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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

Report of the Working Group on Arbitrary Detention

Chairperson-Rapporteur: El Hadji Malick Sow

Summary

During 2009, the Working Group on Arbitrary Detention visited Malta and Senegal at the invitation of the Governments. The reports on these visits are contained in addenda to the present document (A/HRC/13/30/Add.2 and 3).

During the period 1 December 2008 to 30 November 2009, the Working Group adopted 29 Opinions concerning 71 persons in 23 States. These Opinions are contained in the first addendum to the present document (A/HRC/13/30/Add.1).

Also during this period, the Group transmitted a total of 138 urgent appeals to 58 States concerning 844 individuals, including 50 women and 29 boys. States 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 be guaranteed a fair trial.

The Working Group has sought to engage in a continuous dialogue with those countries visited by the Working Group, in respect of which it had recommended changes to domestic legislation governing detention or the adoption of other measures. Information about the implementation of the recommendations made by the Working Group to the governments of countries visited in 2007 was received from the Governments of Norway, and Equatorial Guinea. The Government of Angola requested an extension of the deadline for submitting its comments.

The present report includes several issues which have given rise to concern during 2009. The Working Group welcomes the Human Rights Council panel discussion on the human rights of migrants in detention centres, in which its Chairperson-Rapporteur participated. However, it remains concerned that the human rights of detained migrants in an irregular situation and those of asylum-seekers and refugees are still not fully guaranteed. It emphasizes in the present report that where obstacles to the removal of detained migrants do not lie within their sphere of responsibility, the principle of proportionality requires that they should be released. The report also examines the question of detention in connection with military tribunals and states of emergency.

The Working Group observes that a weak or non-existent institution of habeas corpus still prevails in some States, particularly in the context of administrative detention, despite recommendations addressed to States since the inception of the Working Group in 1991, aimed at strengthening this common law prerogative writ.

On the basis of an analysis of its jurisprudence and recommendations on compliance with international human rights norms, standards and remedies, the Working Group concludes that the typical remedy for arbitrarily detained individuals is their immediate release. This includes the release of (foreign) detainees arbitrarily deprived of their liberty into the territory of the detaining State.

The Working Group also raises concerns over an increase in information received on reprisals suffered by individuals who were the subject of an urgent appeal or Opinion.

The Working Group has decided to devote particular attention in 2010 to the issues of video and audio surveillance in interrogation rooms, alternatives to detention, the detention of drug users, and a revision of its methods of work.

To enable the Working Group to report more systematically and comprehensively, it reiterates its proposal to the Human Rights Council to expand the mandate of the Working Group, if renewed in 2010, so as to include the examination of conditions of detention around the world, and the monitoring of state compliance with obligations concerning all human rights of detained and imprisoned persons.

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I. INTRODUCTION

1. The Working Group on Arbitrary Detention was established by Commission on Human Rights resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty, according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was clarified and extended by the Commission in resolution 1997/50 to cover the issue of administrative custody of asylum-seekers and immigrants. At its sixth session the Human Rights Council adopted resolution 6/4 which confirmed the scope of the mandate and extended it for a further three-year period.

2. During the period 1 January 2009 to 31 July 2009, Manuela Carmena Castrillo (Spain) was a member of the Working Group and its Chairperson-Rapporteur. She was replaced as a member of the Working Group by Mads Andenas (Norway), who assumed his mandate on 1 August 2009. Since then, the Working Group has been composed of Shaheen Sardar Ali (Pakistan), Aslan Abashidze (Russian Federation), Roberto Garretón (Chile) and El Hadji Malick Sow (Senegal), in addition to Mr. Andenas.

3. On 31 August 2009, Mr. Sow was appointed as Chairperson-Rapporteur of the Working Group and Ms. Ali as Vice-Chairperson.

II. ACTIVITIES OF THE WORKING GROUP IN 2009

4. During the period 1 January to 30 November 2009, the Working Group held its fifty-fourth, fifty-fifth and fifty-sixth sessions. It carried out two official missions to Malta (19-23 January 2009) and to Senegal (5-15 September 2009) (see A/HRC/13/30/Add.2 and 3).

5. On 21 January 2009, Mr. Abashidze participated in a seminar in Geneva on the prevention of genocide, reflecting on strategies for effective prevention of genocide and other mass atrocities.

6. On 10 March 2009, at the tenth session of the Human Rights Council, the Special Rapporteur on the promotion and protection of human rights while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances, and the former Chairperson-Rapporteur of the Working

Group on Arbitrary Detention announced that a global joint study into the practice of secret detention in the context of contemporary efforts in countering terrorism would be undertaken by these respective mandates. The Working Group designated its member and current Vice-Chair, Ms. Ali, to represent the Working Group in the joint study.

7. On 17 September 2009, the Human Rights Council held a panel discussion on the human rights of migrants in detention centres as envisaged in its resolution 11/9 of 12 June 2009, in which Mr. Sow participated. The Working Group recalls that in its annual report for 2007 it recommended to the Human Rights Council an in-depth and urgent deliberation to seek effective alternatives to prevent violations of rights affecting the large numbers of asylum-seekers and irregular migrants in detention around the world.[1] It welcomes the fact that such deliberations took place during the twelfth regular session of the Human Rights Council.

A. Handling of communications addressed to the Working Group during 2009

1. Communications transmitted to Governments

8. A description of the cases transmitted and the contents of the replies of States will be found in the respective Opinions adopted by the Working Group (A/HRC/13/30/Add.1).

9. During its fifty-fourth, fifty-fifth and fifty-sixth sessions, the Working Group adopted 29 Opinions concerning 71 persons in 23 countries. Further details of the Opinions adopted during these sessions appear in the table below and the complete texts of Opinions Nos. 17/2008 to 17/2009 are reproduced in addendum 1 to this report.

2. Opinions of the Working Group

10. Pursuant to its methods of work,[2] the Working Group, in addressing its Opinions to Governments, drew their attention to former Commission on Human Rights resolutions 1997/50 and 2003/31, and Human Rights Council resolution 6/4, requesting them to take account of the Opinions of the Working Group and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform

[1] A/HRC/7/4, para. 80 (a).
[2] E/CN.4/1998/44, annex I.

the Working Group of the steps they had taken. On the expiry of the three-week deadline the Opinions were transmitted to the source.

Table 1

Opinions adopted during the fifty-fourth, fifty-fifth and fifty-sixth sessions of the Working Group

Opinion No.	Country	Government reply	Person(s) concerned	Opinion
1/2009	Viet Nam	Yes	Mr. Nguyen Hoang Hai (also known as Dieu Cay); Mr. Nguyen Van Ha; Mr. Nguyen Viet Chien; Mr. Truong Minh Duc; Mr. Pham Van Troi; Mr. Nguyen Xuan Nghia; Ms. Pham Thanh Nghien; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Nguyen Van Tuc.	Mr. Nguyen Hoang Hai (also known as Dieu Cay); Mr. Nguyen Viet Chien; Mr. Truong Minh Duc; Mr. Pham Van Troi; Mr. Nguyen Xuan Nghia; Ms. Pham Thanh Nghien; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Nguyen Van Tuc: Detention arbitrary, category II. Mr. Nguyen Van Ha: Detention arbitrary, category II, between 12 May 2008 and 15 October 2008 (date of his sentence of re-education without detention).
2/2009	United States of America	Yes	Mr. Mohammed Abdul Rahman Al-Shimrani.	Detention arbitrary, category III.
3/2009	United States of America	Yes	Mr. Sanad Ali Yislam Al-Kazimi.	Detention arbitrary, category III.
4/2009	Maldives	Yes	Mr. Richard Wu Mei De.	Between 4 November 1993 and 7 February 2009: Detention arbitrary, categories I, II and III. Case filed (paragraph 17 (a) of the Working Group's methods of work - person released).
5/2009	Lebanon	No	Messrs. Alaa Kasem Lefte; Kaseem Atalla Zayer; Walid Taleb Suleiman Muhammad Al	Detention arbitrary, categories I and III.

Opinion No.	Country	Government reply	Person(s) concerned	Opinion
			Dilimi; Ali Fadel Al Hsaynawi Elyawi; Kheiri Hussein Hajji; Mouayed Allawi Al Kinany Abed; Ali Al-Tamimi; Ahmad Fathi Hamid; Ziad Tarek Al Abdallah Touman; Ramadan Abdelrahman Hajj and Ahmad Naji Al Aamery.	
6/2009	Islamic Republic of Iran	No	Drs. Arash Alaei and Kamiar Alaei.	Detention arbitrary, categories I, II and III.
7/2009	Niger	Yes	Mr. Moussa Kaka.	Between 25 September 2007 and 7 October 2008: Detention arbitrary, categories I, II and III. Case filed (paragraph 17 (a) of the Working Group's methods of work - person released).
8/2009	United Arab Emirates	Yes	Mr. Hassan Ahmed Hassan Al-Diqqi.	Detention arbitrary, category II.
9/2009	Japan	Yes	Messrs. Junichi Sato and Toru Suzuki.	Detention arbitrary, category II.
10/2009	Venezuela	No	Mr. Eligio Cedeño.	Detention arbitrary, category III.
11/2009	Malawi	No	Messrs.Paul Newiri, Boxton Kudziwe and Lawrence Ndele.	Detention arbitrary, category III.
12/2009	Lebanon	Yes	Mr. Nawar Ali Abboud.	Detention arbitrary, category III.
13/2009	Yemen	No	Messrs. Amir Abdallah Thabet Mohsen Al Abbab, Mohamed Abdallah Thabet Mohsen Al Abbab and Movad Thabet Mohsen Al Abbab.	Detention arbitrary, categories I and III.
14/2009	The Gambia	No	Chief Ebrimah Manneh.	Detention arbitrary, categories I, II and III.
15/2009	Zimbabwe	Yes	Messrs. Lloyd Tarumbwa, Fanny Tembo and Ms. Terry Musona.	Detention arbitrary, categories I and III.

Opinion No.	Country	Government reply	Person(s) concerned	Opinion
16/2009	Ukraine	Yes	Mr. Alexandr Rafalskiy.	Case pending until further information from the Government is received (paragraph 17 (c) of the Working Group's methods of work).
17/2009	Spain	Yes	Mr. Karmelo Landa Mendibe.	Detention arbitrary, categories I, II and III.
18/2009	Ukraine	Yes	Mr. Oleksander Oshchepkov.	Case provisionally filed (paragraph 17 (d) of the Working Group's methods of work – the Working Group has not received sufficient elements of information from the source).
19/2009	Colombia	No	Mr. Andrés Elías Gil Gutiérrez.	Detention arbitrary, category III.
20/2009	Papua New Guinea	No	Messrs. David Ketava, Peter Meto, Peter Ripo, Kavini Varo, Jimmy Saki and Stephen Lakore.	Detention arbitrary, category III.
21/2009	Saudi Arabia	Yes	Mr. Khalid Said Khalid Al-Shammari.	Detention arbitrary, category III.
22/2009	Palestine	No	Mr. Mohammad Abu Alkhair.	Between 23 April 2009 and 29 July 2009: detention arbitrary, categories I and III. Case filed (paragraph 17 (a) of the Working Group's methods of work - person released).
23/2009	Mexico	Yes	Mr. Álvaro Robles Sibaja.	Detention not arbitrary.
24/2009	Colombia	Yes	Mr. Príncipe Gabriel González Arango.	Case filed (paragraph 17 (a) of the Working Group's methods of work - person released).
25/2009	Egypt	Yes	The source has specifically requested that the names of the	Detention arbitrary, categories I and II.

Opinion No.	Country	Government reply	Person(s) concerned	Opinion
			10 individuals concerned not be published; the Government was fully informed of their identities.	
26/2009	Yemen	No	Mr. Karama Khamis Saïd Khamicen.	Detention arbitrary, categories I and III.
27/2009	Syria	Yes	Messrs. Sa'dun Sheikhu Mohammad Sa'id Omar and Mustafa Jum'ah.	Detention arbitrary, categories II and III.
28/2009	Ethiopia	Yes	Ms. Birtukan Mideksa Deme.	Detention arbitrary, categories II and III; since 29 December 2009 also category I.
29/2009	Lebanon	No	Messrs. Deeq Mohamed Bere, Ghandl El-Nayer Dawelbeit and Jamil Hermez Makkhou Jakko.	Mr. Jamil Hermez Makkhou Jakko: detention arbitrary, category III. Mr. Deeq Mohamed Bere: between 30 May 2008 and an unknown day before 23 July 2009, detention arbitrary, category III. Mr. Ghandl El-Nayer Dawelbeit: between 3 December 2008 and 14 July 2009; detention arbitrary, category III. Case filed (paragraph 17 (a) of the Working Group's methods of work - persons released).

3. Government reactions to Opinions

11. In a communication dated 18 February 2009, the Government of the Syrian Arab Republic stated that the persons mentioned in Opinions 5/2008,[3] Messrs. Anwar al-Bunni, Michel Kilo and Mahmoud 'Issa, and 10/2008,[4] Messrs. Husam 'Ali Mulhim, Tareq al-Ghorani, Omar 'Ali al-Abdullah, Diab Siriyeh, Maher Isber Ibrahim, Ayham Saqr and Allam Fakhour, were detained for reasons that were nothing to do with their activities as human rights defenders, but for committing acts against Syrian citizens, society and the State. All laws throughout the world draw a distinction between humanitarian activities and incitement to unrest. The Government does not have the right to stop the judiciary from exercising its constitutional and legal prerogative to detain and prosecute Syrian citizens who commit offences. Human rights activists and humanitarian workers do not benefit from legal immunity when they commit an offence.

12. The Government of Lebanon, in a note verbale dated 31 August 2009, stated that the 11 Iraqis referred to in Opinion No. 5/2009[5] had either been voluntarily repatriated, released or handed over to the United Nations. The memorandum of understanding between Lebanon and the Office of the United Nations High Commissioner for Refugees (UNHCR) concerning non-Palestinian asylum-seekers, signed on 9 September 2003, allows foreigners entering Lebanon in an irregular manner to submit asylum applications to UNHCR. If the criteria of the memorandum are met, UNHCR accepts the asylum application and the Government issues a circulation permit, valid for three months and free of charge. If UNHCR grants the asylum-seeker refugee status, a six-month circulation permit is issued, renewable once for three months, so that UNHCR can identify a resettlement country or arrange for voluntarily repatriation.

13. The recommendation made by UNHCR dated 18 December 2006, calling on States to consider displaced Iraqis from central and southern Iraq as refugees under international protection, regardless of their means of entry, contradict the memorandum. As Lebanon is not bound by the 1951 Convention Relating to the Status of Refugees, and is not a country of refuge lacking the capacity to take in additional asylum-seekers, it does not implement these recommendations.

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[3] A/HRC/10/21/Add.1, p. 106.
[4] Ibid, p. 126.
[5] Addendum 1 to this report.

14. National laws allow Lebanon to detain persons liable for deportation with judicial approval. Such detention is not arbitrary. Lebanese courts, in virtually all cases impose minimum prison sentences of one month on humanitarian grounds on foreigners entering the country in an irregular manner. The delay in carrying out deportation is due to factors such as the failure of embassies to follow up on the situation of their nationals and the lack of diplomatic representation of some countries. The Government is currently drafting a proposal on establishing a mechanism to deal with this situation. Deportees are entitled to appeal against decisions of expulsion, taking ordinary and extraordinary recourse, including a plea for clemency. The Government only returns foreigners, including asylum-seekers, who have signed a "voluntary return" form. Lebanon does not conduct large-scale deportations. It is an independent sovereign State which applies its own laws, international public law and the provisions of treaties consistent with its own interests and, first and foremost, that of its citizens. With regard to refugees, Lebanon acts within the scope of the applicable laws and memoranda of understanding.

15. In a note verbale dated 17 November 2009, the Japanese Government submitted comments related to Opinion No. 9/2009 (Japan).[6] It stated that, while everyone has the right to express their opinions, which is clearly guaranteed as a fundamental human right in the Japanese legal system, no one is allowed to commit a crime for the purpose of expression of such opinions. The Greenpeace activists Messrs. Sato and Suzuki, the subjects of Opinion No. 9/2009, could not be acquitted of charges of breaking into a residence and theft on the basis of their activities as these were beyond the limitations of article 19 (3) of the International Covenant on Civil and Political Rights. The criminal investigation into the accusation brought by them against the crew members of a whaling research ship was not obstructed by their detention. The prosecutor concluded there was not sufficient evidence for the prosecution of the crew. There was no reason to consider the detention of Mr. Sato and Mr. Suzuki as arbitrary, as it was determined by a deliberate judgement by a fair court strictly observing the requirements of the Japanese criminal justice system. The Working Group had disregarded the appraisal of the facts and evidence and the application and interpretation of domestic law by the judiciary. The Government will ensure that Messrs. Sako and Suzuki continue to be subject to

[6] Ibid.

proceedings which meet international standards of fairness and that their rights of defence at their trial are fully respected.

16. In a note verbale dated 17 November 2009, the Government of Spain expressed its complete disagreement with Opinion No. 17/2009[7] on the detention of Karmelo Landa considering that it contains biased and incorrect assessments lacking a legal basis. The decisions on the remand in custody and imprisonment of Mr. Landa were taken by independent judicial bodies, in accordance with domestic laws and international human rights standards. The Government considers that the Working Group did not give equal consideration to the arguments made by the source and the Government.

17. The Government cannot agree that the defendant was detained because of his membership in leadership bodies of Batasuna. It was rather his alleged membership in or association with a terrorist group. In any case, the Working Group cannot consider that activities related to a banned political party fall under articles 19, 20 and 21 of the Universal Declaration of Human Rights, and 18, 19 and 22 of the International Covenant on Civil and Political Rights. The Opinion appears to ignore the terrorist nature of the banned political organization of Batasuna, as confirmed by the Spanish Supreme Court, the Council of the European Union, and the European Court of Human Rights.

18. Regarding the conditions of detention and allegations of ill-treatment, the Government submits that its version and that of the source are incompatible; notwithstanding that the Working Group considered the source's submission as more credible.

19. In conclusion, the Government does not consider that the pretrial detention ordered by the courts involves any violation of human rights. The Government cannot interfere with an independent judicial process. The principle of separation of powers must prevail under the rule of law.

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[7] Ibid.

4. Information received concerning previous Opinions

20. On 24 February 2009, the Working Group was informed of the release of Mr. Tin Htay and Than Htun, who were the subject of Opinion No. 7/2008 (Myanmar).[8]

21. In connection with Opinion No. 37/2007 (Lebanon),[9] the source informed the Working Group that Mr. Ahmad Abdel Aal and Mr. Mahmoud Abdel Aal were released on bail on 25 February 2009. The Working Group further notes in relation to this Opinion that in a decision dated 29 April 2009, a pretrial judge of the Special Tribunal for Lebanon ordered that General Jamil Al Sayed, General Ali El Haj, General Raymond Azar and General Moustapha Hamdane be released, unless they were being held on other grounds.

22. The Working Group was informed by the source that Mr. Zhang Honghai, whose detention was declared arbitrary in Opinion No. 32/2007 (China),[10] was released on 12 March 2009, however only after having served his prison term of eight years in full.

23. In connection with Opinion No. 3/2008 (United Arab Emirates)[11] the Working Group was informed by the source that Mr. Abdullah Sultan Sabihat Al Alili was released on 8 May 2009 after 28 months of detention in Abu Dhabi.

24. The source of the case submitted to the Working Group stated that, on 10 July 2009, Mr. Youssef Mahmoud Chaabane (Opinion No. 10/2007, Lebanon)[12] was released following a presidential pardon after more than 15 years in prison.

5. Communications giving rise to urgent appeals

25. During the period 1 December 2008 to 15 November 2009, the Working Group transmitted 138 urgent appeals to 58 States (including the Palestinian National Authority) concerning 844 individuals (765 men, 50 women and 29 boys). In conformity with paragraphs 22 to 24 of its methods of work,[13] the Working Group, without prejudging whether the detention was arbitrary, drew the attention of each of the States concerned to

[8] A/HRC/10/21/Add.1, p. 115.
[9] Ibid., p. 78.
[10] Ibid., p. 60.
[11] Ibid., p. 97.
[12] A/HRC/7/4/Add.1, p. 81
[13] E/CN.4/1998/44, annex I.

the specific case as reported, and appealed to them to take the necessary measures to ensure that the detained persons' right to life and to physical integrity were respected.

26. The Working Group emphasizes that the transmission of an urgent appeal to the concerned State on a humanitarian basis does not exclude the transmission of the same case pursuant to its regular procedure leading to the adoption of an Opinion. According to its methods of work, the two communications procedures are distinct, as in the former case the Working Group does not take a stance on the question as to whether or not the detention of the individual(s) concerned is arbitrary. Only in an Opinion does the Working Group take a definite decision on the case, declaring the detention arbitrary or not, or taking any other appropriate decision in accordance with paragraph 17 of its methods of work. Accordingly, States are requested to provide separate replies to each of the communications.

27. During the period under review, 138 urgent appeals were transmitted by the Working Group as follows.

Table 2

Urgent appeals transmitted to Governments by the Working Group

Government concerned	Number of urgent appeals	Persons concerned	Persons released/ Information received from
Algeria	1	7 men, 1 woman	
Bahrain	1	18 men, 1 boy	
Belarus	1	1 man	1 man (source)
Cambodia	1	30 men	
Chad	1	1 man	
China	14	32 men, 2 women	4 men (source)
Colombia	1	1 man	
Cuba	1	1 woman	
Czech Republic	2	2 men	
Democratic Republic of Korea	1	2 women	2 women (source)
Democratic Republic of the Congo	4	5 men, 1 woman, 10 boys	
Ecuador	1	1 man	1 man

Government concerned	Number of urgent appeals	Persons concerned	Persons released/ Information received from
			(Government)
Egypt	6	34 men, 8 women	
Equatorial Guinea	2	3 men	1 man (source)
Ethiopia	1	1 woman	
Gabon	1	5 men	2 men (source)
Gambia	1	1 man	
Georgia	1	1 man	
Guinea	2	11 men	1 man(source)
Guinea-Bissau	1	2 men	1 man (source)
Guyana	1	1 boy	
Honduras	2	14 men	
Iran (Islamic Republic of)	18	169 men, 14 women, 1 boy	11 men, 2 women (source)
Iraq	2	37 men	37 men (source)
Israel	2	2 men	
Kazakhstan	1	2 men	
Kyrgyzstan	1	2 men, 2 boys	
Lebanon	3	15 men	
Madagascar	1	5 men	
Morocco	2	8 men, 2 women	
Mexico	3	45 men, 1 woman	
Mongolia	2	1 man, 1 woman	
Myanmar	5	8 men, 5 women	
Niger	2	2 men	
Norway	1	1 woman	
Palestine	1	1 man	
Pakistan	2	4 men, 2 boys	
Republic of Korea	2	2 men	
Republic of Moldova	1	129 men	
Russian Federation	2	2 men	
Saudi Arabia	4	20 men, 1 woman	
Spain	1	1 woman	
Sri Lanka	3	6 men	

Government concerned	Number of urgent appeals	Persons concerned	Persons released/ Information received from
Sudan	2	4 men	2 men (source)
Swaziland	1	1 man	
Sweden	1	1 woman	
Syrian Arab Republic	6	10 men	1 man (Government)
Thailand	2	66 men, 3 women, 11 boys	
Turkey	1	3 men, 1 woman	
Uganda	1	9 men	
Ukraine	1	1 man	
United Arab Emirates	3	4 men	
United Kingdom of Great Britain and Northern Ireland	1	1 man	
United States of America	1	1 man	
Uzbekistan	4	27 men	
Viet Nam	4	2 men, 2 women	
Yemen	2	1 man, 1 boy	
Zimbabwe	2	6 men, 1 woman	1 woman (source)

28. Sources reported that, from these 844 persons, 65 were released. States reported that two additional persons were freed. The Working Group wishes to thank those States that heeded its appeals and took steps to provide it with information on the situation of the persons concerned, especially the States that released those persons. In other cases, the Working Group was assured that the detainees concerned would be guaranteed a fair trial.

6. Reprisals in relation to Opinions and urgent appeals

29. On 23 February 2009, the Chairperson-Rapporteur of the Working Group sent a joint urgent appeal to Uzbekistan regarding Mr. Erkin Musaev**,** whose detention had been declared arbitrary in Opinion No. 14/2008.[14] It was alleged that he was threatened that, if

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[14] A/HRC/10/21/Add.1, p. 142.

he or his family did not withdraw their petitions or continued to make complaints to international human rights mechanisms or to spread news about the above decision, they would face reprisals.

30. On 29 May 2009, the Chairperson-Rapporteur of the Working Group sent a joint urgent appeal to Iran concerning Ayatollah Sayed Hossein Kazemeyni Boroujerdi. According to new information received by the Working Group, Ayatollah Boroujerdi wrote a letter to the Secretary-General requesting that international observers be sent to Iran, following which he was reportedly subjected to beatings.

31. On 21 July 2009, the Working Group received allegations that Tin Min Htut and U Nyi Pu, were sentenced to 15 years of imprisonment under laws criminalizing the upsetting of public tranquillity and peace, following their organization of 92 other members of parliament to sign a letter to the Secretary-General and the Security Council that criticized the Government of Myanmar and the United Nations itself and which was published on the Internet.

B. Country missions

1. Request for visits

32. During 2009, the Working Group was invited to visit on official mission Armenia, Azerbaijan, Burkina Faso, the Libyan Arab Jamahiriya and Malaysia. It has also received invitations to visit Georgia and the United States of America.

33. The Working Group has also made requests to visit Algeria, Argentina (a follow-up visit), Egypt, Ethiopia, Guinea Bissau, India, Japan, Morocco, Nauru, Nicaragua (a follow-up visit limited to Bluefields prison), Papua New Guinea, the Russian Federation, Saudi Arabia, Sierra Leone, Thailand, Turkmenistan and Uzbekistan.

2. Follow-up to country visits

34. In accordance with its methods of work, the Working Group decided in 1998 to address a follow-up letter to the Governments of the countries it visited, requesting

information on such initiatives as the authorities might have taken to give effect to the relevant recommendations adopted by the Group contained in its country visit reports.[15]

35. During 2009, the Working Group requested information from the countries it had visited in 2007 and received information from the Governments of Norway and Equatorial Guinea. The Government of Angola requested an extension of the deadline for submitting its comments.

(a) Norway

36. In a communication dated 17 November 2009, the Government of Norway provided information on the steps taken with a view to implementing the recommendations contained in paragraph 98 of the report of the Working Group on its mission to Norway (27 April - 2 May 2007)[16] as follows.

37. Recommendation (a): in 2008, the Government requested the Norwegian Police University College to undertake a survey on applications for remand, restrictions and complete or partial isolation during pretrial detention. The results will be available at the end of 2009.

38. Recommendation (b): the supervision of the Correctional Services was still under consideration. A White Paper was published in September 2008, in which the Government acknowledged that the present system is not fully satisfactory. In the meantime, most decisions by the Correctional Services can be challenged at the regional and central level, and before the Parliamentary Ombudsman. Certain administrative decisions can be reviewed by courts.

39. Recommendation (c): the Government submitted its full report, completed on 30 April 2008, in Norwegian, with a summary in English to follow. The report is under consideration by the Ministry of Justice and the Police.

40. Recommendation (d): in spring 2008, the Government initiated a revision of the *infoflyt* database system with a view to proposing legal regulations as soon as possible.

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[15] E/CN.4/1999/63, para. 36.
[16] A/HRC/7/4/Add.2.

41. Recommendation (e): the Government has discussed the recommendation and decided to continue to make use of existing bodies such as the Supervisory Commission and the Parliamentary Ombudsman. It emphasized that there is ongoing cooperation between prison and health authorities in this respect. A committee was appointed in November 2008 to identify the need for special prison units for inmates with mental sufferings; the proposals of the committee were to be completed in November 2009.

42. With respect to the "waiting list" phenomenon, the Government stated that the number of convicts waiting to serve their prison sentences is now down to approximately 300.

(b) Equatorial Guinea

43. In a communication dated 29 October 2009, the Government reported on the implementation of the recommendations of the Working Group in the report on its mission of 8 to 13 July 2007.[17] It noted that, in order to protect freedom of opinion and expression, the registration of political parties, non-governmental organizations and other civil society organizations had been facilitated and the corresponding legal procedures simplified. A new Organic Law on the Judiciary was adopted by parliament in May 2009 to protect and improve its independence and to allow for the development of academic and professional competencies and skills to gain access to and obtain promotions within the judiciary. The Superior Council of the Judiciary had been strengthened. The Organic Law also established the institution of the "Judge on Execution of Sentences" to improve prison conditions and the legal situation of prisoners. A new Penal Code had been drafted, in conformity with the principles and norms enshrined in the Fundamental Law (Constitution). The Government had also decided to amend the Penal Procedure Code, the Military Penal Code and the Minors Act and to draft a new Law on the Constitutional Court. The publication of laws and decrees in the Official State Bulletin had been strengthened through the allocation of new national budget resources.

44. A new Institute of Judicial Practice had been established as an autonomous entity of public law to improve the training and skills of all those participating in the judicial process. The public prisons of Bata, Evinayong and Malabo had been rebuilt or refurbished and new central police stations in Bata and Malabo had been built. Detention

centres for minors were being built in Evinayong and in the Riaba District. The national budget resources allocated to prisoners and detainees had increased in 2008-2009 by 700 per cent. Mr. Juan Ondo Abaga, whose detention and possible enforced disappearance had been considered by the Working Group, had been granted a presidential pardon and released.

3. Future country missions

45. The Working Group reiterates its concern in relation to the limitation on the number and length of the visits it is able to conduct each year. Two country visits per year, each limited to a maximum of eight working days, as in 2009, are insufficient for an adequate discharge of the mandate. The Working Group conducted three visits in 2004, two in 2005, four in 2006, three in 2007, and four in 2008. Country visits are of great importance to the victims of arbitrary detention.

46. To verify implementation of its recommendations, the Working Group should also be in a position to undertake follow-up visits. They are essential to the mandate, as they are the only means of assessing and monitoring in situ the situation of personal liberty in various countries.

47. The Working Group reiterates its call to the Human Rights Council to take into account the fact that it comprises five members. To best make use of its potential and enable it to discharge its mandate more effectively, the Human Rights Council is requested to provide additional funds for the Working Group to be able to conduct at least five country visits per year and relevant follow-up visits within an appropriate time frame.

C. Other activities

Detention of drug users

48. At its fifty-fourth session, the Working Group decided to globally study in more detail the issue of detention of drug users. To prepare a more systematic thematic consideration of the issue, on 15 June 2009 it addressed a questionnaire to all Member States for response by 14 August 2009.

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[17] A/HRC/7/4/Add.3.

49. Up to the adoption of this report, the Working Group had received 31 replies from the Governments of Belarus, Colombia, Ecuador, Egypt, Finland, Germany, Greece, Hungary, Iraq, Jamaica, Japan, Kazakhstan, Lebanon, Mauritius, Mexico, Montenegro, Oman, Norway, Panama, Paraguay, Peru, Republic of Moldova, Romania, Spain, Switzerland, Togo, Turkey, Turkmenistan, Ukraine, United States of America, and Uzbekistan. The Working Group is grateful to these States for their cooperation. To obtain the broadest possible views and most comprehensive information, it decided during its fifty-sixth session to postpone consideration of this matter until 2010 and requests those States which have not yet responded to submit a response.

Video and audio surveillance

50. In its previous annual report, the Working Group requested "States and other stakeholders to provide the Group with information and share their experiences regarding the installation of video and/or audio (recording) equipment in rooms where interrogations related to criminal investigations are conducted."[18] It renews its call upon States and other stakeholders to provide the Working Group with relevant information.

Alternatives to detention

51. During its fifty-sixth session, the Working Group decided to focus on the issue of alternatives to detention, both in criminal law and in the administrative detention context, as one of its main priorities in 2010. It requests States and other stakeholders to provide it with information, including good practices that it could recommend to States to follow.

Extension of mandate to cover all human rights of detained and imprisoned persons

52. In its previous annual report, the Working Group proposed to the Human Rights Council "to expand [its] mandate … so as to include the monitoring of State compliance with their obligations concerning all human rights of detained and imprisoned persons."[19] For the reasons outlined in that report,[20] and also in chapter II, section A, of this report, it reiterates its proposal.

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[18] A/HRC/10/21, para 83.
[19] Ibid., para. 78.
[20] Ibid., paras. 42 ff..

Revision of methods of work

53. To further enhance cooperation with States, the Working Group, during its fifty-sixth session, decided to focus on a revision of its revised methods of work,[21] both in terms of procedure and substance, and to share with Member States its newly revised methods of work.

III. THEMATIC CONSIDERATIONS

A. Detention of immigrants in an irregular situation

54. In resolution 1997/50 the Commission on Human Rights clarified and extended the mandate of the Working Group to cover the issue of administrative custody of asylum-seekers and immigrants. It has therefore since then devoted particular attention to the situation of detained migrants, identified challenges and best practices, explored ways to promote and protect their right not to be deprived arbitrarily of their liberty, and tried to advocate for remedies to redress their plight. All country mission reports contain a chapter on administrative immigration detention. Some of the fact-finding missions were exclusively focused on the issue of the detention of migrants and asylum-seekers.

55. The experience made during its missions and the information received in communications from various stakeholders throughout the years prompted the Working Group to include more in-depth analysis of the issue of immigration detention in its annual reports covering the years 1998,[22] 2003,[23] 2005,[24] and 2008.[25] In 1999, it adopted its Deliberation No. 5 on human rights guarantees that asylum-seekers and immigrants in detention should enjoy.[26] It has noted with concern during the period reported upon a development towards tightening restrictions, including deprivation of liberty, applied to asylum-seekers, refugees and immigrants in an irregular situation, even to the extent of making the irregular entry into a State a criminal offence or qualifying the irregular stay in the country as an aggravating circumstance for any criminal offence.

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[21] E/CN.4/1998/44, annex I, p.15.
[22] E/CN.4/1999/63.
[23] E/CN.4/2004/3.
[24] E/CN.4/2006/7.
[25] A/HRC/10/21.
[26] E/CN.4/2000/4, annex II.

56. The Working Group has also publicly expressed its concern regarding a law-making initiative by a regional organization mainly comprising receiving countries, which would allow concerned States to detain immigrants in an irregular situation for a period of up to 18 months pending removal. It would also permit the detention of unaccompanied children, victims of human trafficking, and other vulnerable groups.

57. Three Opinions, 45/2006,[27] 18/2004,[28] and 34/1999,[29] provided the Working Group with the opportunity to express itself specifically on whether or not the detention of the concerned migrant was arbitrary.

58. It considers that administrative detention as such of migrants in an irregular situation, that is to say migrants crossing the border of a country in an irregular manner or without proper documentation, or having overstayed a permit of stay, and hence being liable for removal, is not in contravention of international human rights instruments. The Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

59. If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation. The Working Group is concerned about recent developments in some States, which have undertaken criminalization efforts.

60. The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply

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[27] A/HRC/7/4/Add.1.
[28] E/CN.4/2005/6/Add.1.
[29] E/CN.4/2001/14/Add.1.

with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort.

61. Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9 (4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. Established time limits for judicial review must obtain in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State. All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers.

62. These human rights and principles are not always guaranteed. The Working Group has visited countries on official mission where detention of migrants in an irregular situation is mandatory and automatic, without a necessity criteria being applied. It has observed that some national laws do not provide for detention to be ordered by a judge, or for judicial review of the detention order. Detainees often do not enjoy the right to challenge the legality of their detention. There is no maximum length of detention established by law, which leads to prolonged or, in the worst case, potentially indefinite detention in cases, for example, where the expulsion of a migrant cannot be carried out for legal or practical reasons.

63. This is a serious concern, as there are situations in which a removal order cannot be executed because, for example, the consular representation of the country of origin of the migrant does not cooperate or there is simply no means of transportation available to the home country. An example of a legal limitation for removal is the principle of non-refoulement. In such cases, where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary.

64. The principle of proportionality requires that detention always has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal. The Human Rights Committee has reasoned along very similar lines beginning with the case of A. v. Australia.[30] Opinion No. 45/2006[31] of the Working Group could serve as a reference for further details on the applicable legal concepts.

65. During country missions, the Working Group has sometimes witnessed unacceptable substandard conditions of detention in overcrowded facilities that affect the health, including the mental health, of irregular migrants, asylum-seekers and refugees, and increase the risk of a whole range of further violations of human rights, i.e. of economic, social and cultural rights. Alternatives to detention can take various forms: reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place. Such measures are already successfully applied in a number of countries. They must however not become alternatives to release.

B. Military tribunals

66. No es la primera vez que el Grupo de Trabajo observa que el derecho humano a la justicia es afectado por los tribunales militares: Ya lo hizo en sus informes E/CN.4/1994/27 (párrs. 29, 34 y 35); E/CN.4/1995/31 (párr. 44); E/CN.4/1996/40 (párr. 107); E/CN.4/1999/63 (párrs. 49, 79 y 80); E/CN.4/2001/ 14 (párr. 36); E/CN.4/2004/3 (párr. 58, 59 y 67); A/HRC/4/40 (párr. 6) y A/HRC/7/4 (párr. 63 a 66, 78 y 82). El Grupo de Trabajo comprobó en 2009, una vez más, que el juzgamiento de civiles por parte de jueces militares suele producir un efecto adverso al goce al derecho humano a la libertad personal, al justo proceso, especialmente en las dimensiones de ser juzgado en el más breve plazo; a ser llevado sin demora ante un juez; a gozar de la libertad durante el proceso; a recurrir contra la detención; a un juicio público; a un tribunal independiente, competente e imparcial, legalmente establecido; a la presunción de inocencia; a la igualdad de armas y de acceso a pruebas con la acusación; a una defensa libre y adecuada; ausencia de dilaciones y otras.

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[30] Communication No. 560/1993, A. v. Australia, Views adopted on 3 April 1997, para. 9.4.

[31] A/HRC/7/4/Add.1, p. 40.

67. Tan importante es el que no se violen las condiciones mencionadas en el artículo 14 del Pacto Internacional de Derechos Civiles y Políticos, como la seguridad de que ellas no serán violadas. No es un dato menor que el derecho humano a la libertad personal, contemplado en el artículo 9 del Pacto, esté tratado conjuntamente con el derecho humano a la seguridad de la persona. El solo hecho que el juicio en el que se debe decidir sobre la libertad de una persona esté en manos de autoridades judiciales en las que uno de sus valores más característicos es el de la obediencia a superiores ciertamente afecta al derecho a la seguridad reconocido en el citado artículo 9.

68. En el citado informe E/CN.4/1999/63, el Grupo de Trabajo estimó “que de subsistir alguna forma de justicia militar, debería en todo caso respetar cuatro límites:

a) debería declararse incompetente para juzgar a civiles;

b) debería declararse incompetente para juzgar a militares, si entre las víctimas hay civiles;

c) debería declararse incompetente para juzgar a civiles y a militares en los casos de rebelión, sedición o cualquier delito que ponga o pueda poner en peligro un régimen democrático;

d) no estaría en ningún caso autorizado a imponer la pena de muerte”.

69. El Comité de Derechos Humanos, en su Observación General Nº 13 sobre la administración de justicia (párr. 4) y N.º 32 sobre el derecho a un juicio imparcial y a la igualdad ante los tribunales y cortes de justicia (párr. 22) ha advertido las dificultades que la jurisdicción castrense provoca en el goce de los derechos humanos, al observar “que el enjuiciamiento de civiles por tribunales militares o especiales puede plantear problemas graves en cuanto a que la administración de justicia sea equitativa, imparcial e independiente. Por consiguiente, es importante que se tomen todas las medidas posibles para velar por que tales juicios se desarrollen en condiciones en que puedan observarse plenamente las garantías estipuladas en el artículo 14. El enjuiciamiento de civiles por tribunales militares debe ser excepcional; es decir, limitarse a los casos en que el Estado Parte pueda demostrar que el recurso a dichos tribunales es necesario y está justificado por motivos objetivos y serios, y que, por la categoría específica de los individuos y las infracciones de que se trata, los tribunales civiles no están en condiciones de llevar adelante esos procesos” (Observación General N.º 32, párr. 22).

70. El mismo Comité, en su Observación General N.º 8 sobre el derecho a libertad y a la seguridad personales, da cuenta de una situación muy frecuente, que enlaza implícitamente las detenciones dispuestas por tribunales militares, con la vigencia de estados de excepción: Es habitual que uno de los efectos de los estados de excepción sea el entregar los delitos que afectan a la seguridad pública al conocimiento de los tribunales militares. De allí que el Comité prevenga que incluso en los casos en que se practique la detención por razones de seguridad pública, ésta debe regirse por las mismas disposiciones; es decir, no debe ser arbitraria, debe obedecer a las causas fijadas por la ley y efectuarse con arreglo al procedimiento establecido en la ley (párr. 1), debe informarse a la persona de las razones de la detención (párr. 2) y debe ponerse a su disposición el derecho a recurrir ante un tribunal (párr. 4), así como a exigir una reparación en caso de que haya habido quebrantamiento del derecho (párr. 5). Si, por añadidura, en dichos casos se formulan acusaciones penales, debe otorgarse la plena protección establecida en los párrafos 2 y 3 del artículo 9, así como en el artículo 14.

71. La antigua Subcomisión de Promoción y Protección de los Derechos Humanos promovió un excelente estudio que culminó en 2005 con el informe del experto Emmanuel Decaux (E/CN.4/2006/58), que propone 20 proyectos de principios sobre la administración de justicia por los tribunales militares, entre los cuales el N.º 5 dispone que "Los órganos judiciales militares deberían, por principio, ser incompetentes para juzgar a civiles. En cualquier caso, el Estado velará por que los civiles acusados de una infracción penal, sea cual fuere su naturaleza, sean juzgados por tribunales civiles"; el Principio N.º 8 agrega que "La competencia de los órganos judiciales militares debería estar limitada a las infracciones cometidas dentro del ámbito estrictamente castrense por el personal militar. Los órganos judiciales militares podrán juzgar a las personas que tengan asimilación militar por las infracciones estrictamente relacionadas con el ejercicio de su función asimilada"; el N.º 9 proclama: "En todo caso, la competencia de los órganos judiciales militares debería excluirse a favor de la de los tribunales de justicia ordinarios para instruir diligencias sobre violaciones graves de los derechos humanos, como las ejecuciones extrajudiciales, las desapariciones forzadas y la tortura, y para perseguir y juzgar a los autores de esos crímenes"; el N.º 12 refuerza que en virtud de la garantía de hábeas corpus, "toda persona privada de libertad tendrá, en cualquier caso, derecho a interponer un recurso, como el de hábeas corpus, ante un tribunal, a fin de que éste resuelva sin demora sobre la legalidad de su detención y ordene su puesta en libertad si la

detención fuere ilegal. El derecho a instar el procedimiento de hábeas corpus o interponer otro recurso judicial de naturaleza análoga deberá considerarse como un derecho de la persona cuya garantía corresponderá, en todos los casos, a la competencia exclusiva de la jurisdicción ordinaria. En todos los casos, el juez habrá de tener acceso sin excepción a cualquier lugar donde pueda encontrarse la persona privada de libertad”**.**

C. States of emergency

72. El Grupo de Trabajo ha comprobado que cada vez que un Estado declara un estado de excepción en forma arbitraria o contraria a los preceptos del artículo 4 del Pacto Internacional de Derechos Civiles y Políticos, han resultado gravemente afectados los derechos humanos a la libertad personal y a las garantías del justo proceso, consagrados en los artículos 7 a 11 de la Declaración Universal de los Derechos Humanos y el párrafo 3 del artículo 2 y los artículos 9, 10 y 14 del Pacto Internacional de Derechos Civiles y Políticos. Por ello ha informado a la Comisión y al Consejo de Derechos Humanos sobre los resultados negativos de este refuerzo de las potestades públicas en beneficio de quienes lo declaran. Así lo ha hecho en sus informes E/CN.4/1994/27 (párrs. 60, 61 y 72); E/CN.4/1995/31 (párr. 38, 56 y 57); E/CN.4/1996/40 (párr. 124); A/HRC/4/40 (párr. 6); y A/HRC/7/4 (párrs. 40, 59, 61, 63 a 69, 78 y 82).

73. El Grupo de Trabajo comparte con el Comité de Derechos Humanos que el reestablecimiento de la normalidad que asegure el pleno respeto de los derechos consagrados en la Declaración y el Pacto debe ser el objetivo primordial del Estado Parte que suspende alguna de las disposiciones del Pacto (Observación General N.º 29 sobre la suspensión de obligaciones durante un estado de excepción, párrafo 1). Entiende el Grupo de Trabajo que la declaración del estado de excepción (a veces llamado estado de sitio, estado de asamblea, estado de urgencia, ley marcial, estado de conmoción, estado de emergencia, etc.) debe reunir numerosos requisitos copulativos de: excepcionalidad (no una situación estructural, como la pobreza endémica, por ejemplo); legalidad (se trata de un estado de derecho de excepción); temporalidad (no puede ser renovado indefinidamente, como en ciertos casos que ha conocido el Grupo en que se ha prorrogado hasta por 28 e incluso 46 años consecutivos); gravedad (debe estar dirigido a superar sólo aquel evento que colocó en riesgo “la vida de la nación”, y ninguna otra circunstancia menor); necesidad (en el entendido que la situación que se quiere superar no puede ser enmendada por otra vía); publicidad (no existen los estados de excepción de

hecho, por lo que se requiere una proclamación formal y conocida tanto por la población del país así como por todos los Estados Partes, a través del Secretario General de las Naciones Unidas, como lo exige el artículo 40 del Pacto Internacional de Derechos Civiles y Políticos); inderogabilidad de determinados derechos; aplicación sin discriminación alguna; y compatibilidad con todas las demás obligaciones internacionales que tiene el respectivo Estado, particularmente si al obrar en sentido contrario viola una norma de *jus cogens.*

74. El Grupo de Trabajo observa que en los casos en que los Estados alegan como justificación de una privación de libertad las atribuciones propias de un estado de excepción, arbitrariamente parecen no regir los derechos humanos al recurso judicial, contemplados en el párrafo 3 del artículo 2 y el párrafo 4 del artículo 9 del Pacto. Si bien el derecho a estos recursos no figura formalmente en el artículo 4 como inderogable, ellos deben considerarse "como inherentes al Pacto en su conjunto", como bien lo sostiene el Comité de Derechos Humanos en la Observación General N.º 29.

75. La práctica de 17 años del Grupo de Trabajo, permite concluir en la necesidad de una vigilancia minuciosa del Consejo de Derechos Humanos sobre la legalidad de las proclamaciones de estos estados de excepción, mediante una alerta temprana, y, sobre todo, sobre su ejercicio, para lo cual se formularán recomendaciones a este respecto.

D. Administrative detention and habeas corpus.

76. Habeas corpus is a legal procedure which is an undeniable right of all individuals and one of the most effective remedies against challenging arbitrary detention. Article 9 (4) of the International Covenant on Civil and Political Rights incorporates this right, namely the possibility to institute habeas corpus or similar proceedings, personally or on behalf of detained persons, challenging the lawfulness of detention before a court of law that is competent to order their release in the event that the detention is unlawful.

77. Administrative detention may be defined as arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants. As is evident from communications sent to the Working Group and the missions conducted, a large number of States resort to administrative detention as a means to counter terrorism, control irregular migration or protect the ruling regime. The

practice of administrative detention is informed by the belief that by detaining a person, a preventive action has been carried out thus securing society, community and State.

78. Since the inception of the Working Group it has recommended strengthening the institution of habeas corpus as a protective mechanism against arbitrary detention.[32] The "Group regret[ted] that in many countries habeas corpus actions do not exist or have been suspended or are not readily available or relied on very little, since the sources very rarely indicate that this remedy has been applied for, although this step is required in the Working Group's principles for the submission of cases." [33] It considered "… after three years' experience, that habeas corpus is one of the most effective means to combat the practice of arbitrary detention. As such, it should not be regarded 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."[34]

79. Despite these exhortations regarding habeas corpus, the jurisprudence of the Working Group is full of Opinions where States have denied the right of habeas corpus, the detaining authorities have refused to obey a judicial release order, the proceedings are unduly delayed, the review is limited to mere technicalities, or States have suspended habeas corpus during periods of emergency.[35]

80. The Working Group notes that based on the communications received over the years as well as its missions, a weakened habeas corpus institution has led to a weaker challenge to the practice of arbitrary detention. Furthermore, administrative detention and a weak or non-existent habeas corpus facility appear to be correlated. States find it convenient to employ administrative detention as a means to control or manage migration

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[32] E/CN.4/1993/24, para. 43 (c), endorsed by Commission on Human Rights resolution 1993/36, para. 16.
[33] E/CN.4/1994/27, para. 36.
[34] Ibid., para. 74.
[35] Decisions Nos. 3/1993, 8/1993, 22/1993, 33/1993, and 49/1993 (E/CN.4/1994/27); 55/1993 (E/CN.4/1995/31/Add.1); 16/1994 (E/CN.4/1995/31/Add.2); 2/1996, 32/1996 (E/CN.4/1997/4/Add.1); Opinions Nos. 12/1997 (E/CN.4/1998/44/Add.1); 29/2000 (E/CN.4/2002/77/Add.1); 3/2002 (E/CN.4/2003/8/Add.1); 16/2005 (E/CN.4/2006/7/Add.1); 43/2006 (A/HRC/7/4/Add.1); 23/2007 (A/HRC/10/21/Add.1); 32/2008, 45/2008, 2/2009, and 3/2009 (addendum 1 to this report).

within their territories. A robust challenge to this practice would be an increased use of the right of habeas corpus as required by article 9 (4) of the International Covenant on Civil and Political Rights.

E. Compliance and remedies

81. The Working Group promotes compliance with international human rights law and standards prohibiting and preventing arbitrary detention. It also promotes adequate redress when arbitrary detention has occurred, in terms of articles 2 (3) and 9 (4) and (5) of the International Covenant on Civil and Political Rights.

82. Having established the arbitrariness of detention in its Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. When a case falls within category I and/or II of the categories applicable to the consideration of cases submitted to it, the necessary steps to be taken to remedy the situation is typically the immediate release of the detained person, and the Working Group in that case states this explicitly. Such remedy follows from the generally recognized principle of restitution *ad integrum*, requiring the immediate restoration of the physical liberty of the arbitrarily detained person. It is also reflected in article 9 (4) of the International Covenant on Civil and Political Rights, which requires that a court must be empowered to order the release of an unlawfully detained person.

83. For such remedy to be effective, as required by article 2 (3) of the International Covenant on Civil and Political Rights, detaining States are under an obligation to release the arbitrarily detained (foreign) detainee into their own territory even if they wish to deport the (foreign) detainee, but where deportation of the detainee otherwise liable for removal to the country of origin or to a third country accepting the detainee is not promptly possible. This could occur, e.g., if a removal would violate the principle of non-refoulement or if it is not possible for any other legal or factual reasons. Otherwise the international human rights obligation for immediate restoration of the liberty of the arbitrarily detained person would be undermined.

84. When the Working Group finds in its Opinion that the detention of the concerned individual exclusively falls within category III as gravely violating the right to fair trial, the appropriate remedy might take different forms to that of the immediate release of the arbitrarily detained person. For example, affording the detainee a retrial that meets all fair trial guarantees as contained in article 10 of the Universal Declaration of Human Rights and articles 9 (3) and 14 of the International Covenant on Civil and Political Rights. However, given the gravity of the violation of fair trial guarantees, which is a condition for the Working Group to declare the detention to be arbitrary, and the time that the individual concerned has already spent in (pretrial) detention, conditional release, release on bail, or other forms of release pending trial would also typically be the appropriate remedy.

85. In its Opinions, the Working Group encourages States which have not ratified the International Covenant on Civil and Political Rights to do so. When it may wish to restate or develop its jurisprudence on a matter of importance or on a point of law, or call on the States to amend their national legislation or to change their practices to bring them into conformity with its international human rights obligations, it may, under exceptional circumstances, render an Opinion even though the person has been released. In any given case, the Working Group may remind States of their obligation in terms of article 9 (5) of the International Covenant on Civil and Political Rights to provide compensation to the released person.

86. The Working Group has begun to make more frequent and express references to its own jurisprudence, and to that of international, regional and national human rights bodies and courts. Conversely, the Working Group welcomes the fact that the findings and recommendations, contained in its reports and Opinions are increasingly made use of by other United Nations human rights bodies and national and regional human rights courts. When national courts are determining the extent of international law obligations which often have a direct or indirect effect on matters before them, the reports and Opinions of the Working Group may also be of assistance.

IV. CONCLUSIONS

87. **The Working Group, in the fulfilment of its mandate, welcomes the cooperation it has received from States concerning cases brought to their attention.**

88. **The Working Group considers that country and follow-up visits are of the utmost importance and requests the support of Member States in this regard.**

89. **The transmission of an urgent appeal does not exclude the transmission of the same case to the concerned State pursuant to the regular complaints procedure of the Working Group leading to the adoption of an Opinion, and it calls on States to provide it with separate replies to each of its communications.**

90. **The Working Group has decided to devote particular attention in 2010 to the issues of video and audio surveillance in interrogation rooms, alternatives to detention, a revision of its methods of work, and the detention of drug users. It thanks States which have responded to its questionnaire on the detention of drug users and requests others to do so.**

91. **With respect to the detention of migrants in an irregular situation, the Working Group again notes that their human rights are not always guaranteed. In some States detention of migrants in an irregular situation is mandatory and automatic without a necessity criteria being applied. National laws do not provide for detention to be ordered by a judge or for judicial review of the detention order. Detainees often do not enjoy the right to challenge the legality of their detention. There is no maximum length of detention established by law, which leads to prolonged or, in the worst case, potentially indefinite detention. In cases where the legal or practical obstacles for the removal of the detained migrants do not lie within their sphere of responsibility, the detainees should be released to avoid potentially indefinite detention from occurring, which would be arbitrary. The principle of proportionality requires that detention has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.**

92. **The use of habeas corpus, the strengthening of which the Working Group has recommended since its inception, is, contrary to article 9 (4) of the International Covenant on Civil and Political Rights, still weak or non-existent in some States, particularly with respect to administrative detention.**

93. **The immediate release of a person arbitrarily detained is typically the appropriate remedy, not only if the detention is arbitrary in terms of categories I and II as being manifestly devoid of any legal basis or resulting from the exercise of**

certain human rights, but also in terms of category III, given the grave nature of violations of the right to fair trial established by the Working Group when applying category III. For such remedy to be effective as required by article 2 (3) of the International Covenant on Civil and Political Rights, release requires the release of the (foreign) detainees arbitrarily deprived of their liberty into the territory of the detaining State.

V. RECOMMENDATIONS

94. **To enable the Working Group to report more systematically and comprehensively it reiterates its proposal to the Human Rights Council to expand the mandate of the Working Group to include the examination of conditions of detention around the world and the monitoring of State compliance with their obligations concerning all human rights of detained and imprisoned persons.**

95. **In view of an increase in information received on reprisals suffered by individuals subject to urgent appeals or Opinions, States are urged to cease any such practice.**

96. **States should take into account the findings and principles contained in the present report regarding the detention of migrants in an irregular situation, administrative detention and habeas corpus, and compliance with international human rights norms and standards preventing and prohibiting arbitrary detention, as well as appropriate remedies.**

97. **El Consejo de Derechos Humanos debería estudiar la adopción de del proyecto de principios sobre la administración de justicia por los tribunales militares (E/CN.4/2006/58) preparados por la antigua Subcomisión de Promoción y Protección de los Derechos Humanos. Tales principios son esenciales para evitar los abusos que el Grupo de Trabajo ha denunciado por tanto tiempo. Sin perjuicio de lo anterior, el Grupo de Trabajo propone que dichos principios se complementen, retirando de la competencia de juzgados castrenses el juzgamiento de civiles y militares en los casos de rebelión, sedición o cualquier delito que ponga o pueda poner en peligro la estabilidad de un régimen democrático.**

98. **El Grupo recomienda a la Alta Comisionada de las Naciones Unidas para los Derechos Humanos que, tan pronto como se informe de la proclamación de un estado de excepción o un Estado invoque una situación de excepcionalidad, encomiende a titulares de uno o más procedimientos no convencionales la realización de una misión de urgencia, con el fin de verificar sobre el terreno si se han respetado lo principios de excepcionalidad, legalidad, temporalidad, gravedad, necesidad, publicidad (o proclamación), inderogabilidad, aplicación no discriminatoria, y compatibilidad con todas las demás obligaciones internacionales del Estado.**

99. **El Grupo de Trabajo pide al Consejo de Derechos Humanos que profundice en el estudio de la relación entre el derecho a la libertad y el derecho a la seguridad de la persona. El derecho a la seguridad es un derecho humano de la mayor importancia que no ha tenido el necesario desarrollo jurisprudencial.**