



International Service for Human Rights

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ISHR's summaries of documents for Human Rights Council 4th Session

Reports of the Working Group on Arbitrary Detention¹

Chairperson Rapporteur

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Mandate

The mandate was established in 1991² to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts. The Working Group operates mainly by seeking and receiving information from Governments and intergovernmental and non-governmental organisations, as well as individuals concerned, their families or their representatives. The Working Group acts on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and/or bring to their attention these cases. The Working Group also conducts many country visits (also called 'missions') upon the invitation of the Government, in order to understand the situation prevailing in that country, as well as the underlying reasons for instances of arbitrary deprivation of liberty. The right not to be subject to arbitrary detention includes the right to be informed of the charges against oneself, the right to be brought promptly before a judge, and the right to challenge the legality of the detention.

Activities

- Annual report;
- The Working Group adopted 47 opinions concerning 104 cases in 23 countries;³
- During the period from 9 November 2005 to 8 November 2006, the Working group transmitted 156 urgent appeals to 58 Governments concerning 1,615 individuals. 54 of its urgent appeals were replied to. This figure is 3.5% less than last year;
- Mission to Ecuador, 12 – 22 February 2006;
- Mission to Honduras, 23 – 31 May 2006;

¹ Summary prepared by Hannah Klein, Intern, ISHR and Rami Chalabi, Intern, ISHR; edited by Gareth Sweeney, Information Program.

² Commission on Human Rights 1991/42

³ The complete texts of Opinions Nos. 1/2006 to 31/2006 can reproduced to addendum 1 of A/HRC/4/40

- Mission to Nicaragua, 15 – 23 May 2006;
- Mission to Turkey, 9 – 20 October 2006.

Annual Report⁴

Summary and key conclusions:

15 Years of Working Group activities

- The report draws attention to the Deliberations and Legal Opinions of a general nature, formulated during its mandate, referring to examples such as Deliberation 1 on “Restricted residence of house arrest”. It also notes the key issues that have been analysed in Working Group reports, particularly mentioning examples such as abuses of states of emergency and detention motivated by sexual orientation.

Activities for 2006

- In addition to a detailed account of the opinions and communications of the Working Group for 2006, the report discussed the reactions of the USA, who argued that the Working Group had no mandate to consider situations governed by international humanitarian law, such as the armed conflict in Iraq. The Working Group reiterated its established position that “the application of international humanitarian law... does not exclude the application of international human rights law”.⁵⁶
- The Working Group discussed follow-up information provided from the Governments of Belarus, Latvia, Ecuador, Nicaragua and China regarding the implementation of its recommendations following its visits. Belarus, Latvia, Ecuador and Nicaragua all appeared to have implemented a number of concrete recommendations. The Government of China assured the Working Group that it had taken due note of its recommendations, but provided no evidence of action to implement them.

Legal Opinion on preventing arbitrary detention in the context of international transfer of detainees, particularly in countering terrorism

- The report explores the negatives effects of cooperation between States on bringing to justice the perpetrators of terrorist attacks. It shows an increase in the number of cases of allegedly arbitrary detention involving more than one Government, providing numerous examples.⁷
- In light of these cases, the Working Group emphasises the responsibilities of Governments cooperating in transferring persons to the custody of a State where there are substantial grounds for believing that there is a serious risk of arbitrary detention.

⁴ A/HRC/4/40, 9 January 2007

⁵ E/CN.4/2006/7

⁶ E/CN.4/2006/120 para. 83

⁷ For example, cases of individuals transferred from Myanmar to China, Iran to Afghanistan to USA, UK/US/Turkey/Bulgaria to Syria. See A/HRC/4/40, paras. 32-29.

- The report refers to two principles of international law that should guide Governments on this matter. These are the preference for using criminal justice and extradition proceedings to hold perpetrators of terrorist acts accountable, and the principle of non-refoulement⁸.
- The Working Group notes that the practice of rendition has no basis in international law.
- The Working Group goes on to argue that any diplomatic assurances with regard to detention and fair trial should only be accepted if very stringent conditions are met. Instead of these assurances, the Working in Group has observed what it calls “reverse diplomatic assurances”, where sending states are specifically asking for the person being handed over to be deprived of their liberty, although there are no legal bases for detention. For example, the USA Government has sought “reverse diplomatic assurances” when removing persons from Guantanamo Bay.

Overview of the penitentiary systems and the conditions of detainees

- The Working group has noted with concern the global increase in the number of detained people, particularly in developed countries.⁹ Although the Working Group is aware that some aspects of the penitentiary system fall outside its mandate, it is convinced that a decrease in the prison population contributes to a better functioning of prisons.
- It proceeds to explore global problems with mechanisms of judicial control; conditions in overburdened prisons; waiting time before trial; overburdened judges and defence lawyers; and systems of legal aid.

Key recommendations:

- Governments should include the risk of arbitrary detention in the receiving State among elements to be taken into consideration whenever they extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism.
- Governments should stop all forms of rendition and return to the legal proceedings of extradition, deportation and expulsion.
- All diplomatic assurances accepted regarding detention and a fair trial should meet stringent conditions stipulated in the report. Governments should refuse to give “reverse diplomatic assurances”.
- The recent growth in prison populations should be studied and debated with a view to developing measures favouring respect of the rights of detainees.
- States should join efforts to ensure and guarantee the basic needs of detainees, and review their legislation in order to establish or enlarge the scope of alternatives to detention.

⁸ Non-refoulement means that States should not send a person to country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. See Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁹ According to statistics prepared by the School of Law, King’s College, London, at the end of February 2005 there were 9 million people detained around the world, the majority of whom were pre-trial detainees.

- States should ensure that pre-trial detention is strictly limited and credited towards any final sentence.

Opinions adopted by the Working Group on Arbitrary Detention¹⁰

The report contains the opinions adopted by the Working Group at its forty-fourth, forty-fifth, and forty-sixth sessions, held in November 2005, May 2006 and August 2006 respectively. Opinions were adopted on China,¹¹ Cambodia, France, Tunisia, Colombia,¹² Iraq and the USA,¹³ Yemen, Namibia, Uzbekistan, Egypt, United Kingdom of Great Britain and Northern Ireland,¹⁴ Myanmar, Japan, Libyan Arab Jamahiriya,¹⁵ Saudi Arabia,¹⁶ Algeria, Islamic Republic of Iran,¹⁷ Syrian Arab Republic,¹⁸ Lebanon, Gabon, Cameroon, Qatar, Romania, Uruguay, and the United States of America.

Mission to Ecuador¹⁹

Scope:

The mission took place from 12 to 22 February 2006. A delegation from the Working Group visited the capital, and Azuay and Guayas provinces. The delegation held talks with officials of the executive, legislative and judicial branches, and with representatives of civil society, members of the academic community and others. The delegation visited 13 detention centres and held private meetings without witnesses with some 200 detainees. The report on the mission describes the bases of the institutional and legal framework for detention under criminal, administrative and immigration law. The report identifies as issues of concern the divergences between the standards enshrined in the Constitution, the laws in force and observed practices.

Summary and key conclusions:

Legal and institutional reforms

- Since February 1997, Ecuador has overhauled its domestic legal system and political structure. However, in recent years this process of developing laws and regulations has been affected by political instability, which gave rise to the institutional crisis of 2004.
- Judges, prosecutors, representatives of the Office of the Ombudsman and prison wardens appear to be carrying out their work in full accordance with the Constitution and the deadlines set by legislation governing trials.

¹⁰ A/HRC/4/40, 9 January 2007.

¹¹ 4 opinions adopted.

¹² Three opinions adopted.

¹³ Five opinions adopted.

¹⁴ Two opinions adopted.

¹⁵ Two opinions adopted.

¹⁶ Two opinions adopted.

¹⁷ Three opinions adopted.

¹⁸ Three opinions adopted.

¹⁹ A/HRC/4/40/Add.2, 26 October 2006.

- The Working Group feels that there is a considerable discrepancy between the norms contained in the Constitution and some of the domestic laws and the practices observed. Some of the provisions of the Criminal Code, the Code of Criminal Procedure and decisions taken by the national or provincial authorities weaken the Constitutional guarantees.

Detention en firme

- Articles 10 and 16 of the *Act No. 2003-101*, which amend articles 160 and 173 of the Code of Criminal Procedure, establish that judges are obliged to order the *detencion en firme* of a subject without taking into consideration whether the constitutionally established time limit for pre-trial detention has elapsed. Many human rights and legal defence organizations have challenged the introduction of this a contradiction of Article 24.8 of the Constitution.
- *Detencion en firme* has brought about a situation where thousands remain in detention for extended periods awaiting judgement, often for several years. Article 14(3)(c) of the *International Covenant on Civil or Political Rights* states that persons must be tried without undue delay.

Other concerns

- Despite provisions of domestic law to the contrary, the Working Group noted that there were pregnant women and many people over 65 in pre-trial detention.
- The level of violence at detention centres is particularly high.
- Ill-treatment by officers of the Judicial Police, including torture, is apparently common during the initial phases of detention.
- There are only 32 public defenders in the entire country.

Key recommendations:

- Additional funding should be given to police and penitentiary institutions to improve the conditions of detention and police stations.
- Serious consideration should be given to repealing *detencion en firme*.
- Urgent measures need to be taken to put public defence on an equal footing with the Public Prosecutor's Office.
- The overcrowding in police cells, pre-trial detention centres and social rehabilitation centres must be appropriately remedied.

Mission to Honduras²⁰

Scope:

The mission took place from 23 to 31 May 2006. The Working Group met with relevant authorities in the executive and judicial branches and with representatives of civil society and non-governmental organisations. It visited 10 detention facilities, including police

²⁰ A/HRC/4/40/Add.4, 1 December 2006.

stations, prisons and young offenders facilities and interviewed in private more than 200 detainees.

Summary and key conclusions:

- The Working Group observes that since the beginning of the 1990s, the entry into force of a new Criminal Procedure Code in 2002 has expedited criminal proceedings and significantly reduced the number of detainees held on remand, as well as the duration of detention.
- However, the Working Group identified several ways in which reality does not match these new high standards established by the Constitution and the laws of Honduras. Institutions mandated to monitor the legality of detention are considered to be ineffective. Serious shortcomings are noted in the system of legal aid for indigent defendants. The Working Group also identified a lack of checks and balances between the police and the judiciary, and insufficient monitoring of the police during the course of the criminal justice process. The Working Group identified two main reasons explaining this situation. First, the public prosecution lacks independence from the police; and second, the police (rather than an independent penitentiary institution) run the prisons, in which both remand detainees and convicts are held.
- The Working Group were particularly concerned about two specific categories of detainees:
 - The more than 1,800 detainees who were already in pre-trial custody when the Criminal Procedure Code entered into force four and a half years ago are still in detention; and
 - The members of violent youth gangs (*maras*) – a phenomenon that raises considerable alarm in Honduras – whose treatment does not appear to be fully compatible with Honduras’ obligations under international human rights law.

Key recommendations:

- With regard to the situation of the detainees held under the old criminal procedure code:
 - All detainees held under the old criminal procedure code who have been acquitted in the first instance should be released, in accordance with the Supreme Court judgments but without any need for further pronouncements of the Supreme Court.
 - Significant resources must be assigned to address the situation of preventative detainees held under the old code and priority should be given to solving their situation. A time plan for resolving their cases should be drawn up expeditiously under the leadership of the Supreme Court.
- In order to strengthen the control over the legality of detention at all stages of the criminal justice process:

- All institutions in which persons are detained need to maintain complete and transparent records showing the legal basis for detention.
- *Jueces de ejecucion* should carry out their mandate as proactively as set forth in the criminal procedure code, and need to be equipped for the purpose.
- Measures need to be taken to render public defence more effective, including both material resources and training.
- When the legal basis for detention expires, they must be released, without any further need for a judicial decision.
- The penitentiary system needs to be established as a separate institution.
- In the meantime, steps should be taken to bring the prison system closer to compliance with the *UN Standard Minimum Rules for the Treatment of Prisoners*.
- All branches of Government, with input from civil society, should reconsider the response of both the criminal justice system and the State in general to members of the *maras*.
- The investigative capacities of the public prosecution must be strengthened.

Mission to Nicaragua²¹

Scope

The mission took place from 15 to 23 May 2006. The delegation travelled to the Managua, Estelí and Bluefields. The delegation visited eight custodial facilities, including prisons, juvenile detention centres, custodial centres for immigrants and police cells. They were able to have private meetings, without witnesses with 150 detainees selected at random. During its visit, the delegation also had meetings with government authorities at national and provincial level, representatives of the National Assembly, members of the judiciary, officials from self-governing bodies, civil-society representatives, academics and other individuals.

Summary and key conclusions

- The report provides a survey of the institutional framework of Nicaragua, describing the separation of powers, the different levels of the court system, the functioning of the Public Prosecutor's and Defender's offices, and the national police.
- The report gives a comprehensive review of the legal framework for detention, including constitutional rights; rules surrounding police custody, preliminary hearings, initial hearings, trial hearings, pre-trial custody, detention in the enforcement of judgements, detention of minors, administrative detention of immigrants and asylum-seekers; and legislation on narcotics and psychotropic substances.
- Positive comments made by the delegation:
 - The Nicaraguan Government was fully cooperative with the mission.

²¹ A/HRC/4/40/Add.3, 9 November 2006.

- The promulgation of the new Code of Criminal Procedure in 2001 replaced the former inquisitorial system with a new adversarial one based on open, public trials, including jury trials and a system of plea-bargaining.
- There has been a significant decrease in the number of unjustified or arbitrary arrests and detentions. The majority of those held in detention are now convicted persons serving sentences. Fewer than 18% of the prison population were being held in pre-trial custody.
- There is a clear perception amongst the public that courts are now transparent.
- Thanks to ratification of the *Convention on the Rights of the Child* and promulgation of the *Children's and Young Person's Code*, the situation regarding minors in conflict with the law has been considerably improved. The delegation heard reports of preventative work being conducted by the police in marginal urban communities. New legislation stipulates that juvenile delinquency must be tackled through restorative justice programmes.
- Areas of concern identified by the delegation:
 - The delegation was concerned that detainees are sometimes not brought before a judge for a preliminary hearing within the 48-hour period, or given their second appearance within 12 days of arrest as required by national law. When visiting police stations, the delegation observed that there were no systematic registers recording precisely the dates on which detainees were admitted to and released from the police station.
 - The report discusses the plight of so-called “Donados” (or “gifts” to the prison system), who have virtually no communication with the outside world because they are held in prisons far from their homes, do not have relatives willing or able to visit them, or because they have no funds to pay for a lawyer. Such detainees are frequently at risk of being detained arbitrarily as they are incapable of exercising privileges of parole.
 - The delegation noted that penalties under legislation relating to narcotics and psychotropic substances were particularly harsh. Defendants awaiting trial for drugs offences may not be granted bail. Although these harsh penalties are geared towards combating international drugs trafficking, it is primarily users and small-scale traffickers who are punished, and these individuals usually belong to the poorest and most vulnerable sectors of the population. Further, sentences are overly dependent on the precise weight of the drug, with few guarantees against mistakes or abuse in the measurement of this weight.
 - The delegation were particularly concerned about the situation in the Caribbean coastal region of Nicaragua, Bluefields, where most of the population either belong to indigenous groups or are of African descent. The arrangements for detainees in the police station are described as “intolerable”, with the majority being held in pre-trial custody, and some serving their sentences there rather than in prison. The defendants complained of not having been brought to trial until several weeks after

their arrest, and of being subjected to torture and ill-treatment. The delegation found evidence of implements used for torture and one detainee was found chained to a post in the police forecourt, having been left there for more than three months.

- The delegation expressed concern over the continuing provisions in Nicaraguan civil law relating to the institution of “enforcement by committal”.²² Some individuals have remained in police cells on these grounds for up to a year.

Key recommendations:

- The authorities must ensure that police comply strictly with the requirement to bring every detainee before a judge within a maximum of 48 hours following his or her arrest.
- The authorities must take steps to improve the system of registers kept in police stations.
- The country’s drugs laws must be revised.
- The institution of “enforcement by committal” should be removed from the civil statute books.
- The situation of detainees in Bluefield must be urgently reviewed.

Mission to Turkey

Scope:

The mission took place from 9 to 20 October 2006. In the course of the visit, the Working Group met with the relevant authorities in the executive and judicial branches, with representatives of civil society and non-governmental organisations, and privately with more than 200 detainees. It also had the opportunity to visit prisons, police stations, migration holding facilities and a psychiatric hospital.

Summary and key conclusions:

- Turkey has undertaken profound reforms in the last number of years. One of the most significant was the entry into force of the new *Criminal Procedure Code* in 2005.
- The Working Group welcomed the reforms carried out by Turkey in the criminal justice system, such as the ban on statements obtained by the police in the absence of a lawyer, the shortening of the duration of police custody, the introduction of limitation on the duration of pre-trial detention, and the guarantee of the immediate right of access to a lawyer.
- **Criminal justice in terrorism cases:**

²² This refers to the power accorded to a judge in civil proceedings to order the detention of an individual if he or she has failed to surrender an assets hand over as a deposit or loan guarantee, or if he or she fails to comply with a contractual obligation.

1. Concerns were expressed that the detention, prosecution and trial of terrorism suspects take place in a “parallel system” to the common justice system;
 2. The definition of “terrorism” of the *Anti-Terror Act* is very broad and may limit freedoms of expression, association and assembly. The recommendations of the Special Rapporteur on counter terrorism on the amendments to this *Act* have only partially been taken into account;
 - o There are limitations to the right to be assisted by counsel of one’s own choosing. If there is evidence that the defence lawyer might be “liaising” between the detainee and a terrorist organisation, the judge can order the presence of an official during meetings between the suspect and his lawyer, who will be able to examine documents passed between them.
 - o The length of remand detention raised concern, as well as the fact that the time limit provided by the *Criminal Procedure Code* will be applied to persons accused of terrorists crimes only in April 2008.
- **Detention outside the criminal justice system:**
 - o The Working Group observed considerable shortcomings in the protection of rights outside the criminal justice system.
 - 3. There is no remedy for foreigners awaiting expulsion to challenge their detention, and there is no control over detentions by the judicial authority.
 - o The absence of details both on the substantive criteria and the procedural safeguards for involuntary commitment to mental health institutions, including an automatic periodic review of the necessity of deprivation of liberty, was an issue of concern, as well as the fact that very often there is no judicial decision providing a legal basis for the assignment.

Key recommendations:

The Turkish Government should:

- Amend the definition of terrorism to limit its scope;
- Release detainees detained for more than ten years on terrorism charges without having been found guilty, and take measures regarding those held for more than ten years on remand;
- Lift the limitation on the number of defence counsel in terrorism cases;
- Increase its efforts to fully implement the principle that deprivation of liberty shall be the last resort for juvenile offenders and to limit periods of remand detention;
- Ensure that the specialized police departments, prosecutors’ offices and courts for juvenile offenders provided by law are established to cover the entire territory of Turkey;
- Enact a law creating a framework for the detention of foreigners whose detention is considered as necessary to ensure the implementation of migration laws. Before this is established, decisions should include judicial review;
- Enact legislation governing involuntary commitment to psychiatric hospitals.