

**PETITION TO:**  
**UNITED NATIONS**  
**WORKING GROUP ON ARBITRARY DETENTION**

Chairman/Rapporteur: Mr. Malick El Hadji Sow (Senegal)  
Vice-Chairperson: Ms. Shaheen Sardar Ali (Pakistan)  
Mr. Mads Andenas (Norway)  
Mr. Roberto Garretón (Chile)  
Mr. Vladimir Tochilovsky (Ukraine)

**HUMAN RIGHTS COUNCIL**  
**UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of  
**Alan Phillip Gross**  
Citizen of the United States of America



v.

Government of the Republic of Cuba

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**URGENT ACTION REQUESTED**

And Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, 6/4, and 15/18<sup>1</sup>

Submitted By:  
Jared Genser<sup>2</sup> and Chris Fletcher

  
Counsel to Alan Phillip Gross<sup>3</sup>

August 7, 2012

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<sup>1</sup> Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights to extend the mandate of the Working Group on Arbitrary Detention. Resolutions 6/4 and 15/18, further extending the mandate of the Working Group, were adopted by the Human Rights Council, which has “assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights . . .” G.A. Res. 60/251, para. 6

<sup>2</sup> For further information, contact Jared Genser at [info@perseus-strategies.com](mailto:info@perseus-strategies.com) or +1 (202) 466-3069. Perseus Strategies would like to thank Dilpreet Minhas for her research, writing, and editing support.

<sup>3</sup> Perseus Strategies has been authorized by Judy Gross, Alan Gross’s wife, to represent him.

## **BASIS FOR “URGENT ACTION” REQUEST**

As set forth in the attached Petition, the Cuban government is arbitrarily depriving Mr. Alan Phillip Gross of his liberty.

There is reason to believe that Mr. Gross’s life and health may be in danger. Mr. Gross is 63 years of age and during the course of his detention he has lost 105 pounds (47.63kg). He has also developed degenerative arthritis in his leg and a mass behind his shoulder, which he fears may soon become permanent. Mr. Gross also suffers from mental anguish caused by the separation from his family members, several of whom have serious ailments. In 2010, one of his daughters was diagnosed and treated for breast cancer. As her father, Mr. Gross has been distraught that he cannot be by her side to provide her the emotional support she needs at this difficult time. In 2011, his wife underwent surgery, causing her to miss considerable time from work and thus putting further financial strain on her. Finally, Mr. Gross’s 90-year old mother—to whom he is exceptionally close—was diagnosed with inoperable cancer in February 2011. Her condition continues to deteriorate, causing Mr. Gross and his mother to fear that they will never see each other again. Given the above challenges, there are now significant concerns regarding his well-being.

Accordingly, it is hereby requested that the Working Group consider this Petition pursuant to the “Urgent Action” procedure.<sup>4</sup> In addition, it is also requested that the attached Petition be considered a formal request for an opinion of the Working Group pursuant to Resolution 1997/50 of the Commission on Human Rights as reconfirmed by Resolutions 2000/36, 2003/31, and Human Rights Council Resolutions 6/4 and 15/18.

## **QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION**

### **I. IDENTITY**

1. **Family name:** Gross
2. **First name:** Alan
3. **Sex:** Male
4. **Birth date:** May 2, 1949
5. **Nationality:** American
6. **(a) Identity document (if any):** Passport  
**(b) Issued by:** United States  
**(c) On (date):** Unknown  
**(d) No.:** 208021249

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<sup>4</sup> *Report of the Working Group on Arbitrary Detention*, E/CN.4/1998/44 (Dec. 19,1997), Annex 1 at ¶ 22-24.

**7. Profession and/or activity (if believed to be relevant to the arrest/ detention):** International development specialist.

**8. Address of usual residence:** 2501 Porter Street, NW, Washington, D.C. 20008

## **II. ARREST**

- 1. Date of arrest:** December 3, 2009.
- 2. Place of arrest (as detailed as possible):** Hotel in Havana.
- 3. Forces who carried out the arrest or are believed to have carried it out:** Unknown.
- 4. Did they show a warrant or other decision by a public authority:** No.
- 5. Authority who issued the warrant or decision:** N/A.
- 6. Relevant legislation applied (if known):** Unknown.

## **III. DETENTION**

- 1. Date of detention:** December 3, 2009, to Present
- 2. Duration of detention (if not known, probable duration):** 2.7 years
- 3. Forces holding the detainee under custody:** Ministry of the Interior
- 4. Places of detention (indicate any transfer and present place of detention):** Villa Marista Prison, Havana, Cuba; then transferred to Carlos J. Finlay Military Hospital, Havana, Cuba.
- 5. Authorities that ordered the detention:** People's Provincial Tribunal of Havana
- 6. Reasons for the detention imputed by the authorities:** Mr. Gross is alleged to have committed "Acts against the Independence or the Territorial Integrity of the State." See "Statement of Facts" below.
- 7. Relevant legislation applied (if known):** Mr. Gross is alleged to have violated Article 91 of the Cuban Penal Code.

## **IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY**

## A. Statement of Facts

### 1. Biographical Information on Alan Gross

Alan Phillip Gross is a 63-year-old U.S. citizen imprisoned in Cuba. He was born in New York on May 2, 1949, and attended the University of Maryland as an undergraduate. Mr. Gross went on to receive a Master in Social Work (MSW) at Virginia Commonwealth University School of Social Work and is now an international development specialist. Prior to his imprisonment in Cuba, he lived in the Washington, D.C. area with his wife, Judy Gross, with whom he has two adult daughters. For over 25 years, Alan Gross has engaged in community and international development work that has positively impacted the lives of people in over 50 countries and territories worldwide.<sup>5</sup>

Through his work, he contributed to a wide variety of projects, including strengthening the community relations function of a mining operation in Baluchistan, Pakistan; assisting efforts to create jobs in the West Bank and Gaza to support a sustainable economic growth strategy; assisting Palestinian and Israeli counterparts in designing a system of policies, procedures, and mechanisms to facilitate trade between Israel and the West Bank; and helping design and implement internationally-recognized dairy and agricultural improvement projects to help local farmers in Azerbaijan, Bulgaria, and the West Bank.<sup>6</sup> In 2001, Mr. Gross founded the Joint Business Development Center, LLC (JBDC), a company which has “supported Internet connectivity in locations where there was little or no access,” including countries such as Iraq, Afghanistan, Armenia, and Kuwait.<sup>7</sup> Until now, Mr. Gross has never had any legal trouble in any countries in which he has visited or worked.

### 2. USAID Contract

On February 10, 2009, JBDC was subcontracted by Development Alternatives, Inc. (DAI) to engage in a project in furtherance of DAI’s contract with the U.S. Agency for International Development (USAID). The project JBDC undertook was entitled “For the Island,” or *Para la Isla*, in Spanish.<sup>8</sup> Humanitarian in nature, Mr. Gross’s objective was to establish wireless networks and improve the Internet and Intranet access and connectivity for the small, peaceful, non-dissident Cuban Jewish community.<sup>9</sup> Mr. Gross worked to establish this Internet connectivity by utilizing equipment purchased in and transported from the U.S.<sup>10</sup> Such equipment included Apple computers, Hughes Model 9201 Broadband Global Area Network

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<sup>5</sup> The Jewish Community Relations Council of Greater Washington, *Free Alan Gross: Alan P. Gross Backgrounder*, available at [http://www.jccouncil.org/site/PageNavigator/free\\_alan\\_about.html](http://www.jccouncil.org/site/PageNavigator/free_alan_about.html) [hereinafter *Free Alan Gross*].

<sup>6</sup> *Id.*

<sup>7</sup> Ginger Thompson and Marc Lacey, *Contractor Jailed in Cuba was Aiding Religious Groups, US Says*, N.Y. TIMES, Jan. 12, 2010 [hereinafter *Contractor Jailed in Cuba*] (noting that it was a small company, with company records showing JBDC earned less than \$70,000 in 2009).

<sup>8</sup> *Sentence Number Two of the Year Two Thousand and Eleven* (Translation), TRIBUNAL PROVINCIAL POPULAR LA HABANA SALA DE LOS DELITOS CONTRA LA SEGURIDAD DEL ESTADO, Mar. 11, 2011, 3 (Cuba) [hereinafter Cuban Trial Court Decision].

<sup>9</sup> *Cuban Document Details Charges vs Jailed American*, THOMSON REUTERS NEWS AND INSIGHT, Jan. 20, 2012, available at [http://newsandinsight.thomsonreuters.com/Legal/News/2012/01\\_-\\_January/Cuban\\_document\\_details\\_charges\\_vs\\_jailed\\_American/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Cuban_document_details_charges_vs_jailed_American/).

<sup>10</sup> All equipment Gross bought and utilized for his project in Cuba could be purchased in the United States.

(BGAN) satellite communications terminals, Linksys routers, Blackberry mobile phones, external hard drives, web cameras, wireless transmitters, Apple iPods, thumb drives, a modem, and corresponding cables and battery chargers for the aforementioned items.<sup>11</sup>

### **3. Trips To Cuba and Specific Work Performed**

Mr. Gross made a total of five trips to Cuba in furtherance of his project. His first trip to Cuba was from March 30-April 6, 2009, during which time he set up a wireless network in Havana using the equipment he brought from the U.S. Following this, he wrote a report of what he had done, as the submission of such reports was required by contract for his compensation. Mr. Gross later made trips to Cuba on April 25, 2009, June 4, 2009, and July 22, 2009, performing similar activities to establish wireless networks in the Jewish communities of Havana, Camagüey, and Santiago de Cuba, and again submitted reports on the work he had conducted, as per his contract. Mr. Gross made his last trip to Cuba on November 24, 2009 and was arrested on December 3, 2009.<sup>12</sup> He did not write the fifth trip report that exists; this was prepared by DAI, to facilitate completion of the overall project.<sup>13</sup>

### **4. Arrest, Trial, Conviction, and Denial of Appeal**

On December 3, 2009, the last scheduled day of Mr. Gross's fifth and final trip to Cuba, he was arrested at his hotel in Havana. He was detained for 14 months before finally being charged in February 2011 with "actions against the independence or the territorial integrity of the state"<sup>14</sup> and was also "accused by state prosecutors of engaging in a 'subversive project aiming at bringing down the revolution.'"<sup>15</sup> Mr. Gross's trial in the People's Provincial Tribunal of Havana Court began on March 4, 2011, and lasted only two days. He was tried by a panel of four judges, and in a decision issued on March 11, 2011, was sentenced to 15 years in prison.<sup>16</sup>

To explain his knowledge and activities regarding his work, Mr. Gross presented the trial court with the following statement:

I decided to make an opportunity to visit Cuba for a few days in June 2004, as a tourist. While I was here I could not use my cell phone that had U.S.-based service. I also could not help to notice that the Internet at my hotel hardly worked at all and it was very expensive to use. It was normal for me to notice these things because I have used information and Communications technologies (ICTs) since 1983, and ICTs—similar to those on exhibit at the Informatics Exposition recently held at Pavest Po—are an integral part of my business. ICT use in the US and most other

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<sup>11</sup> Cuban Trial Court Decision, *supra* note 8, at 10.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> Desmond Butler, *AP IMPACT: USAID Contractor Work in Cuba Detailed*, ASSOCIATED PRESS, Feb. 13, 2012, available at <http://www.businessweek.com/ap/financialnews/D9SSHGPG2.htm>.

<sup>14</sup> *To the Court of Crimes Against State Security in the Popular Provincial Court of La Habana* (Translation), Jan. 29, 2011, 11 (Cuba) [hereinafter Cuban Indictment].

<sup>15</sup> Human Rights Watch, *World Report 2012: Cuba*, Jan. 2012, available at <http://www.hrw.org/world-report-2012/world-report-2012-cuba> [hereinafter *HRW World Report*].

<sup>16</sup> Cuban Trial Court Decision, *supra* note 8, at 22.

countries is a normal part of most business operations as well as in common home use [sic].<sup>17</sup>

Mr. Gross stated that around October 2008, he received an email from a prospective client containing a non-disclosure agreement that had to be signed prior to receiving their Request for Proposal (RFP) for an upcoming technical project, which he stated he previously “knew nothing about.”<sup>18</sup> After meeting with DAI about the potential project, it was eventually agreed that, “JBDC, LLC would bring to Cuba to test a limited quantity of ICT equipment that would be sufficient for no more than three small computer networks. In the final JBDC, LLC proposal that DAI approved, the only group that I agreed to identify was the Jewish community— my community.”<sup>19</sup> Mr. Gross gave further explanations for his motivation for engaging in the project:

For many years I have worked on behalf of diaspora Jews in many countries. I viewed this project as a way to: 1) Better support my family; 2) Pay off accumulated debts; 3) Help the Jewish community improve its ICT capacities; and 4) Help Cuba by improving ICTs on a test-basis. In no way, at any time, [did I] remotely believe that I was going to harm Cuba or that I was committing any act against the Cuban Government. I viewed my activities as providing a technical service on a professional basis, as well as a Jewish Communal Service on a personal basis . . . because of my personal commitment; I put extra equipment and services into the project, for which no budget was provided.<sup>20</sup>

[...]

I was thoroughly and completely inspected by airport security and customs officials at José Martí International Airport—three times—with whom I offered to leave equipment about which they had questions . . . [they] did have a question about one piece of equipment. I explained what it was and I offered to leave it in their custody and then pick it up from them when I left Cuba. Instead, Customs told me that leaving it with them would not be necessary if I paid a customs tax, which I did and for which I received a receipt. I truly expected to be advised of any and all licensing requirements by Customs Authorities during each airport inspection. I never—repeat—never ‘smuggled’ or attempted to smuggle anything into Cuba.<sup>21</sup>

[...]

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<sup>17</sup> Declaration by Alan P. Gross, 243444, Ref: Preparatory File Number 59 of 2009, Case Number 1/11, Mar. 4, 2011, 2 (on file with authors) [hereinafter Declaration by Alan P. Gross].

<sup>18</sup> Declaration by Alan P. Gross, *supra* note 17, at 5.

<sup>19</sup> *Id.* at 5-6 (emphasis original).

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 7-8.

At no time did I conceal my activities. Each trip to Cuba, each hotel, rental car, domestic airline travel, was arranged for through Havanatur—in the open and officially. I was excited about the only known part of a project in which I had a role—and that was the testing of the equipment, that was procured with private funds, and what I truly thought would be helping the Cuban Jewish community.<sup>22</sup>

[...]

[L]et me be absolutely clear and unambiguous: I have never, would never, and will never purposely or knowingly do anything personally or professionally to subvert a government or political system, or bring harm to anyone, whether or not I happen to agree. Outside of the U.S., my political opinion is totally irrelevant to my work. How any sovereign nation, other than the U.S., governs itself is not my business, nor is it my practice or business to express an opinion about the government of any country in which I am a guest.<sup>23</sup>

[...]

[I] do deeply regret that my actions have been misinterpreted as harmful and a threat against the security and independence of Cuba. Surely, this runs counter to what I had intended. Had I known prior to traveling here, or had I been told by Cuban authorities when they were expected to tell me at the airport, I would never—repeat—never [have] brought anything here....I did nothing in Cuba that is not done on a daily basis in millions of homes and offices around the world. I have an immense fondness for the people of Cuba, and I am deeply sorry . . . my family and I have paid dearly for this.<sup>24</sup>

Despite the fact that Mr. Gross's actions revolved solely around setting up Internet access for small, peaceful Jewish communities, the Court's focus of attention was elsewhere; it was determined to demonstrate its anti-U.S. sentiment and its ancillary assumptions regarding the purpose of U.S. organizations' efforts in Cuba. It stated:

[G]iven the notorious character of these provisions [the Helms-Burton Act and the Torricelli Act], the aggressive and interfering nature of those programs intended to influence the civil society in Cuba, its socialist and political system and consequently its autonomy as a nation, to which they have allocated huge amounts of money whose sum total, calculated since the year of 1996 until the year of 2008, exceeds the figure of 65 million U.S. dollars which have been granted to more than 25 U.S. organizations

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<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 1-2.

<sup>24</sup> *Id.* at 12 (emphasis original).

with the purpose of supporting what they call “transition to democracy in Cuba.”<sup>25</sup>

Further, the Court stated that in the interest of the U.S. Government, Mr. Gross created for DAI and USAID:

. . . a project with a counterrevolutionary political content intended for Cuba . . . following an announcement released by that entity, the objectives of that program being the establishment of a state-of-the-art technological infrastructure of wireless networks with direct satellite communications, whose detection by the Cuban authorities would be very difficult and which would be disseminated though the country not only to facilitate the transmission and reception of materials from and to abroad and domestically among individuals opposed to the revolutionary process but also to have an impact on the Cuban civil society and its socialist political system by using this means to spread distorted information on the Cuban reality with the primary intention of influencing negatively certain sensitive segments of society by discrediting the revolutionary government and fostering the discontent that would create conditions favoring the promotion of civil disobedience actions thus paving the way for actions by the US government against Cuba, aimed at destroying its Revolution, damaging the independence and integrity of the Cuban State, and in order to implement the above project the defendant surreptitiously introduced in Cuba the necessary info-communications equipment and items required to set up such clandestine networks, which he installed in the Synagogues of Havana, Santiago de Cuba and Camagüey, choosing and training people for its operation and care.<sup>26</sup>

[...]

He visited the capital of the country and cities of Camagüey and Santiago de Cuba, where he had installed internet access networks via satellite for counterrevolutionary purposes, with the intention of recruiting and training more persons in the use of these means, who would also be responsible for taking good care of said equipment, always following the instructions contained in the contract signed with Development Alternatives Inc. (DAI), which required the submission of a report after each trip in order to secure his financial reward which, by the time the Project was completed, would total 258 274 US dollars, the evidencing the business-for-profit nature and the conspiratorial and covert character of the defendant’s actions aimed at creating a technological infrastructure almost impossible to detect by the Cuban authorities, which would enable the aforementioned US government agencies and the very government of

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<sup>25</sup> Cuban Trial Court Decision, *supra* note 8, at 3.

<sup>26</sup> *Id.* at 20 (emphasis added).



that country to meet their goals to undermine the Cuban constitutional order and thus harm the independence of the State.<sup>27</sup>

Following his sentencing, Mr. Gross filed for an appeal. On August 4, 2011, the Cuban Supreme Court denied his appeal and affirmed his sentence. In responding to his appeal, the Court decision repeated, almost verbatim, a large portion of the trial court decision. The Court concluded that the “Cuba Democracy Program” launched by DAI was sponsored by USAID, an entity it believes is working toward “overthrowing [the] Socialist Revolution and the establishment of the capitalist system in Cuba” through financing “a series of programs and provid[ing] funds for a wide range of organizations and centers that act against Cuba.”<sup>28</sup>

Based upon such justification, the Cuban Supreme Court affirmed the trial court’s ruling and Mr. Gross’s sentence, stating:

The [trial] court acted wisely by arguing in its judgment that no effective repentance was evidenced in the defendant’s behavior. It was noted that the defendant’s recognition of his actions did not occur with sincerity or effectively contributed to their clarification, since the defendant did not acknowledge the politically destructive intent of his actions. The decision adopted by the court of first instance was correct because the aforementioned mitigating circumstance is based on a behavior that is peripheral to the criminal offense; in other words, a positive conduct in regards the material and social consequences of the criminal offense for the purpose of either mitigating its impact or redressing the aggrieved party, and a conduct of cooperation with the justice administration through confessions to the law enforcement authorities and agents. While the position adopted by Mr. ALAN PHILLIP GROSS was appropriate and had a bearing on the judgment issued by the court of first instance that reduced the sanction requested by the prosecution, his recognition of his actions did not reflect any spontaneous or effective repentance, nor did the defendant show any willingness to redress or diminish the impact of his unfair actions or to apologize to the Cuban people as the victim of the US Government actions, and these reasons are sufficient to confirm the just and proportionate sentence of fifteen years of incarceration imposed on Mr. ALAN PHILLIP GROSS . . . .<sup>29</sup>

Thus, Mr. Gross has been imprisoned in a Cuban maximum-security military hospital facility since shortly after his arrest in December 2009.

## **5. Health Situation**

During his incarceration, Mr. Gross’s condition has steadily deteriorated. He is suffering from a great deal of mental strain and a number of serious physical health problems. He has lost

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<sup>27</sup> *Id.* at 8 (emphasis added).

<sup>28</sup> *Sentence No. Four of Twenty-Eleven* (Translation), LA SALA DE LOS DELITOS CONTRA LA SEGURIDAD DEL ESTADO DEL TRIBUNAL SUPREMO POPULAR, Aug. 4, 2011, 3 (Cuba) [hereinafter Cuban Supreme Court Decision].

<sup>29</sup> *Id.* at 3.

over 105 pounds (47.63kg) while in prison and is suffering from degenerative arthritis, steadily worsening because he is not permitted to walk in his cell; a mass has also developed behind his right shoulder blade.<sup>30</sup> In August 2010, Mr. Gross's 27-year old daughter was diagnosed and treated for breast cancer, and Mr. Gross was deeply distressed by this and the impossibility of providing his oldest daughter with care and support.<sup>31</sup> In June 2011, his wife, Judy Gross, also underwent surgery for an ailment and was unable to work for a considerable time; as Alan Gross was the primary provider, Judy Gross is suffering significant financial hardship in addition to the mental trauma associated with his incarceration.<sup>32</sup> Further, in the time between his daughter and wife's surgeries, Mr. Gross's now 90-year-old mother, Evelyn Gross, was diagnosed with inoperable lung cancer.<sup>33</sup> Since her February 2011 diagnosis, her condition has continued to deteriorate and both mother and son fear they will not see each other again.<sup>34</sup>

Both Judy and Evelyn Gross made personal appeals to President Raúl Castro to release Alan for humanitarian and health reasons but these were denied.<sup>35</sup> Mr. Gross also made personal, written appeals to President Castro, offering to return to Cuba for the conclusion of his case in exchange for being permitted to travel to the U.S. to be with his daughter while she underwent cancer treatment.<sup>36</sup> Additionally, in March 2012, Mr. Gross made a direct request to President Castro seeking permission to travel to the U.S. for two weeks to visit with his ailing mother.<sup>37</sup> President Castro never responded to the latter request. In December 2011, Cuban authorities released nearly 3,000 prisoners on humanitarian grounds, but Alan Gross was not among them, despite his worsening health and the repeated requests made by family members and Mr. Gross himself.<sup>38</sup>

## B. Legal Analysis

The detention of Mr. Gross for "acts against the independence or the territorial integrity of the state" constitutes an arbitrary deprivation of his liberty<sup>39</sup> falling within Category II and

<sup>30</sup> Paul Haven, *Alan Gross, American Jailed in Cuba, In Good Condition, Cuban Authorities Say*, HUFFINGTON POST, Jun. 15, 2012, available at [http://www.huffingtonpost.com/2012/06/15/alan-gross-american-cuba\\_n\\_1600934.html](http://www.huffingtonpost.com/2012/06/15/alan-gross-american-cuba_n_1600934.html) [hereinafter *Alan Gross, American Jailed in Cuba*].

<sup>31</sup> *Free Alan Gross*, *supra* note 5.

<sup>32</sup> *Id.*

<sup>33</sup> *American Jailed in Cuba Says He Feels Like a Hostage*, CNN, May 4, 2012, available at [http://articles.cnn.com/2012-05-04/americas/world\\_americas\\_cuba-jailed-american\\_1\\_alan-gross-cuban-authorities-cuban-government?\\_s=PM:AMERICAS](http://articles.cnn.com/2012-05-04/americas/world_americas_cuba-jailed-american_1_alan-gross-cuban-authorities-cuban-government?_s=PM:AMERICAS) [hereinafter *American Jailed in Cuba*].

<sup>34</sup> *Free Alan Gross*, *supra* note 5, and see *American Jailed in Cuba*, *supra* note 33.

<sup>35</sup> *Free Alan Gross*, *supra* note 5.

<sup>36</sup> *Id.*

<sup>37</sup> *American Jailed in Cuba*, *supra* note 33.

<sup>38</sup> *Free Alan Gross*, *supra* note 5.

<sup>39</sup> An arbitrary deprivation of liberty is defined as any "depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law." *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, at art. 9(1) [hereinafter ICCPR]. Such a deprivation of liberty is specifically prohibited by international law. *Id.* "No one shall be subjected to arbitrary arrest, detention or exile." *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 9 (1948) [hereinafter Universal Declaration]. "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law..." *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, at Principle 2, G.A. Res. 47/173, Principle 2, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) [hereinafter *Body of Principles*].

Category III, as established by the UN Working Group on Arbitrary Detention.<sup>40</sup> Specifically, the detention is arbitrary under Category II because Mr. Gross was imprisoned for exercising his right to freedom of expression. The detention is also arbitrary under Category III because in the prosecution of Mr. Gross, the Cuban Government failed to observe international norms related to a fair trial.

**1. Category III: The Trial and Detention of Mr. Gross Failed to Respect International Norms Relating to the Right to a Fair Trial Guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights**

The Working Group considers a deprivation of liberty to be a Category III arbitrary detention “[w]hen 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.”<sup>41</sup> Additionally, the Working Group looks to the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Body of Principles).<sup>42</sup> Because the trial and detention of Mr. Gross failed to observe the minimum international norms relating to a fair trial, as contained in the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), and the Body of Principles, his detention is arbitrary under Category III.

**i. The Cuban Government Failed to Provide Mr. Gross an Independent and Impartial Judiciary**

ICCPR Article 14(1) affords individuals “a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>43</sup> Though Cuba has yet to ratify the ICCPR, it is a signatory,<sup>44</sup> and is therefore obligated to refrain from acts that would defeat the treaty’s “object and purpose,”<sup>45</sup> which includes proactively violating any of its provisions.

Numerous international human rights groups have conveyed serious concern about Cuba’s judicial system. Human Rights Watch noted in its 2012 Country Report that the Cuban “courts are ‘subordinated’ to the executive and legislative branches, denying meaningful judicial protection.”<sup>46</sup> Likewise, Freedom House wrote, “The Council of State, led by Raúl Castro,

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<sup>40</sup> See Fact Sheet No. 26, *infra* note 51, at pt. IV(B).

<sup>41</sup> Fact Sheet No. 26, *supra* note 40, at pt. IV(B).

<sup>42</sup> *Id.*

<sup>43</sup> ICCPR, *supra* note 39, at art. 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...”). This same right is established by the Universal Declaration Article 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”).

<sup>44</sup> Cuba became a signatory to the ICCPR on February 28, 2008. See list of countries: <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

<sup>45</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1979, art. 18, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980.

<sup>46</sup> HRW World Report, *supra* note 15.

controls the courts and the judicial process as a whole.”<sup>47</sup> Amnesty International has offered similar criticism:

The judiciary is neither independent nor impartial and allows criminal proceedings to be brought against those critical of the government as a mechanism to prevent, deter or punish them for expressing dissenting views. The complicity of the state judicial system in prosecuting government critics, often in summary trials that fail to meet international fair trial standards, has a profound chilling effect on freedom of expression, association and peaceful assembly.<sup>48</sup>

Beyond these generic expressions of the lack of independence and impartiality of the Cuban government’s judicial system, the aforementioned comments by the trial and appeals court illustrate that Mr. Gross did not have an independent and impartial trial in his case. Specifically, the opinions of the courts mirror public political statements from the executive branch of Government of Cuba about the United States.

Because Mr. Gross was arrested, tried, convicted, and imprisoned in Cuba’s judicial system, which is neither independent nor impartial, he did not receive a fair trial and his detention is therefore arbitrary under Category III.

**ii. The Cuban Government Failed to Afford Mr. Gross the Presumption of Innocence and Did Not Prove Its Own Allegations**

ICCPR Article 14(2) requires that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”<sup>49</sup> As is evident from the language in the trial judgment, the Court’s preoccupation was not with Mr. Gross’s actions, but instead with his country of origin and the source of the funding for his project.

The Trial Court stated:

The program launched by Development Alternatives Inc. was sponsored by USAID, an institution that serves the interests of the special services of its government, using as a façade the assistance for development. Said entity also pursues, among other goals, the overthrowing of the Socialist Revolution and the establishment of the capitalist system in Cuba, for

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<sup>47</sup> Freedom House, *Freedom in the World 2012: Cuba*, available at <http://www.freedomhouse.org/report/freedom-world/2012/cuba-0>.

<sup>48</sup> Amnesty International, *Restrictions on Freedom of Expression in Cuba* (2010), available at <http://www.amnesty.org/en/library/asset/AMR25/005/2010/en/62b9caf8-8407-4a08-90bb-b5e8339634fe/amr250052010en.pdf>.

<sup>49</sup> ICCPR, *supra* note 39, at art. 14(2). See also Universal Declaration, *supra* note 39, at art. 11(1) (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”); and Body of Principles, *supra* note 39, at Principle 36 (“1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”).

which it finances a series of programs and provides funds for a wide range of organizations and centers that act against Cuba. . . . By implementing these plans, [USAID] intended to create the conditions to use these channels in order to disseminate distorted information about the Cuban reality and prevent the State competent authorities from detecting the source of misinformation, and its primary objective was to influence certain sensitive sectors of society such as religious groups, youths, blacks, women and social strata they consider marginal with the purpose of discrediting the Revolutionary Government and thus provoke the kind of discontent that would create the conditions to promote civil disobedience actions or disturbances that would allow them to portray an image of social and political chaos in the country, thus making it possible for its government to carry out maneuvers against Cuba aimed at annihilating its Revolution, with the subsequent harm to the constitutional stability that the Cuban people are entitled to.<sup>50</sup>

Rather than analyzing the specific facts of Mr. Gross's case, the Court instead focused its attention on registering its disdain toward the U.S. Government and its agencies. In the Court's eyes, Mr. Gross was guilty simply by virtue of being a U.S. citizen who happened to work for a U.S. Government subcontractor. Toward this end, the Cuban Government (as reflected in the Court's opinion) simply made a series of conclusory statements about Mr. Gross's alleged crimes but it did not present evidence to prove its allegations of subversion. All proffered evidence established only that Mr. Gross was bringing communications technology from the U.S. to Cuba in order to enable the Jewish community to access the Internet. There was no indication that these actions were undermining the Cuban State, and as such, are a far cry from "acts against the independence or the territorial integrity of the state," even if such a crime were consistent with Cuba's international legal obligations, which it is not. Because the Court's actions denied Mr. Gross his right to be presumed innocent, its actions are in direct contravention of ICCPR Article 14(2) and Mr. Gross's detention is arbitrary under Category III.

## **2. Category II: The Detention Resulted From Mr. Gross's Exercise of the Rights or Freedoms Guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights**

Arbitrary detention falls under Category II when detention results from the exercise of fundamental rights protected by international law.<sup>51</sup> These fundamental rights include the right to freedom of expression.<sup>52</sup> Mr. Gross's detention is a result of his exercise of his right to freedom of expression; therefore, it is arbitrary under Category II.

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<sup>50</sup> Trial Court Opinion, *supra* note 8, at 3-4.

<sup>51</sup> A Category II deprivation of liberty occurs, "[w]hen 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 on Human Rights and, 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." Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 26: The Working Group on Arbitrary Detention, pt. IV(B) [hereinafter Fact Sheet No. 26].

<sup>52</sup> Universal Declaration, *supra* note 39, at art. 19. *See also* ICCPR, *supra* note 39, at art. 19(2).

**i. The Cuban Government Arrested and Imprisoned Alan Gross  
Because He Exercised His Freedom of Expression**

The Cuban Government's detention of Mr. Gross is punishment for exercising his freedom of expression protected by Article 19 of the Universal Declaration of Human Rights,<sup>53</sup> and Article 19(2) of the ICCPR. Freedom of expression includes the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>54</sup> In addition to the requirements of international law, Cuban law protects the right of freedom of expression. Article 53 of the Cuban Constitution guarantees "freedom of speech."<sup>55</sup> This Constitutional protection is inextricably linked to Cuba's international obligations as Article 12(b) of Cuba's Constitution provides that: "The Republic of Cuba . . . bases its international relations on the principles . . . proclaimed in the United Nations Charter and in other international treaties to which Cuba is a party."<sup>56</sup> As noted previously, the Government of Cuba signed the ICCPR, which means it cannot proactively violate any of its provisions as it has in the case of Mr. Gross.

As stated above, the prosecution of Mr. Gross by the Government was solely in reaction to his being an American who worked for a U.S. government subcontractor. Mr. Gross's specific actions—helping to provide the Internet to the Jewish Community through which they could access information of their choosing—were well within the protection of freedom of expression afforded by both international and domestic Cuban law. Mr. Gross's right to freedom of expression while present in Cuba includes helping others in Cuba to exercise that same right.

Moreover, Mr. Gross's expression does not fall within the limited category of speech legitimately subject to prohibition by a government. The ICCPR allows governments to restrict freedom of expression only in circumstances that "are provided by law and are necessary: (a)

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<sup>53</sup> While the Universal Declaration, as a General Assembly resolution, is not technically considered binding in its entirety on all states, scholars continue to debate the binding nature of specific provisions. As a General Assembly resolution, the Body of Principles is similarly not legally binding. However, in looking to the Universal Declaration and the Body of Principles, the Working Group has decided to "rely heavily on 'soft' international legal principles to adjudicate individual cases." Jared M. Genser & Margaret Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and Practice*, 39 Colum. Hum. Rts. L. Rev. 101, 114 (2008).

<sup>54</sup> ICCPR, *supra* note 39, at Article 19(2) (emphasis added) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"); *see also* Universal Declaration, *supra* note 39, at Article 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.")

<sup>55</sup> The Constitution of the Republic of Cuba, 1976 (as Amended in 2002), *available at* <http://www.constitutionnet.org/files/Cuba%20Constitution.pdf>, at Article 53 ("Citizens have freedom of speech and of the press in keeping with the objectives of socialist society. Material conditions for the exercise of that right are provided by the fact that the press, radio, television, movies and other organs of the mass media are State or social property and can never be private property. This assures their use at the exclusive service of the working people and in the interest of society. The law regulates the exercise of these freedoms.") These limiting provisions, however, cannot allow the government to restrict the right to freedom of expression below the standard established by its international obligations.

<sup>56</sup> *Id.* at art. 12(b).

[f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”<sup>57</sup> This limited qualification does not allow states to punish expression it dislikes. The Human Rights Committee, the body tasked with authoritatively interpreting the treaty, has held that any restriction of expression is legitimate only if it is, (1) provided by law,<sup>58</sup> (2) for the purpose of protecting the rights or reputations of others, or national security or public order, and (3) “necessary” for that limited purpose.<sup>59</sup>

By imprisoning Mr. Gross for his actions of helping to provide access to the Internet, the Cuban Government provided its position that nobody in Cuba is permitted to freely access information via the Internet. Cuba has given no indication as to why this is needed “for the purpose of protecting the rights or reputations of others, or national security or public order.” Even if Cuba puts forth its Article 91 of the Penal Code as a justification, this would be invalid for its vague and overly broad nature, as such laws must be necessary for a “limited purpose” and thus narrowly tailored; a Government is not permitted to use ICCPR Article 19(3) to eviscerate the entire meaning of ICCPR Article 19(2). Thus, the Government must allow individuals “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>60</sup> By prohibiting this, the Cuban Government violated Mr. Gross’s right to freedom of expression—and by extension the rights of the Cuban Jewish Community to which Mr. Gross was offering his assistance—thus rendering the detention of Mr. Gross arbitrary under Category II.

### 3. Conclusion

Mr. Gross’s detention was punishment for exercising his fundamental right to freedom of expression, and his trial failed to meet the minimum standards required for a fair and impartial trial. Therefore, his detention is arbitrary under Category II and Category III and is in violation of both Cuban and international human rights norms. Given these violations of international law, the Working Group should declare Mr. Gross’s ongoing detention to be in violation of international law. Furthermore, the Working Group should urge for Mr. Gross’s immediate release and compensation for his wrongful conviction.

**INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN.**

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<sup>57</sup> ICCPR, *supra* note 39, at art. 19(3).

<sup>58</sup> While the Human Rights Committee has not addressed this requirement in its jurisprudence, it would likely be interpreted, as other provisions of the ICCPR have, to require “that the limitation must be sufficiently delineated in a State’s law.” Sarah Joseph, et al., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 391 (2000). As such, insofar as the subversion charges are vague and overbroad, they may fall outside the exception contained in ICCPR Article 19(3).

<sup>59</sup> See e.g. Human Rights Committee, *Robert Faurisson v. France*, Communication No. 550/1993, at ¶ 9.4, U.N. Doc. CCPR/C/58/D/550/1993(1996).

<sup>60</sup> ICCPR, *supra* note 39, at art. 19(2) (emphasis added).

On March 4, 2011, Mr. Gross's two-day trial began before the People's Provincial Tribunal of Havana. On March 11, 2011, the Tribunal issued its judgment finding Mr. Gross guilty of crimes of "acts against the independence or the territorial integrity of the state."

On August 5, 2011 the People's Supreme Court denied Mr. Gross's appeal and affirmed his sentence.

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