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Report of the Working Group on Arbitrary Detention

Chair-Rapporteur: El Hadji Malick Sow

Summary

During 2012, the Working Group on Arbitrary Detention, under its regular procedure, adopted 69 opinions concerning the detention of 198 persons in 37 countries (see addendum 1, A/HRC/22/44/Add.1). It also transmitted a total of 104 urgent appeals to 44 States concerning 606 individuals, including 56 women. States informed the Working Group that they had taken measures to remedy the situation of detainees: in some cases, detainees were released; in other cases, the Working Group was assured that the detainees concerned would be guaranteed a fair trial. The Working Group is grateful to those Governments that heeded its appeals and took steps to provide it with the requested information on the situation of detainees. The Working Group engaged in continuous dialogue with countries that it visited particularly concerning its recommendations. Information regarding the implementation of recommendations made by the Working Group was received from the Government of Malta. During 2012, the Working Group visited El Salvador. The report on this visit is contained in addendum 2 to the present document (A/HRC/22/44/Add.2).

In accordance with Council resolution 20/16 adopted on 6 July 2012, the Working Group initiated preparations concerning the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The draft basic principles and guidelines aim at assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty. A report comprising the basic principles and guidelines will be presented to the Human Rights Council in 2015.

The Working Group adopted, at its sixty-fifth session, its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law. The Working Group found that the prohibition of all forms of arbitrary deprivation of liberty forms a part of international customary law and constitutes a pre-emptory or *jus cogens* norm.

The report concludes that the prohibition of arbitrariness in customary international law comprises thorough examination of lawfulness; reasonableness; proportionality and necessity of any measure depriving a human being of his or her liberty. It also concludes that administrative detention should only be permitted in strictly limited circumstances.

In its recommendations the Working Group requests States to enforce the protection of every person's right to liberty under customary international law; ensure that the available guarantees and safeguards are extended to all forms of deprivation of liberty, including for example house arrest, re-education through labour, protective custody, detention of migrants and asylum seekers, detention for treatment or rehabilitation and detention in transit areas; and ensure that persons are not held in pretrial detention for periods longer than those prescribed by law as well as ensuring that such persons are promptly brought before a judge. All detainees should benefit from all minimum procedural guarantees, including the principle of equality of arms; the provision of adequate time and facilities for the preparation of the defence; proper access of evidence; and guarantees against self-incrimination.

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I. Introduction

1. The Working Group on Arbitrary Detention was established by the former Commission on Human Rights in its resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty, according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum seekers and immigrants. At its sixth session, the Human Rights Council assessed the mandate of the Working Group and adopted resolution 6/4 which confirmed the scope of its mandate. On 30 September 2010, by its resolution 15/18, the Human Rights Council extended the Working Group's mandate for a further three-year period.

2. During 2012, the Working Group was composed of Ms. Shaheen Sardar Ali (Pakistan), Mr. Mads Andenas (Norway), Mr. Roberto Garretón (Chile), Mr. El Hadji Malick Sow (Senegal) and Mr. Vladimir Tochilovsky (Ukraine).

3. El Hadji Malick Sow is the Chair-Rapporteur of the Working Group and Shaheen Sardar Ali its Vice-Chair.

II. Activities of the Working Group in 2012

4. During the period 1 January to 30 November 2012, the Working Group held its sixty-third, sixty-fourth and sixty-fifth sessions. It undertook an official mission to El Salvador from 23 January to 1 February 2012 (see addendum 2 for the official country visit report).

5. Pursuant to the Human Rights Council resolution 20/16, the Working Group has initiated preparations concerning the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention, to bring proceedings before court in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The draft basic principles and guidelines aim at assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty, in compliance with international human rights law. A report comprising of the principles and guidelines will be presented to the Human Rights Council in 2015.

6. In November 2011, the Working Group launched a database, accessible at www.unwgaddatabase.org, which is a freely and publicly available compilation of its opinions. The database provides over 600 opinions in English, French and Spanish that have been adopted since the establishment of the Working Group in 1991. Throughout 2012, the Working Group received information that the database was being increasingly used by various stakeholders, including States and civil society organizations. The database provides a practical research tool for victims, lawyers, academics and others, who would like to prepare and submit cases of alleged arbitrary deprivation of liberty to the Working Group.

7. The Working Group has been engaged in discussions regarding the possibility of transmitting cases to Governments on situations where an individual is at risk of being arrested due to an arrest warrant or detention order being issued against him or her, and where the resulting deprivation of liberty is likely to be arbitrary in nature.

8. At its sixty-fifth session held from 14 to 23 November 2012, the Working Group adopted its Deliberation No. 9 on the definition and scope of arbitrary deprivation of liberty in customary international law (the full text of the deliberation is included in the annex to the present report).

A. Handling of communications addressed to the Working Group during 2012

1. Communications transmitted to Governments

9. Hyperlinks to a description of the cases transmitted and the contents of the replies of Governments can be found in the respective opinions adopted by the Working Group (see A/HRC/22/44/Add.1).

10. During its sixty-third, sixty-fourth and sixty-fifth sessions, the Working Group adopted 69 opinions concerning 198 persons in 37 countries. Some details of the opinions adopted during these sessions appear in the table below and the hyperlinks to the complete texts of opinions Nos. 1/2012 to 69/2012 are contained in addendum 1 to the present report.

2. Opinions of the Working Group

11. Pursuant to its revised methods of work (A/HRC/16/47, annex), the Working Group, in addressing its opinions to Governments, drew their attention to resolutions 1997/50 and 2003/31 of the former Commission on Human Rights and resolutions 6/4 and 15/18 of the Human Rights Council, requesting them to take account of the Working Group's opinions and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they had taken. On the expiry of the two-week deadline, the opinions were transmitted to the source.

Opinions adopted during the sixty-third, sixty-fourth and sixty-fifth sessions of the Working Group

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
1/2012	Egypt	Yes	Wael Aly Ahmed Aly	Detention arbitrary, categories I and III
2/2012	Panama	No	Ángel de la Cruz Soto	Detention arbitrary, category III
3/2012	Israel	No	Khader Adnan Musa	Detention arbitrary, categories I and III
4/2012	Democratic People's Republic of Korea	Yes	Shin Sook Ja, Oh Hae Won and Oh Kyu Won	Detention arbitrary, category I and III
5/2012	Philippines	Yes	Five children (names known by the Government)	The separation of the minors from their parents does not constitute arbitrary deprivation of liberty
6/2012	Bahrain	Yes	Abdulhadi Abdulla Alkhawaja	Detention arbitrary, categories II and III

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
7/2012	China	Yes	Chen Wei	Detention arbitrary, category II
8/2012	Saudi Arabia	No	Salman Mohamed Al Fouzan, Khaled Abdulrahman Al-Twijri, Abdulaziz Nasser Abdallah Al Barahim and Saeed Al Khamissi	Detention arbitrary, categories I and III
9/2012	Syrian Arab Republic	Yes	Yacoub Hanna Shamoun	Detention arbitrary, categories I and III
10/2012	Nicaragua	No	Jason Zachary Puracal	Detention arbitrary, category III
11/2012	Egypt	No	Sayed Mohammed Abdullah Nimr, Islam Abdullah Ali Tony and Ahmed Maher Hosni Saifuddin	Detention arbitrary, categories II and III
12/2012	Egypt	No	Ouda Seliman Tarabin	Detention arbitrary, category III
13/2012	Cuba	Yes	José Daniel Ferrer García	Case filed (para. 17 (a) of the Working Group's methods of work)
14/2012	Belarus	Yes	Andrei Sannikov	Detention arbitrary, categories II and III
15/2012	Malawi	No	Lenard Odillo, Eliya Kadzombe, Jasten Kameta Chinseche and Madison Namithanje	Detention arbitrary, category III
16/2012	Iraq	No	Hossein Dadkhah, Farichehr Nekogegan, Zinat Pairawi, Mahrash Alimadadi, Hossein Farsy, Hassan Ashrafian, Hassan Sadeghi, Hossein Kaghazian, Reza Veisy and Mohammad Motiee	Detention arbitrary, category IV
17/2012	Burundi	Yes	François Nyamoya	Detention arbitrary, categories II and III
18/2012	Burundi	No	Crispin Mumango	Detention arbitrary, category III

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
19/2012	Yemen	No	Abbad Ahmed Sameer	Detention arbitrary, categories I and III
20/2012	Israel	No	Hana Yahya Shalabi	Between 16 and 23 February 2012: detention arbitrary, categories I and III; after 23 February 2012: detention arbitrary, category III
21/2012	Philippines	Yes	Marcus Haldon Hodge	Detention arbitrary, category III
22/2012	Saudi Arabia	No	Rabie Mohamed Abdelmaksoud, Jumaa Abdallah Abusraie, Awad Al Sayed Zaky Abu Yahya, Sameh Anwar Ahmed Al Byasi, Abu Al Aineen Abdallah Mohamed Esaa, Youssef Ashmawy, Ahmed Mohamed Al Said Al Hassan, Khaled Mohamed Moussa Omar Hendom, Abdullah Mamdouh Zaki Demerdash, Mustafa Ahmed Ahmed El Baradei, Hassan Anwar Hassan Ibrahim, Abdul Rahman Mahmoud Ibrahim Zeid	Detention arbitrary, categories I and III
23/2012	Cuba	Yes	Yusmani Rafael Álvarez Esmori and Yasmín Conyedo Riverón	Between 8 January and 5 April 2012: detention arbitrary, categories II and III
24/2012	Cuba	Yes	José Daniel Ferrer García	The Working Group decided to request more information both to the Government and to the source
25/2012	Rwanda	No	Agnès Uwimana Nkusi and Saïdati Mukakibibi	Detention arbitrary, categories II and III
26/2012	Sri Lanka	Yes	Pathmanathan Balasingam and Vijiyanthan Seevaratnam	Detention arbitrary, categories I and III
27/2012	Viet Nam	Yes	Le Cong Dinh, Tran Huynh Duy Thuc, Nguyen Tien Trung and Le Thang Long	Detention arbitrary, category II
28/2012	Venezuela (Bolivarian Republic of)	No	Raúl Leonardo Linares Amundaray	Detention arbitrary, category III
29/2012	China	Yes	Gulmira Imin	Detention arbitrary, category II

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
30/2012	Iran (Islamic Republic of)	No	Hossein Mossavi, Mehdi Karoubi, Zahra Rahnavard	Detention arbitrary, categories I, II and III
31/2012	Equatorial Guinea	No	Wenceslao Mansogo	Detention arbitrary, categories II and III
32/2012	Iraq	No	Mehdi Abedi, Akram Abedini, Bahman Abedy, Aliasghar Babakan, Mohammad Reza Bagherzadeh, Sahar Bayat, Fatemeh Effati, Farhad Eshraghi, Maryam Eslami, Manijeh Farmany (residents of Camp Ashraf); and Asghar Abzari, Ali Reza Arab Najafi, Homaun Dayhim, Fatemeh Faghihi, Zahra Faiazi, Ahmad Fakhr-Attar, Effat Fattahi Massom, Jafar Ghanbari, Habib Ghorab, Robabeh Haghguo (residents of Camp Liberty)	Detention arbitrary, category IV
33/2012	Mexico	No	Hugo Sánchez Ramírez	Detention arbitrary, category III
34/2012	Uzbekistan	Yes	Abdurasul Khudoynazarov	Case filed (para. 10 (f) of the Working Group's methods of work)
35/2012	Thailand	Yes	Somyot Prueksakasemsuk	Detention arbitrary, category II
36/2012	China	No	Qi Chonghuai	Detention arbitrary, category III
37/2012	Spain	No	Adnam El Hadj	Detention arbitrary, categories III, IV and V
38/2012	Sri Lanka	Yes	Gunasundaram Jayasundaram	Detention arbitrary, categories II, III and V
39/2012	Belarus	Yes	Aleksandr Viktorovich Bialatski	Detention arbitrary, category II
40/2012	Morocco	Yes	Mohamed Hajib	Detention arbitrary, category III
41/2012	Togo	Yes	Sow Bertin Agba	Detention arbitrary, categories I and III
42/2012	Viet Nam	No	Nguyen Hoang Quoc Hung, Do Thi Minh Hanh, and Doan Huy Chuong	Detention arbitrary, categories II and III

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
43/2012	Iraq	No	Abdallah Hamoud Al-Twijri, Abdallah Hussein Ahmed, Abdulhak Saadi Mhambia, Abdullah Habib Abdellah, Abdullatif Mostafa, Adel Mohamed Abdallah, Adnan Mahmoud Iskaf, Ahmed Mohamed Ali Al Fara, Ali Awad Al Harbi, Amine Al Sheikh, Anas Farouk Ahmed, Anas Khaled Abdulrahim, Aref Abdallah Al Dahmi, Asaad Khalil Mohamed, Azzedine Mohamed Abdeslam Boujnane, Badis Kamal Moussa, Bandar Mansour Hamad, Faraj Hamid Ramadan, Fares Abdallah Ali, Fayez Mohamed Mahmoud Tashi, Hassan Mahmoud Al Abdallah, Hassan Salihine, Ibrahim Abdallah Mohamed, Ismail Ibrahim Al-Maiqal, Jamal Yahya Mohamed,Khaled Ahmed Saadoun, Khaled Hassan Alou, Khalil Hassoun Al Hassoun Al Aouis, Majed Ismail Kayed, Majed Said Al Ghamidi, Mansour Abdallah Lafi, Mohamed Ahmed Ouabed, Mohamed Bin Hadi Al Nawi, Mosaid Mohaya Al Matiri, Moujib Said Saleh, Mounir Mabrouk Bashir, Okab Wanis Okab, Omar Obeid Al Ali, Oussam Ahmed Mohammed, Rashid Alia Yahya, Sadek Hussein Mahoud, Sadiq Omar Muntassir, Salah Faraj Miftah, Saleh Saad Al Qahtani, Tarek Hassan Omar, Waleed Ayed Al Qahtani, Yasser Sobhi Mussa Al Ibrahim, Zayd Raqan Al Shamari	Detention arbitrary, category III
44/2012	Lebanon	No	Badria Abu Meri	Detention arbitrary, category III
45/2012	India	No	Umar Farooq Shaikh	Detention arbitrary, categories I and III

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
46/2012	Guatemala	No	Amado Pedro Miguel; Andrés León Andrés Juan, Antonio Rogelio Velásquez López; Diego Juan Sebastián; Joel Gaspar Mateo; Marcos Mateo Miguel; Pedro Vicente Núnez Bautista; Saúl Aurelio Méndez Munoz; Juan Ventura	Detention arbitrary, category III
47/2012	Democratic People's Republic of Korea	Yes	Kang Mi-ho, Kim jeong-nam, Shin Kyung-seop	Detention arbitrary, category I and III
48/2012	Iran (Islamic Republic of)	No	Muhammad Kaboudvand	Detention arbitrary, categories I, II and III
49/2012	Algeria	No	Saber Saidi	Detention arbitrary, categories II and III
50/2012	Sri Lanka	No	Uthayakumar Palani	Detention arbitrary, categories II and III
51/2012	China	Yes	Kim Young Hwan, Yoo Jae Kil, Kang Shin Sam, Lee Sang Yong	Case filed (para. 17 (a) of the Working Group's methods of work)
52/2012	Saudi Arabia	No	Mohamed Al Jazairy, Al Yazan Jazairy, Hathem Al Lahibi	Detention arbitrary, categories I, II and III
53/2012	Saudi Arabia	No	Nazir Hamza Magid Al Maged	Detention arbitrary, categories I, II and III
54/2012	Iran (Islamic Republic of)	No	Abdolfattah Soltani	Detention arbitrary, categories II and III
55/2012	Malawi	No	Davide Alufisha	Detention arbitrary, category III
56/2012	Venezuela (Bolivarian Republic of)	Yes	Cesar Daniel Camejo Blanco	Detention arbitrary, category III
57/2012	Burundi	No	Anita Ngendahoruri	Detention arbitrary, category III
58/2012	Israel	No	Ahmad Qatamish	Detention arbitrary, categories I and III
59/2012	China	Yes	Guo Quan	Detention arbitrary, category II
60/2012	Libya	No	Sayed Qaddaf Dam	Detention arbitrary, categories I and III

Opinion No.	*Country*	*Government's reply*	*Person(s) concerned*	*Opinion*
61/2012	United Arab Emirates	No	Hassine Bettaibi	Detention arbitrary, category I
62/2012	Ethiopia	No	Eskinder Nega	Detention arbitrary, categories II and III
63/2012	Bangladesh	No	Hachimuddin Sheikh, Mefroza Khatun and Master Ariful Sheikh	Detention arbitrary, category I
64/2012	Switzerland	Yes	Sobirov Shohruh	Case filed (para. 17 (a) of the Working Group's methods of work)
65/2012	Uzbekistan	Yes	Azamjon Farmonov, Alisher Karamatov	Detention arbitrary, category II
66/2012	Bangladesh	No	Azharul Islam, Ghulam Azam, Mir Quasem Ali	Detention arbitrary, category III
67/2012	Uzbekistan	Yes	Dilmurod Saidov	Detention arbitrary, category II
68/2012	Morocco	Yes	Kalid Kaddar	Case filed (para. 17 (b) of the Working Group's methods of work)
69/2012	Cuba	Yes	Alan Phillip Gross	Detention arbitrary, category III

3. Reactions from Governments concerning previous opinions

12. By notes verbales the following Governments submitted information on opinions adopted by the Working Group: Belarus for opinion No. 14/2012; Bahrain for opinion No. 6/2012; Bangladesh for opinion No. 66/2011; Bolivia (Plurinational State of) for opinion No. 63/2011; China for opinion No. 23/2011; Iraq for opinion No. 32/2012; Lebanon for opinions Nos. 55/2011 and 56/2011; Maldives for opinion No. 4/2009; Mauritania for opinion No. 18/2010; Mexico for opinions Nos. 61/2011 and 67/2011; Nicaragua for opinion No. 10/2012; Panama for opinion No. 2/2012; Qatar for opinion No. 68/2011; Syrian Arab Republic for opinions Nos. 24/2010 and 44/2011; Saudi Arabia for opinions Nos. 36/2008, 2/2011, 10/2011, 19/2011, 27/2011, 28/2011, 31/2011, 33/2011, 42/2011, 45/2011; Venezuela (Bolivarian Republic of) for opinions Nos. 20/2010; 27/2011; 28/2011 and 65/2011 and Uzbekistan for opinions Nos. 14/2008 and 53/2011.[1]

13. By note verbale dated 20 November 2012, the Government of Spain submitted information concerning Adnam El Hadj, a Moroccan national and the subject of opinion No. 37/2012 (Spain) adopted on 30 August 2012. The Government expressed that the

[1] Opinions are made available from http://www.unwgaddatabase.org/un/. Recent opinions adopted in 2012 may be available in 2013 after their official publication.

opinion stated that Mr. El Hadj was arrested without a warrant when in fact there was a court order for his arrest. Furthermore, Mr. El Hadj enjoyed all the procedural safeguards common to the rule of law including the right to legal representation and to appeal.

14. According to the Government, the deportation of Mr. El Hadj did not contravene Spanish law as its premise was an order issued by the Criminal Court of Cartagena. The Government refuted the opinion, saying that there was no discrimination against Mr. El Hadj on the basis of national, ethnic or social origin. Mr. El Hadj's deportation resulted from a prior conviction and the subsequent legal decision to deport him was within the ambit of the Spanish law. The Government also stated that the allegations relating to ill-treatment had been a subject of an enquiry made by the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and that the Government of Spain was preparing an official response thereto, a copy of which would be shared with the Working Group in due course.

15. By note verbale dated 10 December 2012 from the Permanent Mission of the Republic of Cuba to the United Nations Office at Geneva, the Government of Cuba rejected the Working Group's opinion No. 69/2012 (Cuba) on the grounds that it was a biased and unbalanced assessment of the case and lacked a proper legal foundation. The Working Group's decision stems from a fundamental flaw that prevents the analysis from being objective, since, having failed to find evidence of violations of due process or of a lack of procedural safeguards in the conduct of the trial, the Working Group instead challenges the entire Cuban judicial system. According to the Government, the Working Group is overstepping its mandate in acting as a body with the authority to determine whether the Cuban courts are independent and impartial and in seeking to dictate changes in the legislation of a sovereign State.

16. Cuba rejects all allegations of violations of articles 9, 10 and 11 of the Universal Declaration of Human Rights, since the judicial proceedings provided all the safeguards available under Cuban law, in accordance with the principles on the independence of the judiciary recognized by the United Nations, to a person who infringed the law in a sovereign State and was duly convicted by a competent court. The Government also reserves the right to voice serious doubts as to whether the case was the subject of an impartial and objective analysis and discussion in view of the fact that the Group did not adhere to its standard procedures and time allotments. The unusual haste with which the examination of the case was completed and the insufficient assessment of the extensive information and evidence provided by the Cuban Government suggest that selective and politicized considerations interfered with the Working Group's deliberations. This is a far cry from the objective and impartial approach that the Group should take to its work. This is in addition to the fact that it has overstepped its mandate as established in resolution 1997/50 of the Commission on Human Rights.

17. By note verbale dated 13 December 2012, the Permanent Mission of the Republic of Cuba to the United Nations Office at Geneva rejected opinion No. 23/2012 (Cuba), adopted by the Working Group on 28 August 2012. It states that the Working Group clearly did not take due account of the information provided by the Government. It further states that Yusmani Rafael Álvarez Esmori and Yasmín Conyedo Riverón were not arrested for exercising their fundamental right to freedom of opinion and expression, but for breaking into a home, physically assaulting its occupants and injuring one of them. Both citizens had the benefit of full procedural safeguards while in prison. The Government regrets that selective and politicized considerations interfered with the examination of this case and expects the Working Group to fulfil its mandate in an objective and impartial manner.

Release of subjects of the Working Group's opinions

18. The Working Group received information from Governments and sources on the release of the following subjects of its opinions: Francois Nyamoya of opinion No. 17/2012 (Burundi); Crispin Mumango of opinion No. 18/2012 (Burundi); Hanevy Ould Dahah of opinion No. 18/2010 (Mauritania); Hugo Sánchez Ramírez of opinion 33/2012 (Mexico); Mohamed Hassan Echerif El-Kettani of opinion No. 35/2011 (Morocco); Ahmed Jaber Mahmoud Othman of opinion No. 57/2011 (Egypt); Maikel Nabil Sanad of opinion No. 50/2011 (Egypt); Mahmoud Abdelasamad Kassem of opinion No. 7/2011 (Egypt); Mohammed Amin Kamal of opinion No. 57/2011 (Egypt); Mohammed bin Abdullah bin Ali Al-Abdulkarrem of opinion No. 43/2011 (Saudi Arabia); Muhammad Geloo of opinion No. 44/2011 (Saudi Arabia); Nizar Ahmed Sultan Abdelhalem of opinion No. 8/2011 (Egypt); Sayed Mohammed Adullah Nimr, Islam Abdullah Ali Tony and Ahmed Maher Hosni Saifuddin, of opinion No. 11/2012 (Egypt); Thamer Ben Abdelkarim Alkhodr of opinion No. 42/2011 (Saudi Arabia); Salem Al-Kuwari of opinion No. 68/2011 (Qatar); Mohamed Abdullah Al Uteibi of opinion No. 33/2011 (Saudi Arabia); Abdul Hafiez Abdul Rahman of opinion No. 37/2011 (Syrian Arab Republic); Tuhama Mahmoud Ma'ruf of opinion No. 39/2011 (Syrian Arab Republic) and Ahmed Mansoor of opinion No. 64/2011 (United Arab Emirates).

19. The Working Group expresses its gratitude to those Governments that undertook positive actions and released detainees that were subjects of its opinions.

4. Requests for review of opinions adopted

20. The Working Group considered the Government requests for review of the following opinions: No. 54/2011 (Angola); Nos. 15/2011 and 16/2011 (China); No. 12/2012 (Egypt) and No. 46/2011 (Viet Nam).

21. After carefully and closely examining the requests for review, the Working Group decided to maintain its opinions, in accordance with paragraph 21 of its methods of work (A/HRC/16/47, annex, and Corr.1).

5. Reprisal against a subject of an opinion of the Working Group

22. The Working Group expresses its concern regarding the continued detention of Marìa Lourdes Afiuni Mora, subject of its opinion No. 20/2010 (Bolivarian Republic of Venezuela), who was arrested in 2009 for ordering the conditional release of Eligio Cedenõ, also the subject of the Working Group's opinion No. 10/2009 (Bolivarian Republic of Venezuela). The Working Group considers the action against Judge Afiuni as reprisal. It calls on the Government of the Bolivarian Republic of Venezuela to immediately release Ms. Afiuni and to provide her with effective reparations.

6. Communications giving rise to urgent appeals

23. During the period 18 November 2011–17 November 2012, the Working Group sent 104 urgent appeals to 44 countries concerning 606 individuals (including 56 women). Urgent appeals were sent to the following countries:

> Algeria (2 urgent appeals); Azerbaijan (1); Bahrain (4); Barbados (1); Bolivia (Plurinational State of) (1); Cambodia (2); Central African Republic (1); China (6); Colombia (1); Cyprus (1); Democratic People's Republic of Korea (1); Democratic Republic of the Congo (1); Egypt (3); Equatorial Guinea (1); Eritrea (1); Ethiopia (2); India (2); Iran (Islamic Republic of) (4); Iraq (3); Israel (2); Kazakhstan (3); Kyrgyzstan (1); Libya (1); Maldives (3); Mali (1); Mauritania (1); Mexico (1); Republic of Moldova (1); Myanmar (3); Oman (2); Pakistan (2); Russian Federation (3); Saudi Arabia (8); Sudan (5); Syrian Arab Republic (6); Thailand (2); Turkey

(4); Uganda (1); United Arab Emirates (5); United States of America (2); Uzbekistan (2); Venezuela (Bolivarian Republic of) (2); Viet Nam (3); and Zimbabwe (2).

The full text of the urgent appeals can be consulted in the joint reports on communications.[2]

24. In conformity with paragraphs 22–24 of its revised methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group, without prejudging whether a detention was arbitrary, drew the attention of each of the Governments concerned to the specific case as reported, and appealed to them to take the necessary measures to ensure that the detained persons' right to life and to physical integrity were respected.

25. When the appeal made reference to the critical state of health of certain persons or to particular circumstances, such as failure to execute a court order for release, the Working Group requested the Government concerned to take all necessary measures to have the person concerned released. In accordance with Council resolution 5/2, the Working Group integrated into its methods of work the prescriptions of the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council relating to urgent appeals and has since applied them.

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

B. Country visits

1. Requests for visits

27. The Working Group has been invited to visit on official mission Argentina (a follow-up visit), Azerbaijan, Brazil, Burkina Faso, Greece, India, Japan, Libya, Spain and the United States of America.

28. The Working Group has also asked to visit Algeria, Bahrain (a follow-up visit), Egypt, Ethiopia, Fiji, Guinea-Bissau, Morocco, Nauru, New Zealand, Nicaragua (a follow-up visit limited to Bluefields), Papua New Guinea, Philippines, the Russian Federation, Saudi Arabia, the Syrian Arab Republic, Thailand, Turkmenistan, Uzbekistan and the Bolivarian Republic of Venezuela.

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

29. In accordance with its methods of work, the Working Group decided in 1998 to address a follow-up letter to the Governments of countries it had visited, requesting information on such initiatives as the authorities might have taken to give effect to the relevant recommendations adopted by the Working Group contained in the reports on its country visits (E/CN.4/1999/63, para. 36).

30. During 2012, the Working Group requested information from Armenia and Malaysia. It had previously also requested information from Italy, Malta and Senegal. It received information from the Government of Malta.

[2] For urgent appeals sent from 1 June 2011 to 31 May 2012 see A/HRC/19/44, A/HRC/20/30 and A/HRC/21/49.

Malta

31. The Government of Malta informed the Working Group of the measures taken in compliance with the recommendations issued in the Working Group's report on its official mission to Malta in January 2009 (A/HRC/13/30/Add.2).

32. The Government of Malta referred to the recommendation concerning the strengthening of the status, powers and functions of the Ombudsman in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). The mandate of the Parliamentary Ombudsman as laid down in the Ombudsman Act (Laws of Malta, chap. 385) has been strengthened by various initiatives. An important legal development was the introduction of article 64 (a) in the Constitution which provides the Ombudsman the function of investigating actions taken by or on behalf of the Government or by such other authority, body or person as may be provided by law, in the exercise of administrative functions. Previously, the Ombudsman did not have this function. The new provision of the Constitution can only be amended or revoked by a resolution approved by a vote of two thirds of the members of the House of Representatives. The amendment ensures the Ombudsman the independent authority to scrutinize administrative actions by the Government.

33. The Government of Malta has been exploring the possibility of widening the mandate of the Ombudsman to allow it to function also as the country's national human rights institution, rather than set up a new administrative structure, which may not be feasible due to financial and cost restraints. The Ombudsman has submitted a formal proposal to Government to implement this measure.

34. The House of Representatives approved a bill further amending the Ombudsman Act, empowering the Ombudsman to provide administrative and investigative services to specialized commissioners entrusted with the investigation of complaints in specific areas of public administration. The Commissioners appointed are to assist with improving good governance and provide citizens with an added mechanism to assist with seeking remedies against maladministration and malpractice. The Government has committed to providing the necessary funding resources for the expansion of the Ombudsman's Office.

35. The Government provided information on various cases in which the Ombudsman effectively assisted in the protection of various rights, including the rights of rejected immigrants to marry and have a family; the right to worship by a group of Muslims; and the right of irregular immigrants to receive humanitarian protection and be reunited with their families. Two cases regarding discrimination on the ground of age (in relation to access to medical care) and employment on the ground of sexual orientation were also handled by the Ombudsman.[3]

C. Follow-up to the joint study on secret detention

36. The Working Group has considered how it can it can contribute to the follow-up of the joint study on secret detention (A/HRC/13/42) within its mandate and will continue this consideration in 2013. The Working Group will also address the follow-up of its own previous reports and opinions on detention and antiterrorism measures, taking account of subsequent developments including the length of detention of individuals.

[3] Case Nos. K 0049, G 0028, K 0056 and H 0457.

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

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.[5]

[4] Commission on Human Rights resolution 1991/42, establishing the Working Group on Arbitrary Detention and Human Rights Council resolutions 6/4 and 15/18. See also Working Group on Arbitrary Detention, annual reports to the Human Rights Council and General Assembly, report 2011 (all reports available on the Internet at www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx). See further Commission on Human Rights resolution 1997/50.

[5] 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.

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 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.[6] 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;[7] second, resolutions of a very general nature on the rules relating to arbitrary detention for all States, without distinction

[6] 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.

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

according to treaty obligations.[8] Such resolutions demonstrate the consensus that the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law.

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".[9]

45. The prohibition of "arbitrary" arrest and detention has been recognized both in times of peace and armed conflict.[10] 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.[11]

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.[12]

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

[8] For example, General Assembly resolution 62/159.

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

[10] 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).

[11] 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).

[12] 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.

factored into the arbitrariness standard itself. Thus, a State can never claim that illegal, unjust, or unpredictable 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.[13]

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.[14] 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.[15] 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".[16]

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.[17] 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 at issue actually be necessary for this purpose and proportionate to that end.[18] As noted above, this can never be possible with arbitrary deprivations of liberty.

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[13] 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.

[14] 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.

[15] See footnote 5 above.

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

[17] 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 *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, paras. 51 and 52.

[18] 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

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.[19]

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.[20]

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.[21] 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 'arbitrary', i.e., the elimination, in all its forms, of arbitrariness, whatever might be the phase of deprivation of liberty concerned".[22]

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necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered".

[19] 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.

[20] Ibid., para. 21.

[21] 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.

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

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.[23]

58. This broad interpretation is confirmed by current State practice.[24]

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.[25] 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.[26]

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.[27]

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.[28] The drafting history of article 9 of the International Covenant on Civil and Political Rights "confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more

[23] Ibid., para. 66.

[24] 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.

[25] 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).

[26] See its deliberations Nos. 1, 4, 5 and 7.

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

[28] 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).

broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".[29]

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".[30] 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".[31]

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.[32] 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.[33]

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.[34] In this regard, national courts have drawn upon notions of arbitrariness as applied by the Human Rights Committee.[35]

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"

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

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

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

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

[33] 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.

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

[35] 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.

before the person is brought before a judge.[36] 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".[37] The court has also highlighted that "justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities".[38]

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.[39] 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.

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."[40] 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

[36] 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.

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

[38] 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.

[39] 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.

[40] Report of the Working Group, E/CN.4/2004/3, para. 84.

detention is a personal right, which must "in all circumstances be guaranteed by the jurisdiction of the ordinary courts."[41]

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 sub-categories 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.[42]

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".[43] 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.

IV. Conclusions

76. **The Working Group, in the fulfilment of its mandate, welcomes the cooperation it has received from States with regard to the responses by the Governments concerned concerning cases brought to their attention under its regular procedure. During 2012, the Working Group adopted 69 opinions concerning 198 persons in 37 countries. It also sent 104 urgent appeals to 44 countries concerning 606 persons (including 56 women).**

77. **The Working Group welcomes the invitations extended to it to pay visits to countries on official mission. The Working Group conducted an official visit in 2012 to El Salvador. Among all the requested country visits, the Working Group has received invitations from the Governments of Argentina (for a follow-up visit), Azerbaijan, Brazil, Burkina Faso, Greece, India, Japan, Libya, Spain and the United States of America. It has also requested to be invited to other 20 countries. The Working Group reiterates its belief that its country visits are essential in fulfilling its mandate. For Governments, these visits provide an excellent opportunity to show developments and progress in detainees' rights and the respect for human rights, including the crucial right not to be arbitrarily deprived of liberty.**

[41] Ibid., para. 85.

[42] Working Group, opinions Nos. 5/2010 (Israel) and 26/2007 (Israel).

[43] Report of the Working Group, E/CN.4/2005/6, para. 77.

78. **The Working Group reiterates than timely responses to its letters of allegations under its regular procedure with full disclosure from Member States furthers the cause of objectivity in rendering the Working Group's opinions. The Working Group regrets that, in some cases, Governments limit their replies to providing general information or merely affirming the non-existence of arbitrary detention in the country or referring to the constitutional norms preventing it from occurring, without making direct references to the specific allegations transmitted.**

79. **The Working Group adopted, at its sixty-fifth session, its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law. The Working Group finds that the prohibition of all forms of arbitrary deprivation of liberty constitutes part of customary international law and constitutes a peremptory norm or *jus cogens*. A significant number of States have adopted and implemented in their domestic legislation strict prohibitions of arbitrary detention and have sought to do so following closely the terms of article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.**

80. **The prohibition of arbitrariness comprises thorough examination of lawfulness, reasonableness, proportionality and necessity of any measure depriving a human being of her or his liberty. The prohibition of arbitrariness can arise at any stage of legal proceedings.**

81. **Administrative detention should only be permitted in strictly limited circumstances. It should be short in nature; be in line with international and domestic legislation and not be used to extend the pretrial detention of the suspects.**

V. Recommendations

82. **The Working Group recommends that States:**

(a) Enforce and protect the right to liberty of every human being under customary international law;

(b) Ensure that the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including house arrest; re-education through labour; prolonged periods of curfew; detention of migrants and asylum seekers; protective custody; detention for rehabilitation or treatment; detention in transit areas; border control checkpoints, etc.;

(c) Ensure that persons are not held in pretrial detention for periods longer than those prescribed by law, with the requirement of prompt production before a judge.

83. **All measures of detention should be justified; adequate; necessary and proportional to the aim sought.**

84. **All persons subjected to a measure of detention should benefit at all stages of access to a lawyer of her or his choice as well as to effective legal assistance and representation.**

85. **All detainees should benefit from all minimum procedural guarantees, including the principle of equality of arms; the provision of adequate time and facilities for the preparation of the defence; proper access to evidence and guarantees against self-incrimination.**