudence of the Working Group.[18] Mr. al Hawsawi first received an administrative hearing before the Combatant Status Review Tribunal in 2004, two years after he was incarcerated, and appeared annually before the Administrative Review Tribunal.

71. That two-year delay in allowing Mr. al Hawsawi to challenge his detention is a grave and clear violation of international law, which is further aggravated by his continued detention.

72. The Working Group again concludes that the administrative hearings before the Combatant Status Review Tribunal and the Administrative Review Tribunal did not satisfy Mr. al Hawsawi's right to habeas corpus and failed to guarantee his right to a full and fair trial as required under article 14, paragraph 1, of the International Covenant on Civil and Political Rights and customary international law. The source has again drawn the Working Group's attention to the ruling by the United States Supreme Court that the Combatant Status Review Tribunal is not an adequate and effective substitution for habeas corpus proceedings,[19] and the Working Group has itself previously stated that "the procedures of the [Combatant Status Review Tribunal] and the [Administrative Review Board] are not adequate procedures to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature".[20]

73. Mr. al Hawsawi's case will be discussed under categories I, III and V of the categories applicable to the cases before the Working Group. The Working Group has not considered categories II or IV applicable.

74. Category I applies when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. Category I embodies a principle of legality. It requires a legal basis for detention in domestic law that complies with international law. Mr. al Hawsawi's detention does not satisfy that requirement. The domestic law used by the United States Government to detain Mr. al Hawsawi does not comply with international law and the requirements of human rights law and international humanitarian law on the further grounds that his detention is prolonged and indefinite.

75. Mr. al Hawsawi's case falls within category I of the categories applicable to cases before the Working Group.

76. Category III applies 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, in other customary international law and in the relevant international instruments accepted by the United States, is of such gravity as to give the deprivation of liberty an

[17] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[18] A/HRC/22/44, para. 47.
[19] *Boumediene et al.* v. *Bush* 553 U.S. (12 June 2008).
[20] Opinion No. 2/2009, para. 32.

arbitrary character. The source has alleged that there were several grave violations of the fair trial rights of the defendant in the main proceedings. The Working Group has considered all the submissions made by the source and the responses by the Government.

77. The Government contends that the restrictions on the accused's access to confidential material in the investigation file were legitimate under international human rights instruments. In that regard, the Working Group notes that such restrictions would be legitimate in respect of material which is not then used as evidence against the accused at trial and is not of an exculpatory nature. In the current case, however, in violation of article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights, the accused, on the pretext of national security, was denied access to substantial evidence used by the prosecution at trial and to some potentially exculpatory evidence.

78. In addition, the Working Group has in its constant jurisprudence considered counsel-client confidentiality as a core element in the due process and fair trial guarantees in article 14 of the International Covenant on Civil and Political Rights and article 10 of the Universal Declaration of Human Rights and other customary international law.[21] The Working Group holds that deprivation of the accused's right to communicate with his defence counsel in private in the courtroom during the trial constitutes a most serious breach of the due process and fair trial guarantees in article 14 of the International Covenant on Civil and Political Rights and article 10 of the Universal Declaration of Human Rights and other customary international law.

79. The Working Group concludes that Mr. al Hawsawi's rights to fair trial and due process have been repeatedly violated, in breach of articles 9 and 14 of the International Covenant on Civil and Political Rights, during his more than 10-year detention. Mr. al Hawsawi was not provided with the reasons for his detention; was not promptly brought before a judicial authority for review of his detention; and was not provided with legal counsel within a reasonable time. The Government did not provide him with formal information on the reasons for his detention for at least two years. He was not given an opportunity to have his detention reviewed promptly by a judicial authority, and he was also denied the legal counsel that international law requires throughout his administrative and military hearings.

80. Mr. al Hawsawi's case falls within category III of the categories applicable to cases before the Working Group.

81. Category V applies when the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.

82. Mr. al Hawsawi has been subjected to prolonged detention because of his status as a foreign national. He was also deprived of due process and fair trial protections of the court system because of his foreign national status. The source contends that those are acts of discrimination that make his detention arbitrary. The Working Group agrees; they are acts in violation of international law for reasons of discrimination based on national and other origin and which both aim towards and result in ignoring the equality of human rights.

83. Mr. al Hawsawi's case falls within category V of the categories applicable to cases before the Working Group.

[21] See Opinion No. 6/2013.

84. Notwithstanding the fact that the findings of the present opinion have been directed to the circumstances of Mr. al Hawsawi's unlawful detention, the Working Group has addressed the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the law on arbitrary detention. The Working Group has clarified many issues of international law in its Guantanamo jurisprudence, to which the present opinion is the most recent addition. To avoid any ambiguity, the Working Group makes it clear that, while it has in the present opinion specifically addressed Mr. al Hawsawi's case, no *a contrario* argument can be made in respect of any of the findings in the present opinion. The conclusions reached by the Working Group in the present opinion apply to other persons finding themselves in similar situations at Guantanamo Bay, including the conclusions on the remedies below.[22]

85. Under international law, the United States has a duty to release Mr. al Hawsawi and accord him an enforceable right to compensation. The duty to comply with international law rests on everyone, including domestic authorities and private individuals, and international and domestic law must provide remedies to make international law effective. States are under a positive obligation to provide an effective remedy for violations of international law concerning human rights. Domestic courts have a particular role to play in granting tort remedies (responsabilité administrative et constitutionnelle). Domestic law cannot erect barriers, such as immunities, jurisdictional limitations, procedural hurdles or defences, based on an "act of State doctrine" in any form that would limit the effectiveness of international law. One basis for jurisdiction is the exercise of control over individuals; under international law, such control exists whenever an act attributable in the widest sense to a State has an adverse effect on anyone anywhere in the world.

86. Article 8 of the Universal Declaration of Human Rights provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[23] Article 14 of the Convention against Torture provides that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".[24] The duty to provide such redress is confirmed as customary international law in the constant jurisprudence of the Working Group. The Working Group points out that the arguments raised and doctrines offered against remedies have so far been only too effective. In terms of actual outcomes, international courts and tribunals and domestic courts have not provided effective remedies. It is contrary to the rule of law and the requirements of an effective international legal order to accept new restrictions effectively barring remedies in domestic courts, as under the international law principles of subsidiarity and complementarity, domestic legal orders have the primary responsibility to provide remedies.

Disposition

87. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

[22] See *Avena and Other Mexican Nationals (Mexico* v. *United States of America) Judgment*, I.C.J. Reports 2004, para. 151, and the Declaration of President Guillaume in *LaGrand (Germany* v. *United States of America)*, Judgment, I.C.J. Reports 2001, p. 517.

[23] See also art. 9, para. 5, of the International Covenant on Civil and Political Rights.

[24] See the clarification of the prohibition of torture as a peremptory norm of international law (*jus cogens*) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012. Arbitrary detention is confirmed as a peremptory norm (*jus cogens*) in the constant jurisprudence of the Working Group.

The deprivation of liberty of Mr. al Hawsawi is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights. It falls within categories I, III and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

88. Consequent upon the opinion rendered, the Working Group requests the Government of the United States of America to take the necessary steps to remedy the situation of Mr. al Hawsawi and bring it into conformity with the standards and principles set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

89. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. al Hawsawi and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 20 November 2014]