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Madam President

Distinguished Delegates

Ladies and Gentlemen,

I am honoured to be here on behalf of the Chair-Rapporteur of the Working Group on Arbitrary Detention, who unfortunately and for unforeseen reasons, could not be here this afternoon to make this presentation. It is a privilege for me, as a member of the Working Group, to present to this Council the report on the activities of the Working Group for the year 2011.

The Working Group conducted a number of important activities during 2011. It held its 60th, 61st and 62nd sessions and undertook official missions to Georgia and Germany. In accordance with Council resolution 15/18, the Working Group commemorated its twentieth anniversary in Paris on 14 November. The event brought together stakeholders including representatives of States and civil society organizations to reflect on the Working Group’s development in the last 20 years and discuss recommendations of good practices that can enhance the Working Group’s functions. The commemorative event would not have been possible without support from the Governments of France and Norway and the National Consultative Commission for Human Rights of France. I take this opportunity to thank them again for their support and assistance in organizing the event.

During the commemorative event, the Working Group officially launched its database which features more than 650 Opinions of the Working Group issued over the last 20 years. This database is available to the public for free via the Internet and is an important and innovative tool that can assist victims of arbitrary detention, other international bodies, authorities, courts, advocates, human rights defenders, researchers and the public in general. It provides information on the unique jurisprudence the Working Group has developed in the past 20 years through its Opinions on individual cases.

Madam President,

During its 62nd session, the Working Group held an informal consultation with representatives of States and civil society to discuss the definition and scope of arbitrary deprivation of liberty in customary international law. The Working Group received helpful and constructive submissions from States and civil society representatitives. One of the many pressing issues is the use of evidence deriving from arbitrary detention. The prohibition of arbitrary detention is a peremptory norm of international law, as restated by the Human Rights Committee and in the constant jurisprudence of the Working Group. Use of such evidence in court trials is contrary to international law. The Working Group has requested information from States and appreciates the
responses that it has received to date. It looks forward to further collaboration and discussions with States and civil society organizations on the many important issues involved.

Country missions are important in 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 Governments of Azerbaijan, Burkina Faso, Greece, India, Japan, the former Libyan Arab Jamahiriya, Spain, and the United States of America for having extended an invitation to the Working Group to visit their countries. I also thank the Government of Argentina for the invitation for a follow-up visit. I take this opportunity Madam President, to reiterate the Working Group’s desire to constructively engage with the 19 Governments it has sent requests to for future visits over the years but which have not replied to these requests.

As part of its follow-up procedure on country visits, the Working Group is pleased to have received information from the Governments of Angola and Colombia.

Madam President,

I turn to the communication procedures. During the period 18 November 2010 to 17 November 2011, the Working Group transmitted 108 urgent appeals to 45 Governments concerning 1,629 persons and received information from Governments and sources on the release of 21 persons. 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.

The Working Group, Madam President, adopted 68 Opinions on individual cases concerning 105 persons in 31 States. I would like to thank the Governments who have co-operated with the Working Group regarding allegations transmitted to them and acted by responding to its communications, releasing detainees, compensating victims of arbitrary detention or engaging in constructive dialogue with the Working Group.

The Working Group welcomes the release of 11 persons who had been the subjects of its Opinions and who were detained in 6 different States

Madam President,

I now turn to the thematic issues that have been the focus of the Working Group in 2011. The Working Group in its report gives particular attention to the issues of pre-trial detention; habeas corpus; and the importance of harmonizing the Working Group’s functions with other human rights mechanisms.
Unjustified and prolonged pre-trial detention constitutes arbitrary deprivation of liberty. The presumption of innocence is also severely undermined when a person has been in prolonged pre-trial detention. In addressing the issue of initial pre-trial detention, the Working Group makes reference in its report to the General Comment No. 8 of the Human Rights Committee. The requirement that an arrested person should be promptly brought before a judge or a judicial authority is restated by article 9 of the International Covenant on Civil and Political Rights and is a peremptory rule of international law.

Through the cases it has received and through country visits it has undertaken, the Working Group has seen the common recourse to prolonged pre-trial detention. The Working Group reiterates that pre-trial detention should not be the norm, and it should only be used in exceptional circumstances and for the shortest duration of time.

Madam President,

The issue of habeas corpus is one that is directly linked to the problem of prolonged pre-trial detention in that it provides the judicial mandate requiring a detainee to be promptly brought before a court, at any time, in order to determine the legality of her or his detention. Habeas corpus is not only a mere fundamental guarantee. It is a personal and fundamental human right that cannot be subject to derogation even in times of state of emergencies. The right of habeas corpus can also effectively combat arbitrary detention in cases of mental illness, drug addiction, immigration controls, accusations of terrorism and situations of secret or incommunicado detention.

Habeas corpus is needed more than ever today as it serves as a robust safeguard against arbitrary deprivation of liberty of political opponents, religious dissenters, members of minorities or persons exercising their freedoms of conscience, opinion, expression or religion.

Throughout its Opinions on individual cases, the Working Group has consistently requested Governments to take the necessary steps to remedy a situation of arbitrary detention in order to bring it into conformity with international human rights standards. Remedies requested by the Working Group not only focus on the release of a detainee but also the provision of adequate compensation for the harm suffered.

The Working Group notes with satisfaction the increasing cross-fertilization between its activities and the work of other United Nations bodies as well as international and regional instruments that promote and protect human rights. The complementarity in the way the Working Group addresses certain issues on deprivation of liberty by referring to the jurisprudence of the International Court of Justice, the Human Rights Committee and international and regional
human rights mechanisms along with the strengthened collaboration of States and civil society is essential to combating arbitrary deprivation of liberty.

Madame President,

Turning to country missions, the Working Group visited Georgia from 15 to 24 June 2011 at the invitation of the Government. The Working Group is grateful for the support and co-operation the Government provided during its visit. The Working Group met with senior Government officials at the executive, legislative and judicial branches of the State; the Public Defender of Georgia or Ombudsman; representatives of the national Bar Association and representatives of civil society. Visits were made to detention facilities including prisons, police detention centres, police stations, psychiatric facilities and detention facilities for women and juveniles in the cities of Batumi, Kutaisi and Tbilisi. Interviews were held in private with 154 detainees.

The Government of Georgia has undergone many legislative reforms and undertaken positive initiatives to assist in safeguarding against the occurrences of deprivation of liberty. Amendments have been made to the Criminal Procedure Code in an attempt to bring it into conformity with international standards. The Working Group noted significant developments in the area of juvenile justice with the establishment in some cities of diversion schemes as alternatives to detention for juvenile offenders. Rehabilitative measures such as education opportunities for juveniles deprived of their liberty and the increase of the age of criminal responsibility from 12 to 14 have also been important Government initiatives. The crime rate in Georgia has also significantly reduced in the past years.

The establishment of an open centre and a new draft law that would provide further protection and humanitarian safeguards for immigrants, asylum seekers and refugees and the availability of free legal aid to indigent persons are also positive initiatives.

The Working Group highlights the active role of the Public Defender of Georgia in monitoring human rights violations. The existence of a national preventive mechanism within the Public Defender's Office is critical with regard to the rights of detainees. The Public Defender's Office is independent in exercising its functions and handles complaints from the public, including persons who are deprived of their liberty.

The Working Group, however, observed various issues of concern that need to be addressed in order to better protect against arbitrary detention. The independence of the judiciary and guarantees for a fair trial are issues of priority. The Working Group notes that the relevant laws generally provide appropriate protection for the independence of the Judiciary and for fair trial guarantees but observes that it is the practice of ensuring independence that needs focus and strengthening. The highly influential role of prosecutors as compared to defence lawyers was an
issue raised constantly by detainees as well as representatives of civil society. The Working Group advised the Government to ensure equality of arms between the prosecution and defence so that fair trial rights and guarantees were rigorously protected at all times.

The adoption of the zero-tolerance policy in 2004 contributed to the rise in the number of criminal convictions with custodial sentences. Georgia has, in comparative terms, one of the highest prison populations in the world due to this. Lack of proportionality and excessive and harsh sentencing are matters of concern. With a very low acquittal rate of 0.1 per cent, the way in which the majority of cases comes through the court system tends to favour the prosecution and result in convictions. Certain vulnerable groups, such as migrants in an irregular situation and drug users ended up with custodial sentences, some which were lengthy and were considered to be unduly harsh. The Working Group has highlighted the need to consider alternative measures to detention to ensure that detention is only used in cases where it is justifiable to do so.

Much information was also received on the practice of plea bargaining which was introduced in 2004. More than the law setting out the plea bargaining process, the practice raised concerns. In Georgia, some 90 per cent of criminal cases that go through the court system resort to plea bargain arrangements. Detainees who were interviewed expressed that they often felt pressured to agree to a plea bargain since they had very little chance of acquittal. They felt that the prosecution had a greater chance of success if their cases proceeded to trial and they were likely to end up with a guilty verdict with a lengthy custodial sentence. Thus the major concern for the Working Group regarding this practice is that many defendants may actually forgo their right to trial because they already envisaged that they will not benefit from a fair and impartial trial. The plea bargain practice was also problematic as it often required the payment of a fine which can place undue financial obligations on those who are poor.

In its report, the Working Group also considers the issue of administrative offences, noting the increase in the maximum punishment from 60 to 90 days. This means in practice that offenders who have to be administratively detained are kept in temporary facilities that are intended for short term detention (about 72 hours) and not long-term detention. An offender who is detained for 90 days under this system can also be deprived of basic rights such as the right to exercise or to receive visits from relatives. The Working Group was also informed that court judgments for administrative offences were often being hastily decided by judges without proper consideration.

In Tbilisi protesters had been administratively detained and the Working Group pointed out the political free speech concerns and also that some of those who were detained during protests complained of not being given the opportunity to contact families and lawyers.

The Working Group has made several recommendations to the Government of Georgia. It is aware that the Government is currently working on further reforms and changes to ensure these issues are resolved. The Working Group thanks the Government for the information it has provided on the various initiatives being undertaken to improve the situation of deprivation of liberty in the country and looks forward to further constructive dialogue and collaboration through its follow up procedure.
Madam President,

The Working Group also conducted a country mission to Germany from 26 September to 5 October 2011. We thank the Government for the invitation given to the Working Group and for doing so immediately after it received the Working Group’s request. We are also grateful for the full cooperation given to us throughout the various stages of the visit.

In Berlin, Hamburg, Karlsruhe and Stuttgart, the Working Group met with federal and state authorities from the Executive, Legislative and Judicial branches of the State; with representatives from the Germany’s national human rights institution and from non-government organizations. It was able to interview 69, in private, detainees in detention facilities that included prisons (such as Fuhlsbüttel), remand prisons (such as Moabit); centres for persons detained pending deportation (such as the Köpenick Centre); penal institutions; psychiatric centres and police stations.

Human rights are protected in Germany by an independent, strong and impartial court system, scrutinised by an active civil society and many non-governmental organizations. The Working Group commends the Government for the positive efforts it has made in recent legislative reforms to improve the law on pre-trial detention in Germany. The infrastructure of detention facilities all conformed to international standards.

The report notes a number of important initiatives regarding collaboration between the police and education departments to respond to factors impacting on criminality. This inter-agency approach to addressing socio-economic causes of offences and offending behaviour and its impact in reducing crime should be widely disseminated. Among the good practices the report mentions is the establishment in Hamburg of an independent special commission for investigation of police officers in cases of alleged misconduct or alleged ill-treatment. The abrogation of the obligation of head teachers and hospital authorities to report children of immigrants in an irregular situation receiving education or emergency medical treatment deserves to be mentioned.

Noting these positive achievements, the report also raises the following issues for the attention of the Government.

New legislation such as the Therapieunterbringungsgesetz (the Act forcibly detaining patients for therapeutic treatment) raises concerns. This legislation provides for the detention of a person in a closed institution when she or he is considered likely to make an attempt against her of his own life, or against the sexual self-determination or personal freedom of others, or cause bodily harm. The treatment provided in the new legislation should be aimed at addressing the cause of the mental disorder.
During its visit the Working Group paid particular attention to the preventive detention system, in which persons who have already served their sentences are deprived of their liberty because it is deemed that they continue to represent a danger for society. Restrictive legislation was applied retroactively.

The Working Group considers that post-sentence preventive detention is to be regarded as a penalty and is therefore subject to the ban on retroactivity in a strict sense. The Federal Constitutional Court requirements for the standards of the detention regime should be followed, in particular so that the conditions satisfy the proportionality requirements by establishing a difference between post-sentence preventive detention and an ordinary prison sentence. The European Court of Human Rights continues to review the compliance with European and international human rights law, and these judgments must be complied with.

The uneven use of restraints, such as handcuffs and shackling, in remand hearings, with clear differences among the local courts that the Working Group visited was also concerning. The Working Group recommends that the use of restraints be monitored. This may provide assistance to the judges that have to apply the relevant proportionality test in German legislation and international human rights standards.

The report also notes the disproportionate number of foreigners and Germans of foreign origin in detention. Remand detention seems to be too easily ordered for foreigners with reference to a lack of local connections.

Another issue of concern is the "fast-track" airport procedure, particularly in Frankfurt Airport. The Working Group considers that the three-day period to appeal the rejection of a request for political asylum to the Administrative Court does not seem sufficient to allow the applicant to prepare her or his appeal, even with the assistance of legal counsel.

The Working Group recommends that an individual risk assessment should be requested to process forcible returns of foreigners, particularly in the cases of foreigners requesting political asylum. The risk of persecution and discrimination in countries of origin should be conscientiously evaluated.

Finally, Madam President,

2011 has proven to be a challenging year in terms of the growing number of cases the Working Group receives, both through its regular procedure and urgent appeals process. It is a sad fact that the mandate of the Working Group has never been as relevant and necessary as it is in today's world. We need only to reflect on the past year and the tumultuous events that have
occurred to see that the phenomenon of arbitrary detention is on the rise, a problem that we will need to confront together in order to guarantee the right to liberty.

The uniqueness of the Working Group in being a human rights mechanism that deliberates on individual cases in an adversarial process has become an important source of assistance to victims of arbitrary detention worldwide, other international bodies, authorities, courts, advocates, human rights defenders, researchers and the public in general. The Working Group relies on the continuing support of the members of this Council particularly in ensuring that responses to information requested by the Working Group are provided on a timely basis and also for the favourable consideration of country visit requests that have been made.

I would like to also reiterate the desire of the Working Group to expand its mandate to include the examination of conditions of detention and the monitoring of State compliance with obligations concerning all human rights of detained and imprisoned persons. During our country visits we receive much information on conditions of detention. We have observed time and again that often those conditions have an overwhelming impact on the fundamental rights of detainees to a proper and effective defence and to a fair trial guarantees.

Distinguished delegates,

Detention should be used only as a last resort and applied in exceptional cases, for a clearly specified reason and for the shortest possible duration, as required by international law. The Working Group will continue to make its contribution with co-operation, open dialogue and a readiness to work together we can make tremendous strides in combatting human rights violations such as arbitrary detention.

Thank you Madam President.