UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/CN.4/2003/8/Add.3
17 December 2002

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-ninth session
Item 11 (a) of the provisional agenda

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

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO MEXICO*

(27 October to 10 November 2002)

Addendum

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

GE.02-16007 (E) 290103 300103

Executive summary

The Working Group on Arbitrary Detention visited Mexico in response to a standing invitation from that country to all thematic mechanisms of the Commission on Human Rights. The Working Group was interested in investigating both the possible arbitrary detention of ordinary prisoners and the situation of detained migrants. It visited four States (Guerrero, Jalisco, Mexico and Oaxaca) and the Federal District. It was unable to visit other States because of the lack of time, the distances involved and the need to make the best possible use of its stay.

The Working Group would first like to point out how pleased it was to learn of a number of reforms that serve as a basis for the new Mexican human rights policy. The following are the principal reforms with which the Government intends primarily to restore the Mexican people's faith in their institutions:

(a) Focus Mexican foreign policy on the defence of human rights;

(b) Develop a human rights culture within the State machinery by setting up various "human rights units" in government departments;

(c) Increase transparency by enhancing cooperation with civil society and with the monitoring mechanisms of the international organizations: in this respect, accord due importance to the role of the National Human Rights Commission and the State human rights commissions;

(d) Complete a programme to ratify international human rights instruments;

(e) Strengthen cooperation with human rights organizations and with the United Nations by setting up a local office of the United Nations High Commissioner for Human Rights.

Nevertheless, serious difficulties undoubtedly remain.

The Working Group learned from conversations with the national and State human rights commissions and with non-governmental organizations (NGOs) that one of the most common human rights violations is arbitrary detention resulting from the lack of due process. While there has been a fall in the number of complaints about torture, ill-treatment and other abuses, there continue to be complaints about arbitrary detention, particularly in connection with drug-related offences (information supplied to the Working Group by the First Inspector of the National Human Rights Commission). The records of the Human Rights Commission of the Federal District show that 1 out of 10 detentions is arbitrary.

After visits to various detention centres and conversations with over 400 prisoners, their relatives and their defence lawyers, it became clear that the victims of arbitrary detention and those unable to extricate themselves from that kind of situation come from the most vulnerable population group. The Working Group's attention was drawn, among other things, to difficulties in preparing an adequate defence, problems of ineffective remedies and disproportionate penalties for certain offences, with no chance of early release. Some convicted prisoners who

had been arbitrarily detained in previous years, and even some who had been convicted recently, had been given no opportunity to remedy their situation through ordinary judicial procedures. This led President Fox to set up the Commission on Release from Prison.

Although the authorities were found to be open and willing to improve the monitoring of detention (a point which the Working Group would like to emphasize), it is still difficult to give effect to measures to prevent arbitrariness. Two examples can be given: the presumption of innocence, which is not expressly mentioned in any legislation, and the concept of "equipollent flagrancy", which amounts to a sort of blank cheque for detaining people. Abuses that took place mostly in the past but that still take place today as a result of both corruption and a lack of human rights training have helped to create a situation in which many people are extremely vulnerable in the presence of public officials.

The problem of the impunity of many officials in connection with arbitrary detention has not yet been overcome. The system often lends itself to this scenario. Moreover, in some parts of the country, particularly in the countryside, there are a number of powerful individuals who, in association with certain local authorities, are able to operate outside the law, sowing fear among local, sometimes indigenous, communities. Despite the efforts of the Guerrero Human Rights Commission, the majority of complaints of arbitrary detention received by the Working Group in this State concern situations of this kind.

In addition, although the Working Group's mandate does not cover detention conditions, its visits to a large number of detention centres revealed several situations that it is bound to mention for humanitarian reasons, so that the State can do something to resolve them. Prison conditions need to be improved, particularly in certain parts of the countryside, given the present overcrowding (Oaxaca, Tlaxiaco, Iguala and Acapulco) and the unlikelihood of any reduction in the number of inmates under the current penal system and system of criminal procedure.

In the high-security prisons ("federal centres for social rehabilitation", known by the abbreviation "Ceferesos"), where security is so tight that not only the members of the Working Group, but also the prison governor himself, had to go through numerous security checks, inmates have no privacy when they talk to their lawyers (their papers are often photocopied). Contacts between inmates and their relatives are even more restricted. Fernando Gatica Chino and his wife Felicitas Padilla Navas, who are held in separate detention centres and whose detention was declared arbitrary (under category III) by the Working Group in its opinion No. 37 (2000) are allowed only one eight-minute telephone call a month.

ANNEX TO THE EXECUTIVE SUMMARY OF THE REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO MEXICO

(27 October to 10 November 2002)

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Introduction

1. The Working Group on Arbitrary Detention, which was established by the Commission on Human Rights in its resolution 1991/42 and whose mandate was defined in Commission resolutions 1997/50 and 2000/36, visited Mexico from 27 October to 10 November 2002 at the invitation of the Mexican Government. The delegation consisted of the Chairperson of the Working Group, Mr. Louis Joinet (head of delegation) and Ms. Soledad Villagra de Biedermann (member of the Working Group), as well as the Secretary of the Working Group, a staff member from the Office of the United Nations High Commissioner for Human Rights in Geneva and two United Nations interpreters.

2. In 2001, the Government of Mexico issued an invitation to all non-treaty thematic mechanisms of the Commission to visit Mexico. In response to the invitation, the Working Group requested a specific invitation to make an official visit to Mexico in 2002. Permission was granted immediately and the visit enabled the Working Group to meet with federal officials from the executive, the legislature and the judiciary, as well as with officials from the States of Guerrero, Jalisco, Mexico and Oaxaca and the Federal District, to talk to representatives of various national and local NGOs and to visit various detention centres and migrant holding centres, where the delegation was able to talk in private and in the absence of witnesses to hundreds of prisoners and inmates of the holding centres.

3. The Working Group would like to express its particular gratitude to the Government of Mexico, particularly the Under-Secretary for Human Rights and Democracy of the Ministry of Foreign Affairs and her officials, who accompanied the Working Group during all its meetings with the authorities, and to the Permanent Mission of Mexico to the United Nations Office at Geneva for their full cooperation, openness and support before, during and after the visit. It would also like to thank United Nations officials in Mexico, including the Resident Coordinator in the country, the chief and staff of the technical cooperation programme of the Office of the United Nations High Commissioner for Human Rights, the Resident Representative of the United Nations Development Programme (UNDP), the press officer of the United Nations Information Centre (UNIC) and the representatives of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF) in Mexico, for substantive and logistical support. Special mention should be made of the many Mexican NGOs which began working towards the success of the visit well before it took place.

I. PROGRAMME OF THE VISIT

4. The Working Group was able to visit 15 detention facilities: the Oriente women's remand prison and men's remand prison in the Federal District; the facilities in the Public Prosecutor's Office in Colonia San Salvador Xochimanca, Atzcapotzalco; the migrant holding centre in Iztapalapa; the La Palma federal centre for social rehabilitation in Almoloya de Juárez, Mexico State; the Colonia Narvarte Diagnostic Centre for Minors in the Federal District; the migrant holding centre at the international airport in Mexico City; the federal centre for social rehabilitation in Puente Grande, Jalisco; the social rehabilitation centre in Iguala, Guerrero; the men's social rehabilitation centre in Acapulco; the women's social rehabilitation centre in

Acapulco; Oaxaca prison; the Santa María Asunción regional prison in Tlaxiaco, Oaxaca; the Southern Rebel Holding Centre; and the military prison in Mexico City. This was the first time ever that the Working Group had held private meetings with detainees in a military prison.

5. The following federal officials who met with the Working Group should be mentioned: the Minister of Public Security, the Minister of the Interior, the President and members of the Senate Human Rights Commission, the President of the Supreme Court, the Executive Secretary for Disciplinary Matters of the Council of the Federal Judiciary, the Director-General for International Relations, the Assistant Attorney for International Affairs at the Office of the Attorney-General, the Director-General for the Protection of Human Rights at the Office of the Attorney-General, the Military Prosecutor, the Under-Secretary for Human Rights and Democracy at the Ministry of Foreign Affairs (who, together with the Director for Human Rights from the same ministry and the Director for Dialogue and Individual Cases, did everything to ensure the success of the mission), the Director of the Justice Department and the Technical Secretary of the National Indigenous Institute, the Under-Secretary for Population, Migration and Religious Affairs, the Commissioner of the National Institute for Migration, and officials from the Office of the Military Prosecutor, the Federal Investigation Agency (AFI), the Organized Crime Unit (UEDO) and the Office of the Public Defender.

6. Special mention should be made of the talks held with the First Inspector-General of the National Human Rights Commission of Mexico, the President of the Human Rights Commission of the Federal District and his very able team, and the presidents of the human rights commissions of the States of Jalisco, Guerrero and Oaxaca.

7. In the Federal District, the Working Group was able to hold talks with the Minister of Public Security of the Federal District, the Assistant Attorney for Human Rights of the Federal District and officials from the Office of the Attorney-General of the Federal District. In the State of Jalisco, the Working Group was able to meet with the President of the High Court, the Secretary-General of the Government, the State's Minister of Public Security, Crime Prevention and Social Rehabilitation, the Director of Crime Policy and Technical Standards, and officials from the State Ministry of the Interior and the Office of the State Attorney-General.

8. In the State of Guerrero, the Working Group held talks with the Secretary-General of the Government, the State Attorney-General, the Minister of Public Security and officials from the Ministry of the Interior, the Ministry of Public Security, the Office of the Attorney-General and the State judiciary. Lastly, in the State of Oaxaca, the Working Group met with the executive's Chief Coordinator for Human Rights, the President of the State's High Court and officials from the Ministry of the Interior, the Ministry of Civil Protection, the Office of the State Attorney and the State Office for Crime Prevention and Social Rehabilitation, as well as with members of the Child Welfare Council.

9. The cooperation between NGOs and the Working Group during the visit was exemplary. The contributions of the following NGOs should be highlighted: the Centro de Derechos Humanos Miguel Agustín Pro Juárez, the Mexican Commission for the Defence and Promotion of Human Rights, the Mexican League for the Defence of Human Rights (LIMEDDH), the

Fray Francisco de Vitoria Human Rights Centre, the National Network of Human Rights NGOs "All Rights for All", Action of Christians for the Abolition of Torture (ACAT) and Sin Fronteras, among others.

10. At the State and regional level, the following organizations were among those that cooperated with the Working Group: Centro Regional de Derechos Humanos "Bartolomé Carrasco Briseño", Organización de Pueblos Indígenas Zapotecos (OPIZ), Coordinadora Oaxaqueña Magonista Antiliberal (COMPA), Consejo Indígena Popular de Oaxaca, Frente Civil de la Sierra Sur, Centro Nacional de Comunicación Social (CENCOS), Centro de Derechos Humanos y Asesoría a Pueblos Indígenas de Tlaxiaco, Red Oaxaqueña de Derechos Humanos, Centro de Derechos Humanos Tlachinollan de Guerrero, Centro Apostólico Ignaciano de Jalisco, Frente Independiente de Pueblos Indios de Oaxaca, Frente Indígena Oaxaqueño Binacional (FIOB), Comunidad Zimatlan de Lázaro Cárdenas, Centro de Derechos Humanos Tepeyac del Istmo de Tehuantepec, Centro de Derechos Humanos de la Montaña Tlachinollan, Comisión de Derechos Humanos Mahatma Gandhi and Organización de Pueblos y Colonias de Guerrero.

11. In all the States visited and in the Federal District, the authorities provided unrestricted access to prisons, detention centres, immigrant holding centres and the military prison. The delegation was able to talk freely both with prisoners chosen at random and with prisoners whose names were on lists given to the Working Group in advance by relatives and by international and Mexican NGOs.

12. The Working Group attached particular importance to the conversations and consultations with NGOs, lawyers, jurists, academics and experts. Among the most interesting conversations were those with the authorities of the Mexican Bar Association (Colegio de Abogados de México), as well as with Professor Miguel Sarre, Director of the Centre for Public Law Studies of the Autonomous Technology Institute of Mexico (ITAM), and Professor Carlos Ríos.

II. THE MEXICAN LEGAL SYSTEM

A. Constitutional and institutional framework

13. The supreme power of the Federation is divided into the legislative, executive and judicial powers (article 49 of the Mexican Constitution). It is a presidential system, in which the President is both Head of State and Head of Government. The legislative power at the federal level is exercised by Congress, which consists of two houses elected by universal direct suffrage. Mexico has a multiparty system dominated by three political parties: the Partido Revolucionario Institucional (PRI), which held a dominant position for over 70 years, the Partido Acción Nacional (PAN) and the Partido de la Revolución Democrática (PRD). There is also a house of deputies in each federal State whose task is to adopt local laws.

14. The Mexican federal system shares jurisdiction and power between the local judiciaries (in the 31 federal States) and the federal judiciary. The exercise of this power is vested in the Supreme Court. The Council of the Federal Judiciary (article 94 of the Constitution) was set up recently (in 1995) and is responsible for administration, supervision, discipline and professional

training in the federal judiciary, except in the case of the Supreme Court, which presides over the system and whose members are appointed by the Senate at the suggestion of the executive every 15 years.

B. Constitutional rights and guarantees

15. The Mexican Constitution recognizes a number of rights and guarantees for individuals. One of these is the right to personal freedom. Article 16 of the Constitution stipulates, among other things, that an arrest warrant can be issued only by a judicial authority and only when there has been a complaint or accusation in respect of an act defined by the law as an offence punishable with at least a custodial sentence and when there is evidence of the corpus delicti and of the likely responsibility of the suspect. The authority issuing the arrest warrant is held strictly accountable for bringing the accused promptly before a judge. Any failure to do so is a criminal offence. The Constitution also stipulates that, in cases of *flagrante delicto*, any person may detain a suspect, who must be handed over without delay to the nearest authority, which must equally promptly hand the suspect over to the Public Prosecutor's Office.

16. The Mexican system of constitutionality controls was modified in 1995 by the inclusion in the Constitution of applications for constitutional review of general legislation and regulations and constitutional disputes (art. 105); such applications, together with *amparo* proceedings and electoral controls, provide the means for nullifying or invalidating laws or, in general, actions by the authorities that violate the federal Constitution.

17. *Amparo* proceedings are the institutional mechanism that protects individual guarantees (articles 103 and 107 of the Constitution). They are intended to protect citizens from actions by State bodies that jeopardize their individual guarantees or to remedy violations of them.

18. The essential features of *amparo* are as follows: proceedings are initiated only at the request of one of the parties, who may be an individual or a group; it is definitive, and thus is available only once all available legal remedies have been exhausted; it can be dealt with only by the federal judiciary, it does not apply *erga omnes* and proceedings are stayed or set aside if a person's legal situation changes, which prevents it from effectively protecting personal freedom (article 73 of the *Amparo* Act).

III. CHARACTERISTICS OF CRIMINAL PROCEDURE

19. Criminal procedure generally consists of the following stages:

(a) Preliminary investigation. In most cases, it is the Public Prosecutor's Office that decides to conduct a preliminary investigation, either ex officio, particularly in the most serious cases (homicide, drug-trafficking, etc.), or following the submission of a complaint, particularly one submitted by the victim. In certain cases (defamation, slander, damage to another person's property, etc.), it can take action only if the party affected submits a complaint. During the preliminary investigation itself, the Public Prosecutor's Office, with the assistance of the judicial police, conducts investigations to determine the facts, find evidence of the crime and identify the alleged culprits. If a person needs to be detained for the purposes of the investigation, the Public Prosecutor's Office has a period of 48 hours (renewable once in cases of organized crime) to

gather the necessary evidence and bring the alleged culprit before a judge. If the Public Prosecutor's Office is unable to gather the necessary evidence, it must release the suspect, although this decision need not end the preliminary investigation, which follows its course if necessary;

(b) Submission of the case. If the Public Prosecutor's Office believes it has evidence of the corpus delicti and the probable criminal responsibility of the person investigated, it must submit the case to a judge, who issues a decision to accept the case. Once this has been done, the Public Prosecutor's Office sends the file on the preliminary investigation to the judge. The decision to accept the case establishes the judge's material and temporal jurisdiction and binds the parties with the judge and each other;

(c) Investigation phase. This phase has two sub-phases. The first is known as the pre-investigation phase, in which it is decided whether a person is to be tried or not. From the moment the judge accepts the case, he has 72 hours in which to issue a detention order (if the offence is punishable with a custodial sentence), a committal order (when the offence is not punishable with a custodial sentence or the latter is just an alternative) or a release order (if there is insufficient evidence to proceed). In the latter case, the person is released for lack of sufficient evidence. In this phase, the accused makes a statement and is given the chance to provide evidence of his innocence. The second sub-phase is the investigation proper, which includes the steps taken by the courts to determine whether or not a crime has been committed and the person is responsible. The decision on whether to release a person or send him for trial is based on the outcome of this investigation. This is the phase in which both the accused and the prosecution must produce all the evidence they find necessary for the trial and set forward their arguments. From this sub-phase of the investigation proper onwards, the Public Prosecutor's Office no longer represents the authority of the State, but acts only as the prosecutor. It thus becomes, together with the suspect, the defence counsel and the criminal judge, one of the parties to the proceedings. The investigation is declared closed by order of the judge;

(d) The trial or ordinary proceedings and the judgement. This is the public hearing during which the parties submit to the judge all their evidence, arguments and conclusions, on the basis of which the judge will decide whether a crime has been committed and whether the criminal responsibility of the accused has been established. During the two periods of time allotted for producing evidence, all kinds of evidence can be produced. The judge may, ex officio, order the presentation of evidence that he considers relevant. The judge lends the file to the Public Prosecutor's Office for five days so that it can give its opinion on the guilt or innocence of the accused. After that, the judge lends the file to the defence lawyer, so that the latter can give an opinion on the Public Prosecutor's position. This phase ends with the judge's announcement that the trial is over and the judgement will follow. From that point, the judge has 30 days to hand down a judgement. If the judge finds the accused guilty, he issues a guilty verdict and imposes the punishment prescribed by the Penal Code. If, in the judge's opinion, no crime has been committed or the accused's guilt is not proven, the judge acquits the defendant and must therefore leave the accused free to go. If the parties disagree with the verdict, they have five days to appeal against it. An appeal is heard by a court of second instance or high court. The Supreme Court is responsible for verifying the legality of court decisions.

IV. POSITIVE ASPECTS

20. In the course of its visit, the Working Group was informed of the following positive initiatives at the domestic level:

(a) The establishment of human rights units to ensure that all officials in the federal branches of the Office of the Attorney-General, the Federal Investigation Agency, the Organized Crime Unit and the Anti-Drugs Office, among others, respect human rights;

(b) The establishment of a mechanism to coordinate with the National Human Rights Commission, thereby enabling staff from the Office of the Military Prosecutor-General to hold weekly meetings with the Commission's inspectors in order to follow up every complaint thoroughly;

(c) The creation within the Ministry of the Interior of a new post of Under-Secretary for Legal Affairs and Human Rights, to be responsible for the promotion of human rights within the federal administration, with the same system adopted at the State level (Oaxaca) by several governments;

(d) The establishment in June 2002 of the Inter-Ministerial Commission on Government Policy on Human Rights.

21. At the international level, attention is first drawn to the above-mentioned open invitation, which was announced in Geneva at the March 2001 session of the Commission on Human Rights. The invitation to pay an official visit to Mexico was extended to all the Commission's thematic mechanisms.

22. The following United Nations mandate-holders visited the country: the Representative of the Secretary-General on internally displaced persons, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on adequate housing and a delegation from the Committee against Torture. The Special Rapporteur on violence against women will be visiting Mexico in 2003. The Working Group made the visit that is the subject of this report in response to the standing invitation.

23. The Organization of American States (OAS) Special Rapporteur on women's rights and Special Rapporteur on the rights of all migrant workers and their families also visited the country.

24. The Working Group was told that the Senate had approved the ratification of the following international instruments: the Inter-American Convention on Forced Disappearance of Persons, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the two optional protocols to the Convention on the Rights of the Child, the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Senate has also approved the declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination and the Committee against Torture.

25. Attention is drawn here to a major constitutional reform amending article 21 of the Constitution in order to enable Mexico to ratify the Rome Statute of the International Criminal Court.

26. The importance of the latter decision, which was solemnly announced in the following terms by the President, can be measured by the reservations certain States have about ratifying the Rome Statute and the opposition of others: "Building the framework of the Statute of the International Criminal Court, a unique body that will allow justice to be done in cases of crimes of genocide and crimes against humanity, is one of the top priorities of Mexican diplomacy … Mexico has embarked upon the legal process to ratify the Statute, which will require amendments to some of the provisions of our Constitution. My Government is determined to encourage all countries to become members of the Court in order to make it a viable and effective institution in the service of mankind" (President Fox, speaking at the Solemn Session of the French National Assembly on 14 November 2002).

27. Another positive initiative is the signing in December 2000 of a multi-phase technical cooperation programme with the Office of the United Nations High Commissioner for Human Rights. The programme was designed, among other things, to develop forensic procedures to combat torture, to strengthen the role of the Mexican National Human Rights Commission and to open a local office (which opened recently) of the United Nations High Commissioner for Human Rights. This office is to conduct an overall stocktaking of the human rights situation in the country with a view to devising, in cooperation with the Government, a national action plan in the field of human rights.

28. In addition, the Working Group has noted visible signs of a real desire for change in the fight against impunity and corruption.

29. With regard to impunity, an effort is being made to take a new look at the country's past, especially the period of the so-called "dirty war", in order to bring about the conditions for reconciliation.

30. Following the publication in November 2001 of a report by the Mexican National Human Rights Commission on enforced disappearances during the 1960s and 1970s, and given people's desire to know the truth, the President decided to set up a special body in the form of the office of a special prosecutor for acts likely to constitute federal crimes committed directly or indirectly by public officials against persons connected with past social and political movements. The task of the office is to investigate (with full access to archives from the days of the "dirty war") past crimes against activists from political or social movements. At the same time, the Supreme Court has ordered an inquiry into the bloody repression of the student demonstration in Tlatelolco (Plaza de las Tres Culturas) in Mexico City in 1968.

31. The Working Group was also interested to note that an effective (at least at the federal level) campaign has been launched against corruption. The cornerstone of the campaign is the Organized Crime Unit, whose offices the Working Group visited. In the detention centres it visited, the Working Group encountered many officials who had been sentenced or were on trial for corruption, including some former members of the army or the Public Prosecutor's Office, former governors and many former police officers and prison guards. During its visit to the

Oriente men's remand prison in Mexico City, the Working Group talked with practically every member of the security staff from the Puente Grande federal centre for social rehabilitation in Jalisco, who are on trial for corruption, having allegedly been involved in the escape of a drug-trafficker. If the credibility of this anti-corruption drive is not to be undermined, the strictest guarantees of due process must be observed.

32. The Working Group was particularly struck by two government decisions intended to institutionalize these initiatives so as to make them effective in the long-term and to lay the foundations for a human rights culture in the State machinery:

(a) One of these decisions was to establish, within the Ministry of Foreign Affairs, the Office of the Under-Secretary for Human Rights and Democracy to be responsible for "drawing up Mexico's international policy in that area, coordinating the country's participation in bilateral and multilateral forums and liasing with both national and international organizations from civil society";

(b) The other decision was to set up, in June 2002, the Inter-Ministerial Commission on Government Human Rights Policy, to be presided by the Minister of the Interior and consisting of representatives of the Attorney-General and the main ministries concerned and attended as an observer by the National Human Rights Commission. The Inter-Ministerial Commission is a permanent body for coordinating the action taken at the national and international levels by the various offices and bodies of the federal administration in the field of human rights policy and for establishing mechanisms to facilitate compliance with the recommendations of the National Human Rights Commission.

V. DETENTION OF MIGRANTS AND ASYLUM-SEEKERS

33. As a transit country, Mexico is host to large numbers of migrants, most of whom come from Central America or South America. These account for the vast majority of persons in the holding centres to be found in various parts of the country.

34. For this reason, the Working Group had planned to spend half of its time in the country looking into the question of migrants and asylum-seekers. However, as the Special Rapporteur on the human rights of migrants had recently been on mission to the country and especially as there was not enough time, the Working Group decided to limit its investigations to visits to the following two centres:

(a) The migrant holding centre in Delegación Iztapalapa, in the Federal District, which is the largest holding centre for undocumented persons in the country. On the day of the Working Group's visit, the centre held 218 persons, including 55 women and 12 children (it can hold up to 250 persons), from 28 different countries. Although the vast majority of these foreigners were from Central and South America, the Working Group observed significant numbers of Chinese nationals and nationals of Balkan countries. Citizens from Latin American countries usually stay in the migrant holding centre for a few weeks before being sent back to their country of origin. Nationals of countries in other regions tend to stay longer: some had

been in the holding centre for three or four months because of logistical problems and, in the case of some nationalities, because of the lack of a consular or diplomatic representative in Mexico, which made it particularly difficult to determine a person's true nationality;

(b) A visit was also paid to the migrant holding centre at Mexico City international airport, to which passengers who arrive on international flights to Mexico City without a valid passport or visa are taken. The maximum stay in this centre is 48 hours. After this, the individuals are returned to their country of origin or sent to the migrant holding centre in Iztapalapa mentioned in the preceding paragraph. Generally speaking, those held in the airport holding centre are waiting to be returned to their country, as flight availability and schedules allow. During its visit, the Working Group saw about 10 people in this migrant holding centre. Most of them had arrived in Mexico a few hours earlier and were waiting to board return flights. Nevertheless, the Working Group observed that this holding centre, which looks more like an airport waiting room, is unsuitable for stays of more than one day, given its lack of facilities - there are no beds or bunks, showers, cooking facilities, dining areas, etc.

35. Following its visit to the country, the Working Group received a communication dated 22 November 2002 from the Permanent Representative of Mexico to the United Nations Office at Geneva, describing the measures taken by the National Institute for Migration to reorganize the migrant holding centre in Iztapalapa, for which the Institute is formally responsible. The reorganization programme includes measures to speed up the procedure for dealing with cases of prolonged detention so that the legal time limits are respected, while guaranteeing the human rights of those held in administrative detention. The other measures include agreements with accredited members of the consular corps in Mexico to streamline procedures for issuing identity papers and recognizing the nationality of the persons being held. Also, Chinese and English interpreters have begun to be hired, coordination with the Ministry of the Interior's Commission for Aid to Refugees (COMAR) in processing asylum applications has been improved and it has been made easier for members of NGOs working with migrants to enter the centre.

36. The Mexican Government also reported that the measures include the publication in the holding centre of the telephone numbers of all accredited consular representatives in Mexico and those of COMAR, UNHCR, the National Human Rights Commission and the internal oversight body of the National Institute for Migration, and reviewing the existing internal regulations and the regulations on security, visits, living together, order and discipline, with a view to ensuring that inmates are guaranteed all their rights, including their right to legality and transparency in the handling of their cases.

VI. AREAS OF CONCERN

A. The preliminary investigation system and arbitrary detention

37. The predominant legal system in Mexico is a so-called "mixed" one, although in practice it is mainly inquisitorial in the investigatory phase, for the following reasons: in addition to its investigatory functions, the Public Prosecutor's Office, which comes under the executive,

performs quasi-judicial functions such as the presentation and evaluation of evidence, which are considered important by the courts, or taking statements from the accused, the value of which as evidence is not properly challenged even in the absence of an adequate defence.

38. The lack of any regulation stipulating the presumption of innocence tends, de facto, to reverse the burden of proof.

B. Equipollent flagrancy and arbitrary detention

39. "Equipollent flagrancy" is based on a broad interpretation of the concept of catching an offender "in *flagrante delicto*". It allows a person to be arrested not only while he is actually committing an offence, in which case the perpetrator is identified, or just after the offence has been committed, but also when the person is found within 72 hours of commission of the offence and there are objects, signs or other evidence showing that he has just committed the offence: the offence has been committed and the person has been arrested after being found out and pursued. As a result of the concept of equipollent flagrancy, arrests can be made without a court order and, as the Working Group discovered in its conversations with numerous detainees, simply on the basis of complaints or statements by witnesses. This assumption of flagrancy is incompatible with the principle of the presumption of innocence and creates risks of both arbitrary detention and extortion.

C. Corruption and arbitrary detention

40. The Working Group took note of the following practices: the judicial police and, in particular, police patrols make arrests without producing an arrest warrant; relatives have recently been asked to pay a "ransom" for the release of a person who would normally be released later anyway for lack of evidence, because no charges are pressed or because the offence of which he is accused is not punishable with a custodial sentence.

D. Security operations and arbitrary detention

41. The Working Group has observed how certain police practices that have no clear or precise legal basis and that can lead to arbitrary detention are tolerated. This was the subject of general recommendation No. 2/2001 of the National Human Rights Commission on the practice of arbitrary detention, which is being investigated by the Human Rights Department of the Office of the Attorney-General. The Working Group saw cars being driven without number plates, so that it would be impossible to identify the drivers, particularly in cases of abuse. Likewise, military operations are conducted in which it is not possible to identify the personnel other than by their military uniform, and the lorries have no number plates. The Working Group saw photographs of this situation.

42. Most cases of arbitrary detention appear to result from the frequent use of what are called "routine checks and surveillance" or periodic raids presented as preventive action against crime in general, as well as from arrests based on "anonymous reports" or "suspicious behaviour" or signs of "marked nervousness", when the person concerned is not told why he is being arrested,

even though, at the same time he is being asked to cooperate. The potential combination of these practices with a possible campaign of "zero tolerance" risks aggravating the harmful effects of these detentions.

E. The system for enforcing sentences and the risks of arbitrary detention

43. In the enforcement of criminal penalties, the actual duration of sentences is ultimately determined by the administrative authorities entitled by law to modify sentences substantially without being subject to control by the ordinary courts. The length of the sentence does not necessarily depend on the nature of the offence and the convicted person has no opportunity at this stage to challenge the decision before a judge.

44. Another concern arises from the 1994 reforms, which introduced an excessive number of serious offences that in practice had a negative impact in terms of prison overcrowding. The subsequent ban on early release for those offences (particularly drug offences), which can be disproportionate in comparison with other offences for which early release is possible, creates a sense of injustice among inmates, as the Working Group was able to ascertain in its interviews with prisoners.

F. Curfews and arbitrary detention

45. At the request of the Public Prosecutor's Office, a judge will issue a home-curfew order or order banning a person from leaving a specific geographical area if a criminal case is being prepared against that person and there is a reasonable risk that the person might abscond.

46. When article 133 bis of the Federal Code of Criminal Procedure was amended, curfew orders were introduced primarily to avoid the use of administrative detention while at the same time guaranteeing that a person could be located and brought before the court, thereby avoiding sending him to prison unnecessarily. In practice, however, curfews have become a form of preventive detention, often enforced in a "curfew house" or, sometimes, in a hotel.

47. The practical consequence of this kind of curfew is that it gives the Public Prosecutor's Office longer to carry out the relevant investigations and collect the evidence it needs to submit to the district judge before the person can be formally charged.

48. There is thus a sort of de facto pre-trial that takes place not before a judge, but before officials from the Office of the Attorney-General, who are thus empowered to perform judicial acts and evaluate evidence and present the means of proof before the person is charged.

49. The Working Group heard criticisms of the way in which this measure is implemented in so-called "curfew houses", which might be houses confiscated from drug-traffickers or fraudsters or rooms rented in hotels to enforce curfew orders. Detainees are then subject to curfew not in their homes, but in this kind of private establishment, which is actually very similar to a prison (in terms of security, numerous armed guards, electronic surveillance, etc.).

50. After visiting one of these curfew houses, the Working Group finds that this arrangement in fact amounts to a form of preventive detention of an arbitrary nature, given the lack of

oversight by the courts and the implementation of the measure in places that, while not actually secret, are "discreet". The Working Group established that inquiries about their precise location were more or less a taboo subject, including for administration officials.

G. Shortcomings of *amparo* for combating arbitrary detention

51. The *Amparo* Act stipulates that the remedy of *amparo* can be used when there is reason to believe a person may have been detained or his place of detention is unknown. Its ineffectiveness results from the fact that the person reporting the crime must say where the victim is supposed to be and which authorities are responsible for the loss of contact, whereas the person filing the *amparo* suit is often uncertain of the victim's whereabouts and does not always know who seized the victim. In most cases, proceedings are shelved, and this rules out any effective control by the courts over those practising arbitrary detention without reference to judicial procedure. To make *amparo* proceedings really effective is probably one of the most urgently needed reforms in the fight against arbitrary detention.

H. Shortcomings in the public defence system and arbitrary detention

52. There are still serious shortcomings in the public defence system in Mexico. Although the Federal Office of the Public Defender has more resources, State-level public defenders are short of funding. While many of the shortcomings can be attributed to incompetence or lack of professional knowledge, they are also the result of a visible imbalance between the Public Prosecutor's Office and the public defence system, with the former dominating the latter in practice.

53. The two parties to the proceedings are not on an equal footing, not only resource-wise, but also because of the system of criminal procedure itself. The Working Group found that there are a number of reasons for this imbalance: a shortage of public defenders and support staff; a lack of independence; poor working conditions;[1] and imbalances in the handling of evidence. With regard to the latter point, the Public Prosecutor's Office, unlike the defence, can call on the support of specialist laboratories. This has a demotivating effect on defence lawyers and discourages them from developing the "culture of opposition" inherent in their role.

54. Many detainees complained to the Working Group about the performance of public defenders. Some public defenders acknowledged that, given the quantity of cases assigned to them and the scarce resources available, they were barely able to defend their clients. Other detainees even said that, because of the great difficulty experienced by the public defender in collecting evidence and calling witnesses to prove their innocence, they preferred to plead guilty to some offence in order to increase their chances of early release.

55. The Working Group also observed that there is not always time for a person who has been arrested to meet with his defence lawyer before he makes his first statement to the Public

[1] According to the Federal Public Defenders Act, there should be one public defender for each investigative unit of the Public Prosecutor's Office, one for each judge and one for each one-person court. These defenders must carry out their duties in the same buildings as appointed officials.

Prosecutor and that, in the phase during which they appear before the judge, detainees must remain in the detention centre, where they are separated by a wire grille, which makes it difficult to ensure they are properly defended and that the proceedings are held in public and are open to all.

56. Another factor that is an obstacle to an adequate defence is the system of having a different defence lawyer for each phase of the criminal proceedings. A detainee does not have a single public defender from start to finish. In the first, indictment phase, there is a court-appointed defence lawyer (called the public defender at the federal level) and an official from the Public Prosecutor's Office; both of these change in the second phase, before the judge, and then again for any appeal. Some specialized skills are needed at each phase, but there is a serious lack of continuity, which means that the incoming public defender has no personal knowledge of the first phase or of any arbitrariness in the proceedings; he simply collects the written documents and cannot properly defend the detainee.

I. Justice for children

57. Children and teenagers are still detained in Mexico under the policy on "minors in illegal situations", even though the country has ratified the Convention on the Rights of the Child. There are still no judges or public prosecutors specialized in children; they are charged with the same criminal offences as adults; an administrative authority determines the penalties (guardianship councils, child welfare councils - even though one of their members may be a judge); and the minimum ages for criminal responsibility in most Mexican States violate the Convention on the Rights of the Child (though not in Jalisco, Guerrero, Nuevo León or Zacatecas).

58. Although the general conditions in the two centres for youth offenders visited by the Working Group (in the Federal District and Oaxaca) appear to be adequate, the Working Group observed that children aged 13 were being held, something which appears to confirm that custodial measures are not a last resort, as called for by the Convention on the Rights of the Child.

J. Past ill-treatment and amnesties

59. The Working Group was glad to learn that various extrajudicial initiatives had been taken with regard to past ill-treatment of detainees who had taken part in social protests. The initiatives include local amnesty laws, pardons and the Ministry of the Interior's prison release programme. As a result, members of the indigenous group in Loxicha, Oaxaca, who had been arrested during a crackdown in 1996, tortured, forced to sign blank sheets of paper and accused of offences under ordinary law were released in 2000 thanks to an amnesty law adopted by the State of Oaxaca.

60. In its many interviews with detainees, their relatives, human rights organizations and even the authorities, the Working Group found that individuals who were detained in an arbitrary manner in the past are still being held in detention; either their legal remedies have been exhausted or they have little chance of being released from prison sentences of up to 30 years.

61. This is the case, for example, of the Zapotec indigenous people belonging to the Organización de Pueblos Indígenas Zapotecos (an indigenous organization) in Oaxaca, Sierra Sur, who have been the subject of judicial proceedings for over six years, and others like Sansón Aguilar Mercedes, who is still being held in Tlaxiaco.

K. Impunity of those responsible for arbitrary detention

62. It is well known that some of those responsible for arbitrary detention enjoy impunity. Many monitoring mechanisms still do not have sufficient independence, as they are hierarchically subordinate to the administrative authority and others lack the necessary credibility. In addition, some practices are tolerated by the perpetrator's superior. A large number of persons are brought before the courts after being detained arbitrarily and their cases are heard, but a similar, or perhaps greater, number are released after being detained illegally and without having access to a judge. Those in the latter group do not always file a complaint, although the Working Group learned of several cases in which complaints that were submitted were not investigated and the officers were not punished for using this kind of detention.

63. Although the monitoring mechanisms are more effective than before, arbitrary detention is not duly classified as a federal offence, but only as abuse. The Working Group is unaware of any cases in which public officials have been tried and punished for this violation, even though it is one of the main complaints about human rights violations, as noted in various reports of the national and State human rights commissions, whose recommendations on this matter are not usually applied properly or followed up sufficiently for practical purposes.

L. Administration of justice by military courts

64. The appearance by two army generals before a court martial prompts the Working Group to make the following critical comments on their recent trial for drug-trafficking and their trial for the crime of enforced disappearance.

65. On the basis of the evidence and given that the two generals were being prosecuted for drug-trafficking, the matter should theoretically have come under the jurisdiction of an ordinary civil court, as in the case of the trial of another general a few years ago. The military court, which was the first to be convened, disqualified itself from the case, saying it should be heard by a civil court. The latter, in turn, disqualified itself. The dispute was settled in favour of the military court. However, for procedural reasons, the Supreme Court has been requested to rule on jurisdiction in the case. Its decision will be particularly important, as it will affect the fight against corruption. To avoid any time-wasting ploys, this fight must be waged, at the judicial level, with the strictest possible respect for the right to a fair trial, which implies that it should take place before an impartial and independent court; this is not usually how military courts are characterized, as they remain directly or indirectly a statutory part of the military hierarchy.

66. With regard to the disappearances, the criminal trials concern enforced disappearances during the years of the so-called "dirty war". These acts were serious violations of human rights. The trend in the administration of justice is towards recognizing the jurisdiction of the civil courts in such cases. Thus, the Inter-American Convention on Forced Disappearance of Persons stipulates, in its article IX, that "persons alleged to be responsible for the acts constituting the

offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions".

67. Mexico is in the process of ratifying this convention. The Working Group therefore believes that to have the case heard by an ordinary civil court would send a strong signal of its willingness to combat impunity.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

68. The Working Group expresses its gratitude to the Government of Mexico, whose representatives worked non-stop to ensure that the federal and State administrations cooperated fully and completely openly with the Working Group.

69. The Working Group urges the Government to pursue and persevere with the interesting initiatives it has taken to develop a human rights culture in the public services.

70. While the Working Group observed significant progress at the federal level, the same could not be said at the level of some of the States, where many of the initiatives to improve the human rights situation could not be carried through because of corruption and the impunity associated with it.

71. Having visited a large number of detention centres, the Working Group calls on the authorities to make use of the prison release programme to review the situation of the many detainees sentenced to long prison terms who complain that the guarantees of due process were not all available to them during their trials.

B. Recommendations

72. In the light of this report, the Working Group recommends that the Government of Mexico should consider:

(a) Amending (without waiting for the ratification of the treaties mentioned earlier) domestic legislation to bring it into line with international standards, particularly with regard to the presumption of innocence, cases of *flagrante delicto,* the proportionality of sentences for offences considered as serious, and conditions for early release. With regard to effective remedies for arbitrary detention, it should also consider modifying the *amparo* process, classifying arbitrary detention as a criminal offence and prohibiting the use of cars without number plates by law-enforcement officers;

(b) Initiating an in-depth debate on the need to reform the penal system, criminal procedure and the para-judicial powers of the Public Prosecutor's Office;

(c) Tackling the reforms needed to bring domestic legislation dealing with children, particularly with the protection of children's freedom, into line with international standards for juvenile justice;

(d) Improving the system of public defenders and court-appointed defence lawyers to make it more effective, providing it with adequate resources and investigative tools to put it on an equal footing with the Public Prosecutor's Office, and reviewing the system whereby court-appointed lawyers have to be replaced at each phase of the procedure in order to guarantee continuity in the defence throughout the proceedings; improving communications with defence lawyers to give them sufficient time to prepare a proper defence before the accused's first statement to the judge and during the trial; and providing guarantees to ensure that detainees are treated with respect for their dignity and not kept behind a grille during hearings, so that hearings really are open to the public;

(e) The Working Group believes it is appropriate to insist on the need to maintain a clear-cut distinction between military tasks and policing tasks in law-and-order functions;

(f) The Government should consider undertaking a wide-ranging review of past cases of abuse in which persons were arbitrarily detained during social and other protests, including the cases on which the Working Group has rendered an opinion, such as those of Fernando Gatica Chino and Felícitas Padilla, who are still being detained and who have no judicial remedy open to them. Democratic openness in Mexico contributes to another kind of social participation, which should be encouraged. Moreover, as the forced disappearances committed by the military in the past constitute serious human rights violations, they should be dealt with by the ordinary civil courts;

(g) As part of action to combat corruption, care should be taken to show exemplary respect for the accused's right to due process so as not to undermine the credibility of the cause. The Working Group considers that, as acts of corruption by the military are offences under ordinary law, they should be tried in future by ordinary civil courts;

(h) Monitoring procedures for public officials, particularly internal monitoring procedures, should be strengthened.

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