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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Chairperson-Rapporteur: Leïla Zerrougui

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Summary

During 2004, the Working Group visited Latvia, Belarus and China at the invitation of the Governments of those countries. The reports on these visits are contained in addenda 2, 3 and 4 to the present document.

During 2004, the Working Group adopted 25 Opinions concerning 51 persons in 17 countries. In 32 cases, it considered the deprivation of liberty to be arbitrary. These opinions are contained in addendum 1 to the present document.

Also during the period from 8 November 2003 to 8 November 2004, the Group transmitted a total of 202 urgent appeals concerning 770 individuals to 56 Governments; 196 were joint appeals with other thematic or country-oriented mandates of the Commission on Human Rights. Subsequently, 35 concerned Governments informed the Working Group that they had taken measures to remedy the situation of the detainees. In some cases, the detainees were released. In other cases, the Working Group was assured that the detainees concerned would receive fair trial guarantees.

The Working Group has continued to develop its follow-up procedure and has sought to engage in continuous dialogue with those countries visited by the Group, in respect of which it had recommended changes of domestic legislation governing detention. The Governments of Australia and Mexico provided follow-up information on the situation regarding the implementation of the recommendations resulting from the Working Group's visit to those countries in 2002. The Governments of Romania and the Islamic Republic of Iran, as well, provided information on the implementation of the recommendations resulting from the Group's visit to those countries in 1998 and 2003, respectively.

The report includes the text of the Working Group's deliberation No. 7 on Psychiatric Detention. The Working Group is of the opinion that holding persons of unsound mind against their will in conditions preventing them from leaving (e.g., in a psychiatric hospital) may, in principle, amount to a deprivation of liberty. Such deprivation of liberty must be governed by laws containing procedural safeguards against arbitrary detention. The procedures must take into account the vulnerability of the person concerned by providing an effective legal assistance. The continued necessity of keeping the person deprived of her or his liberty must be regularly reviewed by a court or other independent and impartial organ, before which adversarial proceedings are conducted.

Other sections of the report are devoted to the developments concerning deprivation of liberty as a measure in countering terrorism and to hostage-taking and arbitrary detention.

In its recommendations, the Working Group calls upon States to bear in mind that, even in taking legitimate measures to counter terrorism, effective safeguards against arbitrary deprivation of liberty must be kept in place, in particular effective judicial control over detention orders. Moreover, the Working Group recommends that States avoid having recourse to prolonged incommunicado detention as a tool in fighting terrorism. The Working Group also

calls on States to avoid the misuse of "administrative detention" under public security legislation, migration laws or other related administrative law, to deprive persons suspected of criminal acts of their liberty. More generally, the Working Group exhorts States whose legal system does not provide for effective remedies to challenge arrest or detention to introduce such remedies. Finally, the Working Group calls upon States to take appropriate measures to prevent inadequate conditions of pre-trial detention from compromising the equality between prosecution and defence, which is a fundamental guarantee of a fair trial and thus a pre-condition to avoiding arbitrary detention.

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Introduction

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty, according to the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned. The mandate of the Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum-seekers and immigrants.

2. During 2004, the Working Group was composed of the following experts: Manuela Carmena Castrillo (Spain), Soledad Villagra de Biedermann (Paraguay), Leïla Zerrougui (Algeria), Tamás Bán (Hungary) and Seyed Mohammad Hashemi (Islamic Republic of Iran).

3. Since 4 September 2003, Ms. Zerrougui is the Chairperson-Rapporteur of the Working Group and Mr. Bán is the Working Group's Vice-Chair.

I. ACTIVITIES OF THE WORKING GROUP

4. During 2004, the Working Group held its thirty-ninth, fortieth and forty-first sessions. It also carried out official missions to Latvia (23 to 28 February 2004), to Belarus (16 to 26 August 2004) and to China (18 to 30 September 2004) (see E/CN.4/2005/6/Add.2, 3 and 4).

5. On 4 June 2004, the Chairperson-Rapporteur of the Working Group wrote to the Governments of the United Kingdom of Great Britain and Northern Ireland, the United States of America, to the Iraqi Governing Council and to the Coalition Provisional Authority (CPA) expressing the Working Group's serious concern regarding the uncertainty of the legal status of detainees subjected to interrogation by occupying forces in Iraq, in the context of allegations of torture, ill-treatment and abuses of persons in detention by military officers serving under the CPA. The Working Group requested the three above-mentioned Governments and the CPA to provide information on the legal status of persons detained in Iraq, and on the application of the rules and norms entailed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the principles of international humanitarian law under the Geneva Conventions of 1949.

6. By letter dated 20 July 2004, the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva submitted a response explaining the three distinct categories of persons detained by United Kingdom troops in Iraq: prisoners of war (POWs) held under the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention); security internees held under the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and criminal detainees. The Government stated that, although the provisions of the Universal Declaration of Human Rights did apply to all three groups, the ICCPR did not apply to prisoners of war and security internees since these were, respectively, under the protection of the Third and Fourth Geneva Conventions, which provided parallel, though not identical, protections to those enshrined in articles 9 and 14 of ICCPR.

7. The Government of the United Kingdom reported that it had detained over 300 POWs. Most of them had been released given the fact that the United Kingdom was no longer party to an armed conflict in Iraq. Control over the remaining POWs was relinquished on the handover of sovereignty to the Government of Iraq. As for about 60 security internees held in mid-June 2004, the Government reported that they were held in accordance with the procedures set out in section 6 of Coalition Provisional Authority (CPA) Memorandum Number 3 Revised. The Fourth Geneva Convention is not more binding at this stage.

8. Lastly, the Government reported that criminal detainees are held for a short period until they can be passed to the Iraqi police. Section 5 of the memorandum gives the Multinational Force the continued power to temporarily detain people suspected of criminal offences. They may be held in an MNF facility at the request of the Iraqi authorities. The United Kingdom's responsibility for the provision of security in southern Iraq has led British forces to detain persons suspected of committing a criminal offence under Iraqi law.

9. Separate forms are completed depending on whether a person has been apprehended as a criminal detainee or as a security internee. In the case of criminal detainees, the form sets out, inter alia, that the detainee has the rights to consult a lawyer and to be brought before a judge. In the case of internees, the form sets out that it is believed that the internee represents a threat to coalition forces and that the case will be reviewed. It also has a section where the internee can nominate a person who he would like to be informed of his internment and how that person may be contacted. Nominated persons will be contacted within 24 hours. A review is conducted by a panel of civilian and military officers in theatre at the 10, 28 and 90-day points, and every 90 days thereafter, to determine whether continued internment is necessary.

A. Handling of communications addressed to the Working Group

1. Communications transmitted to Governments

10. A description of the cases transmitted and the contents of the Governments' replies will be found in the relevant Opinions adopted by the Working Group (E/CN.4/2005/6/Add.1).

11. During its three 2004 sessions, the Working Group adopted 25 Opinions concerning 51 persons in 17 countries. Some details of the Opinions adopted during those sessions appear in the table hereunder and the complete texts of Opinions Nos. 1/2004 to 19/2004 are reproduced in addendum 1 to the present report. The table also provides information about six Opinions adopted during the forty-first session, details of which could not, for technical reasons, be included in an annex to the present report.

2. Opinions of the Working Group

12. Pursuant to its methods of work (E/CN.4/1998/44, annex I, para. 18), the Working Group, in addressing its Opinions to Governments, drew their attention to Commission resolutions 1997/50, 2000/36 and 2003/31 requesting them to take account of the Working Group's Opinions 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 had taken. On the expiry of a three-week deadline, the Opinions were transmitted to the source.

Table 1

Opinions adopted during the thirty-ninth, fortieth and forty-first sessions* of the Working Group

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
1/2004	Morocco	Yes	Ali Lmrabet	Case filed (para. 17 (a) of the Working Group's methods of work; person released).
2/2004	Georgia	No	Giorgi Mshvenieradze	Detention arbitrary, category II.
3/2004	Israel	Yes	'Abla Sa'adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba'neh	'Abla Sa'adat and Asma Muhammad Suleiman Saba'neh: Cases filed (para. 17 (a) of the Working Group's methods of work; persons released). Iman Abu Farah and Fatma Zayed: Detention arbitrary, category III.
4/2004	Ethiopia	No	Tadese Taye	Detention arbitrary, category I.
5/2004	Viet Nam	Yes	Thich Tri Luc	Case filed (para. 17 (a) of the Working Group's methods of work; person released).
6/2004	Syrian Arab Republic	No	Mohammad Shahadeh, Hassan Qi Kurdi, Bashshar Madamani, Haytham Al Hamoui, Yahia Shurbaji, Tarek Shurbaji, Mou'taz Mourad, Abdel Akram Al-Sakka, Ahmad Kuretem, Mohammed Hafez and Moustafa Abou Zeid	Detention arbitrary, categories II and III.
7/2004	United Arab Emirates	Yes	Janie Model	Detention arbitrary, category I.
8/2004	Republic of Moldova	Yes	Andrei Ivantoc	Case provisionally filed (para. 17 (d) of the Working Group's methods of work).
9/2004	Myanmar	Yes	Daw Aung San Suu Kyi	Detention arbitrary, category I.
10/2004	Malaysia	Yes	Muhammad Radzi bin Abdul Razak, Nurul Mohd Fakri bin Mohd Safar, Mohd Akil bin Abdul Raof, Eddy Erman bin Shahime, Muhammad Ariffin bin Zulkarnain, Abi Dzar bin Jaafar, Falz Hassan bin Kamarulzaman, Mohd Ikhwan Abdullah and Shahrul Nizam Amir Hamzah	Muhammad Ariffin bin Zulkarnain, Falz Hassan bin Kamarulzaman, Nurul Mohd Fakri bin Mohd Safar and Shahrul Nizam Amir Hamzah: Cases filed (para. 17 (a) of the Working Group's methods of work; persons released). Muhammad Radzi bin Abdul Razak, Mohd Akil bin Abdul Raof, Eddy Erman bin Shahime, Abi Dzar bin Jaafar and Mohd Ikhwan Abdullah: Detention arbitrary, category III.

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
11/2004	Madagascar	Yes	Azihar Salim	Detention not arbitrary.
12/2004	United States of America	Yes	Dianellys Morato	Case filed (para. 17 (a) of the Working Group's methods of work; person released).
13/2004	Bolivia	Yes	Francisco José Cortés Aguilar, Carmelo Peñaranda Rosas and Claudio Ramírez Cuevas	Case pending until further information be received (para. 17 (c) of the Working Group's methods of work).
14/2004	China	Yes	Jae Hyun Seok	Case filed (para. 17 (a) of the Working Group's methods of work; person released).
15/2004	China	Yes	Huang Qi	Detention arbitrary, category II.
16/2004	Myanmar	No	Maung Chan Thar Kyaw	Detention arbitrary, category III.
17/2004	United States of America	Yes	Ansar Mahmood and Sadek Awaed	Cases filed (para. 17 (a) of the Working Group's methods of work; persons released).
18/2004	United States of America	Yes	Benamar Benatta	Detention arbitrary, categories I and III.
19/2004	Viet Nam	Yes	Nguyen Dan Que	Detention arbitrary, category II.
20/2004	Colombia	Yes	Orlando Alberto Martínez Ramírez	Detention not arbitrary.
21/2004	Colombia	Yes	Israel Morales Hernández	Detention arbitrary, category III.
22/2004	United Arab Emirates	Yes	Cherif Mohamed Haidera	Detention arbitrary, category I.
23/2004	Algeria	Yes	Hafnaoui El Ghoul	Case filed (para. 17 (a) of the Working Group's methods of work; person released).
24/2004	China	Yes	Zhang Yi Nan	Detention arbitrary, category III.
25/2004	Saudi Arabia	Yes	Matrouk b. Hais b. Khalif Al-Faleh, Abdellah Al-Hamed and Ali Al-Damini	Detention arbitrary, category II.

* *Note*: Opinions 20/2004 to 25/2004, adopted during the forty-first session, could not be reproduced in the annex to the present report; they will be reproduced as an annex to the next annual report.

3. Government reactions to opinions

13. In a note verbale dated 8 June 2004, the Permanent Mission of Malaysia to the United Nations Office at Geneva requested the Working Group to reconsider its opinion No. 10/2004 on the grounds that the Working Group had rendered the opinion without taking account of the response of the Government of Malaysia to the communication from the source.

14. The Government drew the attention of the Working Group to the fact that it replied to a Joint Urgent Appeal sent with other thematic mechanisms. The Working Group regrets that this reply was not included when it examined the communication on its merits. In its reply to the Joint Urgent Appeal attached to the request for reconsideration, the Government recalls that four of the nine persons mentioned in the communication were released from detention and placed under a "restricted order" in their district of residence, (as also reflected in the Working Group's Opinion No. 10/2004). The five remaining in detention under the Internal Security Act 1960 (ISA) are connected to Jemaah Islamiyah (JI), an organization that has links with Al-Qaida. According to preliminary police investigations, the five men "have a radical and militant belief in the JI movement", have undergone military training in Afghanistan and Kashmir, and therefore constitute an ongoing danger for the security, well-being and public order of the country.

15. The Government points out that, as is evident from the submissions of the source, it is not true that persons detained under the Internal Security Act are held incommunicado. On the contrary, they enjoy access to legal counsel and can receive visits from family members.

16. The Government does not contest that the persons concerned are being detained pursuant to an administrative decision, that they have never been indicted or brought before a judge and that no charge has been brought against them. The Working Group, taking note of the position of the Government, finds no new element that would invalidate the reasoning on which its opinion was based. The conditions for the reversal of its opinion, contained in paragraph 21 of its methods of work, have therefore not been met.

17. By letter dated 26 March 2004, the Permanent Representative of Cuba to the United Nations Office at Geneva transmitted information on the trials of the persons mentioned in the Working Group's Opinion No. 9/2003 adopted on 9 May 2003. According to the information provided by the Government, all the accused were informed of the charges filed against them and exercised their right to a defence attorney before an ordinary civilian court. All of the defence lawyers had prior access to the prosecution's files. Oral hearings were public and adversarial. All the accused exercised their right to submit evidence and present witnesses.

18. By letters dated 31 March and 18 June 2004, the Permanent Representative of Viet Nam to the United Nations Office at Geneva, expressed his disagreement with the Working Group's Opinion No. 20/2003 (Viet Nam) regarding Thadeus Nguyen Van Ly. He had been deprived in 1981 of his right to do missionary work by late Archbishop Nguyen Kim Dien, because of his self-indulgent lifestyle, which damaged the credibility of the Church. According to the Government, his arrest and trial were conducted in accordance with Vietnamese law. He was

arrested and sentenced for his acts in violation of articles 258 and 269 of the Penal Code. In view of his repentance and the remarkable attitude observed during his imprisonment, the People's Court of Ha-Nam Province reduced his sentence, on 16 July 2003, from 15 to 10 years' imprisonment; and again on 12 June 2004, from 10 to 5 years' imprisonment. Such reductions are a demonstration of the humane and lenient policy of the Socialist Republic towards those who show a sincere attitude of repentance and redemption while serving their sentences.

19. The Permanent Representative of Viet Nam, by a letter dated 28 October 2004, expressed also the disagreement of his Government with regard to the Working Group's Opinion No. 19/2004 (Viet Nam) concerning Dr. Nguyen Dan Que. He was sentenced to two years and six months of imprisonment on charges of stockpiling, circulating and transmitting documents of distorted contents, abusing democratic freedoms to infringe upon the interests of the State as well as the legitimate rights and interests of organizations and citizens, in violation of article 258 of the Penal Code. His trial was conducted in full compliance with penal prosecution procedures of Viet Nam, as well as in strict observance of the international standards relating to a fair trial. His health is well taken care of and he is regularly visited in prison by his family members.

20. Regarding Opinion No. 21/2003, the Permanent Mission of China to the United Nations Office at Geneva, by note verbale dated 26 March 2004, expressed the view that Li Ling and Pei Jiling were given a fair trial with all legal safeguards. According to the Government, the Working Group should refrain from any action which may be taken advantage of by the evil Falun Gong cult, which has led to more than 2,000 deaths and has broken and ruined thousands of happy families.

21. In connection with the legal opinion contained in chapter III of the Working Group's report to the fifty-ninth session of the Commission on Human Rights (E/CN.4/2003/8) regarding the privation of liberty of persons detained at Guantánamo Bay, and Opinion No. 5/2003 (United States of America), the Government of the United States of America reported that the Department of Defense transferred three juvenile detainees under the age of 16 from the Naval Base in Guantánamo Bay, Cuba, to their home country. They had been considered enemy combatants. Their transfer for release was decided by the Defense Department, in consultation with other government officials, after it was determined that they no longer posed a threat to the United States, that they had no further intelligence value and that they were not going to be tried by the Government for any crimes. The Government did not provide their names or further details regarding their capture and release because it was concerned that Al-Qaida or Taliban sympathizers might threaten the safety of these juveniles.

22. The Government of the United States of America also reported that, as of 29 June 2004, 87 detainees in Guantánamo Bay, Cuba, had been released. Four other detainees had been transferred to the Government of Saudi Arabia for continued detention. The Government explained that the evaluation of the detainees was a time-consuming and deliberate process.

4. Communications giving rise to urgent appeals

23. During the period of 8 November 2003 to 8 November 2004, the Working Group transmitted 202 urgent appeals to 56 Governments concerning 770 individuals (673 men, 73 women and 24 minors). In conformity with paragraphs 22 to 24 of its methods of work, the Working Group, without prejudging whether detention was arbitrary, drew the attention of each of the Governments concerned to the specific case as reported, and appealed to them to take the necessary measures to ensure that the detained persons' rights to life and to physical integrity were respected. When the appeal made reference to the critical state of health of certain persons or to particular circumstances, such as failure to execute a court order for release, the Working Group requested the Government concerned to take all necessary measures to have the persons concerned released.

24. During the period under review, 202 urgent appeals were transmitted by the Working Group as shown below in table 2.

Table 2

Urgent appeals

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released (Info. received by)
Algeria	4	32	Reply to 4	
Australia	1	1 minor	Reply to 1	
Azerbaijan	1	1 man	Reply to 1	
Bahrain	2	15 men, 3 minors	Reply to 2	
Bangladesh	4	4 men	Reply to 1	
Belarus	1	2 men, 1 woman	Reply to 1	
Burundi	1	2 men	Reply to 1	
Cameroon	1	2 men	No reply	
Central African Republic	3	3 men	No reply	
China	12	13 men, 10 women	Reply to 8	2 (Source)
Colombia	2	4 men, 1 woman	Reply to 2	
Democratic Republic of the Congo	6	9 men, 4 women, 8 minors	Reply to 2	
Djibouti	1	1 man	Reply to 1	
Ecuador	2	16 men	No reply	
Egypt	1	1 man	No reply	
Equatorial Guinea	3	36 men, 1 woman	No reply	
Eritrea	4	69 men, 3 women	Reply to 1	
Ethiopia	5	37 men, 2 women	Reply to 2	
Gabon	1	1 man	No reply	
Georgia	1	1 man	No reply	
Guinea	1	1 woman	No reply	
Haiti	2	1 man, 1 woman	No reply	
India	1	1 man	Reply to 1	

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released (Info. received by)
Indonesia	4	9 men, 11 women, 7 minors	Reply to 2	
Iran (Islamic Republic of)	6	24 men	Reply to 1	
Israel	2	3 men	No reply	
Jamaica	1	2 men	Reply to 1	
Jordan	1	1 man	No reply	
Kuwait	2	2 men	No reply	
Lao People's Democratic Republic	1	16 men	Reply to 1	
Libyan Arab Jamahiriya	1	2 men, 1 woman	No reply	1 (Source)
Malaysia	3	65 men, 6 women, 1 minor	Reply to 2	8 (Government)
Maldives	2	2 men, 1 woman	Reply to 1	
Mexico	1	1 man	Reply to 1	
Morocco	2	3 men, 1 woman	Reply to 2	
Myanmar	3	6 men, 2 women	No reply	
Nepal	40	76 men, 8 women, 3 minors	Reply to 4	8 (Source)
Niger	1	1 man	No reply	
Nigeria	5	15 men, 3 women	No reply	4 (Source)
Pakistan	3	18 men	Reply to 1	
Philippines	1	1 man	No reply	
Russian Federation	6	16 men, 5 women	Reply to 3	1 (Government)
Rwanda	1	1 man	Reply to 1	1 (Government)
Saudi Arabia	6	17 men	Reply to 3	1 (Source)
Somalia	1	1 man	No reply	1 (Source)
Sri Lanka	2	2 men	Reply to 1	
Sudan	21	72 men, 3 women, 1 minor	Reply to 1	2 (Government) 11 (Source)
Syrian Arab Republic	11	51 men, 5 women	Reply to 6	1 (Government) 7 (Source)
Tonga	1	1 man	No reply	
Turkey	1	4 men	Reply to 1	
Turkmenistan	4	7 men	No reply	
United Kingdom of Great Britain and Northern Ireland	1	1 woman	Reply to 1	
United States of America	1	6 men	Reply to 1	
Uzbekistan	4	4 men, 2 women	Reply to 4	
Viet Nam	2	7 men	Reply to 2	7 (Government)
Yemen	1	2 men	No reply	

25. Of these 202 urgent appeals, 196 were appeals issued jointly by the Working Group and thematic or geographical special rapporteurs.

26. The Working Group wishes to thank those Governments that heeded its appeals and took steps to provide it with information on the situation of the persons concerned, especially the Governments that released those persons. In other cases, the Working Group was assured that the detainees concerned would receive fair trial guarantees.

27. The Group notes that only 33.66 per cent of its urgent appeals received replies, and consequently invites Governments to increase their cooperation under the urgent-action procedure.

B. Country missions

1. Visits carried out

28. During 2004, the Working Group visited Latvia (23 to 28 February); Belarus (16 to 26 August) and China (18 to 30 September). The reports on those visits are contained in addenda 2, 3 and 4 to the present report.

2. Visits scheduled

29. The Working Group's visit to Canada is now scheduled to take place in June 2005.

30. During the Working Group's thirty-seventh and forty-first sessions, conversations were held with representatives of the Permanent Mission of South Africa to the United Nations Office at Geneva concerning a Working Group visit to South Africa. The Chairperson-Rapporteur of the Working Group reiterated its interest in visiting South Africa, during a meeting held on 24 June 2004 with Ms. Bridgitte Mabandla, South African Minister of Justice and Constitutional Development. The visit is now scheduled to take place in September 2005.

31. The Working Group has also requested, in recent years, to be invited to the following countries: Angola; Equatorial Guinea; Guinea-Bissau; Libyan Arab Jamahiriya; Nauru; Papua New Guinea and Turkmenistan. No response has been received from the Governments of those countries.

32. On 25 June 2004, a statement issued by participants of the eleventh meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the Commission on Human Rights (see E/CN.4/2005/5) expressed the desire of the mandate holders that the Chairperson-Rapporteur of the Working Group, together with the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the question of torture and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, should visit, at the earliest possible date, detainees held or tried on grounds of alleged terrorism or other violations in Afghanistan, Iraq, the Guantánamo Bay military base and elsewhere, with a view to ascertaining that international human rights standards are properly upheld with regard to these persons, and also to make themselves available to the authorities concerned for consultation and advice.

33. On 9 November 2004, the Permanent Representative of the United States of America to the United Nations Office at Geneva replied that, although his Government was not able to make provision for the visits as requested, it is willing to provide a briefing in Washington, D.C., by officials of the Government of the United States, including representatives of the Department of

Defense, to discuss the matters raised related to detention practices. The mandate holders mentioned above, by a joint letter dated 22 November 2004, welcomed the United States Government's initiative to begin a dialogue on this matter and considered the invitation to a briefing as a preliminary step that would assist them in the preparation of their requested country visits. They added that, following regular practice, the proposed briefing should take place in Geneva.

3. Follow-up to country visits of the Working Group

34. By its resolution 1998/74, the Commission on Human Rights requested those responsible for the Commission's thematic mechanisms to keep the Commission informed about the follow-up to all recommendations addressed to Governments in the discharge of their mandates. In response to this request, the Working Group decided, in 1998 (see E/CN.4/1999/63, para. 36), to address a follow-up letter to the Governments of the countries that it visited, together with a copy of the relevant recommendations adopted by the Working Group contained in the reports on its country visits.

35. Communications were addressed to the Governments of Australia and Mexico requesting information on such initiatives as the authorities might have taken to give effect to the recommendations contained in the Working Group's reports to the Commission on its visits to those countries in 2002 (E/CN.4/2003/8/Add.2 and E/CN.4/2003/8/Add.3).

36. The Government of Mexico reported that an initiative to reform the Constitution, in order to achieve structural reform of the criminal justice system, has been submitted to Congress. The *Diagnosis of the Human Rights Situation in Mexico* set the bases for the elaboration of a national human rights programme based on the recommendations of international human rights organizations and national experts.

37. Within the framework of the structural reform of the criminal justice system, various measures were adopted addressing the recommendations of the Working Group. In particular, the Sub-Commission for Legislative Harmonization was created to bring domestic legislation into line with international treaties. The reform would recognize the right of detainees to be immediately informed of the reasons for their detention; to know the nature of the offences of which they are accused; to know their rights under the Constitution; to be assisted by a qualified legal defender from the time of detention and the right not to make a statement. The posts of judges for delinquent minors will be created, as will judges for the execution of penalties, and reforms have been made to the Law on *Amparo*. Judges would be allowed to grant provisional liberty. During the period January to September 2004, early release was arranged for 189 indigenous persons sentenced for ordinary and federal crimes. Concerning the concept of "*flagrancia*", operational personnel of the Secretariat for Public Security have been trained to respect constitutional and international guarantees in carrying out their duties. A training programme has been undertaken on the illegality of detention on the basis of a "suspicious attitude", "appearance" or "evident nervousness". Measures have been taken to identify clearly the vehicles of the Secretariat for Public Security. Among the initiatives to reform the criminal procedure system proposed by the executive is the provision of guarantees to protect the accused.

38. By a letter dated 17 November 2004, the Permanent Representative of Australia to the United Nations Office at Geneva informed the Working Group that his Government had given considerable attention to the Working Group's report (E/CN.4/2003/8/Add.2) and provided a detailed response in November 2002 (E/CN.4/2003/G/22). That response outlined the reasons why the Government of Australia could not support the Working Group's recommendations. Accordingly, no action had been taken with a view to implementing the recommendations.

39. However, the Government reported that a number of initiatives had been implemented or were being developed to further improve the immigration detention arrangements in Australia. Two important policy instructions had been issued in December 2002 by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Migration Series Instruction (MSI) 370, "Procedures for unaccompanied wards in immigration detention facilities", provides a framework by which unaccompanied minors are cared for in detention. The general presumption expressed in this instruction is that it would be usually in the best interests of unaccompanied wards to be transferred to an alternative place of detention in the community or, if eligible, to be released on a bridging visa. Until then, the unaccompanied ward's special care needs are assessed and met.

40. MSI 371, "Alternative places of detention", provides a framework for decisions to be made on transferring detainees, particularly women and children, to alternative places of detention outside detention facilities (residential housing projects, or RHPs). RHPs were established at Port Augusta, Port Hedland and Woomera. The Woomera and Port Hedland RHPs were later decommissioned due to decreasing numbers in detention. New RHPs are now planned for Sydney and Perth, allowing women and children to live in family-style accommodation in the community.

41. The Government of Australia affirms that it continues to actively arrange acceptable community-based alternative detention arrangements with community groups and non-governmental organizations. A number of NGOs have voiced strong support for the development of a community detention scheme. As a result, as at 6 October 2004, there was only one child in a mainland detention centre: this child was born in Australia and alternative detention arrangements had been offered for the child and his mother. There is also an enhanced focus on one-to-one case management of those in detention and increased guidance given to staff at immigration detention facilities.

42. The Working Group has also transmitted to the Government of Australia some allegations received from non-governmental organizations concerning the mandatory detention of undocumented immigrants in Australia.

43. In connection with the visits carried out by the Working Group to Romania in 1998, the Government reported that, in pursuance of the elaboration of a new normative framework in the matter of the status of the refugees in November 2000, no asylum-seeker may be indefinitely maintained under administrative custody. Romanian legislation and policies provide safeguards against forcible expulsions. Applicants who meet the definition contained in the Convention relating to the Status of Refugees are granted refugee status. However, the Government may grant humanitarian status to persons exposed to inhumane or degrading treatment or punishment in their country of origin. Furthermore, persons fleeing armed conflicts may receive temporary protection.

44. The legislation was modified in order to eliminate the previous five-year limit on the granting of asylum. Previously, the granting of asylum was limited to three years, with a possible extension for another two years. Asylum-seekers may now submit their applications after their entry into the country and no longer, as before, necessarily within 10 days of their arrival. The legal distinction between documented and undocumented asylum-seekers has also been abolished. Refugees may no longer be detained at airports for periods longer than 20 days, irrespective of the fact of whether asylum-seekers hold documents. The Government further reported that recognized refugees are eligible for social assistance, permission to work and an integration loan. Asylum-seekers wishing to appeal their cases must file with a local court within 10 days of the communication of the negative decision. If the appeal is denied, a second appeal with a high court is possible if the applicant files within five days.

45. In connection with the visit carried out by the Working Group to the Islamic Republic of Iran in February 2003, the Government reported the following reforms in the administration of justice in Iran, following the recommendations made by the Working Group:

(a) Councils of Arbitration have been established to promote a culture of reconciliation among people and to avoid unnecessary recourse to tribunals. Negotiations between the parties in a judicial procedure are being encouraged in order to reach a conciliatory outcome, particularly in less serious cases; i.e., cases relating to offences punished with less than 91 days imprisonment and with fines up to 5 million rials;

(b) A centre for legal counsel composed by judicial experts has been established in order to facilitate the access of people to legal assistance. This has allowed a better, more precise and more cost-effective resolution of judicial cases;

(c) The re-establishment of the Office of the Public Prosecutor has speeded up the consideration and resolution of cases;

(d) A number of legal bills have been drafted by the judiciary and are now ready to be submitted for consideration to the Majlis (Parliament): a draft bill on the establishment of courts for juveniles, another bill on alternative punishments to imprisonment, and drafts on support of victim's relatives, crime prevention and computer-related offences;

(e) Offices to safeguard the rights of women and children have been established.

46. The Government further reported that a recent directive from the head of the judiciary reaffirms that any detention in the Islamic Republic of Iran must be based on the law and respect human rights.

II. DELIBERATION No. 7 ON ISSUES RELATED TO PSYCHIATRIC DETENTION

47. In its report of 15 December 2003 (E/CN.4/2004/3), the Working Group on Arbitrary Detention expressed concern for the situation of vulnerable persons such as the disabled, drug addicts and people suffering from AIDS, who are held in detention on health grounds (para. 74). It recommended that, "with regard to persons deprived of their liberty on health grounds, the Working Group considers that in any event all persons affected by such measures must have

judicial means of challenging their detention" (para. 87). People held in detention because of their mental disability can be, in the view of the Working Group, assimilated to the category of vulnerable persons, because their being forcibly held in psychiatric hospitals, institutions and similar places raises the same concerns.

48. When establishing its methods of work at its first session in 1991, the Working Group deliberately refrained from taking a position in the abstract on measures involving the deprivation of liberty of mentally disabled persons placed in a closed establishment. It held that it is more appropriate to examine this issue later.

49. Since its first session, the Working Group has been seized by several individual communications involving deprivation of liberty of persons allegedly of unsound mind, and it has also received information concerning this matter from various sources, including non-governmental organizations, pertaining to the deprivation of liberty of mentally disabled persons.

50. The Working Group believes that it is topical to outline, on the basis of experience accumulated during its years of existence, its position concerning the detention of mentally disabled persons. In preparing this deliberation, the Working Group relied on the following documents: the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX)); the Principles for the protection of persons with mental illnesses and the improvement of mental health care (General Assembly resolution 46/119); the Declaration on the Rights of Mentally Retarded Persons (General Assembly resolution 2856 (XXVI)). The *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder*, a preliminary report by the Special Rapporteur, Ms. Erica-Irene Daes.[1]

51. The handling of the phenomenon of mental illness is an age-old problem for humanity. Even though the treatment of the mentally ill has undergone considerable improvements, the need to isolate them from the rest of the society seems to remain a permanent element of the treatment. Whether isolation amounts to deprivation of liberty cannot and shall not be decided in the abstract. The Working Group is of the view that the holding against their will of mentally disabled persons in conditions preventing them from leaving may, in principle, amount to deprivation of liberty. Along the lines applied in its deliberation No. 1 on House Arrest, it will devolve upon the Working Group to assess, on a case-by-case basis, whether the deprivation of liberty in question constitutes a form of detention, and if so, whether it has an arbitrary character.

52. It is undisputed that paragraphs 1 and 4 of article 9 of the International Covenant on Civil and Political Rights (ICCPR) applies to all forms of arrest and detention.[2]

53. The Working Group observes that the provisions of article 9 of the Covenant reflect the principles elaborated by general (customary) international law, and are therefore binding also on States, which have not ratified the Covenant. The drafting history of ICCPR testifies that there have been attempts to give an exhaustive list of all possible forms of the deprivation of liberty, and the Commission on Human Rights unanimously adopted in 1949 a general formula prohibiting anyone from being arbitrarily arrested or detained. That article 9 does not cover arrest or detention on grounds of a criminal charge only, is well manifested in General Comment No. 8 of the Human Rights Committee: "The Committee points out that paragraph 1 is

applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention."

54. Under international law deprivation of liberty per se is not prohibited, but it follows from article 9, paragraph 1, of the ICCPR that detention is permissible only when it is lawful and does not have an arbitrary character.

(a) Lawfulness requires that detentions rest on such grounds and are carried out in accordance with procedure established by law. It transpires from the analysis of article 9, paragraph 1 - and from all comparable provisions in the ICCPR[3] - that the requirement, which a "law" has to meet, is that the national legislation must set down all permissible restrictions and conditions thereof. Therefore, the word "law" has to be understood in the strict sense of a parliamentary statute, or an equivalent unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction. Hence, administrative provisions do not meet this requirement. Laws shall be couched in clear terms;

(b) To comply with international standards it is not enough that the deprivation of liberty be provided by law; it must not be arbitrary, either. This requirement stems from article 9, paragraph 1, and its second sentence ("No one shall be subjected to arbitrary detention"). It transpires from all the ICCPR provisions making use of the term "arbitrary", or "arbitrarily",[4] that the prohibition of arbitrariness shall be interpreted broadly. It is not possible, and in the view of the Working Group it is not necessary, to give an exhaustive list of arbitrary detention; arbitrariness must be assessed in the light of all the relevant circumstances of a given detention. The minimum requirement for respect by States of the prohibition of arbitrariness is that deprivation of liberty must not be manifestly disproportionate, unjust, unpredictable or discriminatory. Moreover, the detention is manifestly arbitrary if a person is deprived of his liberty on the pretext of his (alleged) mental disability, but it is obvious that he is detained on account of his political, ideological, or religious views, opinion, conviction or activity.

55. Applying the above principles to mentally disabled persons, the Working Group is mindful that because of their vulnerable situation this group of people needs special attention. Various factors may give rise to deprive of his liberty someone, showing the signs of mental illness: to conduct a medical examination whether or not that person is in fact suffering from mental illness, and if so, to identify the nature of the illness. If his mental illness is established, deprivation of liberty may be motivated by the need of medical treatment, to which the patient is unwilling to subject himself. In addition, in some cases confinement of psychiatric patients in closed institution may prove necessary to prevent the harm which the patient might cause to others or to himself.

56. In legal systems where people of unsound mind cannot be made criminally responsible for the acts they committed, a person suspected of or charged with a criminal offence, who shows the signs of mental illness, may be detained for medical check-up, observation and diagnosis. If his pathological mental state and the ensuing lack of criminal responsibility are established, he may be confined by a court order to forced (compulsory) curative treatment, which may last until it is deemed necessary.

57. As deplorable as the phenomenon of mental disability or illness is for the person concerned, his family and the society at large, it exists. Mental illness may render it inevitable to take measures involving the restriction or deprivation of liberty in the interest of the mentally ill, or in the interest of the society as a whole. It is the position of the Working Group, however, that when assessing whether the measures taken are in compliance with international standards, the vulnerable position of the person affected by his (alleged) illness has to be duly taken into consideration.

58. In the consideration of individual communications under its mandate the Working Group applies the following criteria:

(a) Psychiatric detention as an administrative measure may be regarded as deprivation of liberty when the person concerned is placed in a closed establishment which he may not leave freely. Whether the conditions of someone being held in a psychiatric institution amounts to deprivation of liberty, within the meaning of its mandate, will be assessed by the Working Group on a case-by-case basis;

(b) The same applies to the deprivation of liberty of suspected criminals pending medical check-up, observation and diagnosis of their presumed mental illness, which may have an impact on their criminal accountability;

(c) Law shall provide the conditions of the deprivation of liberty of persons of unsound mind, as well as the procedural guaranties against arbitrariness. The requirements in respect of such laws are set out in more detail under paragraph 45 (a) and (b) above;

(d) Article 9, paragraph 3, of ICCPR shall be applied to anyone arrested or detained on a criminal charge who shows the signs of mental illness, by duly taking into account his vulnerable position and the ensuing diminished capability to argue against detention. If he does not have legal assistance of his own or of his family's choosing, effective legal assistance through a defence lawyer or a guardian shall be assigned to him to act on his behalf;

(e) Article 9, paragraph 4, of ICCPR shall be applied to anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder. In addition, the necessity whether to hold the patient further in a psychiatric institution shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ and the patient shall be released if the grounds for his detention do not exist any longer. In the review proceedings his vulnerable position and the entailing need for an appropriate representation, as provided for under (d) above has also been taken into consideration;

(f) Decisions on psychiatric detention should avoid automatically following the expert opinion of the institution where the patient is being held, or the report and recommendations of the attending psychiatrist. Genuine adversarial procedure shall be conducted, where the patient and/or his legal representative are given the opportunity to challenge the report of the psychiatrist;

(g) Psychiatric detention shall not be used to jeopardize someone's freedom of expression nor to punish, deter or discredit him on account of his political, ideological, or religious views, convictions or activity.

III. DEVELOPMENTS CONCERNING DEPRIVATION OF LIBERTY AS A MEASURE IN COUNTERING TERRORISM

59. On 21 April 2004, the Commission on Human Rights adopted resolution 2004/87 entitled "Protection of human rights and fundamental freedoms while countering terrorism", in which it requested "all relevant special procedures and mechanisms of the Commission, as well as the United Nations human rights treaty bodies, to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their efforts where appropriate in order to promote a consistent approach on this subject".

60. The Working Group recalls that, in implementing Commission resolution 2003/68 concerning the same matter, it dedicated a substantial part of its 2004 annual report to the Commission to the question of the misuse of detention in the context of the fight against terrorism. Taking note of resolution 2004/87, the Working Group informs the Commission that, during the period covered by the present report, it was seized by individual communications and issued opinions in six cases concerning 18 persons in five countries. The Working Group considered that detention was arbitrary in five cases concerning 12 persons, the other persons having been released at the time of adoption of the Working Group's opinion.

61. The Working Group expresses its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It notes a further expansion of States' recourse to emergency legislation diluting the right of habeas corpus or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism. In this respect, several States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention. This kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pre-trial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence.

62. In other countries, legislation newly enacted contains definitions of terrorism that are so wide or vague as to result in a substantial risk that they may be used to suppress legitimate political opposition and other forms of dissent. The risks of abuse posed by such vague definitions of terrorism are compounded where the offence is punishable with the death penalty or life imprisonment.

63. The Working Group is also aware of several instances in which Governments, purportedly in order to more effectively combat terrorism, made use of existing legislation allowing deprivation of liberty in ways that raise serious concerns of arbitrariness. The Working Group received numerous reports according to which detention on charges of terrorism, with the ensuing limitations on the right of habeas corpus, is used to detain political opponents, religious dissenters, and other persons exercising their freedoms of opinion, expression, conscience and religion. According to information received, anti-terror legislation, entailing longer terms of pre-trial detention and facilitated recourse by the prosecution to anonymous witnesses, is used to prosecute and try indigenous leaders in cases concerning conflicts with the Government over land use. In another country, persons suspected of involvement in terrorist activities are reportedly secretly detained by the security forces as "material witnesses" to a crime in order to circumvent the requirement of showing a reasonable suspicion for arrest and detention of a crime suspect. Allegations were also received that administrative detention is being used in certain cases to obtain information from witnesses in pending cases or from persons who may be charged at a later stage.

64. Finally, the Working Group recalls several decisions by courts of appeal in actions challenging detention ordered under provisions of anti-terror legislation. The Working Group welcomes several of these decisions. The supreme court of one State found that the remedy of habeas corpus had extraterritorial effect, whether for citizens or not.[5] In another encouraging development in the same State, a court ruled that it is for the judiciary and not for the executive power to establish whether the Third Geneva Convention applies to persons deprived of their liberty during the hostilities. The same court stated that the exclusion of the defendant from certain hearings and from access to evidence used against him was unlawful.[6] The appeals court of a second State quashed a judgement convicting a defendant on terrorism charges on the grounds that the trial court had not taken into sufficient account that the Government had denied the accused access to evidence potentially in his favour on grounds of national security.[7] The constitutional court of a third State held that, contrary to the claims of its Government, an anti-terror law widening the definition of punishable conduct and introducing the death sentence could not be applied retroactively.[8] The Working Group is, however, deeply concerned about other decisions. In this respect, it notes the decision of a court of appeal, which not only upheld the use of secret evidence to justify the indefinite detention without charges of foreign nationals, but also stated that evidence extracted under torture of a third party in another country can be adduced and relied upon in the proceedings concerning confirmation of this form of detention.[9]

65. The Working Group has also been informed that new immigration laws jeopardizing the rights of immigrants to be free from arbitrary detention, to claim asylum, to receive a full and fair deportation hearing, and to be protected from deportation to countries where they are at risk of torture, were enacted in several countries. The Working Group is gravely concerned by this trend towards administrative detention of aliens, which is gaining strength amidst general agreement, and regrets the abusive tendency to equate terrorism and aliens, including refugees and asylum-seekers, aimed at exploiting the fears created by the terrorist threat.

IV. HOSTAGE-TAKING AND ARBITRARY DETENTION

66. In relation to the question of deprivation of liberty in the context of terrorism and the fight against it, the Working Group notes that in the year 2004 numerous incidents of terrorist hostage-taking caused terrible loss in lives and human dignity and endless pain. The taking of hostages by terrorist groups is undoubtedly a particularly serious form of arbitrary deprivation of liberty, though by non-State actors and thus beyond the confines of the Working Group's mandate.

67. While the Working Group is entirely mindful of the right, not to say duty, of States to use all lawful means to combat terrorism effectively, it remains preoccupied by the methods used by some Governments to end hostage-taking by terrorist groups. The Working Group recalls that the right to life is the supreme human right, and that any government action that puts the life of hostages at risk must be considered with utmost caution, carefully balancing the undisputable need to end terrorist blackmail of Governments with the duty to protect innocent lives.

V. THE NEGATIVE IMPACT ON THE RIGHT TO DEFENCE OF INADEQUATE CONDITIONS OF DETENTION

68. In the course of its visits to detention facilities, the Working Group often witnesses the fact that persons deprived of their liberty during criminal proceedings are detained in conditions that are not compatible with human dignity and may amount to inhuman or degrading treatment. While it is beyond the mandate of the Working Group to examine conditions of detention and assess whether they live up to international human rights standards, the Working Group cannot disregard that such inadequate conditions of detention have a negative impact on the exercise of rights that squarely fall within its mandate.

69. One of the fundamental principles of due process of law is equality between the prosecution and the defence. A detainee who has to endure detention conditions that affect his or her health, safety or well-being is participating in the proceedings in less favourable conditions than the prosecution (see E/CN.4/2004/3/Add.3, paragraph 33, report of the Working Group on its visit to Argentina). Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed. The Working Group is fully aware that the inadequate infrastructure, nourishment, hygiene and medical assistance in detention centres in many countries are in part due to the economic difficulties of these countries' Governments. Nonetheless, Governments are responsible to ensure that conditions of detention do not result in violations of human rights.

70. Similarly, where the authority ruling on the conditions of pre-trial detention, including solitary confinement, contacts with family, phone calls and other activities, is the same authority conducting the criminal proceedings against the detained suspect, the equality between the two parties to the proceedings is severely impaired. Moreover, pre-trial detention becomes arbitrary where the conditions are such as to create an incentive for self-incrimination, or - even worse - to make pre-trial detention a form of advance punishment in violation of the presumption of innocence.

VI. CONCLUSIONS

71. The Working Group welcomes the cooperation it has received from States in the fulfilment of its mandate. The great majority of opinions issued by the Working Group during its three sessions in 2004 met with responses by the Governments concerned regarding the cases brought to their attention. However, the Working Group is concerned by the decrease in the response rate to its urgent appeals and urges all Governments concerned to follow up closely the communications giving rise to urgent appeals sent by the Working Group with other special procedures mechanisms.

72. The Working Group welcomes the cooperation on the part of Governments that have extended invitations. Thanks to this cooperation, the Working Group was able to conduct official missions in 2004 to Latvia, Belarus and China. The Working Group is in contact with the Governments of Canada and South Africa with a view of visiting these countries in 2005. The results of the missions have confirmed the Working Group's belief in the usefulness of these missions from the point of view of fulfilling its mandate. For Governments, these visits provide an excellent opportunity to show that the rights of detainees are respected and that progress is being achieved in that area.

73. Bearing in mind its discussion in last year's annual report (E/CN.4/2004/3) on the deprivation of liberty of vulnerable persons, the Working Group adopted at its forty-first session its deliberation No. 7 concerning the rights and protection of persons held in detention in relation to their mental disability and encourages Governments to consider the Working Group's criteria when deciding on measures involving deprivation of liberty of persons allegedly mentally disabled and their placement in closed psychiatric establishments.

74. Following the concerns raised in last year's annual report and taking note of resolution 2004/87, the Working Group continues to receive a substantial number of communications about the arbitrary character of detention in several countries in the context of the fight against terrorism and the application of National Security legislation. During the period under review, the Working Group was seized by numerous individual communications and issued opinions in six cases concerning 18 persons. The Working Group was also informed during the year 2004 on worrisome developments concerning terrorism, both in the enactment of new legislation and the use of existing legislation

VII. RECOMMENDATIONS

75. **When taking legitimate measures to countering terrorism, States shall bear in mind that effective safeguards against arbitrary deprivation of liberty, such as habeas corpus, *amparo* and the like, belong among the fundamental achievements of human rights. Therefore, measures restricting resort to judicial control of detainees suspected of terrorism-related activity shall be strictly proportionate to the legitimate need to fight against terrorism. Unreasonably harsh restrictions on judicial control easily become counterproductive, in that they may compromise the very foundation of democratic societies governed by the rule of law.**

76. **In particular, the Working Group recalls that, as both the Commission on Human Rights and the Human Rights Committee have stated, prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment. Therefore, the Working Group is of the opinion that the right not to be detained incommunicado over prolonged periods of time cannot be derogated from, even where a threat to the life of the nation exists, and recommends that all States review their legislation and practice in the light of this principle.**

77. **Furthermore, the Working Group recalls that international human rights law provides for a number of rights specific to persons deprived of their liberty on the ground of suspicion that they were involved in an offence. These guarantees apply whether such suspicions have been formalized in criminal charges or not. The use of "administrative detention" under public security legislation, migration laws or other related administrative law, resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law. The Working Group therefore recommends that all States review their legislation and practice so as to ensure that persons suspected of criminal activity or any other activities giving rise under domestic law to deprivation of liberty are in fact afforded the guarantees applicable to criminal proceedings.**

78. **In countries where no effective avenue exists to challenge arrest, detention or any form of deprivation of liberty, or where approval or review are in the hands of investigative, prosecutorial or administrative organs, an effective remedy before court against any form of unlawful or arbitrary deprivation of liberty shall be introduced.**

79. **The Working Group recalls that, in a legal system respecting the rule of law, the rights of the defence constitute a fundamental guarantee for all persons before a court. In the area of criminal law, when coercive measures are imposed, the right to defend oneself must be guaranteed during all phases of the proceedings. This requires equality of means for both the prosecution and the person charged. In order to ensure that equality, the legal system must provide for a separation between the authority driving the investigation and the authorities in charge of the detention and ruling on the conditions of the pre-trial detention. This separation is a necessary requirement to avoid having conditions of detention be used to impair the effective exercise of the right to defend oneself, favour self-incrimination, or allow pre-trial detention to amount to a form of advance punishment.**

Notes

[1] United Nations Publication, Sales No. E.85.14.9.

[2] The provisions relevant in the present deliberation of the International Covenant on Civil and Political Rights read (art. 9, para. 1) "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." And in article 9, paragraph 3: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time of release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." And article 9, paragraph 4: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

[3] Besides article 9, paragraph 1, see articles 12, paragraph 3, 18, paragraph 3, 19, paragraph 3, 21 and 22, paragraph 3, which make use of synonyms to the term "provided by law", such as "established by law", or "prescribed by law".

[4] Besides article 9, paragraph 1, see article 6, paragraph 1: No one shall be arbitrarily deprived of his life; article 12, paragraph 4: No one shall be arbitrarily deprived of his right to enter his own country; article 17, paragraph 1: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.

[5] Supreme Court of the United States of America, *Rasul & Others v. Bush*, decision of 28 June 2004.

[6] United States District Court for the District of Columbia, *Hamdan v. Rumsfeld*, decision of 8 November 2004.

[7] Germany, Bundesgerichtshof decision of 4 March 2004 in the case of *Mounir El Motassadeq*.

[8] Indonesia, Constitutional Court decision of 24 July 2004 on the constitutionality of Law No. 16/2003.

[9] United Kingdom, Court of Appeal, *A. and others v. Secretary of State for the Home Department*, decision of 11 August 2004.
