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**Human Rights Council**  
**Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020****Opinion No. 70/2020 concerning Mr. Laltu (alias Somrat Morol) (Australia)\***

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 29 June 2020 the Working Group transmitted to the Government of Australia a communication concerning Mr. Laltu (alias Somrat Morol). The Government replied to the communication on 28 September 2020. The State 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).

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\* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.



## Submissions

### *Communication from the source*

4. Mr. Laltu (alias Somrat Morol) is a citizen of Bangladesh, born on about 20 July 1988. He speaks Bangla and was born and raised as a Sunni Muslim. In 2017, he converted to Christianity. Mr. Laltu was raised by adoptive parents and has no contact with his biological parents. He has no identification documents and has never held a passport or had a birth certificate.

5. In about 2008, Mr. Laltu began a relationship with a Christian woman and was threatened by her family. Following an attempt to marry, the couple was captured and taken back to their village, where Mr. Laltu was beaten by locals and detained by the police without charge for over a month. Mr. Laltu was disowned by his adoptive father and expelled from the village.

6. Mr. Laltu fears for his safety also owing to the fact that he witnessed a killing in his father's shop in 2007 or 2008. The killing took place during an incident between two local political party members. Members of the political party to which the victim belonged have put pressure on Mr. Laltu to act as a witness. However, members of the opposing party have threatened to kill him if he gives evidence. In October 2010, Mr. Laltu fled to Malaysia by boat, where he worked illegally as a welder. In October 2012, he fled to Australia, via Indonesia, also by boat.

7. On 7 November 2012, Mr. Laltu reached Australian territorial waters in a boat coming from Indonesia. The boat was intercepted by the Australian Navy. The source assumes that some document warranting the detention was shown, but no such document is currently available. It is further noted that the officers were identifiable by their uniforms and the markings on their ship.

8. The detention was based on the decision of the Department of Immigration and Citizenship. The reason for the arrest imputed by the authorities was unauthorized entry into Australia by boat. More specifically, the Australian Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that an unlawful non-citizen may not be released from detention, even by a court, unless the non-citizen has been granted a visa.

9. Mr. Laltu was initially taken to Wickham Point Alternative Place of Detention in Darwin. On 14 November 2012, he was transferred to the Immigration Detention Centre on Christmas Island.

10. The source explains that Mr. Laltu remains detained because he is classified as an unauthorized maritime arrival and an unlawful non-citizen under the Migration Act. Specifically, section 189 of the Act provides that "if an officer knows or reasonably expects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person".

11. On 28 August 2015, Mr. Laltu was invited to apply for a Temporary Protection visa or a Safe Haven Enterprise visa. Persons considered to be unauthorized maritime arrivals are prohibited from making a valid application for protection unless they are invited to do so by the Minister for Home Affairs or the Minister for Immigration and Border Protection. For Mr. Laltu, that prohibition was lifted more than two and a half years after he had arrived seeking asylum and was detained. The relevant Ministers may exercise their non-delegable and non-reviewable powers to release Mr. Laltu from detention at any time.

12. On 15 January 2016, Mr. Laltu submitted a Safe Haven Enterprise visa application. On 12 July 2016, the Department of Home Affairs denied it, which automatically referred the case to the Immigration Assessment Authority. On 16 September 2016, the Immigration Assessment Authority upheld the decision not to grant a visa. On 1 March 2017, the Federal Circuit Court affirmed that decision.

13. On 6 August 2018, the Full Federal Court issued a decision allowing Mr. Laltu to appeal and holding that the Immigration Assessment Authority did not have jurisdiction to

hear Mr. Laltu's case and that he should have been referred to the Administrative Appeals Tribunal. However, on 5 April 2019, Mr. Laltu was notified again of the decision taken by the Department of Home Affairs. He lodged an appeal against that decision before the Administrative Appeals Tribunal on 8 April 2019. On 11 October 2019, the Administrative Appeals Tribunal affirmed the decision of the Department of Home Affairs to deny Mr. Laltu a Safe Haven Enterprise visa.

14. According to the information received, throughout this complex and lengthy appeal process, Mr. Laltu has remained in various immigration detention centres both offshore and on mainland Australia, including in the Christmas Island Immigration Detention Centre, Wickham Point Alternative Place of Detention in Darwin, Yongah Hill Immigration Detention Centre in Western Australia and Melbourne Immigration Transit Accommodation.

15. Throughout his detention, Mr. Laltu has been known to be of good character and has been consistently held in low-security compounds and facilities. His record shows that he is a person who has respectful relationships with other detainees, staff and authorities.

16. Mr. Laltu has become increasingly mentally unwell during his period in immigration detention. He is prescribed the maximum daily dosage of a drug used to treat anxiety and major depressive disorders. He has been diagnosed with mild recurring depression and is also on medication for insomnia.

17. Mr. Laltu lodged an appeal against the decision of the Administrative Appeals Tribunal before the Federal Circuit Court, which was scheduled to be heard by September 2020, almost a year after the decision of the Administrative Appeals Tribunal. However, the Federal Circuit Court action has been withdrawn and Mr. Laltu remains in detention.

18. The source notes that, under section 195A of the Migration Act, the ministerial powers that could be used to release Mr. Laltu from detention are non-compellable and non-reviewable. While some Constitutional challenges to the power of the Department of Home Affairs to indefinitely detain unlawful non-citizens have been lodged, to date, they have been unsuccessful.

19. The source further submits that Mr. Laltu has been deprived of his liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights. Since arriving in Australia, he has been detained while exercising his right to asylum. He was also denied the right to seek asylum until August 2015, when the Department of Home Affairs lifted the bar on his ability to lodge an application.

20. Mr. Laltu has also been deprived of his rights in contravention of article 26 of the Covenant, which provides that all persons are entitled to equal protection under the law, without any discrimination. As an unauthorized maritime arrival, Mr. Laltu has been subject to the fast track review process, in which the initial decision by the Department of Home Affairs is reviewable only by the Immigration Assessment Authority.

21. According to the source, the Immigration Assessment Authority is a limited avenue of review that offers limited opportunities to conduct a substantive reassessment of the applicant's case. The fast track review process subjects vulnerable asylum seekers to a high risk of falling victim to legal errors, including possible breaches of the principle of non-refoulement.

22. The source states that subsequent review of Mr. Laltu's case determined that he was not an unauthorized maritime arrival and therefore should not have been subject to the fast track review process. That error on the part of the Department of Home Affairs caused lengthy delays to the processing of Mr. Laltu's case and has therefore significantly extended the length of time that Mr. Laltu has spent in detention.

23. Immigration detention is described by the Department of Home Affairs as being used as a last resort and for a very small proportion of the people whose status requires resolution, sometimes through protracted legal proceedings. That is not the case for Mr. Laltu, who was detained immediately on arrival and has lived peaceably and without incident in low-security facilities throughout his time in immigration detention.

24. The source notes that, in its general comment No. 35 (2014), the Human Rights Committee required that detention in the course of proceedings for the control of immigration

“must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time”. Mr. Laltu has been held in administrative detention for over seven years and remains in custody. There is no mechanism under Australian law to challenge his detention, given that such detention is authorized under the Migration Act and case law.

25. Mr. Laltu was not invited to apply for protection under section 46A of the Migration Act until August 2015, when he had been in closed detention for almost two and a half years. During that time, there is no evidence that he was put forward for a bridging visa or community detention (under section 195A of the Act), despite his exemplary behaviour and consistently being assigned to low-security facilities.

26. The High Court of Australia has upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution. Furthermore, the Human Rights Committee has held that there is no effective remedy for people subject to mandatory detention in Australia.

27. The source asserts that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The decision of the High Court of Australia in *Al-Kateb v. Godwin* (2004) confirms that detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution. The source concludes that the effective result of that is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

#### *Response from the Government*

28. On 29 June 2020, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 28 August 2020, detailed information about the current situation of Mr. Laltu and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Australia under international human rights law, particularly with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Australia to ensure Mr. Laltu’s physical and mental integrity.

29. On 6 July 2020, the Government requested an extension, which was granted, and a new deadline of 28 September 2020 was set. The Government submitted its reply on 28 September 2020. It submits that Mr. Laltu is a citizen of Bangladesh who arrived in Australia on 12 November 2012. He was determined to be an offshore entry person, under section 5 (1) of the Migration Act, as he was believed to have entered Australia by sea at an excised offshore place. However, as a consequence of the judgment in *DBB16 v. Minister for Immigration and Border Protection* (2018), in which the Federal Court found that the appointment as a proclaimed port the area of waters within the Territory of Ashmore and Cartier Islands to be invalid, Mr. Laltu did not enter Australia by sea at an excised offshore place and is not therefore an unauthorized maritime arrival as defined in section 5AA of the Act. Mr. Laltu is currently held in immigration detention at the Melbourne Immigration Transit Accommodation and he remains in immigration detention because he is an unlawful non-citizen, under section 14 of the Migration Act, given that he is a non-citizen who does not hold a valid visa.

30. Mr. Laltu does not hold a substantive visa and is currently barred from applying for a visa under section 48 of the Migration Act, except for those visas prescribed under regulation 2.12 of the Migration Regulations 1994, including partner visas, protection visas and certain bridging visas. Mr. Laltu is unable to meet the criteria to make a valid onshore application for any of the exempted classes of visa, except for a Bridging Visa E (subclass 050). To make a valid application, Mr. Laltu must be classified as an “eligible non-citizen”, as defined in section 72 of the Migration Act. However, since Mr. Laltu was not immigration cleared at the time of his arrival, he does not meet the section 72 (1) (a) eligibility criterion for classification as an “eligible non-citizen”.

31. The Minister has determined that Mr. Laltu does not satisfy all the criteria under regulation 2.20 (1) of the Migration Regulations. Mr. Laltu therefore cannot be considered an eligible non-citizen pursuant to section 72 (1) (b) of the Migration Act. He cannot make a

valid application for a bridging visa to become a lawful non-citizen. He can only be released from immigration detention if he is granted a visa, removed from Australia or if the Minister chooses to exercise his or her discretionary and non-compellable personal intervention powers to do so. Cases are referred to the Minister for consideration only if the Department of Home Affairs assesses that they meet the ministerial intervention guidelines, which establish the types of cases that should be referred for ministerial consideration.

32. Mr. Laltu's case has been assessed against or referred to the Minister under section 195A of the Migration Act on six separate occasions. The Department is currently examining a group submission that will again include Mr. Laltu's case for ministerial consideration.

33. Following his arrival in Australia on 12 November 2012, Mr. Laltu was initially detained under section 189 (1) of the Migration Act and was subsequently transferred to the Immigration Detention Centre on Christmas Island. On 15 January 2013, the Department initiated consideration of Mr. Laltu's case under the section 195A ministerial intervention guidelines. On 25 January 2013, his case was finalized without referral to the Minister, as it was found not to meet the guidelines.

34. On 11 August 2015, believing Mr. Laltu to be an unauthorized maritime arrival, the Department initiated consideration for ministerial intervention under section 46A of the Migration Act to allow him to apply for a Protection or a Safe Haven Enterprise visa. On 13 August 2015, the Minister lifted the statutory bar, pursuant to section 46A of the Act, to allow Mr. Laltu to submit a visa application. On 28 August 2015, Mr. Laltu was invited to apply for a visa.

35. Mr. Laltu applied for a Safe Haven Enterprise visa on 15 January 2016. His application was also taken to be an application for a Protection visa. The Protection visa application was determined to be invalid, as Mr. Laltu is not an eligible non-citizen under section 72 of the Migration Act, given that he was not immigration cleared upon arrival in 2012. Additionally, the Minister had only intervened under section 46A of the Act to allow Mr. Laltu to lodge a valid application for the above-mentioned types of visa. That is, the determination only provided for Mr. Laltu to make a valid application for a Safe Haven Enterprise visa.

36. On 22 April 2016, the Department commenced further assessment of Mr. Laltu's case under section 195A of the Migration Act. His case was referred for ministerial consideration under that section on 6 May 2016. On 11 May 2016, the Minister declined to consider intervening.

37. On 12 July 2016, Mr. Laltu's visa application was refused, as he was not found to engage the protection obligations of Australia and could not therefore be granted a Protection visa under section 65 of the Migration Act.

38. On 14 July 2016, as Mr. Laltu was then considered to be an unauthorized maritime arrival, the visa refusal decision was referred to the Immigration Assessment Authority for review of the delegate's refusal decision. Under section 473CA of the Migration Act, the Minister must refer a fast track reviewable decision to that Authority as soon as reasonably practicable after the decision is made.

39. The Immigration Assessment Authority is a separate office within the Refugee Review Tribunal, independent of the Department and of the Minister. It conducts reviews of fast track reviewable decisions, which are decisions made by the Minister or a delegate who refuses to grant a Temporary Protection visa to a fast track reviewable applicant. Immigration Assessment Authority decisions are reviewable in the federal courts of Australia.

40. On 16 September 2016, the Immigration Assessment Authority affirmed the delegate's decision to refuse Mr. Laltu's visa application.

41. On 10 October 2016, the Department commenced a further assessment of Mr. Laltu's case under the section 195A guidelines. His case was referred for ministerial consideration on 30 January 2017. On 13 February 2017, the Minister declined to consider intervening.

42. On 18 October 2016, Mr. Laltu lodged an appeal with the Federal Circuit Court in relation to the 16 September 2016 Immigration Assessment Authority decision. On 1 March 2017, that Court dismissed the appeal.

43. On 15 March 2017, Mr. Laltu lodged an appeal of the Federal Circuit Court decision in the Full Federal Court. Mr. Laltu contended that he was never a fast track applicant and, as a result, he was not properly notified of his right to have the decision to refuse his visa application reviewed by the Administrative Appeals Tribunal under part 7 of the Migration Act, rather than by the Immigration Assessment Authority under part 7AA of the Act.

44. On 30 June 2017, the Department commenced a further assessment of the case under the section 195A guidelines. On 18 August 2017, the case was not referred to the Minister as it did not meet the guidelines for referral.

45. On 6 August 2018, the Full Federal Court allowed the appeal and set aside the Federal Circuit Court decision of 1 March 2017. The matter was remitted to the Administrative Appeals Tribunal for review. On 19 August 2018, Mr. Laltu applied to the Tribunal for a merits review of the delegate's 12 July 2016 visa refusal decision.

46. On 5 September 2018, the Department commenced a further assessment of Mr. Laltu's case under the section 195A guidelines and his case was referred for ministerial consideration on 24 September 2018. On 23 October 2018, the Minister declined to consider intervening.

47. On 14 February 2019, the Department briefed the then Assistant Minister on Mr. Laltu's case as part of a wider briefing on a number of long-term detention cases. The submission provided the then Assistant Minister an opportunity to indicate whether she was willing to consider the cases on an individual basis. On 26 February 2019, she indicated that Mr. Laltu's case should again be referred for consideration under the section 195A ministerial intervention powers.

48. Following the 6 August 2018 decision of the Full Federal Court, on 5 April 2019, the Department notified Mr. Laltu of the decision to refuse to grant him a Safe Haven Enterprise visa in accordance with section 66 of the Migration Act. That repeat notification was necessary as the Department had previously notified Mr. Laltu that his visa application had been refused and that the refusal decision had been referred to the Immigration Assessment Authority as he was considered at the time to be a fast track applicant. However, the Full Federal Court determined that Mr. Laltu was not a fast track applicant and that he had not been correctly notified of the decision to refuse his visa application. As a result, the Department sought to correctly notify Mr. Laltu of the visa refusal decision and his right to seek review of the decision by the Administrative Appeals Tribunal.

49. On 8 April 2019, Mr. Laltu lodged a further application with the Administrative Appeals Tribunal for review of the refusal decision.

50. On 7 May 2019, Mr. Laltu's case was referred for ministerial consideration under section 195A of the Migration Act. On 24 July 2019, the Minister declined to consider intervening in Mr. Laltu's case.

51. On 11 October 2019, the Administrative Appeals Tribunal affirmed the decision not to grant Mr. Laltu a Safe Haven Enterprise visa. On 14 October 2019, the second application lodged by Mr. Laltu with the Tribunal in reference to the same refusal decision was found to have no jurisdiction, as the Tribunal had already made a decision on the matter.

52. On 20 November 2019, Mr. Laltu appealed the Administrative Appeals Tribunal's decision of 11 October 2019 in the Federal Circuit Court. On 27 May 2020, he withdrew that application.

53. On 30 January 2020, Mr. Laltu's case was again referred for assessment against the section 195A guidelines. His case will be referred for the Minister's consideration as part of a group submission. The Department is currently examining that submission. The ongoing section 195A ministerial intervention process is not a barrier to Mr. Laltu's removal.

54. As Mr. Laltu's visa application has been finally determined and he has no ongoing litigation matters, his case has been referred for removal. Due to his consistent refusal to engage with Status Resolution Officers regarding a voluntary removal from Australia, the Department is proceeding with Mr. Laltu's involuntary removal.

55. The Government submits that Mr. Laltu has a history of mental health issues, which are managed by the Department's Health Service Provider, International Health and Medical

Services. Recently, he developed somatic preoccupation, which was investigated with no specific cause found. International Health and Medical Services has supported Mr. Laltu in relation to his somatization and modified his mood and sleep medication with his consent. While Mr. Laltu continues to appear anxious and frustrated about his current circumstances, International Health and Medical Services continues to provide him with appropriate targeted health and mental health support.

56. On 13 May 2016, Mr. Laltu was attended by a physician. He was diagnosed with an adjustment disorder with an anxious mood and was prescribed medication. In a follow-up review on 28 October 2016, he was noted to be experiencing a normal mood.

57. On 25 November 2016, Mr. Laltu was attended by a psychiatrist, who recommended that his medication dosage be increased to the maximum daily dosage over ensuing weeks. At subsequent appointments on 6 and 14 December 2016, he reported benefiting from his prescribed medication. During the assessment in 2018, Mr. Laltu again stated that he derived benefit from the medication prescribed and wished to continue taking it.

58. The Government submits that the universal visa system in Australia requires all non-citizens to hold a valid visa.

59. The Australian immigration detention legislative framework provides that an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen (section 189 of the Migration Act). An unlawful non-citizen must be kept in immigration detention until he or she is removed or is granted a visa (sect. 196).

60. Section 195A of the Migration Act enables the Minister to grant a visa to a person in immigration detention. The Minister's powers under that section are personal, discretionary and non-compellable. It is for the Minister to decide what is in the public interest. The Minister has established guidelines that set out the types of cases that should or should not be referred for consideration under that section.

61. Applicants for protection visas will have their claims assessed by the Government. The legislation, policies and practices of Australia are designed to implement the country's non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol thereto, the Covenant and the Second Optional Protocol thereto, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

62. Immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary per se under international law. Continuing detention may become arbitrary if it continues without proper justification. In instances of continuing detention, the determining factor is not the length of the detention, but whether the grounds for the detention are justifiable. Mr. Laltu's case has been repeatedly referred for ministerial consideration under section 195A intervention powers. The Minister's powers under section 195A of the Migration Act are non-compellable. Mr. Laltu is an unlawful non-citizen, and as he was not immigration cleared upon his arrival, he cannot satisfy the criteria to be classified as an eligible non-citizen under section 72 (1) (a) of the Act. He can be an eligible non-citizen only if he is in a class of persons prescribed for that purpose under section 72 (1) (b) or if the Minister determines him to be an eligible non-citizen under section 72 (1) (c).

63. Section 72 (1) (b) of the Migration Act allows for prescribed classes of people, as set out in regulation 2.20 of the Migration Regulations, to be defined as eligible non-citizens. If so defined, Mr. Laltu would be permitted to also test his eligibility against item 1305 (3) (ba) of schedule 1 of the Regulations. There would then not appear to be any impediment to him lodging a valid application for a bridging visa (subclass 050).

64. Subregulation 2.20 (1) of the Migration Regulations provides that for the purposes of the definition of eligible non-citizen in section 72 (1) (b) of the Act, the classes of persons described in subregulations (6) to (12) and (14) to (17) are prescribed.

65. Due to his consistent refusal to engage with Status Resolution Officers regarding voluntary removal, as at 3 June 2020, Mr. Laltu did not satisfy subregulation 2.20 (12) (c) of the Migration Regulations. Mr. Laltu is thus unable to make a valid application for a bridging visa. Moreover, he has been found not to be owed protection and prior to the finalization of

his litigation matters in May 2020, the Department was prevented from returning him to his country owing to the ongoing merits and judicial review processes.

66. Immigration detention is administrative in nature. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the international legal obligations of Australia. Mr. Laltu's immigration detention is lawful because he is an unlawful non-citizen. The ongoing detention of Mr. Laltu is justifiable and not arbitrary in the context of the Covenant as the Department of Home Affairs is proceeding with Mr. Laltu's removal from Australia.

67. As for available review mechanisms, the Department is required under section 486N of the Migration Act to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been detained under section 189 of the Act for a cumulative period of two years and every six months thereafter. Following receipt of the Department's reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Commonwealth Ombudsman may make recommendations to the Minister or Department regarding the circumstances of individuals, including detention placement. The Department has reported on Mr. Laltu's circumstances on 12 occasions, with the most recent report sent to the Commonwealth Ombudsman on 29 May 2020. Another report in relation to Mr. Laltu under section 486N of the Act will be due in November 2020 unless he is removed before that.

68. The Commonwealth Ombudsman has provided the Minister with six assessments under section 486O of the Migration Act, most recently on 2 December 2019. The anonymized version of the assessment and the Minister's response was tabled in Parliament on 6 February 2020.

69. Mr. Laltu's detention continues to be reviewed monthly under case management processes by the Department's Detention Review Committee. The Commonwealth Ombudsman also continues to provide an assessment of the ongoing conditions under which Mr. Laltu is detained every six months.

70. A person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court. Paragraph 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to every matter in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth. Subsection 39B (1) of the Judiciary Act 1903 grants the Federal Court the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. It is those provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of his or her detention, that is, to challenge the legal application of section 189 of the Migration Act.

71. The Government also argues that in *Al-Kateb v. Godwin* (2004), the High Court held that provisions of the Migration Act requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The decision in that case does not alter a non-citizen's ability to challenge the lawfulness of his or her detention under Australian law. Furthermore, non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus. The mechanisms outlined above indicate that the right to seek a remedy against an officer of the Commonwealth under the Constitution is still available to non-citizens.

72. The universal visa system in Australia involves a binary system of lawful and unlawful non-citizens. A non-citizen who does not hold a visa that is in effect is an unlawful non-citizen (sects. 13–14 of the Migration Act). Subsection 189 (1) of the Act obliges officers to detain a person they know or reasonably suspect to be an unlawful non-citizen. The source claims that the effect of section 196 (3) of the Act is that even a court cannot release an unlawful non-citizen from immigration detention unless the person has been granted a visa. However, the courts have the ability to find that a person is not, in fact, an unlawful non-citizen.

73. Nothing in the Migration Act prevents a court from determining and enforcing the limitation in section 189 (1). It is thus open to immigration detainees to challenge their



detention before court on the basis that the relevant officer cannot maintain reasonable suspicion that the person is an unlawful non-citizen. That can be on the basis that the detainee in fact holds a valid visa and is a lawful non-citizen, or that he or she is an Australian citizen and not a non-citizen. If the court agrees, it can order that a person be released from immigration detention. Subsection 196 (3) does not prevent that because the person in question is necessarily either a lawful non-citizen, or not a non-citizen.

74. Mr. Laltu is able to and has sought judicial review of the migration decisions concerning him. On 18 October 2016, he lodged an application in the Federal Circuit Court for judicial review of the decision of 16 September 2016 of the Immigration Assessment Authority. On 15 March 2017, he applied to the Full Federal Court to review the Federal Circuit Court decision. On 19 August 2018 and 8 April 2019, he applied to the Administrative Appeals Tribunal for a merits review of the delegate's decision to refuse to grant him a visa.

75. The source argues that Mr. Laltu has been deprived of his right guaranteed under article 14 of the Universal Declaration of Human Rights. The Government notes that, while proclaimed by the General Assembly, the Universal Declaration of Human Rights does not create binding legal obligations on signatories. Nevertheless, the Government submits that Mr. Laltu is lawfully detained under section 189 of the Migration Act as he is an unlawful non-citizen. It reiterates that a person will not be removed in breach of the non-refoulement obligations of Australia, even in circumstances where the person has been refused a Protection visa.

76. In response to the submission that Mr. Laltu has been deprived of his liberty in contravention of article 26 of the Covenant, the Government notes that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". The purpose of the Act is to differentiate, on the basis of nationality, between non-citizens and citizens. The Government recalls that the Human Rights Committee, in its general comment No. 15 (1986), stated that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory (para. 5).

77. Articles 12 and 13 of the Covenant imply that States parties have the right, under international law, to control the residence, entry and expulsion of aliens. The Government submits that it is a matter for it to determine, in accordance with its obligations under international law, who may enter its territory and under what conditions, including by requiring that a non-citizen hold a visa in order to lawfully enter and remain in Australia and that in the case that a visa is not held, a non-citizen is subject to immigration detention.

78. To the extent that there is differential treatment of citizens and non-citizens in that Australian citizens are not subject to immigration detention, the Government submits that the differential treatment is not discriminatory and does not breach article 26 of the Covenant, since it is aimed at achieving a purpose which is legitimate, based on reasonable and objective criteria, and is proportionate to the aim to be achieved.

79. The Government submits that the differential treatment in the Migration Act between nationals and non-nationals is for the legitimate aim of ensuring the integrity of the Australian migration programme, assessing the security, identity and health of unlawful non-citizens and protecting community. That is consistent with articles 12 and 13 of the Covenant. Any differential treatment between citizens and non-citizens is based on reasonable and objective criteria for a legitimate purpose and does not amount to prohibited discrimination under the Covenant.

80. The Government submits that Mr. Laltu is lawfully detained under section 189 (1) of the Migration Act and that that is consistent with the international obligations of Australia.

*Additional comments from the source*

81. The response of the Government was transmitted to the source for comments, which the source submitted on 13 October 2020. In its comments, the source notes that the detention of an unlawful non-citizen is permitted under Australian law. It also notes that the Government's response is similar to its previous responses.

82. The source reports that recently, the Federal Court found that an immigration detention applicant's detention was unlawful, and he was released on a writ of habeas corpus.<sup>1</sup> While that case is pertinent to many immigration detainees, since in Mr. Laltu's case, a status resolution process has been ongoing for a number of years, it is not yet relevant for him.

83. The source notes that it is misleading to suggest that there is some action taking place in the processing of Mr. Laltu's Protection visa application. Mr. Laltu's visa application is not before the Ministers; it is with the Department of Home Affairs for assessment against guidelines to potentially send to the Ministers for consideration. It is also misleading to suggest that, after refusing Mr. Laltu a visa multiple times, the Department will somehow now conclude that Mr. Laltu meets the guidelines for referral to the Ministers, and that the Ministers will then decide to grant him a visa.

84. Furthermore, the ministerial referral process is a non-reviewable and non-compellable process of personal ministerial decision-making. Submissions are bounced between the Department of Home Affairs and the Ministers without resolve for years. That is the situation for Mr. Laltu. Instead of the Ministers' personal non-discretionary and non-reviewable powers, decisions relating to long-term detained and complex case asylum seekers should be reviewed by a committee of experts that includes experts in legal, health and policy issues, on a regular basis. That would provide an independent and timely review mechanism for such cases.

85. According to the source, the detention review mechanisms that operate within the Australian legal framework permit arbitrary detention. The Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention. The Department has consistently failed to act on the recommendations of the Ombudsman to release individual asylum seekers and refugees from detention. Furthermore, the Department's Detention Review Committee is not an independent body.

86. The source further states that the ruling in *Al-Kateb v. Godwin* reinforces the position of Mr. Laltu, as his arbitrary open-ended detention is authorized by Australian law.

87. The source asserts that the review mechanisms available to Mr. Laltu mentioned in the Government's reply concern the decision-making process relating to the granting of a visa rather than Mr. Laltu's detention.

### **Discussion**

88. The Working Group thanks the source and the Government for their timely and detailed submissions.

89. In determining whether the deprivation of liberty of Mr. Laltu is arbitrary, 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 for breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest with the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

90. The source has submitted, and the Government has not disputed, that Mr. Laltu arrived in Australia in November 2012 by boat. The Government submits that he was detained on 12 November 2012 and transferred to the detention centre on Christmas Island. The Department of Immigration and Citizenship was the detaining authority and the reason for the arrest was unauthorized entry to Australia by boat. Since then, he has remained in immigration detention as an unlawful non-citizen. The Government contends that article 14 of the Universal Declaration of Human Rights, while proclaimed by the General Assembly, does not create binding legal obligations on signatories. Notwithstanding this, the Government submits that Mr. Laltu is lawfully detained under section 189 of the Migration Act as an unlawful non-citizen.

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<sup>1</sup> See *AJL20 v. Commonwealth of Australia* (2020). Available at <https://jade.io/article/764869>.

91. The Government rejects the claim of a breach of article 26 of the Covenant since the object of the Migration Act is to regulate the arrival of non-citizens in Australia and therefore, by definition, it does not apply to citizens. The Government points to the Human Rights Committee's general comment No. 15 (1986) in which it made clear that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that the State, in principle, is free to decide who it will admit to its territory.

92. The Working Group observes that it is not disputed that Mr. Laltu has been in immigration detention for over eight years now. According to the Government, on 15 January 2013, the Department initiated consideration of Mr. Laltu's case under the section 195A ministerial intervention guidelines. This was finalized without referral to the Minister as the case was found not to meet the guidelines on 25 January 2013. Thereafter, there was no action in Mr. Laltu's case until 11 August 2015, when he was allowed to apply for a visa. This was followed by a series of visa applications, all unsuccessful, and challenges to these unsuccessful applications. Throughout this time and to date, Mr. Laltu remains detained.

93. As the Working Group explained in its revised deliberation No. 5 (A/HRC/39/45, annex, para. 12): "Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording their claims or initial verification of identity if in doubt."

94. This echoes the views of the Human Rights Committee, which argued in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

95. In the present case, Mr. Laltu was detained immediately upon arrival and has remained detained for over eight years. When his case was examined on 15 January 2013, it is clear to the Working Group that the Government did not engage in the assessment of the need to detain Mr. Laltu and there was no attempt to ascertain if a less restrictive measure would be suited to his individual circumstances, as required by international law. In fact, throughout his time in Australia, there has never been an attempt on the part of the Australian authorities to do so. The Working Group cannot accept that detention for over eight years could be described as a "brief initial period", to use the language of the Human Rights Committee. Furthermore, the Government has not presented any particular reason specific to Mr. Laltu, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would have justified his detention.

96. These two failures on behalf of the Government lead the Working Group to conclude that there was no other reason for detaining Mr. Laltu but the fact that he was an asylum seeker and was therefore subjected to the automatic immigration detention policy of Australia under the Migration Act. The Working Group therefore concludes that Mr. Laltu was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

97. Furthermore, while the Working Group agrees with the argument presented by the Government in relation to article 26 of the Covenant, it must nevertheless highlight that in the same general comment quoted by the Government, No. 15 (1986), the Human Rights Committee also makes it clear that "aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof" (para. 2) and that "aliens have the full right to liberty and security of the person" (para. 7).<sup>2</sup>

98. This means that Mr. Laltu is entitled to the right to liberty and security of person as guaranteed under article 9 of the Covenant and that when guaranteeing these rights to him,

<sup>2</sup> Revised deliberation No. 5, paras. 2 and 7.

Australia must ensure that this is done without distinction of any kind as required by article 2 of the Covenant. In the present case, Mr. Laltu is subjected to de facto indefinite detention due to his immigration status, in clear breach of article 2, in conjunction with article 9, of the Covenant.

99. Consequently, noting that Mr. Laltu has been detained due to the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Mr. Laltu has always been treated in accordance with the stipulations of the Migration Act. Such treatment is not compatible with the obligations Australia has undertaken under international law (see also paras. 114–116 below). The Working Group also refers the present case to the Special Rapporteur on the human rights of migrants for appropriate action.

100. The source has further argued that Mr. Laltu has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government denies those allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia and that the case of Mr. Laltu has been reviewed by the Commonwealth Ombudsman and the Detention Review Committee.

101. The Working Group recalls that, according to the 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, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>3</sup> That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty<sup>4</sup> and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also migration detention.<sup>5</sup>

102. The facts of Mr. Laltu's case since his detention on 12 November 2012, as presented to the Working Group, are characterized by various visa applications, their rejections and challenges to these rejections. However, as observed above, none of these have concerned the need to detain Mr. Laltu. There have also been numerous reviews by the Case Management and Detention Review Committee, which, according to the Government, have repeatedly examined the legality and reasonableness of Mr. Laltu's detention. However, as the Working Group has already clearly stated in its previous opinions,<sup>6</sup> the Case Management and Detention Review Committee is not a judicial body as required by article 9 (4) of the Covenant. The Working Group observes the repeated failure on the Government's part to explain how the reviews carried out by this Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.<sup>7</sup>

103. The Government has also argued that the case of Mr. Laltu is being periodically reviewed by the Commonwealth Ombudsman. However, once again, in doing so, the Government has not explained how such review satisfies the requirement of article 9 (4) for a review of legality of detention by a judicial body. The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department to release a person from immigration detention.

104. The Government has also argued that the Minister has reviewed Mr. Laltu's detention, but once again, noting that this is a review by an executive, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

105. The Working Group therefore concludes that during his eight years of detention, no judicial body has ever been involved in the assessment of the legality of Mr. Laltu's

<sup>3</sup> HRC/30/37, paras. 2–3.

<sup>4</sup> *Ibid.*, para. 11.

<sup>5</sup> *Ibid.*, para. 47 (a).

<sup>6</sup> Opinions No. 20/2018, para. 61, No. 50/2018, para. 77, No. 74/2018, para. 112, and No. 1/2019, para. 80.

<sup>7</sup> Opinions No. 20/2018, para. 61, No. 50/2018, para. 77, No. 74/2018, para. 112, and No. 1/2019, para. 80.

detention, noting that such consideration by a judicial body would necessarily involve the assessment of the legitimacy, need and proportionality to detain.<sup>8</sup>

106. In this connection, the Working Group wishes once again return to the argument presented by the Government that continuing detention in the context of migration is lawful under international law as long as the grounds for detention are justifiable and that the length of detention is not a determining factor.<sup>9</sup> In the view of the Working Group, this is a misinterpretation of the applicable international human rights law. The Working Group reiterates that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,<sup>10</sup> which is why the Working Group has required that a maximum period for detention in the course of migration proceedings must be set by legislation and upon the expiry of the period for detention set by law, the detained person must be automatically released.<sup>11</sup>

107. The Working Group rejects the argument that the length of detention in itself is not a determining factor and that as long as reasons justifying detention are present, the detention may legally continue. To follow this logic would mean accepting that individuals could be caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite detention which cannot be remedied even by the most meaningful review of detention on an ongoing basis.<sup>12</sup> As the Working Group stated in its revised deliberation No. 5 (para. 27):

There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin; the principle of non-refoulement;<sup>13</sup> or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.<sup>14</sup>

108. The Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.<sup>15</sup> Moreover, as the Working Group noted in its revised deliberation No. 5, detention in the context of migration must be exceptional (para. 12) and in order to ensure this, alternatives to detention must be sought (para. 16).<sup>16</sup> In the case of Mr. Laltu, the Working Group has already established that since his detention on 12 November 2012, no alternatives to detention have been considered.

109. Moreover, despite the claims of the Government to the contrary, the Working Group considers that Mr. Laltu's detention is in fact punitive in nature. As the Working Group notes in its revised deliberation No. 5, this should never be the case (paras. 9 and 14).<sup>17</sup> Mr. Laltu

<sup>8</sup> Revised deliberation No. 5, paras. 12–13.

<sup>9</sup> Opinions No. 74/2019, paras. 69–70, and No. 35/2020, paras. 90–91.

<sup>10</sup> Revised deliberation No. 5, para. 18, opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020 and A/HRC/13/30, para. 63.

<sup>11</sup> Revised deliberation No. 5, para. 25, A/HRC/13/30, para. 61, and opinion No. 7/2019.

<sup>12</sup> See opinions No. 1/2019 and No. 7/2019.

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, and Convention relating to the Status of Refugees, art. 33.

<sup>14</sup> A/HRC/13/30, para. 63, A/HRC/10/21, para. 82, A/HRC/7/4, para. 48, and opinion No. 45/2006.

<sup>15</sup> See *Mr. C. v. Australia* (CCPR/C/76/D/900/1999); *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270 and 1288/2004); *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

<sup>16</sup> A/HRC/13/30, para. 59, E/CN.4/1999/63/Add.3, para. 33, A/HRC/19/57/Add.3, para. 68 (e), A/HRC/27/48/Add.2, para. 124, A/HRC/30/36/Add.1, para. 81, and opinions No. 72/2017 and No. 21/2018.

<sup>17</sup> Opinion 49/2020, para. 87.

has been detained for over eight years, without charge or a trial, in what was clearly a punitive detention, in breach of article 9 of the Covenant.

110. Although the Government submits that Mr. Laltu's case is being processed for involuntary removal, the Working Group observes that such a decision, according to the Government, was taken on 20 January 2020. Yet Mr. Laltu remains detained and has been since 12 November 2012. This is clearly a case of indefinite detention. However, as stated in revised deliberation No. 5, indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary (para. 26).<sup>18</sup> This is why the Working Group has required that a maximum detention period in the course of migration proceedings is set by legislation, and that such detention is permissible only for the shortest period of time.<sup>19</sup> Mr. Laltu has no clear prospect of when he could be released; even the Government has been unable to make any indication in that regard in its reply to the Working Group.

111. Consequently, the Working Group finds that Mr. Laltu is subjected to de facto indefinite detention due to his migratory status, without the possibility to challenge the legality of such detention before a judicial body, the right encapsulated in article 9 (4) of the Covenant. Mr. Laltu's detention of is therefore arbitrary, falling under category IV. In making this finding, the Working Group recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.<sup>20</sup>

112. The Working Group notes the argument presented by the source that, as a non-citizen, Mr. Laltu appears to be in a different situation from Australian citizens in relation to his ability to effectively challenge the legality of his detention before the domestic courts and tribunals owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in that case, the High Court held that the provisions of the Migration Act requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

113. The Working Group notes that the same explanation was submitted by the Government in relation to the High Court's decision on numerous previous occasions and that it has been rejected by the Working Group.<sup>21</sup> This explanation only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

114. The Working Group has noted that the Government does not explain how such non-citizens can effectively challenge their continued detention after this decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again recalls the jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was that there was no effective remedy to challenge the legality of continued administrative detention.<sup>22</sup>

115. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,<sup>23</sup> and this remains the position of the Working Group in the present

<sup>18</sup> A/HRC/13/30, para. 63, and opinions No. 42/2017 and No. 28/2017.

<sup>19</sup> Revised deliberation No. 5, para. 26; opinions No. 5/2009 and No. 42/2017; E/CN.4/1999/63/Add.3, para. 35; and A/HRC/33/50/Add.1, paras. 49–50.

<sup>20</sup> See *Mr. C. v. Australia*; *Baban and Baban v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia*; *Bakhtiyari et al. v. Australia*; *D and E and their two children v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*.

<sup>21</sup> Opinions No. 21/2018, para. 79, No. 50/2018, para. 81, No. 74/2018, para. 117, No. 1/2019, para. 88, No. 2/2019, para. 98, No. 74/2019, para. 72, and No. 35/2020, paras. 95–96.

<sup>22</sup> See *F.J. et al. v. Australia*.

<sup>23</sup> See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019 and No. 35/2020.

case. The Working Group underlines that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Laltu is arbitrary, falling under category V.

#### *Migration Act 1958*

116. The Working Group observes that the present case is the latest in a number of cases from Australia that have come before the Working Group since 2017 which have all concerned the same issue, namely mandatory immigration detention in Australia under the Migration Act.<sup>24</sup> The Working Group reiterates its views on the Migration Act as expressed most recently in opinion No. 35/2020 (paras. 98–103).

117. The Working Group is concerned about the rising number of cases from Australia concerning the implementation of this Act that are being brought to its attention. The Working Group is equally concerned that in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Migration Act 1958. The Working Group wishes to clarify that such an argument can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that that legislation is in accordance with the obligations the State has undertaken under international human rights law. A State cannot legitimately avoid its obligations arising from international human rights law by evoking its domestic laws and regulations.

118. The Working Group wishes to emphasize that it is the duty of the Government of Australia to bring its national legislation, including the Migration Act 1958, into line with its obligations under international human rights law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,<sup>25</sup> the Committee on Economic, Social and Cultural Rights,<sup>26</sup> the Committee on the Elimination of Discrimination against Women,<sup>27</sup> the Committee on the Elimination of Racial Discrimination,<sup>28</sup> as well as the Special Rapporteur on the human rights of migrants<sup>29</sup> and the Working Group.<sup>30</sup> The Working Group once again reiterates the voices of these independent international human rights mechanisms and calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law without delay.

119. The Working Group welcomes the invitation of 27 March 2019 from the Government for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed due to the global coronavirus disease (COVID-19) pandemic, the Working Group looks forward to carrying out the visit as soon as possible. It views the visit as an opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

#### **Disposition**

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

The deprivation of liberty of Mr. Laltu, being in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

121. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Laltu without delay and to bring it into conformity with the

<sup>24</sup> See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019 and No. 35/2020.

<sup>25</sup> CCPR/C/AUS/CO/6, paras. 33–38.

<sup>26</sup> E/C.12/AUS/CO/5, paras. 17–18.

<sup>27</sup> CEDAW/C/AUS/CO/8, para. 53.

<sup>28</sup> CERD/C/AUS/CO/18-20, paras. 29–33.

<sup>29</sup> A/HRC/35/25/Add.3.

<sup>30</sup> Opinions No. 50/2018, paras. 86–89, No. 74/2018, paras. 99–103, No. 1/2019, paras. 92–97, No. 2/2019, paras. 115–117, No. 74/2019, para. 80, and No. 35/2020, paras. 98–103.

relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

122. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Laltu immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Laltu.

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

124. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

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

#### **Follow-up procedure**

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

127. 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.

128. 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.

129. 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>31</sup>

*[Adopted on 24 November 2020]*

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<sup>31</sup> Human Rights Council resolution 42/22, paras. 3 and 7.