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Reports of the Working Group on Arbitrary Detention[1]

Chairperson-Rapporteur

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Mandate

The mandate was established in 1991[2] 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 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

- During 2005, the Working Group held its 42nd, 43rd and 44th sessions;
- The Working Group adopted 48 Opinions concerning 115 persons in 30 countries. In 30 cases, it considered the deprivation of liberty to be arbitrary[3];
- The Working Group transmitted a total of 181 urgent appeals concerning 565 individuals to 56 Governments. 168 were joint urgent appeals with other special procedures of the Commission. 32 Governments informed the Working Group that they had taken measures to remedy the situation of detainees, which indicated a five per cent increase in the response rate in comparison to 2004;
- The Working Group joined efforts with four other mandate holders to produce a study to determine the situation of detainees in the detention centre of Guantánamo Bay[4]. The Working Group and two other mandate holders were invited to visit the detention facilities, but owing to USA's refusal to allow them to conduct interviews with detainees, they decided to refuse this invitation;
- Mission to Canada from 1 to 15 June 2005;
- Mission to South Africa from 4 to 19 September 2005.

Annual Report[5]

Scope

Summary of the activities undertaken in 2005; review of Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet; review of issues of concern; and analysis of the competence of the Working Group with regard to cases of detention linked to armed conflicts.

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[2] Commission on Human Rights *Resolution 1991/42.*
[3] The Opinions are contained in E/CN.4/2006/7/Add.1, except for information about 11 Opinions, which could not, for technical reasons, be included in that report and are therefore detailed in p.5-8
[4] This study can be found in report E/CN.4/2006/120.
[5] E/CN.4/2006/7, 12 December 2005.

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Summary and Key Conclusions

Communications with Governments:

- The Syrian Arab Republic, the United States of America, Egypt and Mexico all reacted to the Working Group's Opinion concerning them. In relation to the USA's reaction, the Working Group reaffirmed the principle that the exhaustion of local remedies does not apply to the Commission's special procedures;
- The Working Group requested follow-up information from Argentina and the Islamic Republic of Iran regarding the implementation of its recommendations following visits in 2003. The former informed the Working Group that the presence of a defence lawyer or legal counsel at all stages of legal proceedings had been deemed compulsory. The latter reported that it was keeping track of detention cases related to migrants. It also mentioned that circulars had been issued to promote good treatment of foreign nationals. The Government also referred to the adoption of the *Istanbul Protocol*, and training courses on human rights for law enforcement staff.

Deliberation No. 8 on deprivation of liberty linked to or resulting from use of the Internet:

- The number of criminal convictions linked to, or resulting from, the use of the Internet continues to increase, especially in light of the new phenomenon of using the Internet for terrorist purposes. In most communications received related to the use of the Internet, deprivation of liberty was arbitrary, falling under category II, which is punishment for the exercise of freedom of expression;
- The Working Group concluded that despite technical differences between the Internet and other means of communications, the same rules of international law govern freedom of expression over the internet and the conditions for its lawful restrictions. The use of the Internet may therefore only be restricted if it unduly interferes with the rights of others or if it aims to promote terrorist purposes;
- The Working Group assesses the conformity of the deprivation of liberty in the context of freedom of expression with international standards on a case-by-case basis. Restrictions on freedom of expression can only be justified if they have a legal basis, are not at variance with international law, and are necessary to ensure the respect of the rights of others, or for the protection of national security, public order, public health or morals, and are proportionate to the pursued aims, which are legitimate[6].

The competence of the Working Group with regard to cases of detention linked to armed conflicts[7]:

- The Working Group's mandate neither explicitly includes nor excludes detention in situations of armed conflict but considers its mandate as being to deal with communications arising from a situation of international armed conflicts, to the extent that the detained persons are denied the protection of the *Third* and *Fourth Geneva Conventions*.

Other issues of concern:

- The Working Group has received reliable information about the existence of **secret prisons** around the world, in the context of the so-called **"global war on terror"**, which contravene the international obligations and responsibilities of the accountable Governments. Transfers and detention occur outside the confines of any legal procedure, and there is no access to counsel or to any judicial body to contest the legality of the transfers or detention. These secret prisons are in violation of international human rights law and tend to increase the practices of torture and other cruel, inhuman or degrading treatment;
- **Over-incarceration**: 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, especially with regard to detentions preceding trial. Acts of discrimination, such as racial profiling in law enforcement, certain bail systems, and insufficient steps to enforce social and economic rights of **vulnerable groups** significantly contribute to their **over-representation** in the penal system;

Key Recommendations

- States should take into account the principles elaborated in the Working Group's **Deliberation No. 8**;
- States should **stop running secret prisons** and the transfer of suspected individuals between States should have a **sound legal basis**;
- Governments should make efforts to **avoid over-incarceration** and to **mitigate the over-representation of vulnerable groups** among the prison population. In this respect, they should take best practices into consideration and establish alternative measures to detention;

[6] Detailed information can be found in pp.15-16 of the report

[7] Detailed information can be found in pp.20-22 of the report.

- States should guarantee the effectiveness of the right to challenge the lawfulness of detention by any foreign national detained under **immigration laws**. The detention of asylum-seekers should remain exceptional and not mandatory, and when detained they should be held separate from convicts.

Mission to Canada[8]

Scope

The Working Group on Arbitrary Detention (the Working Group) visited Canada from 1 to 15 June 2005. The experts visited 12 detention facilities and met with and interviewed more than 150 detainees. The delegation also met with officials of the federal, provincial and territorial governments, members of the judiciary, representatives of civil society, former detainees, relatives of persons in detention and other individuals.

Summary and key conclusions

- Owing to Canada's **federal constitutional system**, systems for administration of justice differ between various jurisdictions. Despite this, Canada generally has a **strong** and **independent judiciary**, and a **vigorous private legal profession**, which exercise control over the lawfulness of all forms of deprivation of liberty;
- **Public enquiries** into cases of malfunctioning of the criminal justice system have allowed Canada to clarify systematic factors and root causes of several issues within the Working Group's mandate;
- The Sentencing Reform Act and the Youth Criminal Justice Act, which provide for the enhanced use of sanctions falling short of incarceration, have contributed to significantly lowering the incarceration rate in Canada;
- So far, this trend has not benefited **Aboriginals**, whose representation in the corrections system has further increased, despite provisions in the sentencing reform that particular attention shall be paid to Aboriginal offenders;
- The rate of **pre-trial detention** has also increased, disparately affecting vulnerable social groups, mainly because the decision to grant bail is usually based on the accused's "roots in the community". Canada has undertaken several **innovative measures** to counteract this tendency, such as specialised courts for vulnerable social groups, but more remains to be done;
- While there is a well-developed criminal legal aid system to secure the constitutionally guaranteed **right to counsel**, in practice the system does not cover the need of many people;
- Although increased concern about security has had an impact on Canada, the **detention of refugee claimants** and **foreigners** remains the exception rather than a common practice;
- The Working Group expressed concern regarding several provisions of the **immigration law** governing the detention of asylum-seekers and migrants, which give immigration officers wide discretion in detaining aliens and limit the review of decisions ordering detention;
- There are also **practical aspects of the detention of aliens** under the immigration law, such as cultural and language barriers, obstacles to the access to legal counsel and to assistance by NGOs, as well as co-mingling with criminal detainees in high security prisons, which result in considerable difficulties in challenging detention;
- The **security certificate process** is highly concerning, because it allows the Government to detain aliens for years on the suspicion that they pose a security threat, without filing criminal charges; limits judicial review of detention only to the 'reasonableness' of the allegation; and restrains the detainee's ability to challenge detention as the evidence on which the security certificate is based is not fully disclosed to the detainee or his/her lawyer;
- The Working Group enjoyed full cooperation of the authorities and noted that they and civil society were aware of the issues of concern raised by the Working Group and were pursuing measures to address these issues.

Key recommendations

- The authorities should continue pursuing and strengthening policies to address the **over-representation of Aboriginals among the prison population**, in particular by increasing the participation of Aboriginal professionals in law enforcement and the justice system, and by increasing efforts to sensitise the members of law enforcement agencies;
- The authorities should address and **reverse the trend of increasing use of pre-trial detention** and pursue their efforts to find innovative alternatives to detention on remand;
- The authorities should ensure that the **detention of asylum-seekers continues to occur only in exceptional circumstances** and should change the provisions of the immigration law, which give rise to

[8] E/CN.4/2006/7/Add.2, 5 December 2005.

cases of unjustified detention of migrants and asylum-seekers. The Government should also take remedial action with regard to the practical aspects of immigration detention that impede the effectiveness of the right to challenge detention;
- The Government should reconsider its policy of **security certificates**. The detention of the individuals concerned should be undertaken within the framework of criminal procedures and in accordance with the corresponding safeguards.

Mission to South Africa[9]

Scope

Mission to South Africa from 4 to 19 September 2005. The Working Group visited 15 detention facilities, in which it was able to meet with and interview more than 500 detainees. The delegation also met with officials of the national and provincial governments, members of Parliament, the judiciary, officials of independent institutions, international organisations, representatives of civil society, and members of academic institutions.

Summary and key conclusions

The report sets out the institutions and norms relation to the issues of detention and of human rights, either in the context of criminal law or of immigration law. It also describes the different proceedings that can lead to detention and all the actors involved.

- The reports commends South Africa for the **dramatic changes** that have taken place over the last 15 years and highlights the **democratic culture** taking root, committed to the respect of the rule of the law and human rights. It also noted that the **protection of human rights**, especially the rights of arrested and detained persons, are well established in the Constitution;
- A variety of institutions with different executive, legislative and judicial powers play a key role in change in the context of the long transition and evolution of attitudes from an authoritarian regime to a mature democracy. These include the Independent Complaints Directorate, which oversees police action, the Investigating Judge of Prisons, and the South African Human Rights Commissions, which investigates complaints of human rights violations and provides human rights education;
- The transformation of the correctional system and the improvement of conditions of detention for convicts are among the priorities included in current reforms. The orientation of the present correctional policy is towards **rehabilitation** and **reintegration** and the Government has established a **legal aid system** available to all detainees in the criminal process, which does not jeopardise the independence of the legal profession;
- The **rate of incarceration** in South Africa is very high, in a context of a high level of criminality due to economic difficulties and persistent inequalities. The rate of incarceration is attributed partly to the Government's tough-on-crime approach, the harsh and long sentences given by courts, and the **mandatory minimum sentences** that are applicable to a range of offences. This has led to a concerning number of people serving long sentences in comparison to the gravity of their crime, and an alarming rate of **overcrowding** in detention facilities;
- The conditions of detention affecting pre-trial detainees are much worse than those for convicts as the facilities are inadequate and sub-standard. This is aggravated by the fact that there is no legal stipulation or directive asking Judges to take the time spent in pre-trial detention into account while deciding the period of the final sentence;
- There is a high rate of **police brutality**, reflected in a high number of deaths in police custody, leading to a negative perception of police activities;
- There is **no separate justice system for young offenders**, although a Child Justice Bill is being discussed;
- The Working Group is concerned about the situation of **foreigners detained under immigration laws**, as the procedure does not make it possible to effectively challenge the lawfulness of detention, thereby increasing the risk of expulsion without any review of recourse of the case for asylum. The procedure also places the burden to prove the right to remain in the country on the person concerned and does not allow for legal aid. There have been allegations of arbitrary arrests and ill-treatment, and the conditions of detention in the Lindela Repatriation Centre in particular do not meet international standards. The Working Group commended the South African Human Rights Commission for its work in this regard;

[9] E/CN.4/2006/7/Add.3, 29 December 2005.

- The Working Group enjoyed the fullest **cooperation of the authorities** in all respects. It noted the constraints and exceptional efforts and resources involved in implementing reform in view of the recent establishment of democracy.

Key recommendations

- Urgent measures are needed to address the **overcrowding in pre-trial facilities** and **police stations**, by making more use of **alternative measures to detention**, reducing the duration of pre-trial detention by all means and avoiding holding pre-trial detainees in police cells;
- An **independent inspecting body** should be established to visit police cells and immigration detention centres or the Inspecting Judge should be authorised to fulfil this function;
- Laws and their implementation in the criminal justice system should be reviewed to ensure that any **time spent in pre-trial detention is taken into account in the final sentence**;
- Situations where people are incarcerated simply because of their **poverty** should be prevented, and alternative sentencing options should be considered in these circumstances;
- The Government should continue the **reforms** already engaged in order to improve the treatment of **young offenders** and to set up a **specialised system of justice for minors**. Pre-trial detention for minors should only be practiced as an exceptional measure, minors under the age of 16 should be excluded from the correctional system, and separate institutions should be established for minors under 18;
- The Government should take appropriate measures to allow for an **effective challenge of the detention of illegal foreigners**.

Opinions adopted by the Working Group on Arbitrary Detention[10]

Scope

This report contains the opinions adopted by the Working Group on Arbitrary Detention at its 41st, 42nd, and 43rd sessions held in November/December 2004, May 2005, and September 2005 respectively. Opinions were adopted on Colombia, the United Arab Emirates, Algeria, China, Saudi Arabia, the Syrian Arab Republic, Turkmenistan, Qatar, Egypt, Latvia, Sri Lanka, Mexico, Myanmar, Bolivia, the Libyan Arab Jamahiriya, Bolivia, the United Sates of America, Pakistan, Vietnam, Australia, Lebanon, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, Brazil, Tunisia and Belarus.

Joint Report on the situation of detainees at Guantánamo Bay[11]

By the Chairperson- Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Scope

Since January 2002, the five mandate holders have been following the situation of detainees held at the United States Naval Base at Guantánamo Bay. In June 2004, they decided to continue this task as a group because the situation falls under the scope of each of the mandates. In studying the situation, they have continuously sought the cooperation of the United States authorities and on 25 June 2004, they sent a letter, followed by several reminders, requesting the Government of the United States of America to allow them to visit Guantánamo Bay in order to gather first-hand information from the prisoners themselves. By letter dated 28 October 2005, the Government of the United States extended an invitation for a one-day visit to three of the five mandate holders, inviting them "to visit the Department of Defense's detention facilities [of Guantánamo Bay]". The invitation stipulated that "the visit will not include private interviews or visits with detainees". In their response to the Government dated 31 October 2005, the mandate holders accepted the invitation, including the short duration of the visit and the fact that only three of them were permitted access, and informed the United States Government that the visit was to be carried out on 6 December 2005. However, they did not accept the exclusion of private interviews with detainees, as that would contravene the terms of reference for fact-findings missions by special procedures and undermine the purpose of an objective and fair assessment of the situation of detainees held in Guantánamo Bay. In the absence of

[10] E/CN.4/2006/7/Add.1, 19 October 2005.
[11] E/CN.4/2006/120, 27 February 2006.

assurances from the Government that it would comply with the terms of reference, the mandate holders decided on 18 November 2005 to cancel the visit[12].

The report is therefore based on the replies of the Government to a questionnaire concerning detention at Guantánamo Bay; interviews with former detainees; responses from lawyers acting on behalf of some Guantánamo Bay detainees; and information available in the public domain, including reports prepared by NGOs, information contained in declassified official US documents and media reports. A number of revisions were made in the light of the Government's reply of 31 January 2006. The report should be seen as a preliminary survey of international human rights law relating to the detainees in Guantánamo Bay.

Summary and Key Conclusions

- As of 21 October 2005, approximately **520 detainees** are being held in Guantánamo Bay. From the establishment of the detention centre in January 2002 until September 2005, 264 persons were transferred from Guantánamo, 68 of whom were transferred to the custody of other Governments. As of the end of December 2005, a total of **nine detainees** had been **referred to a military commission**;
- **International human rights law** is applicable to the analysis of the situation of detainees in Guantánamo Bay and the war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of **international humanitarian law**. The USA has not notified the Secretary-General of any official derogation from the *International Covenant on Civil and Political Rights* (ICCPR). Nevertheless, some rights can never be derogated from, such as the right to life; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; and freedom of thought, conscience and religion;
- The position of the USA is that the laws of war allow it to hold enemy combatants without charges or access to counsel for the duration of hostilities, not as a measure of punishment, but of security and military security. It is particularly important to distinguish between the detainees captured by the United States in the course of an armed conflict and those captured under circumstances that did not involve an armed conflict. Many of the detainees held at Guantánamo Bay were captured in places where there was - at the time of their arrest - no armed conflict involving the United States. In this context, it is to be noted that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law. The legal provision allowing the United States to hold belligerents without charges or access to counsel for the duration of hostilities can therefore not be invoked to justify their detention. The interviews conducted by the mandate holders with detainees corroborated allegations that the purpose of the detention of most of the detainees is not to bring criminal charges against them but to extract information from them on other terrorism suspects.. The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of ICCPR, and to obtain release if detention is found to lack a proper legal basis. This right is currently being violated, as the Combatant Status Review Tribunal (CSRT) created to consider challenges to the legality of detention does not provide detainees with a fair opportunity to do so; and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of Article 9 of ICCPR.
- The executive branch of the United States Government operates as judge, prosecutor and defence counsel of the Guantánamo Bay detainees: this constitutes serious violations of various guarantees of the right to a fair trial before an independent tribunal as provided for by Article 14 of the ICCPR. The right to a fair trial is also limited by restrictions on the right to be tried in one's presence, the right to adequately prepare one's defence, the manner in which information is obtained from detainees, and the right to be tried without undue delay;
- Attempts by the US Administration to redefine "torture" in the context of the war on terror, as well as confusion with regard to authorised and unauthorised interrogation techniques raise extremely serious human rights concerns;
- The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of Article 7 of ICCPR and Article 16 of the *Convention against Torture*. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in Article 1 of the *Convention Against Torture*.
- The general conditions of detention, such as the uncertainty about the length of detention, prolonged solitary confinement amount to **inhuman treatment**, to a violation of the **right to health** and to a violation of the right of detainees under Article 10 (1) of ICCPR to be treated with humanity and with respect for the inherent dignity of the human person;

[12] P. 4 of the Report.

- The **excessive violence** used during transportation, operations by the Initial Reaction Forces, and force feeding of detainees on hunger strike amount to torture;
- The practice of **rendition** of persons to countries where there is a substantial risk of torture amounts to a violation of the principle of non-*refoulement* and is contrary to Article 3 of the *Convention Against Torture*;
- The lack of any impartial **investigation into allegations of torture** and ill-treatment and the resulting impunity of the perpetrators amount to a violation of Articles 12 and 13 of the *Convention Against Torture*;
- There are reliable indications of violations of the right to **freedom of religion or belief**, such as interrogation techniques based on religious discrimination or aimed at offending the religious feelings of detainees. There were also reports of possible mishandling of religious objects such as the Holy Koran, which were confirmed by the Government;
- The totality of the conditions of the confinement of detainees at Guantánamo Bay constitute a violation of the **right to health** because they derive from a breach of duty and have resulted in profound deterioration of the mental health of many detainees reflected in the 350 of acts of self-harm recorded in 2003 alone;
- The American Medical Association has adopted the *Declaration of Tokyo*, which prohibits doctors from participating in, or being present during, any form of torture or other cruel, inhuman or degrading treatment and providing any knowledge to facilitate such acts. In light of this commitment, there are serious concerns about **alleged violations of ethical standards by health professionals**, such as breaches of confidentiality; participation in, advice for or presence during interrogations; and presence or participation in non-consensual treatment, especially the force-feeding of competent detainees.

Key Recommendations

- Persons suspected of being terrorists should be detained in accordance with a criminal procedure that respects safeguards enshrined in international law. The Government should therefore either expeditiously bring all Guantánamo Bay detainees to trial, or release them without further delay. The USA should consider trying suspected terrorists before a **competent international tribunal**;
- The USA should **close the Guantánamo Bay detention facilities** without further delay. Until then, it should refrain from any practice amounting to torture or cruel, inhuman or degrading treatment or punishment; discrimination on the basis of religion; and violations of the rights to health and freedom of religion. In this respect, all special interrogation techniques authorised by the Department of Defence should immediately be revoked;
- The Government should refrain from **expelling, returning, extraditing or rendering** Guantánamo Bay **detainees** to States where there may be at serious risk of being tortured;
- The Government should ensure that every detainee has the right to make a complaint regarding his treatment and that all allegations of torture or cruel, inhuman or degrading treatment or punishment are thoroughly investigated by an independent authority, and all those who have perpetrated, ordered, tolerated or condoned such practices are brought to justice;
- The Government should ensure that all victims of torture or cruel, inhuman or degrading treatment or punishment are provided with **fair** and **adequate compensation**;
- The Government should provide personnel of detention facilities with **adequate training** on international human rights standards for the treatment of persons in detention, and to enhance their **sensitivity of cultural issues**;
- All five mandate holders should be granted **full** and **unrestricted access** to the Guantánamo Bay facilities, **including private interviews with detainees**.