UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/2006/7
12 December 2005

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sixty-second session
Item 11 (a) of the provisional agenda

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

Report of the Working Group on Arbitrary Detention

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GE.05-16648 (E) 201205

Summary

During 2005, the Working Group visited Canada and South Africa at the invitation of the Governments of those countries. The reports on these visits are contained in addenda 2 and 3 to the present document.

During 2005, the Working Group adopted 48 Opinions concerning 115 persons in 30 countries. In 30 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 9 November 2004 to 8 November 2005, the Working Group transmitted a total of 181 urgent appeals concerning 565 individuals to 56 Governments; 168 were joint appeals with other thematic or country-oriented mandates of the Commission on Human Rights. Thirty-two (32) 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 Working Group, in respect of which it had recommended changes of domestic legislation governing detention. The Working Group requested follow-up information from the Governments of Argentina and the Islamic Republic of Iran on the situation regarding the implementation of the recommendations resulting from the Working Group's visit to those countries in 2003.

The report includes the text of the Working Group's Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet.

. Other sections of the report are devoted to the competence of the Working Group with regard to cases of detention linked to an armed conflict and to some issues of concern, such as over-incarceration and the use of secret prisons in the context of the so-called "global war on terror".

In its recommendations, the Working Group calls upon States to duly take into account the principles elaborated by the Working Group in its Deliberation No. 8 when addressing legislative or law enforcement aspects of the use of the Internet. It urges States to stop running secret prisons. The Working Group also urges Governments to make efforts to avoid over-incarceration and to mitigate the over-representation of vulnerable groups among the prison population.

Finally, the Working Group invites States to guarantee the effectiveness of the right to challenge the lawfulness of detention by any foreign national detained under immigration laws.

CONTENTS

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. By its resolution 2003/31, the Commission on Human Rights extended the mandate of the Working Group for a new three-year period.

2. During 2005, 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, Leïla Zerrougui has been the Chairperson-Rapporteur of the Working Group and Tamás Bán the Working Group's Vice-Chairperson.

I. ACTIVITIES OF THE WORKING GROUP

4. During 2005, the Working Group held its forty-second, forty-third and forty-fourth sessions. It also carried out official missions to Canada (1 to 15 June 2005) and South Africa (4 to 19 September 2005) (see E/CN.4/2006/7/Add.2 and 3).

A. Handling of communications addressed to the Working Group

1. Communications transmitted to Governments

5. 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.4/2006/6/Add.1).

6. During its three 2005 sessions, the Working Group adopted 48 Opinions concerning 115 persons in 30 countries. Some details of the Opinions adopted during those sessions appear in the table hereunder and the complete texts of Opinions Nos. 1/2005 to 37/2005 are reproduced in addendum 1 to the present report. The table also provides information about 11 Opinions adopted during the forty-fourth session, details of which could not, for technical reasons, be included in an annex to the present report.

2. Opinions of the Working Group

7. 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.[1]

Table 1

Opinions adopted during the forty-second, forty-third and forty-fourth sessions of the Working Group

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
1/2005	Syrian Arab Republic	Yes	Aktham Naisseh	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
2/2005	Turkmenistan	Yes	Vepa Tuvakov and Mansur Masharipov	Cases filed (para. 17 (a) of the Working Group's methods of work - persons released)
3/2005	Qatar	Yes	Hashem Mohamed Shalah Mohamed al Awadi	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
4/2005	Syrian Arab Republic	Yes	'Abdel Rahman al-Shaghouri	Detention arbitrary, categories II and III
5/2005	Egypt	Yes	Mohamed Ramadan Mohamed Hussein el-Derini	Detention arbitrary, category I
6/2005	Latvia	Yes	Ms. Viktoria Maligina	Detention not arbitrary
7/2005	Syrian Arab Republic	Yes	Muhamad Qutaysh; Haytham Qutaysh and Mas'oud Hamid	Detention arbitrary, categories I and III
8/2005	Sri Lanka	Yes	Maxilan Anthonypillai Robert; Ms. Thirumagal Robert; Loganathan Saravanamuthu; Aarokiyarasa Yogarajah; Selvarasa Sinnappu; Sritharan Suppiah; Selvaranjan Krishnan; Krishnapillai Masilamani; Akilan Selvanayagam; Mahesan Ramalingan; Rasalingam Thandavan; Sarma C.I. Ragupathy; and Ms. Sarma Raguphaty R.S. Vasanthy	Detention arbitrary, category III
9/2005	Mexico	Yes	Alfonso Martín del Campo Dodd	Detention arbitrary, category III
10/2005	Syrian Arab Republic	No	Farhan al-Zu' bi	Detention arbitrary, category I
11/2005	Union of Myanmar	No	U Tin Oo	Detention arbitrary, categories II and III
12/2005	Bolivia	Yes	Francisco José Cortés Aguilar; Carmelo Peñaranda Rosas; and Claudio Ramírez Cuevas	Detention arbitrary, category III
13/2005	Libyan Arab Jamahiriya	No	Muhammad Umar Salim Krain	Detention arbitrary, category I
14/2005	United Arab Emirates	No	Djamel Muhammad Abdullah al-Hamadi; Yunus Muhammad Chérif Khouri; Khaled Gharib; Abdul Rahman Abdullah Ben Nasser al Nuaimi; Ibrahim al Kouhadji; Djemaa Salam Marrane al Dahiri; Abdullah al Moutawaa; Muhammad Djemaa Khedim al Nuaimi;	Detention arbitrary, category I

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
14/2005 (*cont'd*)			Ibrahim al Qabili; Saleh Salem Marrane al Dahiri; Khalifa Ben Temmim al Mehiri; Seïf Salem al Waidi; Muhammad al Sarkal; Mohamad Khellil al Husni; Jassem Abid al Naqibi; Mohammad Ahmad Saleh Abd al Krim al Mansouri; Khaled Muhammad Ali Hathem al Balouchi; Thani Amir Aboud al Balouchi; Meriem Ahmed Hassan al Har; and Hassan Ahmad al Zahabi	
15/2005	United States of America	No	Leonard Peltier	Detention not arbitrary
16/2005	Pakistan	No	Jamal Abdul Rahim	Detention arbitrary, category I
17/2005	People's Republic of China	No	Liu Fenggang and Xu Yonghai	Detention arbitrary, category II
18/2005	Viet Nam	Yes	Thich Quang Do (Dang Phuc Thue) and Thich Huyen Quang (Le Dinh Nhan)	Detention arbitrary, category II
19/2005	United States of America	Yes	Antonio Herreros Rodríguez; Fernando González Llort; Gerardo Hernández Nordelo; Ramón Labañino Salazar; and René González Schweret	Detention arbitrary, category III
20/2005	People's Republic of China	Yes	Yong Hun Choi	Detention arbitrary, category III
21/2005	United States of America	No	Ahmed Ali	Detention arbitrary, category III
22/2005	Saudi Arabia	Yes	Abdullah b. Ibrahim b. Abd El Mohsen al-Rayyes; Said b. Mubarek b. Zair; Jaber Ahmed Abdellah al-Jalahma; and Abderrahman al-Lahem	Cases filed (para. 17 (a) of the Working Group's methods of work - persons released)
23/2005	Australia	Yes	Wang Shimai; Tony Bin Van Tran; and Peter Qasim	Cases filed (para. 17 (a) of the Working Group's methods of work - persons released)
24/2005	Mexico	Yes	Roney Mendoza Flores	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
25/2005	Lebanon	Yes	Samir Geagea	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
26/2005	United States of America	Yes	Abdullah William Webster	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
27/2005	Libyan Arab Jamahiriya	No	Abdenacer Younes Meftah Al Rabassi	Detention arbitrary, categories II and III
28/2005	Russian Federation	Yes	Ms. Svetlana Bakhmina	Detention not arbitrary

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
29/2005	United Kingdom of Great Britain and Northern Ireland	Yes	Edward Reuben Muito	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
30/2005	Brazil	Yes	Urzulas Araújo de Souza; José dos Passos Rodrigues dos Santos; Cláudio Bezerra da Costa; and Junior Alves de Carvalho	Cases filed (para. 17 (a) of the Working Group's methods of work - persons released)
31/2005	Turkmenistan	Yes	Gurbandury Durdykuliyev	Detention arbitrary, categories II and III
32/2005	People's Republic of China	Yes	Ms. Qiu Minghua	Detention arbitrary, categories II and III
33/2005	People's Republic of China	Yes	Zhao Yan	Detention arbitrary, categories II and III
34/2005	Saudi Arabia	No	Abdul Aziz Saleh Slimane Djerboue and Mahna Abdul Aziz Al-Habib	Abdul Aziz Saleh Slimane Djerboue: between 1 January and 1 August 2003: detention arbitrary, categories II and III; since 1 August 2003: detention arbitrary, category I Mahna Abdul Aziz Al-Habib: detention arbitrary, categories II and III
35/2005	Saudi Arabia	No	Mazen Salah Ben Mohamed Al Tamimi; Khalid Ahmed Al-Eleq; Majeed Hamdane b. Rashed Al Qaid	Detention of Al Tamimi and Al Qaid: detention arbitrary, categories I and II. Detention of Al-Eleq; detention arbitrary, category I
36/2005	Tunisia	Yes	Walid Lamine Tahar Samaali	Detention not arbitrary
37/2005	Belarus	Yes	Mikhail Marynich	Detention arbitrary, category III
38/2005	People's Republic of China	Yes	Hu Shigen	Detention arbitrary, category II
39/2005	Cambodia	Yes	Channy Cheam	Detention arbitrary, category III
40/2005	France	Yes	Joseph Antoine Peraldi	Detention not arbitrary
41/2005	Tunisia	Yes	Mohammed Abbou	Detention arbitrary, category II
42/2005	Colombia	Yes	Luis Torres Redondo	Case filed (para. 17 (a) of the Working Group's methods of work - person released)
43/2005	People's Republic of China	Yes	Peng Ming	Detention arbitrary, category II
44/2005	Iraq and United States of America	USA: Yes Iraq: No	Abdul Jaber Al Kubaisi	Detention arbitrary, categories I and II
45/2005	Iraq and United States of America	USA: Yes Iraq: No	Tareq Aziz	Case provisionally filed waiting for further information (para. 17 (c) of the Working Group's methods of work)

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
46/2005	Iraq and United States of America	USA: Yes Iraq: Yes	Saddam Hussein Al-Tikriti	Case provisionally filed waiting for further information (para. 17 (c) of the Working Group's methods of work)
47/2005	Namibia	Yes	John Samboma; Charles Samboma; Richard Libano Misuha; Oscar Muyuka Puteho; Richard John Samati; Moises Limbo Mushwena; Thaddeus Siyoka Ndala; Martin Siano Tubaundule; Oscar Nyambe Puteho; Charles Mafenyeho Mushakwa; Fred Maemelo Ziezo; Andreas Mulupa and Osbert Mwenyi Likanyi	Detention arbitrary, category III
48/2005	Yemen	Yes	Walid Muhammad Shahir Muhammad al-Qadasi; Salah Nasser Salim ' Ali; and Muhammad Faraj Ahmed Bashmilah	Detention arbitrary, category I

3. Government reactions to Opinions

8. By a communication dated 27 June 2005, the Government of the Syrian Arab Republic requested the Working Group not to include in its report the text of its Opinion No. 10/2005 (Syrian Arab Republic), which considers as arbitrary the detention of Mr. Farhan al-Zu'bi. The Working Group regrets that it cannot accede to this request by the Government because it would be contrary to paragraph 19 of its methods of work. The transparency of the Working Group's work and the connected principle of equal treatment of all States would be imperilled if the Working Group allowed exceptions to this principle.

9. However, in the spirit of cooperation with Governments that characterizes its work, the Working Group considered whether the submission of the Government of the Syrian Arab Republic could be dealt with and examined as a request for review in accordance with paragraph 21 of its methods of work. Indeed, the Government's submission critically addressed the merits of the Opinion. The Working Group concluded that the facts had been known to the Government and that it had not opportunely contested them. Accordingly, the Working Group, on the basis of paragraph 21 (b) and (c) of its methods of work, decided to maintain its Opinion.

10. The permanent representative of the United States of America, by letter dated 6 September 2005, considered that it was disappointing that the Working Group had issued its Opinion No. 19/2005 (United States of America) despite the fact that the matter was under active judicial review and pending appeal in the United States at that time. Under the customary international law doctrine of exhaustion of local remedies, ongoing, available and timely domestic proceedings must be respected and allowed to run their course prior to international adjudication. States should have the opportunity to redress allegations of human rights violations by their own means within the framework of its own domestic legal system. According to the Government, international tribunals and mechanisms were not intended to replace national adjudication.

11. The Working Group concurs with the Government of the United States of America in its restatement of the doctrine in customary international law. It observes, however, that while this principle applies to communications to United Nations treaty bodies, it does not find application in the practice of the Commission's special procedures. On the contrary, as far as the Working Group is concerned, Commission resolution 1997/50 establishes that, as a rule, the Working Group shall deal with cases in which the national judiciary has not yet spoken its final word; paragraph 15 of that resolution "[d]ecides to renew … the mandate of the Working Group … entrusted with the task of investigating cases of deprivation of liberty imposed arbitrarily, *provided that no final decision has been taken in such cases by domestic courts*" (emphasis added). The resolution then proceeds to qualify this principle: the Working Group shall be competent in cases in which the domestic courts have rendered a final decision insofar as that decision is contrary to relevant international standards.

12. It is thus clear that the Commission on Human Rights never intended the doctrine of exhaustion of domestic remedies to apply to the activity of the Working Group as a criterion for the admissibility of communications.[2] This will not, however, preclude the Working Group from keeping in mind the rationale underlying the doctrine, i.e. that the State where a human rights violation has allegedly occurred should have the opportunity to redress the alleged violation by its own means within the domestic framework. In the spirit of this doctrine, the Working Group often postpones adopting an Opinion on a communication when the submissions of the Government and the source credibly suggest that the alleged victim's release might be near.

13. To sum up, while the doctrine of exhaustion of domestic remedies does not apply as an admissibility criterion in the Working Group's communications procedure, the Working Group does not ignore the idea and concerns underlying it. The case in question, which was matter of Opinion No. 19/2005 (United States of America), was considered during several Working Group sessions, precisely because the Working Group was waiting for the resolution of the appeal by the court of Atlanta, which, in the end, considered in its resolution arguments similar to those retained by the Working Group.

14. Finally, the Working Group recalls that the doctrine of exhaustion of domestic remedies cannot be applied to cases it raises with Governments in its urgent appeal procedure, as that procedure is premised on a serious risk to the life or physical integrity of the alleged victim.

15. By a note verbale dated 8 November 2005, the Permanent Mission of Egypt to the United Nations Office at Geneva reported, in connection with Opinion No. 5/2005 (Egypt), that Mr. Mohamed Ramadan Mohamed Hussein El-Derini had been released on 19 June 2005.

16. The Government of Mexico requested the revision of Opinion No. 9/2005 (Mexico) concerning the detention of Mr. Alfonso Martín del Campo Dodd, on the basis that the guilt of the accused was not solely proved through his confession, but also by other solid evidence, such as testimony of witnesses, which support his conviction. The Government further stated that this person, according to the Istanbul Protocol, did not suffer from any form of torture.

17. The Working Group considered that it was not necessary to modify its Opinion, taking into account the following:

(a) The determination by the Working Group whether a detention was arbitrary in connection with the category III of its methods of work, does not imply a consideration regarding the innocence or guilt of the concerned person. The Working Group limits itself to checking whether all the necessary guarantees related to a fair trial according to international standards were respected. The Working Group does not substitute itself for the domestic courts;

(b) An important element to consider regarding whether the concerned person benefited from all the guarantees of a fair trial is the administrative sanction for ill-treatment which was imposed on the police officer who interrogated this person. The Working Group recognizes that a person who confessed under torture or ill-treatment could have been the real author of the crimes of which he is accused, but this does not prevent the conclusion that the detention is arbitrary.

4. Communications giving rise to urgent appeals

18. During the period from 9 November 2004 to 8 November 2005, the Working Group transmitted 181 urgent appeals to 56 Governments concerning 565 individuals (494 men, 71 women, including 14 minors). In conformity with paragraphs 22 to 24 of its methods of work, the Working Group, without prejudging whether the 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.

19. During the period under review, 181 urgent appeals were transmitted by the Working Group as follows in table 2.

Table 2

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released (information received by)
Afghanistan	1	1 man	No reply	
Azerbaijan	1	3 men	No reply	1 (Source)
Bangladesh	1	1 man	Reply to 1	1 (Government)
Burkina Faso	1	1 man	Reply to 1	1 (Government)
Burundi	1	1 man	No reply	1 (Source)
Cambodia	2	5 men	No reply	
Cameroon	2	2 men	Reply to 1	
Chile	1	1 man	No reply	
China	10	12 men, 2 women	Reply to 7	3 (Source)
Colombia	3	21 men, 1 woman, 1 minor	Reply to 2	3 (Government)
Cuba	4	12 men	Reply to 4	

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released (information received by)
Democratic Republic of the Congo	10	32 men, 2 women, 4 minors	No reply	25 (Source)
Egypt	1	4 men	Reply to 1	
El Salvador	1	3 men	Reply to 1	3 (Government)
Eritrea	4	12 men, 6 women	No reply	7 (Source)
Ethiopia	3	19 men, 1 woman	No reply	14 (Source)
France	1	1 woman	Reply to 1	1 (Government)
Honduras	1	1 man	No reply	
India	2	4 men	No reply	1 (Source)
Iran (Islamic Republic of)	18	30 men, 12 women	Reply to 8	1 (Government) 3 (Source)
Iraq	6	7 men, 3 women, 1 minor	No reply	1 (Source)
Israel	2	3 men	Reply to 1	
Kazakhstan	1	1 man	No reply	1 (Source)
Kuwait	1	2 men	No reply	
Kyrgyzstan	1	16 men	No reply	
Lebanon	2	2 men	Reply to 1	
Maldives	1	6 men, 1 woman	Reply to 1	1 (Source)
Mauritania	3	18 men, 9 women	Reply to 2	27 (Source)
Mexico	3	11 men, 1 minor	Reply to 2	
Moldova	1	2 men	Reply to 1	2 (Source)
Mongolia	1	1 man	No reply	1 (Source)
Morocco	2	3 men, 2 women	Reply to 2	
Myanmar	10	22 men, 9 women	Reply to 1	3 (Source)
Nepal	12	64 men, 1 woman	Reply to 9	60 (Government)
Niger	1	2 men	Reply to 1	
Nigeria	1	3 men, 3 women	No reply	
Oman	1	1 man, 1 woman	Reply to 1	2 (Source)
Philippines	1	6 men, 4 women	Reply to 1	2 (Government)
Qatar	1	1 woman	No reply	
Russian Federation	5	12 men	Reply to 3	
Saudi Arabia	4	23 men	No reply	3 (Source)
Singapore	1	2 women	Reply to 1	2 (Source)
Sri Lanka	2	4 men	No reply	
Sudan	16	74 men, 3 minors	Reply to 2	7 (Government) 10 (Source)
Syrian Arab Republic	10	12 men, 2 women, 1 minor	Reply to 4	12 (Source)
Tajikistan	1	1 man	No reply	
Togo	1	1 man	Reply to 1	1 (Source)
Tunisia	1	1 man	Reply to 1	

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released (information received by)
Turkey	1	1 woman	Reply to 1	1 (Source)
United Arab Emirates	2	4 men	No reply	4 (Source)
United Kingdom of Great Britain and Northern Ireland	2	2 men	Reply to 1	
United States of America	2	2 men	No reply	
Uzbekistan	9	11 men, 3 women	Reply to 4	2 (Source)
Viet Nam	1	1 woman	Reply to 1	1 (Government)
Yemen	3	3 men, 1 minor	No reply	
Zimbabwe	1	2 men	No reply	

20. Of these 181 urgent appeals, 168 were appeals issued jointly by the Working Group and thematic or geographical special rapporteurs.

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

22. The Group notes that 38.12 per cent of its urgent appeals have been replied to and that there has been a 5 per cent increase in the response rate in comparison to the same period last year. It invites Governments to continue increasing their cooperation with the Working Group under the urgent action procedure.

B. Country missions

1. Visits carried out

23. During 2005, the Working Group visited Canada (1 to 15 June 2005) and South Africa (4 to 19 June 2005) (see E/CN.4/2006/7/Add.2 and 3).

2. Visits scheduled

24. The Working Group has been invited to visit Ecuador, Equatorial Guinea, Honduras and Turkey. Despite the fact that Colombia and Sierra Leone have extended an open standard invitation to all thematic procedures of the Commission on Human Rights, no response has been received by the Working Group to its request to visit those countries.

25. The Working Group has also requested to be invited to visit Nicaragua and is waiting for a positive consideration to its requests. It is also waiting for a positive consideration to its request to visit Angola, Guinea-Bissau, India, the Libyan Arab Jamahiriya, Nauru, Papua New Guinea, Turkmenistan and the United States of America.

26. Since November 2001, the Working Group has been examining the situation of the detainees held in the detention centre located at the Naval Base of Guantánamo Bay, Cuba. On 4 April 2005, a meeting took place in Geneva between a high-level delegation from the Government of the United States of America and the Working Group's Chairperson-Rapporteur together with other three mandate-holders of the Commission on Human Rights. During the meeting and subsequently by a letter dated 20 May 2005, the Government of the United States of America stated that the request to visit Guantánamo by the four mandate-holders "continued to be the subject of intense review and consideration" and that it "had received serious attention and was being discussed at the highest levels of the United States Government". On 23 June 2005, the mandate-holders, together with the Special Rapporteur on freedom of religion or belief, publicly announced at a joint press conference that they had joined their efforts to undertake, within their capacities under their respective mandates, a study to determine the situation of detainees in the detention centre of Guantánamo Bay.

27. The mandate-holders began gathering factual information by various means and planned interviews with former detainees residing in a number of countries. On 21 October 2005, the Government of the United States of America transmitted a detailed reply to a questionnaire that was submitted by the mandate-holders in August. On 27 October 2005, the United States Government invited the Working Group's Chairperson-Rapporteur, as well as the Special Rapporteurs on the question of torture and on freedom of religion or belief, to visit the detention facilities at the Guantánamo Bay Naval Station. The invitation was limited to one day and private interviews or visits with detainees were explicitly excluded. The invitation did not include the other two mandate-holders, the Special Rapporteurs on the right to health or on the independence of judges and lawyers. By letter dated 31 October 2005, the five mandate-holders welcomed the invitation extended and decided to accept it, provided that private interviews with detainees were allowed. By letter dated 15 November 2005, the mandate-holders decided that, owing to the impossibility of holding interviews with detainees, they would not visit Guantánamo Bay. A separate joint report is being submitted to the Commission on Human Rights on this issue.

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

28. 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, paragraph 36), to address a follow-up letter to the Governments of the countries it visited, together with a copy of the relevant recommendations adopted by the Group contained in the reports on its country visits.

29. Communications were addressed to the Governments of Argentina and the Islamic Republic of Iran requesting information on such initiatives as the authorities might have taken to give effect to the recommendations contained in the Group's reports to the Commission on its visits to those countries in 2003 (E/CN.4/2004/3/Add.3 and Add.2, respectively).

30. By note verbale dated 19 September 2005, the Permanent Mission of the Islamic Republic of Iran to the United Nations Office at Geneva reported that, following the current

process of thorough reform in the administration of justice, the Head of the Judiciary had issued on 26 May 2005 a directive (Code of Conduct concerning articles 31 and 32 of the 1977 Amendment Bill of the Law of Justice) to all Justice departments at the national level saying that the presence of a defence lawyer or legal counsel at all stages of legal proceedings had been deemed compulsory. Bar associations were duty-bound to designate a defence counsellor for those who could not afford to assign one for them and they should establish legal assistance institutes in each region. Conciliation and arbitration should also be promoted through the establishment of conciliation and arbitration councils under the supervision of the local Chief of Justice. In arbitration councils, investigating disputes, appeals and enforcement of the rulings will be free of charge.

31. The Government of Mexico reported that the National Commission on Human Rights had continued to receive allegations of arbitrary detention during 2005 and that it was keeping in mind its recommendation 2/2001 on Arbitrary Detentions in order to track down detention cases related to migrants and ordered by authorities who did not have a mandate to do so. The Government also made reference to the circulars issued by the Attorney-General of the Republic to prevent illegal detentions by federal agents of his Office, of the Federal Investigating Agency or of the Federal Investigating Police. Those circulars clearly established the good treatment that foreign nationals and Mexican nationals residing abroad were entitled to receive when subjected to an investigation. The Government further mentioned the adoption of the Istanbul Protocol; the training courses on human rights for staff of the above-mentioned institutions and the establishment of a special training course on detention for federal investigating agents.

II. DELIBERATION No. 8 ON DEPRIVATION OF LIBERTY LINKED TO/RESULTING FROM THE USE OF THE INTERNET

32. When copying out its mandate, the Working Group on Arbitrary Detention has, in recent times, quite often been faced with cases of deprivation of liberty which were, in some way or another, linked to or resulting from the use of the Internet. The number of communications on behalf of individuals deprived of their liberty, mainly by way of criminal convictions based on the reception or dissemination of information, ideas or opinions through the World Wide Web, commonly called the Internet, continues to increase.

33. In addition, a new phenomenon has recently arisen: the use of the Internet to prepare and bring about terrorist acts. Parallel to that, the Working Group observes, some States are inclined to resort to deprivation of liberty, asserting that the use of the Internet in a given case serves terrorist purposes, whereas, in fact, this proves later to be just a pretext to restrict freedom of expression and repress political opponents.

34. The Working Group is, however, aware that not all deprivation of liberty connected to the use of the Internet is per se arbitrary; there might be, and certainly are, situations where deprivation of liberty resulting from the use of the Internet can be justified. In most of the Internet-related individual communications of which it has been seized so far, the Working Group has found that the deprivation of liberty was arbitrary, because the individual concerned had been punished merely or predominantly for having exercised his freedom of expression. Therefore the deprivation of liberty fell under category II of the categories applicable to the consideration of cases submitted to the Working Group.[3]

35. The Working Group feels that the complexity of this matter deserves some consideration. It might be helpful for the Working Group itself and for Governments alike, if the Working Group took stock of the criteria applicable to assess whether the deprivation of liberty in a given situation was justified by the facts surrounding the case.

36. The Internet is, in many respects, a mode of communication comparable to the diffusion or reception of information or ideas through any other means, such as books, newspapers, letters and other similar postal services, telephone, radio broadcasting or television. However, there also exist meaningful differences between the exercise of the freedom of expression via the Internet, and other, more traditional means of communication. Namely, the distribution and reception of information by the Internet is much wider and quicker. In addition, the Internet is more easily accessible to anyone. Even more significantly, the Internet is a mode of communication which operates not on a local but on a global scale, not depending on national territorial boundaries.

37. Yet, this difference between the Internet and other means of communication is rather technical in nature, and does not exert a decisive influence on the meaning and substance of the freedom of expression. Therefore, despite the specific features of the Internet as a particular form of communication, the same rules of international law govern the freedom of expression and the conditions of its lawful restrictions. This freedom must be exercised through the Internet or through other means.

38. In conclusion, the freedom to impart, receive and seek information via the Internet is protected under international law in the same way as any other form of expression of opinions, ideas or convictions.

39. The application of any measure of detention against Internet users, taken in the framework of criminal investigation, proceeding, conviction or by an administrative authority, undoubtedly amounts to a restriction on the exercise of the freedom of expression. Unless it complies with the conditions prescribed by international law, such restriction by the authorities is arbitrary, hence unlawful.

40. In individual communications, which are submitted to the Working Group on behalf of persons deprived of their liberty for having availed themselves of their freedom of expression, Governments frequently assert that deprivation of liberty was the result of legitimate State actions, taken in the interest of the community as a whole, or to protect the rights or reputation of others. The adverse party (“the source”) often disagrees as to whether the restriction applied by the authorities by way of deprivation of liberty was permissible under international law.

41. To assess the conformity of the deprivation of liberty with international standards, the Working Group shall weigh them on a case-by-case basis, that is, whether the circumstances invoked justified the restriction on the freedom of expression by way of deprivation of liberty.

42. In making such an assessment, the starting point for the Working Group is the criteria suggested by the general comments of the Human Rights Committee giving its interpretation of article 19 of the ICCPR, paragraph 4 of which reads: “Paragraph 3 (of art. 19) expressly stresses that the exercise of the right to freedom of expression carries with it special duties and

responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being 'necessary' for that State party for one of those purposes."[4]

43. The established practice of the Working Group is that restrictions placed on the freedom of expression by way of deprivation of liberty can only be justified when it is shown that the deprivation of liberty has a legal basis in domestic law, is not at variance with international law and is necessary to ensure the respect of the rights or reputation of others, or for the protection of national security, public order, public health or morals, and is proportionate to the pursued legitimate aims. A vague and general reference to the interests of national security or public order, without being properly explained and documented, is not enough to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty was necessary. More generally, the Working Group cannot accept the interference of the public authorities with the individual's privacy - including the freedom to communicate among themselves via the Internet - under the unsubstantiated pretext that the intrusion was necessary to protect public order or the community.

44. The Working Group found the deprivation of liberty to be arbitrary in a number of communications, on the ground that individuals were deprived of their liberty solely for having expressed their personal views on political, economic or human rights issues in a non-violent manner.

45. It is true that the opinions expressed are often sharply critical, take a vehement form or are openly hostile to the official government policy. The position of the Working Group is, however, that freedom of expression constitutes one of the basic conditions of the development of every individual. Subject to the restrictions which may be imposed on it on the basis of article 19, paragraph 3, of the ICCPR, the freedom of expression is not only applicable to information and ideas that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that offend or disturb the State or any sector of the population. Such are the demands of tolerance and broadmindedness, without which there is no social progress.

46. The list of the forms and manner of the expression of opinions for which their authors are punished is, according to the Working Group's experience, pretty broad. It includes, but is not limited to: public denunciation of government policy; organizing, founding of, or participation in opposition movements or in public demonstrations; public manifestation of one's religious belief, mainly if that religion is not an officially recognized, or otherwise tolerated denomination or religion; graffiti drawn on walls, contesting the official State ideology; production and distribution of printed material or pamphlets inviting the population to conduct public debates discussing alleged government corruption; invitation to vote for opposition forces at a forthcoming election; listening to or watching foreign radio or television broadcasts; and participation in the funeral of politically controversial figures.

47. Though Governments often argue that the individual who participated in actions referred to above by way of illustration crossed the permissible limits of his freedom of expression, the position of the Working Group is that the peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of the freedom of expression. Hence, deprivation of liberty applied on the sole ground of having committed such actions is arbitrary.

48. Since terrorism has become one of the most alarming threats for humanity, the Internet is increasingly a powerful means in the hands of terrorists to instigate to, prepare, organize and carry out acts of terrorism. For this reason, State actions to prevent - or to punish - the use of the Internet for terrorist purposes is justifiable. Therefore, deprivation of liberty for Internet users in connection with their willingness to provide, disseminate or receive information from each other through the Internet aimed at preparing or carrying out terrorist plots may be, in principle, legitimate. The participation in such actions cannot be justified by reference to the freedom of expression of Internet users.

49. Notwithstanding the deprivation of liberty of Internet users justified by the legitimate interest to protect national security or public order under article 19, paragraph 3, of the ICCPR, such action may become arbitrary when the non-observance of the norms relating to a fair trial spelled out under the relevant international instruments is grave.

50. Similar to what has previously happened in the history of mankind after the emergence of inventions or discovery of utmost importance, which have exerted enormous and positive effects on the scientific development, the appearance of the Internet, together with the profound changes brought about by the convergence and continuing globalization of computer networks, is also accompanied by some negative concomitant phenomena. The areas where cybertechniques can be used to the detriment of the community are being gradually identified. Measures, often in the criminal field, are being taken to prevent abuses threatening or endangering the security and safety of the computer network in general, and the use of the Internet in particular. Since the Internet operates on a transnational scale, the international community has already recognized that serious abuses committed against, or by the use of the Internet can only be prevented through common action. Some international instruments aiming at the struggle against cybercrime have come already to light,[5] others are being prepared. Moreover, attempts are being made to identify ethical behaviour on the Internet.[6]

51. Although the list of behaviours that the international community considers as criminal is not yet complete, it includes illegal access, illegal interception, data interference, system interference, computer-related forgery, computer-related fraud, offences linked to infringements of copyright or related rights. Moreover, and bearing in mind the rising number of offences committed against children by using the means offered by the Internet, the offences related to the sale of children, sexual abuses against children and child pornography have a particularly important place in the list.

52. Persons suspected of the above or similar abuses may not, as a rule, invoke their freedom of expression to justify unlawful or criminal actions. Unless the particular circumstances of the given case warrant otherwise, the Working Group does not consider as arbitrary the deprivation

of liberty applied against common criminals on the sole basis that the offence they are charged with is somehow or another related to the computer system in general, or to the use of Internet, in particular.

III. ISSUES OF CONCERN

A. Secret prisons

53. The Working Group has received information from reliable sources and through different individual communications about the existence of "black sites" or secret prisons around the world where detainees are secretly being held in unknown and uncontrolled conditions. They are transferred there under the responsibility of one Government to the territory of other Governments, especially in the aftermath of the events of 11 September 2001, in the context of the so-called "global war on terror". The reports indicate that they have been taken from one country to another country on flights that have a duration of 3 to 8 hours, have stayed there for periods ranging from 18 months to more than 2 years, and have been transferred again to a third country, all of these under the surveillance of United States agents.

54. The transfer practice, also known as "rendition" or "extraordinary rendition", is supposed to be a counter-terrorism technique, whereby individuals suspected of involvement in a terrorist-related activity are transferred by one Government to others. They are held in order to continue detention and interrogation, and to exchange information with foreign intelligence agents conducting the interrogation.

55. The detainees held relate that they were not formally charged with any crime, nor brought before any authority, administrative or judicial, responsible for their detention to contest the legality of it. The detainees report that they were held in cells without windows, underground, in incommunicado detention, without access to the outside world and could not access their families - who have had no idea of their whereabouts - nor defence lawyers. They were not allowed to speak to anyone but the interrogators. They were also forced to listen to loud music day and night.

56. The Working Group has issued an Opinion in the case of Walid Muhammad Shahir Muhammad al-Qadasi, Salah Nasser Salim 'Ali and Muhammad Faraj Ahmed Bashmilah in a Yemen case brought before it (Opinion No. 48/2005), in which the detainees were transferred to Yemen by United States authorities, as the Government of Yemen itself reports. In these cases, the detainees were transferred before arriving in Yemen to different sites around the world in this type of secret prison, after being originally arrested in Afghanistan and Indonesia. The Working Group has qualified the case as an arbitrary detention of category I - deprivation of liberty without any legal basis.

57. The Working Group is concerned that these transfers occur outside the confines of any legal procedure, such as deportation or extradition, and do not allow access to counsel or to any judicial body to contest the transfer. It is concerned also that the existence of these secret sites of detention where no legal control or human rights protection can be exercised facilitates avoiding the international obligations and responsibilities of the Governments who are running them. It is

also well known that secret detention without any legal control increases the practice of torture and other cruel, inhuman or degrading treatment for the detainee, especially when under interrogation.

58. This type of arbitrary deprivation of liberty, lacking any legal basis, is against international human rights law and implies more gross violations of detainees' rights: forced disappearance; lack of access to lawyers, families, doctors; to have families informed of place of arrest and detention; the right to be free from torture and cruel, inhuman or degrading treatment, all of which are against the standards of international law.

59. The Working Group would like to stress that detaining terrorist suspects under such conditions, without charging them and without the prospect of a trial in which their guilt or innocence will eventually be established, is in itself a serious denial of their basic human rights and is incompatible with both international humanitarian law and human rights law.

B. Over-incarceration

60. Over the past two years, the Working Group has visited countries including those having the highest incarceration rate in the world, as well as a country in which the Government had in recent years successfully pursued penal policies aimed at reducing the prison population. On the basis of its observations in these countries the Working Group finds it appropriate to make some observations with regard to the question of so-called "over-incarceration".

61. In approaching this issue the Working Group is fully cognizant of the fact that States enjoy a wide margin of discretion in the choice of their penal policies, e.g. in deciding whether the public interest is best served by a "tough on crime" approach or rather by legislation favouring measures that are alternatives to detention, conditional sentences and early release on parole. The Working Group also recognizes that the imposition of a long term of imprisonment for an offence which in another country would have received only a light or conditional sentence cannot be taken as arbitrary, in the sense of a case falling into the categories used by the Working Group when considering individual communications.

62. The Working Group is, however, not entirely indifferent to the sentencing policies of States. Article 9 of the International Covenant on Civil and Political Rights starts with the fundamental principle that "Everyone has the right to liberty and security of person". Regional human rights agreements enshrine the same principle.[7]

63. The Working Group takes the view that this principle not only means that nobody shall be deprived of his or her liberty in violation of the law or as a result of the exercise of a fundamental right, but that it first of all requires that States should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need. This principle is particularly relevant with regard to minors, and is accordingly enshrined explicitly in article 40, paragraphs 3 (b) and 4, of the Convention on the Rights of the Child. But its application should not be limited to minors.[8] It is doubtful therefore that a sentencing policy resulting in an incarceration rate of 500 out of every 100,000 residents can find an objective and acceptable explanation, when the sentencing policy of another State produces a 100 out of every 100,000 rate.

64. The principle that deprivation of liberty shall be imposed only to meet a public need, and in a manner proportionate to that need, is most relevant to detentions preceding and pending trial. Under international law, detention prior to conviction must be the exception, not the rule. This finds its explanation in the presumption of innocence principle. The Working Group has, however, observed with concern that - despite recognition of this principle at the international and constitutional level - in some countries the number of pre-conviction detainees approaches and sometimes even exceeds that of convicts imprisoned.[9]

65. The Working Group also notes with great concern that in numerous countries certain ethnic or social groups are grossly over-represented among the prison population. These are often groups that are particularly vulnerable, either as a result of past or current discrimination (racial minorities, indigenous people) or because they are otherwise marginalized, such as those affected by mental disability or substance abuse, or - all too often - on both accounts. The over-representation of these groups has complex roots and cannot be redressed overnight. However, actual discrimination and de facto inequality, such as "racial profiling" in law enforcement, as well as insufficient steps to protect and enforce social and economic rights of the members of these vulnerable groups, significantly contribute to their over-representation in the penal system.

66. Moreover, in legal systems where pretrial detention is ultimately linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial. Bail courts base their decision whether to release an accused person also on his or her "roots in the community". People having stable residence, stable employment and financial situation, or being able to make a cash deposit or post a bond as guarantee for appearance at trial are considered as well-rooted. These criteria of course are often difficult to meet for the homeless, drug users, substances abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty. As empirical research in many countries has shown that defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial, the bail system deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing.

67. The Working Group urges Governments to make efforts to avoid over-incarceration and to mitigate the over-representation of minorities and other vulnerable groups among the prison population. Measures adopted by the Government of Canada are worth studying in this respect.[10]

IV. COMPETENCE OF THE WORKING GROUP WITH REGARD TO CASES OF DETENTION LINKED TO AN ARMED CONFLICT

68. The Working Group observes that it is increasingly seized with cases of detention occurring in the context of armed civil strife, asymmetrical warfare, and the so-called "global war on terror". The Working Group finds it useful to clarify the limits, if any, of its mandate with regard to detention occurring in the context of armed conflicts.

69. The resolutions governing the Working Group's mandate enable it "to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards" (resolutions 1991/42 and 1997/50). They neither explicitly include nor exclude detention in situations of armed conflict from the Working Group's mandate. Arguably, when deprivation of liberty occurs in connection with an armed conflict, the "relevant international standards" referred to in the resolutions will have to be looked for primarily in the Geneva Conventions of 12 August 1949 and the 1977 Additional Protocols thereto, but also in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other human rights law instruments.

70. As a matter of principle, the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are complementary and not mutually exclusive.[11] As the International Court of Justice has pointed out, in the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied.[12]

71. Regarding the situational applicability of human rights law and in international humanitarian law, the following situations can be distinguished:

(a) International armed conflicts, including situations of occupation, imply the full applicability of relevant provisions of international humanitarian law and of human rights law with the exception of guarantees derogated from, provided such derogations have been declared by the State party to the International Covenant on Civil and Political Rights concerned, in accordance with article 4;

(b) Internal armed conflict involves the full applicability of relevant provisions of international humanitarian law and of human rights law with the exception of guarantees derogated from, provided such derogations have been declared by the State party to the International Covenant on Civil and Political Rights concerned, in accordance with article 4;

(c) Post-conflict situations after the end of hostilities and/or occupation imply the full applicability of human rights law after international humanitarian law has ceased to apply. As far as the ICCPR is concerned, in exceptional cases, certain rights may be derogated from in accordance with article 4;

(d) Situations of tensions and disturbances below the threshold of applicability of the norms regulating internal armed conflict imply the full applicability of human rights law. As far as the ICCPR is concerned, in exceptional cases, certain rights may be derogated from in accordance with article 4.

72. With specific regard to deprivation of liberty, the Third and Fourth Geneva Conventions provide for the legal status of prisoner of war and of civilian internee, respectively. The treaty-based international humanitarian law governing non-international armed conflict (common article 3 and Additional Protocol II), on the other hand, only contains provisions concerning the humane treatment of persons detained and the fairness of criminal prosecutions against them, but does not speak to the legal basis itself of deprivation of liberty.[13]

73. In drafting its methods of work, however, the Working Group decided not to deal with individual communications alleging that, in the context of an international armed conflict, detention is being imposed arbitrarily. The 1993 methods of work (E/CN.4/1993/24, p. 104) provided in paragraph 16:

> The Working Group will not deal with situations of international armed conflict insofar as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence.[14]

74. Paragraph 16 was based on the rationale that the Geneva Conventions (applying to international armed conflicts) provide, as a *lex specialis*, for specific legal grounds for deprivation of liberty, giving the ICRC the right of access to prisoners of war, civilian internees and security or common law internees.[15] The Working Group decided not to deal with individual communications arising from situations in which *lex specialis* is clearly applicable. This was also to avoid duplication of the work done by the ICRC, which in the exercise of its mandate to improve the situation of detainees, by doing all it can to ensure that they are treated with dignity and humanity, might also deal with the status of detainees and the legality of detention.

75. Consequently, the Working Group considers its mandate as being to deal with communications arising from a situation of international armed conflict to the extent that the detained persons are denied the protection of the Third or the Fourth Geneva Conventions, or if the reasons for not dealing with situations of international armed conflict underlying paragraph 14 of the methods of work are not applicable.[16] The Working Group shall accordingly deal with communications from detainees finding themselves in such a situation, as it has done in the past.[17]

V. CONCLUSIONS

76. **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 2005 met with responses by the Governments concerned regarding the cases brought to their attention.**

77. **The Working Group welcomes the cooperation on the parts of Governments which extended invitations to the Group. Thanks to this cooperation, the Working Group was able to conduct official missions in 2005 to Canada and South Africa. Among all the countries to which the Working Group has requested to visit, the Working Group has received invitations from the Governments of Ecuador, Equatorial Guinea, Honduras, Nicaragua and Turkey. The Working Group reiterates its belief that its country visits are particularly useful in 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.**

78. **The Working Group adopted at its forty-fourth session its Deliberation No. 8 concerning deprivation of liberty linked to/resulting from the use of the Internet. It pointed out that, despite the specific features of the Internet as a particular form of**

communication, the same rules of international law govern the freedom of expression and the conditions of its lawful restrictions, whether this freedom be exercised through the Internet or through other means.

79. **The position of the Working Group is that the peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, including via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of freedom of expression. Any measure of detention against Internet users amounts to restriction of the exercise of the freedom of expression and is arbitrary, unless it complies with the conditions prescribed by international law. The use of the Internet may be restricted if it unduly interferes with the rights of others or if it aims to promote terrorist purposes. To assess the compliance of the deprivation of liberty with international standards, the Working Group will weigh on a case-by-case basis whether the circumstances invoked justified the restriction on the freedom of expression by way of deprivation of liberty.**

80. **The Working Group is concerned about the use of secret prisons or "black sites" as a total disregard for human rights protections. This current detention policy can only lead to further grave violations of human rights, discrediting at the same time all the fight against terrorism. The Working Group is concerned that these transfers occur outside the confines of any legal procedure, such as deportation or extradition, and do not allow access to counsel or to any judicial body to contest the transfer. The existence of these secret sites of detention where no legal control or human rights protection can be exercised facilitates avoiding the international obligations and responsibilities of the Governments who are running them. The Working Group is also concerned about the question of over-incarceration, on the basis of its findings in the countries visited over the last two years.**

81. **The Working Group finally notes that it is increasingly seized with cases of detention occurring in the context of armed civil strife, asymmetrical warfare, and the so-called "global war on terror". It has clarified the limits, if any, of its mandate with regard to detention occurring in the context of armed conflicts.**

VI. RECOMMENDATIONS

82. **The Working Group recommends that, when addressing legislative or law enforcement aspects of the use of the Internet, States duly take into account the principles elaborated by the Working Group in its Deliberation No. 8.**

83. **The Working Group urges States to stop running secret prisons and detention facilities, and when cooperating with other States in their lawful fights against terrorism, the transfer of suspected individuals between States should always rest on a sound legal basis as arrangements on extradition, deportation, expulsion, transfer of proceedings or transfer of sentenced persons. Judicial control of the admission into or holding in all detention facilities shall be secured.**

84. **The Working Group also recommends that States make every effort to avoid over-incarceration and to mitigate the over-representation of minorities and other**

vulnerable groups among the prison population. It invites Governments to take into consideration best practices in this area and to establish alternative measures to detention which have proved to be effective.

85. **With regard to detention of illegal immigrants and asylum-seekers, the Working Group urges Governments to ensure that the right to challenge the lawfulness of detention is, in practice, guaranteed to any foreign national detained under their immigration law. It further recommends that the detention of asylum-seekers remain exceptional and not mandatory and that, when detained, they be maintained separate from convicts.**

Notes

[1] *Note*: Opinions 38/2005 and 48/2005, adopted during the forty-fourth session, could not be reproduced in the annex to the present report; they will be reproduced as an annex to the next annual report.

[2] The Working Group examined whether the doctrine of domestic remedies applies to its activity already in 1993 in its Deliberation No. 2, paragraph 8, and concluded that "the Working Group therefore considers that it is not within its mandate to require local remedies to be exhausted in order for a communication to be declared admissible" (E/CN.4/1993/24).

[3] See the following Opinions: 35/2000 (China) in E/CN.4/2002/77/Add.1, p. 22; 1/2003 (Viet Nam), E/CN.4/2004/3/Add.1, p. 23; 14/2003 (Maldives), E/CN.4/2004/3/Add.1, p. 75; 15/2003 (Tunisia), E/CN.4/2004/3/Add.1, p. 79; 25/2003 (China), 26/2003 (China), 15/2004 (China) and 19/2004 (Viet Nam) in E/CN.4/2005/6/Add.1, pp. 24, 25, 62 and 73, respectively.

[4] General comment No. 10: On freedom of expression (art. 19, para. 4).

[5] See e.g. Convention on Cybercrime, adopted on 23 November 2001, *European Treaty Series*, No. 185.

[6] See e.g. recommendation 1670 (2004) of the Parliamentary Assembly of the Council of Europe, "Internet and the Law".

[7] American Convention on Human Rights, article 7 (1); European Convention on Human Rights, article 5 (1); African Charter on Human and People's Rights, article 6 (1); Arab Charter on Human Rights, article 5.

[8] Article 40, paragraph 3: "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular (…) (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other

alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

[9] See Add.2 and 3 to this report.

[10] See Add.2 to this report.

[11] See the HRC's general comments No. 29 (CCPR/C/21/Rev.1/Add.11, para. 3) and No. 31 (CCPR/C/21/Rev.1/Add.13, para. 11): "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive".

[12] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), paragraph 25; and Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), paragraphs 108-111.

[13] Customary international law applicable to non-international armed conflicts, however, does provide that "persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist" (rule 128 (c) of the List of Customary Rules of International Humanitarian Law, compiled by the ICRC).

[14] In 1998, paragraph 16 was substituted for paragraph 14 in the Working Group's revised methods of work.

[15] Articles 123 and 126, Third Geneva Convention, and articles 76, 140 and 143, Fourth Geneva Convention.

[16] See the Working Group's Legal Opinion Regarding detention at El-Khiam Prison (E/CN.4/2000/4, paras. 11-18) and the Deprivation of Liberty of Persons Detained in Guantánamo Bay (E/CN.4/2003/8, p. 21).

[17] See Opinion No. 5/2003 (United States of America) (E/CN.4/2004/3/Add.1 and Corr.1, p. 33).
