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DETENTION**

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Mr. President

Distinguished Delegates

Ladies and Gentlemen,

I am honoured to be here on behalf of the Working Group on Arbitrary Detention. Its Chair-Rapporteur, unfortunately and for unforeseen reasons, could not be here this morning to make this presentation. It is a privilege for me, as a member of the Working Group, to present to the Council the report on the activities of the Working Group for the year 2012. The Working Group on Arbitrary Detention is the only body in the international human rights system 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. The Working Group's mandate has been clarified and extended on several occasions, and most recently reconfirmed by the Human Rights Council in 2012 in its resolution 20/16 which also requested the Working Group to 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 a 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 Working Group is recognized as an independent body whose members are highly qualified in human rights law. In its three annual sessions; the Working Group issues Opinions based on individual complaints. This is the core activity of the Working Group, and other international bodies as well as regional human rights courts have recognized the judicial nature of the Working Group's individual complaints procedure. Throughout the year, the Working Group issues urgent appeals in cases where such action is required by a serious threat to a person's health, integrity or life or in relation to other circumstances, often jointly with other Special Procedures mandate holders. Country visits and follow-up complement the working methods. The Working Group's deliberations and legal opinions, and mandates such as that following from Council resolution 20/16 to draft basic principles and guidelines on remedies and procedures, draws on the Working Group's jurisprudence in respect of individual complaints and visits to individual countries. Human rights are part of the legal system of international law, and the Working Group takes account of the decisions and statements by other international bodies and courts.

Mr. President,

The Working Group conducted a number of important activities during 2012. It held its 63rd, 64th and 65th sessions and undertook an official visit to the Republic of El Salvador.

At its 65th session, the Working Group adopted its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, based on a review of its own jurisprudence, international and regional mechanisms, State practice, consultations, and written submissions from States and other stakeholders. The Working Group is not a treaty body and relies on customary international law in much of its jurisprudence, for instance when a State has not ratified the International Covenant on Civil and Political Rights (ICCPR). The Working Group concludes that the prohibition of all forms of arbitrary deprivation of liberty constitutes part of customary international law and a peremptory norm (*jus cogens*). As part of the preparation of Deliberation No. 9, the Working Group held an informal consultation with representatives of States, the International Committee of the Red Cross (ICRC) and civil society in November 2011 and it further requested written information from States. The Working Group reported on this preparatory work and procedures followed to the Human Rights Council in its 2011 annual report. The Working Group wishes to express its appreciation for the responses received and the strong and clear support from States for the work on Deliberation No. 9. It welcomes the fact that practically all States have adopted and implemented in their domestic legislation strict prohibitions of arbitrary detention seeking to follow closely the terms of article 9 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the ICCPR, constituting an almost universal State practice recognizing the unlawfulness of arbitrary detention and supported by State declarations and United Nations resolutions confirming *opinio iuris*.

In the course of 2012, the Working Group has further considered how it can contribute within its mandate to the follow-up of the joint study on secret detention (A/HRC/13/42), and it will continue this consideration in 2013. The Working Group has decided to also address the follow-up of its own previous reports and Opinions on detention and anti-terrorism measures, taking account of subsequent developments, including the length of detention of individuals, which obviously is an increasingly aggravating factor.

In addition, the Working Group is taking further its work on the widespread arbitrary detention of migrants in an irregular situation.

Mr. President,

In November 2011, during the commemoration of its twentieth anniversary in Paris, the Working Group officially launched its database, which features more than 650 Opinions that have been adopted since the establishment of the Working Group in 1991. This database is available to the public for free via the Internet in English, French and Spanish and is an important and practical tool for victims of arbitrary detention, civil society organizations, lawyers, and academics in preparing and submitting cases of alleged arbitrary detention to the Working Group. It also provides information on the unique jurisprudence developed by the Working Group in the past 20 years through its Opinions on individual cases. The Working Group notes with satisfaction that according to recent information received, various stakeholders, including States and civil society organizations, are increasingly using the database.

Mr. President,

As you may know, country visits are an important component of the Working Group's mandate. They provide an important platform for dialogue between Governments and the Working Group. The Working Group would not be able to fully and effectively discharge its functions if it was not able to undertake such visits. I would like to thank the Government of Greece for the support and co-operation provided during the Working Group's recent official visit from 21 to 31 January 2013. I would also like to thank the Governments of Azerbaijan, Brazil, Burkina Faso, India, Japan, Libya, Morocco, Spain, and the United States of America for having extended an invitation to the Working Group to visit their countries, as well as the Government of Argentina for the invitation for a follow-up visit. In two weeks' time, the Working Group will be visiting Brazil at the invitation of the Government. I would like to take this opportunity, Mr. President, to encourage more Governments to extend an invitation to the Working Group for a visit. The Working Group remains committed to constructively engaging with the 18 Governments it has sent requests to for future visits over the years to which there have been no replies.

As part of its follow-up procedure on country visits, the Working Group is pleased to have received information from the Government of Malta.

Mr. President,

In relation to its communications procedures, during the period 18 November 2011 to 17 November 2012, the Working Group transmitted 104 urgent appeals to 44 Governments concerning 606 individuals, including 56 women. The Working Group wishes to thank the Governments that heeded its appeals for release and to those that took steps to provide it with information on the situation of detainees concerned.

In addition, Mr. President, the Working Group adopted 69 Opinions on individual cases regarding 198 persons in 37 countries. I would like to thank the Governments who have cooperated with the Working Group regarding allegations transmitted to them and acted by responding to its communications, releasing detainees, assuring that they would receive fair trial guarantees, compensating victims of arbitrary detention or engaging in a constructive dialogue with the Working Group.

The Working Group welcomes the release of 21 persons who had been the subjects of its Opinions and who were detained in nine different States.

Mr. President,

With regard to reprisals, the Working Group reiterates its concern at the continued detention of Judge María Lourdes Afiuni Mora, subject of its Opinion No. 20/2010, 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. The Working Group considers the action against Judge Afiuni as an act of reprisal and it wishes to underline that her case has also been mentioned in the recent annual reports of the Secretary-General on reprisals and that several special procedures have expressed their deep concern as well. It again calls on the Government of the Bolivarian Republic of Venezuela to immediately release Ms. Afiuni and to provide her with effective reparation.

Mr. President,

I now turn to the thematic issues that have been the focus of the Working Group in 2012.

The topic of the Working Group's Deliberation No. 9 is the definition and scope of arbitrary deprivation of liberty under customary international law. The Working Group establishes that arbitrary detention 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 UDHR, and clear and overwhelming support that the prohibition of all forms of arbitrary deprivation of liberty forms part of international customary law and constitutes a peremptory norm (*jus cogens*).

The prohibition of arbitrary deprivation of liberty is recognized in all major international and regional instruments for the promotion and protection of human rights, widely enshrined in national constitutions and legislation, also of States not party to the ICCPR, constituting an almost universal State practice. Many United Nations resolutions confirm the *opinio iuris* supporting the customary nature of these rules, from the General Assembly, the Security Council and the Human Rights Council. There is further conclusive support in the jurisprudence of the International Court of Justice and other courts and international bodies.

Deliberation No. 9 restates that 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 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.

In its Deliberation No. 9, the Working Group also addresses particular situations of deprivation of liberty, and what constitutes arbitrariness, as developed in its own jurisprudence, by the Human Rights Committee and in State practice. 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 found consistent violations of the various provisions contained in articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR in cases of administrative detention. In a majority of such cases, 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. 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." 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."

No person can be deprived of liberty on the 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.

Mr. President,

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". The Working Group further states that it is clear that under international law the prohibition of arbitrary deprivation of liberty applies both in times of peace and armed conflict. The Working Group recalls that 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.

Mr. President,

In accordance with Council resolution 20/16, the Working Group has recently initiated preparations concerning the elaboration of 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 a 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. Such a right is referred to in some jurisdictions as habeas corpus. The Working Group wishes to underline that these draft basic principles and guidelines aim at assisting States in fulfilling their obligation to avoid arbitrary deprivation of liberty, in compliance with international human rights law, and in strict accordance with Council resolution 20/16. In this regard, the Working Group looks forward to close collaboration and discussions with States, civil society organizations and other relevant stakeholders on this important issue in order to inform its report, comprising of the principles and guidelines, to be presented to the Council in 2015.

Mr. President,

With regard to country visits, the Working Group visited El Salvador from 23 January to 1 February 2012 at the invitation of the Government. The Working Group is grateful for the support and cooperation provided by the Government during its visit. The report on the visit appears in Addendum 2 to the Working Group's annual report (A/HRC/22/44/Add.2). The comments and observations provided by the Government to that report appear in Addendum 3.

The Working Group met with senior Government officials at the executive, legislative and judicial branches of the State; the National Ombudsman; lawyers; prosecutors; public defenders and representatives of civil society. It visited penitentiaries, including a penitentiary farm; prisons; detention centres for minors; the Psychiatric National Hospital; detention centres for migrants and police stations in Apanteos, Ciudad Barrios, Ilobasco, Izalco, Mariona, Santa Ana, San Miguel, Soyapango and San Salvador.

The Working Group notes in its report that 20 years since the signing of the peace agreements of Chapultepec, there is a general awareness by authorities and civil society on the need to respect human rights. However, El Salvador is confronting serious challenges due to the actions of organized crime, particularly gangs and “maras”. Although the laws establishing the policies of “plan mano dura” (tough hand plan) of 2003 and “plan super mano dura” of 2005 were declared unconstitutional and were abolished, they resulted in a high number of arrests and detentions which continue to be taking place. The Working Group recalls that the right to security of the person and public security cannot be pursued or achieved without due consideration to the rights to be free from arbitrary deprivation of liberty and to due process.

Although the maximum time given in Salvadoran law to present a detainee before a judge is 72 hours, the Working Group interviewed multiple detainees who had been kept in detention for long periods beyond the time-limit provided by law. The Working Group also found that 7,376 detainees of a total penal population of 25,411 were pre-trial detainees. Of these 7,376 persons, 937 detainees had already exceeded the maximum time of preventive detention allowed by law.

The Working Group further noted an excessive use of detention: During 2011, the Civil National Police carried out more than 49,000 arrests without a judicial order. The Working Group could also observe difficulties of detainees in accessing and communicating with defence counsels, lack of reliable data and lack of use of scientific evidence, as well as over-reliance on informers and witness testimonies. Widespread overcrowding in prisons and police stations was also of particular concern to the Working Group. Detention facilities were 300 per cent over the limit of their capacities. In police stations, overcrowding at a national level reaches 63 per cent over the capacity.

The Working Group recommends the Government of El Salvador to take urgent measures to identify and immediately release those who have served their sentences but still remain in detention. It also recommends that the recourse to detention of minors should only be an exceptional measure.

Other recommendations contained in the report include: the need to strengthen the fight against impunity; the promulgation of legal norms governing the deprivation of liberty in psychiatric hospitals with due regard to the human rights of patients; to revise and amend the national legislation on asylum-seekers, refugees and migrants in an irregular situation; to increase the number of penitentiary judges in order to carry out an effective control of the legal situation of detainees; and to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, to assist with the problems of overcrowding and inhumane conditions observed by the Working Group during its visits to prisons and detention facilities.

Mr. President,

Arbitrary deprivation of liberty continues to be a most pressing issue in the international human rights monitoring system. The Human Rights Committee is currently elaborating a General Comment on Article 9 (Liberty and Security of Person) of the ICCPR, to which the Working Group has offered its contribution, in parallel with its current work as requested in Council resolution 20/16. The ICRC and the Intergovernmental Copenhagen Process have provided important fora for the discussion of the law and best practices in the handling of detainees in non-international armed conflicts and international military operations, respectively.

The International Court of Justice, human rights courts and United Nations bodies, including the Working Group, have consistently maintained that international law is a legal system, and that legalistic arguments of jurisdiction or ‘self-contained’ regimes cannot limit the application of international law, including human rights protection. Courts and other international bodies, including the Working Group, are still in the process of gradually working out the consequences.

Cooperation and coordination are important to ensure that there is no uncertainty created about the duty to follow the law, and it is equally important that cooperation and coordination do not become the source of such uncertainty. The experiences with arbitrary detention in the past decade in anti- terrorism operations and under occupation demonstrate the importance of the rule of law and the universal application of human rights.

Mr. President,

One lesson learnt from the many violations, as evidenced in the Working Group’s jurisprudence, is surely that arguments to the effect that international law does not apply, need to be robustly rejected. There is a long-term price to be paid for anti-terrorism measures in violation of international law, including human rights law. Some of these measures will inspire terrorist acts and state violations, and weaken the legitimacy of the international community in ensuring compliance with human rights. Compliance with the prohibition of arbitrary deprivation of liberty is a high priority, also in this perspective.

Thank you Mr. President.