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任意拘留问题工作组的报告

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增 编 *

对尼加拉瓜的访问

(2006 年 5 月 15 日至 23 日)

* 本访问报告的内容提要以所有正式语文分发。报告本身载于内容提要附件，仅以原文和英文分发。

内 容 提 要

任意拘留问题工作组是由人权委员会第 1991/42 号决议设立的，人权理事会第 1/102 号决定接管了其任务。该工作组于 2006 年 5 月 15 日至 23 日应尼加拉瓜政府的邀请对该国进行了访问。代表团访问了首都马拉瓜、埃斯特利省省会埃斯特利市和南大西洋自治区首府布卢菲尔兹市。代表团访问了 8 个拘留中心，包括监狱、未成年人拘留中心、移民拘留中心和警察局拘留中心。在这些地方，对约 150 名任意挑选的被拘留者进行了无人在场的私人会谈。

本报告描述拘留的体制和法律构架，特别注意不同的相关机构和关于司法拘留与行政拘留的法律。工作组阐明了一些积极方面，其中包括该国政府在访问前、访问期间和访问后提供的合作；刑事司法体制目前为达到国际标准和确保保护人权而作出的努力；在拘留未成年人方面所作出的努力。自 1987 年颁布了政治宪法以来，尼加拉瓜对其法律制度进行了重大的改革，对国家的民主运作和人权的保护带来了有利的影响。尤其值得一提的是，2001 年颁布了《刑事诉讼法》，这一新法律与以前的审问式的诉讼制不同，它采取了一种基于法律、机会、相称和同时性原则及口头公开审讯原则的诉讼辩护制度。这一制度可缩短诉讼时间，并减少审前被拘留者的人数。工作组注意到，尼加拉瓜在拉丁美洲国家中，是属于被拘留的待审人数远远低于服刑者人数的少数国家之一。

本报告还提请注意在拘留未成年人方面所作出的努力，不但包括由各机构执行的预防青少年犯罪方案，而且还包括重视触犯未成年人的教育和康复。此外，报告不但提请注意新的法律规定，而且也提请注意工作组在访问期间所看到的未成年人的拘留条件。

本报告还确认了一些令人关注的领域，在实践中有新趋势表明未遵守新的《刑事诉讼法》所规定的条件和期限；报告还注意到司法制度和教改制度所遗忘的特殊类被拘留者，他们自称为“los Donados（“被捐献者”），他们在监狱系统中确实被当作“礼物”抛弃；报告还注意到无法与外界接触和无法利用他们有权享有的补救办法的人。

还值得注意的是，对吸毒和贩卖毒品罪行所施加的刑事制裁过重；对这类罪行所课处的罚款最低为 100 万科多巴(约 61,000 美元)，这一数额过分夸张，罪犯因而普遍

无力支付，被改易成一年有期徒刑；采用移送法院办法，根据这一办法，民事法院的法官可以下令将无法履行贷款协议条件的人拘留长达一年。报告还关切地注意到，工作组在布鲁菲尔兹市警察牢房和拘留设施所看到的拘留条件。

工作组在其建议中，主张警察严格遵守每一被拘留者在被逮捕 48 小时内带见法官的义务；大幅改善警察局对拘留者的登记办法；鉴于被判刑者得到康复和重新融入社会方面遭到困难，修订本国的麻醉药品法，尤其是修订不准保释、假释、特赦或给予大赦的规定，或不准在拘留设施中劳动以换取减刑的规定。工作组还建议，紧急审查在布鲁菲尔兹市的被拘留者的拘留条件。

总而言之，工作组建议采取符合人权的预防犯罪和暴力行为措施和管制方法。

Annex**REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION
ON ITS VISIT TO NICARAGUA (15-23 May 2006)****CONTENTS**

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Introduction

1. The Working Group on Arbitrary Detention, set up under resolution 1991/42 of the Commission on Human Rights, whose mandate was taken over by the Human Rights Council under its decision 1/2006, visited the Republic of Nicaragua from 15 to 23 May 2006 at the invitation of the Government of Nicaragua. The Working Group was represented by Ms. Manuela Carmena Castrillo, Spain, who was accompanied by the secretary of the Working Group and by one other official from the Office of the United Nations High Commissioner for Human Rights.
2. The visit included the capital, Managua, and the cities of Bluefields, capital of the autonomous region of Atlántico Sur, and Estelí. During its visit, the delegation had meetings with government authorities at national and provincial level, representatives of the National Assembly, members of the judiciary, officials from self-governing bodies, civil-society representatives, academics and other individuals.
3. The Working Group would like to express its gratitude to the Government of Nicaragua, the authorities of the department of Estelí and of the autonomous region of Atlántico Sur, and to the United Nations Development Programme (UNDP) for their assistance with substantive and logistical elements of the organization and conduct of the Group's visit.

I. PROGRAMME OF THE VISIT

4. The delegation was able to visit the following custodial facilities and other correctional institutions : in Managua, the Tipitapa prison headquarters in Managua, the juvenile custody centre, the immigrants detention centre and the La Esperanza women's prison ; in Bluefields, the Bluefields prison and the police station ; and, in Estelí , the local prison and the cells in one of the police stations. In these detention facilities, the delegation was able to have meetings in private with some 150 detainees.
5. The delegation held meetings with members of the National Assembly legislative committees on human rights, justice and security, with representatives of the Supreme Court of Justice and members of the National Judiciary Board ; with presidents of the appeals courts of Managua and Estelí and with judges of the appeals court of Bluefields ; and with officials from the ministries of internal and foreign affairs. They were also able to meet judges of different levels and jurisdictions ; local and district judges ; criminal enforcement and prison oversight judges ; children's and juvenile judges ; representatives of the Public Prosecutor's Office, of the Public Defenders' Office and of the Human Rights Ombudsman. The delegation was also able to have meetings with police authorities and representatives of the corrections, immigration and youth affairs departments.
6. In addition, the delegation had meetings with representatives of non-governmental organizations working in the areas of human rights, the prisons system, women's and children's rights, the rights of the Miskito indigenous peoples, the rights of people of African descent and the rights of aliens and other vulnerable groups in the criminal justice system. The delegation also met private lawyers, representatives of the Bar Council, academics and representatives of United Nations agencies present in Nicaragua.

II. INSTITUTIONAL AND LEGAL FRAMEWORK

A. Institutional framework

State

7. Nicaragua is a democratic, participatory and representative republic. Its Political Constitution, approved and promulgated on 9 January 1987, establishes four branches of government : the legislature, the executive, the judiciary, headed by the Supreme Court of Justice, and the electoral branch, headed by the Supreme Electoral Council (art. 7). The Constitution states that the people of Nicaragua are multi-ethnic in nature and form an integral part of the Central American nation (art. 8). Legislative authority is vested in the National Assembly, by delegation and mandate of the people. This is a single chamber body made up of 91 representatives elected from regional constituencies through a system of proportional representation for a period of five years (art. 132). Executive authority is wielded by the President of the Republic, who is the head of State, head of Government and head of the country's defence and security forces (art. 144). The President also serves for a term of five years.

Courts

8. The Constitution states that justice emanates from the people and is exercised on behalf and by delegation of the people by the judiciary (art. 158). The Supreme Court must comprise a minimum of seven judges (art. 163). Since 2000, it has been made up of 16 judges, appointed by the National Assembly from a list of candidates put forward by the President of the Republic (art. 163). The judges of the Supreme Court enjoy immunity. The Supreme Court organizes and directs the administration of justice ; it hears and decides ordinary and extraordinary appeals against the decisions of lower courts ; it hears and decides appeals for constitutional protection (*amparo*) and decides on actions of unconstitutionality ; and it appoints the judges of the appeals courts, judges at lower levels and district and local judges (art. 164). Structurally it is divided into constitutional, criminal, civil and administrative chambers.

9. Following the promulgation of the Constitution, a programme of judicial reform was launched. In 1997, the former Courts Act was replaced by the Judiciary Organization Act.

10. The Appeals Court is made up of five judges, each appointed for a term of five years, which may be extended for a further five years. The criminal chambers of the Appeals Court hear appeals against sentences handed down by district judges for serious offences (Code of Criminal Procedure, art. 21). The delegation learned that steps were recently taken to extend the terms of office of 14 of the 20 Appeals Court judges for an additional period of five years.

11. In the criminal justice system, there are three categories of judges : hearings judges, trial judges and criminal enforcement judges. The trial judges may be local judges, competent in the area of minor and less serious offences, and the district judges competent in the area of serious offences. The enforcement judges monitor compliance with the law by the prisons system and ensure that the purpose of the sentence as determined by the Constitution is properly served. The law also establishes the institution of children's and juvenile judges.

12. In 1998, a special Children's and Juvenile Court was set up in Managua and there are currently three enforcement tribunals operating in the city.

13. Under the law, judges and magistrates are independent in the exercise of their judicial activities and answerable only to the Constitution and the law.

Public Prosecutor's Office

14. In accordance with the new criminal legislation, the Public Prosecutor's Office is an independent body responsible for the exercise of public prosecutions, for establishing and investigating the commission of offences and for preparing prosecution cases for the courts. It is structurally, operationally and administratively autonomous.

15. The delegation learned that the Public Prosecutor's Office has a staff of some 200 prosecutors deployed all over the country.

National police

16. The national police, the Office of Migration and Alien Affairs and the national prisons system all report to the Ministry of Internal Affairs. The police is a single security force responsible for implementing the consolidated body of Nicaraguan law and is present throughout the territory of Nicaragua, except in certain remote rural areas.

17. Police officers must coordinate their activities with the Public Prosecutor's Office to ensure the smooth conduct of investigations and the implementation of prosecutions (Code of Criminal Procedure, art. 19). They are responsible for gathering evidence and testimony relating to the commission of offences and for taking steps to arrest and detain persons caught in flagrante delicto. Procedures for the arrest and detention of individuals are set out in the Police Act, Act. No. 228. The head of the police station also has special powers to order the detention of individuals for up to 12 hours on the basis of evidence of the commission of an offence or following the submission of a complaint. The main functions of the police are to investigate offences, in coordination with the Public Prosecutor's Office, and to gather evidence substantiating the commission of an offence and the liability of individuals therefor. Their powers also include the enforcement of judicial orders, including detention orders.

Public Defender's Office

18. Every defendant has the right to be represented by a defender appointed by himself or herself or by his or her family or, if he or she so request, by a public or officially appointed defender. Defendants also have the right to notify a lawyer of their detention (Code of Criminal Procedure, art. 95, paras. 10 and 3, and art. 103). Most accused persons and defendants are not in a situation to hire a private lawyer. In 1998, the first public defender's office was opened in Managua. The delegation learned that the total number of public defenders in the country is limited to 81 : many more would seem to be needed. Each public defender has some 400 cases to attend to.

19. In some departments, where there is no public defender's office, the judge handling the case appoints official defenders from among the lawyers operating in the area. Regrettably, some lawyers do not accept the appointment and prefer to pay the fines and accept the resulting penalties.

20. The law faculties of the Central American University and some law schools offer legal aid services and free defence for needy persons.

B. Legal framework for detention

International instruments ratified by Nicaragua

21. Nicaragua is a State party to the seven principal international human rights treaties, including the International Covenant on Civil and Political Rights and its first Optional Protocol and has signed its second Optional Protocol. Treaties which are at variance with the Constitution have no validity (Constitution, art. 182). Treaties have the same validity as laws.

Constitution and the rights which it guarantees

22. The individual rights and freedoms guaranteed and protected by the Constitution are listed in chapter I of its Part Four. Article 25 sets out the rights to individual freedom, safety and recognition of legal personality and capacity. Articles 33 and 34 relate to the rights of detainees and accused persons and the safeguards against arbitrary detention and imprisonment. All detainees have the right to be informed without delay of the reasons for their detention and of the charges brought against them ; the right to notify their families of their detention and the right to be brought before the authority designated by law within a maximum period of 48 hours. The constitutional rights and safeguards relating to detention are recapitulated in article 232 of the Code of Criminal Procedure, under the duties of the police.

23. No one may remain in detention once their release has been ordered. Any instance of illegal detention will incur liability on the part of the authority responsible (Constitution, art. 33). State protection for and recognition of the rights of the individual shall be extended to every person on its national territory (art. 46).

Detention in the context of criminal proceedings

(a) Police custody

24. Any individual may carry out an arrest in the event of flagrante delicto. The police may also take persons into custody without the need for a warrant when the perpetrator of a punishable act is surprised in the process of committing that act, discovered fleeing the scene of an offence, or apprehended in its vicinity bearing weapons, tools or other items which give grounds to presume that person's involvement in the offence (Code of Criminal Procedure, art. 231). In addition, station chiefs have the power to issue arrest warrants within a period of 12 hours of being notified of the commission of an offence punishable by a custodial sentence (Code of Criminal Procedure, art. 21, para. 3). In all other cases, a court order is required before a person can be taken into custody.

25. Within no more than 12 hours after taking a person into custody, police officers must inform the Public Prosecutor's Office of such action and of the measures that have been taken. The detainee must be brought before a competent judge within the period of 48 hours stipulated in the Constitution. The detainee's family must be informed by the police within a period of 24 hours of his or her detention and of the police station in which he or she is being held. There is no judicial supervision of cells situated in police stations.

26. The delegation learned that, notwithstanding the provisions of the court order, police chiefs interpret the obligation imposed by the Constitution as obliging them merely to inform the competent judge of the detention and to place the detained person formally at the disposition of the judge, without producing them in person.

27. Police records are not included as part of the case file.

(b) Preliminary hearing

28. Once a person has been taken into custody, the proceedings against him or her commence with a preliminary hearing. The purpose of such hearings is to notify the detainee of the charges brought by the Public Prosecutor's Office ; to rule on the application for interim protection measures ; and to uphold the right to defence. The preliminary hearing must be held within 48 hours of a person being taken into custody, measured from the moment when he or she is brought before the competent judge. If the prosecutor does not file charges, the judge must order the immediate release of the detainee. The judge must inform the detainee that he or she has the option to appoint a private lawyer and, if the detainee is unable to afford the associated costs, the judge shall proceed to assign a defence lawyer from the Public Defender's Office or another officially appointed lawyer. Failure by the lawyer to attend the preliminary hearing does not invalidate the hearing. The victim has the right to participate in this hearing.

(c) Initial hearing

29. If, at the preliminary hearing, the pretrial custody of the accused is ordered, the judge must also set a date within the following 10 days for the conduct of the initial hearing. The initial hearing is held for the purpose of determining if there are grounds to commit to trial ; initiating the procedures for the exchange of evidence ; to review the interim protection measures which have been applied ; and to determine procedural acts which should be conducted prior to the trial. Preliminary hearings must be attended by the accused, their defence lawyers and representatives of the Public Prosecutor's Office. It is at this hearing that the representatives of the Public Prosecutor's Office and the individual prosecuting party must submit to the court evidence establishing reasonable and sufficient grounds to commit the accused to trial.

30. If, in the opinion of the judge, the evidentiary elements submitted by the prosecution are insufficient, the judge shall request additional evidentiary elements, which must be provided within a period of five days. If the judge still considers that the additional evidentiary elements that have been provided remain insufficient, he or she shall close the case and order the release of the detainee.

(d) Trial hearing

31. Once the initial hearing has been held, the judge shall issue, if warranted, the committal order. The trial shall be held on the basis of the charges brought and in accordance with the principles of adversarial and concentrated proceedings - in other words, that the trial must be held in the continuous presence of the judge, all members of the jury, the parties to the prosecution, the accused and his or her counsel.

32. Any person charged on suspicion of the commission of a serious offence has the right to be tried by a jury court. This provision does not apply, however, to cases involving offences relating to the consumption or sale of narcotics, psychotropic or other controlled substances or to offences relating to the laundering of money or the proceeds of illicit activities. Accused persons may, however, renounce their right to be tried by jury and request a technical judgement by the judge. The jury court must comprise five full members and one substitute. Each member of the jury shall receive approximately 500 cordobas (approximately 30 United States dollars) as their daily allowance. The delegation learned that some minor offences, such as stock theft, may be assimilated to rustling and, as a result, the corresponding proceedings must be held before a jury. Accordingly, recourse to a jury tends to be fairly infrequent by comparison with the number of offences committed.

33. In jury trials, the role of the judge is limited to presiding over the proceedings, settling all questions of law which arise and instructing the jury on the rules which must be observed in their deliberations. The jury's verdict establishes the guilt or innocence of the accused.

34. All proceedings are conducted orally and in public. The delegation learned that some are broadcast live on television. A courtroom has been set up on the campus of the Central American University, where proceedings are held in the presence of law students and the general public.

35. It should be noted, however, that proceedings continue to be held in accordance with the former Criminal Investigation Code of 1879. The procedure established under this code is inquisitorial, in written form and allows for judgement in absentia.

(e) Pretrial custody

36. Pretrial custody is one of the interim protection measures specified in article 167 of the Code of Criminal Procedure. Only a competent judge may order protection measures and this only when there are reasonable grounds to suspect culpability. The judge must be guided by the principle of proportionality, taking into account the seriousness of the offence, the circumstances of its commission and the probable penalty. The need to continue protection measures must be reviewed monthly by the judge.

37. The judge may replace pretrial custody by house arrest in the case of women in the last three months of pregnancy, mothers of infants under 6 months old or persons suffering from a terminal illness.

38. The Code of Criminal Procedure has imposed strict limitations on the use of pretrial custody. Article 168 states that deprivation of liberty may only be applied when other protection measures are inadequate to ensure that the purposes of the proceedings are fulfilled. These restrictions do not apply to offences involving the sale or use of drugs or the laundering of money or other proceeds resulting from illicit activities. In these cases the judge is obliged to order pretrial custody.

39. Pursuant to article 163 of the Code of Criminal Procedure, the judge may only order pretrial custody at the request of the prosecution and only on condition that certain specified circumstances are attested, relating primarily to the nature of the offence committed and the presumption of the involvement of the detainee, and also on condition the detainee is unlikely to attempt to escape, will not impede the proceedings or pose a danger to victims or that there is no risk of him or her committing further offences.

40. The new code sets shorter periods for the conduct of criminal proceedings at first instance which are even further reduced when the accused is being held in pretrial custody and which, in its turn, entails stricter monitoring to ensure that pretrial custody does not extend beyond these statutory periods. Under article 134, the detainee must be released if the judge has been unable to pass judgement within three months following conduct of the preliminary hearing. The period set for the conduct of proceedings for serious offences where the accused has been remanded in custody is three months ; this is reduced to one month in the case of less serious offences and 10 days for misdemeanours.

41. These periods may be extended in the case of particularly complex proceedings such as those relating to terrorist activities ; trafficking in persons and drugs ; and banking and similar offences. A declaration of complexity of the offence must be submitted during the initial hearing ; once approved, it may serve as the basis for ordering the continuance of pretrial custody for periods of up to one year.

42. As a general rule, article 179 of the code stipulates that, once sentence has been passed, the period of pretrial custody may not exceed the period stipulated in the contested judgement and, if it has, the detainee shall be released forthwith.

(f) Detention in the enforcement of judgements

43. The 1974 Criminal Code establishes, among other things, the following penalties :

(a) Normal imprisonment, namely, deprivation of liberty for periods of between 3 and 30 years. These must be served in a prison and involve the performance of agricultural or factory work within the correctional institution or community service outside the facility (arts. 56 and 59) ;

(b) Medium-term normal imprisonment, defined as deprivation of liberty for periods of between 1 and 12 years, which must be served in a prison or a special agricultural penal colony and which involves the performance of work exclusively within the custodial establishment (arts. 36 and 60) ;

(c) Light imprisonment, namely, deprivation of liberty for periods of between 10 days and 2 years. Persons sentenced to light imprisonment may work within the facility but are not obliged to do so.

44. Enforcement of the penalty does not mean that the convicted person is unable to exercise the rights and prerogatives granted by the Constitution and international treaties. Sentences are enforced by enforcement judges (Code of Criminal Procedure, art. 403). Time spent in pretrial custody and under house arrest counts against the sentence handed down (Code of Criminal Procedure, art. 410).

45. The delegation learned that, at the time of its visit, the country's prison population amounted to 5,758 convicts. Of these, 1,030 were in pretrial custody and 4,728 were serving sentences ; 93 per cent were men and 7 per cent women. Most were first-time offenders.

46. The director of the Nicaraguan prison system informed the delegation that 49.77 per cent of the prison population was aged between 35 and 50 ; 1.04 per cent were teenagers between the ages of 15 and 18 and 0.28 per cent were aged over 70. In all, 29 per cent had been charged with offences against life and personal integrity and safety ; 25 per cent with offences against health (primarily offences involving the sale and use of narcotics and psychotropic substances) ; and 18 per cent for sexual offences. A total of 55.24 per cent were serving prison sentences longer than three months.

47. Convicts are housed in different cell blocks in accordance with their category : rehabilitation and pretrial detention ; labour regime ; open regime ; semi-open regime ; and women. Prisoners in the open regime are entitled to make home visits from the detention facility for periods of between three and six days. Some prisoners complained to the delegation that the period of time that they had spent in police cells had not been taken into consideration when determining their category.

48. The delegation confirmed, in some of the facilities, the existence of prison inmate committees. These are intended to improve the detention conditions and usually work together with the prison authorities on these matters.

49. The delegation visited Tipitapa prison headquarters, the main custodial establishment in the country. Although the prison has capacity for 1,802 prisoners, at the time of the visit there were 1,932 prisoners held inside it. Of these, 18.21 per cent were being held in pretrial custody. They included 107 aliens, most of whom were Hondurans (64) , Colombians (31) and Guatemalans (30). In all, 51 per cent of the prisoners worked inside the facility. Some prisoners who were suffering from chronic illnesses were housed in a separate cell block, known as "Galeria No. 7".

50. When it visited Estelí prison, the delegation found that it housed 634 inmates, 585 of whom were men and 49 women. The prison's capacity, however, is only for 406 inmates. Six of the women were being held in pretrial custody and 43 were serving sentences.

51. In La Esperanza women's prison, the delegation found 177 women, 147 of whom had been charged with the use or sale of narcotics and psychotropic substances. Ten women were being held for offences against property ; two for sexual offences ; and the remainder for breaches of law and order, the illegal carrying of weapons and other offences. In all, 135 women were serving sentences and 42 being held in pretrial custody. The women were housed in five different cell blocks. Those who showed good conduct were allowed to work inside the prison. The delegation noted a preponderance of women from the Caribbean coast in the prison.

52. Act No. 473 of 2003, the Prison System and Enforcement of Sentences Act, regulates the national prison system. This act is implemented by decree 16-2004 of March 2004. There are eight penitentiary facilities centres in the national prison system. The delegation learned, however, that there is no prison in Puerto Cabezas, capital of the autonomous region of Atlántico Norte. In Bluefields, capital of the autonomous region of Atlántico Sur, the delegation visited the only existing prison, which houses both men and women. Although these are held in different cell-blocks, there is no separate prison for women.

Detention of minors

53. Nicaragua ratified the Convention on the Rights of the Child in 1990. It is also a State party to its additional protocols. In May 1988 the Children's and Young Persons' Code was promulgated. Replacing the previous legislation on minors, which was of a tutelary nature, the new legislation sets in place a special criminal system for the administration of juvenile criminal justice. It also establishes the National Council for the Comprehensive Care and Protection of Children and Young Persons (CONAPINA) , which includes representatives of the Nicaraguan Red Cross and of the private sector. The district juvenile courts operate 24 hours per day and seven days per week in 13 departmental capitals.

54. Under article 63 of the code, the Office of the Children's and Young Persons' Ombudsman was set up. In all the country's major cities, there are one or two ombudsmen for children and young persons. There are also procurators who specialize in this area.

55. To incur criminal liability, an offender must be aged 13 and over. The legislation establishes, however, that minors aged between 13 and 15 may not receive custodial sentences and are subject instead to special protection measures. Minors aged between 16 and 18 make up less than 1 per cent of the prison population.

56. Minors may not remain in police detention for longer than the time required to verify their identity and age and not longer than 24 hours. They must immediately be made available to the special procurators for the purpose of initiating the necessary investigations. No minor may be sentenced to a term of imprisonment longer than six years.

57. A significant number of minors in detention are being held for offences related to the use or sale of drugs. The situation is particularly serious in the autonomous regions. Many are also held for involvement in the commission of property-related offences and misdemeanours, sexual offences and domestic violence.

58. A number of postgraduate programmes have been organized to upgrade judges in juvenile law and the application of juvenile justice. Under Act No. 228, the national police service is obliged to establish plans and programmes to prevent juvenile violence.

59. Detained minors must be sent to special custodial facilities where they are to await trial and, if sentenced to custodial penalties, they must serve their sentences in these same facilities.

Administrative detention of immigrants and asylum-seekers

60. In addition to being a destination country for immigrants, Nicaragua is nowadays also a transit country for migrants hoping to gain entry to the United States of America. The country's migration law dates to 1993 and has not been updated. In 1996 the Trafficking in Illegal Migrants Act was promulgated.

61. The delegation visited the custodial centre for aliens and immigrants set up in the premises of the Office of Migration and Alien Affairs. This can accommodate 50 persons. During its visit to the centre, members of the delegation met some 20 inmates. Most of these belonged to a group of Cuban citizens proceeding from Costa Rica with the intention of crossing into the United States of America and seeking political asylum in that country. There were also Chinese nationals who had landed on the Nicaraguan coast and persons from South American countries.

62. Nicaraguan legislation does not have any system for the administrative detention of would-be immigrants. Aliens are held simply while their identity and legal status in the country is verified or while waiting for deportation orders to be carried out. Most migrants illegally entering the country are returned to their countries of origin. Persons interviewed raised concerns, however, about the Costa Rican authorities, who often refuse readmission to aliens who have entered Nicaragua from the territory of Costa Rica.

63. Pursuant to the law, the Office of Migration and Alien Affairs must organize hearings to determine the status of aliens found to be in an irregular situation. These hearings take place within 24 hours of the arrest of the alien concerned. The hearings may result in the issuance of a deportation order. If it is impossible to enforce such an order, the alien is granted temporary permission to remain in the country. It must be borne in mind that many countries outside the American continent have no consular representation in Nicaragua and that most of its international air connections pass through Costa Rica, Mexico or the United States of America.

Legislation on narcotics and psychotropic substances

64. In 1999, the Nicaraguan National Assembly passed into law Act No. 285, amending Act No. 177, the Narcotics, Psychotropic Drugs and Other Controlled Substances Act. Article 51 of Act No. 285 stipulates that persons committing the offence of trafficking in drugs and psychotropic and other controlled substances within the country shall be punished with terms of imprisonment ranging between 5 and 20 years and fines of between 1 million and 5 million cordobas (approximately 61,000-303,000 United States dollars). International drug trafficking carries a penalty of imprisonment between 20 and 30 years and fines ranging from 2 million to 9 million cordobas (Act No. 285, art. 52). Mere possession of drugs, in quantities

not exceeding 5 grams for marijuana or 1 gram for cocaine and other drugs, is punished, for first time offenders, with mandatory detention of 30 days and a fine of between 500 and 1,000 cordobas, for repeat offenders, by mandatory detention of between 30 and 90 days and fines of between 1,000 and 5,000 cordobas.

65. Article 78 of Act No. 285 stipulates that defendants awaiting trial for the commission of such offences may not on any account be released on bail. If found guilty and sentenced, they may not be granted suspended sentences, nor may they be released on parole after having served part of their sentences, nor may they benefit from pardons or amnesties.

III. POSITIVE ASPECTS

A. Cooperation of the Government

66. Throughout its visit, the delegation enjoyed full cooperation with the national and local authorities. It was able to visit all the detention facilities which it asked to see. In these facilities, it was able to have private meetings, without witnesses, with all those detainees who consented to such interviews.

B. Endeavours to comply with international standards and to ensure protection of human rights in the criminal justice system

67. Since the promulgation of its Political Constitution, Nicaragua has implemented wide-ranging changes to its legal system, which have had positive repercussions for the democratic functioning of the State and the protection of its citizens' individual and collective rights.

68. Promulgation of the Code of Criminal Procedure in 2001 brought into existence a new system of criminal justice, which renounced the former inquisitorial approach followed under the now repealed Criminal Investigation Code and replaced it with an adversarial system. Under the new system, the Office of the Public Prosecutor is assigned the powers formerly vested in the examining judge.

69. The former system, based on scrutiny by the judge within his or her own chambers of the case files, has been replaced by an adversarial and oral system based on open and public trials in which the judge presides over the hearings and performs an independent role, functioning as a neutral moderator rather than as an investigator.

70. Implementation of the new legislation has been satisfactory and has brought positive results. Introduction of jury trials and the system of plea-bargaining and the establishment of the institution of enforcement judges and of mandatory deadlines both for the preliminary and initial hearings and for the trial itself have led to a drastic reduction in the number of persons held in pretrial custody and have facilitated the administration of justice.

71. There has been a significant decline in the number of illegal, unjustified or arbitrary arrests and detentions. Generally speaking, the number of arrests has dropped to some 20,000 per year. Of this total, a mere 3,000 persons will actually stand trial. Some of those persons

interviewed told the delegation that, previously, the police approach was to arrest a person first and then to investigate the case ; now, they investigate first and then remand in custody.

72. Another positive consequence is that most of those held in detention are convicted persons serving their sentences. Fewer than 18 per cent of the country's prison population, numbering 5,758 inmates at the time of the delegation's visit, were being held in pretrial custody. This situation contrasts favourably with that observed in most other Latin American countries, where the number of persons in pretrial custody is often far higher than the number serving sentences. This positive trend appears to have been further encouraged by inter-institutional efforts over the past five years, which have also involved non-governmental organizations.

73. There is currently a clear perception among the public that the courts are now transparent. The fact that they are both open and public enables parties to proceedings freely to express their views and to perform their functions without impediment.

C. Efforts undertaken relating to the detention of minors

74. Thanks to ratification of the Convention on the Rights of the Child and promulgation of the Children's and Young Person's Code, the situation regarding minors in conflict with the law has been considerably improved. The delegation heard favourable comments about the preventive work being conducted by the police in marginal urban communities. They also heard positive comments about the social and recreational programmes being conducted, such as the good citizenship and civil safety programme, which are designed to prevent juvenile violence. Unlike some of its neighbours, Nicaragua does not have the problem of criminal teenage gangs.

75. The new legislation stipulates that the problem of juvenile delinquency must be tackled through restorative justice programmes. In addition to the special judges and procurators, public defenders are also involved in appraising juvenile offenders.

76. The delegation visited the special juvenile detention centre set up in the premises of Tipitapa prison headquarters, and known as "Gallery 7". Despite certain shortcomings in the institution's physical amenities, such as the water supply and leaking windows which sometimes let in rain, the juvenile inmates are generally well looked after and kept busy with educational and recreational activities. During its visit to the Estelí prison, the delegation found nine minors housed in a cell-block separate from that of the adults. They also found teenage girls in La Esperanza prison. The delegation was told that some minors are also held in detention in the towns of Chinandega, Chontales and Masaya. The State allocates 10 cordobas (approximately 60 United States cents) per day to cover the needs of a minor in detention, an amount which is clearly inadequate. Efforts are being made, however, to provide psychological support, vocational guidance and educational and recreational programmes for minors.

IV. AREAS OF CONCERN

A. Failure to comply with procedural conditions and deadlines for detention stipulated in the Code of Criminal Procedure

77. Although the introduction of the new Code of Criminal Procedure has been successful, the delegation notes its concern that, on occasion, detainees are not brought before a judge for a

preliminary hearing within a period of 48 hours, as stipulated by both the Constitution and the Code. Lawyers in the Public Defender's Office and the Commissioner of Police concede that, while the police are taking effective action to notify the Public Prosecutor's Office within a period of 12 hours of detention measures, detainees are being held for periods of between 8 and 10 days before being brought in person before judges for a preliminary hearing. During these periods, detainees remain in the police cells.

78. As a result, the judges presiding over the hearing do not receive the detainees within a period of 48 hours from their being taken into detention, even though the Public Prosecutor's Office informs the judges in writing that the detainees have been placed at their disposal, and the requirements for physical attendance at the preliminary hearing are thus not being respected. Similarly, the judge presiding over the preliminary hearing is not able to rule within a period of 48 hours on whether the arrested person should be kept in custody or released or, if such a ruling is made, it is done so in the detainee's absence ; from all this, it may be deduced that the preliminary hearing is treated as a pure formality and that on many occasions it is the initial hearing - which should in fact be the second hearing - at which the physical presentation of the detainees, which, as stipulated by the Code, should take place within 48 hours of arrest, actually occurs.

79. The Working Group also doubts whether, in all cases, this second appearance by detainees actually takes place within the 12 days following their initial detention (48 hours plus 10 days) , as stipulated in article 265 of the Code, since, at a meeting with the delegation, lawyers from the Public Defender's Office stated their view that, when the preliminary hearings were being held more than 12 days after the arrest, the detainees should have been released. The public defenders considered that this period of 12 days during which, as stipulated by the Code, judges must call an initial hearing, should be non-negotiable and, on its expiry, should entail dismissal of the case, as expressly stated in the Code in the event of failure to comply with the time limits set for the conduct of the trial.

80. Without prejudice to the procedural significance of this time limit and the possible consequences for the detainees of its non-observance, the Managua appeals court has rejected the interpretation by lawyers and the Working Group is concerned by a growing trend to tolerate, in practice, violation of the procedural time limits pertaining to the legal framework of detention.

81. In its visits to the Estelí and Bluefields police stations, the delegation observed that there were no specific and systematic registers recording with clarity and precision the dates on which detainees were admitted to and left the police station, the offices and the authorities to which they were presented and the various authorities responsible for the detainees.

82. At the same time, representatives of non-governmental organizations, lawyers and some judges informed the delegation that police officers, when taking people into custody without a court order, did not always do so within the stipulated period of 12 hours of having become aware of the commission of an offence. They pointed out that, on occasion, before this period has expired, certain investigations are carried out with the aim of determining whether notification of the offence has in fact been received during the period stipulated in article 231 of the Code.

83. While the lack of clear records in police stations meant that the delegation was unable to observe these irregularities, it did have interviews with a large number of detainees in Bluefields police station, over the period of several weeks, who said that they had not been brought before any judge, although it was not possible, from the registers that were produced, to verify the exact stage that they had reached in their proceedings.

B. “Los Donados”

84. In the correctional institutions which it visited, the delegation encountered detainees, most of them already serving sentences, who had practically no communication with the outside world, either because they were being held in prisons far from the departments where they lived, or because their relatives were unable or unwilling to visit them, or because they had no funds to pay for the services of a lawyer. These prisoners are sometimes called - and they call themselves - “los Donados” - that is to say, they have been dumped as “gifts” on the prison system. Apart from the tragic nature of their plight, this situation could also give rise to arbitrary detention, since these persons are incapable of exercising privileges to which they might be entitled, such as, for example, parole once they have served part of their sentence. The delegation noted that poverty, marginalization and lack of education impeded the exercise of the rights and powers accorded to them by law. Some prisoners complained that they had already completed their sentences but were not being released because there was no one to whom they could turn to perform the necessary formalities. Enforcement judges and the public defenders must give particular attention to the situation of these persons. The delegation came away with the impression that, while civil society organizations and, in particular, the churches, may be conducting excellent material and spiritual welfare work among the prison population, there were no civil society initiatives under way to provide legal assistance and protection to those persons, such as “los Donados” , who appeared to need it most urgently.

C. Disproportionate severity of penalties for offences relating to the sale and use of narcotics

85. The working group is aware that, since the Nicaraguan coastline runs through one of the major shipping areas for drug traffickers, the authorities have particular international obligations and a specific national interest in taking firm action against such traffickers. The criminal provisions contained in Act No. 285 and its practical application arouse certain concerns, however, falling within the mandate of the Working Group.

86. In the first place, given the geographical situation of the country, the legislation is geared towards firmly combating international drugs trafficking and handing down criminal penalties on drug traffickers using Nicaragua and its territorial waters for the transit of such merchandise. In practice, however, it is primarily users and small-scale traffickers who are punished, generally the least significant among the local traffickers. These individuals usually belong to the poorest and most vulnerable population sectors. Women and, in particular, mothers and housewives, are disproportionately affected by the anti-drugs legislation. As already noted above, of the 177 inmates in the La Esperanza women’s prison, 147 are serving drugs-related sentences.

People from different sectors agree that the major drug traffickers are rarely caught and, when they are, are able to use their economic resources to elude the draconian sanctions handed down under Act No. 285.

87. Act No. 285 is not only severe in the penalties which it imposes, such as a minimum of five years of rigorous imprisonment for drug trafficking, but also in terms of the exorbitant fines specified, ranging from a minimum of 1 million cordobas (some 61,000 United States dollars). For those unable to pay, the fine is commuted into an additional one year's rigorous imprisonment : the minimum sentence of five years' rigorous imprisonment is thereby effectively increased to six years. Offenders sentenced for drugs offences are not allowed to benefit from the system whereby convicts reduce their sentences through work (two days of work give one day's sentence reduction). Neither are those convicted under Act No. 285 able to benefit from parole, like ordinary prisoners. The rehabilitative function of criminal penalties is therefore seriously undermined, since the detainees have no incentive to work, learn skills or study while within the prison establishment. Some criminal judges are not only critical of Act No. 285, but even - and contrary to the express provisions of the act - sentence convicted persons to ordinary rather than rigorous imprisonment, or endeavour to limit the application of custodial sentences to offenders who are merely users.

88. The question of the weight of the seized narcotics is crucial, since it may lead either to a sentence of 30 days' detention for possession of drugs or a minimum sentence of five years' rigorous imprisonment for trafficking. Everything depends on whether the quantity does not exceed 5 grams for marijuana or 1 gram for cocaine or other drugs. The principle that the established weight should relate only to the narcotic substance itself and should exclude any additives is also not uniformly respected and applied in different ways. Nor are there sufficient guarantees against possible abuses or errors on the part of the police relating to the weighing of seized drugs, which could result in serious prejudice to the persons charged.

D. Situation in Bluefields

89. The Caribbean coastal region of Nicaragua differs markedly from the rest of the country in terms of its history, politics, ethnic make-up and culture. Most of its population either belong to indigenous groups or are of African descent. Historically, they have been excluded from the political life of the centre of the country and from its economic development. As a rule, Nicaraguans regard the Atlantic coast, on the one hand, as a vast reserve of natural resources with immense economic potential and, on the other, as a poverty-stricken region awash with crime, violence and drug trafficking. Traditionally, the inhabitants of the Caribbean coastal region have been ignored by the central authorities and subject to a neglect which sometimes borders on racism. These political and social circumstances must be borne in mind when appraising the situation which the delegation observed during its visit to Bluefields.

90. Eighty detainees are held in Bluefields prison (including women) and 104 men are detained in the four cell-blocks at the police station. The detention conditions in this prison may be categorized, like those in Tipitapa and Estelí prisons, as understandable, given the extreme lack of economic resources available to the prison authorities. The situation in the police station,

by contrast, is intolerable : there are bunks for only three detainees in each cell, and the rest have to sleep on the floor or in hammocks hung from the ceilings. The cells are filthy, dark and damp, without ventilation. Detainees are unable to leave their cells for fresh air or to get even the minimum exercise.

91. Some of the detainees in the police cells have been recently arrested and are therefore under police custody, in accordance with the law. The majority, however, are being held in pretrial custody or serving their sentences, and should be in the prison. The prison is unable to take them in, however, owing to lack of space, although the overcrowding is in fact much worse in the police station. Some detainees may remain months and even years on end in police cells. A perverse consequence of this situation is that their effective sentences are much longer, since they are unable to work and therefore unable to benefit from the system of sentence-reduction for work.

92. Detainees in the police station submitted complaints which the delegation only occasionally heard when visiting other detention centres. First, they complained that they had not been brought before a judge until several weeks after their arrest. While the delegation was unable to verify these claims, its scrutiny of the registration records in the police station did not provide any evidence that the claims were unfounded, as the records are so shoddily maintained. The detainees also complained that their lawyers had not been present during their questioning. They also claimed that police officials systematically used torture and ill-treatment, beating them to extract information and confessions and to enforce discipline in the cell-blocks in question. The delegation visited the room used for questioning, which the detainees called the “torture chamber”. Here they found, one after the other, implements which the detainees claimed had been used to torture them. The delegation also found one detainee chained to a post in the police station forecourt. He had been chained there, day and night, for more than three months, mumbling incoherent phrases.

93. It should be noted that the Public Prosecutor’s Office has an office in the police station, right next door to the so-called “torture chamber” and situated less than 10 metres from the cell-blocks and from the forecourt where the chained man was being held.

94. There is no prison facility in Puerto Cabezas, capital of the Atlántico Norte autonomous region. The delegation was informed that, in this area, more than 60 persons are being held in detention in the police station.

E. Enforcement by committal

95. Civil society representatives stated their concern at the continuing provisions in Nicaraguan civil law relating to the institution of “enforcement by committal”. This refers to the power accorded to a judge in civil proceedings to order the detention of an individual if he or she has failed to surrender an item handed over as a loan guarantee or assets which have been kept as deposits or if he or she fails to comply with a contractual obligation. Some individuals have been arrested by order of a civil judge and placed in police cells, where they may remain for a period of months, up to a maximum of one year.

96. Article 41 of the Constitution stipulates that no one may be detained for bad debts. It also establishes, however, that this principle does not limit the powers of the judicial authorities to take action for failure to comply with maintenance obligations. It states in addition that it is the duty of every citizen to pay his or her debts. It could therefore be argued that enforcement by committal may be ordered to ensure compliance with the duty to pay maintenance. In practice, however, recourse to this measure is primarily exercised by banks and other financial institutions against their debtors.

97. The Working Group believes that a clear distinction should be made between the civil obligation to pay a debt resulting from a maintenance obligation and the offence of abandoning a family ; just as a distinction should be drawn between the civil obligation to pay a debt and the offence of fraudulently disposing of an item handed over as a pledge or deposit. The acts leading to civil and criminal consequences may be the same but the legal provisions governing them differ substantially. Article 11 of the International Covenant on Civil and Political Rights expressly stipulates that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Detention may only be imposed for the possible commission of criminal acts and offences.

V. CONCLUSIONS

98. Nicaragua, one of the poorest countries of Latin America, has passed through a long armed conflict, a difficult peace-building process and terrible natural disasters, the consequences of which are visible to this day. Notwithstanding these adverse conditions, however, it has moved forward in a major process of democratic change with regard to the administration of justice. This applies, above all, to the area of criminal justice, where Nicaragua - in contrast to other countries around it, where purely superficial amendments have been made to the implementing legislation - has made truly substantial changes in the practices of its institutions.

99. This positive development of the country's legal framework and in its practical application is all the more impressive when we recall that, regrettably, poverty levels in the country appear not to have dropped to any perceptible degree. These positive gains, which are denied any real impact by their lack of social consolidation, could stall or even regress unless certain practices observed by the Working Group which run counter to the new legal framework are eradicated, practices which should be eradicated with the same enthusiasm and tenacity as were brought to bear on the introduction of the new Code of Criminal Procedure.

100. The assumption by the police in Bluefields of tasks which do not in any way come within its remit is indicative of the mindset of the old order. While no one can dispute that the city's prison is small and lacks the capacity for all the prisoners in the autonomous region, it is absurd that the police station, which is adjacent to the prison, should take in more detainees than the prison itself, a situation which, in a way, demonstrates the inexcusable failure by the central Government to perform its prescribed duties.

101. Tolerance of irregularities relating to the bringing of detainees before judges within the time limits specified in the new code, and also the continued application of discriminatory provisions for persons detained and sentenced for the use and sale of drugs, could also provide a loophole for the revival of practices which run counter to the scrupulous observance of human rights and this could in turn derail the reforms pursued so vigorously to date.

VI. RECOMMENDATIONS

102. Nicaragua has made highly impressive progress in improving its institutions, yet a great deal still remains to be done, in particular relating to the establishment of a true judicial career structure, which would have a restraining effect on the current excessive mobility of judges. Above all, efforts must be made to build on what has already been attained. Accordingly, the Working Group proposes the following recommendations :

(a) The authorities must ensure that the police comply strictly with the requirement to bring every detainee before a judge within a maximum period of 48 hours following his or her arrest. Presentation of the detainee must be made in person, with the physical presence of the detainee, and not consist merely in the submission of the police file. The judicial authorities must urge judges to ensure strict compliance with this rule. Compliance with this rule, which may appear a mere formality to an uninformed observer, is in point of fact a key safeguard against arbitrary detention and the possible occurrence of acts of torture and ill-treatment ;

(b) The authorities must take steps to improve substantially the system of registers kept in police stations. From these registers it should be possible to determine with precision, at any moment, the situation of all detainees, including the date and time of their arrest ; the police officers responsible for taking them into custody ; the date and time on which the detention was notified to the Office of the Public Prosecutor, to the detainees' families and to their legal counsel ; the date and time on which they were physically brought before a judge ; the date and time on which they left the police station and the authority into whose charge they were handed ; etc. The registers must contain all the necessary signatures and stamps ;

(c) Work must be undertaken to revise the rules in the country's drug laws which impede or frustrate the idea that the punishment should be conducive to the rehabilitation of detainees and prepare them to return to society. In particular, a revision should be made to the provision contained in article 78 of Act No. 285, which stipulates that persons who have been prosecuted for the commission of offences involving the use or sale of drugs may not be released on any grounds against surety or benefit from the application of suspended sentences, parole, pardon or amnesty and, in addition, the provisions stipulating that, in all cases, they shall be sentenced to rigorous and not ordinary imprisonment and preventing them from benefiting from the system of sentence reduction for work. Consideration should also be given to the excessively high levels set for fines imposed as the principal penalty, since in the vast majority of cases these are converted to one year's additional rigorous imprisonment. The fine could be set in accordance with the economic capacity, the property status or the income of the person being sentenced ;

(d) The institution of "enforcement by committal" - namely, the right of a judge in civil proceedings to order detention for failure to comply with obligations of a civil nature and the power of the police to detain in their cells persons who have not been arrested for the commission of offences - should be removed from the civil statute books ;

(e) Urgent efforts should be made to review the situation of detainees in Bluefields and to consider the possibility of setting up a new prison system capable of accommodating many of those currently being held in police cells. In the meantime, urgent measures should be taken to relieve congestion in the police cells. Although the Working Group did not visit Puerto Cabezas, it would also recommend the construction of a detention facility in that centre, given that it currently lacks such a facility ;

(f) Nicaragua should continue the process of democratic consolidation launched in 1987 through promulgation of its Political Constitution and in particular the processes of judicial reform and the reform of its criminal procedure. Efforts should also be made to combat crime and violence through policies that are respectful of human rights ; through prevention programmes and by equipping the judiciary, the Office of the Public Prosecutor, the police and the Public Defender's Office with the necessary resources, tools and equipment for them to perform their tasks effectively.
