

No. 10/2013 (United States of America)

Communication addressed to the Government on 6 February 2013

Concerning Mr. Obaidullah

The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

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. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), 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: Mr. Obaidullah is a 29-year-old ethnic Pashtun Afghan citizen resident in the village of Milani, Khost province. On 21 July 2002, he was taken into custody during a raid on his family home. Mr. Obaidullah was initially taken into custody at a United States military station at Chapman Airfield in Khost and then transferred to a prison at Bagram Air Base, near Bagram, where he was held for three months. While imprisoned in Afghanistan, Mr. Obaidullah was not informed of the reasons for his detention. He was threatened, coerced into making false statements and tortured.

4. In October 2002, United States military forces transferred Mr. Obaidullah to the United States detention facility at Guantánamo Bay, Cuba, where he continued to be subjected to torture and

inhuman treatment. More than ten years later, Mr. Obaidullah continues to be detained at Guantánamo Bay. He was not provided any reasons for his detention nor charged. It was reported that he was detained because the United States authorities had received a tip from an unknown source claiming that Mr. Obaidullah was associated with an al-Qaeda cell. The authorities have never released the identity of this source to Mr. Obaidullah.

5. In 2004, Mr. Obaidullah appeared before a military Combatant Status Review Tribunal (CSRT), which concluded that Mr. Obaidullah should remain in detention. It is alleged that the CSRT did not guarantee basic procedural protections such as the exclusion of coerced statements, the exclusion of unreliable hearsay evidence and the ability to cross-examine witnesses.

6. The source further reports that from 2005 to 2007, Administrative Review Boards (ARBs) were held before military officers to review Mr. Obaidullah's detention. The ARBs suffered from the same procedural deficiencies as the CSRTs, and they also concluded that Mr. Obaidullah should remain in detention.

7. At the CSRT and ARB proceedings, Mr. Obaidullah denied any connection with al-Qaeda or the Taliban. He also informed the panels of his mistreatment while in detention.

8. In 2008, six years after his arrest, Mr. Obaidullah obtained legal counsel for the first time. He filed a petition for a writ of habeas corpus to the United States District Court for the District of Columbia. Two months later, the United States Government filed preliminary military commission charges against Mr. Obaidullah for conspiracy and providing material support for terrorism. However the authorities never completed the two-step process necessary to properly file commission charges, and the preliminary charges were dropped in June 2011. From 2008 to June 2010, the habeas proceeding was held in abeyance until the completion of military commission proceedings that never even began.

9. In November 2010, the Court denied Mr. Obaidullah's habeas petition, finding that it was "more likely than not" that he was a member of an al-Qaeda bomb cell and therefore could still be detained. The district court only assessed the sufficiency of the evidence against Mr. Obaidullah, and did not hear arguments about international law. The Court presumed the accuracy of inconsistent and unconfirmed government intelligence reports, admitted unreliable hearsay evidence and used an extraordinarily low burden of proof. Mr. Obaidullah's habeas corpus proceedings did not provide him timely or fair and effective review with minimum due process guarantees.

10. Mr. Obaidullah appealed the habeas corpus court's decision, arguing that there was no legal basis for his detention and that the evidence against him was insufficient. In August 2012, the higher Court affirmed the lower Court's decision.

11. In February 2012, Mr. Obaidullah requested that the district Court reopen his case on the basis of new evidence discovered by a military investigator. This new evidence reportedly cast grave doubt on the Government's evidence, including the Government's secret source.

12. The source contends that Mr. Obaidullah has been detained for more than 10 years without charge or trial, and that he has not been provided an administrative review of his detention since 2007.

13. The source further considers that there is no legal basis for Mr. Obaidullah's prolonged and indefinite detention without charge or trial. His detention does not satisfy the principle of legality. It is indefinite and prolonged, serves no reasonable security-related purpose and has an improper purpose, namely interrogation. Long periods of detention with no prospect of remedial measures are unacceptable under domestic and international law. Indefinite detention violates articles 7 and 9 of the International Covenant on Civil and Political Rights.

14. The source points out that Mr. Obaidullah's detention over 10 years is administrative, since there is no charge, trial or conviction, and he is not serving a definite sentence. According to the International Committee of the Red Cross procedural principles and safeguards for internment and administrative detention in armed conflict and other situations of violence, administrative detention must be used only in exceptional circumstances and for short periods. Mr. Obaidullah's detention has no legal basis because it was for the purpose of interrogation. Detention at Guantánamo Bay was instituted not to prevent combatants from taking up arms against the United States Government, but to obtain information and intelligence on the al-Qaeda network. The authorities deliberately

transferred Mr. Obaidullah away from his family to implement a regime of incommunicado detention with a persistent pattern of interrogation, abuse and torture to elicit information.

15. Detention must not only be lawful, but also reasonable and necessary. Mr. Obaidullah's detention is not necessary to prevent future international terrorist attacks against the United States and serves no security-related purpose now, if indeed it ever did. He has consistently denied any affiliation with al-Qaeda and the unknown source who made the allegation likely made the false accusation against him for personal gain.

16. The authorities did not provide Mr. Obaidullah the reasons for his detention, or promptly bring him before a judicial authority - or any authority - for review of his detention; or provide him with legal counsel within a reasonable time. For at least two years, the authorities did not provide him with a formal explanation of the reasons for his detention. His most basic rights to fair trial and due process were repeatedly violated during his ten-year detention. This contravenes articles 9 and 14 of the Covenant and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The CSRT and ARB administrative review hearings were not held before an independent and impartial tribunal, as required by article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant. The hearings considered secret evidence and unreliable evidence procured through coercion. The hearings were closed to the public; detainees were prohibited from rebutting evidence; they were denied legal counsel; they were required to disprove their guilt, and were compelled to self-incriminate.

17. Until 2008, six years after his arrest, the authorities refused to allow Mr. Obaidullah access to habeas corpus proceedings. These proceedings in the event failed to provide fair, effective and meaningful review of the legality of his detention due to unfair procedures, such as low burden of proof, reliance on hearsay evidence and coerced statements made by the detainee; in addition reliance on secret evidence and a presumption of accuracy to inconsistent government intelligence reports. Although the petition for a writ of habeas corpus was filed in July 2008, the Court did not make a decision until 2010.

18. According to the source, the unfair, untimely and inadequate procedures provided to Mr. Obaidullah gravely violate articles 8 and 10 of the Universal Declaration of Human Rights; articles 9 and 14 of the Covenant and Principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988.

19. The source adds that Mr. Obaidullah was subjected to prolonged and indefinite detention because of his status as a foreign national. He was also deprived of the due process and fair trial protections of the United States court system because of his foreign national status. If he had been a United States citizen, he would not have been subjected to the inadequate protections of the military commissions. Such discrimination lacks any legitimate purpose, violates article 2 of the Universal Declaration of Human Rights and article 26 of the Covenant, and renders his detention arbitrary.

20. The authorities have indicated their intent to charge and try Mr. Obaidullah in the military commission system, as evidenced by the continuation of the appointment of military defence counsel. According to the source, the military commissions contravene international human rights law by subjecting civilians to military trial; they are ex post facto; they seek to try defendants of crimes that are not crimes under the laws of war, and they deprive defendants of minimum due process and fair trial guarantees in violation of article 14 of the Covenant.

21. The source concludes that Mr. Obaidullah's prolonged and indefinite detention without charge or trial for more than ten years is arbitrary and requests his immediate release from military custody, repatriation to his home country and rehabilitation and compensation measures.

Response from the Government

22. In the communication addressed to the Government on 6 February 2013, the Working Group transmitted the allegations made by the source. The Working Group stated that it would appreciate it if in its reply the Government could provide it with detailed information about the current situation of Mr. Obaidullah and clarify the legal provisions justifying his continued detention. The Working Group regrets that it has not received a reply from the Government. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render its opinion on the detention of Mr. Obaidullah in conformity with paragraph 16 of its methods of work.

Discussion

23. 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 of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".¹

24. In a joint statement of 1 May 2013, the Working Group, together with the the Inter-American Commission on Human Rights (IACHR), the United Nations Special Rapporteur on torture, the United Nations Special Rapporteur on human rights and counter-terrorism, and the United Nations Special Rapporteur on health reiterated the need to end the indefinite detention of individuals at the Naval Base in Guantánamo Bay. The Working Group understands that Mr. Obaidullah is taking part in the hunger strike which a large group of detainees at the Guantánamo Naval Base have been carrying out since February 2013 in protest against their state of indefinite detention and the treatment they have received from authorities at the prison. IACHR, the Working Group and the United Nations Special Rapporteurs noted with the utmost concern, as have the United Nations High Commissioner for Human Rights and the International Committee of the Red Cross, that the Guantánamo detainees' lack of legal protection and the resulting anguish caused by the uncertainty regarding their future has led them to take the extreme step of a hunger strike to demand a real change to their situation. IACHR, the Working Group, and the Special Rapporteurs underlined that, even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment. IACHR, the Working Group, and the Special Rapporteurs all confirmed, as has the United Nations High Commissioner for Human Rights, that the continuing and indefinite detention of individuals without the right to due process is arbitrary and constitutes a clear violation of international law.

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

26. Furthermore, IACHR, the Working Group, and the Special Rapporteurs urged the United States 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 Guantánamo 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 have been certified for release by the Government itself; (c) conduct a serious, independent, and impartial investigation into the 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 Guantánamo detention centre under conditions in which they can freely move about the installations and meet freely and privately with the prisoners; and (e) take concrete, decisive steps toward closing the detention centre at the Guantánamo Naval Base once and for all. Along these lines, they urged the Government to state clearly and unequivocally what specific measures it would implement toward that end.

27. In its 2008 annual report, the Working Group drew up a list of principles for the deprivation of liberty of persons accused of acts of terrorism in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant (WGAD annual report 2008, A/HRC/10/21, paras. [53]-[54]. These 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.

28. In several of its Opinions and reports the Working Group has addressed detention at the Naval Base of Guantanamo Bay. 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 United States Government submissions to the Working Group's Opinion No. 29/2006 (United States of America). The Government had referred to the United States Supreme Court in *Hamdan v. Rumsfeld*, and asserted that the law of armed conflicts governs the armed conflict with Al-Qaida. In paragraph 14 of its 2006 annual report, as in section IV of its 2005 annual report (E/CN.4/2006/7), the Working Group pointed out that "the application of international humanitarian law ... does not exclude the application of international human rights law". This is also restated in the Working Group's "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law" (see its 2012 annual report [A/HRC/22/44], para. 45).

29. According to the joint report by five special rapporteurs on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120, para. 83), 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 Covenant by the State party. The United States has not notified any derogation from the Covenant. In its 2006 annual report (para. 15) 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 Covenant. The Working Group and the Human Rights Committee here apply general principles as they have been clarified by the International Court of Justice and this has also gradually become the case in the jurisprudence of the regional human rights courts (in particular, the European Court of Human Rights and the Inter-American Court of Human Rights); see in particular *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, and *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, at para. 109, where the Court stated that "these provisions of CERD 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, requires a justification for a territorial limit on their scope, and this is a consequence of the object and purpose of human rights treaties.

30. The Working Group recalls that, in 1986, the Human Rights Committee, in *López Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, held that "it would be unconscionable to so interpret the responsibility under Article 2 of the International Covenant on Civil and Political Rights (ICCPR) 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".² The Human Rights Committee referred to article 5(1) of the ICCPR, 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."

31. It is at the core of this general rule that a State's international law obligations equally apply to its acts abroad, and those of its agents abroad, and it is clear that it applies when individuals are held in detention. Adopting a contextual and purposive interpretation of article 2 of the Covenant, 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".³ 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 this end, the joint report of five special procedures mandate holders of the former Commission on Human Rights⁴ 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.

32. The United States is bound by international human rights law regarding its detention of Mr. Obaidullah. The International Court of Justice in its 2010 *Diallo* judgment stated that article 9, paragraphs 1 and 2, of the Covenant applies in principle to any form of detention, "whatever its legal basis and the objective being pursued".⁵ 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."⁶ The United States has not derogated from the Covenant, and even if it had, customary international law on arbitrary detention would apply, and in this case it does so as peremptory norm (*jus cogens*) of international law.

33. 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".⁷ In the present case, the Working Group would like to point out that the detention of Mr. Obaidullah is also in direct contravention of the protection provided by international humanitarian law. With no concrete evidence that Mr. Obaidullah 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. Obaidullah serves the purpose of preventing a combatant from continuing to take up arms against the United States.

34. There are further issues relating to the legality of the detention, even if it had not otherwise been in contravention of international law. The Authorization for Use of Military Force (AUMF), which authorizes the President to "use all necessary and appropriate force against those nations, organisation or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"⁸ does not specifically authorize arrest or detention.

35. Pursuant to article 9(4) of the Covenant, any individual deprived of liberty by arrest or detention is entitled to take proceedings before a court without delay to challenge the legality of detention. This right is non-derogable under both treaty law and customary international law.⁹ Mr. Obaidullah first received an administrative hearing before the Combatant Status Review Tribunal (CSRT) in 2004, two years after he was incarcerated, and appeared annually before the Administrative Review Tribunal (ART). The two-year delay in allowing Mr. Obaidullah to challenge his detention is a grave and clear violation, further aggravated by his continued detention. Further, the administrative hearings before the CSRT and ART did not satisfy his right to habeas corpus and failed to guarantee his right to a full and fair trial as required under article 14(1) of the Covenant. The source has again drawn the Working Group's attention to the ruling by the United States Supreme Court that CSRT is not an adequate and effective substitution to habeas corpus proceedings,¹⁰ and the Working Group

has itself previously stated that "the procedures of the CSRT and the ARB are not adequate ... to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature."¹¹

36. Mr. Obaidullah'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 as they are clearly not applicable.

37. 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. This requires a legal base for detention in domestic law that complies with international law. Mr. Obaidullah's detention does not satisfy this requirement. The domestic law used by the United States Government to detain Mr. Obaidullah does not conform to human rights law and international humanitarian law because his detention is prolonged and indefinite.

38. Mr. Obaidullah's case falls into category I of the categories applicable to the cases before the Working Group.

39. 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 and in the relevant international instruments accepted by the United States, is of such gravity as to give the deprivation of liberty an arbitrary character. Mr. Obaidullah's rights to fair trial and due process have been repeatedly violated in breach of articles 9 and 14 of the Covenant during his more than ten-year detention. Mr. Obaidullah 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 of 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 legal counsel throughout his administrative and military hearings.

40. Mr. Obaidullah's case falls into category III of the categories applicable to the cases before the Working Group.

41. 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.

42. Mr. Obaidullah 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. These are acts of discrimination that make his detention arbitrary.

43. Mr. Obaidullah's case falls into category V of the categories applicable to the cases before the Working Group.

Disposition

44. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Obaidullah is arbitrary and 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 into categories I, III and V of the categories applicable to the consideration of the cases submitted to the Working Group.

45. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Obaidullah and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

[Adopted on 3 May 2013]

¹*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Judgments, I.C.J. Reports 1980*, p. 42, para. 91.

²See communications No. R.12/52, *López Burgos v. Uruguay*, views adopted on 29 July 1981, para. 12.3, and No. R.13/56, *Celiberti de Casariego v. Uruguay*, views adopted on 29 July 1981, paras. 12.3 and 10.3.

³Human Rights Committee, general comment No. 31 [80] (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. 1 (A/59/40 (Vol.1)), annex III, para. 10.

⁴E/CN.4/2006/120, para. 11.

⁵*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010*, p. 639 at para. 77.

⁶Opinion No. 44/2005 (Iraq and United States of America), para. 13, also quoted in opinion 2/2009, para. 27. See also general comment No. 31 (see note 3 above), para. 11; draft general comment No. 35, para. 67, and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), p. 226 at para. 25.

⁷Opinion No. 43/2006 (United States of America), para. 31. See also E/CN.4/2006/120, para. 21, noting 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."

⁸Authorisation for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁹See the Working Group's "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law" in the Report of the Working Group on Arbitrary Detention (A/HRC/22/44), para. 47.

¹⁰*Boumediene et al. v. Bush* 553 US (12 June 2008) 37-8; 54-64.

¹¹Opinion 2/2009 (United States of America), para. 32.