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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum*

Mission to China

* The summary of this report is being circulated in all official languages. The report itself is contained in the annex to the summary and is being circulated in Chinese and English.

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Summary

The Working Group on Arbitrary Detention visited China from 18 to 30 September 2004 at the invitation of the Government. The Working Group had carried out a previous visit to China from 6 to 16 October 1997 (E/CN.4/1998/44/Add.2), preceded by a five-day preparatory mission in July 1996 (see E/CN.4/1997/4). In contrast to other missions conducted by the Working Group in countries which it visits for the first time, this visit focused on developments since its visit in 1997, and in accordance with the follow-up character of the mission, the Working Group held meetings with officials of the same ministries, institutions, departments as it had in 1997. Moreover, it visited the same cities (except Shanghai) and, with some minor exceptions, the same detention facilities as in 1997.

The Working Group visited Beijing and the cities of Chengdu, capital of Sichuan Province, and Lhasa, capital of the Tibet Autonomous Region. The Working Group visited 10 detention facilities included in a list previously submitted to the authorities. This list also included police stations, pre-trial detention centres, prisons, re-education through labour camps and psychiatric hospitals. At those detention facilities, the Working Group was able to meet with and interview more than 70 detainees, chosen at random and from a list previously submitted to the authorities, including pre-trial detainees, convicted individuals serving their sentences, women, minors and persons held in administrative detention in re-education through labour camps. The interviews with detainees were carried out in conformity with the Working Group's terms of reference, i.e. in private, without the presence of government officials or guards and in locations chosen by the Working Group.

The report notes that legislation pertaining to the judicial organization and the legal framework governing judicial and administrative deprivation of liberty has not undergone basic changes since the Working Group's last visit. However, the Working Group recalls that China has signed the International Covenant on Civil and Political Rights, and is making preparatory steps for its ratification. Three major decisions were adopted:

(a) In 1999, a constitutional amendment enshrined in the Constitution the principle that the People's Republic of China is a State governed by the rule of law;

(b) In 2000, the NPC enacted a statute intended to standardize China's law-making process and define the boundaries of legislative power. Only the NPC, and in some cases its Standing Committee, can pass legislation on matters relating to the structure of State organs, the criminal justice system, and the deprivation of liberty of Chinese citizens;

(c) The Constitution has been complemented by a provision granting constitutional rank to the protection of human rights. On 14 March 2004, the NPC amended the Constitution to add the provision "The State respects and safeguards human rights", providing for the first time in its history a constitutional protection of human rights. The Working Group was informed that as a consequence of this decision, the Criminal Law, the Criminal Procedure Law and the framework governing administrative detention are under consideration by the NPC Standing Committee in order to bring them into line with the new provisions of the Constitution.

The Working Group attaches primary importance to the decisions taken recently at the political level to further reinforce and develop the protection of human rights in China. Concerning the revised Criminal Law and the revised Criminal Procedure Code, the Working Group reiterates its previous recommendations and invites the authorities to take them into consideration in the course of the ongoing reform process.

The Working Group considers that the rules and practice concerning judicial deprivation of liberty are not in keeping with international law and standards. The period of time for which criminal suspects can be held in police custody without judicial approval is too long, and the status of the public prosecutor does not meet international requirements. The Working Group doubts whether the status of the prosecutors as regulated by Chinese law fulfils the requirement toward the independence of an officer authorized by law to exercise judicial power within the meaning of article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

The report further notes that placing the judiciary in a position of inferiority to the prosecution is incompatible with relevant international norms. As far as the rights of defence are concerned, the 1996 reform does not in certain of its aspects, constitute progress as compared to the previous legal framework. Access to the case file by the defence counsel during the pre-trial phase has been excessively restricted. The rights of the defence are even further restricted if the case concerns charges of endangering national security or State secrets.

There exists no genuine right to challenge administrative detention, including detention for the purpose of re-education through labour and detention in a psychiatric facility. The avenues to challenge placement in re-education through labour institutions do not satisfy international law requirements. The Working Group welcomes the information that the NPC wishes to put on its agenda the reconsideration of the current legal framework for the system of re-education through labour. The unduly long duration of this measure needs to be reduced and an effective remedy against the decision of the authority to placement in re-education through labour must be introduced.

The Working Group recommends to the authorities that they examine the possibility of instituting a simplified emergency procedure to allow a person detained to be brought before a judge and not only before a procurator. As far as minor administrative offences are concerned, it recommends that all conduct subject to sanction be described in great detail, and that all persons deprived of their liberty on account of administrative offences be guaranteed a public and adversarial trial. All persons placed against their will in a psychiatric hospital or disintoxication centre should enjoy an effective judicial remedy.

Lastly, the Working Group recommends the amendment of all legal provisions that could be used to sanction the peaceful exercise of rights and freedoms enshrined in the Universal Declaration of Human Rights and in the Constitution of the People’s Republic of China.

Annex

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS MISSION TO CHINA

(18 TO 30 SEPTEMBER 2004)

CONTENTS

Introduction

1. The Working Group on Arbitrary Detention visited China from 18 to 30 September 2004 at the invitation of the Government. The delegation consisted of Ms. Leïla Zerrougui, Chairperson-Rapporteur of the Working Group and head of the delegation, and Mr. Tamás Bán, the Working Group's Vice-Chairperson. The delegation was accompanied by the Secretary of the Working Group, an official from the Office of the United Nations High Commissioner for Human Rights and two interpreters from the United Nations Office at Geneva.

2. The visit included Beijing, and the cities of Chengdu, capital of Sichuan Province, and Lhasa, capital of the Tibet Autonomous Region. The mission was in follow-up to the previous missions of the Working Group carried out from 14 to 21 July 1996 (see E/CN.4/1997/4) and from 6 to 16 October 1997 (see E/CN.4/1998/44/Add.2). Therefore, in contrast to other missions conducted by the Working Group to countries which it visits for the first time, this visit focused on developments since its 1997 visit. Therefore, the Working Group met, to the extent possible, with the same authorities and visited the same detention facilities as during its previous visits.

3. The Working Group would like to express its gratitude to the Government of China, particularly the authorities of the Ministries for Foreign Affairs, Public Security, Justice, and Health; to the authorities of the People's National Congress (PNC), the Supreme People's Court, the Supreme People's Procurator and the governments of Sichuan Province and of the Tibet Autonomous Region; as well as to the United Nations Development Programme, and to Chinese non-governmental organizations (NGOs) and individuals whom the Working Group could meet. Particular gratitude is expressed to the Department of International Organizations and Conferences of the Ministry for Foreign Affairs for its permanent cooperation before and during the visit.

I. PROGRAMME OF THE VISIT

4. The Working Group was able to hold meetings with the Vice-Ministers for Foreign Affairs, Public Security, Justice, and Health, as well as with other authorities of these Ministries; with the Vice-Chairman of the Supreme People's Court, the Vice-Chairman of the Supreme People's Procurator, the Deputy Director-General and other members of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, the Deputy Governors of Sichuan Province and of the Tibet Autonomous Region and other authorities of those local governments; and judges, prosecutors, police authorities and penitentiary administration officials working at the national, provincial and district levels. It also held meetings with the Deputy President and members of the Board of the All China Lawyers Association as well as with the Vice-Chair and members of the China Society for Human Rights Studies.

5. The Working Group visited the following 10 detention facilities included in a list previously submitted to the authorities: the Beijing Municipal Detention Centre No. 501 in Chaoyang District; the Beijing Juvenile Reformatory; the Beijing Tuang He Re-education through Labour Camp; the Chengdu Reformatory Penitentiary; the Jinjiang Prison; the Chengdu Detention Centre; a police station in the city of Chengdu; Prison No. 1 of the Tibet Autonomous Region (Drapchi Prison) and the Lhasa Detention Centre (Gutsa); as well as the Mental Health Hospital at Fangshang District, Beijing.

6. At these detention facilities, the Working Group was able to meet with and interview more than 70 detainees, chosen at random and from a list previously submitted to the authorities, including pre-trial detainees, convicted individuals serving their sentences, women, minors, and persons held in administrative detention in re-education through labour camps.

II. GENERAL OBSERVATIONS

7. The Working Group recalls that it had carried out a first visit to China at the invitation of the Government from 6 to 16 October 1997, preceded by a five-day preparatory mission in July 1996 by Mr. Louis Joinet, then Chairman of the Working Group. In 2004, the Working Group was invited by the Government to carry out a third visit to China.

8. In accordance with its methods of work, the Working Group held preliminary consultations with the Chinese authorities, informed them of its terms of reference, of the places it wished to visit and of the authorities it wished to meet, and forwarded to them a list of the detention facilities, which had been selected so as to allow the Working Group, on the one hand, to return to detention facilities already visited and, on the other, to meet persons whose cases were subjects of an individual communication. This list included police stations, pre-trial detention centres, prisons, re-education though labour camps, and psychiatric hospitals in Beijing, Shangdu and Lhasa.

9. Thus, the 2004 mission to China had a follow-up character, the Working Group holding meetings with the officials of the same ministries, departments, institutions, and with representatives of the same judicial organs as in 1997. Moreover, it visited, with the exception of Shanghai, the same cities and, with some minor exceptions, the same detention facilities as in 1997. Therefore, in contrast to other visits conducted by the Working Group in countries which it visits for the first time, this visit focused on developments that have taken place since its visit in 1997. As part of this follow-up, the Working Group sought, during its visit to ascertain to what extent, if any, the recommendations contained in its report on its previous visit had been adopted.

10. Despite efforts to adopt a mutually agreed programme for the visit before the Working Group's departure, the agenda could only be finalized after members of the delegation had arrived in Beijing. Thanks, however, to the coordinated efforts of the Working Group and the Chinese Ministry for Foreign Affairs, in particular its dedicated staff in the International Organizations and Conferences Department, acting under the helpful direction of the Special Representative on Human Rights of the Ministry for Foreign Affairs, Mr. Shen Yongxiang, most of the difficulties could be overcome.

11. The Working Group is pleased to emphasize that the local authorities, and first of all the staff members of detention facilities, have changed their attitudes to visits by the Working Group. This time, they adapted themselves much better to the culture of cooperation, including the acceptance of the Working Group's methods of work. With one exception, the Working Group could meet prisoners of its own choosing and could hold interviews with them in full respect of its methods of work and of the prisoners' privacy. The authorities have given proof of great flexibility in many respects. For example, they helped the Working Group to meet with four prisoners on its list who were serving terms in a distant detention facility. These prisoners were brought to a detention facility near Beijing to enable the Working Group to

interview them. Similarly, the authorities helped the Working Group to meet a recently conditionally released prisoner in Lhasa, who was also on the list, but who was living far-away from the Working Group's itinerary. The Working Group acknowledges the flexible attitude of the Chinese authorities in helping to fulfil its mission.

12. In the light of the foregoing, what occurred in Drapchi Prison in Lhasa can be considered, the Working Group hopes, an unfortunate and isolated incident.

13. When it visited that detention facility, the Working Group expressed its wish, as on the occasion of its previous prison visit, to interview inmates of its own choosing. Similarly, it insisted in meeting those detainees whose names were on the list handed over to the Chinese authorities at the beginning of the visit. The administration of Drapchi Prison, however, referring to the internal prison regulation prohibiting any foreigner from visiting prisoners exhibiting violent behaviour and prisoners whose re-education would be in jeopardy if he/she met with foreign visitors, as well as prisoners in possession of State secrets, denied access to the detainees to be selected by the Working Group. Therefore, the Working Group stopped its visit and left Drapchi Prison.

14. The Working Group wishes to express its dissatisfaction with regard to this incident. It is unacceptable that a Member State should impose limitations on human rights mechanisms under the pretext that their members are "foreigners".

15. Without attaching paramount importance to this incident, which was partly remedied by measures taken promptly by the authorities (e.g. to arrange a meeting with a recently released Buddhist nun and by giving detailed information concerning a number of detained prisoners who were the subject of individual communications submitted to the Working Group, some of whom were recently released from detention), the Working Group recommends to the Chinese authorities that they properly re-examine the regulations governing access of relevant United Nations mechanisms to prisoners of their own choosing.

III. NEW DEVELOPMENTS REGARDING THE CONSTITUTIONAL AND LEGAL FRAMEWORK IN AREAS COVERED BY THE MANDATE OF THE WORKING GROUP

16. According to information provided by the host authorities, legislation pertaining to the judicial organization and the legal framework governing judicial and administrative deprivation of liberty has not undergone basic changes since the Working Group's last visit. An analysis of the laws accessible through the Internet, such as the Constitution, the Criminal Procedure Law, the Judges Law, the Public Procuratorates Law and the Administrative Procedure Law,[1] supports this information. The provisions of these laws relevant to deprivation of liberty are discussed in detail in the report on the Working Group's previous visit to China. For reasons of time and space, the Working Group does not consider it necessary to include the same information again in the present report. It notes, however, that the information concerning the legislation presented in the 1998 report would prove useful for a better understanding of how the legal framework to protect individuals against arbitrary deprivation of liberty has evolved in China since the Working Group's last visit.

17. As a consequence, the present report concentrates on developments in areas covered by the Working Group's mandate. A new and important development is that on 5 October 1998, China signed the International Covenant on Civil and Political Rights and is making preparatory steps for its ratification. This development sheds a new and favourable light on China's commitment to enhance the protection of human rights in general and, in particular, on the approach of the Chinese authorities to the legal regulation pertaining to deprivation of liberty, as well as the implementation of the relevant laws.

18. The new approach of the Chinese authorities is also shown by recent constitutional amendments.

19. Since the last visit of the Working Group to China, three major legislative changes have been made:

(a) In 1999, an amendment enshrined in the Constitution the principle of the rule of law, which had been established as a principle of governance by the 15th Congress of the Chinese Communist Party;[2]

(b) In 2000, the NPC enacted the Legislation Law, a statute intended to standardize China's law-making process and define the boundaries of legislative power. Under this law, only the NPC and, in some cases, its Standing Committee can pass legislation on matters relating to the structure of State organs, the criminal justice system, and the deprivation of the personal freedom of citizens. Before the Legislation Law was enacted, the State Council (Government branch) was empowered with a wide mandate to regulate;

(c) On 14 March 2004, the NPC amended the Constitution by adding the provision: "The State respects and safeguards human rights", providing for the first time in Chinese history a constitutional protection of human rights. The Working Group has been told that for a long time, human rights had been considered taboo and regarded as a slogan of the bourgeoisie. Enshrining human rights in the Constitution is therefore a matter of major importance and a milestone in the move to promote and protect human rights. The most recent constitutional amendment further enshrined the principle of the inviolability of private property.

20. The Working Group was informed that as a consequence of this decision the Criminal Law, the Criminal Procedure Law and the legal framework governing administrative detention are under consideration by the NPC Standing Committee to bring them into line with the new provisions of the Constitution.

IV. ANALYSIS OF CERTAIN ASPECTS OF THE LEGAL FRAMEWORK CONCERNING DEPRIVATION OF LIBERTY

21. The Working Group recalls that after its first visit to China, it reported on the organization of the judiciary, the characteristics of the Chinese legal system and the criminal justice system and, in particular, the legal framework governing deprivation of liberty. The Working Group had examined the reforms of the Criminal Procedure Law and of the Criminal Law introduced in 1996 and 1997 respectively, and had noted that the reforms were inspired by the principle of the rule of law and tended to improve the protection of human rights in the

criminal justice system. In its appraisal, the Working Group had also identified shortcomings and made recommendations aimed at bringing criminal law and criminal procedure into compliance with international standards.

22. On the basis of the understanding it has accumulated during its two previous visits, the Working Group is now able to make a more in-depth appraisal of the legislation governing deprivation of liberty in China.

A. The revised Criminal Law

23. The Working Group had identified three matters of concern: the lack of a precise definition of the concept of "endangering national security", which is applied to a broad range of offences, the criminalization of contacts and exchange of "classified" information with individuals, institutions or organizations based abroad, and the danger posed to the freedom of expression by the punishment of "control", a measure introduced in order to reduce the inmate population. The Working Group recommended that the crime of "endangering national security" be defined in precise terms and an exception be introduced into the Criminal Law to the effect that the peaceful activity in the exercise of the fundamental rights guaranteed by the Universal Declaration of Human Rights is not considered criminal.

24. There is no doubt that since then progress has been made, but as far as the criminal law is concerned, the situation has unfortunately not evolved and the recommendations of the Working Group have not been put into effect. The Working Group continues to receive individual communications confirming that its concerns were well founded.

25. The Working Group has been informed that since its last visit, dozens of interpretative regulations on the Criminal Law and on the Criminal Procedure Law have been issued by the Supreme People's Court, the Supreme People's Procurator, the Ministry of Public Security, the Ministry of Justice and local authorities. These regulations sometimes incorporate conflicting rules that allow for an arbitrary application of the law, especially as concerns State secrets and State security. In this respect, while visiting the Drapchi Prison in Lhasa, the Working Group learned with concern that the prison authorities can, irrespective of the decision of the court on this point, classify inmates convicted for endangering national security as holding State secrets and impose on them restrictions resulting from that classification.

26. The Working Group reiterates its previous recommendations and invites the authorities to take them into account in the course of the ongoing reform process.

B. The revised Criminal Procedure Law

27. While it is true that the 1996 reform constitutes a qualitative evolution as compared with the previous Law, it nonetheless appears that in certain aspects it is not in conformity with the relevant international instruments, in particular with the provisions of the International Covenant on Civil and Political Rights, which China signed and is preparing to ratify. Several aspects deserve to be reconsidered in the course of the ongoing reform process.

C. Judicial deprivation of liberty

28. Under international law, a person detained on a criminal charge shall be promptly brought before a judge or other judicial officer authorized by law to exercise judicial power, and shall within a reasonable time be entitled to trial or released. This requirement, which is spelt out in clear terms in article 9, paragraph 3, of the International Covenant on Civil and Political Rights, reflects the generally accepted standard of customary international law, irrespective of whether a State is a party to the Covenant.

29. Under Chinese law, the police (the public security organ) may detain a criminal suspect without formal charges for 24 hours, which can be extended with the approval of the procurator for a period of up to 7 days, and in exceptional cases to 37 days (articles 60 to 76 of the Criminal Procedure Law). Even though the law is silent on whether, for the purpose of the approval of the extension of the detention, the suspect has to be brought before the procurator, from the interviews conducted by the Working Group with detainees it is clear that, as a rule, the procurator does not hear the suspect in person.

30. After the expiry of the statutory deadline for detention without charges, the procurator has the prerogative to decide on the arrest (*daibu*), which equates with pre-trial detention in some other legal systems, of the suspect. Here again no hearing of the suspect by the procurator is required by law prior to this decision (art. 59). The detained persons with whom the Working Group conducted interviews had all not been heard by the prosecutor at that stage of their detention.

31. The maximum statutory length of pre-trial detention during investigation is two months, with a possible extension of an additional month (art. 124). Under certain conditions, e.g. if the case is serious and complex, involves criminal gangs, or the offence was committed in different areas, a further extension amounting altogether four months is possible (arts. 126 and 127).

32. To assess the conformity of this system of arrest/pre-trial detention with international standards, three issues have to be addressed: firstly, the "promptness" requirement, secondly, the "bringing" requirement and thirdly, the status of the judicial officer (i.e. the procurator) taking a decision on arrest:

(a) As to the first issue, the Working Group believes that the holding of a person in police custody for more than four to five days is problematic under the requirement of promptness. Even though, according to the law, the approval of the procurator is necessary to hold the suspect in detention beyond 24 hours, this approval is apparently taken on the basis of the case file, without hearing the suspect in person;

(b) As to the second issue, it is the view of the Working Group that the decision by the procurator to approve the suspect's arrest pending investigation, if taken, as the Working Group was informed, without the procurator hearing the suspect does not satisfy international standards. The rationale behind the requirement that the person in custody shall be *brought* before a court or a judicial officer is that before taking a decision on his arrest, the suspect shall be given an opportunity to argue against this decision;

(c) As to the third issue, the Working Group doubts that the status of the procurator as regulated by law in China fulfils the requirement of independence of an officer authorized by law to exercise judicial power. This opinion of the Working Group is suggested by the constitutional provision (art. 132) stipulating that the Supreme People's Procuratorate directs the work of the local people's procuratorates at different levels, and the people's procuratorates at higher level direct the work of those at lower level. A similar provision is contained in article 5 of the Public Procurators Law. As a result of this hierarchical subordination of the organs of prosecution, procurators are bound by the orders of their superiors. In the absence of any unambiguous provision stating that individual procurators are independent in exercising their power to take decisions in pre-trial detention matters, procurators do not meet the criteria of an officer authorized by law to exercise judicial power within the meaning of article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

D. Supervision of the People's Procuratorates over the courts

33. According to the Criminal Law and the Criminal Procedure Law, the People's Procuratorates supervise judicial activities undertaken by courts in handling civil, criminal and administrative cases. The Working Group was told that procurators at criminal trials not only prosecute the cases, but supervise the proceedings. In addition, prosecutors are empowered to protest rulings or judgements on criminal cases issued by courts. The Working Group was informed that if the procurator lodges a protest, the court must retry the case.

34. This situation - placing the judiciary in a position of inferiority vis-à-vis the prosecution, is manifestly incompatible with relevant international norms. The prosecution is a party to the proceedings; it brings the charges and argues them before the court. It cannot at the same time be judge and party and remain impartial. It is for the court to guarantee to all parties to the proceedings, including the prosecution, the respect of the principle of legality - and not the other way round.

E. The restrictions on the right to defence

35. In the course of a meeting with representatives of the Bar Association, the Working Group was informed that as far as the rights of the defence are concerned, the 1996 reform does not constitute, in certain respects, progress as compared with the previous legal framework, but is even a step back. During the entire pre-trial phase, access to the case files by the defence counsel has been excessively restricted. Defence lawyers only have access to a certain amount of documents of a technical character, while they cannot review the documents and other evidence relating to the facts of the case before the opening of the trial (article 36, Criminal Procedure Law).

36. Where the case concerns charges of endangering State secrets, the rights of the defence are even further restricted. Under article 96 the right of the accused to be represented by a counsel of his own choosing as from the first hours of detention and the right of the lawyer to meet his or her client are subject to a preliminary authorization by the authorities in charge of the investigation. In practice, this provision appears to give rise to numerous abuses, either because the notion of State secret is not defined with sufficient precision, or because it is interpreted in an extensive manner.

37. The second paragraph of article 96 provides that when the defence counsel meets a detained client, the authorities in charge of the investigation can, in view of "the serious nature of the crime and when it deems it necessary", impose the presence of a representative of the "investigative organ" at the meeting. This provision is manifestly incompatible with article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights.

38. Finally, article 306 of the Criminal Law makes "a defender or agent ad litem" who destroys or fabricates evidence, or forces or incites a witness to change his or her testimony or to commit perjury punishable by a sentence of up to seven years of imprisonment. Article 38 adds to this provision by making "interfering with the proceedings before judicial organs" an offence. It appears that these provisions have occasionally been used to intimidate, harass, or sanction lawyers who made use of their freedom of expression in order to defend their clients before the courts.

F. Administrative deprivation of liberty

39. Since the late 1950s, China has known different forms of administrative detention, which have allowed people to be detained for long periods without charge or trial outside the criminal justice system. Individuals held in administrative detention are not entitled to the safeguards for criminal suspects enshrined in the Criminal Procedure Law. In 1996, the Law on Administrative Penalties was adopted and came into force; it regulates the system of administrative sanctions, including administrative detention.

40. Forms of administrative detention still in force include the following:

- Re-education through Labour, (*laodong jiaoyang*);
- "Custody and education" of prostitutes and clients implemented by law enforcement, in accordance with the decision of the Standing Committee of the NPC on "Strictly Prohibiting Prostitution and the Visiting of Prostitutes", which foresees detention for periods ranging between six months and two years (*shourong jiaoyang*);
- The State Council "Methods of Forced Detoxification", adopted on 12 January 1995, which allow local Public Security Bureau officials to commit, for three to six months, a drug user to a forced detoxification centre (*qianzhi jiedu*);
- Administrative detention under the 1997 Law on Administrative Penalties (*xzingzheng juliu*);
- Work Study Schools (*gongdu xuexiao*), implemented to correct what is described in the Law on Preventing Juvenile Delinquency adopted on 28 June 1999 as "Seriously unhealthy behaviour that seriously harms society but does not qualify for criminal punishments".

41. According to other sources, another form of "extrajudicial" detention known as *shuang gui* ("two designated", also known as "*liangzhi*" or "*lianggui*") is still implemented. In these cases, Party authorities or supervision departments can interrogate persons suspected of corruption at a "designated" place and a "designated" time. This is regulated in the 1997

Administrative Supervision Law and the 1994 Party document "CCP Disciplinary Organs' Working Regulations on Case Investigation". Public Security also have the power to commit individuals to psychiatric facilities called *ankang* ("Peace and Health").

42. During its visit, the Working Group was not able to study all the above-mentioned forms of administrative deprivation of liberty; it concentrated its attention on Re-education through Labour, which is currently the most controversial form of non-judicial deprivation of liberty. In addition, for the reasons described below, the Working Group was also interested in questions related to the forcible holding and treatment in psychiatric institutions of persons of unsound mind.

G. Re-education through Labour

43. Re-education through Labour involves detention without trial or charge. The decision is supposed to be made by an Administrative Committee made up of officials from the bureaux of civil affairs, public security, and labour. In practice, however, public security officers dominate the decision-making process.

44. In its first report, the Working Group focused particularly on the re-education through labour system and pointed out the risks this form of deprivation of liberty involves for the enjoyment of fundamental rights. In its recommendations, the Working Group suggested the incorporation into the law of a categorical declaration that re-education through labour cannot be imposed on anyone for exercising his or her fundamental freedoms protected under the Universal Declaration of Human Rights, and to subject this measure to prior control by a judge, without thereby depriving it of its administrative character. (E/CN.4/1998/44/Add.2, para. 95.)

45. Returning to China seven years later, the Working Group found that the measure of re-education through labour still raises concerns, although important decisions have been taken and improvements made. The Working Group notes that since the 1996 reform, new guarantees have improved administrative detention and re-education through labour institution. Detention decisions may be challenged through a number of channels, including administrative litigation before a judge; administrative review and administrative supervision. And people liable to administrative punishment now also have the right to defend themselves.

46. In January 2003, new regulations reinforcing the effectiveness of the administrative and judicial procedures to challenge re-education through labour measures were introduced. In June 2003, the most disputed form of administrative detention, "custody and repatriation", was abolished. The Working Group also noted that, both within the civil society and within the institutions, the debate on the reform of the re-education through labour system has evolved considerably. At the institutional level, however, the system is still defended. It is argued that re-education through labour is rooted in Chinese society and that it has the advantage of avoiding petty and first-time offenders being given prison sentences and thereby having permanent criminal records.

47. The experiences the Working Group gathered through interviews conducted with inmates in the re-education through labour centres and prisons that it visited are, however, different. Some detainees in the labour centre clearly stated that instead of being sent, as an administrative measure, to a re-education through labour camp, they would have preferred to go through the

criminal justice system and be sentenced to a prison term, despite the obvious drawbacks (e.g. a criminal record). They explained that the lack of a fixed term for their detention - three to four years in a centre - made prison preferable. Similar views were expressed by other prisoners who told the Working Group that they would prefer being in prison rather than in a labour camp. However, other detainees did voice different views to the Working Group.

48. The Working Group recalls that a significant number of organizations defending human rights, both in China and abroad, challenge the re-education through labour system and demand its abolition. Several sources assert that it is used to suppress freedom of expression. Some sources highlight that certain groups are over-represented in this system, such as followers of Falun Gong, drug addicts, sex workers and those living off their earnings. According to Tibetan activists, the Chinese authorities have been increasingly using the labour camps to punish Tibetans for political reasons. It was precisely in order to remove all possible doubts in this respect that the Working Group asked that the law clearly state that this measure is not applicable to persons exercising their fundamental freedoms protected under the Universal Declaration of Human Rights. The present mission allowed the Working Group to better analyse the legal framework for the re-education through labour system and to better evaluate the merits attributed to it and the objections made against it.

49. Re-education through labour has been practised for about 50 years. According to the Chinese authorities, it is imposed as punishment for actions that fall between a crime and a simple error. It is based on a State Council decision approved in 1957 by the Standing Committee of the NPC, albeit without fixed terms. On 29 November 1979, the terms of the system were fixed by a State Council decision approved by the NPC Standing Committee for periods of up to three years, with a possible extension of one year. On 21 January 1982, the Ministry of Public Security, which is in charge of its implementation, issued its first set of comprehensive regulations, which were approved by the State Council. These regulations stipulated the procedure for deciding on this type of sentence, detailed the categories of people punishable under it and allocated responsibilities for the administration of these facilities. Following the enactment of these regulations, in May 1983 the management of re-education through labour facilities was handed over to the Ministry of Justice, while the Ministry of Public Security retained the authority to decide who should be punished under the regulations.

50. In examining article 10 of the 1982 regulations, which is the only body of law defining the categories of persons that can be subjected to re-education through labour, one observes that the points of criticism are not devoid of foundation. This article identifies the following six categories of petty offenders as not deserving criminal sanctions:

(a) Counter-revolutionaries or elements who oppose the Communist Party or socialism;

(b) Those who commit minor offences relating to group crimes of murder, robbery, rape and arson;

(c) Those who commit minor offences such as hooliganism, prostitution, theft, or fraud;

(d) Those who gather together to fight, disturb social order, or instigate turmoil;

(e) Those who have a job but repeatedly refuse to work, and disrupt labour discipline, complain endlessly, as well as disrupt the production order, work order, school and research institute order and people's normal life;

(f) Those who instigate others to commit crimes.

51. The Working Group notes that article 10 makes use of outdated terminology and is in conflict with the legislation adopted since 1996 within the framework of the reforms. In this regard, the Working Group draws attention to the law of 1 October 1996 concerning administrative sanctions, and especially to its article 9, which reads: "Administrative penalty involving restriction of freedom of person shall only be created by law". The Legislation Law adopted in 2000 contains similar provisions.[3] Thus, these two laws require that, to be lawful, any measure like re-education through labour to be authorized by a law, a term specifically referring to legislation passed either by the NPC or its Standing Committee (articles 62 (3) and 67 (2) of the Constitution). However, the offence and the categories of persons subject to this administrative sanction are only defined by the above-mentioned 1982 regulation issued by the Ministry of Public Security; the above-mentioned decisions of the State Council of 1957 and 1979 do not establish to whom re-education through labour can be applied. The Working Group also notes that all provisions of a legislative nature concerning administrative detention enacted since 1996 limits the duration of administrative detention to a maximum of 15 days.

52. Under international law, anyone deprived of his/her liberty by arrest or detention shall be entitled to proceedings before a court so that the court may decide, without delay, on the lawfulness of the detention and order the person's release if the detention is not lawful. This requirement, which is spelt out in clear terms in article 9, paragraph 4, of the International Covenant on Civil and Political Rights, reflects the generally accepted standards of customary international law, irrespective of whether a State is a party to the Covenant.

53. In response to the critical remarks made by the Working Group during its conversation with the host authorities concerning the lack of judicial review of placement in re-education through labour institutions, the Chinese authorities put forward the following two arguments. Firstly, re-education through labour is governed by administrative, not by criminal law, hence a decision to place someone in such an institution does not have a criminal law character. As a consequence, the involvement of a judge in the decision is not necessary. Secondly, they explained that even if the law does not provide for the involvement of a judge in decisions to send someone to such an institution, avenues, including judicial ones, are available against such decisions. The Working Group disagrees with both arguments.

54. Firstly, it is uncontested that irrespective of the legal qualification given to detention in such institutions by Chinese law, the system of re-education through labour involves deprivation of liberty. International law provisions and standards referred to above require that everyone deprived of his/her liberty should be given an opportunity to contest *before a court* the lawfulness of the detention. In this context, lawfulness means conformity with domestic law and international standards. The fact that the legal system of China classifies re-education through labour as an administrative deprivation of liberty as opposed to judicial deprivation of liberty governed by criminal law, does not affect China's obligation to ensure judicial control over this form of deprivation of liberty.

55. Secondly, article 10 of the 1982 regulations itself considers some of the behaviours sanctioned by placement in re-education centres as criminal in nature. Even if the Chinese authorities might be led by the good intention to provide a milder system of sanctions for petty criminals, the result of removing them from the criminal system is ultimately that they are stripped of the guarantees surrounding criminal procedure.

56. Thirdly, the Working Group is of the view that the arguments of the Chinese authorities, namely that there exist judicial avenues to challenge administrative decisions in a re-education through labour camp institution are, in the light of what happens in reality, of very little value.

57. In fact, relevant laws provide detailed rules on how the decision-making procedure to place someone in a re-education through labour institution shall be conducted. The legal framework for such decision-making seems to reflect the international standards of due process of law: the administrative procedure is public, the individual concerned has to be heard, he/she is given the opportunity to put forward a defence, legal counsel can apparently represent him/her, and the authority shall issue a reasoned decision. The decision of the authority is subject to judicial review.

58. The operation of the laws governing decision-making on placement in a re-education through labour camp is, however, highly problematic. From reliable sources, including interviews with persons affected, it is clear that in the overwhelming majority of cases, a decision on placement in a re-education centre is not taken within a formal procedure provided by law. The commission vested with the power to take this decision in practice never or seldom meets, the person affected does not appear before it and is not heard, no public and adversarial procedure is conducted, no formal and reasoned decision on a placement is taken (or issued for the person affected). Thus, the decision-making process completely lacks transparency. In addition, recourse against decisions are often considered after the term in a centre has been served.

59. For this reason, the Working Group concludes that no effective judicial review against placement in re-education through labour camps is available.

H. Deprivation of liberty of mentally ill people

60. The Working Group views with particular concern cases of deprivation of liberty of mentally ill or disabled people. This particular interest led the Working Group to use the opportunity of its visit to China to become acquainted with the legal framework and practice in this area. The current legal framework can be summarized as follows.

61. There is no uniform legislation at the national level on forcible admission and holding in mental health institutions. Some provisions exist in some autonomous regions and provinces, but these regulations vary from province to province and lack consistency.

62. The decision to deprive someone of his/her liberty by placing him in a mental health institution against his/her will, as well as to release him/her, seems to be in the hands of psychiatrists employed by the mental health institutions. No genuine avenue is available to challenge such a decision before an outside and independent body.

63. For offenders whose accountability is diminished or who are not liable because of their mental state, there are some 23 mental health institutions nationwide, run by public security organs (Ministry of the Interior). Before the cases are sent to a court, the decision to transfer suspected criminals to such institutions as well as to release them lie exclusively with the public security organs, without an effective remedy available to the patient.

64. The Working Group is of the opinion that the Chinese system of confinement of mentally ill persons in mental health facilities, which they are not allowed to leave, is to be considered a form of deprivation of liberty, since it lacks the necessary safeguards against arbitrariness and abuse. One of the reasons why repeated criticisms are directed against the Government of China alleging that mental health institutions are used to intimidate and punish political opponents is the lack of transparency. The Working Group believes that it is in the best interest of the Government to review its legislation and practice concerning the deprivation of liberty of allegedly mentally ill people in the light of international law and international standards. As emphasized above, international law requires that everyone deprived of his/her liberty on any ground, including health grounds, be able to challenge before a court the lawfulness of the detention.

65. The draft law on mental health, about which the delegation of the Working Group was informed, is encouraging in this aspect. If adopted, it will regulate in a uniform manner across the whole country the holding against their will of mentally ill persons in mental health institutions. Secondly, patients hospitalized on suspicion of being mentally ill must be examined by two psychiatrists without delay. Only if both of them agree that the patient's confinement in the mental health institution is absolutely necessary, and in the patient's or the community's interest is the forcible holding and compulsory treatment decided. After his/her admission, certified psychiatric doctors shall regularly assess the patient's mental situation, and the patient shall be immediately released if his/her mental health does not require further treatment or stay in the institution.

66. The Working Group believes that the adoption of the new mental health law would be a positive step forward. Judicial review of the lawfulness of a patient's deprivation of liberty should, however, be made possible, if the patient so requests.

V. CONCLUSIONS

A. Positive aspects of developments since the Working Group's last visit

67. The Working Group expresses its deep satisfaction that China has signed the International Covenant on Civil and Political Rights and that preparations are being made for the ratification of the Covenant. The Working Group is confident that as a result, the requirements of international law pertaining to deprivation of liberty will be better reflected in the Chinese legal system.

68. The Working Group attaches great importance to the decisions taken recently on the political level to further reinforce and develop the protection of human rights in China. As a consequence of this decision, the Constitution has been complemented by a provision granting constitutional rank to the protection of human rights and fundamental freedoms. Together with

the constitutional provision already in force stipulating that China is a State governed by the rule of law, this constitutional provision will surely lay the foundation for a more effective legal framework for the protection of human rights in China.

69. The Working Group welcomes the fact that in the spirit of the recent political and constitutional decisions, the following issues are being examined by the National People's Congress as possible matters for new legislation or legislative amendments:

- That the State governed by the rule of law requires that all arrests by the public security organs should be ordered on the basis of more solid evidence than is currently the case;

- Limitation of the length of detention and the introduction of alternative measures to detention, and reinforcement of the defence lawyers' participation in criminal proceedings, including their immediate involvement after arrest;

- Compulsory recording of the questioning by the police of the suspected person, in order to eliminate the possibility of coercion by investigators;

- Inadmissibility of evidence gathered under duress;

- The right to silence of the person charged;

- More efficient methods to ensure the appearance and testimony of witnesses, through, inter alia, the reimbursement of their travel expenses and other financial losses they may suffer.

70. The Working Group welcomes the information that the National People's Congress wishes to put on its agenda the reconsideration of the current legal framework for the system of re-education through labour. According to a representative of the NPC whom the Working Group met, the main weak points of the current regulation are the unduly long duration of this measure, which needs to be reduced, and the lack of an effective remedy against the decision of the authority to assign re-education through labour.

71. The Working Group was informed that the question of including in the criminal law legislation a provision that clearly reflects the principle of the presumption of innocence is being discussed. The Working Group welcomes this initiative, which would constitute the implementation of a recommendation it has made previously.

72. The Working Group is especially satisfied that certain improvements made in the places of detention it had previously visited are, in part, attributed to the recommendations made during its previous visit. It also noted that the Government has allocated important financial resources to the improvement of the conditions of detention, and the good practices introduced to better protect the rights of the detainees.

B. Areas of concern

73. None of the recommendations that the Working Group formulated in its earlier report have been followed. No definition of the term "endangering national security" in criminal law was adopted, no legislative measures have been taken to make a clear-cut exemption from criminal responsibility of those who peacefully exercise their rights guaranteed in the Universal Declaration of Human Rights, and no real judicial control has been created over the procedure to commit someone to re-education through labour.

74. The rules and practice concerning judicial deprivation of liberty are not in keeping with international law and standards. The holding period in police custody of criminal suspects without judicial approval is too long, and the status of the procurator called to approve arrest pending investigation does not meet the requirements of an officer authorized by law to exercise judicial power. In addition, since the procurator is a party in the criminal proceedings, he lacks the requisite impartiality to take decisions in matters relating to arrest.

75. There exists no genuine right to challenge administrative detention, including detention for the purpose of re-education through labour and psychiatric confinement. The avenues to challenging placement in re-education institutions do not satisfy international law requirements.

76. As no law provides a clear definition of "State secrets", the Working Group is concerned about the restriction on the right to defence imposed by regulations issued by public security departments, prison administration or prosecutors when a case involves State security or State secrets.

VI. RECOMMENDATIONS

77. **The Working Group welcomes the commitment of China to human rights, reflected in a newly adopted constitutional provision declaring the paramount importance China attaches to human rights protection. The Working Group believes that the best way to demonstrate this commitment would be an early ratification of the International Covenant of Civil and Political Rights.**

78. **In the spirit of assisting China to improve the system of protection against arbitrary detention, the Working Group makes the following recommendations:**

(a) Laws governing criminal detention should be reconsidered. Either the procuratorates empowered to take decisions on arrest should be vested with the requisite independence in order to meet the criteria of a judicial officer authorized by law to exercise judicial power, or the power to order or approve arrest should be shifted from the procuratorate to courts;

(b) In all cases of administrative deprivation of liberty, an effective right to challenge before a court the lawfulness of the detention and the right to be represented by a legal counsel shall be granted;

(c) Noting with satisfaction that high-level political decisions have been taken to review the system of re-education through labour, the Working Group believes that the minimum requirements for complying with international standards are the following:

(i) All acts giving rise to re-education through labour should be clearly provided by law;

(ii) Due process requirements - e.g., the personal appearance before and hearing of the individual concerned by the competent body, the opportunity to put forward his/her arguments against being sent to a re-education through labour facility, the right to be represented by legal counsel, the right to appeal against unfavourable decisions and the like - should be provided by law and scrupulously implemented in each case;

(iii) If the person so wishes, a genuine review of his case should be made by a court;

(iv) The time one can spend in re-education through labour centres should be considerably reduced;

(v) The system of re-education through labour should never be used to punish the peaceful expression of one's opinion or belief;

(d) Conditions of the admission against his/her will and the forcible holding of people who are allegedly mentally ill or for detoxification shall be meticulously provided by law. Bearing in mind the vulnerable situation of mental health patients, that law shall prescribe effective safeguards against arbitrariness. Courts shall be vested with competence to review, upon request, the legality as well as the necessity of keeping someone against his/her will in a mental health institution;

(e) Persons charged often invoke their freedom of opinion, expression, religion or belief, freedom of association or assembly, or the right to take part in the conduct of public affairs of the country as a legal basis for their conduct and exempting them from criminal responsibility. The Working Group recommends that the question - to which of the conflicting interests shall priority be given - shall be decided after careful consideration of all the relevant circumstances, giving proper weight to the rights of the individuals. Definitions in criminal law legislation having such vague, imprecise or sweeping elements like "disrupting social order", "endangering national security", "violating the unity and integrity of the State", "subverting public order", "affecting national security" and the like shall not be used to punish the peaceful expression of the rights and freedoms that the Declaration of Human Rights grants to everyone.

Appendix

LIST OF PERSONS IN DETENTION

During its visit to China, the Working Group on Arbitrary Detention requested to receive information on the current legal and personal situation of several persons in detention in China. The Working Group was able to meet the following: **Li Chang, Wang Zhiwen, Ji Liewu, Yao Jie** and **Phuntsok Wang** (**Phuntsok Legmon Namdrol)**.

During the Working Group's visit, the Government submitted information concerning the following individuals:

1. **Huang Qi**. On 9 May 2003, he was sentenced by the Chengdu Intermediate Level People's Court to five years' imprisonment for the crime of inciting subversion of the political authority of the State. On 7 August 2003, the Sichuan Supreme People's Court upheld the verdict. He is currently serving his sentence in the Chuanzhong prison in Sichuan Province;

2. **Ouyang Yi**. This person was found guilty of inciting to overthrow the State power under article 105 of the Criminal Law. He was arrested on 7 January 2003 and sentenced on 13 August 2003 by the People's Intermediate Court of Sichuan. He is currently serving his sentence;

3. **Zhao Changqing** was arrested on 25 December 2002. On 17 July 2003, the Xi' an Court found him guilty of incitement to subvert State power under article 105 of the Criminal Law. He was sentenced, according to the law, to five years' imprisonment and three years of deprivation of his political rights;

4. **Xu Wenli**. He was released on medical parole. In December 2002, he was authorized to travel to the United States of America for medical treatment;

5. **Li Ling**. On 4 November 2002, the Jinzhou Intermediate People's Court found her guilty of using an illegal group to undermine law enforcement and confirmed her previous sentence of four years' imprisonment;

6. **Pei Jilin**. On 18 June 2002, the Jilin Municipal Re-education Through Labour Management Committee assigned him to two years' re-education, on account of his unlawful activities disrupting the social order;

7. **Liu Xianbin**. On 7 August 1999, the Zhuning City Intermediate People's Court sentenced him to 13 years' fixed-term imprisonment and stripped him of his political rights for three years, for the offence of subverting the authority of the State. He is currently serving his sentence in Chuandong Prison.

8. **Li Bifeng**. On 28 April 1998, the Mianyang City People's Court sentenced him to seven years' fixed-term imprisonment for the offence of fraud. He is currently serving his sentence in Ya' an prison.

9. **Wang Wanxing**. He was found in Beijing Tiananmen Square in June 1992 disturbing public order. He accepted to be put under medical treatment at Ankang Psychiatric Hospital in Beijing. In June 2002, the judicial psychiatric appraisal division of the Ankang Hospital confirmed that Wang Wanying had been suffering paranoia. His activities in violation of the law were attributable to his loss of self-control and his state of delusion. Consequently, no criminal responsibility was found for his behaviour. Mr. Wang Wanying is currently receiving the necessary medical treatment according to his wishes.

10. **Jigme Gyatso**. On 25 November 1996, the Lhasa Municipal Intermediate People's Court found him guilty, under articles 98, 102, 51, 52, 22, 23 and 24 of the Criminal Law, of planning to found an illegal organization and seek to divide the country and damage its unity and sentenced him to 15 years' imprisonment and deprivation of political rights for five years.

11. **Phuntsok Wang**. This person is currently serving his sentence in the Tibet Autonomous Region prison; and

12. **Ngawang Sandrol**. She was punished not because she held political views different from those of the Government but because she violated the criminal law by engaging in certain activities which endangered the security and unity of the State. She realized the seriousness of her crime and was released in 2003. She is currently living in the United States of America.

After the Working Group's visit, the Government submitted information on the following persons, who are serving their sentences: **Liu Huo; Yang Jianli; Zhong Bo; Liu Qihua; Zhang Jiuhai; Wang Bingzhang; Tenzin Choewang; Sey Khedup; Tserin Lhagon; Yeshi Tenzin; Thraba Yeshi; Ngawang Tsultrim; Nyima Dhakpa; Wei Yuejuan; Xiao Yunliang; Rebiya Kadeer; Li Chang; Wang Zhiwen; Ji Liewu; Yao Jie and Tohti Tunyaz**.

The Government further reported that **Yue Wu** and **Zhang Qi** were released from residential surveillance by the Guangdong public security authorities. **Chen Gang** completed his re-education in December 2001 and was released. **Liu Li** has now completed her re-education. **Wu Xiaohua** was released on 29 June 2003. **Gai Shuzhi** completed her re-education and was released on 8 January 2003. **Zhu Xiaodei** was released on 25 May 2004. **Tang Xitao** was released from labour re-education on 14 May 2002. **Zhao Ming** completed his re-education and was released on 12 March 2002. **Jiang Qisheng** was released on 17 May 2003.

The Working Group also requested information on the following individuals, without receiving so far any information from the Chinese Government: **Di Liu, Zhang Wenfu**, **Liu Junhua**, **Gurmey**, **Cao Maobing**, **Han Yuejuan**, **Yang Chanrong, Yao Fuxin**, **Yuhui Zhang**, **Zhou Guoqiang**, **Xue Deyun**, **Xiong Jinren**, **Ngawang Choephel** and **Wang Youcai**. The Government reported that despite thorough inquiries by all ministries, it has been unable to find any further details on these persons.

Notes

[1] www.chinacourt.org.

[2] The 15th Congress of the Chinese Communist Party has established the rule of law as the fundamental principle for governance of the country and called for judicial reform.

[3] Under the Legislation Law, only the NPC and its Standing Committee can pass legislation on matters relating to the criminal justice system and the deprivation of the personal freedom of citizens.
