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## مجلس حقوق الإنسان

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البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

## تقرير الفريق العامل المعني بالاحتجاز التعسفي عن زيارته إلى الولايات المتحدة الأمريكية\*

### مذكرة من الأمانة

بناء على دعوة من الحكومة، زار الفريق العامل المعني بالاحتجاز التعسفي الولايات المتحدة الأمريكية في الفترة من ١١ إلى ٢٤ تشرين الأول/أكتوبر ٢٠١٦. وتشرف الأمانة بأن تحيل إلى مجلس حقوق الإنسان التقرير المتعلق بتلك الزيارة، والذي يتضمن نتائج الفريق العامل، واستنتاجاته وتوصياته المتعلقة بالحرمان من الحرية في سياق الهجرة، ونظام العدالة الجنائية، وبشأن الأسباب المرتبطة بالصحة والحالة في خليج غوانتانامو.

\* استُنسخ مرفقا هذا التقرير كما وردا، وباللغة التي قُدِّمَ بها فقط.



الرجاء إعادة الاستعمال



## Report of the Working Group on Arbitrary Detention on its visit to the United States of America\*\*

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\*\* Circulated in the language of submission only.

## **I. Introduction**

1. At the invitation of the Government, the Working Group on Arbitrary Detention visited the United States of America from 11 to 24 October 2016. The Working Group was represented by Seong-Phil Hong (Republic of Korea), José Antonio Guevara Bermúdez (Mexico, Vice-Chair) and Leigh Toomey (Australia, Vice-Chair). They were accompanied by two staff members of the Office of the United Nations High Commissioner for Human Rights.
2. The Working Group extends its gratitude to the Government for the invitation and for its cooperation before and during the visit. The Working Group intends to continue the constructive dialogue with the Government.
3. The Working Group also recognizes the contribution of numerous stakeholders from civil society, particularly representatives of non-governmental organizations, human rights defenders, lawyers, academics and jurists, as well as individuals who have been or are currently deprived of their liberty.

## **II. Programme of the visit**

4. During its 14-day visit, the Working Group met with officials from the Department of State, the Office of the Special Envoy for Guantanamo Closure, the Department of Homeland Security, the Department of Justice and its Bureau of Prisons and the Department of Health and Human Services, as well as various authorities in Texas, California and Illinois. This included meetings with officials of the San Antonio Immigration Court, the South Texas Family Residential Center (Dilley), the South Texas Detention Complex (Pearsall), the Travis County Jail, the Texas Attorney General's Office, the Southwest Key care provider facility in San Diego, the Border Patrol (San Diego Sector), the California Department of Corrections and Rehabilitation, the San Quentin State Prison, the California Substance Abuse Treatment Facility (Corcoran II State Prison), the Illinois Department of Corrections, the Metropolitan Correction Center and Cook County Jail.
5. The Working Group considers that its visit allowed it to obtain information on issues within its mandate. Given its intention to thoroughly examine issues relating to the deprivation of liberty and given the length of the visit, it was not possible to visit more than three states. The decision to visit detention centres in Texas, California and Illinois was based on information obtained from other United Nations bodies and special procedures, as well as from civil society. However, the Working Group also received submissions on arbitrary detention in other states that are referred to in the present report. The Working Group considered that the range of issues pertinent to its mandate and the reportedly large number of people detained warranted a visit to the United States. While it was not possible to visit the Guantanamo Bay detention facility and given the existence of Executive Order No. 13492 entitled "Review and disposition of individuals detained at the Guantanamo Bay Naval Base and closure of detention facilities", the Working Group requested and received a briefing on the plans to close the facility.
6. The Working Group visited nine places of deprivation of liberty at the federal, state and county levels (see annex I), including border patrol locations and immigration detention centres housing children, adults and families; immigration courts; county jails where persons are held in pretrial detention; large correctional centres and prisons of different security classifications; and centres at which drug treatment is provided and where inmates with serious psychosocial disability are under care. The Working Group interviewed 280 persons currently deprived of their liberty.
7. In most of the places of detention visited, the Working Group received the full cooperation of the authorities, including unimpeded access to the facility and the ability to confidentially interview persons deprived of their liberty. However, the Working Group regrets that, despite its request, it was not granted access to the facility at San Ysidro Port of Entry, in California. The Working Group attempted to visit that facility on 17 October 2016

but was not permitted entry. The Working Group also made a request to visit the Homan Square police facility in Chicago, Illinois, as it had received serious allegations of arbitrary detention and torture at the facility. That request was not granted and when the Working Group attempted to make an unannounced visit on 22 October 2016 it was refused entry. The ability of the Working Group to enter any detention facility to which it seeks access at any time is an essential aspect of its mandate, as stated in the terms of reference of the special procedures concerning country visits.

8. The Working Group shared its preliminary findings with the Government on 24 October 2016.

### **III. Overview of the institutional and legal framework**

9. The essential guarantees of human rights and fundamental freedoms within the United States are set forth in the Constitution and in statutes. The Constitution includes 27 amendments. The first 10 amendments, referred to as the Bill of Rights, provide for the basic protection of individual liberties. In practice, the enforcement of those guarantees ultimately depends on the existence of an independent judiciary. The judiciary has the power to invalidate acts of the other branches of government at the federal, state and local levels, which conflict with those constitutional guarantees.

10. Under the Constitution, all powers not exercised by the federal government and not prohibited to the states are reserved to the states. Local governments have autonomy when dealing with matters such as the exercise of police power and the prison system.

#### **A. Judicial guarantees**

11. The Constitution, as well as federal and state statutes, provides a number of substantive and procedural protections for individuals accused of committing crimes, being held for trial and being held in prisons or jails. In this respect, the Constitution and various statutes and rules of criminal procedure protect individuals against arbitrary arrest and detention.

12. The Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens; several provisions bear directly on the power to arrest and detain. The Fourth Amendment provides that all persons shall be free from unreasonable searches and seizures and that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”. The Fifth Amendment provides that no person shall be “deprived of ... liberty ... without due process of law”. Similarly, the Fourteenth Amendment provides that no state shall “deprive any person of ... liberty ... without due process of law”. Finally, the Sixth Amendment provides that, in all criminal prosecutions, the accused shall be given a “speedy and public trial, by an impartial jury of the state”, and that persons shall be “informed of the nature and cause of the accusation” brought against them.<sup>1</sup>

13. In addition to federal legislation, states through their own laws guarantee that individuals will not be arbitrarily arrested and detained by state authorities and also require prompt notification of charges and a speedy public trial without unnecessary delay. Each state within the Union is obligated at a minimum to adhere to the requirements of the Constitution, but it may adopt greater protections.<sup>2</sup>

<sup>1</sup> See also CCPR/C/81/Add.4, paras. 203-299.

<sup>2</sup> Ibid., para. 205.

## B. International human rights obligations

14. The United States is party to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Protocol relating to the Status of Refugees. Ratification by the United States of the Covenant was subject to a number of reservations, understandings, declarations and provisos.<sup>3</sup>

15. The United States is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention relating to the Status of Refugees, the Optional Protocol to the Convention against Torture, the first Optional Protocol to the International Covenant on Civil and Political Rights, on an individual complaints procedure, or the second Optional Protocol to the Covenant, aiming at the abolition of the death penalty. It has signed but not ratified the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

16. The United States maintains the position that human rights obligations assumed by a State party to the International Covenant on Civil and Political Rights apply only to individuals who are both within the territory of the State and its jurisdiction.<sup>4</sup>

17. In its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee stated that States parties were required by article 2 (1) to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. That means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.<sup>5</sup>

18. The United States is a member of the Organization of American States. It has not ratified the American Convention on Human Rights and has not submitted itself to the jurisdiction of the Inter-American Court of Human Rights.

## IV. Findings

### A. General remarks

19. In determining whether information provided, including from persons interviewed during the visit, raised issues regarding the arbitrary deprivation of liberty, the Working Group considered the five categories of arbitrary deprivation of liberty outlined in its methods of work (see A/HRC/33/66, para. 8).

20. The Working Group has found that there are serious issues relating to the arbitrary deprivation of liberty in the United States in the context of immigration, criminal justice, health-related confinement and the situation at Guantanamo Bay.

<sup>3</sup> Ibid., annex III.

<sup>4</sup> See CCPR/C/USA/4 and Corr.1, paras. 504-505, CCPR/C/USA/3, annex I, CCPR/C/SR.3044, paras. 6 and 36, and CCPR/C/SR.3046. See also CCPR/C/USA/CO/4, para. 4.

<sup>5</sup> See also the observations of the United States on the Human Rights Committee's draft general comment No. 35 (2014) on liberty and security of person.

## **B. Deprivation of liberty in the context of immigration**

21. The United States is facing a large movement of immigrants and asylum seekers across its borders. The challenge is to manage this situation while fully respecting the human rights of those seeking to enter the country, in particular those who are subject to international protection, i.e. asylum seekers and victims of human trafficking, among others. The Working Group is of the view that all administrative detention, in particular of immigrants in an irregular situation, should be in accordance with international human rights law; and that such detention is to be a measure of last resort, necessary and proportionate and be not punitive in nature, and that alternatives to detention are to be sought whenever possible.

22. In order to understand the complex issues relating to immigration detention, the Working Group sought the perspective of those responsible for overseeing immigration-related detention and of immigrants currently held in detention. The Working Group met with individuals and families in immigration detention, including those who had come to the United States from Afghanistan, Bangladesh, Brazil, Colombia, Cuba, El Salvador, Guatemala, Guinea, Honduras, India, Iraq, Mexico, Nicaragua, Peru and Somalia. In addition, the Working Group received information from various organizations across the United States in relation to the detention of immigrants.

23. Following these discussions, the Working Group identified five areas of concern.

### **1. Practice of mandatory detention**

24. The Working Group was informed of the practice of mandatory detention, which has existed in the United States since 1988 and has grown exponentially in recent years. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act, the United States drastically expanded the scope of mandatory detention provisions. Under the Act, non-United States citizens who have been convicted of certain criminal offences and non-United States citizens deemed to be a national security risk are subject to mandatory detention. The Act also put into place a framework for accelerated procedures known as expedited removal. Under expedited removal, non-United States citizens, including asylum seekers, “whose inadmissibility is being considered” or who have a prior removal order are subject to mandatory detention pending further immigration proceedings. According to information provided by the United States, at least an estimated 352,850 people are detained each year across the United States pending the outcome of their immigration proceedings. This level of detention of immigrants, including asylum seekers, costs United States taxpayers approximately \$2 billion annually.

25. On 25 January 2017, the Administration issued an executive order affecting immigration detention. Subsequently, on 20 February 2017, the Secretary of the Department of Homeland Security issued a memorandum on implementing the President’s border security and immigration enforcement improvements policies. The Working Group was encouraged by the fact that the order called for the allocation of all available resources to assigning asylum officers and immigration judges to immigration detention facilities. While the Working Group recognizes that this is part of an effort to reduce overall detention time, it notes with concern that the executive order and implementing memorandum lay the groundwork for expanding the existing detention system by increasing the number of individuals subject to immigration detention. Under the order, apprehended individuals may be detained “on suspicion” of violating federal or state law, which includes unauthorized entry. Additionally, the order and the memorandum mandate that steps be taken to prioritize enforcement of offences “with a nexus to the southern border”, such as unauthorized entry and re-entry into the United States, and contemplate the expansion of the reach of accelerated procedures such as expedited removal. To accommodate these changes, the order and the memorandum specifically envisage the construction of new detention facilities. Such a development will worsen the situation and increase the cost for the taxpayers.

26. The Working Group is of the view that the mandatory detention of immigrants, especially asylum seekers, is contrary to international human rights and refugee rights

standards. Furthermore, it recalls that individuals held in immigration detention shall be brought promptly before a judicial authority empowered to order their release or to vary the conditions of release. If detention is ordered, it should be subject to regular, periodic reviews to ensure that it is reasonable, necessary, proportional and lawful, and that alternatives to detention are considered.<sup>6</sup>

27. In addition, while immigration detention should be non-punitive in nature, the Working Group observed during its visits to immigration detention and holding facilities that immigrants were subject to mandatory detention under punitive conditions<sup>7</sup> that were often indistinguishable from those applicable to persons who had been sentenced to punishment in the criminal justice system. In some cases, the length of detention pending immigration proceedings was unreasonable, as it lasted for periods ranging from six months to more than one year without resolution. Similarly, the Working Group observed that the mandatory detention of persons seeking to migrate to the United States appeared to be implemented to deter individuals from continuing their immigration claims and could result in asylum seekers revoking their legitimate immigration claims. Immigrants who vigorously pursued claims for relief from removal (for example, by continuing to raise asylum claims) reportedly faced substantially longer detention periods than those who concede to removability.

28. The Working Group is aware that there are mechanisms that may allow for the release of individuals while their case is pending, including parole authority, bond and alternatives to detention. However, the Working Group was informed that, in practice, such relief is routinely denied to individuals or combined with conditions that make release impracticable (i.e., excessive bond amounts).

## 2. Need for individualized assessments

29. During its visit, the Working Group observed that the mandatory detention of immigrants was taking place without an effective individualized assessment of the necessity of detention.<sup>8</sup> The Working Group is of the view that an appropriate type of review requires the Government to prove that it has a legitimate interest in detention, that the accrued length of detention is taken into account in determining whether to release an individual and that serious consideration is given to whether alternatives to detention are available in each case.

30. Until the Government definitively ends mandatory immigration detention, the authorities should reinterpret its expedited removal policies, which effectively lead to mandatory detention, and allow alternative forms of custody, such as the case-management-based release of individuals into the custody of family members or other community sponsors, non-monetary parole and release on recognizance. The Working Group remains concerned that many “alternatives to detention”, such as the imposition of excessive bond amounts, ankle bracelets and electronic monitoring, are more appropriate to criminal settings and are not true alternatives that would allow an individual to be released, and that some of these “alternatives” may affect other human rights, such as the prohibition of discrimination and the presumption of innocence and of the inherent dignity of individuals. For instance, the Working Group was informed that the use of ankle bracelets had a stigmatizing effect, preventing immigrants from obtaining employment and integrating into society.

31. The Working Group is of the view that the current level of detention of immigrants demonstrates an excessive use of immigration-related detention that cannot be justified

<sup>6</sup> See A/HRC/30/37, annex, in particular principle 21.

<sup>7</sup> See also American Immigration Lawyers Association, *Statutory Enforcement Report: the State of Civil Rights at Immigration Detention Facilities* (Washington, D.C., September 2015), which details the punitive conditions at such facilities.

<sup>8</sup> ICE has developed a “risk classification assessment” to assist in taking release and custody decisions. However, the Office of Inspector General of the Department of Homeland Security found that, in practice, the assessment is “not effective in determining which aliens to release or under what conditions”. See [www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](http://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf).

based on legitimate necessity. Rather, the detention of immigrants appears to be influenced by economic incentives. The Working Group was informed that 18 per cent of Immigration and Customs Enforcement (ICE) detainees were housed in privately owned facilities that ICE contracted directly and that 26 per cent were housed in “ICE-dedicated facilities” for which the ICE contract was with a city or county. The city or county, however, subcontracted the management of the facility to a private detention company, which had a contractual incentive to detain as many immigrants as possible. Such incentives are reinforced by legislation imposing “bed quotas” on immigration facilities. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act, section 5204 of which directed the Department of Homeland Security to make available at least 8,000 beds at immigration detention facilities between 2006 and 2010. However, in 2014, Congress also mandated the Department to make 34,000 beds available at immigration detention facilities per day.

32. The Working Group recalls that immigration detention should be the exception rather than the rule. It should be used only if warranted after an individualized assessment of the necessity of detention, to prevent flight or danger to the community or to execute a final order of removal after a full hearing in which due process is guaranteed.

### 3. Privatization of immigration detention

33. The Working Group visited and interviewed detainees at facilities operated by private companies near Pearsall and Dilley,<sup>9</sup> in Texas. The Working Group observed that the outsourcing to private companies was one of the elements that facilitated the significant expansion of immigration-related custody. In that regard, the Working Group notes that the Secretary of the Department of Homeland Security has undertaken to review the use of private facilities in the immigration context.<sup>10</sup> The Working Group urges the discontinuation of the use of private facilities.

34. During the interviews conducted by the Working Group in those private immigration facilities, interviewees expressed concern about the conditions in which they were detained and their treatment throughout the immigration detention process. They also expressed concern about substandard conditions at the moment of apprehension, the poor quality of food and drinking water, the limits imposed on recreation time and access to medical services, the lack of books and information in languages other than English, and the practice of solitary confinement. It was brought to the attention of the Working Group that certain vulnerable groups, such as lesbian, gay, bisexual, transgender and intersex detainees, were reportedly at a higher risk of sexual assault.<sup>11</sup> Several detainees complained about the very low pay provided for work undertaken in the facilities, as well as the high cost of goods available for purchase in facility convenience stores. Those conditions were described as having had a significant effect on the ability of detainees to participate in, and be an asset to, their immigration proceedings.

35. The Working Group was informed that private companies did not require the same level of expertise of its employees and did not provide the same level of employee training as government-run facilities. The Working Group also received information related to concerns about whether private facilities were subject to effective independent oversight and, if so, whether there were any meaningful consequences for those that failed to comply with applicable detention standards.

36. The Working Group was made aware that some companies that managed immigration detention facilities also provided electronic bracelets to detainees released from detention and that immigrants were sometimes charged for the cost of the bracelet.

<sup>9</sup> The city of Eloy, Arizona, has subcontracted the day-to-day operation of the facility at Dilley, Texas, to a private company.

<sup>10</sup> See [www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration](http://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration).

<sup>11</sup> Since 2009, ICE has taken important steps to reform the detention system as part of the Director’s detention reform initiatives and various measures to-date have benefited lesbian, gay, bisexual, transgender and intersex detainees.



The use of such bracelets involves the imposition of restrictions that, as noted earlier, affect the ability of detainees to fully integrate into society.

#### 4. Difficulties in accessing legal representation

37. The Working Group encountered detainees who had experienced barriers in accessing legal representation at immigration detention centres, including the remote locations of detention centres, limited access to telephone and communication services, and limited access to interpretation assistance.<sup>12</sup> Some detainees had been placed in facilities that were remote and far from legal service providers, and had limited means of contacting lawyers. Any border patrol post or immigration facility holding detainees should ensure that immigrants have adequate access to legal representation in order to enable them to request to a judge to verify the legality of the detention, confidential attorney visitation space and the means for legal counsel to communicate confidentially with detainees by telephone, email and other means, as well as through qualified interpreters.<sup>13</sup> The lack of legal representation was particularly detrimental for those in expedited removal proceedings who only received a brief “credible fear interview” with asylum officers to determine whether their claim for asylum or protection under the Convention against Torture could be heard by an immigration judge, as well as for detainees whose status was complicated and required substantial legal advice.

38. As a positive practice, the Working Group notes the onsite availability of pro bono legal representation at locations such as Dilley, including through university clinics and civil society organizations. Another positive example is the “know your rights” programme run by the Casa Cornelia Law Center in San Diego for detained unaccompanied children, as well as other pro bono programmes provided by civil society organizations across the country.

39. The availability of non-governmental pro bono representation at different immigration facilities varies in each state. Such representation is often insufficient to meet the needs of indigent immigrant detainees and can often only be made available in priority cases such as deportation proceedings. Access to justice in immigration proceedings should not depend on the generosity of legal service providers; it should be guaranteed and funded by the Government. The Working Group encourages the Government to guarantee the provision of legal representation, at government cost, for persons detained pending immigration proceedings. The consequences of unsuccessful immigration proceedings, namely deportation to a situation where an immigrant may face persecution for having attempted to flee or other dire living conditions, are as serious as those faced by defendants in criminal proceedings and demand the same access to legal representation.

40. Stakeholders noted that a range of programmes could be funded by the Government, such as appointed counsel, legal fellowships and additional funding for pro bono support. One example of a positive model is the National Qualified Representative Program, which provides government-funded legal representation to detainees with psychosocial disabilities. Stakeholders stated, however, that the programme could be extended to other detainees who may not be competent to fully participate in immigration proceedings. Another positive example is the initiative of an immigration court in San Antonio that provides helpdesk services to participants in court proceedings. It also allows children to observe court proceedings so that they can better participate, with their legal representatives, in their own proceedings.

<sup>12</sup> Moreover, it learned, for example, that “represented immigrants in detention who had a custody hearing were four times more likely to be released from detention (44 percent with counsel, versus 11 percent without)”. See <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

<sup>13</sup> ICE has recently increased its efforts to enhance detained individuals’ access to legal resources and representation, including by creating the following email address: Detention.LegalAccess@ice.dhs.gov.

## 5. Detention of unaccompanied children and families

41. The Working Group was deeply disturbed by information relating to the detention of unaccompanied child immigrants. According to information received in March 2017, the Department of Homeland Security was reportedly considering separating children from parents caught crossing the border, in an attempt to deter illegal immigration from Mexico.<sup>14</sup> This is particularly serious given the increasing trend of unaccompanied children migrating to escape violence and reunite with family members. The Working Group is gravely concerned that the proposal could result in the detention of the parent and the placement of any accompanying children in the care of the Government or any relatives they may have in the United States.

42. While visiting the Southwest Key care provider facility in San Diego, the Working Group observed that the centre provided excellent support to unaccompanied children, including safe and humane conditions and culturally appropriate education and recreation facilities. Stakeholders indicated that the centre was exceptional and that unaccompanied children were not detained in suitable conditions across the country. The Working Group recalls that:

Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.<sup>15</sup>

The best interests of the child is to be a primary consideration in all actions concerning children. Accordingly, the deprivation of liberty of children by the United States authorities should be consistent with the best interests of the child, which means it should be prohibited.<sup>16</sup>

43. The Working Group received testimony relating to the separation of family members during immigration detention and the significant anxiety caused by this practice. Stakeholders expressed concern about the detention of families seeking to migrate to the United States, noting that such detention was often justified as a deterrent to immigrant families, which was not a legitimate basis for detention. They also noted several inconsistencies, as the immigration claims made by families in similar situations resulted in different outcomes.

44. Families are currently detained at centres such as the Berks County Residential Center, the Karnes County Residential Center and the centre in Dilley. The Working Group encountered several instances of families (particularly women and their children, some only a few days old) being detained despite the availability of less restrictive measures, such as release into the custody of family members or faith-based community sponsors. The Working Group was informed of the substantial mental and physical deterioration of detained family members, including post-traumatic stress, anxiety, depression and suicidal behaviour.

45. The Working Group was also made aware that, in some cases, the detention of families violated applicable law and standards, such as the Flores Settlement Agreement of 1997. The Working Group received information that the Berks County Residential Centre was in violation of national standards prohibiting the detention of children who were under the age of 9 or who had not been detained by a Pennsylvania court order, and that the Centre's licence had not been renewed in January 2016 because of the failure to comply with the state law requirements for licensing. Although the Berks County Commission,

<sup>14</sup> See [www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally](http://www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally). See also Women's Refugee Commission, Lutheran Immigration and Refugee Service and Kids in Need of Defense, "Betraying family values: how immigration policies at the United States border is separating families", 10 January 2017.

<sup>15</sup> See Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 18.

<sup>16</sup> See A/HRC/30/37, annex, para. 46, and A/HRC/28/68, para. 80.

which owned and operated the centre, had won a decision on appeal, the Department of Health and Human Services had appealed and the case was ongoing. Similarly, a final judgment was granted in December 2016 prohibiting the issuance of a childcare licence to the centre in Dilley because it did not qualify as a childcare facility under Texas law. Those legal challenges reinforced the need to comply with international norms and to find alternatives to detention.

46. When the Working Group visited the centre in Dilley, it observed that women and their children were detained pending the resolution of their immigration status. The Working Group recalls that the detention of children on the basis of their own, or their parents' migration or residency status (or lack thereof), is not in the best interests of the child. Furthermore, when the child's best interests require keeping the family together, the requirement not to deprive the child of liberty extends to the child's parents and family members and requires the authorities to choose alternative measures to detention for the entire family. Various governmental, intergovernmental and advisory bodies have recommended that family detention be abolished.<sup>17</sup> The Government must urgently take appropriate measures to remedy this practice.

### C. Deprivation of liberty in the criminal justice system

47. The Working Group acknowledges the efforts made at the federal, state and county levels to reform the criminal justice system and the juvenile justice system. The Working Group gathered information and testimonies on many positive practices in this regard.

48. For example, at the federal level, following the launch in 2013 of the Attorney General's "Smart on crime" initiative,<sup>18</sup> the Department of Justice launched a review of the criminal justice system in order to identify reforms to ensure that federal laws were enforced fairly and efficiently. Those reforms included changes to charging policies so that people who had committed low-level, non-violent drug offences, with no ties to gangs, would no longer be charged with offences leading to the imposition of mandatory minimum sentences. It also included the consideration of early release for inmates who had not committed violent crimes and who had served significant portions of their sentences, and the pursuit of alternatives to incarceration for low-level, non-violent crimes. In California, the newly proposed parole system would employ a behaviour assessment standard designed to offer opportunities for release to non-violent defendants.<sup>19</sup>

49. The Working Group acknowledges the efforts made in the process of reforming the correctional system, particularly in encouraging the re-entry of offenders into society. For instance, efforts have been made by the California Department of Corrections to shift the focus from security to rehabilitation by providing programmes to prepare detainees for re-entry into society.<sup>20</sup>

50. However, the Working Group has identified several areas where systemic problems within the criminal justice system are resulting in the arbitrary deprivation of liberty. These include: lengthy pretrial detention; the lack of effective legal representation; economic and racial disparities; disproportionate sentencing; prolonged use of administrative segregation and restrictive housing; the treatment of juveniles; and the use of prisons to house inmates with psychosocial disability. While the prison population in some institutions is falling, the Working Group is nonetheless concerned about the high rate of incarceration across the

<sup>17</sup> Inter-American Commission on Human Rights, "Human rights situation of refugee and migrant families and unaccompanied children in the United States of America", 24 July 2015. See also the reports of the American Immigration Lawyers Association, *Statutory Enforcement Report*, and of the United States Commission on International Religious Freedom, "Assessing the U.S. Government's detention of asylum seekers: further action needed to fully implement reforms", April 2013.

<sup>18</sup> United States Department of Justice, "Smart on crime: reforming the criminal justice system for the 21st century", August 2013. See also the Smart on Crime Initiative at <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative>.

<sup>19</sup> See [www.cdcr.ca.gov/proposition57](http://www.cdcr.ca.gov/proposition57).

<sup>20</sup> See [www.cdcr.ca.gov/rehabilitation](http://www.cdcr.ca.gov/rehabilitation).

United States. While the Working Group is aware of issues concerning the alleged arbitrary deprivation of liberty during domestic proceedings for terrorism charges, it was not able to examine them during the visit.

## 1. Lengthy pretrial detention

51. The Working Group was informed that lengthy pretrial detention was the norm rather than the exception, contrary to the right to liberty under international human rights law. The Working Group received testimony from pretrial detainees who had spent years detained in county jails awaiting trial. In many cases, individuals had remained in detention because the bail or bond had been set at an excessively high level and was beyond their capacity to pay (and sometimes administered by private bonds companies), without regard to the flight risk or danger posed by the detainee to the community, to victims and to witnesses. Such detention often has a serious impact on those detained, including loss of employment, educational opportunities, housing and custody of their children. That was one example of the “criminalization of poverty” in the criminal justice system in the United States.

52. The Working Group regrets that, in some cases, individuals from low-income backgrounds tend to plead guilty, especially on minor charges, so as to be released from prison because they cannot afford to pay the bond. Even if they do not plead guilty, a University of Pennsylvania study of misdemeanour cases in Harris County, Texas, found that defendants who cannot make bail are 25 per cent more likely to be convicted, 43 per cent more likely to be sentenced to jail rather than probation and 30 per cent more likely to be charged with a felony in the 18 months after they have been released from prison.<sup>21</sup>

53. Although a discriminatory regime of wealth-based pretrial detention appears to be widespread, the Working Group notes a number of positive initiatives. For example, the no-cash bail system operating in Washington, D.C., and the risk-based system for pretrial release in Kentucky were described as making a significant contribution to reducing the pretrial population while ensuring that a rigorous risk assessment is the sole criterion for determining whether a person should remain in detention pending trial. In Cook County, Illinois, legislation has been proposed to allow the sheriff to seek a lower bond for individuals who cannot pay the amount originally determined by the courts. If it passes, the legislation will address egregious situations in that county, including a recent case relayed to the Working Group regarding a man who was found to be in possession of a small amount of marijuana but whose bond was set at \$50,000. The Working Group also identified a trend, particularly in California and Illinois, to implement alternatives to pretrial detention, such as electronic monitoring.<sup>22</sup>

## 2. Effective legal representation

54. Defendants remanded in custody acquire their Sixth Amendment right to counsel when formal adversarial judicial proceedings are initiated against them.<sup>23</sup> Most of the detainees interviewed had access to legal representation from an early stage in the criminal justice process, although not always promptly after initial apprehension and arrest by the police. Legal representation was usually provided by public defenders or, when unavailable, through a court-appointed attorney from the private bar. In exceptional cases, detainees paid for their own private attorneys. Despite the relative ease of access to counsel, the quality of representation, particularly by public defenders and court-appointed attorneys, was described as variable at best and often poor.

55. Government-funded attorneys often carry too heavy a caseload to provide quality legal representation, even in cases involving serious charges where substantial expertise is required. Such attorneys were often described as being less interested and less capable than

<sup>21</sup> Paul Heaton and others, “The downstream consequences of misdemeanor pretrial detention”, available from <https://www.law.upenn.edu/live/files/5693-harriscountybail>.

<sup>22</sup> See California Senate bill No. 10 of 5 December 2016 and Illinois House bill No. 3421, on reducing pretrial detention.

<sup>23</sup> See also CCPR/C/USA/3, para. 279.

attorneys who had been privately retained by detainees, and it appears that the hearings and outcomes of their cases were less successful than those of privately retained attorneys at both the bond hearing and disposition phases of criminal proceedings. For example, a study conducted at the Central Bond Court in Cook County in April 2016 revealed that defendants represented by a private attorney spent three times longer in front of the bench during bond hearings than defendants represented by a public defender.<sup>24</sup>

56. Many interviewees noted that it was difficult to appeal the lack of effective legal representation, as poor decisions by trial lawyers were often attributed to trial strategy and not overturned. The lack of effective legal representation raises serious doubts as to whether defendants are being arbitrarily deprived of their liberty. This concern is heightened in relation to the dispensation of justice by courts whose judges are subject to re-election and who may have an incentive to appear to be upholding law and order by convicting and imposing harsher sentences on defendants.

### **3. Economic and racial disparities**

57. The Working Group learned that some indigent people had been imprisoned for failure to pay court-ordered fines and fees. The practice was referred to as “debtors’ prison”, as it involved incarcerating people who could not pay minor fines or traffic tickets without determining their ability to pay and without offering alternative measures, such as community service, a reduced payment or a reasonable payment schedule. For example, in 2014, more than 560,000 municipal cases in Texas were closed when the defendant served time in prison in exchange for the city forgiving the unpaid fines. However, the Colorado legislature passed legislation in 2014, which was strengthened in 2016, to end the incarceration of individuals who were unable to pay fines and other fees.

58. The Working Group is concerned about the existence of racial disparities at all stages of the criminal justice system. Information provided indicates that, compared to the Caucasian population, African Americans are more likely to be stopped and searched by law enforcement officers; more likely to be arrested for marijuana possession, despite equal levels of use; and more likely to be sentenced to longer terms of imprisonment. Moreover, civil asset forfeiture laws applicable in some states allow police departments to confiscate and keep cash or property tied to drugs, resulting in economic incentives for law enforcement agencies to engage in racial profiling. However, some states, such as New Mexico, have abolished civil asset forfeiture, while Texas will be considering bills to do so in the next legislative session.

59. The Working Group noted with concern the overrepresentation of African American and Hispanic detainees in the prisons it visited. For instance, as of 19 October 2016, African Americans represented 72 per cent of those held in Cook County Jail, while 16 per cent were Hispanic, 11 per cent Caucasian and 1 per cent from other groups. The Working Group is also deeply concerned about reported police brutality (including fatal shootings) at the time of arrest and pretrial detention, committed towards predominantly African American suspects. In some cases, the apparent presumption of guilt of certain suspects has jeopardized their right to a fair trial, potentially resulting in arbitrary detention.

### **4. Disproportionate sentencing**

60. The Working Group interviewed many detainees who had received life sentences without the possibility of parole or heavy sentences ranging from minimum non-parole periods of 25 to 50 years (effectively a life sentence). Many cases appeared to be the result of sentences imposed under “three strikes” legislation or as the result of “enhancements” applied (particularly in the federal system) to defendants with a criminal history, including young men who were barely adults when they committed the offences.

61. While the Working Group recognizes the need to ensure that those responsible for the commission of criminal acts are subject to appropriate penalties, much of the testimony it received appeared to involve heavy-handed sentencing imposed in response to demands

<sup>24</sup> See <https://www.documentcloud.org/documents/3144964-Sheriff-s-Justice-Institute-Central-Bond-Court.html>.

for law and order rather than ensuring the reintegration of offenders back into society. However, the Working Group learned of several positive initiatives, such as recent amendments to the federal sentencing guidelines to provide prosecutors with greater discretion to seek lower penalties and the reduction of federal drug sentencing guidelines by two levels (“drugs minus two”) to retroactively reduce sentences and release more inmates. These reforms have already led to the release of thousands of prisoners. In some states, compassionate release and the granting of pardons and clemency are being more actively used to release detainees with longer sentences.

62. During its visit, the Working Group received information indicating that the death penalty was increasingly being used in some states. Given the concerns highlighted in the present report regarding fair trial rights, the Working Group is concerned that imposing the death penalty after a trial at which the defendant was not afforded all necessary safeguards constitutes arbitrary deprivation of life.<sup>25</sup>

## 5. Prolonged use of administrative segregation and restrictive housing

63. During its visit to places of deprivation of liberty, the Working Group observed that solitary confinement, also known as administrative segregation and restrictive housing, was widely used for administrative and disciplinary purposes, including to protect the segregated individual and the general prison population.

64. The Working Group is concerned about the widespread use of solitary confinement, its prolonged duration and its application at the discretion of detention officials. In some cases, individuals were reported to have been subjected to periods of confinement ranging from a few weeks to years, with the review of such confinement taking place only after 30, 60 or 180 days. There was, reportedly, a lack of independent and external review of solitary confinement, allowing for the possibility of abuse of authority by detention officials.

65. The Working Group welcomes the development of standards, such as the American Correctional Association’s *Restrictive Housing Performance Based Standards* (August 2016) and the Association of State Correctional Administrators’ “Restrictive status housing policy guidelines” (2013), which seek to ensure that administrative segregation and restrictive housing is a safe and humane form of detention that is used as a measure of last resort and that is applied for the shortest period possible.

## 6. Treatment of juveniles

66. The Working Group welcomes recent Supreme Court rulings (*Graham v. Florida* (2010), *Miller v. Alabama* (2012) and *Montgomery v. Louisiana* (2016)) finding that the mandatory sentencing of juvenile offenders to life imprisonment without parole is unconstitutional and that the rulings should be applied retroactively. In the light of these decisions, the Working Group encourages all states to change their laws and practices with the aim of abolishing the sentence of life without parole for persons who were under the age of 18 at the time of committing a crime.

67. The Working Group notes with concern the practice of treating minors in certain cases as adult offenders. In some instances, this leads to juvenile offenders being detained with adults, both during the pretrial phase and after conviction. During its visit, the Working Group was informed that, under Texas criminal law, children are considered adults once they turn 17.<sup>26</sup> In Texas and some other states, depending on the offences, children as young as 14 years old can be certified as adults and tried before adult courts.<sup>27</sup> The Working Group urges the United States to ratify the Convention on the Rights of the Child and to bring its law into conformity with the provisions of the Convention.

<sup>25</sup> See Human Rights Committee general comment No. 6 (1982) on the right to life.

<sup>26</sup> United States, Texas Family Code, title 3, chapters 51 and 54. See also [https://www.texasattorneygeneral.gov/files/cj/juvenile\\_justice.pdf](https://www.texasattorneygeneral.gov/files/cj/juvenile_justice.pdf).

<sup>27</sup> United States, Texas Family Code, title 3, chapter 54, section 2.

## 7. Detention of persons with psychosocial disabilities in prisons

68. The proportion of prison inmates with a psychosocial disability has grown significantly throughout the United States, despite findings that incarceration can cause or exacerbate mental health problems. Several interviewees described the situation as the “criminalization of psychosocial disability”. State prisons and county jails hold as many as 10 times more people with serious psychosocial disabilities than state psychiatric institutions. Prisons serve as the largest mental health providers in 44 of the 50 states, at significant cost to the state. For instance, one third of detainees at Cook County Jail self-identify as having some form of psychosocial disability. On any given day, approximately 20 per cent of prisoners undergo mental health treatment, making that facility one of the largest de facto mental health facilities in the country. By 2015, almost one in three people in Texas jails had at least one serious psychosocial disability. Apart from the fact that prisons and jails are often ill-equipped to provide appropriate care to inmates with psychosocial disability, submissions to the Working Group indicated that such inmates are more likely to be abused by other inmates.

69. In order to address this situation, the Sheriff of Cook County has led the development of a mental health template for United States jails. In addition, the Cook County Jail has implemented mental health assessments at two stages, i.e. at the pre-bond and post-admission stages. This allows officials to place detainees in an adequate housing and treatment plan and to supply inmates with the tools needed to succeed outside the correctional institution.<sup>28</sup> There is also a voluntary outpatient treatment programme available (the Mental Health Transition Center) for detainees with substance abuse disorders or psychosocial disabilities. Detainees interviewed by the Working Group expressed positive views about the programme.

70. The Working Group observed a strong correlation between reported psychosocial disability and substance abuse among persons interviewed during the visit, and received information that as many as 55-69 per cent of individuals with substance abuse disorders had a co-occurring mental health problem. Furthermore, 60 per cent of those with a mental health condition had a co-occurring substance abuse disorder. The Working Group was informed that Corcoran II State Prison in California was addressing those issues through its substance abuse and mental health treatment facilities.

## D. Deprivation of liberty on the grounds of health and disability

71. The Working Group made findings in two specific areas: the confinement of pregnant women suspected of substance abuse and the involuntary hospitalization of persons with psychosocial disabilities.

### 1. Confinement of pregnant women

72. The Working Group identified a trend involving the increasing use of civil laws to confine pregnant women suspected of substance abuse. Five states (Wisconsin, North and South Dakota, Oklahoma and Minnesota) allow such confinement and involuntary substance abuse treatment.

73. In some of these states, government officials, hospital staff and social workers are authorized to initiate confinement proceedings in court against a pregnant woman if she is deemed a danger to herself or others with respect to the use of alcohol or controlled substances. Some women have been arrested after visiting health-care providers to seek prenatal care and subjected to confinement proceedings that have resulted in orders that they be detained and undergo medical treatment. Other women have been involuntarily placed in residential treatment facilities without sound medical evidence that they are drug dependent or that the health of their fetus has been jeopardized, thus removing them from their homes, families and employment. This procedure lacks due process and serves as a deterrent for other women who require health care.

<sup>28</sup> See [www.cookcountysheriff.org/MentalHealthTemplate.html](http://www.cookcountysheriff.org/MentalHealthTemplate.html).

74. The civil proceedings to commit pregnant women are often in closed hearings, lack meaningful standards and provide few procedural protections. In some states, important early hearings may take place without the mother having legal representation, as the pregnant woman does not have the right to appointed counsel although the fetus has a court-appointed guardian ad litem. This form of deprivation of liberty is gendered and discriminatory in its reach and application, as pregnancy, combined with the presumption of drug or other substance abuse, is the determining factor for involuntary treatment. In addressing this issue, drug treatment funding to states could be made conditional on the elimination of policies that threaten maternal health by permitting involuntary detention.

## **2. Involuntary hospitalization and treatment of persons with psychosocial disabilities**

75. The Working Group received information on mental health laws in several jurisdictions, including Washington, D.C., and California, which authorize involuntary hospitalization based on an actual or perceived psychosocial disability, and mental health treatment without obtaining the free and informed consent of the persons concerned or providing the appropriate support to enable them to exercise their legal capacity. This form of confinement is justified using criteria such as danger to the confined person or others and/or the need for care and treatment, which is inherently discriminatory since it is based on the person's actual or perceived impairment. The Working Group received testimony from individuals who had been subjected to prolonged periods of detention in psychiatric institutions in violation of their human rights. In some cases, individuals were subjected to "voluntary hospitalization", but without their informed consent to treatment and without the ability to leave at any time.

76. The voluntary institutionalization of persons with psychosocial disabilities needs to take into account their vulnerable position and their likely diminished capability to challenge their detention. If such persons do not have legal assistance of their own or of their family's choosing, effective legal assistance through a defence lawyer is to be assigned to act on their behalf and the necessity of continued institutionalization is to be reviewed regularly at reasonable intervals by a court or a competent independent body in adversarial proceedings and without automatically following the expert opinion of the institution where the persons are held. The persons are to be released if the grounds for hospitalization no longer exist. Involuntary institutionalization of persons with psychosocial disabilities and forced treatment is prohibited.

## **E. Deprivation of liberty at Guantanamo Bay**

77. Various United Nations human rights mechanisms have expressed concern regarding the deprivation of liberty at Guantanamo Bay Naval Base. The Working Group, together with other special procedure mandate holders, issued in 2010 a joint study on global practices in relation to secret detention in the context of countering terrorism.<sup>29</sup> The Working Group reiterates the recommendations made in that context.

78. The Working Group received testimonies regarding the difficulties that the legal representatives of detainees faced while representing clients detained at Guantanamo Bay, including in terms of accessing the facility and all relevant evidence and meeting privately with detainees. Such obstacles amount to a restriction of full legal representation and the right to be represented by counsel. The Working Group is particularly concerned that detainees have not been tried by an independent and impartial court after many years of arbitrary deprivation of liberty.<sup>30</sup>

79. During its visit, the Working Group met with representatives of the Office of the Special Envoy for Guantanamo Closure, who said that, in order to close the Guantanamo Bay detention facility, the Government was identifying opportunities for transferring designated detainees, that the Periodic Review Board was continuing to review the threat posed by detainees not eligible for transfer and that the Government was continuing with

<sup>29</sup> A/HRC/13/42.

<sup>30</sup> See annex II and E/CN.4/2006/120.



prosecutions led by military commissions. The Government was also identifying individual dispositions for detainees designated for continued detention, including their transfer to third countries for foreign prosecution or, should Congress lift the ban on transfers to the United States, their transfer to the United States for trial.

80. During the meeting, the Working Group learned that 61 detainees remained at Guantanamo Bay. Among these individuals, 21 had been approved for transfer, 10 had cases pending before military commissions and 30 had been designated for continued detention. Furthermore, the Working Group learned that, by the end of January 2017, 20 more detainees had been transferred. Among the 41 remaining detainees, 5 had been approved for transfer, 7 had been charged by a military commission, 3 had been convicted by a military commission and 26 had been designated for continued detention.<sup>31</sup>

81. The Working Group welcomes the transfer of several individuals who have been the subject of its opinions but expresses concern about the fact that Mustafa al-Hawsawi, the subject of opinion No. 50/2014, is still being detained after a decade of confinement at Guantanamo Bay. According to information received, Mr. Al-Hawsawi is suffering severe health problems as a result of torture inflicted on him during his detention, which are impeding his efforts to defend himself.

82. The Working Group regrets that the Government has not yet met its long-standing commitment to closing the Guantanamo Bay detention facility and recalls that closure of the facility must remain a priority for the United States, including under its new administration, if it is to honour its human rights commitments under international law.

## V. Implementation of opinions adopted by the Working Group

83. Since its establishment, the Working Group has adopted 35 opinions involving the United States; in 22 cases, the Working Group found that detention was arbitrary (see annex II). The Working Group invites the Government to submit updated information, including on whether the subjects of the opinions have been released, whether reparations have been made to them and whether any other action has been taken to implement the recommendations.

## VI. Conclusions

84. **The Working Group appreciates the willingness of the Government to submit itself to scrutiny through the visit, and considers that the findings in the present report offer an opportunity to support the Government in addressing situations of arbitrary deprivation of liberty.**

85. **The Working Group was informed of many positive changes that were being made across the United States in relation to the deprivation of liberty, including the availability of onsite legal representation and legal literacy programmes at some immigration detention facilities and programmes such as the National Qualified Representative Program, which extends legal representation to vulnerable groups; policies which offer opportunities for early release to non-violent criminal defendants and the rehabilitation of offenders; the introduction of a risk-based assessment for pretrial release; reforms to end incarceration for failure to pay a debt; the abolition of mandatory life without parole sentences for juvenile offenders; and the development of plans to support inmates with psychosocial disabilities.**

86. **The Working Group acknowledges that the United States is experiencing a large number of arrivals of immigrants and asylum seekers, particularly at its southern border, but considers that the Government must respond in a way which upholds its international human rights obligations. Such obligations include seeking alternatives to the detention of immigrants and asylum seekers and ending the**

<sup>31</sup> See [www.nytimes.com/interactive/projects/guantanamo](http://www.nytimes.com/interactive/projects/guantanamo).

criminalization of their entry into the country in order to preserve the right to seek asylum.

87. The Working Group has observed that the current system of detaining immigrants and asylum seekers is, in many cases, punitive, unreasonably long, unnecessary, costly when there are alternative community-based solutions, especially for children and families, not based on an individualized assessment of the necessity and proportionality of detention, carried out in degrading conditions, and a deterrent to legitimate asylum claims.

88. The Working Group identified systemic problems within the criminal justice system which placed defendants at a high risk of arbitrary detention, including: lengthy pretrial detention; lack of effective legal representation; discriminatory practices towards indigent defendants and those with particular racial profiles; increasingly harsh and disproportionate sentencing; the widespread and discretionary use of administrative segregation and restrictive housing for prolonged periods; the treatment of juvenile offenders as adults; the housing of inmates with psychosocial disabilities in prisons; and the high rate of incarceration in the United States.

89. The Working Group found that an increasing number of people were subject to a relatively hidden and unknown form of detention through civil confinement proceedings or involuntary hospitalization in relation to suspected substance abuse and mental health issues. Both forms of detention discourage the seeking and provision of appropriate health services to those who have given their informed consent to receive treatment and often lack basic due process guarantees such as legal representation, the ability to present contradictory evidence and periodic review. Such detention is often based on discriminatory grounds such as gender and disability.

90. The Working Group remains deeply concerned regarding the ongoing operation of the detention facility at Guantanamo Bay, particularly given the extensive attention which allegations of arbitrary detention and torture and other ill-treatment at the facility have received by the Working Group and other United Nations human rights mechanisms in recent years. The transfer and trial of remaining detainees with full respect for their human rights and the closure of the Guantanamo Bay detention facility must remain a priority for the United States. In the meantime, the Working Group urges the Government to cooperate with United Nations human rights mechanisms and allow them full access to the facility.

91. The Working Group would welcome the opportunity to conduct a follow-up visit to the United States, including to visit facilities and examine the issues it was unable to address in October 2016, such as detention at Guantanamo Bay and the domestic prosecution for terrorism offences.

## VII. Recommendations

92. In relation to immigration-related detention, the Working Group recommends that the Government of the United States:

(a) Put an end to the mandatory detention of immigrants and asylum seekers because of their irregular status and provide a prompt administrative procedure for an individualized assessment of their circumstances and a timely decision on their status. In the meantime, the Government should:

(i) Reduce the number of individuals subject to mandatory detention by using a more favourable interpretation of expedited removal statutes (for instance, the authorities should place individuals with claims for protection directly into full asylum proceedings that do not trigger mandatory detention);

(ii) Allow alternative forms of custody of immigrants and asylum seekers, such as case-management-based release of individuals into the custody of family members or other community sponsors, non-monetary parole and release on recognizance;

(b) Ensure that the authorities responsible for administering immigration detention are aware of, and give practical effect to, the right to seek asylum under international law, which is not a criminal act and should not be penalized through the use of punitive detention conditions;

(c) Stop prioritizing the prosecution of immigrants and asylum seekers for entry and re-entry to the United States so that such individuals are not prosecuted for crimes that relate solely to their assertion of the right to seek asylum;

(d) Ensure that there are no “bed quotas” for immigration detention, as they are leading to the excessive and unnecessary detention of immigrants and asylum seekers;

(e) Extend the recent pledge by the Government to discontinue the use of private companies to operate penal detention facilities to the operation of facilities used for immigration detention;

(f) Take measures to ensure that affected individuals have access to legal representation;

(g) Provide government funding for a range of programmes, such as appointed counsel, legal fellowships and pro bono advice, to expand access to legal representation by immigrants and asylum seekers;

(h) Ensure that the legality of detention can be challenged before a court and that a regular review is conducted within a fixed time limit;

(i) Ensure that placement and custody decisions relating to unaccompanied children by the Office of Refugee Resettlement are subject to scrutiny by an independent judicial body;

(j) Abolish the detention of families and children and return to the prior practice of issuing relevant documents at the port of entry, permitting families to apply for asylum together, to ensure that the best interests of the child, including family unity, are prioritized.

93. In relation to detention in the criminal justice system, the Government should:

(a) Introduce legislation and guidelines requiring that bail and bonds be based on an individual risk assessment which takes into account the defendant’s capacity to pay and is limited to the amount necessary to secure the defendant’s appearance or to protect the community. Additionally, it should ensure access to counsel at pretrial hearings and that, for fine-only offences, reasonable bail can be advocated;

(b) Explore initiatives aiming to increase the availability of quality legal representation, particularly for serious criminal offences, including debt forgiveness programmes for law graduates providing legal aid, and the funding of university clinical legal education and other pro bono legal programmes;

(c) Make greater use of release on personal recognizance and community-based supervision and community service, including for defendants who do not have the means to pay court-ordered fines or fees;

(d) Require federal and state law enforcement agencies to adopt policies strictly prohibiting racial profiling, tracking failures to comply, and provide disciplining and correcting officers with training in diversity and implicit bias;

(e) Continue and step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies that have a racially disparate impact at the federal, state and local levels;

(f) Continue to develop sentencing guidelines which allow prosecution and judicial authorities to exercise greater discretion in sentencing, including the imposition of sentences other than imprisonment;

(g) Continue to introduce and apply standards which limit the use of administrative segregation and restrictive housing within detention facilities, in particular its prolonged use, and which limit the time between periodic reviews of confinement. Such limits on the use of administrative segregation and restrictive housing should apply at both the pretrial stage and following conviction, in the federal criminal justice system as well as nationwide. Additionally, the review of the use of administrative segregation and restrictive housing should be carried out by an independent body;

(h) In respect of juvenile offenders, review legislation and practices to give effect to the abolition of mandatory life without parole sentences and make it possible to consider parole after a reasonable period of incarceration. Ensure that juveniles are separated from adults during pretrial detention and after sentencing. Additionally, review legislation to ensure that juvenile defendants are not treated as adult offenders;

(i) Ratify the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, as well as other international human rights instruments to which it is not a party, and review all reservations with a view to withdrawing them;

(j) Expand access to the treatment of psychosocial disabilities outside the criminal justice system and develop pre-arrest and pretrial intervention programmes aimed at preventing the incarceration of persons in need of mental health treatment. Additionally, develop protocols to protect inmates with psychosocial disability from abuse and provide training to law enforcement and corrections officers on de-escalation skills when inmates suffer mental health crises. Ensure appropriate follow-up so that individuals are able to access mental health treatment upon release.

94. In relation to detention on health-related grounds, the Government should:

(a) Take affirmative steps at the federal level to maximize the availability of health care for pregnant women, including prenatal care, treatment for addiction and outpatient services, so that responses to substance use in pregnancy prioritize human rights and public health;

(b) Review legislation and practices to ensure that any confinement of pregnant women suspected of substance abuse takes place voluntarily and respects due process guarantees. These include access to legal representation; an opportunity for women to present evidence on their behalf; a requirement that any determination with respect to the need for treatment be carried out by qualified medical professionals; and periodic review to ensure that any treatment remains necessary and appropriate;

(c) Enact an enforceable right under legislation for persons with psychosocial disability to live in the community and be provided with health services that are free from coercion and restriction. Additionally, ensure that legislation and practices relating to hospitalization respect due process guarantees.

95. In relation to detention at Guantanamo Bay, the Government should:

(a) Close without delay the Guantanamo Bay detention facility, as called for by Executive Order No. 13492 and numerous States during the universal periodic review of the United States in May 2015;

(b) Expedite the transfer of detainees designated for transfer to countries where their human rights will be fully respected;

(c) Lift prohibitions in current law so as to enable the transfer of detainees to the continental United States for prosecution and trial before a court of law;

(d) Give full effect to the opinions of the Working Group, including in relation to the release and rehabilitation of Mr. Al-Hawsawi.

## **Annex I**

### **Detention facilities visited**

#### **Texas**

- South Texas Family Residential Center
- South Texas Detention Complex
- Travis County Jail

#### **California**

- Southwest Key San Diego Care Provider Facility
- San Diego Sector, U.S. Border Patrol
- San Quentin State Prison
- California Substance Abuse Treatment Facility, Corcoran II State Prison

#### **Illinois**

- Metropolitan Correction Center
- Cook County Jail

## Annex II

### Opinions concerning the United States of America

1. Opinion No. 56/2016: Abdul Fatah and Said Jamaluddin (Afghanistan and United States of America) A/HRC/WGAD/2016/56
2. Opinion No. 53/2016: Lacin Akhmadjanov (Afghanistan and United States of America) A/HRC/WGAD/2016/53
3. Opinion No. 50/2014: Mustafa al Hawsawi (United States of America and Cuba) A/HRC/WGAD/2014/50
4. Opinion No. 57/2013: Mohamed Yusuf & Ali Yasin Ahmed (Djibouti, Sweden and the United States of America) A/HRC/WGAD/2013/57
5. Opinion No. 10/2013: Mr. Obaidullah (United States of America) A/HRC/WGAD/2013/10
6. Opinion No. 03/2009: Sanad Ali Yislam Al-Kazimi (United States of America) A/HRC/WGAD/2009/3
7. Opinion No. 02/2009: Mohammed Abdul Rahman al-Shimrani (United States of America) A/HRC/WGAD/2009/2
8. Opinion No. 35/2007: Vatcharee Pronsivakulchai (United States of America) A/HRC/WGAD/2007/35
9. Opinion No. 17/2007: Ahmed Mohamed Barodi (United States of America) A/HRC/WGAD/2007/17
10. Opinion No. 11/2007: Mohammad Al-Bakry (Afghanistan and United States of America) A/HRC/WGAD/2007/11
11. Opinion No. 43/2006: Saleh Kahlah Al-Marri (United States of America) A/HRC/WGAD/2006/43
12. Opinion No. 33/2006: Tariq Aziz (Iraq and United States of America) A/HRC/WGAD/2006/33
13. Opinion No. 31/2006: Saddam Hussein al-Tikriti (Iraq and United States of America) A/HRC/WGAD/2006/31
14. Opinion No. 29/2006: Mr. Ibn al-Shaykh al-Libi and 25 other persons (United States of America) A/HRC/WGAD/2006/29
15. Opinion No. 05/2006: Majeed Hameed (Iraq and United States of America) A/HRC/WGAD/2006/5
16. Opinion No. 46/2005: Saddam Hussein al-Tikriti (Iraq and United States of America) A/HRC/WGAD/2005/46
17. Opinion No. 45/2005: Tariq Aziz (Iraq and United States of America) A/HRC/WGAD/2005/45
18. Opinion No. 44/2005: Abdul Jaber al-Kubaisi (Iraq and United States of America) A/HRC/WGAD/2006/44
19. Opinion No. 26/2005: Abdullah William Webster (United States of America) A/HRC/WGAD/2005/26
20. Opinion No. 21/2005: Ahmed Ali (United States of America) A/HRC/WGAD/2005/21
21. Opinion No. 19/2005: Antonio Herreros Rodríguez, Fernando González Llort, Gerardo Hernández Nordelo, Ramón Labaniño Salazar and René González Schweret (United States of America) A/HRC/WGAD/2005/19

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