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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS
OF TORTURE AND DETENTION**

Report of the Working Group on Arbitrary Detention

Chairperson-Rapporteur: Leïla Zerrougui

Summary

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. 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.

During 2003, the Working Group visited the Islamic Republic of Iran and Argentina 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 the same period, the Working Group adopted 26 Opinions concerning 151 persons in 12 countries. In 131 cases, it considered the deprivation of liberty to be arbitrary.

Also during the period 23 November 2002-7 November 2003, the Working Group transmitted a total of 157 urgent appeals concerning 812 individuals to 47 Governments; 147 were joint appeals with other thematic or country-oriented mandates of the Commission on Human Rights. Thirty-three 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. Following its thirty-seventh session, the Group requested the Governments of Indonesia, Peru and Romania to provide follow-up information on the recommendations resulting from the Group's visit to those countries in 1998 and 1999.

In its recommendations in this annual report, the Working Group attaches particular importance to the question of protection of human rights and fundamental freedoms in the context of the fight against terrorism.

As issues of concern, the Working Group mentions this year:

- (a) Discrimination;
- (b) Deprivation of liberty of vulnerable persons;
- (c) Pre-trial detention; and
- (d) Deprivation of liberty linked to the use of the Internet.

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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, of the standards set forth in the Universal Declaration of Human Rights and of 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 2003, the Working Group was composed of the following experts: Soledad Villagra de Biedermann (Paraguay), Leïla Zerrougui (Algeria), Tamás Bán (Hungary), Seyyed Mohammad Hashemi (Islamic Republic of Iran) and Louis Joinet (France), later replaced by Manuela Carmena Castrillo (Spain).

3. The Working Group has so far submitted 12 reports to the Commission, covering the period 1991-2002 (E/CN.4/1992/20, E/CN.4/1993/24, E/CN.4/1994/27, E/CN.4/1995/31 and Add.1-4, E/CN.4/1996/40 and Add.1, E/CN.4/1997/4 and Add.1-3, E/CN.4/1998/44 and Add.1 and 2, E/CN.4/1999/63 and Add.1-4, E/CN.4/2000/4 and Add.1 and 2, E/CN.4/2001/14 and Add.1, E/CN.4/2002/77 and Add.1 and 2 and E/CN.4/2003/8 and Add.1-3). The Working Group's initial three-year mandate was first extended by the Commission in 1994 and again extended in 1997, 2000 and 2003 for another three years.

4. As a result of Commission on Human Rights decision 2000/109 on enhancing the effectiveness of the mechanisms of the Commission, the composition of the Working Group has gradually changed during the last three years. Pursuant to the decision, Mr. Joinet resigned from the Working Group in July 2003 and was replaced in August 2003 by Ms. Carmena Castrillo. The Working Group has thus culminated the process of renewal of its membership recommended by the above-mentioned decision.

5. At its thirty-seventh session, on 4 September 2003, Ms. Zerrougui was unanimously elected Chairperson-Rapporteur of the Working Group, after resigning as Vice-Chairperson. At the same session, the Working Group unanimously elected Mr. Bán as its new Vice-Chairperson.

I. ACTIVITIES OF THE WORKING GROUP

6. During 2003, the Working Group held its thirty-sixth, thirty-seventh and thirty-eighth sessions. It also carried out an official mission to the Islamic Republic of Iran (15-27 February 2003) and another mission to Argentina (22 September-2 October 2003).

A. Handling of communications addressed to the Working Group

1. Communications transmitted to Governments

7. 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.4/2004/3/Add.1).

8. During its three sessions in 2003, the Working Group adopted 26 Opinions concerning 151 persons in 12 countries. Some details of the Opinions adopted during those sessions appear in the table hereunder and the complete texts of Opinions Nos. 1/2003 to 18/2003 are reproduced in addendum 1 to the present report. The table also provides information about eight Opinions adopted during the thirty-eighth session, details of which could not, for technical reasons, be included in an annex to the present report.

2. Opinions of the Working Group

9. 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.

Opinions adopted during the thirty-sixth, thirty-seventh and thirty-eighth sessions of the Working Group

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
1/2003	Viet Nam	Yes	Le Chi Quang	Detention arbitrary, category II
2/2003	China	Yes	Yang Jianli	Detention arbitrary, category III
3/2003	Egypt	Yes (after the adoption of the Opinion)	Mu'awwadh Mohammad Youssef Gawda	Detention arbitrary, category I
4/2003	Algeria	Yes	Karim Abrica, Chabane Adryen, Kader Belaidi, Kamel Bendou, Khadir Benouareth, Karim Benseddouk, Azeddine Ikane, Hocine Kaci, Farès Ouedjdi, Hacène Saleh, Abderrahmane Si-Yahia, Kamel Soufi, Kamel Talbi and Chabane Tiza	Case filed (para. 17 (a) of the Working Group's methods of work - persons provisionally released) (Ms. Zerrougui did not participate in the deliberations on or the adoption of this Opinion)
5/2003	United States of America	No	Mourad Benchellali, Khaled Ben Mustafa, Nizar Sassi and Hamed Abderrahman Ahmed	Detention arbitrary, category I
6/2003	Tunisia	Yes	Abdallah Zouari	Cases filed (para. 17 (d) of the Working Group's methods of work)

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
7/2003	China	Yes	Zhong Bo, Liu Li and Gai Suzhi Chen Gang, Zhang Wenfu, Wu Xiaohua, Liu Junhua, Zhang Jiuhai and Zhu Xiaofei	Cases filed (para. 17 (a) of the Working Group's methods of work) Detention arbitrary, category II
8/2003	Iran (Islamic Republic of)	Yes	Syamak Pourzand	Detention arbitrary, category II (Mr. Hashemi did not participate in the deliberations on or the adoption of this Opinion)
9/2003	Cuba	Yes	Nelson Aguiar Ramírez and 78 other persons	Detention arbitrary, category II
10/2003	China	Yes	Yue Wu and Ms. Zhang Qi Wang Bingzhang	Detention arbitrary, category I Detention arbitrary, category III
11/2003	Syrian Arab Republic	Yes	Jaramani Najib Youcef	Detention arbitrary, category III
12/2003	China	Yes	Bifeng Li and Liu Xianbin	Detention arbitrary, category II
13/2003	China	Yes	Tenzin Choewang, Sey Khedup, Tserin Lhagon, Yeshe Tenzin, Thraba Yeshe, Ngawang Tsultrim, Nyima Dhakpa Gyurmey	Detention arbitrary, category II Case pending until further information is received (para. 17 (c) of the Working Group's methods of work)
14/2003	Maldives	Yes	Mohammed Zaki, Ibrahim Moosa Luthfee, Ahmed Ibrahim Didi and Fathimath Nisreen	Detention arbitrary, category III
15/2003	Tunisia	Yes	Zouhair Yahyaoui	Detention arbitrary, categories II and III
16/2003	Cuba	Yes	Lester Téllez Castro, Carlos Brizuela Yera, Carlos Alberto Domínguez and Bernardo Arévalo Padrón	Detention arbitrary, category II
17/2003	Cuba	Yes	Leonardo Miguel Bruzón Ávila, Juan Carlos González Leyva and Oscar Elías Biscet González	Detention arbitrary, category II

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
18/2003	Syrian Arab Republic	Yes	Tanious Kamil El-Habr	Detention arbitrary, category I
19/2003	Thailand	Yes	Abdelkader Tigha	Case filed (para. 17 (a) of the Working Group's methods of work)
20/2003	Viet Nam	Yes	Thadeus Nguyen van Ly	Detention arbitrary, category II
21/2003	China	Yes	Li Ling and Pei Jilin	Detention arbitrary, category II
22/2003	Algeria	Yes	Khaled Matari	Detention arbitrary, category III
23/2003	China	No	Xu Wenli	Detention arbitrary, categories II and III
24/2003	Israel	Yes	Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi	Detention arbitrary, category III
25/2003	China	No	Di Liu	Detention arbitrary, categories II and III
26/2003	China	No	Yi Ouyang and Changqing Zhao	Detention arbitrary, category II

Note: Opinions Nos. 19/2003 to 26/2003, adopted during the thirty-eighth 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

10. On 28 April 2003, the Chairperson-Rapporteur of the Working Group wrote to the Permanent Representative of Egypt to the United Nations Office at Geneva requesting updated information on the so-called "Queen Boat" case. By note verbale dated 2 May 2003, the Permanent Mission replied the following:

"Given that decisions of the High Court of State Security are not subject to appeal and cannot be overruled, the matter was referred to the President of the Republic, who, as commander-in-chief of the armed forces, issued a decision confirming the sentence passed on the first two offenders, namely five years' imprisonment, and overruling the judgements handed down on the other 21 offenders, which were all referred back to the ordinary courts, the Qasr el-Nil court of the first instance (thus the case is no longer under the jurisdiction of the special courts)."

11. In connection with Opinion No. 3/2003 (Egypt), the Government of Egypt reported that Mr. Mu'Awwadh Mohammad Youssef Gawda was released on 20 July 2003, after he no longer seemed to pose a threat. He had been arrested because of the threat he posed to public security

as a member of the terrorist organization Al-Jama'ah Al-Islamiyyah (the Islamic Group), an illegal organization under the terms of the Constitution. His case was processed in accordance with all the legal and judicial procedures stipulated in the Emergency Act.

12. The source informed the Working Group of the liberation in China of Mrs. Wu Xiachua as referred to in Opinion No. 7/2003. The Working Group welcomes the liberation of this person.

13. Regarding Opinion No. 21/2002 (United States of America), the Government of the United States reported that Mr. Ayub Ali Khan (alias Syed Gul Mohammed Shah) was transferred to immigration custody on 25 October 2002, upon completing his criminal sentence. He was subsequently removed from the United States. Mr. Azmath Jaweed (alias Mohammed Azmath) was transferred to immigration custody on 19 September 2002. He was subsequently removed from the United States. The men had been detained on immigration violations on 12 September 2001 in Texas, after law enforcement officials found box cutters, hair dye, a knife and several thousand dollars among their belongings. They were detained on charges of overstaying their immigration visas, were charged with conspiracy to commit credit card fraud on 13 December 2001 and were indicted on 14 January 2002.

14. The Government of Tunisia informed the Working Group that Mr. Zouhair Yahiaoui had been released on parole on 18 November 2003 and requested it to reconsider Opinion No. 15/2003 on the grounds that the defendant had been given a fair trial and had been sentenced for telephone fraud, misinformation on an Internet site and disturbing public security. The Working Group welcomes the early release of Mr. Zouhair Yahaoui but, while noting the Government's position, cannot find any new information that might, given the Group's methods of work, invalidate the arguments on which its Opinion is based.

15. With regard to Opinion No. 19/2002, the Government of Peru informed the Working Group that the Supreme Council of Military Justice's decision had found private Rolando Quispe Berrocal guilty of fraud, which is classified as an offence in article 301, paragraph 4, of the Military Justice Code. At the same time, the civil courts were conducting investigations in order to determine the criminal responsibility of Mr. Federico Ayarza Richter, Mr. Elvys Paucar Ipchas and Mr. Wilber Llactahuaman Astoray, accused by Mr. Quispe Berrocal of having committed a crime against humanity in the form of torture, and a crime against the administration of justice by mounting a cover-up.

16. The Government of the United States of America disagreed with the legal opinion contained in chapter III of the last report of the Working Group to the Commission on Human Rights (E/CN.4/2003/8) regarding the deprivation of liberty of persons detained at Guantánamo Bay. It reported that there were approximately 625 persons detained at Guantánamo and the detainees had begun arriving in January 2002. They were enemy combatants detained in the course of an armed conflict under the laws and customs of war. None had been charged with a criminal offence. Should a detainee be charged, that detainee would be provided fundamental procedural safeguards, including counsel.

17. The Government of the United States of America added that under the laws and customs of war, the detaining power was not obliged to prosecute detained enemy combatants or release them prior to the end of the conflict. Captured enemy combatants had no right of access to

counsel to challenge their detention. In appropriate cases, the United States would return detainees to their country of origin or nationality. In fact, it had released 64 detainees (July 2003).

18. The Government further stated that the consequences of conflating human rights law and the law of war-international humanitarian law would be dramatic and unprecedented. The two systems were distinct. On the other hand, the enemy combatants were not entitled to prisoner-of-war (POW) status. Shortly after the arrival of the detainees at Guantánamo, the President of the United States determined that the conflict with the international terrorist group al-Qa'idah was not covered by the Geneva Conventions. Members of al-Qa'idah and the Taliban did not enjoy POW status because they did not meet the criteria applicable to lawful combatants. Consequently, they could be detained at least for the duration of hostilities. They were not honourable soldiers who abided by the law of armed conflict, but terrorist combatants who violated the law of armed conflict and basic principles of international humanitarian law. Their detention was not an act of punishment but one of security and military necessity.

19. For the same reasons, the Government of the United States also disagreed with Opinion No. 5/2003 (United States of America). The Government explained that, for reasons of national security, it was not in a position to provide information regarding the four persons detained in Guantánamo mentioned in the Opinion.

20. In conclusion, the Government of the United States considered that the Working Group on Arbitrary Detention lacked competence to address law-of-armed-conflict issues.

21. Regarding Opinion No. 10/2003 (China), the Government of China reported that the courts had determined that, since the 1980s, Wang Bingzhang had collected military secrets of mainland China for Taiwan intelligence agencies, advocated violence and assassination, organized a terrorist group and planned to conduct explosions in Beijing and against the Chinese Embassy in Thailand. He was not a so-called internationally recognized activist in pro-democracy movements, but rather a criminal who had been engaged in espionage and terrorist activities endangering the national and public security of China. During his judicial process, Mr. Wang benefited from the right to legal counsel, to presumption of innocence and to a fair and speedy trial.

22. The Government of Cuba considered that in rendering its Opinion No. 9/2003 the Working Group was violating the principles of objectivity, impartiality and non-selectivity. All the persons mentioned in the Opinion had been found guilty of taking part regularly in meetings organized by the United States Interest Section in Havana, for the purposes of maintaining the trade embargo and discouraging possible foreign investment; conspiring to subvert Cuba's constitutional and institutional order; fabricating false information about Cuban society and the economy; meeting and communicating regularly with officials and agents of the United States intelligence services and Cuban-American terrorist organizations, and other offences, none of which had anything to do with freedom of opinion, expression or assembly. According to the Government of Cuba, the Working Group assumed that all the arguments put forward by the source were valid, and had not considered, as it should have done, any of the information duly and promptly furnished by the Government.

4. Communications giving rise to urgent appeals

23. During the period 23 November 2002-7 November 2003, the Working Group transmitted 157 urgent appeals to 47 Governments concerning 812 individuals (778 men and 34 women). In accordance 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.

24. During the period under review, 157 urgent appeals were transmitted by the Working Group as follows:

Government concerned	Number of urgent appeals	Persons concerned	Reply
Azerbaijan	4	70 men	Reply to 1
Bangladesh	5	1 woman, 12 men	Reply to 5
Burundi	1	8 men	Reply to 1
China	7	2 women, 11 men	Reply to 7
Colombia	1	1 man	Reply to 1
Comoros	1	1 man	No reply
Cuba	3	1 woman, 4 men	Reply to 3
Democratic Republic of the Congo	5	4 women, 20 men	Reply to 1
Dominican Republic	1	2 men	Reply to 1
Egypt	5	25 men	Reply to 3
Equatorial Guinea	1	1 man	No reply
Eritrea	3	26 men	No reply
Gabon	1	5 men	No reply
Honduras	1	3 men	Reply to 1
Indonesia	2	21 men	No reply
Iran (Islamic Republic of)	8	23 men	Reply to 2
Israel	5	3 women, 10 men	Reply to 5
Jamaica	1	1 man	No reply
Jordan	1	1 man	No reply
Kenya	1	2 men	No reply
Kyrgyzstan	1	1 man	Reply to 1
Lebanon	1	1 man	Reply to 1
Libyan Arab Jamahiriya	1	1 man	No reply
Malaysia	3	7 men	Reply to 3

Government concerned	Number of urgent appeals	Persons concerned	Reply
Mauritania	3	94 men	No reply
Mexico	1	1 woman, 8 men	Reply to 1
Myanmar	4	2 women, 55 men	Reply to 2
Nepal	24	2 women, 49 men	Reply to 3
Niger	1	2 men	No reply
Pakistan	3	6 men	No reply
Philippines	2	1 woman, 9 men	Reply to 1
Russian Federation	1	1 man	Reply to 1
Rwanda	1	1 man	No reply
Saudi Arabia	2	1 woman, 83 men	Reply to 1
Sri Lanka	1	1 man	Reply to 1
Sudan	24	6 women, 145 men	Reply to 3
Syrian Arab Republic	6	4 women, 9 men	Reply to 6
Tajikistan	1	1 man	No reply
Thailand	2	13 men	Reply to 2
Tunisia	2	2 men	Reply to 2
Turkey	3	5 men	Reply to 3
Uganda	1	2 men	No reply
United States of America	1	1 man	No reply
Uzbekistan	4	2 women, 5 men	Reply to 4
Viet Nam	2	2 men	Reply to 1
Yemen	1	1 man	No reply
Zimbabwe	4	2 women, 55 men	Reply to 1

25. Of these 157 urgent appeals, 147 were appeals issued jointly by the Working Group and thematic or geographical special rapporteurs (the Special Rapporteur on the question of torture; the Special Rapporteur on freedom of opinion and expression; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Representative of the Secretary-General on human rights defenders; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people; the Special Rapporteur on adequate housing; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteurs on the situation of human rights in the Democratic Republic of the Congo, in Myanmar and in the Sudan).

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. The Government of Bangladesh reported that Zaiba Malik, journalist, and L. Bruno Sorrentino, cameraman, of the British TV

company Channel-4, were released from detention and returned to their respective countries. The two journalists apologized for having entered the country improperly by concealing their professional identities. The Government of Bangladesh also reported that Mohiuddin Khan Alamgir, Shahriar Kabir, Allalou Farid, Muntasir Mamun, Saber Hossain Chowdhury and Saleem Samad, were released on 18 September 2002, and on 7, 9, 12 and 19 January 2003, respectively. The Government of Burundi reported that Alexandre Nzeyimana had been released on 17 February 2003. The Government of the Dominican Republic reported that José Gonell Franco and Abraham Corniel, who had been interrogated in connection with charges of defamation against the son of the President of the Republic, were released pending investigation.

27. The Government of China reported that Liu Shujie, who had been sentenced to two years' re-education through labour, was sent home since she was suffering from coronary heart disease. Wang Yuzhi was allowed to serve her term of re-education through labour outside the custodial facility, for health reasons. Later, she left the country. Zha Peng (Shongdu), Dan Zeng (Tamding), Xiong Di (Palzin) and Renzeng Enli (Ngodup), who had taken part in the December 2002 disturbances at the Wuming (Serthar) Buddhist seminary in Sichuan province, were released after serving their terms of 10-15 days' administrative detention.

28. The Government of Egypt reported the liberation of one of the persons who were arrested on 1 January 2003 pursuant to the terms of a warrant issued by the Department of Higher State Security. Concerning the arrest of 13 other supposed members of the banned Muslim Brotherhood group, the Government advised that they were being kept in custody pending further investigation. The Government of Egypt also reported that the persons detained during a manifestation against the war in Iraq had been released after interrogation. Mohammed Hassan Hassan and Ramez Gehad Fathi, who were detained for breaching public order and encouraging disorder, were released on 6 June 2003. Marwan Ahmad was released on the day of his arrest, without any action being taken against him.

29. On 6 May 2003, the Government of the Islamic Republic of Iran reported that all Iranian Jews arrested in 2000 in Shiraz on charges of espionage had been released on parole. On 23 October 2003, it reported that Mazaheri Kalahroudi was released on 4 September 2003. The Government of Israel reported that Anan Nabih Labadeh was released on 24 April 2003. Jihad Abu Ayesh (aged 15) and Hussam Zeitun (aged 14) were stopped briefly at the Huwara checkpoint on 1 June 2003. They were never arrested and were free to continue on their way within the hour. The Government of Kyrgyzstan reported that Erlan Bektemirov had been released but that he was subject to a restricted residence order. Mr. Bektemirov had been charged with distributing leaflets for an extremist religious organization. The Government of Lebanon reported that Hanna Chalita had been released on bail according to an order from investigating magistrate Abdallah Bitar.

30. The Government of Myanmar reported that Soe Pa Pa Hlaing was released after interrogation. Ninety-six persons who were arrested for their participation in the incidents which took place on 30 May 2003 were released after necessary interrogation, including Khin Win, Maung Maung, Ko Than Aung and Ko Aung Thein Myint. The Government of Saudi Arabia reported that Abdul Mohsen Musalam was released on 3 April 2002. He had been detained on the basis of a civil action brought against him after he wrote a poem besmirching the reputation of judges. The Government of the Sudan advised that Ghazi Suleiman, Chairman of the

Sudanese Association for Human Rights, was released on 15 July 2003. Hassan Abdalla Alturabi, leader of the opposition party "The Popular Congress", was released on 13 October 2003. The Government stated that there were no more political detainees in the Sudan.

31. The Government of the Syrian Arab Republic advised that Abd al-Razaq Shular was released after questioning. Fathiya Rajab Damur, who was arrested when she arrived from Iraq on 9 April 2003, was released once it was established that she had no case to answer. The Government of Thailand reported that Pirjo Svensson-Rytilahti, a nurse of Swedish nationality who was arrested on 29 April 2003, was deported on 5 June 2003. The Government of Tunisia advised that the most senior examining magistrate of the first instance court of Tunis had ordered, on 25 December 2002, the liberation of Fadhel Ben Hedi Naouar, arrested in the context of investigations into the attack against the La Bhriba synagogue in Djerba. The Government of Turkey reported that journalists Anestis Mutatis and Ioannis Canellakis were released promptly after their detention. The Government of Uzbekistan reported that Halima Ismailova was released from custody on 16 June 2003. Lastly, the Government of Zimbabwe reported that Lovemore Madhuku was released on bail.

32. The Group notes that only 43.21 per cent of its urgent appeals were replied to and consequently invites Governments to increase their cooperation under the urgent action procedure.

B. Country missions

1. Visits carried out

33. During 2003, delegations of the Working Group visited the Islamic Republic of Iran (15-27 February) and Argentina (22 September-2 October). The reports on those visits are contained in addenda 2 and 3 to the present report.

2. Visits scheduled

34. The Working Group has expressed interest in visiting the following countries:

(a) Belarus. During the fifty-first session of the Sub-Commission on the Promotion and Protection of Human Rights (20 August 1999), the Permanent Representative of Belarus to the United Nations Office at Geneva stated that the Government of Belarus would invite the Working Group on Arbitrary Detention to visit the country. By letter dated 4 December 2001, the Deputy Permanent Representative of Belarus to the United Nations Office at Geneva informed the Chairperson of the Working Group that the issue of the organization of the Working Group's visit to Belarus was under consideration by the competent authorities and that final dates would be agreed upon through diplomatic channels. During the Working Group's thirty-eighth session, consultations were held between the Permanent Mission of Belarus to the United Nations Office at Geneva and the Working Group. The visit is now planned to take place during May/June 2004 or September/October 2004;

(b) Canada. In November 2002, the Working Group initiated consultations with the Permanent Mission of Canada to the United Nations Office at Geneva, with a view to conducting

a mission to that country. The Government has issued a standing invitation to all thematic mechanisms of the Commission on Human Rights. The visit is now scheduled to take place in June 2005;

(c) Latvia. The Government of Latvia has also issued a standing invitation to all thematic mechanisms of the Commission. In January 2002 the Working Group initiated consultations with the Permanent Mission of Latvia to the United Nations Office at Geneva, with a view to conducting a mission to that country to study the legal, judicial and administrative aspects of the question of detention in Latvia. During the Working Group's thirty-seventh and thirty-eighth sessions, meetings were held with the Counsellor at the Permanent Mission in Geneva. The visit is scheduled to take place from 23 to 28 February 2004;

(d) Nauru and Papua New Guinea. The Working Group wrote to both Governments in 2002 expressing its interest in receiving an invitation to visit those countries in order to study the question of the administrative detention of unauthorized arrivals, asylum-seekers and refugees. No response has been received so far. The Working Group's request to visit those countries is a consequence of its mission to Australia. Since September 2001, large numbers of asylum-seekers arriving without authorization in Christmas Island, Cocos Island and Ashmore Reef have been transferred to Nauru and Manus Island in Papua New Guinea where they are reportedly housed in detention centres pending an asylum determination process;

(e) Angola and Guinea-Bissau. No response has been received from the Governments of these African countries. The Working Group hopes to receive invitations to visit them in the near future;

(f) Libyan Arab Jamahiriya. In January 2003, the Working Group requested a formal invitation from the Libyan authorities to conduct an official mission to the Libyan Arab Jamahiriya. In February 2003, the Working Group was informed by the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Office at Geneva that the competent authorities in Tripoli were considering attentively the possibilities of extending an official invitation for such a visit;

(g) South Africa. The Working Group considered the standing invitation extended by the Government of South Africa on 23 July 2003 to all the thematic mechanisms of the Commission on Human Rights and decided to write to the Government expressing its interest in receiving an invitation to visit South Africa during 2004. During the Working Group's thirty-seventh session, conversations were held in this regard with the Chargé d'affaires a.i. of the Permanent Mission of South Africa to the United Nations Office at Geneva.

35. On 22 January 2002, the Working Group requested an invitation to visit the United States of America and the military base of Guantánamo Bay in order to examine in situ the legal aspects of the detention of people as a consequence of the 11 September 2001 attacks. On 17 December 2002, the Government of the United States declined the request, considering that the Working Group lacked the competence to address what it considered law-of-armed-conflict issues, not international human rights matters. According to the Government, representatives of the International Committee of the Red Cross (ICRC), which it considered to be the organization vested with the competence to conduct such visits, had access to the detainees on a regular basis.

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

36. By 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 it visited, together with a copy of the relevant recommendations adopted by the Group contained in the reports on its country visits.

37. Communications were addressed on 4 September 2002 and 16 July 2003 to the Governments of Indonesia, Peru and Romania requesting information on such initiatives as the authorities might have taken to give effect to the recommendations contained in the reports of the Group to the Commission on its visits to those countries in 1998 and 1999 (E/CN.4/2000/4/Add.2; E/CN.4/1999/63/Add.2 and E/CN.4/1999/63/Add.4).

38. The Government of Indonesia informed the Working Group about the various measures that it had adopted since the visit of the Working Group in 1999. In particular, the Government pointed out that since 1999, hundreds of political prisoners had been released or had their parole restrictions removed. In addition, a National Police Commission had been formed to advise the President and to exercise oversight of police management and performance.

39. In order to ensure independence of the judiciary, a Judicial Commission and a Constitutional Court had been created under an amendment to the Constitution. The Judicial Commission will act as an external supervisor, including for the appointment and inspection of judges across the country. The Constitutional Court will have the authority to review judicial laws, adjudicate disputes between State institutions, dissolve political parties and resolve electoral disputes. A Human Rights Court was also created to try cases of grave human rights abuses, genocide and crimes against humanity.

40. The Government of Indonesia further informed the Working Group that other measures to help strengthen the judiciary included the revocation of the controversial Law on Subversion and the Internal Security Act. Emergency laws and measures were now dealt with comprehensively within the legal system, which included two types of emergency law: civilian and military. Such measures were recently adopted in Aceh to help restore security in the face of a deteriorating situation.

41. Finally, the Government informed the Working Group that the Law on Criminal Procedure and the Penal Code were being reviewed. A legal aid system was being set up by law societies and universities.

42. The Government of Mexico informed the Working Group that it considered the report on the visit to its country (E/CN.4/2003/8/Add.3), which had taken place between 27 October and 10 November 2002, to be an objective report that reflected the problems still facing the country in the area of human rights and the administration of justice. The recommendations in the report would be examined by the Inter-Ministerial Commission on Government Policy on Human Rights and the Federal Government's mechanism for dialogue with civil society. Both the report and the recommendations would be very useful for the overall stocktaking of the human rights

situation in the country being carried out during the second phase of the cooperation programme signed between the Government of Mexico and the Office of the United Nations High Commissioner for Human Rights.

43. The Government of Mexico also made some comments on the report to follow up on the Working Group's recommendations.

44. The Working Group thanks the Government of Mexico for having implemented some of its recommendations.

45. The Government of Australia rejected the report of the Working Group on its mission to that country in 2002 (E/CN.4/2003/8/Add.2). According to the Government, the report contained fundamental factual errors, misrepresented its policies and was confused about the relationship between international and Australian law. Examples of factual errors included claims that asylum-seekers were routinely handcuffed when outside detention centres, the existence of barbed wire around a small residential housing project at Woomera, and the affirmation that unauthorized arrivals were not able to challenge their continued detention before a court.

46. Immigration detention is an essential element underpinning the integrity of Australia's migration programme and the protection of Australia's borders. There is no recognition in the Working Group's report of the role Australia plays every year in the resettlement of thousands of refugees around the world. In conclusion, the Government considered that, yet again, a United Nations human rights body had produced a report misguidedly critical of Australia.

47. With regard to the comments of the Government of Australia, the Working Group notes that the Human Rights Committee, in its Views adopted on 6 August 2003 on communication No. 1014/2001 (*Omar Sharif Baban v. Australia*) (CCPR/C/78/D/1014/2001, para. 7.2), reached the same conclusions as did the Working Group following its visit to Australia (E/CN.4/2003/8/Add.2, para. 63) regarding the incompatibility of the indiscriminate mandatory detention system with the international norms.

48. The Working Group was informed that, in June 2003, the Australian Family Court claimed jurisdiction to examine cases of child detainees and ruled that holding minors in immigration detention centres indefinitely would be illegal. The Family Court stated that it had an obligation under the Convention on the Rights of the Child to protect minors held under the Government's immigration policies. The Government considered that the Family Court did not have jurisdiction over children held in detention centres. The Working Group urges the Government of Australia to consider urgently the immediate release of the children held in detention centres for immigration reasons. Their continued detention, as the Working Group observed during its visit to the country, is harmful to their welfare.

49. The Working Group was also informed that, in June 2003, at least 400 asylum-seekers, mainly from Afghanistan, the Islamic Republic of Iran and Iraq, remained in Nauru. Australia is compensating Nauru for hosting the facilities for asylum-seekers with an extensive development assistance programme.

II. THE QUESTION OF PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CONTEXT OF THE FIGHT AGAINST TERRORISM

50. Since 11 September 2001, efforts to combat terrorism have accelerated at an astounding pace to become one of the priorities, if not *the* priority of all Governments and intergovernmental systems, at both the regional and international levels. Effective action to combat terrorism is claimed by some as grounds for relieving States of their obligations under international law, particularly those relating to human rights and fundamental freedoms. In that connection, addressing the Security Council Counter-Terrorism Committee, on 6 March 2003, the Secretary-General said: "Our responses to terrorism as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension."

51. The General Assembly and the Security Council recalled, on 18 December 2002 and 20 January 2003 respectively, in resolution 57/219 entitled "Protection of human rights and fundamental freedoms while countering terrorism" and in the declaration on the issue of combating terrorism attached to resolution 1456 (2003), that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. States were also encouraged to consider the recommendations of the special procedures and mechanisms of the Commission on Human Rights and the relevant comments and views of United Nations human rights treaty-monitoring bodies.

52. On 25 April 2003, the Commission on Human Rights reaffirmed those principles in resolution 2003/68 entitled "Protection of human rights and fundamental freedoms while countering terrorism", and requested the United Nations High Commissioner for Human Rights, using all relevant special procedures and mechanisms of the Commission, to consider, within his mandate, the question of the protection of human rights and fundamental freedoms in the context of measures to combat terrorism.

53. The Working Group takes note of these resolutions and draws the Commission's attention to the fact that, since 11 September 2001, it has received many communications about the arbitrary character of detention in several countries where inquiries into terrorist acts are being conducted. It has also received, from reliable sources, reports of secret detention centres where suspected terrorists are held; lengthy administrative detention without judicial supervision; transfers of detainees from one country to another in violation of the principles of non-refoulement and the guarantees for a normal extradition procedure; and abuses of the law on immigration to circumvent judicial safeguards and hold aliens in detention indefinitely.

54. Under the circumstances, and in order to comply with the instructions given in Commission resolution 2003/68, the Working Group considers it worthwhile contributing to the definition under international law of the legal framework governing detention as part of efforts to combat terrorism, by clarifying its position on a number of matters falling within its mandate that are currently the subject of debate. It also considers that there might be merit in recalling the relevant jurisprudence it has developed since its establishment so as to put detention in the context of states of emergency in general, and the fight against terrorism in particular.

55. It has been the Working Group's experience that when action is taken and/or legislation is adopted to combat what States rightly or wrongly qualify as terrorism, subversive activities or attacks against State security, there is an increase in human rights violations. On the subject of terrorism, the Working Group has stressed from the outset its "concern [at] frequent attempts by Governments to use normal legislation or to have recourse to emergency or special laws and procedures to combat terrorism and thereby permit, or at least to increase, the risk of arbitrary detention".¹

56. The Working Group is particularly concerned by the studied ambiguity over terrorist acts and war crimes in a situation, described as an all-out war against terrorism, which is invoked to set aside certain norms of international law, particularly those on the guarantees available to suspected terrorists in detention.

57. The Working Group is even more concerned that, in context of the fight against terrorism, classified information and the protection of national security are often put forward as grounds for refusing to cooperate, and that its competence to judge the lawfulness of the detention of suspected terrorists is challenged on the pretext that the Group's mandate does not cover situations of armed conflict.²

58. On deprivation of liberty in connection with the fight against terrorism and, states of emergency generally, the Working Group finds, when it looks at State practice before and after 11 September 2001, that this practice raises in particular the questions:

Derogations that are unlawful and not consistent with States' obligations under international law;

Loose definitions of terrorism in national legislation;

Recourse to military tribunals and special courts;

Abuse of immigration laws to circumvent judicial guarantees.

59. The Working Group had occasion to state its views on these matters long before 11 September 2001. Its experience from the outset has been that the main causes of arbitrary deprivation of liberty are the abuse of states of emergency, the exercise of the powers specific to a state of emergency without a formal declaration, recourse to military, special or emergency courts, non-observance of the principle of proportionality between the gravity of the measures taken and the situation concerned, and loose definitions of offences that are often described as infringements of State security.³

60. **With regard to derogations that are unlawful and inconsistent with States' obligations under international law**, the Working Group reaffirms that the fight against terrorism may undeniably require specific limits on certain guarantees, including those concerning detention and the right to a fair trial. It nevertheless points out that under any circumstances, and whatever the threat, there are rights which cannot be derogated from, that in no event may an arrest based on emergency legislation last indefinitely, and it is particularly

important that measures adopted in states of emergency should be strictly commensurate with the extent of the danger invoked. On all these points the Working Group refers to Human Rights Committee general comment No. 29 on derogations from the provisions of the International Covenant on Civil and Political Rights during a state of emergency.

61. The Working Group recalls that, in carrying out its mandate, it may be called upon to consider whether a State's domestic legislation is in line with applicable international human rights standards, especially since, pursuant to Security Council resolution 1373 (2001), virtually all States have had to take steps to prevent, prosecute and punish all terrorist acts falling under their jurisdiction, and increase their cooperation in eradicating international terrorism. And some States are indeed reproached for adopting legal measures that are not always consistent with the peremptory norms of international human rights and humanitarian law.

62. The Working Group stresses that it attaches particular importance to the existence and effectiveness of internal controls over the legality of detention. In its experience, the right to challenge the legality of detention is one of the most effective means of preventing and combating arbitrary detention. As such, it should be regarded not as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency. That is why it considers that the absence of such a remedy deprives the persons concerned of a powerful means of defence against arbitrary detention, or at least a way of promptly remedying injury caused by unlawful or unjust imprisonment. However, it finds that, even under legal systems where the remedy of *amparo* or *habeas corpus* exists, in the fight against terrorism, especially when a state of emergency is declared or related prerogatives are exercised, it is often suspended or in effect rendered impracticable.

63. In a growing number of cases in the fight against terrorism, legal safeguards concerning detainees are now observed only insofar as they are consistent with the objectives of military security. No justification can be used in any circumstances - whether conflict, war, or state of exception - to abrogate the right to challenge unlawful detention. Such restrictions of rights have so far not proved to be effective in combating terrorism.

64. **Concerning the definition of terrorism in national legislation**, the Working Group recalls that it is still concerned at the extremely vague and broad definitions of terrorism in national legislation. On several occasions it has noted that "either per se or in their application, (these definitions) bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal circumstances".⁴

65. In the absence of a definition of the offence or when the description of the acts or omissions with which someone is charged is inadequate, the Working Group considers that the requirement of a precise definition of the crimes - the key to the whole modern penal system - is not fulfilled and that the principle of lawfulness is thus violated, with the attendant risk to the legitimate exercise of fundamental freedoms.

66. Since 11 September 2001, the principle of lawfulness has often been abused. The Working Group has been sent reports from reliable sources indicating that people have been arrested, transferred from one country to another and held in detention for belonging to groups

appearing on lists of terrorist organizations drawn up by one or more countries. Irrespective of the controversy surrounding such lists in the absence of an internationally accepted definition of terrorism, the Working Group is particularly concerned by the fact that accusations of belonging to, financing or fund-raising for terrorist organizations are not always supported by sound evidence, and that detainees are not told what they are being blamed for. In that connection, the Working Group points out that any one arrested must be promptly informed of any accusation, charges and evidence against him.

67. **Concerning recourse to military tribunals and special courts.** Bringing suspected terrorists before special courts is regular practice. Since 1992, the Working Group has expressed concern about the establishment of special courts going by various names. On several occasions it has drawn attention to how special courts and military tribunals operate and has warned against the immoderation of this form of justice. It finds from experience that one of the most serious causes of arbitrary detention is precisely the existence of such courts, virtually none of which respects the guarantees of the right to a fair trial. The violation of the normal standards for a fair trial is all the more evident since, in some countries, such “courts” are not established by law and their competence *ratione materiae* is not based on objective criteria but on the nationality of the suspected terrorists. This is discrimination based on nationality.

68. **Concerning administrative detention and the transfer of foreigners,** the Working Group is concerned by reports it is receiving of the improper and discriminatory use of immigration laws to circumvent the presumption of innocence and related judicial guarantees. Individual communications have been submitted to it on the subject of people arrested for violating immigration law who, before being deported to their countries of nationality have been held in solitary confinement for months without being able to contact their families.⁵

69. We now know that dozens of people suspected of collaborating with the al-Qa’idah network or other terrorist organizations are being detained in secret in several countries and that individuals who had been held at Guantánamo Bay or elsewhere have been transferred to their countries of nationality where they remain in detention, either at the request of the country that transferred them or because they were wanted, without a court ever having ruled on the legality of their detention.⁶ Such transfers circumvent judicial guarantees relating to extradition, which allow the competent court in the requested State to prohibit extradition to countries where people risk being subjected to torture, not being granted a fair trial, and in cases where capital punishment has been repealed, the application of the death penalty.

70. It is by no means the Working Group’s intention, in highlighting the concerns raised by the working methods used to combat terrorism, to belittle the threat terrorism poses to world peace and security, far less to question the right, not to say duty, of States to use all lawful means to combat terrorism effectively. Nor can there be any doubt that the fight against terrorism calls for exceptional methods that limit certain guarantees, including those relating to detention and the right to a fair trial.

71. The Working Group nonetheless considers that, even when fighting terrorism, States are not entitled to undermine such fundamental principles as the presumption of innocence, legally defined offences and penalties, the non-retroactive application of harsher criminal laws and the

right to be tried within a reasonable period of time by a competent, independent and impartial court; otherwise they will lose any legitimacy they claim to have vis-à-vis the terrorist organizations, discredit their actions and seriously impair the effectiveness of action to combat terrorism.

III. ISSUES OF CONCERN

A. Discrimination

72. Discrimination is of course a common phenomenon in the administration of criminal justice, but since 11 September 2001, differences in treatment and discrimination, particularly with regard to foreign nationals, have greatly increased. As part of efforts to combat terrorism and transnational organized crime, countries with large migratory flows have tightened up their legislation to control illegal immigration and imposed restrictions on the right to asylum which are not always in conformity with refugee law and international humanitarian law. Some countries routinely detain anyone found on or entering their territory illegally, while others just as routinely denigrate or lock up victims of slavery or trafficking in migrants; at the same time, entire populations are rightly or wrongly assessed as potentially dangerous and, solely for that reason, risk being subjected to lengthy administrative detention.

73. The Working Group has also been informed that, in some countries, drug addicts, prostitutes, homosexuals and people suffering from AIDS are locked up on the grounds that they represent a risk to society, and people are given prison sentences solely because of their sexual orientation. Having received a communication concerning 55 persons prosecuted and detained on account of their homosexuality, the Working Group took the view that their detention was arbitrary because it violated articles 2, paragraph 1, and 26 of the International Covenant on Civil Rights, which guarantee equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex. The Working Group based its opinion on that of the Committee on Human Rights, according to which the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation (CCPR/C/50/488/1992, para. 8.7).

B. Deprivation of liberty of vulnerable persons

74. The Working Group has also been informed by several sources that, in some countries, the disabled, drug addicts and people suffering from AIDS are detained in places that are incompatible with their state of health, sometimes without treatment and without it having been established that their detention is justified on medical or public health grounds. The Group is concerned because it is vulnerable persons that are involved, people who are often stigmatized by social stereotypes; but it is concerned above all because often such administrative detention is not subject to judicial supervision.

C. Pre-trial detention

75. The Working Group was informed by a reliable source that 17 persons have been held in detention in Spuz prison in the Republic of Montenegro since 1995 awaiting a final verdict on their cases. The source alleges that Montenegrin legal procedure allows indefinite detention once charges have been filed and that persons are detained for up to six months in pre-trial detention and during their trials, which can sometimes last for years.

76. The Working Group has transmitted these allegations to the Government of Serbia and Montenegro.

D. Deprivation of liberty linked to the use of the Internet

77. The Working Group has observed the rise in the number of cases where deprivation of liberty was connected to the use of the Internet and similar modern communication media. In recent years the Group has received a number of individual communications of this kind. In several such cases the Working Group found that the deprivation of liberty had been arbitrary.

78. The Working Group notes that, on the one hand, the Internet may in principle be utilized for unlawful purposes, for instance impermissible intrusion into individual privacy: the advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence; advertisement of prohibited activity such as child pornography; disclosure of industrial or banking secrets and the like. On the other hand, however, the limitation through the application of criminal law sanctions of the use of the Internet may amount to restriction of the freedom to seek, receive and impart information, a restriction which is incompatible with article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. In such cases deprivation of liberty may prove to be arbitrary. This new communication medium, like the postal service or use of the telephone, allows freedom of expression protected by the right to privacy (article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights).

IV. CONCLUSIONS

79. The Working Group welcomes the increased cooperation it has received from States in the fulfilment of its mandate. The great majority of Opinions issued by the Group during its three sessions in 2003 met with responses by the Governments concerned regarding the cases brought to their attention.

80. This cooperation on the part of Governments has also been reflected in the greater number of invitations by States to the thematic mechanisms of the Commission on Human Rights to visit their countries. Thanks to such cooperation, the Working Group was able to conduct official missions in 2003 to the Islamic Republic of Iran and Argentina. The Group is in contact with the Governments of Belarus, Latvia and South Africa with a view to visiting two of these countries in 2004, and with the Government of Canada to visit that country in 2005. The Group considers that these visits are important for the implementation of its mandate.

81. The results of the missions have confirmed the 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.

82. Taking note of resolution 2003/68, the Working Group draws the Commission's attention to the fact that, since 11 September 2001, it has received many communications about the arbitrary character of detention in several countries where inquiries into terrorist acts have been carried out. It has also been sent reports from reliable sources referring to secret detention centres where suspected terrorists are held, to lengthy administrative detention without judicial supervision, to transfers of detainees from one country to another in violation of the principle of non-refoulement and the guarantees accompanying normal extradition proceedings, and to abuses of immigration law so as to circumvent judicial guarantees and hold aliens in detention indefinitely.

83. Bearing in mind the rising importance of the Internet and similar modern information media, the Working Group is concerned that some States unduly interfere, through the application of criminal law sanctions, with the use of the Internet. Therefore, it considers that the question of arbitrary detention with regard to the use of the Internet deserves more extensive study.

V. RECOMMENDATIONS

84. **The Working Group reaffirms there can be no doubt that the fight against terrorism may require the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial; it nonetheless points out that in all circumstances deprivation of liberty must remain consistent with the norms of international law.**

85. **The Working Group considers that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts.**

86. **The Working Group considers that, even where illegal immigrants and asylum-seekers are concerned, any decision to place them in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law and that, where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary.**

87. **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.**

Notes

¹ See E/CN.4/1995/31, para. 25 (d).

² In its last annual report (E/CN.4/2003/8) the Working Group adopted a legal opinion of general scope, in which it clarifies its position on the lawfulness of detention for the category of so-called “enemy combatants” and applied that jurisprudence to an individual communication concerning four persons held at Guantánamo Bay (see Opinion No. 5/2003, E/CN.4/2004/3/Add.1).

³ See E/CN.4/1995/31, para. 14.

⁴ See E/CN.4/1993/24, para. 31, E/CN.4/1994/27, paras. 72 and 73, and E/CN.4/1995/31, para. 25 (d).

⁵ See E/CN.4/2004/3/Add.1, Opinion No. 21/2002, adopted by the Working Group on 3 December 2002.

⁶ In a letter addressed to the Working Group, the Government of the United States of America acknowledged that “some enemy combatants have been transferred to their countries of nationality for continued detention”.

Annex

STATISTICS

(Covering the year 2003. Figures in parentheses are corresponding figures from last year's report)

1. Cases of detention declared arbitrary

	<u>Female</u>	<u>Male</u>	<u>Total</u>
Cases of detention declared arbitrary falling within category I	1 (0)	8 (2)	9 (2)
Cases of detention declared arbitrary falling within category II	0 (2)	107 (59)	107 (61)
Cases of detention declared arbitrary falling within category III	0 (0)	12 (7)	12 (7)
Cases of detention declared arbitrary falling within categories II and III	0 (2)	3 (20)	3 (22)
Cases of detention declared arbitrary falling within categories I and II	0 (0)	0 (0)	0 (0)
Cases of detention declared arbitrary falling within categories I and III	0 (0)	0 (0)	0 (0)
Cases of detention declared arbitrary falling within categories I, II and III	0 (0)	0 (0)	0 (0)
Total number of cases of detention declared arbitrary	1 (4)	130 (88)	131 (92)

2. Cases of detention declared not arbitrary

<u>Female</u>	<u>Male</u>	<u>Total</u>
0 (0)	0 (13)	0 (13)

3. Cases which the Working Group decided to file

	<u>Female</u>	<u>Male</u>	<u>Total</u>
Cases filed because the person was released, or was not detained	0 (1)	18 (17)	18 (18)
Cases filed because of insufficient information	0 (0)	2 (2)	2 (2)
Total number of cases dealt with by the Working Group during 2002	1 (5)	150 (120)	151 (125)
