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المجلس الاقتصـــادي والاجتماعي

لجنة حقوق الإنسان

الدورة التاسعة والخمسون

البند 11(ب) من جدول الأعمال المؤقت

الحقوق المدنية والسياسية، بما في ذلك مسألة التعذيب والاحتجاز

تقرير الفريق العامل المعني بمسألة الاحتجاز التعسفي

إضافة

بعثة إلى أستراليا*

موجز تنفيذي

في 31 كانون الثاني/يناير 2002 دعت حكومة كومنولث أستراليا الفريق العامل المعني بمسألة الاحتجاز التعســفي إلى زيارة البلاد. ويتناول التقرير الحالي هذه البعثة التي جرت من 24 أيار/مايو إلى 6 حزيران/يونيه 2002. وكانت البعثة تتعلق بالاحتجاز الإداري للأشخاص الذين وصلوا إلى البلاد دون تصريح. وكان غرضها هو بحث مسائل حقوق الإنسان المتعلقة بشرعية احتجاز طالبي اللجوء، والضمانات القانونية المطبقة على الاحتجاز في أســتراليا بالمقارنة بالمعايير الدولية. وكانت البعثة مكونة من السيد لويس جوانيه، رئيس/مقرر الفريق العامل

* يجري تعميم الموجز التنفيذي لتقرير هذه البعثة بجميع اللغات الرسمية. ويرد التقرير نفسه في مرفق هذا الموجز وسيعمم باللغة التي قدم بها وحدها.

والسيد تاماس بان. وقامت بزيارة مراكز استقبال وإعداد المهاجرين في ميناء هيدلاند ووروميرا وباكستر، ومراكز احتجاز المهاجرين في فيلاوود وميريبيرنونغ وبيرث. وقابلت البعثة وزير الخارجية، ووزير الهجرة وشؤون التعدد الثقافي والسكان الأصليين والمدعي العام ورئيس لجنة حقوق الإنسان وتكافؤ الفرص. كما التقت البعثة في أديلايد وسيدني وملبورن بممثلي أكثر من 40 منظمة غير حكومية وبعدد كبير من نشطاء المجتمع المدني. وتمكنت من إجراء أحاديث مع بضع مئات من المحتجزين في مراكز الاحتجاز التي زارتها.

ويثير التقرير الحالي عدة دواعي للقلق بشأن الاحتجاز الإلزامي لمن يصلون إلى أستراليا دون تصريح، بسبب الطابع الأوتوماتيكي وغير التمييزي لهذا الاحتجاز، واحتمال استمراره لفترة غير محدودة، وعدم وجود رقابة قضائية على شرعية الاحتجاز، والأثر النفسي للاحتجاز على طالبي اللجوء الذين يعانون من "متلازمة اكتئاب جماعية"، وإنكار الحق في وحدة الأسرة في عديد من الحالات، واحتجاز الأطفال، والتعديلات الأخيرة التي أدخلت على قانون الهجرة لعام 1958 والتي تقيد المراجعة القضائية. ويشعر الفريق العامل بقلق بالغ إزاء احتجاز الفئات الضعيفة وخاصة الأطفال، وإزاء كل العملية القانونية التي تحكم احتجاز طالبي اللجوء، ونقص المعلومات الكافية التي تقدم للمحتجزين. ومن دواعي القلق الأخرى المذكورة في التقرير الافتقار إلى آليات شكوى صحيحة، وآثار تولي شركة خاصة إدارة مراكز الاحتجاز.

ويلاحظ الوفد فيما يتعلق بموقف الحكومة التي هي كذلك طرف في العهد الدولي الخاص بالحقوق المدنية والسياسية أن المعاهدات الدولية لا تنفذ نفسها بنفسها ولا بد من دمجها في القانون الوطني باعتماد تشريع محدد. ويوضح الوفد كذلك أن هناك سوابق قانونية لأداء أستراليا لالتزاماتها بمقتضى العهد حتى في غياب مثل هذا التشريع، وبوجه خاص قانون تكوين لجنة حقوق الإنسان وتكافؤ الفرص.

ويختتم الوفد تقريره بالتعبير عن أمله في أن تتخذ أستراليا مبادرة مراجعة قوانينها لجعلها متمشية مع المعايير الدولية المقبولة عموماً، ولا سيما العهد الدولي الخاص بالحقوق المدنية والسياسية، والتوصية بأن تراعي حكومة أستراليا دواعي القلق التي وجدت تعبيراً عنها من أجل تحسين وضع هؤلاء الأشخاص، وخاصة من هم في وضع ضعيف.

Annex

Report of the Working Group on Arbitrary Detention on its visit to Australia

(24 May-6 June 2002)

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Introduction

1. The Government of Australia, in a letter dated 31 January 2002, invited the Working Group on Arbitrary Detention to visit Australia. The visit took place from 24 May to 6 June 2002.

I. PROGRAMME OF THE VISIT

2. According to the invitation, the visit was related to Australia's administrative custody of unauthorized arrivals in that country. The purpose of the mission was to look into the human rights issues concerning the legality of the detention of asylum-seekers and the legal guarantees that apply to detention in Australia, as compared to the international standards.

3. The delegation was composed of Mr. Louis Joinet, Chairman-Rapporteur of the Working Group, and Mr. Tamás Bán. The delegation was able to visit the Immigration Reception and Processing Centres of Port Hedland, Woomera (500 kilometres north-west of Adelaide) and Baxter (the newly constructed and, at that time, still unused detention centre in Port Augusta), as well as the Immigration Detention Centres of Villawood (in south-west Sydney), Maribyrnong (in Melbourne) and Perth. Upon the request of the Australian Government, the mission was conducted at the same time as the visit of the personal envoy of the High Commissioner for Human Rights, Justice Prafullachandra Natwarlal Bhagwati. Justice Bhagwati joined the delegation during its visits to the Woomera and Baxter centres.

4. The delegation met with the Minister for Foreign Affairs, Mr. Alexander Downer; the Minister for Immigration and Multicultural and Indigenous Affairs, Mr. Philip Ruddock MP; the Attorney-General, Mr. Daryl Williams; and Dr. Zev Ozdowski, Chairman of the Human Rights and Equal Opportunity Commission (HREOC).

5. The strong cooperation extended to the delegation and the transparency observed by the Government of Australia are particularly to be mentioned. The substantive and logistical support given by the United Nations Information Centre, Sydney and the cooperation of the Office of the United Nations High Commissioner for Refugees, the Australian Red Cross and the Australian Committee for UNICEF were also very important to the success of the mission.

II. LEGAL FRAMEWORK APPLICABLE TO THE DETENTION OF UNLAWFUL NON-CITIZENS

6. Problems arising out of the great number of illegal arrivals from overseas ("boat people" and others attempting to enter Australia by air) prompted the Government to amend the Migration Act 1958. As a consequence of the amendments the law requires, as from September 1994, that non-citizens unlawfully in Australia - basically persons who have arrived or are in Australia without a valid visa - must be immediately detained. This deprivation of liberty, effected in order to bring about the goals of Australia's immigration policies, is, in the terminology used by the Commission on Human Rights and the Working Group on Arbitrary Detention, a form of administrative detention. The detention requirement subsists until the person either is determined as having a lawful reason to remain in Australia (e.g. cases where the authorities recognize that Australia owes such person protection under the 1951 Convention relating to the Status of Refugees, ratified by Australia on 22 January 1954), or is removed or deported from Australia. The Act applies to all illegal entrants regardless of age, sex, nationality or any other status and irrespective of whether they are asylum-seekers.

7. The detention centres for the purpose of immigration detention are: Christmas Island, Cocos Island, Curtin, Maribyrnong (Victoria), Perth and Port Hedland (Western Australia), Villawood (New South Wales) and Woomera (South Australia). The total number of detainees as at 3 May 2002 was around 1,500 persons, most of them of African origin, especially from the Maghreb, and from Asia (Afghans, Chinese, Iranians, Iraqis, Kurds and Vietnamese).

8. Recently, Australia has made arrangements with two countries, Papua New Guinea and Nauru, to transfer unlawful non-citizens to their territory. Under the arrangements, called "the Pacific solution", an unspecified number of transfers have been already made. Papua New Guinea (Manus Island) and Nauru provide detention camps for Australia-bound asylum-seekers.

9. After being placed in a detention centre, unlawful non-citizens undergo entry inquiries, which seek to identify their reasons for having travelled to Australia, their reasons for leaving their home country and any reason for which the individual is unwilling to return to his country of origin or to his former country of residence. It is first considered whether persons arriving illegally are claiming any kind of protection. If they apply for asylum or other kind of protection (the case of the vast majority) they are sent to immigration processing and detention centres, where they are interviewed in more depth. If not, they are put in so-called "separation detention" in order to arrange for their removal.

10. An immigration agent of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is assigned to each asylum-seeker. The Immigration Agent considers the information provided by that person or otherwise collected during the interviews. Unless it is established by that official that Australia owes protection to the applicant under the Refugee Convention, the application shall be denied. In such event the Refugee Review Tribunal (RRT) provides the applicant with a review of the merits of the application. This tribunal only hears protection visa cases. Other cases go to the Migration Review Tribunal. Previously, the applicant could lodge an appeal against an RRT decision to the Federal Court (first a single judge sitting, and then another appeal to the Full Bench of the Federal Court comprised of three judges) and then to the High Court. After the adoption last year of an amendment to the Migration Act 1958 (the "privative clause"), however, an applicant (either an asylum-seeker or the Immigration Minister) can now appeal to the High Court only, and only on very limited grounds. The Minister can - and does - appeal the decisions of the RRT.

11. The Migration Act 1958 enables the Minister of Immigration to substitute for the RRT decision a decision which is more favourable to the applicant. The exercise of this power is, however, non-compellable and any decision to exercise it is not subject to either merit or judicial review. The Minister does not seem to avail himself of this power very often.

III. THREE ASPECTS OF THE SYSTEM OF DETENTION OF UNLAWFUL NON-CITIZENS IN AUSTRALIA

12. The Working Group believes, very much along the lines of the reasoning of the Human Rights Committee in A. v. Australia'[1] that to detain unlawful non-citizens is not, in itself, arbitrary. In case of illegal entry the need for the immigration authorities for identity checks and the initial immigration screening may justify temporary detention of unlawful non-citizens, particularly if they are unwilling to cooperate with the authorities and if they are likely to abscond. But any deprivation of liberty must be proportionate to the aims pursued and a fair balance shall be struck between the conflicting interests: the interest of the State to implement its immigration policy and to protect the community against illegal immigration, on the one hand, and the fundamental right to liberty of the unlawful entrants, on the other hand.

A. Detention of unlawful non-citizens under the Migration Act 1958 is mandatory, automatic and indiscriminate

13. Detention of unlawful non-citizens is effected by the operation of the law, not by an order of an administrative authority or a court, without a prior assessment of the particular circumstances of each individual case which would balance the conflicting interests. The system of mandatory detention sets up a presumption whereby each unlawful non-citizen, if not detained, represents a danger to the community, even in cases when the implementation of this system results in the detention of children, elderly or sick people and others in a vulnerable situation, the detention of whom is obviously not absolutely necessary to achieve the aims of the immigration policy. Since this presumption is irrefutable, even when the immigration agent is convinced that in a particular case detention is unnecessary, he or she may not disregard the mandatory character of detention.

14. The conditions of detention are in many respects similar to prison conditions; detention centres are surrounded by impenetrable and closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centres they are, as a rule, handcuffed; escape from a centre constitutes a criminal offence under the law and the escapee is prosecuted.

15. During talks conducted with government officials it became obvious that one of the goals of the system of mandatory detention and the way it is implemented is to discourage would-be immigrants from entering Australia without a valid visa.

B. Detention of unlawful non-citizens is indefinite

16. The Working Group finds particularly worrying the lengthy detention of unlawful non-citizens, especially those whose application (for asylum or for permission to remain in Australia) has been refused by a final decision and who are awaiting removal or deportation.

17. The prospects of this category of detainee are particularly uncertain. The majority of them travelled to Australia from countries to which the Government cannot or is unwilling to return them. According to DIMIA officials, some people who have been finally rejected cannot be returned because they refuse to go back, because they refuse to cooperate, or because the country to which they are to be sent back, or a transit country, refuses to accept them.

18. The delegation was informed by high-ranking officials that the Government works hard to find a solution for them, possibly to find third countries willing to admit them. Yet, the delegation

met a fairly large number of detainees awaiting removal who have been detained for years after their application to remain in Australia had been denied by a final decision. The prospect of spending an indefinitely long time in detention until a solution is found has detrimental effects on the physical health and mental integrity of the detainees concerned. The delegation met a considerable number of detainees in such a situation who manifested the signs of deep mental depression, distress, and even various physical ailments. Many of them have caused serious harm to themselves or attempted to commit suicide. Some detainees succeeded.

C. Lack of access to a court to challenge the lawfulness of the detention

19. Another matter of concern to the Working Group was the lack of sufficient judicial review of the detention. Under international law anyone deprived of his/her liberty shall be entitled to take proceedings before an independent court in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is unlawful.

20. Section 196, subsection (1), of the Migration Act 1958 provides that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is removed from Australia, deported, or granted a visa. Subsection (3) provides that "to avoid (any) doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa".

21. The delegation was told that under general (common) law, various avenues are available to challenge the lawfulness of immigration detention. DIMIA officials cited as an example that if detention is effected on grounds not provided in the Migration Act 1958 (e.g. the detainee contests that he/she is an unlawful non-citizen), a writ of mandamus or of habeas corpus are remedies available to him/her.

22. The Working Group obviously does not contest the existence of such constitutional remedies. However, it is unlikely that these remedies are effective in ordinary immigration detention cases. The Immigration Advice and Assistance Scheme does not cover judicial review. Asylum-seekers looking for advice, assistance or legal representation after an RRT decision must find it and pay for it themselves. Such assistance is said to be quite expensive; it is unclear whether legal aid is accessible for detainees in poor financial straits and it is also unlikely that judicial proceedings meet the requirement that courts must take a decision speedily (article 9, paragraph 4, of the International Covenant on Civil and Political Rights). Moreover, no example has been provided of such remedies having ever been used.

IV. COMPLIANCE WITH INTERNATIONAL STANDARDS

23. Treaties do not form part of the Australian domestic law unless and until they are incorporated by statute. This fundamental rule was expressed by Mason C.J. and Deane J. in Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273.[2] Each time a new treaty is entered into, a decision has to be made by the Federal Government as to whether legislation is warranted. The International Covenant on Civil and Political Rights has not been incorporated into Australian domestic law, hence it does not form, in principle, part of the laws of Australia. Irrespective of the binding or not-binding character of international treaties under Australian law, representatives of the Government also agree that international law requires remedies before courts for victims of unlawful detention. However, they consider that the Immigration Act 1958 serves as a sound basis for detention, hence detention is not unlawful, therefore international law does not come into play.

24. The Working Group remains unconvinced of the validity of this argument for the five following reasons:

(a) By ratifying the Covenant (1980), Australia committed itself to undertake, "[w]here not already provided for by existing legislative or other measures … the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant";

(b) According to article 26 of the Vienna Convention on the Law of Treaties, "a treaty is binding upon the parties and must be performed in good faith". Can it be considered that the "good faith" requirement of this article is respected when a State ratifies a convention, notably in the field of human rights, refrains for 21 years from adapting its domestic legislation, and then takes advantage of this legal void, for which it is responsible, to evade its obligations?

(c) Legislative changes may not be necessary where, for example, the treaty is capable of being implemented solely by administrative means (e.g. regulation of day-to-day life in the detention centres). Similarly, legislative changes may not be required if the treaty obligations are capable of being implemented through existing legislation, in combination with common law;

(d) Just because a treaty has not been directly incorporated into domestic law does not mean that its ratification has no significance for Australian law. Australia's international obligations, including treaty obligations, may be used by the courts in the interpretation of statutes. This flows from the presumption that a parliament, in enacting legislation, intended to act consistently with Australia's obligations under international law;

(e) Last and above all, the Working Group has noted that international treaties are given some legal effect at the domestic level in Australia. For example seven international human rights instruments are schedules to the Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act), including the International Covenant on Civil and Political Rights (ICCPR); people can complain about actions of the Federal Government which they deem contrary to the terms of the treaty, and the Commission can attempt to conciliate. Ultimately, the Commission can report on the matter to the Federal Attorney-General.

25. It is precisely in these terms, and basing itself on Australian law, that HREOC, in its Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre (HRC Report No. 12) to the Attorney-General, framed its views on the Quan and Su case making explicit reference to the

applicability of the Covenant: "Section 3 of the HREOC Act defines 'human rights' as including the rights and freedoms recognized in the ICCPR, which is Schedule 2 to the Act" (HRC Report No. 12, para. 3.2).

26. The reasoning of the Human Rights Commissioner is based directly on ICCPR. His findings read: "I find that the Department's acts and practice in not informing Mr. Quan and Mr. Su of their right to legal advice between 15 June and 5 July 1996 breached their right under ICCPR article 10.1 …; I find that the Department's handling of Mr. Quan's and Mr. Su's request for access to legal advice and for application forms for protection visas was not timely and so inconsistent with their human treatment in detention and therefore breached Mr. Quan's and Mr. Su's rights under ICCPR article 10 (1) … I find that Mr. Quan's detention from October 1996 until 27 May 1997 and Mr. Su's detention from July 1996 to February 1997 were arbitrary within the meaning of ICCPR article 9 (1) … I find that Mr. Quan and Mr. Su were held for 96 days in

separation detention in conditions which in many respects are identical to incommunicado detention, in breach of ICCPR article 10.1" (ibid., para. 4.1).

27. Taking into account the foregoing, in particular the position taken by the Australian legislator in adopting the HREOC Act and the constant references to the Covenant by HREOC in the fulfilment of its mandate and in its reports to the Attorney-General on its inquiries, the Working Group considers it legitimate to take into consideration ICCPR - in particular article 9 - in examining the compliance by Australia with international law of the detention of unlawful non-citizens in the following matters that raise particular concerns in the following areas, that the Working Group submits to the attention of the Commission on Human Rights.

V. SUBJECTS OF CONCERN TO THE WORKING GROUP

A. The detention of vulnerable persons

28. Essentially of concern are: children (especially young children/unaccompanied minors), the physically or mentally handicapped, elderly persons, pregnant women and women who are alone. Of particular concern is the detention of a large number of children. As of 3 May 2002, 170 minors (65 girls and 105 boys, of whom 5 are unaccompanied) were in detention. According to testimonies gathered during the visit to the centres, most of these children find themselves detained after having experienced a first traumatic episode (persecution or armed conflict followed by clandestine flight and therefore a brutal rupture with the family environment and, for a number of them, the hardships of boat people). Their detention, coming without a transition at the very moment that their trials seemed to be coming to an end, exacerbates their distress.

29. These observations are corroborated by those made in the June 2001 report of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) of the Australian Parliament, A Report on Visits to Immigration Detention Centres, which cites among the harmful effects of detention on children "the shame at having left another country only to end up in a centre … their confusion about their surroundings, their sense of loss when playmates leave … and the general stress of their situation" (JSCFADT report, para. 7.5).

30. One can also cite the National Inquiry into Children in Detention submitted recently (May 2002) to HREOC by the Conference of Leaders of Religious Institutes (CLRI) who emphasize the stress - as the delegation itself observed - of having to live surrounded by razor wire 24 hours a day, the constant roll calls, the tension between the security officers - akin to police or army - and the detainees. Also brought to the fore was the stress provoked in certain centres by the sight of acts of self-mutilation, or the panic that seizes the children when riots break out in confined quarters to protest against the conditions of confinement, as occurred in Port Hedland in January 2001 (CLRI report, pp. 4-6).

31. This environment, oppressive for everyone (some children see their families crack, as the delegation witnessed in Woomera), causes recurrent behaviour problems such as refusing food, "sleep problems, night terrors, regression to bed wetting, temper tantrums" and, in the most serious cases, acts of self-mutilation (lacerating), and even suicide attempts (ibid.). The report gives statistics (see paragraph 39 below).

32. These observations were confirmed by testimonies gathered by the delegation from detained parents as well as former teachers and psychologists who worked in the centres and who wished to remain anonymous because of a clause in their contracts which requires confidentiality even after the end of their employment.

33. Desirous of finding an alternative solution for the children, since August 2001 DIMIA has fitted out several houses in an urban area (near suburbs of Woomera) for four families. A DIMIA fact sheet (No. 82), entitled "Immigration Detention", revised on 7 May 2002, states that this project for alternative detention outside the detention facility "enables up to 25 women and children to live in family-style accommodation". In May 2002, there were seven adult women and eight children living in the bungalows. But again they were enclosed by barbed wire and under the surveillance of female agents of Australasian Correctional Management Pty. Ltd., (ACM), the company subcontracted to provide custodial services in the centres (see paragraph 55 below). The fathers remained in the detention centre, and the majority of the families were depressed by the separation. For example, during the visit, taking advantage of the presence of the delegation, one of the mothers succeeded, despite the distance, in travelling on foot back to Woomera in order to be with "the family". According to officials at the centre, this act constitutes escape, which is punishable by five years' imprisonment. The Chairman-Rapporteur, together with the directors of the centre, was able to obtain assurances from the women that the incident would not be repeated.

34. The delegation also noted the presence in the Port Hedland centre of an Iranian woman detained with her sister and three children who were seriously mentally impaired, and who had been abandoned by her husband for that reason. The situation of that family, who suffered constant rejection by the detainee community, was tragic to behold. There was also at Port Hedland an elderly person, almost blind, who was the butt of jokes and degrading remarks by certain detainees.

35. The attention of the delegation was also drawn to acts of sexual harassment, directed solely against women on the part of detainees.

B. The relationship between the legal framework for detention and "collective depression syndrome"

36. Officials publicly reproached the delegation for its concern about this "so-called" syndrome. The delegation insists on its evaluation, corroborated by the report of the JSCFADT which states, "Inside the centres, the strongest memory some Committee members retained was the despair and depression of some of the detainees, their inability to understand why they were being kept in detention in isolated places, in harsh physical conditions with nothing to do" (JSCFADT report, para. 4.238). Recalling the words of one detainee, one of the subtitles of the report is "Immigration detention syndrome", a term similar to that for which the delegation was reproached (ibid., para. 7.13).

37. In the light of the many testimonies gathered, the delegation can state that the following behavioural anomalies existed: affective regression and infantilism; aggressivity against detainees (at Villawood, an increasing number of quarrels between women were noted); and, above all, acts of self-mutilation going as far as suicide.

38. The delegation also took note of equally alarming information concerning, for example, the case of Palestinian detainees (several suicide attempts); a Syrian man who had to be stitched up after trying to commit hara-kiri; an attempt to hang himself by a 12-year-old child who wanted to go home to his grandparents in Iran; a mother hospitalized for two months during which one of her two children tried to commit suicide and her sister and son-in-law went on hunger strike, he sewing his lips together. In a report submitted to HREOC in May 2002, "Two Australian national policies on self-injury and suicide", Dr. Michael Dudley, a psychiatrist, mentions specific and concording allegations, including as to the probable date of death, concerning five persons said to have committed suicide (annex I of the study).

39. These observations were generally corroborated by DIMIA statistics: “In the eight months between 1 March 2001 and 30 October 2001 there were 264 incidents of self-harm reported (238 males and 26 females). The rates of self-harm are appallingly high for people in the 26-35 age range: 116 people (105 men and 11 women). They were followed by those people entering their adulthood aged 20-25 years, of whom 103 had self-harmed (98 males and 5 females). Twenty-nine children and young people up to the age of 20 were recorded as having self-harmed.” Following its interviews with detainees, the delegation was able to compile a list of the following acts of self-harm, some of which were witnessed personally:

(a) Corporal lacerations by jumping onto the razor wire (witnessed by the delegation) or by stealing sharp implements to lacerate arms or legs. The delegation was informed of the case of a detainee who cut the word “freedom” into his arm;

(b) Lips sewn together (two cases during the visit);

(c) Hitting of the head against walls or objects such as air conditioning units;

(d) Suicide or attempts by hanging, jumping off buildings or trees (the case of an Afghan whom the delegation met in Perth), taking an overdose of medicine, and poisoning by drinking shampoo, detergent, fly spray or other toxic liquids.

40. Following the exchange of views that the delegation had on this subject with the Immigration and Detention Advisory Group (IDAG) charged with advising the Minister, and in the light of the testimonies gathered and the reports submitted by NGOs, the delegation considers that the two following factors play a preponderant role:

(a) On the one hand, the wracking uncertainty, day after day, in which the detainees live concerning the length of their detention which, contrary to common-law prisoners, is without legal limit (see paragraphs 16 ff);

(b) On the other hand, the inadequate information provided on the status of the application at whatever stage, or the difficulty in obtaining information on the frequent problems encountered during the investigation of the application (see paragraphs 20 ff).

41. This absence of temporal reference points foments collective turmoil, each person trying to find out the status of everyone else’s case, which breeds jealousy and frustration; in the absence of sufficient information, the granting of visas is often compared to a lottery. “We are suspended in time”, says one detainee; “We live in limbo”, says a mother.

42. Among other stress factors observed, the delegation notes in particular:

(a) The constant “eye” of the surveillance camera (detainees say, “We are totally robbed of privacy”; “We no longer have any control over our lives”);

(b) The too-frequent practice of handcuffing, using disposable plastic flexcuffs, of detainees for trips outside the centre, in particular for dental or medical treatment; the detainees say they feel like criminals;

(c) The frequent roll calls (four per day on average, including one at night by counting heads in the bedrooms and dormitories). On this point, the observations of the delegation were corroborated by the JSCFADT report which cites “a number of complaints about the waking of detainees during nightly checks of sleeping accommodations” (para. 6.87);

(d) Autistic reactions provoked by the difficulties encountered by some detainees in making their needs known because of language problems that are so diverse that it has been impossible for ACM to deal with them, despite its efforts. This problem is particularly acute for women who, in the absence of an adequate number of female interpreters, are reluctant to discuss their private problems;

(e) The routine calling for detainees over the public address system using their registration number, composed of three letters and a number. According to an NGO that had provided toys for Christmas, the children were called up to receive their gifts using their registration numbers. The delegation also observed that most of the detainees who came forward introduced themselves by their registration numbers. At bottom, this practice is felt to be a loss of the detainees' identity.

C. The practice of collective or individual isolation

43. New arrivals or detainees who are being prepared for removal or deportation from Australia are subjected as a group to a "separation detention" regime. Arrivals are not placed in isolation in the sense that they are totally alone; however, groups are isolated from other groups of detainees. The goal of collective isolation is, on the one hand, to be able to proceed with normal medical examinations, and, on the other hand, to prevent the new arrivals from receiving information and advice which the experienced detainees could give them, with the explicit purpose "[of protecting] the integrity of the protection visa process and to ensure that Australia's resources are directed at those with genuine claims for protection not those who would use the protection process in an attempt to achieve migration outcomes" (HREOC report No. 12, p. 25). The is the time when new arrivals most need advice about their rights, in view of their feelings of alienation and the automatic character of the detention. Because of their isolation, detainees do not know how to obtain any advice other than that given by their assigned immigration agent.

44. More disturbing is the second case, the putting of individual detainees thought to be "risks" in "observation cells" fitted with cameras. The delegation, which visited almost all those cells, could not clearly distinguish which were reserved for medico-psychological observation (emergency aid is administered to protect a detainee against him/herself) and which were reserved for disciplinary purposes (troublemakers), to the extent that, for example, acts of self-mutilation or hunger strikes seemed to be treated as both medical and discipline problems.

45. In the report by Dr. Dudley mentioned above, he cites, for example, several cases of isolation for going on hunger strike (at Port Hedland and Woomers, for three months) or for self-mutilation (Maribyrmong).

D. Detention in prison

46. One category of detainee is exempt from criticism: that of aliens in an irregular situation convicted not for this but for violating the law, and serving their prison term in a normal manner. More serious is a second category composed of aliens in the first category who, having completed their prison terms, remain in prison awaiting removal, therefore - de facto - for an undetermined period. One extreme example is the case of a Vietnamese man detained for four years whereas he had been sentenced to one year's imprisonment. A third category is a matter of the utmost concern: that of asylum-seekers taken out of detention centres and transferred to State prisons (some 100), either because of a lack of space in the centres or - and this is true for the majority - for disciplinary reasons. These appear to be cases of arbitrary detention, the persons concerned being held without charge or conviction.

47. The modalities of these transfers - the basis for which is found in section 189 of the Migration Act - are set by Ministerial Instruction MSI-421. The decision, taken by ACM, must be countersigned by DIMIA. The Instruction allows such transfers for the following reasons, inter alia: "unacceptable behaviour", "continuing risk to other detainees", "a history of violence", "a health or security concern", "a history of sexual or drug offences" and, above all - this point must be underscored - "psychiatric illness". It is noteworthy that although the cooperating prisons charge a daily rate, certain Australian States are reticent to admit these persons - who have not been criminally charged - to their prisons. In his "Report of Own Motion Investigation into Immigration Detainees held in State Correctional Facilities (March 2001)", the Ombudsman recommended - a point of view shared by the delegation - "that mentally ill detainees are not transferred to prisons" (recommendation 6).

E. The gross inadequacy of guarantees concerning the role of lawyers and of the judiciary

48. Deficiencies concerning legal aid, to the detriment of the rights of the defence, result from the exclusion of ordinary legal aid, procedural restrictions imposed on lawyers and separation from their clients owing to the great distances involved.

49. Aliens detained under the Immigration Act were excluded from receiving ordinary legal aid in July 1997, which has had the de facto effect of dramatically reducing the presence of lawyers. DIMIA has consequently created a corps of "immigration agents", recruited by public offer followed by only a few days of training before being certified. The agents work under contract to DIMIA and are paid by the case: a single fee for the whole process, from first interview to RRT decision, no matter how much work is required in each case. Usually a firm of immigration agents contracts for tens or hundreds of cases at a time.

50. The use by ACM, and sometimes by DIMIA, of the term "lawyer" to designate these agents creates a regrettable confusion in the minds of the detainees.

51. The lawyers, for their part, object to the recruitment, certification and "by-case" payment procedures because they make the defence of the unlawful non-citizens entirely subject to market forces. This, it is thought, can lead to refusals to renew certification, notably for lawyers judged "too militant"- in the words of one of their number whose contract was not renewed - or can induce some detainees to prefer to consult an "immigration agent", thinking to increase their chances of success because of the agents' supposed "privileged" relationship with DIMIA.

52. Other restrictions, de jure or de facto, on the rights of the defence are:

(a) The barring of counsel from the first ("screening") interview, which is the subject of a procès-verbal which is signed but not transmitted to the lawyer, is a problem. Some lawyers did finally succeed in securing this document by invoking the Freedom of Information Act, but have recently again been refused. The lawyers whom the delegation met regretted their exclusion from the screening interview in particular because that interview determines the procedure that will be followed with respect to the asylum-seeker because, according to a strict application of the Refugee Convention, if in ignorance an alien fails to take the initiative to request asylum - the question not having been asked - he/she is said not to be covered by Australia's obligations as a State party to the Convention;

(b) The RRT hearings are not public. The participation of lawyers in the hearings is at the discretion of the Tribunal. There is no compulsion for contracted law firms actually to attend RRT hearings. At RRT hearings, lawyers do not have the right to advocate for the asylum-seeker;

(c) Because they are under age, unaccompanied minors may not designate counsel; their legal guardian being the Minister of Immigration, the latter finds himself in a conflict of interests;

(d) Because of distance (Australia covers three time zones), visits are infrequent. The Woomera centre, for example, is in the middle of a desert which is accessible only by air taxi - as the delegation discovered - or by an eight-hour road journey from Adelaide;

(e) This handicap is exacerbated by frequent and sudden transfers which complicate the work of the lawyers, who are thereby obliged to continue their researches on their own. Another difficulty is that, weekend visits not being authorized, the "militant" lawyers, in particular those working voluntarily for NGOs, must take time out from their other work to visit;

(f) The distance explains the frequent recourse to teleconferencing, including for some RRT hearings. Lawyers have reported cases of discussions taking place with the detainee, the lawyer or immigration agent, the RRT members and the interpreter each being in a different place; lawyers complained that this made interactive debate difficult. Interpretation by telephone, which was resorted to twice by the delegation during interviews with detainees, is uneven;

(g) The absence of judicial guarantees concerning detention. The legal procedures stipulated in the law only regulate the submission of an application for a visa to enter the country. This lacuna is all the more worrisome as detention is automatic and of indeterminate length.

F. Costs levied on detainees

53. Three sorts of charges exist:

- Payment of a fee for the issuance of a "bridging visa" (authorization of temporary residence);

- Payment of a tax (A$ 1,000) in case of a negative decision by RRT; it is paradoxical that, while in very many countries a tax is payable on visas issued, Australia requires payment for a refusal;

- Payment of a daily fee (A$ 60-114) for detention for those detainees leaving the country, either voluntarily or by expulsion. This measure seems aimed at dissuading arrivals, as the money is not payable unless the alien returns - even legally - to Australia. However, this is not always made clear in the bill given to the detainee; the document, of which the delegation saw many examples, only mentions that such "arrangements" are possible. The shock felt at the sudden receipt of this bill is all the more striking as the persons concerned are generally destitute. The delegation was informed of two bills for A$ 214,346 and A$ 37,685.50, respectively.

G. Delays in releasing detainees to whom protection has been granted

54. The Working Group is concerned that after the asylum-seekers' right to protection has been recognized by a final decision, they remain in detention while police clearances are carried out.

This procedure may substantially prolong the time spent in detention, the result of which is the prolongation of the psychological stress.

H. Ramifications of the privatization of the centres on the legal status of detention

55. Following a public offer, Australasian Correctional Services Pty. Ltd. (ACS), a company specializing in the provision of correctional services, signed a contract with DIMIA on 27 February 1998, then subcontracted services to the Australasian Correctional Management Pty. Ltd. (ACM) (ACS is a wholly owned subsidiary of the United States company Wackenhut Corrections Corporation, itself a subsidiary of Wackenhut Corporation) and Theiss Constructions, an Australian company (JSCFADT report, paras. 3.2, 3.3, 3.23). The contract includes a set of standards, the Immigration Detention Standards (IDS), but, according to DIMIA, the contract "is not prescriptive" about these standards because "it is more about quality of delivery" (JSCFADT report, paras. 3.2, 3.23 see also the Report of Inquiry into Immigration Detention Procedures, February 2001, conducted by Philip Flood, AO, para. 4.2).

56. This situation is the cause of the contradictions noted by the delegation between, on the one hand, the delegated exercise of authority that is usually the prerogative of the public powers and, on the other, the profit motive.

57. Among the prerogatives of the public powers can be cited: the surveillance of the detention of unlawful non-citizens (who in any case are incarcerated without any form of judicial control); the exercise of the power to discipline (e.g. putting in isolation); maintaining order (the use of clubs, handcuffs, a water cannon in Woomera); the equipping of a special anti-riot unit at Woomera; the setting by ACM (in accordance with section 256 of the Migration Act) of conditions on access to the centres by lawyers and other professionals. ACM can refuse lawyers permission to enter the detention centres; they do not have to give a reason for so refusing.

58. This is a case of prerogatives normally reserved for the public powers being exercised by a commercial company, recruited by tender and therefore according to the laws of the market, whose purpose, notably in response to pressure from its stockholders, is to realize profits through a contractual relationship with the State. This explains why, when the delegation was refused a copy of ACM's contract, representatives of the company invoked, to the delegation's astonishment, "business secret", not "State secret"; the State was regarded as an ordinary "client" (see ACM review No. 2, p. 2).

59. The commercial sanctions regime provided for in the contract, in the form of a point system of penalties having a financial equivalent, derives from the same privatization logic. For example: each escape results in penalty points, i.e. a cost, which could be partially reimbursed should ACM capture the escapee. This clause - contestable, in the delegation's view - encourages ACM to implement stricter and stricter security measures to the detriment of measures that would permit the improvement of the conditions of daily life.[3]

VI. CONCLUSIONS

60. At the end of its visit, the delegation of the Working Group had the clear impression that the conditions of detention are in many ways similar to prison conditions: detention centres are surrounded by impenetrable and closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centre they are, as a rule, handcuffed; escape from a centre

constitutes a criminal offence under the law and the escapee is prosecuted. In certain respects, their regime is less favourable (indeterminate detention; exclusion from legal aid; lack of judicial control of detention; etc.). Several detainees who had been in both situations told the delegation that their time in prison had been less stressful than the time spent in the centres. During talks with government officials it became obvious that one of the goals of the system of mandatory detention and the way it is implemented is to discourage would-be immigrants from entering Australia without a valid visa.

61. This "deterrent system", in the words of a psychologist, disconcerted the delegation; at certain times during the visit, the members asked themselves if the negative comments which they would be obliged to make concerning the situation of the asylum-seekers might not themselves become components of the "deterrent system".

62. The authorities stressed that these practices, have the support of most sectors of public opinion. This is no doubt the case, but with the following reservations:

(a) One could reasonably assume that if public opinion were fully and specifically informed about the conditions to which human beings are being subjected in Australia and the negative consequences for the image of a democratic country, public opinion would change. The delegation observed that the media and a growing segment of the public were becoming more and more aware of the dramatic conditions in which vulnerable persons, especially children, were living;

(b) Australian public opinion must also know that, to the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world.

63. The Working Group hopes that the Government will take the initiative to review the laws in order to bring them into compliance with international standards, now that HREOC and the adoption of its founding Act have opened the way, and to fulfil its obligations with regard to article 2 of the International Covenant on Civil and Political Rights.

VII. RECOMMENDATIONS

64. In the light of the observations made in sections III and IV of the present report, the Working Group proposes to the Government of Australia the implementation of the following recommendations:

(a) Concerning the legal regime governing detention (sect. III):

Recommendation 1. The mandatory, automatic and indeterminate character of detention (para. 14) should be reviewed. The decision should no longer be taken solely on the basis of the law but on the basis of a court order or, at least, by an authorized official so that account can be taken of specific information that might have a bearing on each case (age, unaccompanied minors, vulnerability, family situation, etc.).

Recommendation 2. The potentially indeterminate duration of detention (para. 20) should be revised as follows:

(i) A reasonable time limit for detention should be set, after which the person would be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area;

(ii) Persons able to provide credible guarantees (relatives with Australian nationality, family residing legally and permanently in Australia, benevolent organizations providing sponsorship or acting as guarantors, etc.) should be released and received in the community while waiting for a decision. In the case of a negative decision, the person should be detained pending removal only if he/she refuses to leave voluntarily;

(iii) Every family one of whose members - particularly a father who has arrived first - has been granted a bridging visa should be reunited in the community while awaiting the final decision concerning the whole family.

Recommendation 3. The lack of sufficient judicial review of the detention (para. 20) should be remedied as follows. The current legal procedures govern only the procedure for the issuance (or rejection) of entry visas while legal control over detention is, de jure and de facto, inexistent. A court should be able to be seized of the matter, either by a detainee or counsel in accordance with a specific, habeas corpus-type procedure that is simple and free, or automatically as soon as the "reasonable" time limit for detention (recommendation 1) has been reached, except when there are justifiable reasons for deciding that the slowness of the procedure is due mainly to a lack of cooperation by the person concerned. In addition, legal control of detention should be the rule, in particular while Ministerial Instruction MSI-421, which enumerates the cases in which an unlawful non-citizen can be transferred or kept in detention not in a centre, but in a prison, without charge or sentence, remains in force. In implementing the above-mentioned recommendation 6 of the Australian Ombudsman (para. 51), mentally ill persons transferred to prisons should be immediately released for treatment.

(b) Concerning other matters of concern to the Working Group (sect. IV):

Recommendation 4 - Measures to better guarantee the rights of the defence:

(i) Improve the level of training of the "immigration agents" and clarify their role vis-à-vis the lawyers, who should be able to assist the unlawful non-citizens without requiring certification; the profession of lawyer should be able to be exercised with complete independence;

(ii) Re-establish ordinary legal aid for unlawful non-citizens so that they are not less well treated than common-law criminals;

(iii) All transfers of detainees to another centre or to a prison should be notified to his/her lawyer or an immigration agent;

(iv) Counsel should be able to attend all screening interviews which follow upon the arrival of an unlawful non-citizen or, at the very least, should be able to obtain the procès-verbal of the hearing.

65. By taking into consideration the present recommendations, Australia - following on from the adoption of the HREOC Act and the mandate and activities of HREOC - will honour its obligations as a State party to the International Covenant on Civil and Political Rights with regard to article 2, and in particular articles 9 and 10, paragraph 1.

Notes

[1] CCPR/C/59/D/560/1993 (30 April 1997).

[2] "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power, whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."

[3] "… the overall direct cost of detention asylum-seekers for the 1999/2000 Financial Year was A$ 96,650,701, with an average cost per detainee per day of about A$ 104" (JSCFADT report, para. 3.25).
