

DETENTION

Working Group on Arbitrary Detention (E/CN.4/1997/4; E/CN.4/1997/4/Add.1)

The Working Group (WG) on Arbitrary Detention was established by the Commission in 1991 (resolution 1991/42) charged with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistent with international standards set forth in relevant international instruments. The WG is composed of five independent experts. The Group's mandate is subject to renewal every three years. Cases considered by the WG are those that fall into one or more of three categories in which the deprivation of liberty or freedom is arbitrary:

1. as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of the sentence or despite an amnesty act);
2. based on facts giving rise to prosecution or conviction related to the exercise of certain fundamental freedoms which are protected by the Universal Declaration and the International Covenant on Civil and Political Rights (the latter for states parties) and, in particular, the rights to freedom of thought, conscience and religion, freedom of opinion and expression, and the right of peaceful assembly and association; and/or
3. based on non-observance of all or part of the international provisions related to the right to fair trial to the extent that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.

In the last few years, several governments have questioned the approach taken by the WG, basing their objections on the distinction between "detention" and "imprisonment" contained in the UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Principles define a "detained person" as anyone "deprived of personal liberty except as a result of conviction for an offence" and an "imprisoned person" as anyone "deprived of personal liberty as a result of conviction for an offence". The governments which have questioned the WG's approach have maintained that anyone convicted under national law could not be considered detained, even in those cases where national legislation is inconsistent or violates international norms, and therefore no such case could properly be considered to fall within the mandate of the WG.

The resolution adopted at the 1996 session of the Commission (1996/28) requested the WG to take into consideration the distinction between detention and imprisonment. The WG's 1997 report includes commentary on the Group's deliberations and summarizes its conclusions, stating:

- ▶ it is not the intention of the Commission on Human Rights to restrict every person's right not to be arbitrarily deprived of freedom to pre-trial situations;
- ▶ the essence of the mandate derives from the word "arbitrary" and therefore addresses the need to eliminate, in all its forms, arbitrariness, irrespective of the phase of deprivation of liberty concerned;
- ▶ proceeding on the basis of a distinction between detention and imprisonment as set out in the Body of Principles

would mean that deprivations of liberty resulting in sentencing in the absence of proper guarantees of due process would no longer be prohibited under the provisions in international human rights instruments which form the foundation for the mandate of the WG;

- ▶ the mandate of the Group was established with reference to article 10 of the Universal Declaration, related to a fair and public hearing by an independent and impartial tribunal; thus, the Commission intended the WG to consider detentions and sentences imposed by courts that are not independent or impartial and either had not heard the accused or had not done so publicly;
- ▶ arbitrary deprivations of liberty are not carried out only by the judiciary and thus it was not the Commission's intention for the WG not to consider allegations and cases committed by the executive branch of government or other comparable bodies;
- ▶ the distinction between detention and imprisonment is only used in the Body of Principles; other texts use either term and both have been accepted by states as valid descriptions of deprivation of liberty — whether pre-trial or post-trial;
- ▶ the WG's mandate is not restricted to the Universal Declaration or the Body of Principles; it applies to all relevant international legal instruments accepted by the states concerned, including both conventional mechanisms and resolutions adopted by the General Assembly and the Economic and Social Council;
- ▶ article 9 of the Universal Declaration specifically refers to arbitrary arrest, detention and exile and therefore the Declaration condemns arbitrariness in all forms of deprivation of liberty;
- ▶ if detention refers only to pre-trial detention then it must be concluded that the Universal Declaration does not condemn arbitrary imprisonment following a trial of whatever nature; and
- ▶ the Body of Principles makes clear that the distinction drawn between detention and imprisonment is to be used only for the purposes of that text and no other; further, that the Principles do not define anything but merely establish a use of terms for the purposes of the Principles.

Thus, in considering the implications of limiting the WG's mandate to detention as defined in the Body of Principles, the Group stated that its credibility would be seriously challenged if it should express an opinion only concerning the very first days of pre-trial detention. It gave the example of a case in which a person was condemned to a heavy sentence for having written an editorial or a book; where the sentence was handed down by a special court after a secret trial, held a very short time after the arrest of the defendant; and where the rights of the defence had not been respected. The Group further stated that, were the distinction in the Principles between "detention" and "imprisonment" to prevail, it would not be able to consider the deprivation of liberty of a person who, for example, had previously been tried for the same offence or crime, and perhaps even found not guilty; or sentenced for an act which, at the time it was committed, did not constitute an offence.