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**Human Rights Council**  
**Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019****Opinion No. 70/2019 concerning Mohammed al Qahtani (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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 31 July 2019, the Working Group transmitted to the Government of the United States of America a communication concerning Mohammed al Qahtani. The Government did not reply to the communication. The United States is a party to the International Covenant on Civil and Political Rights.

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);

(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. Mohammed al Qahtani is a citizen of Saudi Arabia. He was born in 1979 in Dalam, Saudi Arabia. The source reports that Mr. al Qahtani has suffered from mental illness since he was a child, beginning with paranoid ideation and auditory hallucinations. As he grew older, Mr. al Qahtani reportedly began to find it difficult to control his behaviour. The Riyadh police once found him naked in a dumpster. Another time, he threw his cellular telephone out of the window of a moving car, believing it was affecting his mind.

5. In May 2000, Mr. al Qahtani was hospitalized against his will in a psychiatric ward for five days following an acute psychotic break. While visiting Mecca, he had thrown himself into traffic in an attempt to commit suicide. He experienced continued delusions throughout his stay in the hospital, where he was sedated and treated with antipsychotic medication. The source reports that this occurred less than a year and a half before the start of his detention at Guantánamo Bay, Cuba.

#### (a) Arrest, detention, transfer and interrogation

6. According to the source, Mr. al Qahtani was taken into custody by Pakistani security forces on 15 December 2001 as he was crossing the border from Afghanistan into Pakistan. Eleven days later, he was handed over to the United States authorities, who subsequently transferred him to Guantánamo Bay on 12 February 2002.

7. Immediately after Mr. al Qahtani's arrival at Guantánamo Bay, United States government forces, including personnel of the Joint Task Force, the Criminal Investigation Task Force and the Federal Bureau of Investigation at Camp X-Ray, began interrogating him. According to the source, Mr. al Qahtani asserted that he was innocent of any wrongdoing.

8. On 15 July 2002, the Federal Bureau of Investigation informed military personnel at Guantánamo Bay that it believed that Mr. al Qahtani was part of the conspiracy to carry out the attacks of 11 September 2001. Acting on this allegation, the authorities transferred Mr. al Qahtani to an isolation cell on 8 August 2002. According to the source, Mr. al Qahtani was held in solitary confinement for at least five months until early 2003. The source alleges that, during that time, he was subjected to treatment amounting to torture, as the authorities subsequently conceded.

9. The source reports that once Mr. al Qahtani was placed in solitary confinement, he was completely isolated from other human beings. His cell was constantly lit. He had no interaction with anyone other than his interrogators. According to the source, there was no legitimate or legal reason to place him in solitary confinement. The purpose was to intimidate him, to extract more information from him, and to punish him for his perceived lack of cooperation. Mr. al Qahtani described the effect of this isolation in detail:

“Solitary confinement has destroyed me ... [It] was like a huge mountain that was on top of me. And the pressure on me was so high it squeezed tears out of my eyes ... I had no sense of [time] passing, no definition to mark it. I found that I had [soiled] myself. I would find myself in hysterics. I was crying and crying and crying. I found myself talking to myself, talking to the interrogators, talking to my family [even though they weren't there].”

10. In November 2002, agents of the Federal Bureau of Investigation observed these and other effects, noting that after three months of isolation, Mr. al Qahtani had started talking to non-existent people, hearing voices and crouching in a corner of his cell covered with a sheet for hours on end. In a letter alerting other authorities to the suspected mistreatment of detainees, the Deputy Assistant Director of the Bureau reportedly described Mr. al Qahtani's behaviour as exhibiting symptoms of extreme psychological trauma.

11. The source alleges that in early September 2002, United States military intelligence officials planned and developed a more aggressive interrogation regime for Mr. al Qahtani and other detainees. In designing these enhanced interrogation techniques, military intelligence officials applied tactics used in a programme originally designed to train

military personnel to resist torture if captured by enemy forces. In October 2002, military interrogators released attack dogs to intimidate Mr. al Qahtani and exploit his phobias. Between 23 November 2002 and 11 January 2003, a new interrogation regime, known as the “first special interrogation plan”, was applied to Mr. al Qahtani.

12. In addition, the source alleges that during the seven-week period of the interrogation plan, United States officials physically abused, sexually humiliated and otherwise tortured Mr. al Qahtani. He was interrogated in repeated 20-hour sessions. He was allowed to sleep no more than four hours per night, leaving him physically exhausted and mentally depleted. To keep him from sleeping, his captors shifted him from cell to cell throughout the night, kept all the cells illuminated 24 hours a day, woke him by creating loud noises and disrupted his sleep patterns by only allowing him to sleep during the day. According to the source, Mr. al Qahtani was forced to endure both extreme heat and cold. On several occasions, his interrogators adjusted the air conditioning to increase the chill in the room while pouring cold water over his head. Mr. al Qahtani was repeatedly placed in tight restraints and subjected to stress positions, sometimes standing up straight for up to four hours with his arms extended out to the side. He was also subjected to “short shackling”, a technique in which interrogators bound his wrists to his ankles with metal or plastic handcuffs, causing him to double over while lying on the ground or sitting in a chair. Mr. al Qahtani was also exposed to ear-blasting music for prolonged periods, forced to shave his head and beard, and subjected to forced intravenous feeding by medical personnel.

13. The source claims that Mr. al Qahtani was also subjected to sexual humiliation, by both female and male interrogators. He was forced to strip naked in the presence of female personnel and to endure sexual taunting by female interrogators, including “lap dances”. He was forced to wear a woman’s bra and to place female underwear over his head. According to the source, interrogators told Mr. al Qahtani that he was a homosexual and that the rest of the inmates at Guantánamo Bay were aware of his sexual orientation. Mr. al Qahtani was also subjected to religious humiliation, as interrogators prevented him from praying, squatted over a Koran and threatened to desecrate it.

14. Mr. al Qahtani was subjected to degrading treatment designed to strip him of his humanity. His interrogators refused to let him use the toilet during interrogations, forcing him to urinate on himself. They forced him to dance and they made him pick up trash with his hands. They reportedly tied a leash to his neck and led him around the room, forcing him to perform dog tricks. They yelled at him and insulted him constantly. They compared his family to a pack of rats and told him that his female family members were whores. They threatened to send him to a country that would subject him to more severe forms of torture.

15. During this entire period, Mr. al Qahtani remained in complete isolation from the rest of the world. The source claims that he was not allowed any human contact apart from the interrogation sessions. His guards refused to speak to him and ordered him to turn away when they were present. Even after the period of isolation ended in January 2003, the Government continued to deprive him of access to the outside world for five more years until 2008.

16. In May 2008, the Government withdrew all criminal charges against Mr. al Qahtani. On 14 January 2009, the senior official in charge of the Office of Military Commissions admitted: “We tortured Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer [his] case [for prosecution].”

(b) Consequences of Mr. al Qahtani’s treatment

17. The source argues that the treatment of Mr. al Qahtani by the Government would have traumatized anyone who had been subjected to it. Even those not already suffering from mental illness would have their “sense of identity, selfhood, dignity, [and] perception of reality” permanently impaired by such trauma.<sup>1</sup> The treatment led Mr. al Qahtani, who

<sup>1</sup> Memorandum from Dr. Emily A. Keram (a consultant in neurology and psychiatry who had interviewed Mr. al Qahtani) to Ramzi Kassem (one of the legal counsels for the detainee), “Re: Mohammed al-Qahtani”, 5 June 2016.

has endured a lifetime of mental health problems, to feel profoundly isolated, hopeless and helpless.

18. From 22 to 27 May 2015 and from 22 to 27 January 2017, a doctor certified in psychiatry, neurology and forensic psychiatry met with Mr. al Qahtani at Camp Echo in Guantánamo Bay to perform a mental health assessment. During the examination, he reportedly told the doctor:

“I was all alone in the world. I couldn’t find a way to stop the torture. I couldn’t find a way to kill myself. ...The intensity I had to kill myself was not the intensity to die, it was the intensity to stop the psychological torture, the horrible pain of solitary confinement ... the symptoms of psychological torture were horrific. It was even worse than the effects of the physical torture.”

19. Furthermore, the source reports that Mr. al Qahtani experienced auditory and visual hallucinations. At times, he believed that ghosts were present. At other times, he heard a bird talking to him from outside, assuring him that he was still alive.

20. The source alleges that the serious harm to Mr. al Qahtani had dramatic consequences for his physical health. On one occasion documented by the interrogation log, he was rushed to a hospital at the military base because his heart rate had dropped to around half the normal rate as a result of extreme sleep deprivation and trauma. According to the source, the military authorities continued to interrogate Mr. al Qahtani in the ambulance during his transportation to the hospital. The military authorities allowed him to sleep one full night but after he had been cleared by medical personnel, they resumed their interrogation the next day.

21. In addition, Mr. al Qahtani’s chronic mental illness and repeated brain trauma in the past eroded his ability to make his own decisions. As a result, his psychological and cognitive deficits left him vulnerable to manipulation and coercion. The doctor found that the treatment he endured, particularly the combination of solitary confinement, sleep deprivation, extreme temperature and noise exposure, stress positions, forced nudity, body cavity searches, sexual assault and humiliation, beatings, strangling, threats of rendition and water-boarding, would have profoundly disrupted and left long-lasting effects on a person’s sense of self and cognitive functioning “even in the absence of pre-existing psychiatric illness”.

22. The torture and inhumane treatment of Mr. al Qahtani was the subject of investigations and reports, as well as a memorandum prepared by the former General Counsel of the United States Navy. In his memorandum, the General Counsel warned that the use of these impermissible interrogation methods could make United States personnel susceptible to war crimes prosecutions.

23. According to the source, Mr. al Qahtani is overwhelmed by flashbacks of his torture, a symptom of post-traumatic stress disorder. He suffers from nightmares, distressing trauma-related thoughts, fear, horror, shame and alienation. He is tormented by skin lesions that appear when he recalls his torture. Furthermore, he continues to endure symptoms of depression. The source claims that, if he remains detained at Guantánamo Bay, his symptoms will almost certainly worsen.

24. The source alleges that Mr. al Qahtani will likely require lifelong mental health care, which he cannot adequately receive at Guantánamo Bay. The source considers that it is “impossible for Mr. al Qahtani to form an effective doctor-patient relationship” with any of the medical personnel present in Guantánamo Bay because they were instrumental in his torture. Even if it were possible to administer it, medication alone would be inadequate. A doctor concluded that Mr. al Qahtani required culturally-appropriate treatment, as well as support from his family and from medical professionals whom he trusted, if he was to have any hope of recovery.

(c) Proceedings against Mr. al Qahtani

25. Since his initial arrest on 15 December 2001, Mr. al Qahtani has never been brought to trial. On 21 October 2004, almost three years after his detention began, the Government convened a Combatant Status Review Tribunal, a panel consisting entirely of military

officers, to determine whether or not he was an “enemy combatant”. Mr. al Qahtani appeared before the tribunal but was not given access to legal counsel. He was also not informed of the specific charges against him. The source alleges that the tribunal relied solely on the second-hand testimony of officials and included information obtained by torture. Mr. al Qahtani was not given the opportunity to challenge the evidence against him because it was considered “classified”.

26. In October 2005, the Center for Constitutional Rights filed a habeas corpus petition on Mr. al Qahtani’s behalf in the district court for the District of Columbia. Since that time, his case has been pending before the court. The source submits that habeas corpus proceedings cannot substitute for a criminal trial because the Government is not required to produce witnesses and the standard of review is limited and highly deferential to the Government.

27. In 2005, 2006 and 2008, the Government convened an Administrative Review Board, which concluded that Mr. al Qahtani’s continued detention was necessary. The source states that, once again, the Board relied on hearsay evidence and did not allow Mr. al Qahtani to be represented by counsel, to confront any witnesses, or to call witnesses in his defence. Throughout these proceedings, Mr. al Qahtani denied any knowledge of the attacks of 11 September 2001.

28. According to the source, Mr. al Qahtani’s detention has continued, even though the Government has long since dropped all charges against him. On 11 February 2008, more than six years after he was arrested, the Government announced that it would prosecute Mr. al Qahtani in a military commission for murder in violation of the laws of war, along with five other alleged members of al-Qaida. However, the trial never took place. On 12 May 2008, the military commission announced the dismissal of all charges against Mr. al Qahtani, without explanation. On 18 November 2008, the Chief Prosecutor announced that he would file new charges against Mr. al Qahtani based on what he claimed to be “independent and reliable evidence”, but those charges never materialized.

29. On 14 July 2009, the senior official in charge of the Office of Military Commissions explained that she had not pursued charges against Mr. al Qahtani because “[h]is treatment met the legal definition of torture”.

30. On 16 July 2016, a third non-judicial body, the Periodic Review Board, reviewed Mr. al Qahtani’s detention. Two days later, on 18 July 2016, the Board refused to clear him for release, condemning him to indefinite detention. According to the source, the Periodic Review Board process had many of the same deficiencies as the Combatant Status Review Tribunal and Administrative Review Board proceedings. The Periodic Review Board is not independent from the executive branch, nor is its decision subject to judicial review. The detainee cannot know the allegations against him, except in the most cursory fashion, because they are classified. Counsel for the detainee cannot review the government submission to the Board in full, and cannot discuss with the client whatever he or she is allowed to see. A prisoner cannot meet counsel to discuss the Board without the presence of a military representative.

31. The source reports that the Periodic Review Board refused to permit Mr. al Qahtani’s defence team to review the complete file on which it had based its decision. Despite repeated requests to review the entire file, the defence received only “summaries and substitutes” of portions of the dossier considered by the Board. The source considers that the Board probably relied upon the statements that Mr. al Qahtani provided under torture because, as a general matter, it does not exclude such evidence, unless all agencies involved concur that it was the product of torture.

32. The Periodic Review Board is composed of executive branch officials from the Departments of Defense, Homeland Security, Justice and State, as well as the Joint Chiefs of Staff. Its express purpose is to “assist the executive branch” in its decisions. Review of Board determinations is carried out by a review committee, made up of top-level officials of the executive branch: namely, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence and the Chair of the Joint Chiefs of Staff. Before the Board will clear a detainee for release, all agencies must be

in unanimous agreement, including agencies that were responsible for torturing detainees in Guantánamo Bay and elsewhere.

33. The purpose of the Periodic Review Board is to determine whether continued detention is necessary to protect against a significant threat to national security. The detainee may only present written or oral statements, introduce relevant information, answer questions posed by the Board and call reasonably available witnesses. There is no indication as to on whom the burden of proof lies or what standards must be met to support the detainee's continued detention or release.

34. The result of the system established at Guantánamo Bay under the Periodic Review Board is that an individual whom the Government cannot successfully prosecute does not benefit from the absence of prosecution. Rather, the detainee may be shifted into what may be a much harsher outcome, such as indefinite detention.

(d) Legal analysis

35. The source submits that Mr. al Qahtani's deprivation of liberty is arbitrary under categories I, III and V.

Category I

36. In relation to category I, the source submits that Mr. al Qahtani's deprivation of liberty has no legal basis because it is not authorized under any domestic law. While the Government may argue that Mr. al Qahtani is being held under the "Authorization for use of military force", such a resolution does not explicitly allow for arrest or detention, and therefore does not provide a domestic legal basis for the deprivation of liberty. Even if Mr. al Qahtani's detention was authorized domestically under the Authorization, it would still conflict with international law by virtue of being indefinite, prolonged and for an improper purpose.

37. Furthermore, Mr. al Qahtani's ongoing detention cannot be justified on the basis of his self-incriminating statements, which were produced through lengthy torture sessions designed to break him down. Such techniques are known to produce false confessions, as they compel victims to say what interrogators wish to hear in an attempt to stop the torture. They are not only unreliable, but are inadmissible as evidence under international law.

38. In addition, Mr. al Qahtani's detention has no end in sight. He has not stood trial, he has not been convicted, he is not serving any sentence, and the charges against him have been dropped. Nevertheless, the Government argues that it will continue to detain Mr. al Qahtani until the end of its conflict with al-Qaida. The source claims that there is no foreseeable or definite end to Mr. al Qahtani's administrative detention, rendering his detention arbitrary.

39. The source notes that international human rights law prohibits prolonged administrative detention. Mr. al Qahtani has now been detained for over 17 years at Guantánamo Bay, which is unjustifiably prolonged and, as there is no invocation of a state of emergency in the United States, there is no justification for its length.

40. Finally, the source submits that international law forbids administrative detention for the purposes of interrogation. In the case of Mr. al Qahtani, the objective of the deprivation of liberty is not primarily to prevent him from taking up arms, but to interrogate him to gather intelligence. The details of his detention, interrogation and torture are well-documented. Detention for such purposes lacks legal justification.

Category III

41. In relation to category III, the source submits that the government violation of his rights to a fair trial renders Mr. al Qahtani's detention arbitrary.

42. International human rights law requires States to promptly provide detained persons with the reasons for the deprivation of their liberty, regardless of whether the detention is criminal or administrative. The source recalls that the Government failed to inform Mr. al Qahtani of the formal reasons for his detention until the end of 2005, four years after his

capture. Such a delay is inexcusable. Mr. al Qahtani had a right to be formally notified of the reasons for his detention at the moment he was detained, not after four years of detention, interrogation and torture.

43. Furthermore, international human rights law forbids persons from being detained without an effective opportunity to be heard promptly by a judicial or other authority. The source recalls that Mr. al Qahtani was handed over to the United States on 27 December 2001 and for the next 1,029 days was detained, interrogated and tortured, while being denied a review by any authority. It was not until the end of 2004 that he finally received an administrative hearing before a military tribunal. Furthermore, the failure by the Government to provide even a limited form of review for three years after Mr. al Qahtani's detention exacerbates the violation of his right to a prompt review.

44. The source recalls that everyone is entitled under article 14 (1) of the Covenant to a "fair and public hearing by a competent, independent and impartial tribunal". The principles in this provision apply to those detained under suspicion of having engaged in acts of terrorism. Articles 9 and 14 of the Covenant demand that such persons are afforded due process rights. The first review of Mr. al Qahtani's detention took place 34 months after his initial arrest on 15 December 2001, through the Combatant Status Review Tribunal. The Tribunal, which is composed only of military officers, is a non-judicial body and did not comply with due process requirements. The second, third, and fourth reviews of his detention took place in 2005, 2006 and 2008 through the Administrative Review Board, another non-judicial body. None of these hearings has provided the procedural safeguards required under article 14 (1) of the Covenant.

45. The source alleges that the Periodic Review Board, like the Tribunal and the Administrative Review Board, does not satisfy the right to a fair and independent trial. The Periodic Review Board panel is composed of members of the executive, the same branch of government that detained Mr. al Qahtani in the first place. They assist the executive branch in decision-making, not with conducting an independent review of the merits of each detainee's case. A review board composed of members of the executive branch cannot be seen as independent. The Human Rights Committee has observed that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective, and impartial.<sup>2</sup> These requirements apply to those in military detention, or in detention pursuant to counter-terrorism or security measures.

46. Moreover, the source submits that the Periodic Review Board hearing failed to provide the procedural safeguards required by article 14 of the Covenant. The Board refuses to exclude evidence produced by torture unless all participating agencies concur that the interrogators engaged in torture. Mr. al Qahtani's requests to review all of the evidence presented to the Board were repeatedly ignored. Instead, he was given an unclassified summary of the evidence. Without knowing precisely what evidence the Board would consider, he had no way of effectively countering that evidence in arguing that he was entitled to release.

47. International human rights law requires that detained persons be given immediate access to legal counsel. Mr. al Qahtani was denied legal counsel upon his initial detention and during his first four administrative hearings. After his capture and detention in December 2001, he was not allowed to meet with a lawyer until December 2005.

#### Category V

48. In relation to category V, the source submits that detention based on national origin is a clear violation of the Universal Declaration of Human Rights and the Covenant. The Human Rights Committee has made clear that this prohibition extends to discrimination based on citizenship.<sup>3</sup> Every prisoner brought to Guantánamo Bay was Muslim, indicating

<sup>2</sup> Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 32.

<sup>3</sup> Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 2.

that the Government of the United States has discriminated on the basis of religion, as well as national origin.

49. Guantánamo Bay is a military prison reserved exclusively for Muslim foreign nationals. It was specifically created to place foreign detainees outside the reach of constitutional protection in the United States. Owing to his status as a foreign national, Mr. al Qahtani has remained in indefinite and prolonged detention, has been denied access to basic due process guarantees and has been subjected to years of interrogation and torture.

#### *Response from the Government*

50. On 31 July 2019, the Working Group transmitted the allegations from the source to the Government of the United States under its regular communication procedure. The Working Group requested the Government to provide detailed information by 30 September 2019 about the current situation of Mr. al Qahtani. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of the United States under international human rights law. The Working Group also called upon the Government to ensure Mr. al Qahtani's physical and mental integrity.

51. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

#### **Discussion**

52. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

53. Over the last 18 years, since the events of 11 September 2001, the Working Group has developed a considerable 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 permitted,<sup>4</sup> and that the prolonged and indefinite detention of individuals at Guantánamo Bay violates that prohibition.

54. The Working Group considers it timely to briefly restate the key principles relevant to the present opinion based on its previous analyses of detention at Guantánamo Bay:

(a) In its 2002 annual report, the Working Group published its "Legal opinion regarding the deprivation of liberty of persons detained in Guantánamo Bay" (E/CN.4/2003/8, paras. 61–64). The Working Group considered that the Third Geneva Convention and the Covenant were both part of the legal framework applicable to detainees at Guantánamo Bay. If a detainee is not recognized by a competent court as having prisoner of war status under the Third Geneva Convention, the right to have the lawfulness of detention reviewed and the right to a fair trial under articles 9 and 14 of the Covenant still apply;<sup>5</sup>

(b) In 2006, the Working Group joined four other mandate holders to present a report to the former Commission on Human Rights on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120). The report includes a number of important conclusions:

(i) Given consistent findings by the Human Rights Committee that a State party to the Covenant must ensure the rights under the Covenant to anyone within its

<sup>4</sup> See A/HRC/22/44, para. 51, and opinions No. 89/2017, para. 36; No. 50/2014, para. 66; and No. 10/2013, para. 32.

<sup>5</sup> See E/CN.4/2006/7, paras. 68–75, in particular para. 70; and A/HRC/4/40, paras. 14–15, in particular para. 14. See also opinions No. 89/2017, para. 37 (a); No. 53/2016, para. 42; No. 3/2009, para. 30; No. 2/2009, para. 27; and No. 44/2005, para. 13. See further Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights, *Human Rights Situation of Detainees at Guantánamo* (Warsaw, 2015), paras. 8–9 and 111.



power or effective control, the obligations of the United States under international human rights law extend to persons detained at Guantánamo Bay (paras. 10–11);<sup>6</sup>

(ii) The global struggle against international terrorism does not constitute an armed conflict for the purposes of the applicability of international humanitarian law.<sup>7</sup> 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. Such deprivation of liberty is governed by articles 9 and 14 of the Covenant. That includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of independence and impartiality, the right to be informed of the reasons for arrest, the right to be informed of the evidence underlying those reasons, the right to assistance by counsel and the right to a trial within a reasonable time or release. Any person deprived of liberty must enjoy effective access to habeas corpus proceedings, and any limitations on this right should be viewed with the utmost concern (paras. 21 and 25–26);<sup>8</sup>

(iii) Torture is prohibited under article 7 of the Covenant and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture is non-derogable, including during the fight against terrorism, because of its status as a *jus cogens* norm. The prohibition of torture 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 (paras. 41–45);

(c) In May 2013, the Working Group, together with the Inter-American Commission on Human Rights and three other special procedures mandate holders, reiterated the need to end indefinite detention at Guantánamo Bay.<sup>9</sup> The authors of the joint statement emphasized that, even in extraordinary circumstances, the indefinite detention of individuals beyond a minimal and reasonable period of time constitutes a flagrant violation of international human rights law, which in itself constitutes a form of cruel, inhuman and degrading treatment. The authors urged the United States to adopt all legislative, administrative, judicial and other measures to prosecute, with full respect for due process, individuals held at Guantánamo Bay or, where appropriate, provide for their immediate release or transfer to a third country in accordance with international law;

(d) The Working Group's jurisprudence has determined that prolonged and indefinite detention at Guantánamo Bay is arbitrary. The Working Group considered the cases of detainees held at Guantánamo Bay for periods of 14.5 years (opinion No. 89/2017); 8 years (opinion No. 50/2014); more than 10 years (opinion No. 10/2013); almost 5 years (opinion No. 3/2009); and 6.5 years (opinion No. 2/2009). In each case, the detainees had not been afforded due process, such as the right to a prompt review of the lawfulness of their detention before a judicial authority and other fair trial rights, which had resulted in prolonged and indefinite detention.<sup>10</sup> Following its visit to the United States in 2016, the Working Group expressed concern that detainees at Guantánamo Bay had not been tried by an independent and impartial court after many years of arbitrary detention (A/HRC/36/37/Add.2, para. 78).

55. Other human rights mechanisms have expressed concern about the arbitrary deprivation of liberty, lack of due process and ill-treatment of detainees at Guantánamo Bay. These include the Human Rights Committee (CCPR/C/USA/CO/4, para. 21), the

<sup>6</sup> See opinion No. 57/2013, para. 55, and 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. See also *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

<sup>7</sup> See opinions No. 11/2007, para. 11, and No. 43/2006, para. 31. See also A/HRC/13/42, para. 51.

<sup>8</sup> See opinion No. 89/2017, para. 43.

<sup>9</sup> See [www.oas.org/en/iachr/media\\_center/PReleases/2013/029.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/029.asp).

<sup>10</sup> In an earlier case involving four detainees held without charge at Guantánamo Bay, the Working Group found that there was no legal basis for their detention (opinion No. 5/2003).

Committee against Torture (CAT/C/USA/CO/3-5, para. 14) and special procedures mandate holders,<sup>11</sup> as well as regional bodies such as the Inter-American Commission on Human Rights<sup>12</sup> and OSCE.<sup>13</sup> Moreover, during the universal periodic review of the United States in May 2015, 16 delegations expressed concern and made recommendations in relation to Guantánamo Bay, including providing due process to detainees, allowing independent monitoring and investigation, and closing the facility.<sup>14</sup>

56. Turning to the application of the above-mentioned principles to the present case, it is clear from the Working Group's jurisprudence that the obligations of the United States under international human rights law extend to persons, including Mr. al Qahtani, who are detained at Guantánamo Bay. The Working Group must determine whether the Government has violated those obligations in Mr. al Qahtani's case. In doing so, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case of breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the allegations made by the source.

57. The source alleges that Mr. al Qahtani's deprivation of liberty is arbitrary under categories I, III and V.

58. In considering whether Mr. al Qahtani's deprivation of liberty is arbitrary, it is important to determine the nature of his detention. The source describes Mr. al Qahtani's detention as administrative. However, the Working Group is of the view that his detention was criminal in nature, at least initially for almost seven years following his arrest on 15 December 2001 until May 2008. During that period, Mr. al Qahtani was suspected by the Federal Bureau of Investigation of involvement in the attacks of 11 September 2001 and criminal charges appear to have been contemplated against him.<sup>15</sup> According to the source, all criminal charges against Mr. al Qahtani were withdrawn in May 2008 and announcements that further charges would be brought have not eventuated. As a result, the Working Group considers that it is appropriate to apply to Mr. al Qahtani's case the guarantees under the Covenant that relate to detention in a criminal matter. It appears that Mr. al Qahtani has been held in administrative detention for over 11 years since May 2008 for the purpose of interrogation and intelligence gathering on al-Qaida, although further criminal charges may still be brought against him.

59. The source alleges that the Government failed to inform Mr. al Qahtani of the reasons for his detention until the end of 2005, four years after his capture in December 2001. The source submits that Mr. al Qahtani had a right to be formally notified of the reasons for his detention at the moment he was detained, not after four years of detention. The Government was given an opportunity to respond to this allegation, but did not do so.

60. 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.<sup>16</sup> As the Human Rights Committee has explained, one purpose of requiring that arrested persons be informed of the reasons for the arrest is to enable them to seek release if the legal basis for the detention is unfounded.<sup>17</sup>

<sup>11</sup> Several urgent appeals have been sent to the United States in relation to detention at Guantánamo Bay (see, for example, UA USA 22/2017; JUA USA 5/2016; JUA 31/2012). The communications and the responses of the Government are available at: [www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx).

<sup>12</sup> See, for example, *Towards the Closure of Guantánamo* (2015), particularly para. 23.

<sup>13</sup> See *Human Rights Situation of Detainees at Guantánamo*. See also OHCHR and OSCE, "Open letter to the Government of the United States of America on the occasion of the 14th anniversary of the opening of the Guantánamo Bay detention facility" (January 2016).

<sup>14</sup> A/HRC/30/12, paras. 41, 72, 84, 99, 176.239–176.250 and 176.288.

<sup>15</sup> See Human Rights Committee, general comments No. 35, para. 15, and No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15.

<sup>16</sup> The Human Rights Committee has stated that this requirement applies broadly to providing reasons for any deprivation of liberty, general comment No. 35, para. 24.

<sup>17</sup> *Ibid.*, para. 25.

Mr. al Qahtani was not informed of the reasons for his arrest and had no information to challenge the legality of his detention, in violation of article 9 (2). An arrest is arbitrary when carried out without informing the arrested person of the reasons for the arrest.<sup>18</sup>

61. In addition, it appears that Mr. al Qahtani was not promptly informed of any charges. There is nothing to suggest that he was informed of any charges prior to his appearance before the Combatant Status Review Tribunal on 21 October 2004, almost three years after his initial detention. Moreover, the source indicates that he was not informed during his appearance before the Tribunal of any charges. The Government did not contest the allegation. That amounts to a violation of Mr. al Qahtani's right under article 9 (2)<sup>19</sup> and 14 (3) (a) of the Covenant to be promptly informed of the charges, as well as a failure to invoke a legal basis to justify his detention.

62. Furthermore, the source alleges that Mr. al Qahtani was deprived of his liberty without an effective opportunity to be promptly heard by a judicial or other authority. Mr. al Qahtani was handed over to the United States on 27 December 2001. For the next 1,029 days, he was detained, interrogated and tortured, while being denied a review by any type of authority. It was not until 21 October 2004, almost three years after his detention began, that he finally received an administrative hearing before the Tribunal. He filed a habeas corpus petition in October 2005, but the case was pending at the time of the submission by the source to the Working Group. The Government has not responded to these allegations. It clearly violated Mr. al Qahtani's right under article 9 (3) of the Covenant to be brought promptly before a judge or other officer authorized by law to exercise the judicial power to review the legal basis for his detention.<sup>20</sup> Moreover, even when Mr. al Qahtani's detention was finally reviewed by the Tribunal in October 2004, this did not meet the standards of review by a judicial authority, as the Tribunal is a military tribunal of a summary nature.<sup>21</sup>

63. The Working Group notes that Mr. al Qahtani was held in prolonged solitary confinement, in complete isolation from other people for at least five months from 8 August 2002 to early 2003.<sup>22</sup> Holding persons incommunicado so that they have no access to the outside world, particularly to their family and lawyers, violates their right to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant.<sup>23</sup> Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty<sup>24</sup> under the Covenant and customary international law, and is essential to ensuring that detention has a legal basis. Given that Mr. al Qahtani was unable to challenge his detention for almost three years, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated.

64. According to the source, Mr. al Qahtani's deprivation of liberty has no legal basis under any domestic law. While the United States has argued that Mr. al Qahtani is detained lawfully under the Authorization for Use of Military Force, that authorization does not explicitly allow for arrest or detention, and does not provide a legal basis for detention. As the Working Group has stated, the Authorization authorizes the President of the United States to "use all necessary and appropriate force against those nations, organizations, or

<sup>18</sup> See opinions No. 10/2015, para. 34, and No. 46/2019, para. 51.

<sup>19</sup> See Human Rights Committee, general comment No. 35, para. 29.

<sup>20</sup> This right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control. It applies even before formal charges are asserted, so long as the person is arrested or detained on suspicion of criminal activity. See general comment No. 35, para. 32.

<sup>21</sup> See 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, guideline 4, para. 55. See also opinion No. 46/2019, para. 54. The Working Group reached a similar conclusion in relation to the Tribunal in opinions No. 89/2017, para. 46; No. 50/2014, para. 72; No. 10/2013, para. 35; and No. 2/2009, para. 32.

<sup>22</sup> The source states that Mr. al Qahtani was not able to meet with a lawyer until December 2005 but does not state whether Mr. al Qahtani, a Saudi national, had access to consular assistance.

<sup>23</sup> See opinions No. 45/2019, No. 33/2019, No. 32/2019, No. 46/2017 and No. 45/2017.

<sup>24</sup> United Nations Basic Principles and Guidelines, para. 3.

persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001<sup>25</sup> but does not specifically authorize arrest or detention.<sup>26</sup>

65. Moreover, the source alleges that all criminal charges against Mr. al Qahtani were dropped on 12 May 2008 following an admission by the Office of Military Commissions that military interrogators had tortured Mr. al Qahtani. While the Chief Prosecutor announced in November 2008 that further charges would be brought against Mr. al Qahtani, those charges have never materialized. Mr. al Qahtani has remained in administrative detention since the dropping of the charges, without legal justification, so that the authorities can gather intelligence.<sup>27</sup>

66. The Working Group concurs with the statement by the Human Rights Committee that administrative detention would normally amount to arbitrary detention, as other effective measures of addressing any security threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and the burden of proof increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 of the Covenant.<sup>28</sup> The Government has not demonstrated that it has met these requirements. Mr. al Qahtani has not stood trial, he has not been convicted, he is not serving any definite sentence, and the charges against him have been dropped. The Working Group finds that Mr. al Qahtani has been held in prolonged and indefinite administrative detention for over 11 years, since May 2008, without a legal basis.<sup>29</sup>

67. The Working Group wishes to recall the concluding observations of the Human Rights Committee on the fourth periodic report of the United States, in which the Committee stated that the United States should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo Bay were dealt with through the criminal justice system rather than military commissions, and that those detainees should be afforded the fair trial guarantees enshrined in article 14 of the Covenant (CCPR/C/USA/CO/4, para. 21).

68. The Working Group finds that there is no legal basis for Mr. al Qahtani's deprivation of liberty, which is arbitrary under category I.

69. In addition, the source alleges that the Government failed to observe international fair trial standards.

70. Mr. al Qahtani has been deprived of his liberty for nearly 18 years at Guantánamo Bay with no indication when, if ever, he will be brought to trial. That period is manifestly excessive, unfair and contrary to due process. Mr. al Qahtani'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, have been violated.<sup>30</sup>

71. According to the source, Mr. al Qahtani was subjected to torture during his detention, particularly during his isolation from 8 August 2002 to early 2003. The source alleges that this treatment further damaged the psychological well-being of Mr. al Qahtani, who was suffering from a pre-existing mental illness at the time of his arrest. The source further submits that the damage caused by the torture cannot be addressed effectively while Mr. al Qahtani remains in prolonged and indefinite detention, which is inhumane in itself

<sup>25</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>26</sup> See opinions No. 50/2014, para. 69; and No. 10/2013, para. 34.

<sup>27</sup> The source provided a letter dated 30 June 2017 from the United States Justice Department stating that Mr. al Qahtani's detention remains necessary to protect against a continuing significant threat to United States security.

<sup>28</sup> See Human Rights Committee, general comment No. 35, para. 15.

<sup>29</sup> See opinion No. 89/2017, para. 44. See also opinions No. 50/2014, para. 74; and 10/2013, para. 37.

<sup>30</sup> See Human Rights Committee, general comment No. 32, para. 61.

(CAT/C/USA/CO/3-5, para. 14). In support of those claims, the source notes that Mr. al Qahtani's allegations of torture are well documented and undisputed, referring to an admission by the senior official in charge of the Office of Military Commissions that Mr. al Qahtani's treatment met the legal definition of torture.

72. The Working Group considers that the source has presented a credible *prima facie* case that Mr. al Qahtani was subjected to an appalling level of physical and psychological torture (*Ibid.*). That conduct appears to violate 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 and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>31</sup> According to the source, the determination to subject Mr. al Qahtani to suffering was so great that the military authorities continued to interrogate him in an ambulance when he was rushed to hospital. The Working Group calls on the Government to investigate Mr. al Qahtani's alleged torture, in accordance with its obligations under articles 4, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and prosecute anyone found to have been involved. Any lack of accountability for torture would only undermine the moral authority with which terrorism must be fought.

73. The source also submits that Mr. al Qahtani's detention cannot be justified on the basis of his self-incriminating statements, which were produced through torture. The Working Group recalls that the burden is on the Government to prove that Mr. al Qahtani's statements were given freely,<sup>32</sup> but it has not done so. Mr. al Qahtani did not have access to a lawyer until December 2005, four years after he was detained. Confessions made in the absence of legal counsel are not admissible as evidence in criminal proceedings.<sup>33</sup> By detaining Mr. al Qahtani based on a statement obtained by coercion, the authorities have violated his right to be presumed innocent under article 14 (2) of the Covenant and his right not to be compelled to confess guilt under article 14 (3) (g) of the Covenant. The intentional infliction of pressure in order to obtain and use a confession violated the obligations of the United States under articles 2, 13, 15 and 16 of the Convention against Torture.

74. Having taken into account the severity of the alleged torture and its impact upon Mr. al Qahtani's pre-existing mental illness, the Working Group considers it extremely unlikely that Mr. al Qahtani would have been able to effectively participate in his first review at the Combatant Status Review Tribunal in October 2004, in his second, third and fourth reviews in 2005, 2006 and 2008 before the Administrative Review Board, and his review before the Periodic Review Board in July 2016. The Working Group considers that this adds weight to its conclusion that Mr. al Qahtani's right to a fair trial was violated.<sup>34</sup>

75. Given the serious allegations of torture and ill-treatment, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

76. In addition, the source alleges that Mr. al Qahtani was denied his right to a fair hearing by a competent, independent and impartial tribunal when his detention was reviewed by the Tribunal and the two Review Boards. According to the source, all these bodies are non-judicial and do not satisfy the requirements of article 14 (1) of the Covenant.

77. The source reports that the Tribunal consists entirely of military officers. When Mr. al Qahtani appeared before it, he was not given access to legal counsel. The Tribunal relied

<sup>31</sup> The Working Group notes the reservations to article 7 of the Covenant and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in particular that the Government of the United States considers itself bound by the prohibition of cruel, inhuman or degrading treatment or punishment only to the extent that it means the cruel, unusual and inhuman treatment or punishment prohibited by the fifth, eighth and/or fourteenth amendments to the Constitution of the United States.

<sup>32</sup> See Human Rights Committee, general comment No. 32, para. 41.

<sup>33</sup> See opinions No. 14/2019, para. 71; No. 1/2014, para. 22; and No. 40/2012, para. 48. See also E/CN.4/2003/68, para. 26 (e).

<sup>34</sup> See opinion No. 29/2017, para. 63. See also opinions No. 53/2018, para. 77 (c); No. 52/2018, para. 79 (j); and No. 47/2017, para. 28. See also E/CN.4/2004/3/Add.3, para. 33.

solely on the second-hand testimony of officials and information obtained through torture. Mr. al Qahtani could not challenge the evidence against him because it was classified. According to the source, the Administrative Review Board operates under similar limitations, while the Periodic Review Board panel is composed of members of the executive. The Periodic Review Board refuses to exclude evidence produced by torture unless all participating agencies concur that the interrogators engaged in torture. Mr. al Qahtani's requests to review all of the evidence presented to the Periodic Review Board were repeatedly ignored and he was given an unclassified summary of the evidence.

78. The Working Group considers that the proceedings against Mr. al Qahtani before the Tribunal and the two Review Boards did not meet the standards of article 14 (1) of the Covenant. The information submitted by the source, which was not contested by the Government, indicates that they did not respect the equality of arms as they failed to ensure that a lawyer was available to Mr. al Qahtani, relied on hearsay and coerced evidence, and refused to release classified information.

79. Every individual deprived of liberty has the right to have access to material related to their detention, including information that may assist the detainee in arguing that the detention is not lawful or that the reasons for the detention no longer apply.<sup>35</sup> However, that right is not absolute and the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly point to the factual basis for the detention.<sup>36</sup> In the present case, the Government did not provide any justification as to why Mr. al Qahtani could not have access to all the evidence presented to the tribunals. That violated his rights under article 14 (1) and 14 (3) (b) of the Covenant to a fair hearing and to have adequate time and facilities for the preparation of a defence "in full equality".<sup>37</sup>

80. The Working Group has previously found that the procedures of the Combatant Status Review Tribunal and the Administrative Review Board are not adequate to satisfy the right to a fair and independent trial, as these are military tribunals of a summary nature.<sup>38</sup> The Periodic Review Board also fails to meet this standard, as the reference to an independent and impartial tribunal in article 14 (1) of the Covenant designates a body that is independent of the executive branch of government.<sup>39</sup> The Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.

81. The source alleges that Mr. al Qahtani was denied legal counsel upon his initial detention and during his first four administrative hearings. After his detention in December 2001, he was not allowed to meet with a lawyer until December 2005. All persons deprived of their liberty have the right to legal assistance by counsel at any time during their detention, including immediately after their apprehension.<sup>40</sup> Mr. al Qahtani was not afforded his right under article 14 (3) (b) of the Covenant to adequate time and facilities for the preparation of his defence and to communicate with counsel.

82. Those violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. al Qahtani an arbitrary character under category III. Given the delay in bringing Mr. al Qahtani to trial, as well as the trauma that he endures, the Working Group considers that it is no longer possible for Mr. al Qahtani to receive a fair trial.

83. Further, the source claims that Mr. al Qahtani is being held in indefinite detention on a discriminatory basis, namely his status as a foreign national and his religious beliefs.

<sup>35</sup> See United Nations Basic Principles and Guidelines, principle 12 and guidelines 11 and 13.

<sup>36</sup> *Ibid.*, guideline 13, paras. 80–81.

<sup>37</sup> See opinions No. 78/2018, paras. 78–79; No. 18/2018, para. 53; No. 89/2017, para. 56; No. 50/2014, para. 77; and No. 19/2005, para. 28 (b).

<sup>38</sup> See opinions No. 89/2017, para. 46; No. 50/2014, para. 72; No. 10/2013, para. 35; and No. 2/2009, para. 32. See also A/HRC/27/48, paras. 66–71 and 85–86, and opinions No. 46/2019, para. 66; No. 4/2019, para. 58; No. 73/2018, para. 61; and No. 3/2018, para. 57.

<sup>39</sup> See Human Rights Committee, general comment No. 32, para. 18.

<sup>40</sup> See United Nations Basic Principles and Guidelines, principle 9 and guideline 8.

According to the source, Guantánamo Bay is a military prison reserved exclusively for Muslim foreign nationals. It was specifically created to place foreign detainees outside the reach of constitutional protection in the United States.

84. In the proceedings before the military commission, Mr. al Qahtani has been deprived of the fair trial guarantees that would ordinarily apply within the judicial system of the United States. That act of discrimination on the basis of his status as a foreign national<sup>41</sup> and his religion has denied Mr. al Qahtani equality before the law and violates articles 2, 5 (a) and (b) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>42</sup> articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.

85. The Working Group notes that the 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.<sup>43</sup> 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.

86. Mr. al Qahtani's deprivation of liberty is therefore arbitrary under category V.

87. The Working Group is concerned about the health of Mr. al Qahtani, which is reportedly precarious. The Working Group urges the Government to release him immediately and unconditionally from the custody of the United States military, to ensure that he receives the necessary rehabilitation for the physical and psychological harm that has resulted from his prolonged detention, and to transfer him to his home country.

88. The Working Group has clarified many issues of international law in its Guantánamo Bay jurisprudence, to which the present opinion is the most recent addition. While it has specifically addressed Mr. al Qahtani's case, the conclusions reached in this opinion also apply to other detainees in similar situations at Guantánamo Bay.

89. This is one of several cases brought before the Working Group concerning the arbitrary deprivation of liberty of persons at Guantánamo Bay.<sup>44</sup> Under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.<sup>45</sup> As the Working Group stated during its visit to the United States in October 2016, it remains deeply concerned at the ongoing operation of the detention facility at Guantánamo Bay. The Working Group recalls that the closure of Guantánamo Bay was previously an important priority of the Government and urges the Government to once again prioritize putting an end to detention at that facility. In the meantime, the Working Group urges the Government to cooperate with United Nations human rights mechanisms and allow them full access to the facility (A/HRC/36/37/Add.2, para. 90).

90. The Working Group would welcome an invitation to undertake a follow-up visit to the United States, with specific authorization to visit Guantánamo Bay Naval Base. According to the terms of reference for country visits by the Working Group, such a visit would need to be conducted under conditions which allow its members to have unrestricted access to the facility and to hold private and confidential interviews with any detainee.<sup>46</sup>

<sup>41</sup> See opinions No. 89/2017, No. 50/2014 and No. 10/2013. See also CERD/C/USA/CO/7-9, para. 22.

<sup>42</sup> See Committee on the Elimination of Racial Discrimination, general recommendations No. 30 (2004) on discrimination against non-citizens, paras. 19–21, and No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

<sup>43</sup> See declarations and reservations to the Covenant at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

<sup>44</sup> See opinions No. 89/2017, No. 50/2014, No. 10/2013, No. 3/2009 and No. 2/2009.

<sup>45</sup> See opinion No. 47/2012, para. 22.

<sup>46</sup> See [www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx](http://www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx). See also [www.ohchr.org/Documents/HRBodies/SP/ToRs2016.pdf](http://www.ohchr.org/Documents/HRBodies/SP/ToRs2016.pdf).

### **Disposition**

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

The deprivation of liberty of Mohammed al Qahtani, being in contravention of articles 2, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2 (1), 2 (3), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

92. The Working Group requests the Government of the United States of America to take the steps necessary to remedy the situation of Mr. al Qahtani without delay and 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.

93. The Working Group considers that, taking into account all the circumstances of the case, including the grave harm to the physical and psychological well-being of Mr. al Qahtani, the appropriate remedy would be to release him immediately and to accord him an enforceable right to compensation and other reparations, in accordance with international law.

94. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. al Qahtani, and to take appropriate measures against those responsible for the violation of his rights.

95. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to: (a) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and (b) the Special Rapporteur on the independence of judges and lawyers for appropriate action.

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

### **Follow-up procedure**

97. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. al Qahtani has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. al Qahtani;
- (c) Whether an investigation has been conducted into the violation of Mr. al Qahtani'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 United States of America with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

98. The Government is invited to inform the Working Group of any difficulties it 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.

99. The Working Group requests the source and the Government 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.



100. 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.<sup>47</sup>

*[Adopted on 20 November 2019]*

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<sup>47</sup> Human Rights Council resolution 42/22, para. 3.