ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ **E**

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ДОКЛАД РАБОЧЕЙ ГРУППЫ ПО ПРОИЗВОЛЬНЫМ ЗАДЕРЖАНИЯМ

Добавление[*]

ВИЗИТ В КАНАДУ

(1-15 июня 2005 года)

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Резюме

По приглашению правительства Канады Рабочая группа по произвольным задержаниям посетила эту страну в период с 1 по 15 июня 2005 года. Рабочая группа побывала в столице Оттаве, Икалуите, Нувавут; Торонто, Онтарио; Эдмонтоне, Альберта; Ванкувере, Британская Колумбия; и Монреале, Квебек. В этих городах она посетила 12 пенитенциарных учреждений, включая полицейские участки, центры досудебного содержания под стражей, пенитенциарные учреждения для осужденных лиц, пенитенциарное учреждение для молодых правонарушителей и иммиграционные центры приема. В пенитенциарных учреждениях Рабочая группа смогла встретиться и побеседовать наедине с более чем 150 лицами, содержащимися под стражей, ряд которых были выбраны заранее, а большинство - в произвольном порядке в период посещения конкретного учреждения.

В докладе изложены основные соображения в отношении учреждений и норм, регламентирующих порядок содержания под стражей в Канаде, а также несколько более подробно - положения, относящиеся к областям, которые, по мнению Рабочей группы, представляют особый интерес либо как примеры потенциально наилучшей практики, либо как вопросы, вызывающие озабоченность, в сфере как уголовного права, так и режима задержания согласно иммиграционному законодательству. В докладе отмечается, что, поскольку Канада имеет четкую федеральную конституционную систему, многочисленные вопросы, охватываемые мандатом Рабочей группы, входят в компетенцию провинций и территорий и что в этой связи в тех или иных районах, подпадающих под соответствующую юрисдикцию, может складываться разная ситуация.

В докладе учитывается тот факт, что Канада является правовым государством, в котором сильная и независимая судебная система стремится обеспечить справедливое судебное разбирательство и в целом осуществляет жесткий контроль за законностью всех форм лишения свободы. Осуществляемый судебной системой надзор дополняется активной ролью, которую играют юристы в частной практике и неправительственные организации. Рабочая группа также обращает особое внимание на ту роль, которую играют комиссии по рассмотрению процедур отправления правосудия.

Закон о реформе системы назначения наказаний, принятый Канадой в 1996 году, и Закон об уголовном судопроизводстве по делам несовершеннолетних 2002 года предусматривают более широкое применение санкций, не влекущих за собой лишение свободы, и в значительной степени способствовали уменьшению числа заключенных в Канаде. Однако степень чрезмерного представительства коренных жителей в контингенте заключенных, содержащихся в исправительных учреждениях, еще более возросла,

несмотря на то, что в уголовном законодательстве содержатся четкие положения о необходимости учета альтернатив тюремному заключению, в особенности в отношении правонарушителей из числа представителей коренных народов.

В докладе отмечается, что уменьшение числа заключенных сопровождается вместе с тем все более активным обращением к таким действиям, как заключение под стражу до начала судебного процесса. Такая ситуация в несоразмерно большей степени затрагивает такие уязвимые социальные группы, как представители общин коренных жителей и представители меньшинств, неимущие, наркоманы и лица с психическими расстройствами. В докладе приводится описание ряда инновационных мер, таких, как создание специализированных судов и организация программ, которые предназначены для того, чтобы противодействовать этой тенденции.

Рабочая группа также отмечает, что, хотя в Канаде создана тщательно разработанная система оказания правовой помощи по уголовным делам с целью обеспечения гарантированного в конституционном порядке права пользоваться услугами адвоката, на практике эта система не позволяет удовлетворить многие потребности.

Что касается административного задержания согласно иммиграционному законодательству, то в докладе признается тот факт, что, хотя соображения, касающиеся необходимости увеличения степени безопасности, встретили должное понимание в Канаде, задержание лиц, обращающихся с просьбой о предоставлении статуса беженца, и иностранцев по их прибытии в Канаду или ввиду их высылки по-прежнему производится в исключительном порядке. Однако Рабочая группа выражает озабоченность по поводу ряда положений иммиграционного законодательства, регламентирующих задержание лиц, обращающихся с просьбой о предоставлении убежища, и мигрантов. Порядок применения этих положений сотрудниками иммиграционной службы, а также пределы, в которых в соответствии с законом осуществляется судебный надзор за их применением, приводят к тому, что иностранцы неоправданно задерживаются и не могут эффективно оспаривать своего задержания. Рабочая группа также приводит описание практических аспектов задержания иностранцев в соответствии с иммиграционным законодательством, которые в значительной степени затрудняют осуществление процедур оспаривания содержания под стражей: культурные и языковые барьеры, трудности с доступом к услугам адвоката и помощи со стороны НПО, а также их содержание в пенитенциарных учреждениях строгого режима вместе с уголовными преступниками.

И наконец, Рабочая группа выражает серьезную озабоченность по поводу процедуры оформления свидетельства о безопасности. Эта процедура позволяет правительству содержать иностранцев под стражей на протяжении многих лет по подозрению в том, что

они представляют собой опасность для национальной безопасности, не выдвигая при этом каких-либо обвинений в совершении преступления. Судебный надзор за содержанием под стражей осуществляется через чрезмерно длительные промежутки времени и не затрагивает существа вопроса о необходимости содержания конкретного лица под стражей. Возможности лица оспаривать свое содержание под стражей в значительной степени ограничиваются тем фактом, что в интересах защиты конфиденциальной информации ему предоставляются лишь весьма поверхностные сведения о его причинах.

Основываясь на своих выводах, Рабочая группа формулирует предназначенные для правительства рекомендации в таких областях, как несоразмерно высокая доля коренных жителей в тюрьмах, чрезмерное использование такого средства, как заключение под стражу до начала судебного процесса в отношении обвиняемых лиц, входящих в состав уязвимых социальных групп, и неудовлетворенные потребности в юридической помощи. Что касается содержания под стражей согласно иммиграционному законодательству, то Рабочая группа рекомендует внести определенные изменения в законодательство и/или проводимую политику. И наконец, Рабочая группа рекомендует, чтобы содержание лиц, подозреваемых в терроризме, осуществлялось в соответствии с положениями уголовно-процессуального права с сопутствующими гарантиями, а не в рамках иммиграционного законодательства.

Annex

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION VISIT TO CANADA (1 – 15 June 2005)

CONTENTS

Introduction

1. The Working Group on Arbitrary Detention, which was established pursuant to Commission on Human Rights resolution 1991/42 and whose mandate was most recently extended by Commission resolution 2003/31, visited Canada from 1 to 15 June 2005 at the invitation of the Government. The delegation consisted of Ms. Leïla Zerrougui, Chairperson-Rapporteur of the Working Group and head of the delegation, as well as Ms. Soledad Villagra de Biedermann and Mr. Seyyed Mohammad Hashemi, members of the Working Group. 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 the Federal Capital, Ottawa, and the cities of Iqaluit, Toronto, Edmonton, Vancouver and Montréal. During its visit, the delegation met with officials of the Federal, Provincial and Territorial governments, members of the judiciary, representatives of civil society, former detainees, relatives of persons in detention and other individuals. It was able to visit 12 detention centres, and had meetings, in private and without witnesses, with more than 150 detainees.

3. The Working Group would like to express its gratitude to the Government of Canada, to the governments of the Territory of Nunavut and of the Provinces Ontario, British Columbia and Québec, as well as to the Office of the High Commissioner for Refugees, which greatly assisted with the logistics of the visit, and to the Canadian civil society representatives met.

I. PROGRAMME OF THE VISIT

4. The Working Group was able to visit the following detention centres and facilities: in the Territory of Nunavut the Baffins Correctional Centre and the Isumaqsunngittukkuvik (Young Offenders Centre) in Iqaluit; in Ontario the Toronto West Detention Centre, the Rexdale Immigration Holding Centre, the Maplehurst Correctional Complex, and the Vanier Centre for Women; in Alberta the Pê Sâskâtêw Centre in Hobbema, and the Edmonton Institution for Women; in British Columbia the Immigration Holding Facility at Vancouver International Airport, Vancouver Jail, and the North Fraser Pre-Trial Centre; in Québec the Rivière-des-Prairies detention centre, and holding cells of the Service de police de la Ville de Montréal. The Working Group assisted to bail hearings before the Aborginal Peoples' Court, the Drug Treatment Court and the Mental Health Court in Toronto's Old City Hall, as well as to a detention review hearing before the Immigration Division in Vancouver.

5. The Working Group met in Ottawa with representatives of the Department of Foreign Affairs and International Trade, the Department of Public Safety and Emergency Preparedness (including the Royal Canadian Mounted Police (RCMP), the Correctional Service of Canada (CSC) and the Canada Border Services Agency (CBSA)), the Department of Justice, and the Department of Citizenship and Immigration and the Immigration and Refugee Board; in the Provinces it visited and in the territory of Nunavut, the Working Group met with representatives of the departments responsible for policing, the administration of justice and corrections. The Working Group also met with members of the judiciary, both Federal and Provincial, representatives of prosecutor's offices, human rights commissions, and legal aid services.

6. The Working Group also held meetings with representatives of several non-governmental organizations, including the bar associations, relatives of persons in detention and former detainees.

II. LEGAL AND INSTITUTIONAL FRAMEWORK

A. Institutional framework

7. The Constitution of Canada includes two main documents (the Constitution Acts of 1867 and 1982) and a set of unwritten conventions inherited from the British tradition. The focus of the main documents is the division of powers between the Parliament of Canada and the provincial legislatures, and the protection of individual rights and freedoms in the Canadian Charter of Rights and Freedoms, which is part of the 1982 Constitution Act. Canada's political system can be described as a constitutional monarchy, a parliamentary system on the British model, and a representative democracy. Most importantly for the purposes of this Report, Canada's Constitution creates a federal system, in which the powers concerning deprivation of liberty are divided between the federal level and the ten Provinces and three Territories (hereinafter "the Provinces").

1. Division of powers between the Federal level and the Provinces

8. In the sphere of criminal law and procedure, legislation lies with the federal Parliament. The Provinces have the power to enact laws sanctioning minor offences. The administration of justice, i.e. the establishment of courts, the initiation of criminal investigations, indictments, and the prosecution of cases at trial, is within the competence of the Provinces. Certain offences, the most relevant example being drug trafficking offences, are prosecuted by the federal Attorney General.

9. As to detention in the framework of criminal procedure, sentences of two years and more are served in a federal correctional institution. Sentences of less than two years are served in provincial institutions. Whether the offence is prosecuted by the federal or a provincial prosecutor, bail hearings are held before provincial judges or justices of the peace. Detention before and during trial takes place in provincial detention centres.

10. As for immigration legislation (and detention imposed in that context), the competence lies with the federal Parliament and Government.

2. The Courts

11. The Supreme Court of Canada is at the apex of the Canadian judicial system. It hears in last instance cases that arise both from the federal court system (for the purposes of the Working Group's mandate this means immigration and national security detention cases) and from the provincial court systems.

12. Criminal trials in Canada take place before the superior courts and lower courts set up by each province. The superior courts are constituted by the provincial legislature, but their members are appointed and paid by the federal Government. The lower courts – provincial or municipal courts – are created by the provincial legislatures and their members are appointed by provincial governments. Justices of the peace (appointed by the provincial Attorney General) also play a limited role in criminal matters, but no trials take place before them. Judgments of the superior courts are subject to appeal to the provincial court of appeals and to the Supreme Court of Canada.

13. The Criminal Code allows bail hearings to take place either before a justice of the peace or a provincial court judge. In some jurisdictions (e.g. British Columbia and Québec) bail hearings always take place before a provincial court judge, while in other jurisdictions (e.g. Ontario) they take place mostly before a justice of the peace. Justices of the peace are not necessarily lawyers.

3. The Crown (i.e. prosecutorial services)

14. Both at the federal level and in each Province, the Minister of Justice is at the same time the Attorney General, i.e. the head of the prosecutorial service (referred to as "the Crown" in the context of criminal proceedings). Individual prosecutors, called "Crown counsel", act as agents of the (respectively federal or provincial) Attorney General and under his or her direction. The common practice, however, is for the Attorney General to grant broad discretion to Crown counsel in criminal prosecutions. In addition to Crown counsel who are its employees, the Attorney Generals also have recourse to *per diem* counsel to act as prosecutors.

15. Crown counsel will review all charges laid by the police and proceed with prosecution where they estimate that (i) there is a reasonable prospect of conviction, and (ii) prosecution is in the public interest. In applying the latter criterion, crown counsel will exercise prosecutorial discretion and take into account both general prosecution policies and the unique circumstances of the individual case, including victims, offenders, and local conditions.

4. The police

16. The police, i.e. the RCMP or, in Ontario and Québec, the Ontario Provincial Police and the Sûreté du Québec respectively, and in large urban centres municipal police, investigate and lay charges where they believe on reasonable grounds that an offence has been committed.

5. Legal Aid

17. Responsibility for legal aid in criminal matters is shared between the federal government under its authority to make criminal laws and to protect the rights enshrined in the Charter, and the provinces under their constitutional authority for the administration of justice. Similarly, responsibility for legal aid in immigration matters is shared between the federal government and the provinces. The federal government contributes funds to the provinces and territories for criminal legal aid through a series of agreements with the provinces and territories. Until 1990-91, criminal legal aid costs were shared in equal parts by the federal government and the provinces and territories. Since then, however, the federal share has dropped to approximately 35 percent. As a consequence of the shared responsibility for legal aid, the way legal aid is administered varies from province to province.

18. In addition to legal aid programs, duty counsel programs provide another important tool to assist un-represented accused persons. Duty counsel lawyers are assigned to courts to assist clients who do not have a lawyer with them in the courtroom. In the criminal courts, duty counsel advise clients of the right to plead guilty or not guilty, help them apply for bail or ask for an adjournment. Duty counsel can sometimes represent clients at bail hearings, pleas of guilty and sentencing. Both law societies and legal aid programs provide duty counsel services.

B. The legal framework of detention

1. International instruments ratified by Canada

19. Canada has ratified all major international human rights treaties, except for the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

2. The Canadian Charter of Rights and Freedoms

20. Most relevant to the legal framework of detention are Sections 7, 9, 10 and 11 of the Canadian Charter of Rights and Freedoms (the Charter). Section 7 reads: “Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 9 provides that “Everyone has the right not to be arbitrarily detained or imprisoned.” Section 10 sets forth the rights everyone enjoys on arrest or detention (the right to be informed of the reasons for detention, to counsel and to habeas corpus proceedings). Section 11 lists the rights of persons charged with an offence. These Charter rights are recognised to “everyone”, not only to Canadian citizens or citizens and persons legally present in Canada.

3. Detention in the context of criminal proceedings

(a) Custody before sentence

21. When the police arrest or detain an individual, they must explain the reasons for the arrest or detention and the specific charge, if one is being made. They must also without delay inform the detainee that he has the right to consult a lawyer and about legal aid services available in the province.

22. If the police deem that the person detained on suspicion of having committed an offence should be kept in custody pending investigation and criminal proceedings, they will have to bring that person before a bail court as soon as possible (usually within 24 hours). In bail court, Crown counsel will have to provide arguments why the suspect should be kept in custody, he will have to “show cause” for continued detention. The prosecutor can apply to adjourn a show cause hearing for up to three days. Longer adjournments may be requested with the consent of the accused.

23. The Criminal Code of Canada (section 515(10)) provides three grounds upon which detention may be ordered before and during trial: (a) ensuring the accused’s attendance in court; (b) protection and safety of the public, which includes the safety of victims and witnesses, as well as the likelihood that the accused will, if released from custody, interfere with the administration of justice by destroying evidence or coercing witnesses; and (c) maintenance of confidence in the administration of justice. Where an accused person is charged with certain, particularly serious, offences, however, the burden of proof shifts to the accused, i.e. the accused will have the burden of showing why he should not be detained before and during trial (section 516(4)).

24. The bail court can order the release of an accused person subject to a variety of measures: undertakings by the accused, with or without conditions (such as reporting to the police at regular intervals, remaining within a specific territory or area, drug or alcohol treatment, etc.) imposed on him by the court, a cash deposit, or a "surety" (usually a friend or relative) who agrees to pay a certain sum in the event that the accused fails attend a court hearing in his case or otherwise to comply with a release condition.

25. Sections 520 and 521 permit the accused person and the prosecutor to seek review of the bail court's decision to order detention or release. The bail decision can be appealed before a superior court judge. A review hearing will also be held mandatorily at regular intervals, after 90 days in the case of an indictable offence and after 30 days in the case of proceedings by summary conviction. For some particularly serious offences, e.g. murder charges, there is no mandatory review of pre-trial detention, but the accused may apply for review.

(b) Detention while serving a criminal sentence

26. In 1996 Canada enacted a sentencing reform, embodied in Part XXIII of the Criminal Code. As stated by the Canadian Supreme Court, the reform "must be understood as a reaction to the overuse of prison as a sanction". Section 718.2(d) and (e) reads:

"A court that imposes a sentence shall also take into consideration the following principles: … (*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[1]

27. To allow courts to put these principles in practice, the Criminal Code provides for a set of sanctions falling short of incarceration (most of which predate the Sentencing Reform). In ascending order of severity, these measures are alternative measures (also referred to as diversion), discharge, probation, fines, intermittent sentences, and sentence to be served in the community.

[1] This provision was construed and given an ample remedial interpretation by the Supreme Court of Canada in the *Gladue* judgment of 23 April 1999 (*R. v. Gladue* [1999] 1 S.C.R. 688).

28. The provision allowing "alternative measures" instead of the criminal judicial process is the primary avenue by which provincial governments administer restorative justice programs. The Supreme Court of Canada has defined restorative justice as an attempt to "(r)emedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim and the community." Restorative justice approaches include sentencing circles, family group conferences, victim-offender reconciliation programs, and victim-offender mediation. Some of the restorative justice programs are derived from the traditional understanding and practice of justice of Canada's Aboriginal communities, and are therefore particularly suited to carry out the mandate to pay special attention to the circumstances of Aboriginal offenders in Section 718.2(e).[2]

(c) Credit for pre-sentence custody

29. Section 719(3) permits a sentencing judge to "take into account any time spent in custody by the person as a result of the offence", but does not require it. According to the information gathered by the Working Group, sentencing judges usually give credit for pre-sentence custody (arising from denial of bail) towards a sentence of imprisonment subsequently imposed at a rate of two days of credit for each day of pre-sentence custody. The two-to-one rate is motivated by two main reasons: (i) benefits that lead to early release from imprisonment, such as remission and parole, do not attach to pre-sentence custody; and (ii) generally, conditions are harsher during pre-sentence custody, e.g. with regard to visits and the availability of programs for detainees. In the course of the last five years, sentencing judges have occasionally given "enhanced credit" for pre-sentence custody, i.e. at a rate of more than two-to-one, to account for particularly harsh conditions of pre-sentence custody.

4. Anti-terrorism legislation

30. The Working Group will not describe Canada's criminal anti-terrorism legislation enacted after 11 September 2001 in this Report, as that legislation is, according to both Government and civil society sources, basically unused insofar as its application would fall within the remit of the Working Group's mandate. As extensively described below, Canada is combating international terrorism primarily through its immigration law.

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[2] *R. v. Proulx*, [2000] 1 S.C.R. 61.

5. Detention of minors

31. On 1 April 2003 the Youth Criminal Justice Act (YCJA) was proclaimed into force, replacing the Young Offenders Act (YOA). The YCJA is intended to address the concerns raised by the YOA, particularly the exceedingly high youth incarceration rate.

32. The YCJA applies to "young persons", defined as accused who, at the time of the offence, were aged between 12 and 18 years. If charged with committing a criminal offence, a young person will appear in youth court. Provincial Court judges sit as youth court judges. With regard to the criminal procedure, generally the Criminal Code applies. Special provisions apply with regard to unrepresented young persons, and to increase the protection of the privacy interests of parties.

33. The YCJA provides for a variety of measures that can be used by the police or the crown attorney to deal with young persons without resorting to the formal youth justice system. Where a young person goes to trial and is found guilty, the court will have to decide whether to impose a youth sentence or an adult sentence. If the guilty finding concerns a so-called "presumptive offence" (murder, attempted murder, manslaughter and aggravated sexual assault), the burden lies on the young person to show why an adult offence should not be imposed, otherwise the Crown will have to show why an adult sentence should be imposed. Youth sentences are generally non-custodial.

6. Administrative detention under immigration law

(a) Detention of migrants and asylum seekers

34. Until December 2003 the federal Department of Citizenship and Immigration, which has the general competence for migration and asylum matters, was also responsible for immigration detention (which includes the detention of asylum seekers). Since then this responsibility has been assigned to the Canada Border Services Agency (CBSA), an agency created in 2002 within the Department of Public Safety and Emergency Preparedness. The decision to order immigration detention accordingly now lies with CBSA officers. Such decisions are subject to review by a member of the Immigration Division of the Immigration and Refugee Board, an independent administrative tribunal. Members of the Immigration and Refugee Board are civil servants appointed by the government for a term not exceeding seven years, subject to removal at any time for just cause. They are eligible for reappointment upon expiry of their term.

35. The legal framework for the administrative detention of aliens by the CBSA is outlined in sections 55 to 61 of the Immigration and Refugee Protection Act (IRPA) and sections 244 to 250 of the Immigration and Refugee Protection Regulations (IRPR). This legal framework applies to permanent residents, migrants and persons applying for refugee status in Canada, i.e. the IRPA does not distinguish between refugees and asylum-seekers who have entered illegally or overstayed their permit and other illegal aliens for the purposes of ordering detention. According to the information gathered by the Working Group, in practice detention depends on the availability of identity documents and, often, on whether or not the individuals have presented themselves voluntarily to make a refugee claim or if the claim is made after they have been apprehended by the authorities.

36. Under section 55, an officer may detain an alien (including a permanent resident) who the officer has "reasonable grounds to believe is inadmissible" and is either (i) a danger to the public, or (ii) unlikely to appear for examination, an admissibility hearing or removal from Canada. A third ground for detention is that "the officer is not satisfied of the identity of the foreign national in the course of any procedure" under IRPA.

37. Within 48 hours after an alien is taken into custody, or without delay thereafter, the detainee must be brought before the Immigration Division for a review of the reasons for continued detention (Section 57). If detention is confirmed at that stage, it must be reviewed again within seven days, and thereafter at least once during each 30-day period. There is no limit in the IRPA to the overall length of detention. As detention engages Charter rights, however, the jurisprudence has established that immigration detention without a reasonable prospect of removal violates the right to liberty.

38. The Immigration Division shall order release, unless "it is satisfied" that the detained alien is (i) either a danger to the public, or (ii) unlikely to appear for the next hearing or removal, or (iii) "the Minister is taking necessary steps to inquire into a reasonable suspicion" that the person is inadmissible on grounds of security, or (iv) "the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity." (Section 58(1)).

39. Both the immigration officer and the Immigration Division may impose conditions, such as reporting to an immigration officer, not going into certain places or not associating with certain persons, the payment of a cash deposit or the posting of a guarantee, when they order the release of a detained foreign national or permanent resident.

40. The remedy against decisions of the Immigration Division is an application for leave to apply for judicial review to the Federal Court. A judge of the Federal Court will decide, without personal appearance of the detained person, whether to grant leave to commence an application for judicial review. If leave to commence an application for judicial review is granted, however, the Federal Court will hold a hearing in the judicial review proceedings before it decides the case.

(b) Detention under security certificates

41. The principal goal of the security certificate process is to permit the removal of non-citizens who are inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality through a procedure that protects confidential information. Security certificates have existed in Canadian immigration law since 1978, and the procedure has been used 27 times. There are currently four persons detained under security certificates, and two released under very strict terms and conditions imposed by a judge upon release. It is important to stress that the majority of aliens inadmissible to Canada on grounds of security are held in immigration detention without resorting to the security certificate process.

42. A security certificate is signed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. The security certificate will be referred to a judge of the Federal Court. The proceedings before the Federal Court in security certificate cases are governed by rules intended to ensure the confidentiality of the information on which the certificate is based.

43. The judge “shall, on the basis of the information and evidence available, determine whether the certificate is reasonable”, and quash it if it is not reasonable. The determination of the judge is final and may not be appealed or judicially reviewed. (IRPA Section 80). If a certificate is determined to be reasonable, “it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing”, and the person named in it may not apply for refugee protection (Section 81).

44. As soon as the security certificate is issued (i.e. without awaiting the judge’s determination on the reasonableness of the certificate), arrest and detention of the person concerned are mandatory, unless he is a permanent resident. If the person concerned by the security certificate is a permanent resident of Canada, the two ministers can issue an order for his arrest (IRPA Section 82). Not later than 48 hours after the beginning of detention of a permanent resident, a judge shall commence a review of the reasons for the continued detention. The measures aimed at protecting the confidentiality of information apply to this hearing as well.

Until the judge has determined whether the certificate is reasonable, the permanent resident must be brought back before a judge at least once every six months. The judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding for removal (Section 83).

45. If the person named in the security certificate is not a permanent resident, he may apply for release 120 days after the Federal Court determined the certificate to be reasonable. The judge may order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person (Section 84(2)).

III. POSITIVE ASPECTS

A. Cooperation of the Government

46. During the entire visit and in all respects, the Working Group has enjoyed full cooperation of the Federal Government and of all the Provincial authorities it dealt with. The Working Group was able to visit all the detention centers or other facilities that it requested. In all these facilities, the Working Group has been able to meet with and interview whoever it wanted, police holds, pre-sentence detainees, convicted persons serving their sentence, immigration holds, women, minors, persons held in segregation quarters and infirmaries, detainees identified beforehand to the Government by their name and detainees chosen at random. In this context, it is particularly relevant to stress that the Government allowed the Working Group to hold long private interviews with the three security certificate detainees held at the Toronto West Detention Centre, as requested by the Working Group. The Working Group reiterates its gratitude for the authorities' transparency and cooperation.

B. Independence of the judiciary and checks on the criminal justice system

47. Canada is a country governed by the rule of law, in which a strong and independent judiciary strives to ensure that trials are fair and exercises a generally vigorous control over the lawfulness of all forms of deprivation of liberty. On the side of the criminal defendants, legal aid programs provide representation to those who cannot afford it (with the limits the Working Group will discuss below), and lawyers in private practice have traditionally seen it as their role to exercise the profession also in the public interest by providing their services *pro bono* or at rates below the market rate.

48. In addition to the judicial control over the deprivation of liberty – and on a different level – the Working Group finds the role played by public enquiries into cases of malfunctioning of the criminal justice system particularly significant. Such enquiries have allowed the country as a whole to look into incidents of unjust detention, from miscarriages of justice to systemic discrimination against minorities in the criminal justice system, to the particular vulnerability of Canada's Aboriginal people when they come into contact with law enforcement. These enquiries have clarified the systemic factors and root causes of several issues within the Working Group's mandate and yielded recommendations that contribute to remedying the problems. Public enquiries also exemplify, again, the pivotal role Canadian civil society plays in denouncing circumstances in which detention might be considered arbitrary.

49. The Canadian Human Rights Commission, hearing complaints from Canadian citizens or residents, and the human rights institutions of each of the provinces and cities, such as Ombudsmen offices, provide additional controls. The free and open dialogue between legislative and executive authorities on the one hand and civil society on the other, greatly contributes to limiting the occurrence of instances of arbitrary detention in Canada.

C. Decrease in incarceration rate

50. Until the mid-1990s, Canada was among the countries with the highest prison population rates in the "Western world". Since the Sentencing Reform enacted by Parliament in 1996, the federal (convict) prison population has been steadily declining. The incarceration rate currently is at 116 per 100,000 inhabitants. Only 7 percent of the persons "in the corrections system" (i.e. serving a sentence) are actually in detention, while 47 percent of the sentences imposed by courts in 2003-2004 involved terms of probation. The 2002 Youth Criminal Justice Act constitutes a very important step to address the over-incarceration of juvenile offenders, and the number of young persons in custody has declined as a result. These developments have been accompanied by a decrease in the crime rate.

51. Regrettably, the general decrease of the incarceration rate resulting from the Sentencing Reform has not had beneficial effects on the problem of over-incarceration of Canada's Aboriginal population. On the contrary, the over-representation of Aboriginal's – particularly Aboriginal women – among the prison population has become even more marked. The Working Group was told that this is due to a number of reasons, including the demographic structure of the Aboriginal population, their growing urbanization and impoverishment, accompanied by high unemployment rates and lesser enjoyment of physical and mental health.

52. The Working Group observes, however, that the authorities are fully aware of and highly concerned by this situation, and are taking measures to address it. The provision in Section 718.2(e) of the Criminal Code, mandating that in applying the principle that "all available sanctions other than imprisonment … should be considered" courts shall have "particular attention to the circumstances of aboriginal offenders" is very significant in this respect, and the Supreme Court's interpretation of this provision in the *Gladue* judgment should allow it to develop its full potential. The Working Group has further been informed of the efforts at increased recruitment of Aboriginals into the police, the judicial system, the corrections administration and the legal professions more in general. These efforts are to be commended.

D. Specialised courts and other programs aimed at reducing pre-trial detention, particularly of persons belonging to vulnerable and marginalised groups

53. In order to address the disparate impact of remand detention on vulnerable groups, the Old City Hall Courts in Toronto, the busiest court in Canada, have established specialized courts dealing with Aboriginal defendants, drug using defendants and offenders with mental health issues.

54. The Gladue (Aboriginal Persons) Court is open to all Aboriginal accused persons. The judge, prosecutors and court workers have a particular understanding of the way in which traditional criteria for granting or denying bail have a disproportionately negative impact on Aboriginal accused persons. Moreover, they have specific expertise with regard to the programs and services available to Aboriginal people in Toronto as possible alternatives to pre-trial custody.

55. The Mental Health Court at Old City Hall is staffed by two mental health workers, a case manager and a psychiatrist, in addition to a judge and prosecutors with expertise in mental health issues. By significantly mitigating the adversarial character of bail hearings, this court takes into specific account the disadvantage accused persons with mental health problems face in arguing for judicial release from pre-trial detention. All parties involved in bail proceedings before the Mental Health Court aim, where appropriate, at returning these individuals to the health care system with adequate housing and support systems in place.

56. Non-violent accused who are drug dependent may elect to have their application for bail heard in the Drug Treatment Court at Toronto's Old City Hall Courts. In this court, prosecution and the accused can agree to charges being stayed or withdrawn if the accused successfully completes a rehabilitation program. During the eight to 15 months duration of the rehabilitation program, the accused will regularly appear for bail hearings before the Drug Treatment Court and thus remain under the supervision of the court. The Provincial Court in Vancouver has opened a Drug Treatment Court as well.

57. The Working Group attended hearings of each of these three courts and heard about their undoubtable strengths. Some of the Working Group's interlocutors have, however, also highlighted reservations they entertain with regard to the full and effective respect of the right to a fair trial in proceedings before the Drug Treatment Court. They point out that charges against the accused are "suspended" and the determination of their guilt or innocence delayed for often more than a year. Additionally, the coercive powers of the criminal process are used for purposes of inducing persons to undergo health treatment.

58. Another project that has impressed the Working Group is the Bail Supervision and Verification Program in Toronto (the "Toronto Bail Program"), which – with funding provided by the provincial government – assists accused persons who otherwise would be denied bail to obtain a judicial release. In this program, Toronto Bail Program staff interview potential clients (i.e. remand detainees seeking release who are otherwise unlikely to obtain bail) and conduct a detailed analysis of the detainee's situation. Based on this information, the program decides whether or not it will accept the client. If the Toronto Bail Program accepts the client, it will then supervise compliance by the accused person with the terms and conditions imposed by the bail court. At any time, hundreds of persons in the Toronto area who would otherwise be in remand detention are not deprived of their liberty, but under the supervision of the Toronto Bail Program.

59. The Working Group commends Canada for these innovative programs aimed at reducing the levels of pre-trial detention. The Working Group considers that such programs deserve being "exported" from Ontario to other jurisdictions in Canada and might prove useful as models also to other countries. At the same time, however, the Working Group remains concerned about the continuous increase of recourse to pre-trial detention in Canada over the last ten years, as explained below.

E. Detention of refugee claimants and foreigners without status is the exception

60. Although the increased concern about security has had an impact in Canada, the detention of refugee claimants and foreigners upon arrival in Canada or in view of removal from Canada remains the exception. Moreover, in most cases, immigration custody lasts less than 48 hours or only a few days.

IV. ISSUES OF CONCERN

A. Detention in the framework of criminal procedure

1. Difficulty to obtain bail for accused belonging to vulnerable and marginalized groups

61. While the convict population has been constantly decreasing since the enactment of the Sentencing Reform, the number of persons detained on remand has been growing considerably. Canada-wide, the daily count of persons detained on remand increased of 9% from 2001/02 to 2002/03[3].

62. The incessant rise of the remand population (against a background of decreasing crime rates and decreasing sentenced prison population) is of great concern. First of all because under both Canadian and international law everyone has the right to be considered innocent until proven guilty at trial. Secondly, while in Québec and British Columbia persons detained on remand have access to the programs that benefit those serving a sentence, this is not the case in most of the other provinces. Thirdly, as Canadian courts have recognized in giving double and even triple credit for pre-sentence custody, conditions of remand detention are generally harsher than those of persons serving a sentence.

63. Fourthly, pre-trial detention disparately impacts on vulnerable social groups, such as the poor, persons living with mental health problems, Aboriginal people and racial minorities. In evaluating whether an accused is likely to attend future court hearings in his case, and therefore should be granted bail, the Crown and the courts have traditionally used, *inter alia*, indicators relating to the accused's "roots in the community". These criteria (which of course are common to most bail systems), when applied to an accused who is poor, living with mental health problems or a drug addiction, or otherwise marginalized, are likely to lead to denial of bail.

64. Another worrying aspect is the high number of persons living with mental health problems kept in pre-trial detention instead of in a medical setting, where they could receive adequate treatment. Sometimes judicial orders that criminal defendants awaiting trial be remanded to a psychiatric hospital are not implemented, and, as a result, they are kept in prison. According to the information received, this is due both to past political choices and to a current lack of resources.

65. The Working Group commends the initiatives that have been developed at local level to counteract this trend, as described above (paras. 53 to 58).

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[3] Juristat, Canadian Centre for Justice Statistics, Vol. 24, no. 10, *Adult Correctional Services in Canada, 2002/03*, p. 4.

2. Legal aid in the criminal justice system

66. The right to counsel for persons charged with an offence carrying a prison sentence is enshrined in Canadian law and is implemented through duty counsel and legal aid programs. A positive aspect of the legal aid system in Canada is that the defendants can choose their own lawyer, and numerous successful defense attorneys are willing to work at the fees paid by legal aid programs, which are below the market price for legal services. Detainees interviewed by the Working Group who were assisted by legal aid lawyers were generally satisfied with the work of their lawyer.

67. The Working Group noted, however, also a number of shortcomings of the legal aid coverage. As explained above, legal aid is funded by both the federal Government and the provinces, but administered by each province. In 1991 the federal Government sharply reduced its contribution to the provincial legal aid programs.

68. In all ten provinces the threshold for eligibility for legal aid is below the Statistics Canada low income cut-off. Considering that the low income cut-offs are determined with regard to everyday requirements such as food, clothing and shelter, and that the cost of legal services is significantly greater than the cost of these goods, there is little doubt that many accused who are not eligible for legal aid will not be able to afford to retain legal counsel. The Governments of the North-West Territory and of Nunavut have taken a significant step in putting in place a policy whereby criminal defendants are presumed to be in need of legal aid.

69. The Working Group's attention was drawn to a further serious problem: a conviction on charges relating to several offences which are not serious enough to qualify for legal aid (e.g. welfare fraud), will result in the loss of social welfare benefits for those found guilty, and, in the case of non-citizens, to the loss of temporary or permanent resident status. It appears that often persons who cannot afford legal counsel will plead guilty to charges on such offences, or be found guilty after trial, with very grave consequences which they did not understand when they entered the criminal process unrepresented.

70. In conclusion, the Working Group recalls that the requirement of effective legal representation for those charged with an offence carrying a custodial sentence is a right, not an option to be granted within the boundaries of the resources a government makes available. When this right is not fully respected, the price is paid by the poor and socially marginalized, who are already overrepresented among the prison population.

3. Concerns regarding police and corrections oversight

71. Each province (and the federal level) has its own system for dealing with complaints concerning misconduct of police officers. Some provinces only have internal complaints mechanisms, others provide for the possibility of an appeal to an external, independent civilian body against procedures and findings of the internal mechanism, still others provide for investigation by an independent civilian oversight body. Several public inquiries in Canada in recent years have shown that exclusively internal investigation of complaints concerning misconduct by police– as is still the case in some provinces – is not sufficient to adequately address cases of arbitrary conduct, including arbitrary arrests by the police. Also where an independent, external agency to receive complaints against the police is in place, the effectiveness of the oversight will be diminished if that agency cannot conduct its own investigations and therefore has to rely on internal investigations. This shortcoming can be remedied, at least in part, by attributing the police oversight agency the power to order a different police force to conduct an investigation, as is the case in British Columbia.

72. Analogous concerns apply to the area of corrections, where in several Canadian jurisdictions no external, independent mechanism exists for the investigation of complaints regarding the conduct of corrections officers. Other jurisdictions do have independent oversight mechanisms and there is also an ombudsman for federal corrections, the Correctional Investigator.

B. Detention under immigration law

73. As already stated above, the detention of refugee claimants and foreigners without status is the exception. The Working Group wishes to underline that this is – and hopefully will remain – the positive background against which the concerns it expresses with regard to immigration detention must be viewed.

1. Application of the grounds for detention of foreigners pending admissibility hearings or removal

74. One of the grounds on which an immigration officer can detain a foreign national is that she is not satisfied of the foreigner’s identity. When the immigration officer relies on this ground, as they often do, the law does not allow the Immigration Division to review whether the immigration officer was reasonable in concluding that the identity of the detainee was not established. The legislation thus fails to offer judicial oversight of the decision to detain based on identity.

75. The Working Group is of course aware that some foreign nationals intentionally destroy or conceal their identification papers. Immigration officers, however, often have unrealistic demands regarding the quantity and quality of identification documents refugees can realistically be expected to carry with them. For instance, according to consistent reports received by the Working Group, people fleeing countries in turmoil or areas of conflict are asked to get documents that they are unlikely to be able to produce or that they might never have used before (credit cards, family photos, birth certificates). This practice of applying "developed world criteria" to the reasonable proof of identity by an asylum seeker is all the more preoccupying as the inability to produce such documents is often interpreted by the immigration authorities as an unwillingness to co-operate, which not only leads to the immigrant being considered at risk of flight, but is also seen to negatively affect the credibility of the asylum claim.

76. Flight risk is presented as a justification for detention under another ground, too, that the person is unlikely to appear for the next hearing or for removal. The Working Group observed that, in practice, the Immigration Division occasionally maintains asylum seekers in detention on the ground that in claiming asylum they stated that they fear persecution if deported back to their home country. As a consequence, they have strong motives to fear removal and are, allegedly, not likely to appear. The Working Group is concerned that this line of reasoning leads, in practice, to persons being detained on the basis of having claimed refugee status.

2. Practical aspects of detention under immigration law giving rise to concerns

77. In addition to the concerns arising from the IRPA provisions governing detention and their application, the Working Group is concerned by a number of practical aspects of the detention of aliens under IRPA which considerably impair their capability to effectively seek release from detention.

78. Each person detained under the immigration law is informed of the right to retain legal counsel and afforded an opportunity to contact legal aid lawyers. There is, however, no requirement that immigration detainees be assisted by a lawyer. As in the criminal law sphere, legal aid is regulated at the provincial level, and the level at which legal aid programs cover immigration detention varies greatly from province to province (to a much greater extent than in respect of criminal legal aid). The fact that immigration detainees are mostly held in detention facilities at a fair distance from major urban centres also constitutes a practical barrier to their access to free legal representation. The distance from urban centres also renders the access of NGOs assisting asylum seekers to persons detained in immigration holding facilities more difficult. When asylum seekers are held in provincial prisons among the criminal population, NGO access to them is even more difficult.

79. The Working Group also noted that many of the immigration detainees do not really understand the legal process they are being subjected to and why exactly they are being detained. The legal system and the culture underlying it are entirely unfamiliar to migrants and asylum seekers coming from many countries, who are not accustomed to the heavy reliance on paper work and its crucial role to obtain release from detention. In some Provinces (notably British Columbia), otherwise unrepresented immigration detainees are provided with duty counsel for their first detention review hearings. But that is not the requirement under the law and not the case in the two Provinces with by far the most cases, Ontario and Québec. While interpretation is provided at the detention review hearings, the detainees do not have access to an interpreter ahead of the hearing and are thus unable to adequately prepare themselves.

80. In Québec, Ontario and British Columbia, the three provinces that share among themselves more than 95% of the immigration detainee population, the CBSA runs immigration detention facilities. In all other provinces, immigration detainees are placed in custody in ordinary provincial jails. Where the CBSA deems that a foreigner poses a security risk or is at risk of flight, however, it will rely on provincial correctional facilities also in Québec, Ontario and British Columbia. In the provincial detention facilities the Working Group has visited, immigration detainees are held together (co-mingled) with persons held under criminal law, mostly remand detainees, but also convicts. In Québec, immigration detainees are assessed at admission into a provincial detention centre as to the security level they require (as are remand prisoners), and will therefore be assigned to maximum or medium security quarters. In Ontario and British Columbia, however, immigration detainees are automatically and invariably assigned to maximum security, on the ground that they are not expected to remain long enough in the "system" for an assessment to be viable. The holding of immigration detainees, who often have no criminal record, among the criminal population affects them adversely in various ways, impairing their ability to effectively challenge detention. As statistics show, longer periods of detention are associated with non-immigration facilities[4].

81. The Working Group is particularly concerned by credible allegations that immigration detainees have been transferred from immigration holding centers to provincial criminal facilities as a reprisal for conduct such as claiming better treatment or conditions of detention. The Working Group was also told (both by civil society representatives and officials of the corrections system) that there is very poor communication between federal and provincial

[4] The CBSA provided the Working Group with statistics clearly evidencing this situation. In the fiscal year 2003/2004 the average days of detention per detainee in CBSA facilities were 7.67, while in non-CBSA facilities (i.e. criminal detention centres) the average amounted to 26.99 days.

authorities with regard to the background, detention history and needs of immigration detainees. In the light of all this, the ongoing negotiation of a Memorandum of Understanding between the Federal Government and the Provinces regarding the matter gains particular importance.

82. These circumstances of immigration detention place a special burden on vulnerable persons, such as victims of trafficking. As the primary means to obtain release from immigration detention is the posting of a cash bond, persons who lack financial resources or have no connections in the country (often migrants smuggled into Canada without any belongings) face great difficulties obtaining release.

83. As with many of its other areas of concern, the Working Group observed commendable counter-measures also in this respect. Numerous, very active NGOs assist immigration detainees in their efforts to obtain release. With funding provided by government, the Toronto Bail Program assists immigration detainees who otherwise would be denied release.

3. Detention under security certificates

84. Finally, regarding detention under the security certificate process, the Working Group wishes to stress that it is fully aware of the duty of the Canadian government to protect its citizens from terrorist acts and to comply with its international obligations with regard to combating terrorism. It is also aware of the fact that there are only four men currently detained under this procedure. Nonetheless, the Working Group is gravely concerned about the following elements, which undermine the security certificate detainees' rights to a fair hearing, to challenge the evidence used against them, not to incriminate themselves, and to judicial review of detention:

- the security certificate procedure applies only to suspects who are not Canadian citizens; in fact, all four men currently detained under security certificates are Arab Muslims;

- if the person certified is not a permanent resident, detention is mandatory;

- the length of this detention without charges is indeterminate; the duration of the detention of the four persons currently detained under a security certificate ranges from four to six years;

- the only way out of detention appears to be deportation to the country of origin; all four men currently detained argue – not without plausibility – that they would be exposed to a substantial risk of torture in case of deportation;

- the evidence on which the security certificate is based is kept secret from the detainee and his lawyer, who are only provided with a summary of the information concerning them. They are thus not in a position to effectively question the allegations brought against him;

- the Federal Court judge tasked with confirming the certificate has no jurisdiction to review, on the merits, whether the certificate is justified. His jurisdiction is limited to assessing the "reasonableness" of the government's allegations;

- when the Federal Court considers that a security certificate is reasonable its decision is final and cannot be appealed, removal is ordered and the person is detained pending execution of the order "without the necessity of holding or continuing an examination or an admissibility hearing". The person named in it may not apply for refugee protection. On the other hand, if the Federal Court considers the security certificate not reasonable, the two Ministers can at any time issue a new certificate. According to the information gathered by the Working Group, such new certificate can be based on a new interpretation of the same facts underlying the quashed certificate.

85. One of the most troubling aspects of the security certificate process is the delay with which non-citizens under a security certificate can challenge their detention. Article 9(4) of the ICCPR requires that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added). The case of Mahmoud Jaballah, one of the four men currently detained under security certificates, illustrates how the process violates this fundamental principle. Mr. Jaballah has been detained without criminal charges for five years and been given the chance to challenge his detention only once. [5]

86. The case of Adil Charkaoui also illustrates the concerns raised by the security certificate procedure. Mr. Charkaoui, a permanent resident of Canada, was detained under a security certificate for more than twenty months. He has been released in February 2005, but is subject to very strict terms and conditions that disrupt the life of his entire family. He asks to be indicted and put on trial in order to enjoy a fair hearing, but the authorities deny him this right.

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[5] In the *Ahani* case the UN Human Rights Committee found a violation of Article 9(4) of the ICCPR in the case of a person detained under a security certificate (*Ahani v Canada*, Comm.No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004), §§ 10.2 and 10.3). Mr. Ahani, who had been recognized as a refugee in Canada, was held in immigration custody (without criminal charges being raised) for nine years, from June 1993 to June 2002, when he was removed to Iran.

V. CONCLUSIONS

87. The Working Group visited Canada on the invitation of the Government and enjoyed the fullest cooperation of the authorities in all respects. The Working Group reiterates its gratitude to the Government and all other authorities who contributed to enabling the Working Group to carry out its mandate.

88. As a markedly federal system, the administration of justice differs between the various Canadian jurisdictions. But in all of them a strong and independent judiciary and a vigorous private legal profession ensure that deprivation of liberty generally complies with the law and that criminal trials are substantially fair.

89. The Working Group observed that the authorities and the civil society are aware of the issues of concern raised by the Working Group and are pursuing measures to address these issues. The Working Group identified several good practices which deserve being brought to the attention of the international community.

90. Reforms of the part of the criminal code relating to sentencing and of the juvenile criminal law have led to a substantial decrease in the incarceration rate. This trend has not so far benefited Canada's Aboriginal population, which remains dramatically overrepresented in the criminal justice system. Moreover, the Working Group notes that the rate of detention on remand has been constantly increasing in the course of the last decade. Remand detention disparately affects vulnerable social groups, such as the Aboriginal population and minorities, the poor, persons with mental health problems and drug users. These sectors of the population also often have difficulties accessing effective legal representation.

91. With regard to administrative detention under immigration laws, the Working Group notes that, considering the overall number of migrants and asylum seekers coming to Canada, their detention remains the exception. The Working Group is concerned, however, about several aspects of the immigration law, which give the immigration officers wide discretion in detaining aliens and limit the review of decisions ordering detention. The Working Group is also gravely concerned about the security certificate process, by which persons suspected of involvement in terrorist activities are detained over years without being adequately informed of the reasons for their detention and in the absence of other guarantees of a criminal process.

VI. RECOMMENDATIONS

92. Canada is perceived as a model and point of reference for the peoples of many countries with regard to the rule of law and respect for human rights. It is also with this important role Canada plays in mind that the Working Group recommends that:

(a) The authorities continue pursuing and strengthening policies to address the over-representation of Aboriginals among the prison population. In this respect, the Working Group recommends particularly efforts aimed at increasing the participation of Aboriginal professionals in law enforcement and the justice system on the one hand, and – on the other hand – reinforcing efforts to sensitize the members of law enforcement agencies to the ways in which their policies and conduct contribute to such over-representation.

(b) The authorities address and reverse the trend to ever increasing use of pre-trial detention and pursue and expand their efforts to find innovative alternatives to the detention on remand of accused without "strong roots in the community", which basically means persons belonging to vulnerable and marginalized social groups. In this context, the Working Group also recommends to make available additional resources to cover unmet needs for legal aid in the criminal justice system.

(c) The detention of asylum seekers remain exceptional. Moreover, the Working Group recommends that the Government change the provisions in the immigration law and /or their application policies which give rise to cases of unjustified detention of migrants and asylum seekers, as identified by the Working Group, and strengthen the control of the Immigration Division over the decision-making by immigration officers. The Working Group further recommends that the Government take remedial action with regard to the practical aspects of immigration detention that impede the effectiveness of the right to challenge detention, in particular the co-mingled detention in criminal high security facilities.

(d) The Government reconsider its policy of using administrative detention and immigration law to detain persons suspected of involvement in terrorism and particularly the use of security certificates. The Working Group recommends that detention of terrorism suspects be imposed in the framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law, in particular Articles 9(3) and 14 of the International Covenant on Civil and Political Rights, to which Canada is a Party.
