

Working Group on Arbitrary Detention
COMPILATION OF DELIBERATIONS¹

CONTENTS

1. Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law
2. Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet
3. Deliberation No. 7 on issues related to psychiatric detention
4. Deliberation No. 6, legal analysis of allegations against the International Criminal Tribunal for the Former Yugoslavia
5. Deliberation No. 5 on situation regarding immigrants and asylum-seekers
6. Deliberation No. 4 on rehabilitation through labour
7. Deliberation No. 3 on deprivation of liberty subsequent to a conviction, quality of the information on which decisions are based, 90-day deadline for replies, and “urgent action” procedure
8. Deliberation No. 2 on admissibility of the communications, national legislation, and documents of a declaratory nature
9. Deliberation No. 1 on house arrest
10. “Deliberations” of the working group

¹ The documents are organised in reverse chronological order. Paragraphs numbering within each document retained in accordance with their numbering in the relevant Annual Report.

1. Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law

(Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012)

A. Introduction and methodology

37. The Working Group on Arbitrary Detention is the only body in the international human rights system entrusted by the former Commission on Human Rights and the Human Rights Council with a specific mandate to receive and examine cases of arbitrary deprivation of liberty. In this capacity, the Working Group has interpreted and enforced the international legal rules on deprivation of liberty as they have developed in domestic, regional and international jurisdictions since 1991.⁴ In order to determine the definition and scope of arbitrary deprivation of liberty under customary international law, the Working Group has reviewed international treaty law and its own jurisprudence and that of international and regional mechanisms for the protection of human rights.

38. The Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where:

- (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
- (b) The deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights;
- (c) The total or partial non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and in the relevant international instruments is of such gravity as to give the deprivation of liberty an arbitrary character;
- (d) Asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of remedy;
- (e) The deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights.

39. On 31 October 2011, the Working Group consulted States and civil society and sent a note verbale inviting all to reply to two questions concerning the prohibition of arbitrary deprivation of liberty in national legislation.²

40. The Working Group received written submissions from Afghanistan, Australia, Azerbaijan, Canada, Chile, Colombia, Denmark, Estonia, France, Georgia, Greece, Japan, Jordan, Kyrgyzstan, Lebanon, Lithuania, Mauritania, Mauritius, Morocco, Oman, Paraguay, Portugal, Qatar, Saudi Arabia, Serbia, Spain, Suriname, Switzerland and Turkey. The Working Group also received written submissions from the International Commission of Jurists and the Spanish Society for International Human Rights Law. It further notes with appreciation the constructive engagement and cooperation

² These questions were: (1) is the prohibition of arbitrary deprivation of liberty expressly contained in your country's legislation? If so, please refer to the specific legislation; and (2) what elements are taken into account by national judges to qualify the deprivation of liberty as arbitrary? If possible, please provide concrete examples of the judgments.

of Governments and civil society attending the Working Group's public consultation of 22 November 2011.

41. Based on the findings of the review of its own jurisprudence, international and regional mechanisms, consultations and the submissions to the note verbale, the Working Group adopts the following deliberation on the definition and scope of arbitrary deprivation of liberty under customary international law.

B. The prohibition of arbitrary deprivation of liberty in international law

42. The prohibition of arbitrary deprivation of liberty is recognized in all major international and regional instruments for the promotion and protection of human rights. These include articles 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, article 6 of the African Charter of Human and Peoples' Rights (African Charter), article 7, paragraph 1, of the American Convention on Human Rights (American Convention), article 14 of the Arab Charter on Human Rights (Arab Charter), and article 5, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

43. Currently, 167 States have ratified the International Covenant on Civil and Political Rights, and the prohibition of arbitrary deprivation of liberty is widely enshrined in national constitutions and legislation and follows closely the international norms and standards on the subject.³ This widespread ratification of international treaty law on arbitrary deprivation of liberty, as well as the widespread translation of the prohibition into national laws, constitute a near universal State practice evidencing the customary nature of the arbitrary deprivation of liberty prohibition. Moreover, many United Nations resolutions confirm the *opinio iuris* supporting the customary nature of these rules: first, resolutions speaking of the arbitrary detention prohibition with regard to a specific State that at the time was not bound by any treaty prohibition of arbitrary detention;⁴ second, resolutions of a very general nature on the rules relating to arbitrary detention for all States, without distinction according to treaty obligations.⁵ Such resolutions demonstrate the consensus that the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law.

³ According to replies received to the questionnaire mentioned in paragraph 38 of the present document, see: sections 18 of the Human Rights Act and 21 of the Charter of Human Rights and Responsibilities Act in Australia and article 75 (v) of the Constitution of Australia; articles 28 of the Constitution of Azerbaijan and 14 of the Criminal Procedure Code; section 9 of the Canadian Charter of Rights and Freedoms; article 66 of the Constitution of France and articles 432 (4) and following of the Criminal Code of France; article 17 (4) of the Constitution of Spain; article 71 (2) of the Constitutional Act of Denmark; article 19 (7) of the Constitution of Chile; article 23 of the Constitution of Morocco; articles 31, 33 and 34 of the Constitution of Japan; articles 414–417 of the Penal Code of Afghanistan; articles 11, 12 and 133 of the Constitution of Paraguay; Habeas Corpus Law of Paraguay No. 1500/99; articles 18, 40 and 42 of the Constitution of Georgia; articles 143, 176 and 205 of the Criminal Code of Georgia; article 6 of the Constitution of Greece and articles 325–326 of the Penal Code of Greece; articles 174–177 of the Penal Code of Colombia; article 146 of the Criminal Code of Lithuania; article 31 of the Constitution of Switzerland; articles 90–108 of the Penal Code of Turkey; article 16 of the Constitution of Kyrgyzstan and articles 125 and 324 of the Penal Code of Kyrgyzstan; section 136 of the Penal Code of Estonia; articles 27–31 of the Constitution of Serbia; article 27 of the Constitution of Portugal; and section 5 of the Constitution of Mauritius.

⁴ For example, Security Council resolutions 392 (1976), 417 (1977) and 473 (1980) on South Africa.

⁵ For example, General Assembly resolution 62/159.

44. The International Court of Justice in its judgment in the case concerning United States diplomatic and consular staff in Tehran emphasized that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”.⁶

45. The prohibition of “arbitrary” arrest and detention has been recognized both in times of peace and armed conflict.⁷ International law recognizes detention or other severe deprivation of physical liberty as a crime against humanity, where it is committed as part of a widespread or systematic attack against any civilian population.⁸

46. Detailed prohibitions of arbitrary arrest and detention are also contained in the domestic legislation of States not party to the International Covenant on Civil and Political Rights, including China (art. 37 of the Constitution), Qatar (art. 40 of the Code of Criminal Procedure), Saudi Arabia (art. 36 of the Saudi Basic Law of Governance and art. 35 of the Saudi Law of Criminal Procedure (Royal Decree No. M/39)), the United Arab Emirates (art. 26 of the Constitution) and others. This practice of non-States parties to the major human treaties is further evidence of the customary nature of the prohibition of the arbitrary deprivation of liberty.

47. The prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention, known in some jurisdictions as habeas corpus, are non-derogable under both treaty law and customary international law. Regarding the former, this is explicitly recognized by the Arab Charter, which lists the right to not be arbitrarily deprived of one’s liberty as non-derogable (art. 14, para. 2). Similarly, the American Convention prohibits derogation from “the judicial guarantees essential for the protection of [non-derogable] rights” (art. 27, para. 2). Under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter and the European Convention, derogation from the prohibition of arbitrary deprivation of liberty is excluded. This follows from the condition common to all derogation provisions in human rights treaties that any measure taken pursuant to derogation be necessary for the protection of the particular interest under threat.⁹

48. Arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations that a State may invoke pursuant to derogation are already factored into the arbitrariness standard itself. Thus, a State can never claim that illegal, unjust, or unpredictable

⁶ United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgments, I.C.J. Reports 1980, p. 42, para. 91.

⁷ See, for example, Human Rights Committee, concluding observations on the combined fourth and fifth periodic reports of Sri Lanka, CCPR/CO/79/LKA, para. 13; concluding observations on the initial report of Uganda, CCPR/CO/80/UGA, para. 17; concluding observations on the third periodic report of the Sudan, CCPR/C/SDN/CO/3, para. 21. See also International Committee of the Red Cross, Customary International Humanitarian Law Database, rule 99 (deprivation of liberty).

⁸ Article 7, paragraph 1 (e), of the Rome Statute of the International Criminal Court; see also the Working Group’s opinions No. 5/2010 (Israel), No. 9/2010 (Israel) and No. 58/2012 (Israel).

⁹ See, for example, art. 4, para. 1, of the Covenant on Civil and Political Rights; art. 15, para. 1, of the European Convention; art. 27, para. 1, of the American Convention; art. 4, para. 1, of the Arab Charter on Human Rights.

deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end. This view is consistent with the conclusion of the Human Rights Committee that the Covenant rights to not be arbitrarily deprived of one's liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention are non-derogable.¹⁰

49. With regard to the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention, all regional treaties mentioned declare that right non-derogable.¹¹ In addition, both the prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention, are adopted in the domestic legislation of Member States of the United Nations, so that detaining someone without the required legal justification is against accepted norms of State practice.¹² The International Court of Justice in its 2010 Diallo judgment stated that article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and article 6 of the African Charter (Prohibition of Arbitrary Detention) are applicable in principle to any form of detention, "whatever its legal basis and the objective being pursued".¹³

50. Furthermore, derogation from customary international law's prohibition of arbitrary deprivation of liberty is not possible. The equivalent to the right to derogate under customary international law is to be found in the secondary rules on State responsibility, in particular in the plea of necessity as a circumstance precluding wrongfulness for an act inconsistent with an international obligation.¹⁴ The International Law Commission's articles on Responsibility of States for internationally wrongful acts confirm that this may only be invoked where, *inter alia*, it "is the only way for a State to safeguard an essential interest against a grave and imminent peril" (art. 25, para. 1 (a)). As with the right to derogate codified in the human rights treaties, an essential condition for the valid invocation of the customary international law plea of necessity is that non-compliance with the international obligation

¹⁰ Human Rights Committee, general comment No 29 (2001) on derogation during a state of emergency, paras. 11 and 16. The Inter-American Commission on Human Rights has also concluded that the arbitrary deprivation of liberty prohibition is non-derogable in its resolution adopted at the 1968 session, document OEA/Ser.L/V/II.19 Doc 32, Inter-American Yearbook on Human Rights, pp. 59–61.

¹¹ The Inter-American Court of Human Rights has confirmed this with regard to the American Convention, see, for example, *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, 1987, Series A, No. 8, paras. 42–44; *Judicial Guarantees in States of Emergency* (arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, 1987, Series A, No. 9, para 41(1); *Neira Alegria et al v. Peru*, Judgement of 19 January 1995, paras 82–84 and 91(2). See also *Habeas Corpus in Emergency Situations*, para. 35.

¹² See footnote 3 above.

¹³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, para. 77.

¹⁴ International Law Commission, articles on Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I) and Corr.4, art. 25. The customary character of both the doctrine of necessity itself, as well as the conditions for its invocation listed in the Commission's articles, has been confirmed by the International Criminal Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, paras. 51 and 52.

at issue actually be necessary for this purpose and proportionate to that end.¹⁵ As noted above, this can never be possible with arbitrary deprivations of liberty.

51. Consequently, the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a jus cogens norm. Its specific content, as laid out in this deliberation, remains fully applicable in all situations.

C. Qualification of particular situations as deprivation of liberty

52. In 1964, a committee established by the former Commission on Human Rights studied the right of everyone to be free from arbitrary arrest, detention and exile. To date, this study remains the one and only detailed multilateral study on the issue. According to this study, detention is: the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities.¹⁶

53. The study defined arrest as: the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.¹⁷

54. When the Working Group was established, the term “detention” was not expressively defined. It was only with the adoption of resolution 1997/50 of the former Commission on Human Rights that the differing interpretations of the term were provisionally resolved. The resolution provides for the renewal of the mandate of the Working Group: entrusted with the task of investigating cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.

55. The Human Rights Committee in its general comment No. 8 (1982) on the right to liberty and security of persons concluded that article 9, paragraph 1, of the Covenant is applicable to “all deprivations of liberty” including cases concerning immigration control.¹⁸ Any confinement or retention of an individual accompanied by restriction on his or her freedom movement, even if of relatively short duration, may amount to de facto deprivation of liberty.

56. The Working Group has consistently followed the position that “what mattered to the [former Commission on Human Rights] in the expression ‘arbitrary detention’ was essentially the word

¹⁵ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002), p. 184: “the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered”.

¹⁶ Department of Economics and Social Affairs, *Study of the right of everyone to be free from arbitrary arrest, detention and exile* (United Nations publication, Sales No. 65.XIV.2), para. 21.

¹⁷ *Ibid.*, para. 21.

¹⁸ Human Rights Committee, *Torres v. Finland*, communication No. 291/1988, Views adopted on 2 April 1990; *A. v. Australia*, communication No. 560/1993, Views adopted on 3 April 1997.

‘arbitrary’, i.e., the elimination, in all its forms, of arbitrariness, whatever might be the phase of deprivation of liberty concerned”.¹⁹

57. The Working Group regards as detention all forms of deprivation of liberty and would like to re-emphasize its former statement: if the term “detention” were to apply to pretrial detention alone, then it would follow that the [Universal Declaration of Human Rights] does not condemn arbitrary imprisonment pursuant to a trial of whatever nature. Such an interpretation is per se unacceptable. In fact the Declaration, in article 10, stipulates the entitlement in full equality of a fair and public hearing to everyone by an independent and impartial tribunal. This further confirms that the expression “detention” in article 9 refers to all situations, either pre-trial or post-trial.²⁰

58. This broad interpretation is confirmed by current State practice.²¹

59. Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.²² The Working Group has confirmed this in its previous deliberations on house arrest, rehabilitation through labour, retention in non-recognized centres for migrants or asylum seekers, psychiatric facilities and so-called international or transit zones in ports or international airports, gathering centres or hospitals.²³

60. In this regard secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human being under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection.²⁴

D. The notion of “arbitrary” and its constituent elements under customary international law

61. The notion of “arbitrary” stricto sensu includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary.²⁵ The drafting history of article 9 of the International Covenant on Civil and Political Rights “confirms that ‘arbitrariness’ is not to be equated

¹⁹ Report of the Working Group to the Economic and Social Council, E/CN.4/1997/4, para. 54.

²⁰ Ibid., para. 66.

²¹ See e.g. submissions by Canada (R. v. Swain, [1991] 1 S.C.R. 933; R. v. Demers, [2004] 2 S.C.R. 489, para. 30; May v. Ferndale Institution, [2005] 3 S.C.R. 809, para. 76; Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, p. 831; Cunningham v. Canada, [1993] 2 S.C.R. 143, pp. 148–151); United States of America (Restatement (Third) of Foreign Relations Law, section 702 (1987), and Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); and De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985)); see also submission by the Government of Lithuania.

²² See report of the Working Group to the Economic and Social Council, E/CN.4/1998/44, para. 41; Working Group opinion No. 16/2011 (China).

²³ See its deliberations Nos. 1, 4, 5 and 7.

²⁴ See the joint study on global practices in relation to secret detention in the context of countering terrorism, A/HRC/13/42, p. 2.

²⁵ See e.g. Human Rights Committee, A. v. Australia; Marques de Morais v. Angola, communication No. 1128/2002, Views adopted on 29 March 2005, para. 6.1; Inter-American Court of Human Rights, Gangaram Panday v. Suriname, Judgement, Ser. C, No. 16, 1994, para. 47; Working Group, opinions No. 4/2011 (Switzerland); No. 3/2004 (Israel).

with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”.²⁶

62. The Human Rights Committee has stated that “in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification”.²⁷ The legal basis justifying the detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally. Moreover, according to the Human Rights Committee, an essential safeguard against arbitrary arrest and detention is the “reasonableness” of the suspicion on which an arrest must be based. According to the European Court of Human Rights, “having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as ‘reasonable’ will however depend upon all the circumstances”.²⁸

63. The notion of “arbitrary detention” *lato sensu* can arise from the law itself or from the particular conduct of Government officials. A detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds.²⁹ An overly broad statute authorizing automatic and indefinite detention without any standards or review is by implication arbitrary.

64. Legislation allowing military recruitment by means of arrest and detention by the armed forces or repeated imprisonment of conscientious objectors to military service may be deemed arbitrary if no guarantee of judicial oversight is available. The Working Group has on occasion found the detention of conscientious objectors in violation of, *inter alia*, article 9 of the Universal Declaration of Human Rights and articles 9 and 18 of the International Covenant on Civil and Political Rights.³⁰

65. Legal provisions incompatible with fundamental rights and freedoms guaranteed under international human rights law would also give rise to qualification of detention as arbitrary.³¹ In this regard, national courts have drawn upon notions of arbitrariness as applied by the Human Rights Committee.³²

²⁶ As noted by the Human Rights Committee in *Mukong v. Cameroon*, communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

²⁷ Human Rights Committee, *Madani v. Algeria*, communication No. 1172/2003, Views adopted on 28 March 2007, para. 8.4.

²⁸ European Court of Human Rights, *Fox, Campbell and Hartley v. The United Kingdom* (application No. 12244/86, 12245/86, 12383/86), Judgement, para. 32.

²⁹ See category V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

³⁰ See, for example, Working Group, opinions No. 8/2008 (Colombia) and 16/2008 (Turkey); see also, Human Rights Committee, *Yoon and Choi v. Republic of Korea*, communications Nos. 1321/2004 1322/2004, Views adopted on 3 November 2006.

³¹ See, for example, Working Group, opinions No. 25/2012 (Rwanda) and No. 24/2011 (Viet Nam).

³² Submission from the Government of Australia: in *Blundell v. Sentence Administration Board of the Australian Capital Territory*, Judge Refshauge drew upon notions of arbitrariness as applied by the Human Rights Committee in *A. v. Australia*. Judge Refshauge identified disproportionality, capriciousness and lack of comprehensive reasons as the hallmarks of arbitrariness.

66. The Working Group observes that the notion of promptness as set out in article 9, paragraph 3, of the International Covenant on Civil and Political Rights is one key element that might render detention arbitrary. The Human Rights Committee has consistently found violations of article 9, paragraph 3, of the Covenant in cases of delays of a “few days” before the person is brought before a judge.³³ At the same time, the European Court of Human Rights has explained that the “scope for flexibility in interpreting and applying the notion of ‘promptness’ is very limited”.³⁴ The court has also highlighted that “justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities”.³⁵

67. Any extension of the period of deprivation of liberty detention must be based on adequate reasons setting out a detailed justification, which must not be abstract or general in character.

68. The increased reliance on administrative detention is particularly worrying. Types of administrative detention considered by the Working Group include preventive detention, detention in emergency or exceptional situations, detention on counter-terrorism grounds, immigration detention, and administrative penal law detention. Article 9 of the International Covenant on Civil and Political Rights is one of the central provisions regarding the freedom of those detained under an administrative order.³⁶ Administrative detention may also be subject to the customary norm codified in article 14 of the Covenant, e.g. in cases where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative.

69. Since its establishment, the Working Group has been seized of an overwhelming number of administrative detention cases. Already in 1992, the Working Group held that the detention of the individual under emergency laws was arbitrary and contrary to the provision on the right to seek a remedy and a fair trial. In subsequent years, the Working Group has consistently found violations of the various provisions contained in articles 9 and 14 of the International Covenant on Civil and Political Rights in cases of administrative detention.

70. In the majority of the cases of administrative detention with which the Working Group has dealt, the underlying national legislation does not provide for criminal charges or trial. Consequently, the administrative rather than judicial basis for this type of deprivation of liberty poses particular risks that such detention will be unjust, unreasonable, unnecessary or disproportionate with no possibility of judicial review.

³³ Human Rights Committee, *Bousroual v. Algeria*, communication No. 992/2001, Views adopted on 30 March 2006, para. 9.6; *Bandajevsky v. Belarus*, communication No. 1100/2002, Views adopted on 28 March 2006, para. 10.3; *Borisenko v. Hungary*, communication No. 852/1999, Views adopted on 14 October 2002, para. 7.4.

³⁴ See *Brogan and Others v. The United Kingdom* (application 11209/84; 11234/84; 11266/84; 11386/85), Judgement, para. 62.

³⁵ European Court of Human Rights, *Belchev v. Bulgaria*, Final Judgement (application No. 39270/98), Judgement, para. 82. See also *Medvedyev and Others v. France* (application No. 3394/03), Judgement, paras. 119, 121 and 122.

³⁶ The International Court of Justice in its *Diallo* decision concluded that article 9, paragraphs 1 and 2, of Covenant apply in principle to any form of arrest or detention and are not confined to criminal proceedings. See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, para. 77.

71. Although it is acknowledged that counter-terrorism measures might require “the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial” in a very limited manner, the Working Group has repeatedly stressed that “in all circumstances deprivation of liberty must remain consistent with the norms of international law.”³⁷ In this respect, the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention is a personal right, which must “in all circumstances be guaranteed by the jurisdiction of the ordinary courts.”³⁸

72. Counter-terrorism legislation that permits administrative detention often allows secret evidence as the basis for indefinite detention. As this would be inconsistent with the prohibition of arbitrary deprivation of liberty, no person should be deprived of liberty or kept in detention on the sole basis of evidence to which the detainee does not have the ability to respond, including in cases of immigration, terrorism-related and other subcategories of administrative detention. The Working Group has held that, even if lawyers of the detainee have access to such evidence but are not allowed to share or discuss it with their client, this does not sufficiently protect the detainee’s right to liberty.³⁹

73. The Working Group also reiterates that “the use of ‘administrative detention’ under public security legislation [or] migration laws ... resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law”.⁴⁰ The practice of administrative detention is particularly worrying as it increases the likelihood of solitary confinement, acts of torture and other forms of ill-treatment.

74. Even though administrative detention per se is not tantamount to arbitrary detention, its application in practice is overly broad and its compliance with the minimum guarantees of due process is in the majority of cases inadequate.

75. In conclusion and in the light of the foregoing, the Working Group on Arbitrary Detention finds that all forms of arbitrary deprivation of liberty, including the five categories of arbitrary deprivation of liberty as referred to above in paragraph 38, are prohibited under customary international law. The Working Group also concludes that arbitrary deprivation of liberty constitutes a peremptory or jus cogens norm.

³⁷ Report of the Working Group, E/CN.4/2004/3, para. 84.

³⁸ Ibid., para. 85.

³⁹ Working Group, opinions Nos. 5/2010 (Israel) and 26/2007 (Israel).

⁴⁰ Report of the Working Group, E/CN.4/2005/6, para. 77.

2. Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet

(Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005)

32. When copying out its mandate, the Working Group on Arbitrary Detention has, in recent times, quite often been faced with cases of deprivation of liberty which were, in some way or another, linked to or resulting from the use of the Internet. The number of communications on behalf of individuals deprived of their liberty, mainly by way of criminal convictions based on the reception or dissemination of information, ideas or opinions through the World Wide Web, commonly called the Internet, continues to increase.

33. In addition, a new phenomenon has recently arisen: the use of the Internet to prepare and bring about terrorist acts. Parallel to that, the Working Group observes, some States are inclined to resort to deprivation of liberty, asserting that the use of the Internet in a given case serves terrorist purposes, whereas, in fact, this proves later to be just a pretext to restrict freedom of expression and repress political opponents.

34. The Working Group is, however, aware that not all deprivation of liberty connected to the use of the Internet is per se arbitrary; there might be, and certainly are, situations where deprivation of liberty resulting from the use of the Internet can be justified. In most of the Internet-related individual communications of which it has been seized so far, the Working Group has found that the deprivation of liberty was arbitrary, because the individual concerned had been punished merely or predominantly for having exercised his freedom of expression. Therefore the deprivation of liberty fell under category II of the categories applicable to the consideration of cases submitted to the Working Group.⁴¹

35. The Working Group feels that the complexity of this matter deserves some consideration. It might be helpful for the Working Group itself and for Governments alike, if the Working Group took stock of the criteria applicable to assess whether the deprivation of liberty in a given situation was justified by the facts surrounding the case.

36. The Internet is, in many respects, a mode of communication comparable to the diffusion or reception of information or ideas through any other means, such as books, newspapers, letters and other similar postal services, telephone, radio broadcasting or television. However, there also exist meaningful differences between the exercise of the freedom of expression via the Internet, and other, more traditional means of communication. Namely, the distribution and reception of information by the Internet is much wider and quicker. In addition, the Internet is more easily accessible to anyone. Even more significantly, the Internet is a mode of communication which operates not on a local but on a global scale, not depending on national territorial boundaries.

37. Yet, this difference between the Internet and other means of communication is rather technical in nature, and does not exert a decisive influence on the meaning and substance of the freedom of expression. Therefore, despite the specific features of the Internet as a particular form of

⁴¹ See the following Opinions: 35/2000 (China) in E/CN.4/2002/77/Add.1, p. 22; 1/2003 (Viet Nam), E/CN.4/2004/3/Add.1, p. 23; 14/2003 (Maldives), E/CN.4/2004/3/Add.1, p. 75; 15/2003 (Tunisia), E/CN.4/2004/3/Add.1, p. 79; 25/2003 (China), 26/2003 (China), 15/2004 (China) and 19/2004 (Viet Nam) in E/CN.4/2005/6/Add.1, pp. 24, 25, 62 and 73, respectively.

communication, the same rules of international law govern the freedom of expression and the conditions of its lawful restrictions. This freedom must be exercised through the Internet or through other means.

38. In conclusion, the freedom to impart, receive and seek information via the Internet is protected under international law in the same way as any other form of expression of opinions, ideas or convictions.

39. The application of any measure of detention against Internet users, taken in the framework of criminal investigation, proceeding, conviction or by an administrative authority, undoubtedly amounts to a restriction on the exercise of the freedom of expression. Unless it complies with the conditions prescribed by international law, such restriction by the authorities is arbitrary, hence unlawful.

40. In individual communications, which are submitted to the Working Group on behalf of persons deprived of their liberty for having availed themselves of their freedom of expression, Governments frequently assert that deprivation of liberty was the result of legitimate State actions, taken in the interest of the community as a whole, or to protect the rights or reputation of others. The adverse party ("the source") often disagrees as to whether the restriction applied by the authorities by way of deprivation of liberty was permissible under international law.

41. To assess the conformity of the deprivation of liberty with international standards, the Working Group shall weigh them on a case-by-case basis, that is, whether the circumstances invoked justified the restriction on the freedom of expression by way of deprivation of liberty.

42. In making such an assessment, the starting point for the Working Group is the criteria suggested by the general comments of the Human Rights Committee giving its interpretation of article 19 of the ICCPR, paragraph 4 of which reads: "Paragraph 3 (of art. 19) expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being 'necessary' for that State party for one of those purposes."⁴²

43. The established practice of the Working Group is that restrictions placed on the freedom of expression by way of deprivation of liberty can only be justified when it is shown that the deprivation of liberty has a legal basis in domestic law, is not at variance with international law and is necessary to ensure the respect of the rights or reputation of others, or for the protection of national security, public order, public health or morals, and is proportionate to the pursued legitimate aims. A vague and general reference to the interests of national security or public order, without being properly explained and documented, is not enough to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty was necessary. More generally, the Working Group cannot accept the interference of the public authorities with the individual's privacy - including the freedom to communicate among themselves via the Internet - under the unsubstantiated pretext that the intrusion was necessary to protect public order or the community.

⁴² General comment No. 10: On freedom of expression (art. 19, para. 4).

44. The Working Group found the deprivation of liberty to be arbitrary in a number of communications, on the ground that individuals were deprived of their liberty solely for having expressed their personal views on political, economic or human rights issues in a non-violent manner.

45. It is true that the opinions expressed are often sharply critical, take a vehement form or are openly hostile to the official government policy. The position of the Working Group is, however, that freedom of expression constitutes one of the basic conditions of the development of every individual. Subject to the restrictions which may be imposed on it on the basis of article 19, paragraph 3, of the ICCPR, the freedom of expression is not only applicable to information and ideas that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that offend or disturb the State or any sector of the population. Such are the demands of tolerance and broadmindedness, without which there is no social progress.

46. The list of the forms and manner of the expression of opinions for which their authors are punished is, according to the Working Group's experience, pretty broad. It includes, but is not limited to: public denunciation of government policy; organizing, founding of, or participation in opposition movements or in public demonstrations; public manifestation of one's religious belief, mainly if that religion is not an officially recognized, or otherwise tolerated denomination or religion; graffiti drawn on walls, contesting the official State ideology; production and distribution of printed material or pamphlets inviting the population to conduct public debates discussing alleged government corruption; invitation to vote for opposition forces at a forthcoming election; listening to or watching foreign radio or television broadcasts; and participation in the funeral of politically controversial figures.

47. Though Governments often argue that the individual who participated in actions referred to above by way of illustration crossed the permissible limits of his freedom of expression, the position of the Working Group is that the peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of the freedom of expression. Hence, deprivation of liberty applied on the sole ground of having committed such actions is arbitrary.

48. Since terrorism has become one of the most alarming threats for humanity, the Internet is increasingly a powerful means in the hands of terrorists to instigate to, prepare, organize and carry out acts of terrorism. For this reason, State actions to prevent - or to punish - the use of the Internet for terrorist purposes is justifiable. Therefore, deprivation of liberty for Internet users in connection with their willingness to provide, disseminate or receive information from each other through the Internet aimed at preparing or carrying out terrorist plots may be, in principle, legitimate. The participation in such actions cannot be justified by reference to the freedom of expression of Internet users.

49. Notwithstanding the deprivation of liberty of Internet users justified by the legitimate interest to protect national security or public order under article 19, paragraph 3, of the ICCPR, such action may become arbitrary when the non-observance of the norms relating to a fair trial spelled out under the relevant international instruments is grave.

50. Similar to what has previously happened in the history of mankind after the emergence of inventions or discovery of utmost importance, which have exerted enormous and positive effects on the scientific development, the appearance of the Internet, together with the profound changes brought about by the convergence and continuing globalization of computer networks, is also accompanied by some negative concomitant phenomena. The areas where cyber-techniques can be

used to the detriment of the community are being gradually identified. Measures, often in the criminal field, are being taken to prevent abuses threatening or endangering the security and safety of the computer network in general, and the use of the Internet in particular. Since the Internet operates on a transnational scale, the international community has already recognized that serious abuses committed against, or by the use of the Internet can only be prevented through common action. Some international instruments aiming at the struggle against cybercrime have come already to light,⁴³ others are being prepared. Moreover, attempts are being made to identify ethical behaviour on the Internet.⁴⁴

51. Although the list of behaviours that the international community considers as criminal is not yet complete, it includes illegal access, illegal interception, data interference, system interference, computer-related forgery, computer-related fraud, offences linked to infringements of copyright or related rights. Moreover, and bearing in mind the rising number of offences committed against children by using the means offered by the Internet, the offences related to the sale of children, sexual abuses against children and child pornography have a particularly important place in the list.

52. Persons suspected of the above or similar abuses may not, as a rule, invoke their freedom of expression to justify unlawful or criminal actions. Unless the particular circumstances of the given case warrant otherwise, the Working Group does not consider as arbitrary the deprivation of liberty applied against common criminals on the sole basis that the offence they are charged with is somehow or another related to the computer system in general, or to the use of Internet, in particular.

⁴³ See e.g. Convention on Cybercrime, adopted on 23 November 2001, European Treaty Series, No. 185.

⁴⁴ See e.g. recommendation 1670 (2004) of the Parliamentary Assembly of the Council of Europe, "Internet and the Law".

3. Deliberation No. 7 on issues related to psychiatric detention

(Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004)

47. In its report of 15 December 2003 (E/CN.4/2004/3), the Working Group on Arbitrary Detention expressed concern for the situation of vulnerable persons such as the disabled, drug addicts and people suffering from AIDS, who are held in detention on health grounds (para. 74). It recommended that, “with regard to persons deprived of their liberty on health grounds, the Working Group considers that in any event all persons affected by such measures must have judicial means of challenging their detention” (para. 87). People held in detention because of their mental disability can be, in the view of the Working Group, assimilated to the category of vulnerable persons, because their being forcibly held in psychiatric hospitals, institutions and similar places raises the same concerns.

48. When establishing its methods of work at its first session in 1991, the Working Group deliberately refrained from taking a position in the abstract on measures involving the deprivation of liberty of mentally disabled persons placed in a closed establishment. It held that it is more appropriate to examine this issue later.

49. Since its first session, the Working Group has been seized by several individual communications involving deprivation of liberty of persons allegedly of unsound mind, and it has also received information concerning this matter from various sources, including non-governmental organizations, pertaining to the deprivation of liberty of mentally disabled persons.

50. The Working Group believes that it is topical to outline, on the basis of experience accumulated during its years of existence, its position concerning the detention of mentally disabled persons. In preparing this deliberation, the Working Group relied on the following documents: the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX)); the Principles for the protection of persons with mental illnesses and the improvement of mental health care (General Assembly resolution 46/119); the Declaration on the Rights of Mentally Retarded Persons (General Assembly resolution 2856 (XXVI)). The Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder, a preliminary report by the Special Rapporteur, Ms. Erica-Irene Daes.⁴⁵

51. The handling of the phenomenon of mental illness is an age-old problem for humanity. Even though the treatment of the mentally ill has undergone considerable improvements, the need to isolate them from the rest of the society seems to remain a permanent element of the treatment. Whether isolation amounts to deprivation of liberty cannot and shall not be decided in the abstract. The Working Group is of the view that the holding against their will of mentally disabled persons in conditions preventing them from leaving may, in principle, amount to deprivation of liberty. Along the lines applied in its deliberation No. 1 on House Arrest, it will devolve upon the Working Group to assess, on a case-by-case basis, whether the deprivation of liberty in question constitutes a form of detention, and if so, whether it has an arbitrary character.

52. It is undisputed that paragraphs 1 and 4 of article 9 of the International Covenant on Civil and Political Rights (ICCPR) applies to all forms of arrest and detention.⁴⁶

⁴⁵ United Nations Publication, Sales No. E.85.14.9.

⁴⁶ The provisions relevant in the present deliberation of the International Covenant on Civil and Political Rights read (art. 9, para. 1) “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or

53. The Working Group observes that the provisions of article 9 of the Covenant reflect the principles elaborated by general (customary) international law, and are therefore binding also on States, which have not ratified the Covenant. The drafting history of ICCPR testifies that there have been attempts to give an exhaustive list of all possible forms of the deprivation of liberty, and the Commission on Human Rights unanimously adopted in 1949 a general formula prohibiting anyone from being arbitrarily arrested or detained. That article 9 does not cover arrest or detention on grounds of a criminal charge only, is well manifested in General Comment applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, *etc.* It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.”

54. Under international law deprivation of liberty per se is not prohibited, but it follows from article 9, paragraph 1, of the ICCPR that detention is permissible only when it is lawful and does not have an arbitrary character.

(a) Lawfulness requires that detentions rest on such grounds and are carried out in accordance with procedure established by law. It transpires from the analysis of article 9, paragraph 1 - and from all comparable provisions in the ICCPR⁴⁷ - that the requirement, which a “law” has to meet, is that the national legislation must set down all permissible restrictions and conditions thereof. Therefore, the word “law” has to be understood in the strict sense of a parliamentary statute, or an equivalent unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction. Hence, administrative provisions do not meet this requirement. Laws shall be couched in clear terms;

(b) To comply with international standards it is not enough that the deprivation of liberty be provided by law; it must not be arbitrary, either. This requirement stems from article 9, paragraph 1, and its second sentence (“No one shall be subjected to arbitrary detention”). It transpires from all the ICCPR provisions making use of the term “arbitrary”, or “arbitrarily”,⁴⁸ that the prohibition of arbitrariness shall be interpreted broadly. It is not possible, and in the view of the Working Group it is not necessary, to give an exhaustive list of arbitrary detention; arbitrariness must be assessed in the light of all the relevant circumstances of a given detention. The minimum requirement for respect by States of the prohibition of arbitrariness is that deprivation of liberty

detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” And in article 9, paragraph 3: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time of release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.” And article 9, paragraph 4: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

⁴⁷ Besides article 9, paragraph 1, see articles 12, paragraph 3, 18, paragraph 3, 19, paragraph 3, 21 and 22, paragraph 3, which make use of synonyms to the term “provided by law”, such as “established by law”, or “prescribed by law”.

⁴⁸ Besides article 9, paragraph 1, see article 6, paragraph 1: No one shall be arbitrarily deprived of his life; article 12, paragraph 4: No one shall be arbitrarily deprived of his right to enter his own country; article 17, paragraph 1: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.

must not be manifestly disproportionate, unjust, unpredictable or discriminatory. Moreover, the detention is manifestly arbitrary if a person is deprived of his liberty on the pretext of his (alleged) mental disability, but it is obvious that he is detained on account of his political, ideological, or religious views, opinion, conviction or activity.

55. Applying the above principles to mentally disabled persons, the Working Group is mindful that because of their vulnerable situation this group of people needs special attention. Various factors may give rise to deprive of his liberty someone, showing the signs of mental illness: to conduct a medical examination whether or not that person is in fact suffering from mental illness, and if so, to identify the nature of the illness. If his mental illness is established, deprivation of liberty may be motivated by the need of medical treatment, to which the patient is unwilling to subject himself. In addition, in some cases confinement of psychiatric patients in closed institution may prove necessary to prevent the harm which the patient might cause to others or to himself.

56. In legal systems where people of unsound mind cannot be made criminally responsible for the acts they committed, a person suspected of or charged with a criminal offence, who shows the signs of mental illness, may be detained for medical check-up, observation and diagnosis. If his pathological mental state and the ensuing lack of criminal responsibility are established, he may be confined by a court order to forced (compulsory) curative treatment, which may last until it is deemed necessary.

57. As deplorable as the phenomenon of mental disability or illness is for the person concerned, his family and the society at large, it exists. Mental illness may render it inevitable to take measures involving the restriction or deprivation of liberty in the interest of the mentally ill, or in the interest of the society as a whole. It is the position of the Working Group, however, that when assessing whether the measures taken are in compliance with international standards, the vulnerable position of the person affected by his (alleged) illness has to be duly taken into consideration.

58. In the consideration of individual communications under its mandate the Working Group applies the following criteria:

- (a) Psychiatric detention as an administrative measure may be regarded as deprivation of liberty when the person concerned is placed in a closed establishment which he may not leave freely. Whether the conditions of someone being held in a psychiatric institution amounts to deprivation of liberty, within the meaning of its mandate, will be assessed by the Working Group on a case-by-case basis;
- (b) The same applies to the deprivation of liberty of suspected criminals pending medical check-up, observation and diagnosis of their presumed mental illness, which may have an impact on their criminal accountability;
- (c) Law shall provide the conditions of the deprivation of liberty of persons of unsound mind, as well as the procedural guaranties against arbitrariness. The requirements in respect of such laws are set out in more detail under paragraph 45 (a) and (b) above;
- (d) Article 9, paragraph 3, of ICCPR shall be applied to anyone arrested or detained on a criminal charge who shows the signs of mental illness, by duly taking into account his vulnerable position and the ensuing diminished capability to argue against detention. If he does not have legal assistance of his own or of his family's choosing, effective legal assistance through a defence lawyer or a guardian shall be assigned to him to act on his behalf;

(e) Article 9, paragraph 4, of ICCPR shall be applied to anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder. In addition, the necessity whether to hold the patient further in a psychiatric institution shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ and the patient shall be released if the grounds for his detention do not exist any longer. In the review proceedings his vulnerable position and the entailing need for an appropriate representation, as provided for under (d) above has also been taken into consideration;

(f) Decisions on psychiatric detention should avoid automatically following the expert opinion of the institution where the patient is being held, or the report and recommendations of the attending psychiatrist. Genuine adversarial procedure shall be conducted, where the patient and/or his legal representative are given the opportunity to challenge the report of the psychiatrist;

(g) Psychiatric detention shall not be used to jeopardize someone's freedom of expression nor to punish, deter or discredit him on account of his political, ideological, or religious views, convictions or activity.

4. Deliberation No. 6, legal analysis of allegations against the International Criminal Tribunal for the Former Yugoslavia

(Report of the Working Group on Arbitrary Detention, E/CN.4/2001/14, 20 December 2000)

12. The Working Group considered a communication concerning General Talic, who had been arrested in Vienna on 23 August 1999 on a warrant issued by the International Criminal Tribunal for the Former Yugoslavia and transferred on 25 August 1999 to the Tribunal's Detention Unit. By an order issued on 31 August 1999 the Tribunal placed him in pre-trial detention. The communication contests these measures on the grounds that they are based on provisions of the Tribunal's Statute and Rules of Procedure and Evidence that are inconsistent with article 9, paragraphs 1, 2, 3 and 5, of the International Covenant on Civil and Political Rights. The author of the communication also cites the jurisprudence of the European Court of Human Rights, thereby allowing the Working Group to refer to that jurisprudence in its argument.

(a) Admissibility

13. The Working Group considers that the communication does not fall under the Opinion procedure provided for in section III.A of its revised methods of work (E/CN.4/1998/44, annex I). This procedure presupposes that the communication contains a complaint against a State, which is not the case in the present instance, since the International Criminal Tribunal for the Former Yugoslavia is a subsidiary body of the Security Council. The Working Group does, however, consider that, looking beyond the case at hand, the matter is one of a purely legal interpretation of the norms of international law, and the Working Group is thus entitled to state its views as it has done in the past, not in the form of an Opinion, but in the form of a Deliberation to which it can refer if it receives further communications concerning the administration of justice by an international criminal tribunal that are based on the same legal reasoning.

14. The communication makes the following allegations against the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia:

- (a) First allegation: detention is the rule and release the exception (breach of article 9, paragraph 3, of the Covenant);
- (b) Second allegation: no grounds are given in the arrest warrants and the detention orders, making the detention arbitrary (breach of article 9, paragraph 1, of the Covenant);
- (c) Third allegation: the period of detention is indefinite (breach of article 9, paragraph 3, of the Covenant);
- (d) Fourth allegation: the Rules of Procedure and Evidence make no provision for compensation of persons unlawfully arrested or detained (breach of article 9, paragraph 5, of the Covenant).

15. The Working Group notes that the fourth allegation is a consequence, and not a cause, of the arbitrariness that can characterize detention. It therefore considers this allegation to be inadmissible, since it does not fall within the Group's mandate as set out in Commission on Human Rights resolution 1997/50.

(b) Preliminary question: does the administration of international justice have specific features that distinguish it from national justice?

16. According to the communication, “the rules applied by the Tribunal, at least those that relate to the detention, do not meet international standards for guaranteeing the rights of the accused to a fair trial” (communication, p. 3, para. I, line 1).

17. Before considering this allegation on the merits, the Working Group raised the following preliminary question: should the Working Group view, as the communication does, the international norms in question as being applicable in the same way as they would be in a national criminal court trying ordinary crimes, or should they be interpreted in the light of the specific nature of such courts which derives from their international character and the crimes they are called on to try and judge? In other words, can the administration of justice in an international criminal court be simply equated with the administration of justice in a national criminal court? If the answer is yes, the application by the authors of the communication may have merit; if the answer is no, their application may be rejected.

(i) Specific features of the Tribunal deriving from its international jurisdiction

18. The major features that distinguish an international criminal court from a national criminal court are set out in the report of the Expert Group (A/54/634) which, at the initiative of the General Assembly (resolution 53/212 of 18 December 1998), was entrusted by the Secretary-General with evaluating the effective operation and functioning of the International Criminal Tribunal for the Former Yugoslavia. Some of the most significant features cited by the experts in their report were:

- (a) The hybrid characteristics of the Tribunal’s procedures, which combine elements of the common law and civil law systems (para. 23);
- (b) The fact that the Tribunal’s Rules of Procedure and Evidence embrace a broader range of complex matters than is apt to be found in comparable rules of national legal systems (para. 23);
- (c) The lack of coercive powers (or even of injunction) in relation to the Tribunal’s arrest warrants, which renders it dependent in that respect on the cooperation and assistance of national Governments and international forces (para. 25), cooperation that is not always immediately forthcoming;
- (d) Dependence on States also in obtaining access to witnesses and victims and in obtaining evidence (para. 25), or in ensuring that indictees whose presence is essential for trying other accused parties are delivered into custody (para. 35);
- (e) The existence of victims who are usually also direct witnesses, and whose security must be adequately ensured on both counts (Statute, art. 22) to encourage them, in the interest of “the proper administration of international criminal justice”, to overcome their reluctance to testify. This again gives rise to certain situations that are not normally characteristic of national courts: witnesses testifying in locations that afford them better security, hearings in closed court sessions, testimony by deposition by video link from remote locations and voice and image distortion (paras. 191 and 192);
- (f) The establishment of a Victims and Witnesses Section. In addition to the security of victims and witnesses before, during and after their appearance in court (individual protection plans), this Section is responsible for organizing their travel to and from the tribunal (tickets, visas and accommodation as well as material and, where necessary, psychological assistance).

(ii) The specific nature of the crimes prosecuted and judged by the Tribunal as an international court

19. The list of offences which the Tribunal is competent to try (Statute, arts. 2-5) reveals that all of them are “international crimes”, whereas national courts, except in the very rare cases when a universal jurisdiction clause is invoked, do not generally try the crimes described in articles 2 to 5 and 7 of the Tribunal’s Statute, namely:

- (a) Grave breaches of the Geneva Conventions on the humanitarian law applicable in time of war;
- (b) War crimes;
- (c) Crimes against humanity;
- (d) The crime of genocide.

20. On this point the Working Group noted with interest that, owing to the international dimension of these crimes and their extreme gravity, several international instruments, including the International Covenant on Civil and Political Rights, limit - again, with a view to the proper administration of justice - some of the rules protecting an accused person in order to prevent the abuse of these rules to abet impunity for international crimes. Examples of such limitations include:

- (a) Article 15 of the Covenant, which sets out the principle of non-retroactivity of criminal laws in paragraph 1 and then interprets it in paragraph 2 as not prejudicing the “punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”;
- (b) Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968;
- (c) Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, which states that “these crimes shall not be considered as political crimes for the purpose of extradition”;
- (d) Article 1 of the Convention relating to the Status of Refugees of 14 December 1950, which uses a slight rewording of article 14, paragraph 2, of the Universal Declaration of Human Rights, concerning asylum, to stipulate that the rights deriving from refugee status shall not be enjoyed by “any person with respect to whom there are serious reasons for considering that ... he has been guilty of acts contrary to the purposes and principles of the United Nations”.

In the light of these specific features, the Working Group is of the view that the norms of the Covenant cited in the communication cannot be interpreted as though they were simply being applied in a national court, since, unlike the Tribunal, such courts seldom try cases involving international crimes, as the Committee has pointed out.

(c) On the merits

21. As to the first allegation, that detention is the rule and release the exception (breach of article 9, paragraph 3, of the Covenant), it is true, as the communication rightly points out, that while the Statute contains no specific measures applicable to pre-trial detention, the Rules of Procedure and Evidence do. The Working Group has in fact noted that the latter contain rules very similar to those applied in national systems when the authors of extremely grave crimes are tried, this can be seen from the combined application of the two relevant rules of the Rules of Procedure and Evidence: rule 64 (Detention on remand) and rule 65 (Provisional release).

22. Once the accused has been served with an indictment confirmed by a judge, he or she is transferred to the seat of the Tribunal and placed in the Tribunal's detention facilities (art. 64). Thereafter the accused may not be released except on an order of the Tribunal and not of the Prosecutor (art. 65). It will be noted that the grounds most frequently cited by national legislation for placing or maintaining a person in detention are:

- (a) The gravity of the breach and thus of the corresponding penalty, in that it creates a risk of flight (European Court of Human Rights, decision in the *Wemhoff* case, 27 June 1968);
- (b) The lack of ties in the country (*Stögmüller* case, 10 November 1969).

23. In other words, the Working Group notes that in the case of international crimes or, in national legal systems, of extremely grave crimes, the legislation in most Member States, regardless of the type of legal system, uses similar criteria to determine the exact time period during which a judge may legitimately allow the exception (detention) to prevail over the rule (release).

24. In practice these criteria are, in order of importance:

- (a) Preventing the flight of accused persons so that they remain accessible to the justice system;
- (b) Preventing any pressure on witnesses and victims;
- (c) Preventing any collusion or fraudulent collaboration between co-authors and/or accomplices.

25. In the light of the foregoing, the Working Group is of the view that two circumstances may legitimately be considered to constitute grounds for the detention contested in the communication:

- (a) The extreme gravity of the crimes involved, and thus of the corresponding penalty;
- (b) More generally, the fact that, with the single exception cited by the authors of the aforementioned report (A/54/634), the accused who were or are being sought, far from turning themselves in to the Tribunal, were or are, in virtually all cases, including the present case, in flight or shielded, by others and even by their own status; this explains why a warrant was systematically issued for their arrest and why they were subsequently placed in detention, as is generally done in all legal systems when a person in flight is to be kept accessible to the justice system.

In addition to these reasons, which justify in principle the decision to detain the accused, there are other grounds which can justify - even in a national court, and a fortiori in an international court - the prolongation of the period of pre-trial detention, as they do here.

26. The decision to prolong pre-trial detention is most often associated with the length of delays involved in the administration of justice by an international criminal court; these are due to the aforementioned constraints, which national courts experience only rarely and which are unavoidable (the hybrid nature of trials, the unusually complex nature of the cases heard, the lack of coercive powers, the importance - and often lack of - cooperation on the part of States, and the need to ensure the safety of witnesses and victims). Some of these guarantees which imply delay exist for the benefit of the accused as well, such as the requirement that all written materials must be available at least in French and English (and even in the accused's own language) or that the accused and the accusation must be kept on an equal footing owing to the contributions of the common law system to Tribunal proceedings.

27. In this context, the aforementioned decision by the European Court of Human Rights in the *Wemhoff* case strikes an interesting balance between the requirements that the duration be reasonable

and that the truth be sought and established: “It should not be overlooked that, while an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases and to pronounce judgment only after careful reflection on whether the offences were in fact committed and on the sentence” (Wemhoff decision, para. 17).

28. The Working Group considers that the first allegation is unfounded for the following reasons:

- (a) The nature and the extreme gravity of the crimes and the constraints arising from their international dimension;
- (b) The need to prevent guarantees aimed at the release of the accused from being misused to the advantage of the oppressor and to the detriment of the oppressed and efforts to combat impunity, which the Universal Declaration of Human Rights describes as “barbarous acts which have outraged the conscience of mankind” (Preamble, second para.).

29. With regard to the second allegation, that the arrest warrants and the detention orders are unjustified, which would confer an arbitrary character on the detention (breach of article 9, paragraph 1, of the Covenant), the Working Group finds this allegation to be unfounded for the following two reasons:

- (a) A detention is arbitrary in the sense of article 9, paragraph 1, of the Covenant only if it is not accompanied by the guarantees provided for in paragraph 2 of that article (which the communication neglects to cite), which stipulates that “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” However, the procedure set out in the Statute and the Rules of Procedure and Evidence scrupulously respects the requirements of paragraph 2, as the documents attached to the communication attest:
 - (i) In the indictment, the grounds both de facto and de jure, are clearly spelt out (communication, annex 11);
 - (ii) The indictment is subsequently submitted for confirmation to a judge of the Tribunal, who determines whether the charges are sufficient and, if so, decides whether it is to be circulated on a confidential or restricted basis (annex 2);
 - (iii) The Prosecutor then issues the arrest warrant, which is drafted in complete conformity with the aforementioned requirements of paragraph 2, as its wording indicates (annex 3):

“HEREBY DIRECT the authorities of (name and country) to search for, arrest and surrender to the International Tribunal:

(name of the accused and date) alleged to have [committed] in the territory of (name of country), between (date) and (date), a crime against humanity, punishable under articles 5 and 7 (1) of the Tribunal Statute,⁴⁹ and to advise the said (name) at the time of his arrest, and in a language he understands, of his rights as set forth in article 21 of the Statute and, mutatis mutandis, in Rules 42 and 53 of the Rules which are annexed hereto, and of his right to remain silent, and to caution him that any statement he makes shall be recorded and may be used in evidence. The indictment and

⁴⁹ The annexes may be consulted in the secretariat.

review of the indictment (and all other documents annexed to the present warrant) must also be brought to the attention of the accused”;

(iv) Lastly, at the time of detention, the order by the judge cites the arrest warrant, of which the accused is aware. Thus it cannot be maintained that the arrest warrants and the detention orders were issued without the accused being made aware of the charges and that the detention of the accused was therefore arbitrary.

(b) Rather than insisting that there are no grounds, the communication states that the detention is arbitrary because the charges are not precise enough, particularly as the victims of the alleged crimes are not specifically or personally identified;

(i) This criticism, which might be admissible in a case involving ordinary crimes, disregards another specific feature of international crimes, which is that their prosecution does not necessarily require that each victim be individually identified so long as victims can be identified by groups (genocide, crimes against humanity or the importance of keeping up-to-date information on mass graves);

(ii) Similarly, international criminal law does not require that the authors have personally and directly participated in the barbaric acts in question, so long as it can be proved that at the time they occurred, the authors were implicated by reason of their responsibilities: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime” (art. 7, para. 1). And again: “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof” (para. 3).

The Working Group therefore finds the second allegation unfounded.

30. With regard to the third allegation, that the detention was indefinite and, given the length of the trial, too long to be consistent with the proper administration of justice (breach of article 9, paragraph 3, of the Covenant), the Working Group finds that, insofar as the indefinite length is concerned, none of the Covenant’s provisions obligate States parties to fix a date by which the period of pre-trial detention must end. The only requirement is that the detention period be “reasonable”. However, the wording used in the communication in this regard is based on the theory that the term “reasonable time” in article 9, paragraph 3, of the Covenant is to be interpreted on the basis of rigid criteria that allow for no distinction between the administration of national and international justice.

31. This view is not shared by the Working Group, which, together with the experts who authored the aforementioned report (A/54/634), believes that many of the constraints provided for in the Statute have no equivalent in domestic law. The following examples can be cited:

(a) The abundance of procedural guarantees: rule 72 of the Rules of Procedure and Evidence offers the accused a whole series of preliminary exceptions with deadlines that affect the length of the proceedings, given that many accused persons make improper use of all forms of motions and such actions can be taken into consideration by the judge. During 1997/1998 the Tribunal received over 500 pre-trial motions, orders and applications;

(b) The complex nature of the evidence, which also prolongs the proceedings because of the constraints implicit in international jurisdiction:

(i) Specific difficulties related to the burden of collecting material evidence (such as the exhumation of mass various graves) and the gathering of testimony (in 1997/1998, some 699 witnesses testified, and their testimony covered almost 90,000 pages of transcript (para. 65));

(ii) The many problems posed by the organization and deployment of on-site fact-finding missions, all of which take place in another country (problems of language, administrative formalities, searching for witnesses and cooperation with local authorities).

The two main criteria used by both the Human Rights Committee and the European Court of Human Rights in determining whether the length of a trial is unreasonable or not are the actions of the applicant and the complexity of the investigation; it should be noted, however, that to date there has been no instance of any decision being taken by either of these two bodies to determine whether the length of a period of detention is reasonable in the context of prosecutions involving international crimes.

32. In the light of the foregoing, the Working Group considers that, the second condition having been met, the third allegation is unfounded.

(d) Conclusion

33. In the light of the foregoing, the Working Group notes that, insofar as the administration of justice by an international criminal court is concerned, the legal guarantees of a fair trial such as those provided by the Statue and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia are consistent with the relevant international norms.

5. Deliberation No. 5 on situation regarding immigrants and asylum-seekers

By resolution 1997/50, the Working Group was requested by the Commission to devote all necessary attention to reports concerning the situation of immigrants and asylum-seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.

In the light of the experience gained from its missions carried out in this framework, the Working Group took the initiative to develop criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants may be arbitrary. After consultation, in particular with the Office of the United Nations High Commissioner for Refugees, the Working Group, in order to determine whether the above situations of administrative detentions were of an arbitrary nature, adopted the following deliberation:

Deliberation No. 5

For the purposes of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

- The term “a judicial or other authority” means a judicial or other authority which is duly empowered by law and has a status and length of mandate affording sufficient guarantees of competence, impartiality and independence. .- House arrest under the conditions set forth in deliberation No. 1 of the Working Group (E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train are assimilated with custody of immigrants and asylum-seekers.
- The places of deprivation of liberty concerned by the present principles may be places of custody situated in border areas, on police premises, premises under the authority of a prison administration, ad hoc centres (“centres de rétention”), so called “international” or “transit” zones in ports or international airports, gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41). In order to determine the arbitrary character of the custody, the Working Group considers whether or not the alien is enabled to enjoy all or some of the following guarantees:

I. Guarantees concerning persons held in custody

Principle 1: Any asylum-seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and grounds for the decision refusing entry at the border, or permission for temporary residence in the territory, that is being contemplated with respect to the person concerned.

Principle 2: Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.

Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person’s

identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.

Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

II. Guarantees concerning detention

Principle 6: The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Principle 9: Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

Principle 10: The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

6. Deliberation No. 4 on rehabilitation through labour

(Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993)

At its fifth session, in connection with the consideration of a number of cases, the Working Group adopted the present deliberation pursuant to paragraph 23 (d) of its report to the Commission on Human Rights (E/CN.4/1992/20), which read as follows:

“23. ... (d) Rehabilitation through labour: the Working Group will have to determine whether measures taken most often in the form of administrative detention and generally designed to encourage an individual to change or even renounce his opinions, using methods resembling coercion, constitute, by definition, arbitrary detention under category II ...”.

Responding to this question and taking account of the diversity - and sometimes the absence - of legislation on the matter and of the modalities of its implementation, the Working Group decided to deal with these cases in the following manner.

In deciding whether deprivation of freedom accompanied by compulsory labour is arbitrary or not, the Working Group, after having ascertained whether the decision involved was judicial or administrative, will consider the role played by:

- I. The economic and juridical status of the person deprived of freedom depending on whether or not he or she is required to perform compulsory labour;
- II. The existence, accompanying the decision, of adequate safeguards to ensure that there are no violations of the right to a fair trial of a gravity such that they confer on the deprivation of freedom an arbitrary character, within the meaning of category III of the principles applicable in the consideration of cases submitted to the Working Group;
- III. The purpose of the measure, whatever it may be called (reform, rehabilitation, readjustment, reintegration, reintegration into society, etc.). In order to determine whether it is in conformity with the international norms relating to freedom of opinion and of expression, consideration will be given to those referred to in category II of the applicable principles referred to above and especially article 18, paragraph 2, of the International Covenant on Civil and Political Rights, which provides that “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”.

I. Compulsory labour

Compulsory labour may be the result of either a criminal penalty or an administrative measure.

A. Criminal penalties

It should be noted first of all that, as far as criminal penalties imposed by courts are concerned, almost all penitentiary systems include a period of work in the daily schedule of detainees. This work, which is in principle optional during pre-trial detention, is almost always compulsory following conviction. This form of compulsory labour is consistent with the international norms. Convicted persons usually wish to perform such work, and one of the difficulties encountered by the authorities, particularly during a recession, is to find work for them to do.

B. Administrative measures

The situation is not the same, however, when the deprivation of freedom is administrative in character. There probably are bodies legislation under which administrative measures of rehabilitation do not include compulsory labour or are executed in a manner similar to those mentioned above in connection with the execution of criminal penalties. Usually, however, compulsory labour is of a coercive nature which makes it possible to exploit the detainee's working capacity: central organization of camps into planned production units with high production norms implying long hours, rapid working tempos and derisory remuneration - if any payment is made at all - all of which are characteristic features of forced labour.

II. The right to a fair trial

It is mainly in assessing the juridical character of administrative measures that this subject will assume particular importance.

A. Judicial measures

In the case of a criminal penalty that includes a requirement to perform compulsory labour imposed by the court as punishment for an offence, the arbitrary character or otherwise of the deprivation of freedom may be assessed simply by referring to category III of the principles applicable in the consideration of cases submitted to the Working Group.

B. Administrative measures

Where administrative measures are concerned, however, the following cases may call for different solutions:

1. The case where there exists a judicial remedy. As this case is similar to the preceding one (criminal penalty), it must be assessed directly by reference to category III. The conclusion will be based mainly on the safeguards provided by the remedy and the effectiveness thereof.
2. The case where there are substitute safeguards such as a specific administrative instance. In this case it will be necessary to consider the extent to which the safeguards are equivalent by examining the following points: the juridical basis (laws and regulations or the absence thereof, the consultative or decision making character of the instance, whether it is collegial or not, its composition, whether there is provision for cross-examination, whether there is assistance by counsel, the time elapsed between the person's arrest and his appearance before the administrative instance, etc.).
3. Cases of measures that are of either limited or unlimited duration:

- (a) The case where the measure is of limited duration.

Notwithstanding the fact that it is of limited duration, the deprivation of freedom may be arbitrary in character as regards any period which may precede it, where such preliminary period is not deducted from the term of deprivation of freedom finally served.

- (b) The case where the measure is of unlimited duration.

Whether as a result of the law, of jurisprudence or of practice, there are four situations that are assimilable to detentions of unspecified duration which, as such, necessarily have a totally or partly arbitrary character:

- Where the unspecified duration of the measure is directly provided for by law;
- Where the lifting of the measure depends on the progress made, in the view of the authorities, in the detainee's rehabilitation;
- Where the measure, although initially limited in duration, may be continually re-imposed (depending on the circumstances, only the initial period may not be arbitrary in character);
- Where the person may continue to be held in detention upon expiry of the measure, no longer as a penalty, but in order to use his working capacity for production purposes. (Here again, only the initial period may, depending on the circumstances of the case, be arbitrary in character).

III. The purpose of the deprivation of freedom, from the standpoint of freedom of thought

Where the main purpose of the measure is political and/or cultural rehabilitation through self-criticism, the deprivation of freedom is, by reason of its very purpose, inherently arbitrary. This is because it violates in flagrant fashion two fundamental international norms, namely two rules laid down in the International Covenant on Civil and Political Rights:

- (a) The Covenant's article 14, paragraph 3, subparagraph (g), which provides that no one may be compelled to testify against himself or to confess guilt;
- (b) And especially its article 18, which provides that:
 - Everyone shall have the right to freedom of thought, in other words to have a belief of his choice, and, as a corollary,
 - No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Conclusions

I. Cases where the deprivation of freedom is not considered to be arbitrary

- A. Cases of criminal penalties imposed by a court without any serious violations of the right to a fair trial (cf. category III of the principles applicable in the consideration of cases submitted to the Working Group), where compulsory labour is merely one aspect of execution of the penalty of deprivation of freedom.
- B. Cases of administrative measures where one or more effective judicial (and not merely hierarchic) remedies are available, that are exercised according to a procedure that does not involve any particularly serious violations of the right to a fair trial.
- C. Cases in which, although the administrative measure is not accompanied by any judicial safeguards *stricto sensu*, alternative safeguards are available, provided that the latter are sufficient to ensure a level of protection comparable to that provided by the principles of the right to a fair trial.

II. Cases where the deprivation of freedom may be considered arbitrary

- A. The case of a criminal penalty imposed in a manner that involves particularly serious violations of the right to a fair trial (category III).
- B. The case of an administrative measure where a judicial remedy is available resort to which also involves such violations (category III).

C. The case of an administrative measure where there are alternative safeguards that are clearly of less value than those which guarantee the right to a fair trial (category III).

D. The case of an administrative measure whose duration is specified, but not at the time of the decision, the latter offering adequate safeguards. The initial deprivation of freedom may be arbitrary in character provided that its duration can be determined and is not deducted from the term of deprivation of freedom finally served.

III. Cases where the measure of deprivation of freedom is inherently arbitrary in character

A. Case of an administrative measure of indefinite duration.

1. Where the duration is linked to the progress which, in the view of the authorities, has been made in rehabilitation.
2. Where, although the measure has been made of specific duration, it is continuously renewable and, a fortiori, renewed.
3. Where, upon expiry of the measure, the person is kept in detention, whether for a fixed or for an indefinite period, in order to use his working capacity for productive ends.

B. The case of a coercive administrative measure whose purpose is not only occupational rehabilitation, but mainly political and cultural rehabilitation through self-criticism.

7. Deliberation No. 3 on deprivation of liberty subsequent to a conviction, quality of the information on which decisions are based, 90-day deadline for replies, and “urgent action” procedure

(Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993)

This deliberation was adopted as a result of a letter sent by the Cuban Government to the Working Group, dealing with the following questions:

A. The competence of the Working Group to consider communications relating to the arbitrariness or otherwise of deprivation of freedom when it is subsequent to a conviction

The Working Group notes that neither the provisions of resolution 1991/42, which established its terms of reference, nor the discussion which led up to its adoption, as reflected in the summary records (E/CN.4/1991/SR.25-SR.33), justify the view that such communications should be declared inadmissible on the ground that there has been a conviction. It notes, however, that the resolution, in its paragraph 2, gives the Working Group the task of investigating cases of detention, not *stricto sensu*, in other words as opposed to cases of imprisonment, but where the detention is "imposed arbitrarily or otherwise inconsistently with the relevant international standards", as referred to in the resolution. It also notes that the International Covenant on Civil and Political Rights uses the expressions "arrest" and "detention" indiscriminately in referring to persons standing trial and to persons who have already been tried. Article 9, paragraph 3, states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time ...", from which it must be inferred that a person "detained" has not been tried. It states further that "It shall not be the general rule that persons awaiting trial shall be detained in custody". Finally (paragraph 4), anyone who is deprived of his liberty by "arrest or detention" shall be entitled to take proceedings before a court in order that a decision may be taken on the lawfulness of his detention, which is incompatible with the status of a convicted person. This interpretation is the same as that arrived at by the Human Rights Committee in its General Comment 8 adopted at its sixteenth session (1982) (see HRI/GEN/1), when it states that "paragraph [1 of article 9] is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.". The Committee adds that "the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention". The Committee then goes on to discuss the question of "preventive detention", which in its view should more logically be called "preventive arrest".

Any other interpretation would have led the Working Group to declare itself incompetent to consider, for example:

- Continuation of deprivation of freedom notwithstanding an amnesty or after expiry of the sentence handed down (cf. category I of the principles applicable in the consideration of cases submitted to the Working Group);
- Cases where the deprivation of freedom is the result of clear violations of the right to a fair trial of a gravity such that they confer on it an arbitrary character (cf. category III of the principles applicable in the consideration of cases submitted to the Working Group) as asserted in the reports submitted to the Commission on Human Rights and the General Assembly by the Ad Hoc Working Group of Experts on Southern Africa, by the Special Committee to Investigate Israeli

Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories and by the Special Rapporteur on the question of human rights in Chile (prior to 1988).

Such an interpretation would respect neither the letter nor the spirit of the above-mentioned resolution 1991/42.

Recalling that the Commission on Human Rights, in its resolution 1992/28, after expressing its satisfaction to the Working Group at the diligence with which the letter had devised its methods of work (para. 1), had thanked the experts for the rigour with which they had discharged their task (para. 2), the Working Group decided that there was no necessity to review the provisions it had adopted relating to its methods of work.

B. Improvement in the quality of the information on the basis of which the Working Group has to take decisions

The Working Group noted a marked improvement in the information submitted to it - as regards both accuracy and veracity - after it had taken the following two measures:

1. As regards the accuracy of the information: the Group improved its methods by adopting a questionnaire (E/CN.4/1992/20, annex II) which enables the secretariat where necessary, in liaison with the Chairman, to seek from the source additional information to be placed before the Working Group.
2. As regards the veracity or otherwise of what is alleged, the Working Group considered that only the establishment of an adversarial procedure would be sufficiently effective. It was, moreover, thanks to such a procedure that, in the case of the communications concerning Cuba, for example, certain inaccuracies or errors (non-existent person, confusion of name, non-existent place of detention, person not in detention, etc.) came to the attention of the Working Group.
3. Furthermore, the Working Group considers that the adoption of an adversarial - and not accusatory - procedure is the only option that will enable it to satisfy the requirement of objectivity imposed on it by the Commission on Human Rights in paragraph 4 of its resolution 1991/42.

C. The 90-day deadline for replies

In adopting this deadline, the Working Group based itself on the experience of other thematic Rapporteurs of the Commission on Human Rights. It will be noted that, under paragraph 10 of the Working Group's methods of work (E/CN.4/1992/20, para. 13), if the Government's reply has not been received by the deadline, the Working Group "may" (and not "must"), on the basis of all data compiled, take a decision. This does not therefore imply a priori any "presumption as to the veracity of the allegation made".

D. Criteria for resort to the "urgent action" procedure

Considering this procedure to be necessarily exceptional in its principle and summary in its methods, the Working Group sought to make it restrictive by limiting resort to it to the following two cases and by attaching specific safeguards to its use (cf. E/CN.4/1992/20, para. 13, subpara. 11):

- first case: "where there are sufficiently reliable allegations that a person is being detained arbitrarily and that the continuation of the detention constitutes a serious danger to that person's

health or even life". Whenever, prima facie, these two conditions are fulfilled, the Chairman himself, or, in his absence, the Vice-Chairman, may take the decision.

- second case: "where the detention may not constitute a danger to a person's health or life, but where the particular circumstances of the situation warrant urgent action". In this case there is a further safeguard: the Chairman must secure the agreement of two other members of the Working Group.

This second, and more strict, procedure has been applied only once.

8. Deliberation No. 2 on admissibility of the communications, national legislation, and documents of a declaratory nature

(Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993)

1. The Working Group on Arbitrary Detention adopted the following deliberation in response to the letter from the Cuban Government dated 24 December 1991 requesting it to “publicly communicate to Member States for their comments” its views on the following points concerning its methods of work:

2. (a) The juridical standards which the Working Group has formally established for the admissibility of the communications it receives; under the procedure laid down by Economic and Social Council resolution 1503 (XLVIII), the exhaustion of all available means at the national level should be a *sine qua non* for accepting and taking action on each communication.

(b) The Working Group’s opinion of the value to be attached to the national legislation in force in the Member States; this is an essential element for determining whether detention, arrest, preventive imprisonment or jailing is or is not arbitrary (that is to say, contrary to the legal order existing in the country in question, including international obligations acquired under treaties freely entered into).

(c) The legal grounds upon which the Working Group bases its consideration of the provisions contained in documents of a merely declaratory nature (for example, the principles set out in General Assembly resolution 43/173), or in juridical instruments which cannot be applied to an “accused” State that is not party to them (as would be the case of Cuba with respect to the International Covenant on Civil and Political Rights), as appropriate criteria to be used for determining *prima facie* whether a case of detention or imprisonment is “arbitrary”.

A. Admissibility of communications subject to exhaustion of local remedies

3. The Working Group notes that, contrary to what is stated in paragraph (a) of the letter from the Cuban Government, there is no requirement under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 that local remedies must be exhausted in order for a communication to be admissible under the confidential procedure.

4. Paragraph 6 (b) (i) of the said resolution imposes such a requirement only if the Commission decides, as it is entitled to, to appoint a committee to carry out an on-the-spot investigation.

5. It will be noted that, of the 67 countries cited thus far under the 1503 procedure, in only one case has the question of the exhaustion of local remedies been raised; but it was raised as an element in the assessment of the facts in the light of the circumstances of the case, not as a condition of admissibility.

6. Moreover, if an admissibility procedure requires the prior exhaustion of local remedies, that condition is expressly provided for in the instrument or rule concerned as borne out, for instance, by article 41 (1) (c) of the International Covenant on Civil and Political Rights.

7. However, there is no such provision in resolution 1991/42 which lays down the Working Group’s mandate.

8. The Working Group therefore considers that it is not within its mandate to require local remedies to be exhausted in order for a communication to be declared admissible.

B. Importance accorded to the national as compared to the international standard

9. The Working Group notes that, while resolution 1991/42, which lays down its mandate, refers expressly to the international standard, it has not provided for national law to be taken into consideration in determining whether a measure involving deprivation of freedom is arbitrary.

10. It nonetheless considers that national standards can be an important factor in determining whether a case of deprivation of freedom is arbitrary.

11. For this reason the Working Group took the view that, although national standards are not referred to in so many words in its mandate, it should also take them into account as a criterion in the assessment of cases submitted to it.

12. It would, however, point out that international law prevails over national law.

13. In the light of these considerations, it therefore decided to draft chapter I, paragraph 10, entitled “The Mandate and Legal Framework of the Working Group”, to read:

“10. The legal framework within which the Working Group will have to carry out its mandate is made up primarily of international standards and legal instruments, but in certain instances of domestic legislation as well. The Working Group will thus have to look into domestic legislation in investigating individual cases, where it will have to determine whether internal law has been respected and, in the affirmative, whether this internal law conforms to international standards. It may thus have to consider, in certain cases where there are alleged practices of arbitrary detention, whether they have not been made possible as a result of laws which may be in contradiction with international standards.”

14. It follows from the foregoing that, in the performance of its task, the Working Group takes into consideration not only the national standard but also the international standard, ensuring, where necessary, that the national standard conforms to the relevant international standard.

C. Possibility of the Group's referring to instruments of a purely declaratory nature

15. The Working Group would point out that resolution 1991/42, which lays down its mandate, refers expressly to “the ... international legal instruments accepted by the States concerned” as an international reference standard for the Working Group, in addition to the Universal Declaration of Human Rights. Consequently, the specific question raised by the Cuban Government’s letter, as applied to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereinafter referred to as the “Body of Principles”), is to establish (a) whether the Body of Principles is actually an “instrument”, (b) whether it is of a “declaratory” nature and, if so, (c) whether it can be regarded as having been “accepted” by Member States.

(a) Legal definition of “instrument”

16. As interpreted in legal writings generally, the term “legal instruments” covers all legal texts, whether they are conventional, that is to say binding, instruments, such as conventions, covenants, protocols and other treaties or such forms of agreement as resolutions or gentlemen’s agreements (for instance, the Final Act of the Conference on the Security and Co-operation in Europe, the Paris Charter).

17. The Cuban Government’s letter of 24 December 1991 in fact supports this proposition since it refers to the Body of Principles as an “instrument”.

18. The use of the word “instruments” without further qualification in paragraph 2 of resolution 1991/42 therefore shows that it was not the intention of the Commission on Human Rights to confine the reference standards of the Working Group to treaties and other similar instruments but that it also wished to include in it acts of agreement, such as resolutions.

(b) "Declaratory" nature

19. The question put to the Working Group is whether the Body of Principles should be regarded as an “instrument of a purely declaratory nature”, according to the characterization given by the Cuban Government, and, if so, whether the Working Group can still invoke it.

20. The Body of Principles is an instrument declaratory of pre-existing rights, inasmuch as the main purpose of many of its provisions is to set forth, and sometimes develop, principles already recognized under customary law.

21. It should be noted that, in the case of mere acts of agreement (and this applies to General Assembly resolutions), legal writers draw a distinction between those which are declaratory of pre-existing rights (as in the abovementioned example of most of the provisions of the Body of Principles or the Declaration on Territorial Asylum or the Declaration on Torture, etc.) and those - purely declaratory - instruments whose purpose is not to produce such an effect (for example, resolutions which take note of a report of a working group, or which institute a decade on a given theme).

22. The Working Group also wishes to point out in this connection that, according to legal writers, in the case of a non-party State, the same applies to any convention since it is not an instrument which lays down procedural rules, for instance, and therefore has no declaratory effect (as, for example, the Optional Protocol to the International Covenant on Civil and Political Rights) but is an instrument which lays down principles (such as the Covenant). In other words, and to take the case of the Covenant again, it has a binding effect with respect to States parties and a declaratory effect with respect to non-party States.

23. In the light of the foregoing, the Working Group considers that, when it takes a decision on whether a case of detention is arbitrary, it is justified in referring, in categories I, II and III which it established in connection with its methods of work both to:

the International Covenant on Civil and Political Rights, even if the Working Group has before it a case concerning a non-party State, in view of the tenacity of the declaratory effect of the quasi-totality of its provisions;

and the Body of Principles, again on account of the declaratory effect of its substantive provisions.

(c) The concept of "accepted" instrument

24. When it comes not to treaty instruments having binding force but to acts of agreement, the question is whether they can still be regarded as having been “accepted”, inasmuch as resolution 1991/42 setting up the Working Group refers, inter alia, to “the relevant international legal instruments accepted by the States concerned” as reference standards for the Working Group.

25. In adopting a position on this point, the Working Group relied on a decision of the International Court of Justice (Judgment of 27 June 1986:

Case concerning Military and Paramilitary Activities in and against Nicaragua - Nicaragua v. United States of America - Reports 1986, pp. 100 et seq.), which held that the “consent” of the

States Members of the United Nations to the text of declaratory resolutions setting forth customary law (particularly where they are adopted by consensus) may “be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves” and, in so far as the United States had supported those resolutions, the Court considered that it had “accepted” them.

26. In paragraph 1 of the above-mentioned resolution 43/173, however, the General Assembly “approves” the Body of Principles. International legal terminology makes no distinction between “acceptance” and “approval”. Approval was given by all States since the resolution was adopted by consensus. By participating in that consensus, the States therefore “accepted” the Body of Principles.

27. This is particularly so since:

paragraph 4 of General Assembly resolution 43/173 “urges that every effort be made so that the Body of Principles becomes generally known and respected”;

the first paragraph of the Body of Principles stipulates: “These principles apply for the protection of all persons ...”.

28. The Working Group therefore considers that the Body of Principles, as an act of agreement, should be regarded as having been “accepted” within the meaning of the paragraph in resolution 1991/42 which lays down its mandate.

Conclusion

29. These are the legal grounds - this being the question posed - which led the Working Group to adopt the term “accepted declaratory instrument”:

for the Body of Principles, on the one hand, in so far as Member States are concerned;

for the International Covenant on Civil and Political Rights, on the other, in so far as States which have yet to ratify it are concerned;

and hence to take it into consideration when determining whether a deprivation of freedom is arbitrary.

9. Deliberation No. 1 on house arrest

(Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993)

Without prejudging the arbitrary character or otherwise of the measure, house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave. In all other situations, it will devolve on the Working Group to decide, on a case-by-case basis, whether the case in question constitutes a form of detention, and if so, whether it has an arbitrary character.

10. “Deliberations” of the working group

(Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993)

19. In its first report to the Commission on Human Rights (E/CN.4/1992/20, chapter IV) the Working Group identified a number of situations involving questions of principle which required the Working Group’s special consideration (see also para. 4 above). At its third session, in March 1992, the Working Group decided that it would consider such questions and adopt decisions thereon (referred to as “deliberations”), not in the abstract, but in connection with the consideration of individual cases submitted to it. Thus, deliberation 01 was adopted in connection with the consideration of cases in Myanmar, and deliberations 02 and 03 were adopted in response to questions put forward by the Cuban Government.

The first three deliberations were adopted by the Working Group at its fourth session; deliberation 04, which concerns the question of re-education through labour (mentioned in the Working Group’s first report to the Commission (E/CN.4/1992/20, para. 23) as one of the special situations receiving the consideration of the Working Group), was adopted at the fifth session, in connection with the consideration by the Group of numerous cases reported in several countries. By adopting those deliberations the Working Group takes a position on a number of pertinent questions which may arise in other countries, thus laying the ground for its own jurisprudence and facilitating the consideration of future cases.