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Report of the Working Group on Arbitrary Detention

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Summary

The present report is being submitted to the Human Rights Council at the conclusion of the fifteenth year of activity of the Working Group on Arbitrary Detention. In the first part, the Working Group recalls its main activities during these 15 years, including the thematic issues it dealt with in its reports and the countries it visited.

The second part provides an overview of the Opinions issued by the Working Group in the course of 2006 on communications received and the urgent appeals addressed to Governments. It also includes the reactions of Governments to these communications. It discusses the follow-up to the visits undertaken by the Working Group in 2004, namely to Belarus, China and Latvia.

The third part of the report discusses the problem of arbitrary detention in the context of the international transfer of detainees, particularly in efforts to counter terrorism. As reflected in the rising number of cases being dealt with by the Working Group (some of which are reviewed in the present report), this is an issue of growing concern. The Working Group argues that both human rights law and the anti-terror conventions adopted under the auspices of the United Nations enshrine a clear preference for extradition as the legal framework for such transfers. The practice of so-called "renditions", on the contrary, because it is aimed at avoiding all procedural safeguards, is not compatible with international law.

The Working Group further argues that, in applying the principle of non-refoulement, Governments should not only examine whether the person to be removed will be at risk of extrajudicial killing or torture but also whether there is a substantial risk of arbitrary detention. In this respect, diplomatic assurances (which are not acceptable with regard to the risk of torture) can be a legitimate means to protect against arbitrary detention and unfair trial, provided stringent conditions are satisfied. A current practice in the context of countering terrorism, however, is to seek what could be called "reverse diplomatic assurances", i.e. assurances that a detainee to be transferred will continue to be detained in the country of destination even in the absence of a legal basis therefore.

The fourth part of the report discusses concerns of the Working Group which have arisen primarily in the context of its recent country visits. These include:

- Insufficiency of resources allocated to the penitentiary system and the resulting failure to protect prisoners' rights;

- Excessive recourse to and duration of pretrial detention;

- Infringements of the right to an effective defence caused by conditions of detention and insufficient funding of legal aid programmes.

On the basis of the matters discussed, the Working Group makes recommendations aimed at both preventing arbitrary detention in the context of the international transfer of detainees and reducing the duration of remand detention.

CONTENTS

Introduction

1. The Working Group on Arbitrary Detention was established by the former Commission on Human Rights in its resolution 1991/42 and entrusted with investigating 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 its resolution 1997/50 to cover the issue of administrative custody of asylum-seekers and immigrants. The mandate was confirmed by Commission resolution 2003/31 and assumed by the Human Rights Council in its decision 2/102.

2. During 2006, the Working Group was composed of the following experts:

- Ms. Manuela Carmena Castrillo (Spain);
- Ms. Soledad Villagra de Biedermann (Paraguay);
- Ms. Leïla Zerrougui (Algeria);
- Mr. Tamás Bán (Hungary);
- Mr. Seyed Mohammad Hashemi (Islamic Republic of Iran).

3. Since 4 September 2003, Ms. Leïla Zerrougui has been the Chairperson-Rapporteur of the Working Group and Mr. Tamás Bán the Vice-Chair.

I. FIFTEEN YEARS OF WORKING GROUP ACTIVITIES

4. During 2006, the Working Group held its forty-fifth, forty-sixth and forty-seventh sessions. It also carried out official missions to Ecuador (12 to 22 February), Honduras (23 to 31 May), Nicaragua (15 to 23 May) and Turkey (9 to 20 October) (see addenda 2-5 to the current report).

5. In the framework of the review of the mechanisms initiated by the Human Rights Council, the Working Group would like to outline some of the work it has accomplished during the 15 years of uninterrupted activities in the exercise of its mandate. The Working Group is the only non-treaty-based human rights mechanism whose mandate expressly provides for consideration of individual complaints. In addition to the adoption of Opinions on individual cases of detention, the Working Group has also formulated the following Deliberations and Legal Opinions on matters of a general nature, in order to develop a set of guidelines and support States in their efforts to prevent arbitrary deprivation of liberty:

- Restricted residence or house arrest (Deliberation No. 1);
- Rehabilitation through labour (Deliberation No. 4);

- Guarantees concerning detention of immigrants and asylum-seekers (Deliberation No. 5);

- Legal Analysis of allegations against the International Criminal Tribunal for the Former Yugoslavia (Deliberation No. 6);

- Issues related to psychiatric detention (Deliberation No. 7);

- Deprivation of liberty linked to/resulting from the use of the Internet (Deliberation No. 8).

Deliberations Nos. 2 and 3 were adopted in response to specific questions which had been put forward by a Government concerning the Working Group's criteria and methods of work. Furthermore, the Working Group adopted Legal Opinions on Allegations of detention ordered by the International Criminal Tribunal for Rwanda and on the Deprivation of liberty of persons detained in the naval base of Guantánamo Bay.

6. Among the issues analysed over the years in the Working Group's reports, the following deserve particular mention:

- Applicability of provisions of conventions on human rights to States that are not party to them;

- Interpretation of the term "detention";

- Excesses of military justice;

- Abuses of states of emergency;

- Protection of human rights defenders;

- Detention prior to extradition and extradition not followed by trial;

- Detention of conscientious objectors;

- Arrest and detention for dissemination of State secrets;

- Protective custody and detention as a means of protecting victims;

- Imprisonment related to insolvency;

- Failure to take pretrial detention into account;

- Detention motivated by sexual orientation;

- Deprivation of liberty of vulnerable persons;
- Discrimination in detention;
- Impact of inadequate conditions of detention on the right to defence;
- Deprivation of liberty as a measure to countering terrorism;
- Hostage-taking and arbitrary detention;
- Secret prisons;
- Over-incarceration.

7. The Working Group considers that its official visits to countries constitute an important instrument to strengthen its cooperation with States. To date, the Working Group has visited the following countries:

Argentina (2003); Australia (2002); Bahrain (2001); Belarus (2004); Bhutan (1994 and 1996); Canada (2005); China (1996, 1997 and 2004); Ecuador (2006); Honduras (2006); Indonesia (1999); Iran (Islamic Republic of) (2003); Latvia (2004); Mexico (2002); Nepal (1996); Nicaragua (2006); Peru (1998); Romania (1998); South Africa (2005); Turkey (2006); United Kingdom of Great Britain and Northern Ireland (1998); and Viet Nam (1994).

II. ACTIVITIES OF THE WORKING GROUP IN 2006

A. Handling of communications addressed to the Working Group during 2006

1. Communications transmitted to Governments

8. A description of the cases transmitted and the contents of the Governments' replies will be found in the relevant Opinions adopted by the Working Group (A/HRC/4/40/Add.1).

9. During its forty-fifth, forty-sixth and forty-seventh sessions, held in 2006, the Working Group adopted 47 Opinions concerning 104 cases in 23 countries. Some details of these Opinions are given in the table below. The complete texts of Opinions Nos. 1/2006 to 31/2006 are reproduced in addendum 1 to the present report.

2. Opinions of the Working Group

10. Pursuant to its revised methods of work (E/CN.4/1998/44, annex I, para. 18), the Working Group, in addressing its Opinions to Governments, drew attention to Commission on Human Rights resolutions 1997/50, 2000/36 and 2003/31 in which Governments were requested to take account of the Working Group's Opinions and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they had taken. On the expiry of a three-week deadline, the Opinions were transmitted to the source.

Table 1

Opinions adopted during the forty-fifth, forty-sixth and forty-seventh sessions of the Working Group

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
1/2006	Uzbekistan	Yes	Ms. Elena Urlaeva	Case filed (released)[1]
2/2006	Egypt	Yes	Mr. Metwalli Ibrahim Metwalli	Case filed (released)
3/2006	United Kingdom of Great Britain and Northern Ireland	Yes	Mr. Tosin Fred Adegbuji	Case filed (released)
4/2006	Myanmar	Yes	Ms. Su Su Nway	Detention arbitrary, categories II and III
5/2006	Iraq/United States of America	Iraq: No United States of America: Yes	Mr. Majeed Hameed	Case filed (released)
6/2006	Japan	Yes	Mr. Kyaw Htin Aung	Case filed (released)
7/2006	Yemen	Yes	Mr. Muhammad Abdullah Salah Al-Assad	Case filed (released)
8/2006	Libyan Arab Jamahiriya	Yes	Mr. Abdel Razak Al-Mansuri	Case filed (released)
9/2006	Saudi Arabia	No	Mr. Mustapha Muhamed Mubarak Saad Al-Jubairi, Mr. Faysal Muhammad Mubarek Al-Jubairi	Detention arbitrary, category I
10/2006	Algeria	Yes	Messrs. Salaheddine Bennia, Mohamed Harizi, Amar Medriss and Mohamed Ayoune	Messrs. Salaheddine Bennia, Mohamed Harizi and Mohamed Ayoune: cases filed (released) Mr. Amar Medriss: detention not arbitrary
11/2006	China	Yes	Mr. Zheng Zhihong	Detention arbitrary, category II
12/2006	Saudi Arabia	No	Messrs. Abdelghani Saad Muhamad Al Nahi Al Chehri and Abdurahman Nacer Abdullah Al Dahmane Al Chehri	Detention arbitrary, category I

[1] Under paragraph 17 (a) of its revised methods of work, the Working Group shall generally file the case, i.e. end consideration of a communication without adopting an opinion on the merits of the case, if the person concerned is released before the Working Group adopts an opinion.

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
13/2006	United Kingdom of Great Britain and Northern Ireland	Yes	Mr. Paul Ikobonga Lopo	Detention not arbitrary
14/2006	Iran (Islamic Republic of)	Yes	Ms. Kobra Rahmanpour	Detention arbitrary, category III
15/2006	Syrian Arab Republic	Yes	Mr. Ryad Hamoud Al-Darrar	Detention arbitrary, categories II and III
16/2006	Syrian Arab Republic	Yes	Messrs. Ahmet Muhammad Ibrahim, Muhammad Fa'iq Mustafa, Muhammed Osama Sayes, Nabil Al-Marabh and 'Abd Al-Rahman Al-Musa	Mr. Ahmet Muhammad Ibrahim: detention arbitrary from 25 March 2005 until his release on 3 November 2005, category III Mr. Muhammad Fa'iq Mustafa: detention arbitrary from 22 November 2002 until his release on 22 January 2006, category III Messrs. Muhammed Osama Sayes, Nabil Al-Marabh and 'Abd Al-Rahman: detention arbitrary, category III
17/2006	Lebanon	Yes	Mr. Nehmet Naïm El Haj	Detention arbitrary, category III
18/2006	Libyan Arab Jamahiriya	No	Messrs. Fardj Al Marchaï, Salah Eddine Al Aoudjili, Khaled Chebli, Idris Al Maqsubi, Djamel Aquila Abdullah Al Abdli, Rejib Salem Al Raqaï and Assaad Mohamed Salem Assabar	Detention arbitrary, category I
19/2006	Iran (Islamic Republic of)	Yes	Mr. Arash Sigarchi	Detention arbitrary, category II
20/2006	Gabon	Yes	Mr. Robert Sobek	Case filed (released)
21/2006	Syrian Arab Republic	Yes	Messrs. Muhamad Ra'dun and Ali Al-Abdullah	Cases filed (released)

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
22/2006	Cameroon	Yes	Messrs. François Ayissi, Pascal Antagama Obama, Alim Mongoche, Marc Lambert Lamba, Christian Angoula, Blaise Yankeu Yankam Tchatchoua, Stéphane Serge Noubaga, Balla Adamou Yerima and Raymond Mbassi Tsimi	Detention arbitrary, category II
23/2006	Replaced by Opinion No. 32/2006 (Qatar)			
24/2006	Colombia	Yes	Mr. Jhon Jaime Romaña Denis	Case filed (released)
25/2006	Romania	Yes	Mr. Hayssam Omar	Case filed (released)
26/2006	Iran (Islamic Republic of)	Yes	Mr. Abdolfattah Soltani	From 30 July 2005 until 6 March 2006: detention arbitrary, categories II and III
27/2006	China	Yes	Mr. Shi Tao	Detention arbitrary, categories II and III
28/2006	Uruguay	Yes	Messrs. Jorge, José and Dante Peirano Basso	Cases filed (para. 17 (d) of the Working Group's methods of work - abandon of the complaint)
29/2006	United States of America	No	Messrs. Ibn Al-Shaykh Al-Libi; Abul Faisal; Abdul Aziz; Abu Zubaydah; Abdul Rahim Al-Sharqawi; Abd Al-Hadi Al-Iraqi; Muhammed Al-Darbi; Ramzi bin Al-Shibh; Abd Al-Rahim Al-Nashiri; Mohammed Omar Abdel-Rahman; Mustafa Al-Hawsawi; Khalid Sheikh Mohammed; Majid Khan; Yassir Al-Jazeeri; Ali Abdul Aziz Ali; Waleed Mohammed bin Attash; Adil Al-Jazeeri; Hambali; Mohamad Nazir bin Lep; Mohammad Farik Amin; Tariq Mahmood; Hassan Ghul; Musaad Aruchi; Mohammed Ñaeem Noor Khan; Ahmed Khalfan Ghailani; Abu Faraj Al-Libi	Detention arbitrary, category I

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
30/2006	Colombia	No (response received after the end of the forty-sixth session)	Ms. Natalia Tangarife Avendaño; Juan David Ordóñez Montoya; Juan David Espinoza Henao; Juan Camilo Mazo Arenas; Carlos Andrés Peláez Zapata; David Esneider Mejía Estrada; Andrés Maurio Zuluaga Rivera and Yeison Arlet García Pérez	Detention arbitrary, category III
31/2006	Iraq/United States of America	Iraq: No United States of America: Yes	Mr. Saddam Hussein Al-Tikriti	Detention arbitrary, category III
32/2006	Qatar	Yes	Mr. Amar Ali Ahmed Al Kurdi	Case filed (released)
33/2006	Iraq/ United States of America	Iraq: No United States of America: No	Mr. Tarek Aziz	Detention arbitrary, category III
39 /2006	Tajikistan	Yes	Mr. Mahmadruzi Iskandarov	Detention not arbitrary
40/2006	Algeria	Yes	Mr. Abdelmadjid Touati	Detention arbitrary, category III
41/2006	China	Yes	Mr. Wu Hao	Case filed (released)
42/2006	Japan	Yes	Mr. Daisuke Mori	Detention not arbitrary
43/2006	United States of America	Yes	Mr. Ali Salem Kahlah Al Marri	Detention arbitrary, category III
44/2006	Saudi Arabia	Yes	Mr. Syed Asad Humayun	Detention not arbitrary
45/2006	United Kingdom of Great Britain and Northern Ireland	Yes	Mr. Mustafa Abdi	Detention arbitrary
46/2006	Democratic Republic of the Congo	No	Mr. Theodore Ngoyi	Detention arbitrary, categories II and III
47/2006	China	Yes	Mr. Chen Guangcheng	Between 12 July 2005 and 12 March 2006: detention arbitrary, category I. Since 12 March 2006: detention arbitrary, category II

Note: As Opinions 32/2006 to 47/2006 were adopted at the forty-seventh session, they could therefore not be reproduced as an annex to the present report but will be reproduced as an annex to the next annual report.

3. Government reactions to Opinions

11. The Government of the United States of America reacted to three Opinions of the Working Group, arguing that the Working Group had no mandate to consider situations governed by international humanitarian law. With regard to Opinion No. 44/2005 (United States of America) concerning the case of Mr. Abdul Jaber Al Kubaisi, in which the Working Group had stated that the detention of this person by the multinational force in Iraq (MNF-I) violated the provisions of article 9 of the International Covenant on Civil and Political Rights and the Fourth Geneva Convention, the Government stated that, since the situation in Iraq was an armed conflict covered by international humanitarian law, the Working Group did not have a mandate to assess the validity of security internment in that country. It further argued that under the Geneva Conventions, a Detaining Power is able to use an administrative board to review and decide on challenges by protected persons on their detention. It was of the opinion that the Working Group had therefore erred in its assumption that security internees were entitled to initiate proceedings before a judicial court. Additionally, the Covenant had no application outside the territory of a Member State. It said that the multinational force was authorized under Security Council resolution 1546 to intern individuals "where necessary for imperative reasons of security". Its mandate had been extended by the Council in its resolution 1637 (2005). Lastly, the Government pointed out that the multinational force had released Mr. Al Kubaisi in December 2005.

12. The Government reiterated this stance in relation to the Working Group's Opinion No. 29/2006 (United States of America). It added that, as recently confirmed by the United States Supreme Court in *Hamdan v. Rumsfeld*, the law of armed conflicts governs the armed conflict with Al-Qaida. The Supreme Court held that Common Article 3 of the Geneva Conventions applies to that conflict. Fourteen detainees had been transferred from classified locations to Department of Defense custody at the United States naval base at Guantánamo Bay, Cuba. The Permanent Mission pointed out that the International Committee of the Red Cross had had access to these detainees at Guantánamo.

13. In connection with Opinion No. 46/2005 (Iraq/United States of America), the Government of the United States welcomed "the conclusion that the Working Group will not take a position on the alleged arbitrariness of the deprivation of liberty of Mr. Saddam Hussein during the period of international armed conflict".

14. In relation to these observations, the Working Group notes that in section IV of its last report (E/CN.4/2006/7) it had pointed out that "the application of international humanitarian law ... does not exclude the application of international human rights law". As explained in the joint report by five special rapporteurs on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120, para. 83), international armed conflicts, including situations of occupation, imply the full applicability of relevant provisions of international humanitarian law and of international human rights law, with the exception of guarantees derogated from, provided such derogations have been declared in accordance with article 4 of the International Covenant on Civil and Political Rights by the State party. The United States has not notified any official derogation from the Covenant. The Working Group's methods of work are based on the rationale that the Geneva Conventions applying to international armed conflicts as a *lex specialis* provide for specific legal grounds for deprivation of liberty, providing ICRC with the right of access to prisoners of war, civilian internees and security or common law internees.

15. However, if the detained persons are denied the protection of the Third or Fourth Geneva Conventions, the Working Group considers that its mandate allows it to deal with communications arising from situations of international armed conflict. Lastly, the Working Group wishes to point out that a State's jurisdiction and responsibility extend beyond its territorial boundaries. Thus, the Human Rights Committee has consistently held that the Convention can have extraterritorial application.

16. With regard to Opinion No. 46/2005 (Iraq/United States of America), the Government of the United States also stated that criminal proceedings against Saddam Hussein were ongoing and that the Working Group had recognized his opportunities to avail himself of domestic remedies. Such remedies had not been exhausted in this case.

17. As the Working Group noted in its last report (E/CN.4/2006/7, para. 11), the requirement to exhaust domestic remedies applies to communications to United Nations human rights treaty bodies but does not find application in the practice of the special procedures. On the contrary, as far as the Working Group is concerned, Commission resolution 1997/50 establishes that, as a rule, the Working Group shall deal with cases in which the national judiciary has not yet spoken its final word. In accordance with these principles, during its forty-sixth session the Working Group adopted a final Opinion on the case of Saddam Hussein (Opinion No. 31/2006) (Iraq/United States of America).

4. Communications giving rise to urgent appeals

18. During the period from 9 November 2005 to 8 November 2006, the Working Group transmitted 156 urgent appeals to 58 Governments concerning 1,615 individuals (1,394 men, 151 women, and 70 minors). In conformity with paragraphs 22 to 24 of its methods of work, the Working Group, without prejudging whether the detention was arbitrary, drew the attention of each of the Governments concerned to the specific case as reported, and appealed to them to take the necessary measures to ensure that the detained persons' rights to life and to physical integrity were respected.

19. The following table provides an overview of the urgent appeals sent.

Table 2

Urgent appeals

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released/ Information received by
Algeria	1	2 men	Reply to 1	
Armenia	1	1 man	No reply	
Azerbaijan	3	7 men and 3 minors	Reply to 1	2 (Source)
Bahrain	1	7 men	Reply to 1	
Belarus	2	217 men, 36 women, 45 minors	No reply	50 (Source)
Bhutan	1	2 men	Reply to 1	
Burundi	3	5 men	No reply	2 (Source)

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released/ Information received by
Cambodia	2	4 men	No reply	
Chile	1	1 woman	No reply	1 (Source)
China	9	25 men, 5 women	Reply to 7	3 (Government) 3 (Source)
Colombia	3	22 men, 3 women	Reply to 3	
Cuba	3	4 men, 1 woman	Reply to 3	
Democratic People's Republic of Korea	1	1 man	Reply to 1	
Djibouti	1	2 men	No reply	2 (Source)
Ecuador	1	1 man	No reply	1 (Source)
Egypt	2	3 men	Reply to 2	
Eritrea	1	172 men	No reply	
Ethiopia	5	150 men, 2 women, 2 minors	Reply to 2	62 (Source)
Gambia	2	25 men, 1 woman	No reply	2 (Source)
Georgia	1	1 man	No reply	1 (Source)
Equatorial Guinea	1	4 men	No reply	
India	2	3 men	No reply	3 (Source)
Indonesia	1	58 men	Reply to 1	
Iran (Islamic Republic of)	22	98 men, 7 women, 9 minors	Reply to 7	9 (Source)
Iraq	1	14 men	No reply	
Israel	6	10 men	Reply to 1	
Kazakhstan	1	1 man	No reply	
Kyrgyzstan	2	4 men	No reply	
Libyan Arab Jamahiriya	1	215 men, 80 women and 5 children	No reply	
Maldives	3	8 men, 3 women	Reply to 2	
Morocco	2	4 men, 1 woman	No reply	
Mauritania	1	18 men	Reply to 1	
Mexico	3	14 men, 2 women, 2 minors	Reply to 2	1 (Source)
Mozambique	1	3 men	No reply	
Myanmar	5	20 men, 2 women, 1 minor	No reply	
Nepal	1	1 man	No reply	1 (Source)
Niger	2	3 women	No reply	
Nigeria	2	3 men, 1 woman	No reply	2 (Source)
Pakistan	4	9 men, 1 woman	Reply to 2	
Philippines	1	9 men, 2 minors	Reply to 1	

Government concerned	Number of urgent appeals	Persons concerned	Reply	Persons released/ Information received by
Republic of Korea	1	2 men	Reply to 1	
Moldova	2	2 men	Reply to 1	2 (Source)
Democratic Republic of the Congo	5	13 men, 1 woman	No reply	2 (Source)
Russian Federation	4	16 men	Reply to 3	4 (Source)
Saudi Arabia	1	1 man	No reply	
Senegal	1	1 man	Reply to 1	1 (Government)
Singapore	2	2 men	Reply to 1	
Sudan	8	129 men	Reply to 2	34 (Source)
Syrian Arab Republic	11	29 men	Reply to 5	15 (Source)
Chad	2	6 men, 1 minor	No reply	1 (Source)
Tunisia	1	1 man	No reply	
Turkey	1	1 man	Reply to 1	
Turkmenistan	2	6 men, 3 women	No reply	4 (Source)
United Arab Emirates	2	14 men	No reply	
United States of America	1	1 man	No reply	
Uzbekistan	4	18 men, 1 woman	No reply	
Venezuela	1	1 man	No reply	
Yemen	1	1 man	No reply	1 (Source)

20. The Working Group wishes to thank the Governments that heeded its appeals and took steps to provide it with information on the situation of the persons concerned, and especially the Governments that released those persons. In other cases, the Working Group was assured that the detainees concerned would receive a fair trial.

21. The Working Group notes that 54 of its 156 urgent appeals were replied to, which amounts to 34.62 per cent. This figure is 3.5 per cent less than that for the same period last year. The Working Group therefore invites Governments to increase their cooperation with the Group under its urgent action procedure.

B. Country missions

1. Request for visits

22. The Working Group has been invited to visit Equatorial Guinea and Norway, although no specific dates have yet been fixed. It has requested to visit Colombia, Italy and Sierra Leone, three countries which, in spite of having extended an open formal invitation to all the thematic

mechanisms of the Human Rights Council, have not yet replied to the Working Group's requests. During its forty-sixth session, the Working Group held meetings with representatives of the Governments of Angola, India, the Libyan Arab Jamahiriya and the United States to examine the possibility of visiting those countries in 2007. During its forty-seventh session, the Working Group made a revision of the list of countries it had requested to visit in the past and decided to reiterate its request to be authorized to visit, in addition to those already mentioned, the following countries: Afghanistan, Angola, Ethiopia, Guinea Bissau, India, Libyan Arab Jamahiriya, Turkmenistan and the United States of America.

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

23. In its resolution 1998/74, the Commission on Human Rights requested those responsible for the Commission's thematic mechanisms to keep the Commission informed on the follow-up to all recommendations addressed to Governments. In response to this request, the Working Group in 1998 decided (see E/CN.4/1999/63, para. 36) to address a follow-up letter to the Governments of the countries it had visited, together with a copy of the relevant recommendations adopted by the Working Group contained in the reports on its country visits.

24. Communications were addressed to the Governments of Belarus, Latvia and China requesting information on such initiatives as the authorities might have taken to give effect to the recommendations contained in the reports to the Commission on the Working Group's visits to these countries in 2004 (E/CN.4/2005/6/Add.3, 2 and 4, respectively).

Latvia

25. At the end of the Working Group's visit to Latvia, the Government informed the Working Group that its recommendations were being carefully examined with a view to amending legislative norms and improving administrative practices. The Government's priorities in the area of criminal justice were to improve the effectiveness of control over detention, paying special attention to the situation of juveniles; to facilitate the work for probation services; to promote alternative sanctions and to improve the physical conditions of detention. The Ministry of Justice was implementing a juvenile court system and had prepared a draft of a new Criminal Procedure Code. A Law on State-guaranteed Free Legal Assistance had been adopted and another Law on the imposition of Coercive Measures on Children had entered into force. The Imprisonment Facility Management Board had placed among its priorities the establishment of a central national register of imprisoned persons.

Belarus

26. At the end of the Working Group's visit to Belarus, the Government reported that some amendments and additions were being made to the legislation on the conditions of pretrial detention, as well as to the law on criminal proceedings for minors. It was working to implement the Working Group's recommendations, particularly through the adoption of a code on the administration of justice and the status of judges. A draft law on the legal status of foreigners had been drawn up. Efforts were continuing to improve the Criminal Procedure Code. It further reported that the Working Group's recommendations on the judicial decisions of forced placement in psychiatric hospitals were also under due consideration.

China

27. Following the Working Group's visit to China, the Government informed the Group that it had taken due note of its recommendations and that the relevant departments were studying them carefully.

Ecuador

28. Concerning the visits carried out during 2006, the Government of Ecuador reported that it was working on the implementation of the Group's recommendations. By Executive Decree No. 1339 of 20 April 2006, it has established the Sub-Secretariat of Citizen Security, which will have, as a main responsibility, to guarantee the respect of human rights of detainees through the necessary coordination of the activities of the National Police, the Attorney-General's Office, the Judiciary and the National Directorate for Social Rehabilitation. The municipalities of Cuenca, Guayaquil and Quito were drafting a legal norm which would allow them to participate in issues concerning contraventions and minor offences. This would accelerate the judicial processes for such infractions and guarantee the rights of the detainees. Lastly, by Executive Decree No. 1330-A of 7 April 2006, the Government had declared all the penitentiary establishments to be in a state of emergency, thus obtaining the necessary financial resources to urgently attend to the needs of such detention centres. A sum of US$ 8 million was immediately assigned.

Nicaragua

29. The Government of Nicaragua reported that it had undertaken measures to comply with the recommendations of the Working Group. For instance, concerning the situation of the detention centres in the Southern Atlantic Autonomous Region (RAAS), it announced that it had decided to build a new penitentiary in the city of Bluefields and was trying to obtain the required financial resources.

III. LEGAL OPINION ON PREVENTING ARBITRARY DETENTION IN THE CONTEXT OF INTERNATIONAL TRANSFER OF DETAINEES, PARTICULARLY IN COUNTERING TERRORISM

A. Introduction

30. Cooperation among States in law enforcement and criminal justice matters is crucial to international efforts to bring to justice perpetrators of terrorist acts, their accomplices and financial supporters, and thereby prevent further terrorist attacks. In reacting to the unprecedented terrorist attacks on the United States of America, the Security Council decided in resolution 1373 (2001) of 28 September 2001 that all States shall "Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings" (para. 2 (f)). In the same resolution, the Council also called upon all States to "Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts" (para. 3 (c)).

31. It is therefore not surprising that the Working Group has seen an increase in the number of cases brought to its attention in which more than one Government is involved in the, allegedly arbitrary, deprivation of a suspected terrorist's freedom. The following cases dealt with by the Working Group provide some recent examples.

B. Cases illustrating the Working Group's concerns

32. Opinion No. 43/2005 relates to a man handed over by the security forces of Myanmar to the police of China, although he had been recognized as a refugee by the Office of the United Nations High Commissioner for Refugees. In China he was detained and put on trial on charges of terrorist activities, which the Working Group found to be aimed at suppressing his "legitimate political and not violent activities carried out peacefully and in exercise of his rights to the freedom of association and expression" (para. 23).

33. Opinion No. 47/2005 concerns three men of Yemeni origin. One of them was arrested in the Islamic Republic of Iran and handed over by the security forces to the Government of Afghanistan, which, after three months of keeping him in detention, in turn handed him over to the Government of the United States. After one month at Baghram Air Base, outside Kabul, he was transported to Guantánamo Bay, were he remained for approximately two years. In May 2004, the United States authorities removed him to Yemen, where he has been in detention ever since. The second man was arrested by the police in Indonesia and removed to Jordan; the third man also lived in Indonesia and was arrested at Amman airport. Both were interrogated and tortured by Jordanian security forces before being handed over to United States military forces, which held them consecutively at two secret underground detention facilities (so-called "black sites") for 18 and 20 months respectively. In both places, the two men were interrogated about their activities in Afghanistan and Indonesia, and about their knowledge of other persons suspected of terrorist activities. Thereafter, the Government of the United States transferred them to Yemen, where they remain detained since May 2005. None of the transfers from the custody of one State to another was accompanied by any judicial or other hearing or extradition proceedings. In all three cases, the Yemeni authorities informed the source that the detainees were being held without charges at the request of the United States authorities and would remain detained in Yemen pending receipt of their files from the United States authorities for investigation. Such files, however, have not been forthcoming notwithstanding the respectively one and two years that have elapsed.[2]

34. Opinion No. 16/2006 concerns five men of Syrian origin who had been living in the United Kingdom, Turkey, the United States (two) and Bulgaria. All were deported to the Syrian Arab Republic, where they were immediately arrested at the airport, detained at secret locations or otherwise incommunicado, and put on trial before special courts grossly violating fair-trial guarantees.

[2] The Working Group was informed that subsequent to the adoption of its opinion, a Yemeni court sentenced them to a short prison term and they were released.

35. Opinion No. 29/2006 concerns 26 men held, some of them for five years by now, by the United States Central Intelligence Agency (CIA) at secret detention facilities around the world for the purpose of interrogation. They were arrested by the authorities (generally the intelligence services) of their country of residence, in most cases Pakistan, but also the United Arab Emirates, Thailand and Iraq, and handed over to the CIA without any procedure contemplated by law. Allegations were also received regarding the existence of a related system of secretly returning prisoners to their home country when they have outlived their usefulness to the United States. The transfer practice is also known as "rendition" or "extraordinary rendition".

36. In December 2005 and June 2006 the Chairperson of the Working Group joined the Special Rapporteur on torture, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers in two urgent appeals to the Government of Kyrgyzstan, asking that it desist from returning five Uzbek refugees to the authorities of Uzbekistan. The Chairperson of the Working Group did so out of concerns that "the Uzbek authorities might not guarantee these persons the right to a fair trial. […] These concerns regard irregularities in the preparation of the trial, inadequate defence procedures, the definition of the crime of terrorism in national law, which might not be compatible with the requirements of articles 6 and 15 of the International Covenant on Civil and Political Rights, and the excessive reliance of the courts on confessions". The Government of Kyrgyzstan did not reply to the special procedures' urgent communication. The five men were returned to Uzbekistan in August 2006.

37. Finally, the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120) also illustrates the Working Group's concerns regarding the transfer of terrorism suspects from one jurisdiction to another. The six men of Algerian origin transferred to Guantánamo from Bosnia and Herzegovina (see paragraph 25 of the report) were handed over to United States forces by the authorities of Bosnia and Herzegovina in violation of an order by the highest human rights court of the country.[3] Five years later, they are still detained without charges. Five of the Uighurs (see paragraph 28 (e) of the report), who according to the Combatant Status Review Tribunal were not "enemy combatants", were subsequently transferred from Guantánamo to Albania, where - according to information received in the meantime by the Working Group - they are held at a refugee camp in Tirana, a former prison, enclosed with barbed wire, which they are permitted to leave only for short periods.

38. In all these cases (with the exception of the urgent appeals, which do not imply an opinion of the Working Group on the legality of detention), the Working Group found the detention to be arbitrary. What the Working Group would like to draw attention to here is the responsibility and obligations of the Governments who cooperate in transferring persons to the custody of a State where there are substantial grounds for believing that there is a real risk of arbitrary detention.

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[3] For the circumstances of the arrest and transfer of the six men to Guantánamo Bay, see the decision of the Human Rights Chamber for Bosnia and Herzegovina of 11 October 2002 in case No. CH/02/8679 et al., *Boudellaa & Others v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina,* available at www.hrc.ba.

39. The Working Group finds it useful to recall two fundamental principles that international law provides in this respect: first, the preference for criminal justice as instrument to hold perpetrators of terrorist acts accountable and render them harmless; secondly, the principle of non-refoulement.

C. Preference for criminal justice and extradition proceedings

40. The International Convention for the Suppression of Terrorist Bombings,[4] which counts 145 States parties, constitutes a useful starting point for this inquiry. The Convention provides that a State on whose territory a person suspected of a terrorist bombing crime is found must either prosecute the suspect or extradite him to another State willing to prosecute (art. 8 (1)). Furthermore, "[u]pon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition" (art. 7 (2)), which under many circumstances will be arresting the suspect. The Convention contains numerous other provisions aimed at strengthening the obligation to cooperate through extradition proceedings and international judicial assistance.

41. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[5] the International Convention Against the Taking of Hostages,[6] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[7] and other anti-terrorism conventions ratified by a large majority of Member States of the United Nations all unmistakably enshrine the same principle: suspected terrorists must be prosecuted or extradited for prosecution in another country. These conventions, which the Security Council in the wake of the 11 September 2001 attacks urged all countries that had not already done so to ratify, do not contemplate prolonged administrative detention as an alternative to criminal justice, nor do they envisage formless "renditions" as an alternative to the guarantees of extradition proceedings.[8]

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[4] This Convention entered into force on 23 May 2001. As of 1 January 2006, the Convention had 148 parties.

[5] Entered into force on 26 January 1973. To date, the Convention has 183 parties.

[6] Entered into force on 3 June 1983. To date, the Convention has 153 parties.

[7] Entered into force on 20 February 1977. To date, the Convention has 159 parties (see, in particular, article 7).

[8] On the contrary, article 8 of the Diplomatic Agents Convention, for example, endeavours to make the Convention a sufficient basis for extradition where extradition would otherwise not be possible under the domestic laws of one of the two countries.

42. This preference for accusations of involvement in terrorist crimes to be put in the form of criminal charges and aired in a criminal trial, where procedures are in place to test them, instead of remaining amorphous and often as secret suspicions underlying unchallenged administrative detention is not peculiar to the anti-terror conventions. It is already implied in article 11 of the Universal Declaration of Human Rights, the first paragraph of which reads: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Articles 9 and 14 of the International Covenant on Civil and Political Rights are inspired by the same preference for criminal proceedings.

43. Extradition proceedings can only take place if there is a request to that end by a State different from the one on whose territory the terrorism suspect is found. International law also recognizes the right of States to expel or deport from their territory non-citizens who represent a threat to national security[9] in the absence of a request for extradition. What distinguishes deportation or expulsion from the practice of renditions, however, is that they have a basis in national law and are preceded by an administrative process resulting in a decision which is notified to the person to be expelled or deported and can be challenged before a court. This opportunity to challenge the removal from the territory of the State is essential to uphold the principle of non-refoulement.

D. Non-refoulement

44. The principle of non-refoulement is enshrined in both international refugee law and international human rights law. Article 33 of the 1951 Convention relating to the Status of Refugees, which reflects customary international law,[10] states as follows:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> "2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

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[9] See paragraph 2 of article 33 of the 1951 Convention relating to the Status of Refugees.

[10] The United Nations anti-terrorism conventions also acknowledge the need to protect fundamental rights of those whose extradition is requested in connection with charges of terrorism (see, for example, articles 12 and 14 of the International Convention for the Suppression of Terrorist Bombings).

45. In international human rights law the principle of non-refoulement is explicitly contained in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Under the International Covenant on Civil and Political Rights, though not explicitly enshrined in a separate provision, the obligation not to extradite, deport, expel or otherwise remove a person is not limited to the risk of torture but extends also to violations of the right to life and to cruel, inhuman or degrading treatment or punishment.[11]

46. While many bilateral and multilateral treaties provide for the possibility of denying a request for extradition if there are well-founded concerns that the person to be extradited would not enjoy a fair trial in the receiving State, the reluctance of States and international human rights bodies to extend the application of the prohibition of refoulement to the rights protected by articles 9 and 14 of the Covenant is comprehensible. It would constitute a considerable obstacle to the legitimate faculty to deport or expel non-citizens if the sending State had to assess in every case whether the person concerned would be at risk of not being tried within a reasonable time if charged, or of not being compensated if unlawfully arrested, or of not having "adequate time and facilities for the preparation of his defence" if charged and tried - particularly as deportation and expulsion are generally not connected to criminal charges in the receiving State.

47. The principle of non-refoulement remains, however, relevant also with regard to arbitrary detention. Where there are substantial grounds for believing that there is a real risk that the person to be removed from the territory will be deprived of his or her liberty in the receiving State (as is often the case when the ground for removal is a suspicion of involvement in terrorist activities), the sending State should examine whether such detention would be arbitrary within the meaning of the three categories of arbitrary detention identified in the Working Group's methods of work:

- Deprivation of liberty without legal basis;

- Deprivation of liberty to repress the exercise of fundamental freedoms, such as freedom of religion, freedom of opinion, freedom of association;

- Deprivation of liberty in grave violation of international fair-trial norms.

48. In many cases this test will overlap with the prohibition of refoulement already mandatory for States under international treaty and customary law: prolonged incommunicado detention and indefinite detention can both amount to inhuman treatment;[12] deprivation of liberty

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[11] See, for example, Human Rights Committee general comment No. 31 on article 2 of the Covenant, paragraph 12.

[12] As stated by the Commission on Human Rights in its resolution 2003/38, "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment".

as a result of the exercise of freedoms of expression or opinion will most of the time fall under the scope of article 33 of the 1951 Refugee Convention. Moreover, as a matter of experience, torture, inhuman and degrading treatment are much more likely to occur in detention when procedural safeguards protecting the legality of detention are disregarded.

49. The cases brought to the Working Group's attention, however, evidence the need for Governments to include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism. To remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control. If the three categories of arbitrary detention identified by the Working Group are used as standard, extending the prohibition of refoulement to the risk of arbitrary detention will not place an unrealistic burden on Governments. In fact, the United Nations Model Treaty on Extradition places a more exigent obligation on Governments. Under its article 3 (f) it is a mandatory ground to refuse extradition "[i]f the person whose extradition is requested … would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14".

E. Renditions

50. The practice of "renditions", i.e. the informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries (often the intelligence services), without procedural safeguards is irremediably in conflict with the requirements of international law. When a Government eludes procedural safeguards, in particular the affected person's right to be heard, it cannot in good faith claim that it has taken reasonable steps to protect that person's human rights after removal, including the right not to be arbitrarily detained. As a consequence, it will share responsibility for ensuing arbitrary detention.

51. Governments should therefore stop all forms of rendition and return to the extradition, deportation and expulsion proceedings that are well established in their laws. This is in no way incompatible with the obligation to cooperate swiftly and effectively in international efforts to counter terrorism.

F. Diplomatic assurances with regard to detention and fair trial

52. The practice of obtaining "diplomatic assurances" from the receiving State in order to overcome the obstacle of the non-refoulement principle has been much discussed recently. As far as detention and fair trial are concerned, such assurances are acceptable only if very stringent conditions are met.

53. First, they must not be used to circumvent higher applicable standards. Where an extradition treaty is in force between two States, removal for criminal proceedings must take place pursuant to that treaty. If the treaty provides, along the lines of article 3 (f) of the

United Nations Model Treaty on Extradition, that extradition shall be refused if there is a risk of a trial falling short of article 14 guarantees in the receiving country, then extradition must be refused if there is such a risk, and no diplomatic assurances (which would constitute recognition of the existence of the risk) can legitimately overcome the obstacle. Similarly, if extradition is possible in the absence of a treaty on the basis of the domestic legislation of the sending country, diplomatic assurances cannot be used to circumvent a prohibition on extradition if there is a risk of arbitrary detention or unfair trial.

54. A second precondition is that the sending State has reason to consider the assurances reliable and that the authority in the receiving State that is giving the assurances is in fact in a position to ensure compliance.

55. Thirdly, diplomatic assurances can never be acceptable where the sending Government has substantial grounds for believing that there is a real risk of treatment contrary to article 7 of the Covenant upon removal. In this respect, the Working Group agrees with the Special Rapporteur on torture, inhuman or degrading treatment or punishment in rejecting diplomatic assurances as "unreliable and ineffective" insofar as torture is concerned.[13]

56. In the end, diplomatic assurances regarding detention and trial can be a legitimate means only when, on the one hand, the prohibition of refoulement does not otherwise impede the removal (in particular, no risk of torture or other ill-treatment) and, on the other hand, the guarantees provided by extradition proceedings are not available. Instead of such diplomatic assurances, however, the Working Group notes a phenomenon that could be named "reverse diplomatic assurances".

G. "Reverse diplomatic assurances"

57. Whereas in the case of diplomatic assurances a sending Government seeks from the receiving Government a (however ineffective) guarantee that the person extradited, deported or expelled will not be subjected to treatment contrary to human rights norms, in the case of "reverse diplomatic assurances" the sending Government seeks precisely assurances that the person handed over will be deprived of liberty, although there are no criminal charges against him and no other legal basis for detention. The cases in Opinion No. 47/2006 are an example of this practice. The Working Group has also received information that in its efforts to move detainees from so-called "black sites" and from the Guantánamo Bay detention facilities to the detainees' country of origin or third countries, the United States Government is seeking such "reverse diplomatic assurances", i.e. asking receiving Governments to detain the persons handed over despite the absence of criminal charges or to otherwise indefinitely place heavy restrictions on their freedom. The Working Group underlines that Governments cannot accept detainees under such conditions without incurring serious violations of their obligations under international human rights law.

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[13] Ibid. See also report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/60/316, para. 51).

58. This does not mean that any and all commitments by the receiving State to take measures to prevent a person suspected of constituting a threat to the sending State even after removal have to be rejected. It might be acceptable for a receiving State to undertake to keep a person returned to its territory under surveillance, as long as such surveillance does not amount to a deprivation of liberty without charges, is not as intrusive as to violate other fundamental rights (e.g. the right to respect for privacy and family life), and is subject to periodic review.

IV. OVERVIEW OF THE PENITENTIARY SYSTEMS AND THE CONDITIONS OF DETAINEES

59. Since its establishment, the Working Group on Arbitrary Detention has tried to cooperate in avoiding detention in violation of the rights enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, or at least diminishing the number of persons so detained. After 15 years of efforts and noting the changes currently introduced by the Human Rights Council, the Working Group believes this is a good moment to undertake a general assessment of what it had encountered on the penitentiary systems and the condition of detainees.

60. The Working Group has so far visited several types of detention centres in 21 countries and has received a significant number of communications from different sources claiming the arbitrariness of the detention of hundreds of individuals. It has thereby been able to acquire a better knowledge of the different penitentiary systems around the world, the conditions of the detainees in prisons, particularly of the detainees in pretrial detention. Moreover, it has been made aware of the increase in the number of people in detention in the whole world, but particularly in the developed countries. Troubled by this information,[14] it felt that the issue had to be tackled and evaluated in this annual report. The Working Group, aware that some aspects of the penitentiary system fall outside its mandate, is nevertheless convinced that a decrease in the prison population contributes to a better functioning of prisons and, at least indirectly, to a more effective social rehabilitation.

61. The Working Group observes that the majority of persons in detention come from a poor milieu and that a large number of them are in pretrial detention. Furthermore, their situation is often extremely precarious and they do not enjoy the guarantees established by the relevant international norms, mainly the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

62. The Working Group also notes that, in spite of the fact that many States have ratified the main international instruments relating to detention, their implementation in many countries leaves much to be desired. The mechanisms of judicial control set forth are, in many cases, just formal and do not constitute a real safeguard against arbitrary detentions.

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[14] According to statistics prepared by the School of Law, King's College, London, at the end of February 2005 there were 9 million people detained around the world, the majority of whom were pretrial detainees.

63. The situation of detainees varies and depends on the penitentiary systems and the structures of the judiciary and of the administration of justice in each country. Therefore, in most cases, those who are detained in countries where the system is better structured and well equipped enjoy better conditions while in detention. Nonetheless, it was also noted that even in countries where human rights are largely and institutionally recognized and developed, prisons and detention facilities still fail to fulfil the most elementary needs of the prisoners with regard to food, health and security.

64. A number of developed countries have increased and gathered large amounts of their public financial budget for the development of their penitentiary systems. Unfortunately, this has reinforced the isolation and marginalization of the detainees because their rights are still not fully guaranteed. This could also be a cause of relapse upon release.

65. The detainees are deprived of their basic needs, which has serious repercussions on their rights to life and to physical and moral integrity. Some are also affected by being kept in isolation. Being detained far from their families impedes them from having access to adequate resources. The disengagement of the State obliges the detainees to find other means to ensure their security, nutritional and health needs. As a result, prisons are abandoned to the control of gangs or "mafia" groups, composed mainly of prisoners but also of guards. And what can be witnessed in these detention facilities or prisons are horrifying human rights violations, going from modern forms of slavery to the murder of detainees.

66. The Working Group has already expressed its concern over the impact of precarious conditions of detention on the rights of detainees. In its 2004 annual report, it stated that inadequate conditions of detention have a negative impact on the exercise of rights that fall squarely within its mandate, such as the right to legal defence. This issue has principally affected and weakened pretrial detainees and thereby impaired the principle of "equality of arms". Under such circumstances, a fair trial can no longer be ensured even if other procedural guarantees are scrupulously observed. States have the obligation to protect the basic rights of people under their custody and cannot disengage themselves from this responsibility. The Working Group wished to recall that pretrial detainees have the right to be presumed innocent until proven guilty according to law. In the case of convicts, the punishment is solely the deprivation of liberty and should not imply threats to the life or to the physical integrity or the security of detainees.

67. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988, establishes that a person detained on a criminal charge shall be entitled to trial within a reasonable time or to be released pending trial.

68. However, the Working Group notes that in some countries, there are detainees who are still waiting to be tried after 12 or 13 years. For some of these persons, the time they spend in pretrial detention will not even count as a credit concerning the sentence to be served. The Working Group raises the question as to whether these detainees will have to be condemned based on the evidence set forth against them or in order to avoid the burden of having to justify the release of a person who has spent such a long time in pretrial detention.

69. Moreover, the Working Group frequently finds detainees in pretrial detention, who have been accused of no serious offence. They are kept in custody only to ensure that they will appear before the judge. Therefore, these individuals are not detained because of the real danger that they could represent to the society but because States are simply not capable of guaranteeing that they will appear in court.

70. The increase in the number of detained persons, as well as in the number of proceedings pending before the courts, also has a negative effect on the administration of justice and its operators. The judiciary often lacks financial and technical resources, which frequently leads to ineffective administration of justice and to insufficient control of cases. For instance, in many lawsuits, the Working Group noted that the detainees had never been directly questioned by the judge in charge of their cases. Like the judges, defence lawyers are also swamped and are confronting a serious increase in their workload. Many have neither the technical nor the financial and management resources to prepare their cases adequately and exercise their defence in adequate conditions.

71. The Working Group wishes to point out that the systems of legal aid, i.e. public defence lawyers and lawyers appointed and paid by States in order to ensure a basic defence to the accused (depending on the legal aid system of the country), do not work satisfactorily everywhere.

72. Consequently, the guarantees established by article 14 of the International Covenant on Civil and Political Rights, are not being appropriately fulfilled in several States. These guarantees include the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing; the right to be heard by a competent, independent and impartial judge and the right to interrogate witnesses during the trial.

V. CONCLUSIONS

73. The Working Group welcomes the cooperation it has received from States in the fulfilment of its mandate. In the great majority of cases in which the Group adopted an Opinion during its three sessions in 2006, the Government concerned had provided submissions regarding the case.

74. The Working Group welcomes the cooperation on the part of Governments that extended invitations to the Group for visits. Thanks to this cooperation, in 2006 the Working Group was able to visit Ecuador, Honduras, Nicaragua and Turkey. During its forty-seventh session, the Working Group made a revision of the list of countries it had requested to visit on official mission. It decided to persist in its requests to receive invitations to visit Afghanistan, Angola, Ethiopia, Guinea-Bissau, India, Italy, the Libyan Arab Jamahiriya, Turkmenistan and the United States of America, and to receive specific timing proposals for its visits to Colombia, Equatorial Guinea and Sierra Leone.

75. In a new Legal Opinion, the Working Group concludes that the transfer of detainees without procedural safeguards is in conflict with international law. Governments should stop all forms of rendition and return to the legal proceedings of extradition, deportation and expulsion.

The practice of diplomatic assurances is acceptable only if the very stringent conditions mentioned in the Legal Opinion are met. On the contrary, the practice of "reverse diplomatic assurances", as described in the current report, constitutes a serious violation of international human rights law.

76. The Working Group calls upon all States to join political and technical efforts in order to ensure and guarantee the basic needs and rights of people in detention. The Group considers that the minimum conditions are the following: the protection of the security, health and nutritional needs of the detainees and of their rights to have access to an adequate legal defence and to a fair trial.

VI. RECOMMENDATIONS

Growth in prison populations, particularly in developed countries

77. **Having been made aware of an increase in the number of people being detained around the world, particularly in developed countries, the majority of the detainees being in pretrial detention, the Working Group recommends that this recent growth in prison populations should be studied and debated with a view to developing measures favouring respect of the rights of the detainees.**

Detention on remand

78. **Regarding detention on remand, the Working Group addresses to States the following recommendations:**

(a) Time spent in pretrial detention should be credited towards the sentence to be served;

(b) Detainees acquitted in first instance should be immediately released;

(c) Domestic legislations should establish the maximum duration of pretrial detention, which should not exceed the sanction established for the offence attributed to the accused;

(d) Effective remedies to ensure compliance with limits on the duration of remand detention should be put in place.

Alternatives to deprivation of liberty

79. **States should review their legislation in order to establish or enlarge the scope of alternatives to deprivation of liberty as a sanction for criminal offences.**

International transfer of detainees

80. **With regard to the international transfer of detainees, particularly in the context of countering terrorism, the Working Group recommends:**

(a) Governments removing persons in their custody from their territory and into the custody of another Government should do so within proceedings that offer adequate safeguards, in particular to argue before an independent body offering judicial guarantees that removal would expose those persons to extrajudicial killing, torture or other cruel, inhuman or degrading treatment, or arbitrary detention and denial of a fair trial;

(b) Governments should not engage in so-called "renditions", which undermine such guarantees and are very likely to result in arbitrary detention;

(c) Governments should refuse to give assurances that they will deprive of their freedom persons transferred to their territory, unless such assurances can be given in accordance with both the domestic legislation and the Government's international human rights obligations.
