联 合 国 A

大 会

Distr.
GENERAL

A/HRC/4/40/Add.4
1 December 2006

CHINESE
Original: ENGLISH

人权理事会
第四届会议
临时议程项目 2

执行题为“人权理事会”的大会 2006 年 3 月 15 日第 60/251 号决议

任意拘留问题工作组的报告

增 编*

对洪都拉斯的访问
(2006 年 5 月 23 日至 31 日)

* 本内容提要以所有正式语文分发。报告本身附于内容提要之后，只以英文和西班牙文分发。

GE. 06-15263 (C) 050107 090107

内 容 提 要

任意拘留问题工作组应洪都拉斯政府的邀请，于 2006 年 5 月 23 日至 31 日访问了该国。在访问过程中，工作组会见了行政和司法部门的有关领导以及民间团体和非政府组织的代表。它访问了十个拘留中心，以及警察局、监狱和少年犯罪羁押场所，私下采访了 200 多名被羁押者，其中有些人是以前知道的，大多数人是在现场随机选择的。

工作组注意到，自 1990 年代初以来，有关洪都拉斯被剥夺自由的法律和体制框架发生了深刻变化。2002 年新的《刑事诉讼法》生效，加速了刑事诉讼进程，大大减少了被羁押者人数以及未定罪者的羁押时间。以前还建立了单独的少年司法制度。下述这些以及其他改革使洪都拉斯能够更好地尊重和保护其管辖下人民不被任意剥夺自由。

然而，工作组也发现了现实做法不符合宪法和洪都拉斯法律规定标准的若干领域，引起了严重和普遍的任意拘留现象。报告中提到的第一个问题是监督羁押合法性的机构性不起作用。工作组还注意到了土著人被告的法律援助系统存在严重缺陷，刑事司法过程中对警察的监督不够，警察和司法机构之间缺少制衡和平衡。在刑事诉讼中警察权利得不到有效控制和管制。工作组认为存在这些情况有两个原因。第一，公诉人无法独立于警察；第二，管理监狱的是警察而不是独立的监狱管理机构。

工作组还对两类特别被羁押者表示关切：

(a) 四年半新的《刑事诉讼法》生效时被审前羁押的 1800 多人现在仍被羁押，或等待审判或等待无罪释放，因为公诉人已发出请求；

(b) 暴力青年团伙成员——在洪都拉斯令人震惊的一个现象——的待遇似乎不完全符合洪都拉斯依照国际人权法承担的义务。

根据调查结论，工作组向政府提出了一些旨在加强对刑事司法进程各阶段羁押合法性的管制的建议。工作组要求政府迫切解决根据旧的《刑事诉讼法》羁押的所有人的问题。它还建议政府建立由专业人员管理并独立于警察的监狱体系。最后，工作组强调在解决暴力青年团伙问题以及防治犯罪问题上应该加强预防、执法和刑事司法，不松懈法治，避免任意拘留。

Annex

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO HONDURAS (23-31 May 2006)

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CONTENTS (*continued*)

I. INTRODUCTION

1. The Working Group on Arbitrary Detention, which was established pursuant to Commission on Human Rights resolution 1991/42 and whose mandate was assumed by the Human Rights Council by its decision 1/102, visited Honduras from 23 to 31 May 2006 at the invitation of the Government. The delegation consisted of Ms. Leïla Zerrougui, Chairperson-Rapporteur of the Working Group and head of the delegation, and Ms. Manuela Carmena Castrillo, member of the Working Group. The delegation was accompanied by the Secretary of the Working Group, an official from the Office of the United Nations High Commissioner for Human Rights, and two interpreters from the United Nations Office at Geneva.

2. The Working Group would like to express its gratitude to the Government of Honduras, as well as to the United Nations Country Team, which greatly assisted with the logistics of the visit, and to the Honduran civil society representatives whom it met.

II. PROGRAMME OF THE VISIT

3. The delegation of the Working Group visited the capital, Tegucigalpa, and the cities of San Pedro Sula and La Ceiba. The delegation was able to visit the following detention facilities: in Tegucigalpa, the Penitenciaría Nacional and the centres for juvenile offenders “Renaciendo” (male) and “Sagrado Corazón” (female); in San Pedro Sula, the Centro Penal, the centre for male juvenile offenders “El Carmen” and the “Casitas Blancas” centre for girls at risk; and in La Ceiba, the Granja Penal “El Porvenir”. The delegation further visited the holding cells of the police stations in all three cities.

4. The Working Group met with the Minister for Foreign Affairs and the Minister of Security, with commanding officers of the National Police, judges of the Supreme Court and of trial and appeals courts, the Human Rights Ombudsman, the Chief Prosecutor and representatives of prosecutors’ offices, and with lawyers of the Public Defender’s offices. The delegation also held meetings with representatives of several non-governmental organizations and professional associations, including the bar association.

III. LEGAL AND INSTITUTIONAL FRAMEWORK

A. Institutional framework

1. The transition from authoritarian Government to democracy and the 1982 Constitution

5. While the purpose of the present report is not to provide a history of the institutions dealing with public security, criminal justice and detention in Honduras, it is important to note that the country was governed by military regimes between 1963 and 1982. In 1982 a new Constitution entered into force, providing for a President elected for a non-renewable four-year term as Head of State and Government, and a legislature, the National Congress. In spite of the return to civilian rule during the 1980s, the armed forces nonetheless waged a systematic campaign of arbitrary detentions, torture, disappearances and extrajudicial executions, particularly against left-wing activists.

2. The judicial branch

(a) The Supreme Court

6. The Supreme Court of Justice, composed of 15 judges elected for a seven-year term by the National Congress, has a twofold mandate in Honduras. On the one hand, it is the highest judicial court of the country and, on the other, it is also an administrative body responsible for the organization and administration of the judicial system.

7. Among its administrative functions, the Supreme Court drafts the budget for the court system and submits it to the National Congress; divides the country into judicial districts; establishes, abolishes, merges or transfers trial courts, courts of appeal and other tribunals; manages public defenders' offices; and appoints and dismisses judges.

8. As the country's highest court, the Supreme Court sits in different chambers: Constitutional, Criminal, Labour, Administrative and Civil. The chambers hear appeals in cassation of the decisions of the lower courts. The Supreme Court also hears appeals on the constitutional remedies of habeas corpus, appeals on constitutional grounds (*amparo*), and cases of unconstitutionality.

(b) Trial and appellate courts

9. The oral and public trials in felony cases that are the hallmark of the new Criminal Procedure Code (CPP) take place before three-member trial courts (CPP, art. 57).

10. Individual judges hold hearings and rule on all issues arising at the pretrial stage, including preventive detention and other preventive measures. They also hear cases tried in expedited proceedings, e.g. *procedimiento abreviado* (CPP, art. 403), which can be used if the accused pleads guilty.

11. Justices of peace (who are not necessarily trained lawyers) hear cases for minor offences (CPP, art. 59). They also deal with urgent matters which would otherwise fall within the competence of the *juez de letras* or the prosecutor (such as ordering the detention of a suspect) when the latter cannot immediately intervene, which occurs mostly in remote rural areas.

12. Appeals against the decisions of a justice of peace are brought before an individual judge (CPP, art. 58.6), while appeals against the decisions of a trial court are brought before a court of appeal (CPP, art. 56). The Supreme Court hears appeals in cassation.

(c) The *juez de ejecución*

13. The mandate of the *juez de ejecución de penas y medidas de seguridad* (judge in charge of monitoring the execution of sentences and security measures, hereinafter "*juez de ejecución*") is to ascertain that preventive detention and prison sentences are carried out in accordance with the law and the judicial decisions. The *juez de ejecución* is also competent to decide on all incidents arising during the execution of a prison sentence, as well as to ensure that the rights of

convicts are respected. In discharging his or her duties, the *juez de ejecución* hears and rules on requests from detainees regarding conditional release, complaints of unlawful disciplinary measures and violations of their fundamental rights (CPP, arts. 60 and 381-382). In addition, the *juez de ejecución* keeps track of the time spent in custody, including in pretrial detention (which is to be subtracted from the sentence). Therefore, the *juez de ejecución* also rules on the timeliness of applications for conditional release, and keeps both the detainee and the prison authorities informed on these matters. Prison authorities are required to duly register such information (CPP, art 386). For their parts, the public prosecutor and the convict can bring to the attention of the *juez de ejecución* all questions pertaining to the execution of a sentence and conditional release. The *juez de ejecución* issues rulings on such matters after having held oral hearings (CPP, art. 386).

14. The *juez de ejecución* is also responsible for monitoring the strict enforcement of the principle according to which preventive detention may not assume the nature of a sanction and should only be used to prevent flight, obstruction of justice or further criminal activity. In case of non-compliance with such rules, the *juez de ejecución* promptly informs the judge in charge of the criminal proceedings, who should, within 24 hours, rule on the matter.

3. The Public Prosecution Service

15. The Law of 1994 regulating public prosecution establishes a Public Prosecution Service independent of the other branches of Government. It is responsible, inter alia, for investigating and prosecuting the case and for ensuring that the constitutional rights of the accused are respected. According to article 33 of the Law, public prosecutors participate directly in the investigation: they direct and supervise the police during the course of the investigation; decide whether to bring charges against suspects and act as prosecutors during the trial.

16. The 1994 Law on public prosecution provided the establishment of a directorate of criminal investigation (DGIC), under the responsibility of the Public Prosecution Service (art. 41). However, the 1998 Law on the National Police, reallocated investigation to the Ministry of Security, leaving the Public Prosecution Service in charge only of providing guidance to the *Dirección General de Investigación Criminal* (DGIC), which, under the new law, acts under the authority of the police. The CPP of 2002 defines the relationship between the Public Prosecution Service and the police and its article 279 prescribes that in discharging their duties the members of DGIC act on their own initiative, in accordance with the general guidelines (*orientaciones*) provided by prosecutors and execute orders received from the prosecutors.

17. In recent years, specialized prosecution sections have been established within the Public Prosecution Service, inter alia to follow cases relating to violations of human rights, offences against women, protection of children, etc.

4. The National Police

18. Until the 1990s, when it was placed under civilian control, the National Police were under the authority of the Ministry of Defence. They are now governed by the Law on the National Police of 1998 and come under the authority of the Ministry of Security.

19. The National Police are responsible for:

(a) Investigating offences: the DGIC acts under the authority of the Ministry of Security and the legal guidance of the Public Prosecution Service, during the judicial investigative process (art. 30.2);

(b) Preventing, discouraging and combating all kinds of offences, restoring law and order (art. 37); and

(c) Managing the penitentiaries and ensuring their security (art. 52).

5. The penitentiary system

20. All detention facilities (except military ones) are run by the police, which, with the DGIC, have holding cells for police custody and preventive detention ordered by the public prosecutor.

21. Judicially ordered preventive detention is carried out in regular prison facilities which are run by a separate directorate of the National Police, the *Dirección General de Servicios Especiales Preventivos* (DGSEP). Nonetheless, article 86 of the Constitution and article 191 of CPP provide that pretrial detainees shall be kept absolutely separate from convicted detainees, even though they may be held in the same facilities.

6. The Honduran Institute for Childhood and Family and juvenile detention

22. In view of the lack of legal protection for minors, Honduras adopted a Childhood and Adolescence Code, in 1996, which established the Honduran Institute for the Childhood and Family (IHNFA) as the government agency responsible for the promotion and protection of the rights of the child, and profoundly renewed the juvenile justice system. The age of criminal responsibility is set at 12 years of age, but until 18 offenders are to be dealt with exclusively in accordance with the Childhood Code (arts. 180 and 181).

7. The Human Rights Commissioner

23. The mandate of Human Rights Commissioner (CONADEH) was established in 1990 to guarantee the implementation of the human rights obligations contained in the Constitution and the international treaties to which Honduras is a party. The Commissioner, nominated by the legislature for a six-year term, is independent from all branches of the Government and enjoys ample powers to investigate alleged human rights violations and to report about them.

24. The Working Group noted with satisfaction that the Commissioner has unrestricted access to all military and civilian facilities and detention centres as well as unrestricted access to all administrative and judicial files, including those classified as secret. Besides, obstruction to the Commissioner's functions has been criminalized.

25. The criminal procedure code provides also that DGIC shall inform the Commissioner without delay of any detention carried out (CPP, art. 280).

8. The Office of the Public Defender and private lawyers

26. The Office of the Public Defender, mandated to assist criminal defendants who do not have the means to hire a private lawyer, is established under the umbrella of the Supreme Court and financed out of its budget.

27. Private lawyers are organized in a bar association.

B. The legal framework of detention

1. International instruments ratified by Honduras

28. Honduras has ratified all seven major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child.

2. Constitutional guarantees

29. The Constitution of Honduras contains ample and detailed provisions ensuring the protection of fundamental rights. With specific regard to criminal proceedings, it provides that nobody shall be arrested without a warrant issued by the competent authority, except for arrest in flagrante delicto (art. 84). The Constitution sets strict limits on detention without criminal charges (24 hours without judicial order, six days on judge's order (art. 71)); it establishes the right to legal aid (art. 83) and the right not to be coerced to make statements incriminating oneself or a member of one's family, only recognizing the validity of statements made before the competent judge (art. 88) and reaffirming the presumption of innocence (art. 89).

30. With regard to places of detention, the Constitution provides that no one can be held in places other than those provided by law (art. 85); persons under trial must be held separately from the convicted (art. 86); prisons shall contribute to the rehabilitation of detainees and their reintegration to working life (art. 87).

31. Article 182 of the Constitution provides the respect of the writ of habeas corpus, which is available to any person unlawfully imprisoned, detained or restrained, or in case of mistreatment, torture, harassment, or unlawful demands during lawful detention.

3. The criminal trial

32. The new criminal procedure code entered into force on 20 February 2002. The previous code reflected the inquisitorial model, in which the investigating judge was actively involved in determining the facts of the case and obtaining the confession of the suspect, which was the primary means to prove the offence (old CPP 163-173 and 219-235). The new criminal procedure is inspired by the adversarial model in which prosecution and defence argue before the court their opposing versions of the facts and the applicable law, and an independent and impartial judge presides over the proceedings and decides questions of law.

4. Detention in the context of criminal proceedings

(a) Police power to arrest

33. The criminal procedure code defines the circumstances under which the police can proceed to arrest a person without a judicial order or warrant, mostly in flagrante delicto or immediately after the commission of an offence. Within six hours from the arrest, the police have to inform the public prosecutor and the judge competent for the arrest. If the arrest was carried out by the preventive police, the person shall be immediately placed at the disposal of the DGIC (art. 175 CPP).

34. At the time of arrest, the police have to inform the arrestee "with the greatest clarity possible" about:

- The motives of the detention;
- The right to contact a family member or other person of his or her choice;
- The right to be assisted by a lawyer;
- The right to be seen by a forensic doctor;
- The right to remain silent and not to make statements against himself or herself and/or a member of his family or household, and the fact that only statements made before a competent judge will have evidentiary value (CPP, art. 282.6).

35. Moreover, at the time of the arrest the police are to record in a publicly accessible register all information relating to the place and time of the arrest (CPP, art. 282.7-8).

(b) Preventive detention ordered by the public prosecutor

36. The public prosecutor can order the preventive detention of a person suspected of having committed an offence for up to 24 hours (including the hours spent in police custody). All detention thus ordered shall be brought to the attention of the competent judge without delay (CPP, art. 176).

(c) Judicial preventive detention

37. If the prosecutor takes the view that preventive detention is necessary beyond the initial 24 hours, an order placing the arrestee at the disposal of the competent judge within 24 hours needs to be taken. At this stage, the prosecutor can request an extension of the detention for up to six days, for which the arrestee shall be taken to the courthouse (CPP, art. 286). The judge informs the arrestee of his rights, including the right to be assisted by a lawyer and to remain silent, and the arrestee makes a statement. If an order of continuation of the detention is issued, it is carried out at a prison facility and no longer at police holding cell and the next hearing (the initial hearing) shall take place within six days at the latest. The following hearing (the "preliminary hearing") shall be held within 60 days, or in complex cases within 120 days, of the initial hearing (CPP, art. 300). The judge shall decide on the trial date

within three days of the preliminary hearing. Pretrial detention, that is preventive detention between the first appearance before a judge and the final decision on the case, can be ordered under one of the following circumstances:

- Risk of flight of the accused;
- Possible obstruction to the investigation by the accused;
- Well-founded risk that the accused may rejoin the criminal organization to which he is suspected of belonging;
- Well-founded risk that the accused may make attempts on the life or other reprisals against those who accused or denounced him (CPP, art. 178).

38. Orders of preventive detention are subject to appeal before an appellate court which shall rule within three days.

39. Preventive detention can last for a maximum of two years on charges for offences carrying out six or more years of imprisonment, and up to one year for lesser offences. In cases in which the evidence to be gathered is particularly extensive or complex, the Supreme Court can exceptionally extend these maximum terms by six months. In no case may the duration of preventive detention exceed more than half the minimum sentence available for the offence (CPP, art. 181). Once the accused has been convicted in first instance, preventive detention can be extended for up to half the duration of the pronounced sentence (CPP, art. 181.4).

40. Once the preventive detention of an accused has reached its maximum duration the judge must provisionally release the detainee and decide on an alternative preventive measure (CPP, art. 181.5). However, according to an amendment introduced in January 2005 regarding detainees charged with being members of an illicit association, preventive detention can never be substituted with an alternative measure (CPP, art. 184.6).

41. Preventive detention is forbidden in cases where the offence carries a maximum sentence of less than five years' imprisonment (CPP, art. 182), except if there is a reasonable suspicion that the accused may make reprisals against those who accused or denounced him.

42. If the accused is acquitted, the court shall order the immediate release. However, until the acquittal has become final, the court may, upon request of the prosecutor, continue to impose preventive measures in order to ensure that the accused remain at the disposal of the court, insofar as such measures do not involve deprivation of liberty (CPP 339.2-3).

(d) Alternative measures to preventive detention

43. As already mentioned, the Criminal Procedure Code provides for a number of alternative security measures, such as house arrest, obligation to report to the judge or other surveillance authority, prohibitions to visit certain places or meet certain persons, and financial guarantees.

(e) Preventive detention under the old CPP

44. Under the 1984 Criminal Procedure Code (1984 CPP), the investigating judge would automatically order the detention of anyone suspected of having committed a serious offence (1984 CPP, art. 162). The detention order remained in place for as long as there was proof that a serious offence had been committed and elements reasonably pointing towards the involvement of the accused (1984 CPP, art. 177). There were no limits on the duration of preventive detention, no effective possibility to challenge detention remand and no review of detention (once ordered) by the judge. Even in cases of first instance acquittal, the judge ordered the "provisional release" of the defendant only if the charges carried imprisonment for less than three years (1984 CPP, art. 384).

45. In 1996 the National Congress enacted a law (*Ley del Reo Sin Condena*) which provided for the release of remand detainees provided that they (a) were not accused of certain particularly serious crimes; (b) had spent in preventive detention more than one third of the term of imprisonment applicable to the offence they were accused of; (c) had no criminal antecedents; and (d) had shown good conduct during their preventive detention.

46. Pursuant to article 446 of the 2002 CPP all criminal proceedings initiated under 1984 CPP will continue to be governed by that law, with the exception of a few provisions of the new code. The preventive detention regime established by the old CPP, as mitigated by the *Ley del Reo Sin Condena*, thus remains applicable to all persons who were in preventive detention before 20 February 2002.

5. Special provisions governing "illicit associations"

47. Article 332 of the Criminal Code, governing the offence of "illicit association", was revised in January 2005. It now provides that the leaders (*jefes o cabecillas*) of youth gangs (*maras*, *pandillas*) and "other groups associating with the permanent objective of committing crimes" shall be punished with 20 to 30 years of imprisonment, while simple membership shall carry a term of imprisonment of a third less, that is between 13 and 20 years. At the same time, a special provision was introduced in the Criminal Procedure Code regarding the preventive detention of persons charged with belonging to an "illicit association", making it almost mandatory.

6. Juvenile justice and detention of minors

48. The Childhood Code provides that deprivation of liberty (referred to as "internment" and not "imprisonment") shall be the exception in dealing with juvenile offenders (art. 198) and that preference be given to other "socio-educational measures", which include orientation, warning, community service, restrictions on freedom of movement and semi-liberty (art. 188). Internment shall be ordered only for minors guilty of crimes against life or serious attacks on the physical integrity of a person, or in cases of recidivism or repeated failure to comply with previous measures. Internment shall be imposed only for the minimum duration necessary and the need for internment shall be reassessed every six months (art. 198). Interned minors are entitled to "effective, regular and private" legal advice and should be fully informed about their status and rights (art. 199).

49. In the pretrial phase and during trial, minors accused of serious offences may be subjected to preventive measures, including restrictions on liberty or even internment, which are pronounced on an exceptional basis (arts. 206 and 207). Preventive internment (or other measures) can be ordered for up to 30 days and be prolonged for another of 30 days maximum, if necessary.

50. Juvenile court judges shall monitor the strict compliance with the measures (both preventive and socio-educational) they have ordered (art. 260). No child shall be admitted to an internment centre without an order issued by the competent authorities (art. 262), and a file shall be kept for each detained child.

IV. POSITIVE ASPECTS

A. Cooperation of the Government

51. During the entire visit, the Working Group has enjoyed the fullest cooperation of the Government in all respects. The Working Group was able to visit all the detention centres or other facilities it requested and to meet with and interview whoever it wanted, detainees identified beforehand to the Government and detainees chosen at random. The Government accepted several requests by the Working Group to change the programme of the visit. The Working Group reiterates its gratitude for the authorities' transparency and cooperation.

B. Protection against arbitrary detention in the Constitution and the new Criminal Procedure Law

52. The Constitution of Honduras provides for very detailed guarantees against arbitrary detention. The strict provisions concerning detention in unofficial sites, incommunicado detention, and judicial control over detention clearly demonstrate a strong will to prevent the recurrence of the arbitrary detention and disappearance practices of the-not-too-distant past.

53. The new Criminal Procedure Code provides for a fair, expeditious and transparent criminal trial. It brings the Criminal Procedure Law into compliance with the Constitution of Honduras and the international human rights obligations of the country. The institution of the *juez de ejecución* is a mechanism with great potential for effective monitoring of the legality of detention.

C. Decrease in the rate and number of detainees awaiting trial

54. The application of the new Criminal Procedure Code has resulted without any doubt, in greater transparency of judicial proceedings and reduced the delays besetting the administration of justice. According to the most reliable statistics provided by the Government to the Working Group, the share of prisoners held without sentence, which in 2002 amounted to 76 per cent, had shrunk to approximately 62 per cent by March 2006. The overall number of detainees was also reduced, though only slightly: it had peaked in 2001 with more than 12,500 detainees and decreased to 12,020 as of end-2005.

55. The delegation has also observed that the authorities (judges, prosecutors and the police) take the strict deadlines for the various procedural steps and for detention set forth in the new code very seriously and generally show a strong will to respect them.

D. Juvenile justice

56. In a country in which one half of the population is below 18 years of age, the treatment of juvenile offenders is of major importance. Regarding juvenile justice, the Childhood Code provide Honduras with a legislative framework fully compliant with the relevant provisions of the Convention on the Rights of the Child: a separate judicial system is established for minors in conflict with the law, the primacy of education and rehabilitation over punishment are stressed in unmistakable terms, the exceptional character of detention as a sanction for young offenders is clearly stated. Moreover, the Honduran Institute for Childhood and Family (IHNFA), the government agency charged with the protection and promotion of the rights of the child and not the general penitentiary system, is in charge of managing the detention facilities for young offenders.

57. The Working Group has also noted that the new management of IHNFA, which had only been in office for a few months at the time of the visit, appears to be fully committed to turning the promise of the Childhood Code into reality. The Inter-American Commission on Human Rights made a request for interim measures of protection in December 2004 in view of the terrible conditions of detention at the "Renaciendo" centre. In October 2005 and April 2006 the Supreme Court of Honduras issued orders to IHNFA in habeas corpus proceedings initiated by the human rights prosecutors of Tegucigalpa and San Pedro Sula in favour of the internees of the "Renaciendo" and "El Carmen" centres. When the Working Group visited those two centres it observed that significant efforts were under way to improve the conditions of detention, particularly at "Renaciendo", where the detained youths acknowledged, in private interviews with the members of the delegation, the efforts made by the new administration. However, despite the efforts made recently by IHNFA, much remains to be done to improve the conditions of detention and to ensure respect for human dignity and detainees' rights.

E. Role of specialized human rights prosecutors and Human Rights Commissioner

58. In addition to the institutions mandated under the Criminal Procedure Code with monitoring the legality of detention, that is primarily the *juez de ejecución*, the public prosecutor and the defence counsel, the Human Rights Commissioner has a role in the prevention of arbitrary detention. In this respect, the Commissioner's power of unrestricted access to all detention facilities and the police's obligation to report all cases of detention to the Commissioner provide the population with important protection.

59. Also the creation of the special human rights prosecutors has the potential to add a layer of protection, as the habeas corpus proceedings brought by human rights prosecutors in favour of the detainees of the prisons in Tegucigalpa (Valle del Tamara), San Pedro Sula and Puerto Cortes, as well as of the internees of "Renaciendo" and "El Carmen" show. Unfortunately, their number is limited and particularly in rural areas they are absent, also because of lacking resources.

60. At a more fundamental level, however, the Working Group notes that, as welcome as these institutions may be, their efforts cannot substitute for the effective functioning of the institution with primary responsibility in this respect, the *juez de ejecución*.

V. ISSUES OF CONCERN

A. Abdication of the responsibility to monitor legality of detention

1. The responsibility of the *juez de ejecución*

61. In visiting detention centres, speaking to detainees and revising case files of detainees, the Working Group has found a number of cases in which the maximum length of detention on remand as dictated in the new criminal procedure code appears to have been exceeded. The police in charge of the detention centres take the stance that they cannot release anyone without an order from a judge, even if that means keeping a person in detention without legal basis. Detainees who have accrued the right to benefits such as conditional release often remain in detention, because they have no means to exercise that right in practice, as they do not have a lawyer or family member who would raise the matter with the *juez de ejecución*, and no opportunity to speak with the judge or transmit a message to him or her.

62. The CPP clearly establishes the responsibility of the *juez de ejecución* to ensure that preventive detention and prison sentences are carried out in accordance with the law and judicial decisions. The *juez de ejecución* is further mandated to keep record of the serving of prison terms, to determine at what time a convict can apply for conditional release, and to keep both the detainee and the prison authorities informed on these matters.

63. The reality in Honduras' prisons, however, is that where there should be control of the legality of detention there is instead a gaping void. This situation is in part explained by the insufficient number of *jueces de ejecución*. According to the Supreme Court there should be 24 *jueces de ejecución*, but there are currently only 12. In Tegucigalpa, two *jueces de ejecución* are responsible for monitoring the legality of the detention of more than 3,000 persons deprived of liberty. Considering the absence of a proper prison administration and of internal procedures for the resolution of issues arising in the penitentiary context (disciplinary measures, benefits, release), as well as the omnipresent corruption, which the Working Group all describes below, a ratio of one judge per 1,000 prisoners (or 1,500 in Tegucigalpa) is not sufficient.

64. However, it is the Working Group's impression that the insufficient number of *jueces de ejecución* only partially explains the almost complete absence of control over the legality of detention. Many of the *jueces de ejecución*, and the same applies for public prosecutors and public defence lawyers, appear to have to a great extent abdicated their mandate to exercise this control.

65. The *jueces de ejecución* are also to receive complaints of detainees concerning disciplinary measures and to rule on them. In practice, in violation of article 381 CPP, the *jueces de ejecución* do not exercise any ex officio control over the imposition of disciplinary measures, which are imposed at the whim of the prison police. The Working Group was particularly troubled by the situation it encountered in the high security wing of the Penitenciaría Nacional, the main prison in Tegucigalpa, the so-called "Escorpión". The detainees there are held in small isolation cells and do not get any exercise or other opportunity to leave their cells. The Working Group was not able to determine the criteria and rules by which the detainees are sanctioned to

be held in the "Escorpión", or whether these criteria are written down in a set of rules accessible to the detainees and the outside world. There appear to be no written decisions referring detainees to "Escorpión", no accessible information on the motives and duration of the isolation measure, no means to challenge the sanction. The *juez de ejecución* and public defence lawyers do not appear to ever enter the "Escorpión", so that the detainees there are basically incommunicado.

2. The situation in the juvenile detention centres

66. Similarly, and notwithstanding the undoubted efforts recently made by those in charge of the juvenile detention centres "Renaciendo" and "El Carmen", there are currently many juveniles deprived of their liberty without legal basis. Registers and individual files of detainees in IHNFA facilities are in a catastrophic state. They do not reflect the situation on the ground, but they are often sufficient to determine that the internee is being detained without a legal basis, either because he has served his socio-educative measure, as juvenile sentences are called, or because the preventive internment order has not been renewed, or because detention has been extended beyond the limits provided for in the law. IHNFA argues that even when an internment order has expired it cannot release an internee without a judicial order to do so, and the Working Group does not doubt that this claim is made in good faith. But this stance simply overlooks the fact that in the absence of a judicial decision justifying detention, the deprivation of liberty is without legal basis and thus arbitrary.

3. The situation in police stations

67. As stated above, the Working Group is under the impression that the police are generally taking their duty to comply with the strict and short time limits for police detention of suspects seriously. However, as with prisons and juvenile facilities, records of arrests, detentions, transfers and releases at police stations are in a deplorable state and do in fact not allow a real control of the legality of detention. In the course of the visit, the Working Group delegation repeatedly drew the attention of the police to the importance of registers showing whenever a person is taken into custody and all changes in the detainee's status, with proof (stamp and signature) of the responsible authority, as an X-ray of detention essential for the prevention of abuses.

B. Lack of effectiveness of public defenders

68. The new criminal code introducing the adversarial system significantly increases the role and the responsibility of defence counsel in the criminal trial. In a country like Honduras, in which a significant portion of the population is too poor to afford a private lawyer, the role of the public defender is absolutely central to equality of arms in the criminal process and the prevention of arbitrary detentions. In fact, according to information received by the Working Group, more than half of the criminal defendants have to rely on a public defender. In the four years since the entry into force of the new criminal procedure code, the number of public defenders has grown from 90 to approximately 250.

69. This sharp increase in the number of public defence lawyers is to be warmly welcomed. However, the resources assigned to this public service indispensable for the rule of law remain insufficient. Public defenders appear to lack fundamental office equipment, such as computers

and reference materials. The Working Group was told that they have difficulties visiting detention centres as they lack vehicles and fuel. A further problem appears to be that the public defender assigned to a case may change repeatedly.

70. During the Working Group's visit it emerged, however, that in addition to the lack of resources, the effectiveness of public defence is undermined also by the failure of many public defence lawyers to assertively play their role. They appear to limit themselves to a purely formal role and passive presence at the hearings in which the legality and necessity of detention is decided on. The Working Group has also received reports according to which public defence lawyers often press the defendants they assist to accept abridged proceedings or induce them to confess guilt in order to avoid a fully-fledged trial.

C. Excessive power of the police

71. Until a decade ago, the National Police were under control of the military and the military was itself strongly involved in internal security. The police have since then been asserting themselves as a law enforcement force under civilian control. However, they face formidable challenges: in a country in which the population perceives crime and insecurity as dramatic problems, the police are only approximately 8,000 men and women strong. By way of comparison, according to information received by the Working Group, there are more than 50,000 private often heavily armed security guards in Honduras.

72. The police also experience severe lack of material resources. They do not have a sufficient number of vehicles to carry out their mandate, particularly in rural areas, and they do not have the means to purchase enough fuel to be able to use the vehicles whenever necessary. This can be the cause of detentions in violation of the law, such as when a suspect held in a police holding cell in a remote location cannot be brought before a judge, or when a minor cannot be immediately brought to one of the four IHNFA detention facilities, the only places minors can be lawfully held. The police also lack advanced forensic equipment and training. The Working Group has further observed that not only the holding cells for suspects at police stations are degrading, but also - at least in some police stations - the living areas and sanitary facilities for the policemen.

73. While the shortage of resources weakens the police's capacity to effectively perform its function, the law gives the Ministry of Security and the police excessive power in the criminal justice system. In addition to its preventative mandate, the police are, through their General Directorate for Criminal Investigation (DGIC), in charge of the investigation of serious offences. While this function is in theory exercised under the direction of the public prosecution, in practice the 1998 law on the police has significantly weakened the control of the public prosecutors over criminal investigations by taking the DGIC away from the Public Prosecution and reincorporating it into the Ministry of Security.

74. As the National Police also runs the detention facilities, it exercises physical control over all persons in detention at all stages, and not only during the first 24 hours while they are in the holding cells of police stations. Whether or not the police act in conformity with the law and in good faith, this situation seriously jeopardizes the integrity of the criminal process, which requires effective checks and balances.

75. Moreover, although it has in general conformed its practice with the provisions of the criminal procedure code, the National Police continues in many instances to ill-treat detainees, both as a measure to further the investigative function assigned to it by law, and to maintain discipline in the detention facilities.[1] Although there have certainly been efforts by some human rights prosecutors, who have opened proceedings regarding such abuses, it does not appear that their perpetrators are being effectively brought to justice. The Working Group is very concerned by the apparent indifference of the majority of judges and prosecutors to the widespread ill-treatment of detainees by the police.

D. The absence of a proper penitentiary system

76. As mentioned above, when detainees are transferred from police custody into the prison system, they continue to be under the control of the police. They thus are dependent on the police in order to establish contact with their defence lawyer and in order to have petitions or motions delivered to the judge in charge of their case. The Working Group was informed, both by detainees and by judges, of frequent instances in which the prison police fail to deliver judgements to a detainee, thereby preventing him or her from asking to be released or to exercise the right to appeal. Moreover, the prison system completely lacks a functioning complaints procedure.

77. While the detainees are at the mercy of the police in the above-mentioned respects, the prison authorities (i.e. the police) have in fact, to a large extent, renounced their task to manage the detention centre. Segregation between remand detainees and convicts, which is so emphatically prescribed in the Constitution and the laws, is non-existent in reality. Food provided by the prison administration is minimal and most detainees rely on purchasing food for themselves. Similarly lacking are hygienic and health services, adequate facilities and treatment for vulnerable groups such as detainees with serious bodily ailments and the mentally ill. In the prisons of both San Pedro Sula and La Ceiba there is in practice no control over the interaction between male and female detainees. The limits on the State budget allocated to the prisons and the pitiful remuneration of the police assigned to serve in prisons cannot justify the abdication from the public responsibility to provide the detainees with these services, which they currently can obtain only through constant unlawful payments and a bustling network of businesses run by the inmates, established or tolerated without any kind of control by the authorities.

78. This situation prevents the adequate design of a criminal justice policy in which the rehabilitation and reintegration into the community of the offender enjoys a primary importance. According to the director of the Penitenciaría Nacional, there is one social worker per thousand detainees in that prison. As the Supreme Court has found in several decisions, the situation in the prisons violates article 87 of the Constitution of Honduras, which mandates the prison system with ensuring the rehabilitation of the detainees and their preparation for reintegration. In its decision of 10 February 2006 on the habeas corpus petition brought by the Tegucigalpa human rights prosecutor on behalf of the detainees of the Penitencaría Nacional, the Supreme Court ordered the Ministry of Security to correct the situation in the Penitencaría Nacional within one year. However, without a substantial increase in resources and a profound change in the attitude of the authorities, the Supreme Court decision is destined to remain a dead letter.

79. A bill to create a separate, independent institution in charge of the penitentiary system was pending in the past legislature, and the Minister of Security informed the Working Group that the Government intends to revive this proposed legislation. The Working Group considers that this would constitute a very important step in the direction outlined in the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Constitution of Honduras.

E. The situation of persons detained under the old criminal procedure code

80. The old criminal procedure code, providing for mandatory detention on remand and inquisitorial proceedings, continues to be applied to those who have been charged with an offence committed before the entry into force of the new system. The Working Group is conscious of the reasons underlying the decision not to automatically extend the limits on preventive detention established in the new code to all defendants in preventive detention at the time the new code entered into force. At that time, there were approximately 8,000 remand prisoners, and for many of them the maximum duration of remand detention under the new code had already been exceeded. Immediately applying the new code to their cases would have meant the release - from one day to the other - of several thousand persons accused of serious crimes and would have caused justified alarm in the population.

81. The current situation, however, is simply unbearable, as the discrimination between the two categories of prisoners lasts for more than four-and-a-half years by now. While the Working Group has not been able to obtain reliable figures concerning the number of remand detainees awaiting trial under the old criminal procedure code, they are no less than 1,800, and probably significantly more. These persons have been in detention without being found guilty of a crime for at least four-and-a-half years by now, in some cases identified by the Working Group more than 10 years. The old code applied to them sets no time limits for the duration of the proceedings in their case and for the duration of their detention, and does not provide for their right to challenge continued remand detention or for ex officio control over the need therefore. The Working Group has further been informed that some *jueces de ejcución* refuse to deal with cases of persons held under the old code on the argument that, as the *juez de ejcución* was only established by the new code, they cannot be competent to deal with detainees whose trial is governed by the old code. The Working Group was informed that this stance has been rejected by the Supreme Court in a recent decision, but it remains to be seen what fruits the Court's decision will give in practice.

82. Instead of giving priority to the resolution of these cases, the prosecution and the courts are placing them "on the back burner". While this strategy is supported by the legitimate aim of using the scarce resources of the criminal justice system to comply with the deadlines provided by the current criminal procedure code for remand detention, the result is a serious violation of the right to a fair trial, which includes the right to be tried expeditiously, for those 1,800 or more detainees held under the old code. Some interlocutors in the judiciary have pointed out to the Working Group that the transitional provisions governing the entry into force of the new code dictate that these cases shall be decided by the end of 2006. This laudable goal, however, is by now completely unrealistic, and there do not appear to be any serious efforts under way to attain it. On the contrary, the judicial authorities have informed the Working Group that they count on an extension of the deadline.

83. Among the pretrial detainees held under the old criminal procedure code there is one category whose detention is particularly arbitrary: persons found not guilty by the first instance court of the charges on which they have been deprived of their liberty for years, who now continue to be detained for years more because the prosecution has appealed the acquittal. The Working Group is relieved to have learned of two recent decisions of the Supreme Court in the case of four men in this situation ordering that they should be released. Despite these Supreme Court judgements, it does not appear that the other detainees in the same tragic situation will be released as an immediate consequence of the Supreme Court rulings. Their detention, which can only be qualified as arbitrary, thus continues.

F. Corruption

84. The Working Group expresses its concern with regard to the circumstance that despite the honesty of many professionals and officials in the administration of justice, corrupt practices would appear to continue to exist and are not fought with the necessary force and effectiveness. According to the 2006 Human Development Report for Honduras, less than a fifth of the population has trust in the justice system, with trust levels particularly low in rural areas and among the poorer population groups.[2]

85. Both during meetings with officials and representatives of civil society, the Working Group received numerous allegations of corruption among the judiciary. It has moreover become clear that in the detention centres detainees have to make payments to the prison police in order to exercise their most basic rights and protect themselves against arbitrary detention, for instance in order to see the judge, to be handed the judgement in their case, to file an appeal.

G. Detention of members of youth gangs (*maras*)

86. As other Central American societies, Honduras is plagued with the phenomenon of the violent youth gangs (*maras*), which terrorize the population with extortion, robberies, and murders, the latter particularly in the fight between the two main gangs, the MS and the Mara 18.

87. Many countries deal with organized crime in its varied forms (from mafia to terrorist organizations) by making the membership itself of the criminal group a criminal offence, in addition to all the forms of criminal participation in offences perpetrated by the group, and international human rights law (e.g. art. 22 of the ICCPR) certainly allows for this. Article 332 of the Criminal Code, governing the offence of "illicit association" and commonly referred to as the "ley anti-maras", is therefore not on its face incompatible with human rights law, although doubts can be expressed as to whether a term of imprisonment of 12 to 20 years is necessary in a democratic society for simple membership in a *mara*.

88. The practical application of article 332, however, does raise serious concerns. The police (as well as the general public and *mara* members themselves) identify *mara* members by the tattoos they bear, highly visibly, all over their body. As membership of an "illicit association" is a continuous offence, a tattooed young man or woman is permanently in flagrante delicto, and can be arrested by the police at any time without warrant and could be immediately rearrested upon release.

89. Moreover, detention on remand is mandatory for persons detained on charges under article 332 of the Criminal Code. This raises concern with regard to article 9 (3) ICCPR, providing that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody".

90. In prison *mara* members, whether detained on remand or upon conviction, are segregated from the general population. The police guarding the prison only ensure from outside that the prisoners do not escape, while inside the wing the *mara* leadership rules the life of the detainees without any interference by the authorities. Rehabilitation and the preparation for a life outside the "illicit association" upon release thereby become all but impossible. On the contrary, membership and hierarchical structures within the *mara* are cemented under the Government's authority.

91. The Working Group also observes that it emerged clearly from its meetings with government officials that little effort is made to understand the phenomenon of the *maras* from a sociological and criminological point of view and its roots in poverty, lack of employment prospects for the adolescents and disintegration of the family structure. Instead, the Government (and the media echoing the authorities) appear to be content to blame the *maras* for all or most of the violence and crime occurring in Honduras, which also is understood to relieve them from thoroughly investigating.

92. Finally, it cannot go unmentioned that more than 100 *mara* members have been killed in detention centres in the last four years under circumstances still awaiting clarification. While these killings do not fall within the Working Group's mandate, they are an integral part of the State's response to the phenomenon of *maras* and further taint the policy under which *mara* members are detained.

H. Further issues of concern with regard to juvenile justice

93. The Working Group observed that, notwithstanding the reforms, judges continue to use deprivation of liberty as the primary means to combat juvenile delinquency. Of particular concern is the general recourse to preventive detention with regard to youths accused of a serious offence. In the centre "Renaciendo", e.g. at the time of the Working Group's visit 72 out of 112 detainees were in preventive detention, and only 40 serving "socio-educational measures". Moreover, the juvenile justice system is understaffed. There are only 9 or 10 juvenile judges. Although being a juvenile judge requires specific additional training and skills, the role is considered minor. In parts of the country where there is no juvenile judge, young offenders will end up before the regular (adult) court system, at least during initial phase of criminal proceedings.

94. In the IHNFA facilities, far too little is done for the education of the minors and to teach them skills that will allow them to find a job upon release. Moreover, as there are juvenile detention centres only in the Valle de Tamara near Tegucigalpa and in San Pedro Sula, young offenders are often isolated from their family and community. These shortcomings risk standing in the way of IHNFA's mission of putting the internees on a track that will not lead to relapsing into criminal activity once released.

V. CONCLUSIONS

95. Since the beginning of the 1990s, the legal and institutional framework governing deprivation of liberty in Honduras has profoundly changed: the creation of the Human Rights Commissioner, the law on the Public Prosecutor, the creation of IHNFA and reform of juvenile justice, the creation of the public defenders' office, and, finally, the entry into force of the new criminal procedure code. All these reforms have put Honduras in a much better position to respect and ensure the right of persons under its jurisdiction not to be arbitrarily deprived of their liberty.

96. In the Working Group's opinion, there are two major institutional engineering initiatives which remain to be addressed: establishing a real penitentiary system separate from the police, and measures to address the negative consequences of the "divorce" of the investigative police from the public prosecution.

97. The real challenge for Honduras, however, is to close the enormous gap between, on the one hand, the high standards set in its Constitution and laws and the reality on the other. All institutions involved in the criminal justice system, from the judges and prosecutors to the police, to the private and public defence lawyers, are falling dramatically short of playing the eminent roles the Constitution and the laws assign to them. The scarcity of material resources assigned to the system bears only part of the responsibility and should not be used as a convenient excuse. The primary victims of this failure are all those who - often guilty of an offence, sometimes innocent, but nearly always poor - end up in detention which, though in most cases lawful and justified at the beginning, becomes arbitrary as the checks on its legality and necessity fail to work. But Honduran society at large can only suffer from this situation, which not only undermines the rule of law in the country, but also transforms the prisons in veritable "schools of crime".

VI. RECOMMENDATIONS

98. **On the basis of its findings, the Working Group recommends the following measures.**

99. **With regard to the situation of the detainees held under the old criminal procedure code:**

(a) All detainees held under the old criminal procedure code who have been acquitted in first instance should be released, in accordance with the Supreme Court judgements but without any need for further pronouncements of the Supreme Court. This is a matter of urgency and can be solved within a few weeks;

(b) Significant resources need to be assigned to addressing the situation of preventive detainees held under the old code and priority should be given to solving their situation. An ambitious but feasible time plan for resolving their cases should be drawn up expeditiously under the leadership of the Supreme Court. There must be a time set in the not too distant future at which the rules on preventive detention of the new code shall apply to all detainees.

100. **In order to strengthen the control over the legality of detention at all stages of the criminal justice process:**

(a) All institutions in which persons are detained need to maintain complete and transparent records showing the legal basis for detention. In particular, police stations need a single record book showing all information relevant to the case of each person passing through police custody, providing proof of the duration of each phase of custody and of the authority responsible, and certification by the relevant authority of all transfer of custody;

(b) *Jueces de ejecución* should carry out their mandate proactively as set forth in the criminal procedure code, and need to be equipped for the purpose (e.g. with vehicles and information technology);

(c) Measures need to be taken to render public defence more effective. These could include both providing material resources, such as offices, computers, vehicles, and providing training. However, on a more fundamental level, thought will need to be given on how to strengthen their role as lawyers acting on behalf of a client, even if they are paid out of public funds;

(d) In all events, when the legal basis for deprivation of a person's liberty has expired, whether held in a police station, a prison, or an IHNFA facility, the authority holding the detainee must release him or her, without any further need for a judicial decision.

101. **Honduras needs to establish a penitentiary system as a separate institution, run by professional penitentiary management and staff, not connected to the police. Such a separate system is necessary to prevent arbitrary detention and ensure that, as prescribed by the Constitution, detention is aimed at rehabilitation and preparation for a working life outside prison.**

102. **In the meantime, already before legislation to this effect can be passed and put into practice, steps should be taken to bring the prison system closer to compliance with the Standard Minimum Rules for the Treatment of Prisoners. Penitentiary facilities should respect the separation between remand and convict detainees; women should be held separately from men; persons with serious mental health problems and those terminally ill require special attention which is better provided outside prison. Internal disciplinary and complaints procedures should be established and complied with, so that the rule of law extends to penitentiary facilities.**

103. **All branches of Government, seeking input from civil society as well, should reconsider the response of both the criminal justice system and the State in general to the young men and women belonging to *maras*. The current system, based exclusively on repression, in particular rules governing detention which in practice violate international human rights law, does not appear to be able to either address the root of the problem or enhance the security of the population.**

104. **Vigorous guarantees for defendants must go hand in hand with a strong police and public prosecution service. To this end, the investigative capacities of the public prosecution must be strengthened. Serious thought should be given to providing the Ministerio Público with its own investigative police, whether by reversing the 1998 "divorce" between investigative police and public prosecution or otherwise.**

105. **On a more general level, the Working Group finds it useful to underline that in its experience it is through preventive action and vigorous, well-resourced law enforcement that rising crime levels are best fought. Relaxing safeguards against arbitrary detention, which Honduras has strengthened through its recent criminal procedure reform, and thereby undermining the rule of law has not yet proved to be an effective way to respond to the justified demand of security of a society.**

Notes

[1] The Working Group delegation has itself, in the course of the visit to a police station, met a man who showed obvious traces of having been beaten by the police a few hours before.

[2] 2006 Human Development Report (pp. 91-93).
