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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 17/2020 concerning Miguel Mora and Lucía Pineda (Nicaragua)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 9 December 2019 the Working Group transmitted to the Government of Nicaragua a communication concerning Miguel Mora and Lucía Pineda. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Miguel Mora Barberena is a Nicaraguan who was born in August 1965 and lives in Managua. He is a journalist and the director of the national television channel 100% Noticias. The source reports that 100% Noticias denounced the national police's repression of the protests that began in April 2018, as well as the arrest, alleged torture, disappearance and prosecution of numerous protesters.

5. According to the source, the continuous coverage given by 100% Noticias to the repression of the protests of April 2018 and the months that followed led to the channel's being attacked, including by the Government, which took a wide range of measures to silence this news outlet and its journalists.

6. The source reports that before Mr. Mora was arrested, he and his family received several death threats, as did other people affiliated with 100% Noticias. These threats began after the Legal Directorate of the Nicaraguan Institute for Telecommunications and Mail, on 30 November 2018, asked satellite television companies to block the signal of 100% Noticias.

7. On 5 December 2018, riot police surrounded the headquarters of 100% Noticias; there were at least five squads in the area around the building. On 7 December 2018, the building was besieged by fanatics, who were keeping watch and making recordings with their mobile phones. On the same day, a dozen police officers held up a van that was carrying journalists from 100% Noticias who were going about their work. On 8 December, the police abducted a cameraman who worked for 100% Noticias. On 10 December, the premises of 100% Noticias were kept under surveillance by armed paramilitaries, who took photographs and recorded videos of everyone who entered or left the building. The source also alleges that paramilitary forces kept watch from a parcel of land owned by the army opposite the premises and harassed all staff members and guests who arrived at the building to take part in the channel's various programmes. On 13 December 2018, the Inter-American Commission on Human Rights requested precautionary measures in favour of Mr. Mora.

(a) Raid and arrest

8. According to the information received, at around 9 p.m. on 21 December 2018, the premises of 100% Noticias were raided by several police squads, which dismantled and removed equipment. Around 40 members of the Special Operations Directorate of the national police forced their way in, pointed their weapons at the staff members present and arrested Mr. Mora and several journalists without showing a warrant. The arrested persons were not informed at that point of the reasons for their arrest or the charges against them. All of them were taken to the premises of the National Legal Cooperation Directorate, known as El Chipote.

9. The source insists that the police did not show a warrant for the raid or for Mr. Mora's arrest. According to the official letter issued by the judge, at 5.30 p.m. on 21 December 2018, the assistant prosecutor filed the charges and the Sixth District Criminal Court ordered that Mr. Mora's home and the premises of 100% Noticias be searched, that Mr. Mora be arrested, and that the National Legal Cooperation Directorate be instructed to execute these orders. However, Mr. Mora's lawyer learned of the existence of this official letter only at the preliminary hearing.

10. On 21 December 2018, one hour after the raid on the premises of 100% Noticias, the Nicaraguan Institute for Telecommunications and Mail issued a statement announcing that "as from 9 p.m., the legal entity Primicias S.A., a public limited company that operates under the trademark 100% Noticias, is no longer authorized to broadcast via the system concerned".

(b) Indictment and pretrial detention

11. Mr. Mora was brought before the judge on 22 December, the day after his arrest, and was charged with inciting, instigating and conspiring to commit terrorist acts under article 398 of the Criminal Code, as well as the conduct described in article 32 of the Code, which refers to hate crimes based on discrimination as aggravated offences. The charges brought by

the Public Prosecution Service were based on information reported by government sympathizers who were trying to accuse Mr. Mora of inciting hatred and terrorism through the media and social networks. The charges also included, as an aggravating circumstance, discrimination on the basis of political ideology, to the detriment of Nicaraguan society, the State and 11 people who claimed to have been harmed by various events. The facts on which the charges were allegedly based were deaths, injuries and property damage suffered by government sympathizers during the April 2018 protests. The source stresses that neither Mr. Mora nor the 100% Noticias team was directly or indirectly involved in these events.

12. The arraignment hearing was private, but representatives of pro-government media outlets were allowed to attend and subsequently launched a campaign to stigmatize Mr. Mora, using recordings made during the hearing. The source notes that at the end of the hearing, the judge ordered that Mr. Mora be placed in detention for the duration of the proceedings but did not assess the need for such a measure. The judge's argument for imposing pretrial detention has been used repeatedly to deprive persons arrested during the protests of their liberty. The relevant provision is article 1 of Act No. 952, which amended article 565 of the Criminal Code in order to establish that pretrial detention must be imposed in cases involving terrorism, financing of terrorism or organized crime, among other offences. The source claims that this legal provision is a violation of the independence of the judiciary, since it requires that pretrial detention be imposed for the duration of the proceedings if the prosecution service deems that the conduct in question constitutes one of the criminal offences covered by that article. The Act also allows for the extension of procedural time limits, which means that it may take longer than usual for a ruling to be handed down at first instance.

13. Mr. Mora was held incommunicado for a month at El Chipote detention centre. He was beaten when he arrived and slept on a concrete platform in his underwear. He was deprived of sunlight for 37 days, in a cell without lighting; this affected his vision. As a result of the very poor sanitary conditions, his cell became infested with mosquitoes and he suffered from allergies. For the first month of his detention, he was not allowed to receive visitors. On 22 January 2019, he received his first visit from a family member; the visit lasted 10 minutes and was supervised by the police at all times.

14. After the initial hearing, which took place on 30 January 2019, Mr. Mora was transferred to La Modelo prison. The source claims that the prosecution service interfered with Mr. Mora's ability to exercise his right of defence by failing to give his lawyer access to the recordings that were allegedly being submitted as evidence and by preventing him from talking to his lawyer, except for half an hour at the courthouse on the day of each hearing. He was unable to meet with his lawyer at any point during his imprisonment in La Modelo, despite his requests. After several failed attempts, his family was finally able to visit him there for 15 minutes, under supervision, on 4 February 2019. In La Modelo, Mr. Mora was held in the cell block known as "the little hell", which is intended for maximum security prisoners who are considered a risk to prison security.

15. On 19 February 2019, Mr. Mora began a hunger strike to protest the repeated violations of his rights, especially the fact that he was unable to receive visits from family or packages. On 4 March, he was allowed to receive a second visit from his family members, who saw the impact that the hunger strike had had on his physical appearance and health. The visit lasted 45 minutes.

16. In view of the Government's failure to take the precautionary measures that had been requested, and at the request of the Inter-American Commission on Human Rights, on 21 May 2019, the Inter-American Court of Human Rights requested urgent measures with respect to 17 detainees, including Mr. Mora. Based on the allegations and evidence submitted, the Court established that people who had taken part in the protests were being prosecuted for offences such as terrorism and that it was common practice to impose pretrial detention.

(c) Release under the Amnesty Act

17. On 11 June 2019, Mr. Mora was released, along with 105 other prisoners, under an amnesty law. The legal situation following the amnesty is uncertain, since the proceedings

against the persons concerned have not been definitively dismissed. Moreover, the Amnesty Act itself states that a person may be taken back into custody if he or she engages in certain conduct.

18. Mr. Mora remains in Nicaragua, where he is trying to work as a journalist and reopen 100% Noticias. He continues mostly to be insulted and denigrated on social media, where he is called a terrorist and a putschist, among other things. He works with a small team in Nicaragua and another team in exile; they are subject to severe financial constraints, as the equipment and premises are under police control.

(d) Political and social context in Nicaragua

19. The source reports that, since the beginning of the crisis in April 2018, the situation in Nicaragua has been characterized by the selective repression of persons exercising their right to protest, as well as of independent journalists, human rights defenders and civil society organizations, which have been stripped of their legal status. Police and vigilantes continue to abduct, arrest and harass citizens who are linked to the protests.

20. On 14 December 2018, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the Organization of American States condemned the repeated attacks, raids and censorship suffered by independent journalists and media outlets and called on the Government to immediately cease all forms of harassment and persecution and to ensure that journalists, including those working for 100% Noticias, are able to perform their work.

21. On 12 March 2019, seven special rapporteurs of the Human Rights Council expressed concern about the decision to revoke the legal status of several Nicaraguan human rights organizations and the raids carried out on the offices of various media outlets and civil society organizations. They also expressed grave concern about the lack of trust in the judicial system and the lack of guarantees to ensure independence and impartiality when it came to the investigation, trial and punishment of perpetrators.

22. The Office of the United Nations High Commissioner for Human Rights reported that serious human rights violations have continued to occur in Nicaragua, especially violations of the right to freedom of peaceful assembly, expression and association and the right to liberty of person. It issued a report recommending that the exercise of freedom of peaceful assembly, expression and association be guaranteed, that the legal status of nine civil society organizations and media outlets be restored and that a comprehensive action plan for accountability be drawn up.

(e) Allegations of human rights violations

23. The source claims that Mr. Mora was arbitrarily detained for exercising his right to freedom of expression and for denouncing and reporting on the human rights violations and abuses that were taking place in Nicaragua in his role as a journalist. The way Mr. Mora was treated in prison, according to the source, violated his right to security of person and his right to receive decent treatment and was contrary to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Furthermore, the conditions of detention to which he was subjected violated his right to physical and mental health and put his life and physical integrity at risk. Mr. Mora's case clearly reflects a broader pattern of criminalization of protests in Nicaragua.

(i) Category I: No legal basis

24. The source claims that Mr. Mora's detention was arbitrary under category I because the authorities imposed pretrial detention automatically and prevented him from exercising his right to challenge the lawfulness of his detention. The source notes that Mr. Mora was charged with inciting, instigating and conspiring to commit terrorist acts and was automatically placed in pretrial detention, as a result of the legal requirement arising from Act No. 952. The source argues that automatically ordering pretrial detention without a case-by-case examination of whether it is necessary is contrary to article 9 (3) and (4) of the

Covenant and demonstrates that there is no legal basis for the detention. The source notes that the criminal offence of terrorism and automatic pretrial detention have been used to punish journalists and human rights defenders for exercising their right to freedom of expression and peaceful assembly.

(ii) Category II: Fundamental rights and freedoms

25. The source argues that Mr. Mora's detention was arbitrary under category II because it resulted from his exercise of his right to freedom of opinion and expression. The source claims that the authorities violated this right, which is enshrined in article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Mr. Mora is a journalist and the director of a media outlet that gave continuous coverage to the repression of the protests until it was shut down and its directors were arrested. Mr. Mora reportedly demanded justice and the restoration of democracy in his country, through the television broadcasts in which he used to participate.

(iii) Category III: Due process

26. In addition, the source claims that the detention of Mr. Mora was arbitrary under category III because it involved a failure to observe the international norms relating to the right to a fair trial.

27. The source claims that when the authorities entered the 100% Noticias building on 21 December 2018, they did not show an arrest warrant, thus violating Mr. Mora's right to protection from arrest without a warrant and to be informed of the required warrant at the time of the arrest. The source argues that the authorities also violated the legal requirements governing the search of the premises and the arrest of members of the reporting team, because the raid took place at a time of day at which such raids, under article 217 of the Code of Criminal Procedure, are not permitted.

28. The source also argues that the authorities violated Mr. Mora's right to be informed of the reasons for his arrest at the time of the arrest. When the authorities arrested him on 21 December 2018, they did not explain why he was being arrested. Not until the hearing on 22 December 2018 did he learn of the serious charges being brought against him.

29. The source also claims that the authorities violated Mr. Mora's right to be treated with respect for human dignity. When he arrived at El Chipote, a police officer took his glasses off him and hit him in the face, causing a bruise. He was stripped naked and placed in a small cell before being moved to a different cell that was shared with four other people. He was deprived of sunlight for 35 days in a cell without lighting. As a result of the poor sanitary conditions, his cell became infested with mosquitoes and he suffered from allergies.

30. The source notes that when Mr. Mora was transferred to La Modelo, he was placed in a maximum security cell measuring 2 m by 3 m; this affected his motor skills. The cell was located in a block known as "the little hell", where temperatures were high and there was little ventilation or lighting. In addition, he was subject to the strict regime of solitary confinement that is imposed on the most dangerous prisoners and was allowed only one visit a month, until greater flexibility was shown in May and June. On 11 February, his family requested that he be moved to a different cell but never received a response.

31. According to the source, the authorities also violated Mr. Mora's right to challenge the lawfulness of his detention and his right to a proper defence, throughout the period of detention. The solitary confinement to which he was subjected, together with the restrictions that he faced when trying to meet with his lawyer and the Public Prosecution Service's refusal to provide access to the evidence, constitute a violation of his right of defence. Moreover, principle 9 of the Body of Principles, which states that detained persons have the right to receive legal assistance from counsel of their choice at any time during their detention, including immediately after their arrest, was not respected.

32. The source claims that the circumstances of Mr. Mora's detention suggest a concerted effort by the State authorities to cause him additional suffering. This continuous treatment amounts to a violation of the right to have contact with the outside world, which is established

in rules 43 (3) and 58 of the Nelson Mandela Rules and principles 15, 19 and 20 of the Body of Principles.

33. The source also argues that the authorities violated Mr. Mora's right to be presumed innocent until proven guilty, since they arrested him and placed him in pretrial detention based on the legal requirement arising from his being charged with terrorism. Ordering pretrial detention without determining whether it is necessary in the specific case in question amounts to premature punishment that violates the principle of the presumption of innocence. Even where pretrial detention is provided for by law, it must be in accordance with international law.

(iv) Category V: Discrimination based on political opinion

34. Lastly, the source claims that Mr. Mora's detention was arbitrary under category V. The fact that Mr. Mora had no access to alternatives to detention violated his right to equality before the law and non-discrimination, which is enshrined in articles 2 (1), 3 and 26 of the Covenant, and amounted to ignoring the equality of human beings. Furthermore, the charges brought against him fit into the broader pattern of persecution of journalists and human rights defenders by the authorities. The solitary confinement to which he was subjected and the irregularities in the criminal proceedings should serve as evidence that the authorities were doing everything in their power to make an example of him and thus to send a clear message to their opponents. For these reasons, the source considers that Mr. Mora, was deprived of his liberty on discriminatory grounds – namely, for being an independent journalist who had criticized the Government.

35. Lucía Pineda Ubau is a Nicaraguan and Costa Rican national who was born in September 1973 and lives in Managua. She is a journalist and the news director of 100% Noticias. Ms. Pineda played a key reporting role during the protests by providing on-the-spot coverage. In addition, on several occasions, she reported on the national police's repression of the protests and the arrest, alleged torture, disappearance and prosecution of numerous protesters.

(f) Raid, arrest, indictment and pretrial detention

36. According to the source, Ms. Pineda was arrested at around 9 p.m. on 21 December 2018 during the raid on the headquarters of 100% Noticias, without being shown a warrant for her arrest or informed of the reasons for her arrest or her rights. She was taken to El Chipote, where she remained for the first 40 days of her detention. The source notes that she was missing for more than 30 hours, until 23 December 2018, when she was brought before a judge.

37. The source reports that, on 23 December 2018, the police brought Ms. Pineda before the judge and that she was one of the people charged with inciting, instigating and conspiring to commit terrorist acts. Although the preliminary hearing was private and access was denied to family members, friends and the independent press, representatives of pro-government media outlets were allowed to attend and subsequently launched a campaign to stigmatize her and brand her a terrorist, using recordings made during the hearing. In order to indict Ms. Pineda, the Public Prosecution Service extended the charges brought against Mr. Mora, taking the view that both of them, together with other reporters from 100% Noticias, had been involved in a plan to destabilize the situation by publishing fake news.

38. In the document extending and amending the charges, which was dated 22 December but received on 23 December, the prosecutor requested that "an arrest and search warrant be issued for Lucía Pineda, in accordance with article 266 of the Code of Criminal Procedure", even though she had been in detention since the night of 21 December. Moreover, in the official letter that the judge sent to the head of legal cooperation, ordering the raid on 100% Noticias and the arrest of Mr. Mora, there was no mention of Ms. Pineda.

39. The charges were based on deaths, injuries and property damage that occurred during the protests of April 2018. On the basis of these facts, the authorities accused Ms. Pineda of having used 100% Noticias to foster and incite hatred. She was accused of spreading fake and unsubstantiated news in order to generate anxiety and extreme hatred. The prosecutor considered that her intention was to unleash terror, violence and contempt for the national

police and to incite hatred, civil disobedience and the commission of related crimes of a serious nature, such as terrorism.

40. The charges were based on article 398 of the Criminal Code, read in conjunction with article 32. They also included, as an aggravating circumstance, discrimination on the basis of political ideology, to the detriment of Nicaraguan society, the State and 11 persons who claimed to have been harmed by events that, in their view, had been triggered by Ms. Pineda and 100% Noticias.

41. In accordance with the legislation that defines the offence of terrorism, the judge automatically ordered detention for the duration of the proceedings. This legislation – Act No. 952 – also allows the judge to extend procedural time limits, which means that the handing down of a ruling at first instance can be delayed by up to one year. In Ms. Pineda's case, preventive detention was not imposed out of necessity, contrary to the conditions governing its application, which state that it may be ordered only when other precautionary measures are insufficient to ensure that the proceedings are conducted as intended. Furthermore, detaining Ms. Pineda was not a measure proportional to the acts she allegedly committed, which are protected under articles 66 and 67 of the Constitution.

42. On 29 December 2018, the police raided Ms. Pineda's home and questioned the people who were taking care of it. A family member who visited Ms. Pineda in prison and transmitted her messages to the outside world was subjected to harassment that included being photographed, filmed and followed.

43. Over the course of the month that Ms. Pineda spent in El Chipote, she was interrogated more than 30 times and attempts were made to force her to record a video of herself apologizing to the President. For the first few days, she had no access to food or toiletries. She was allowed to receive visits from her family only after one month of detention.

(g) Transfer and conditions of detention

44. On 30 January 2019, after the initial trial hearing, Ms. Pineda was transferred to La Esperanza women's prison. There, she was kept in solitary confinement while she waited for the trial hearing – which never took place, as it was rescheduled five times before she was released on 11 June 2019 – with access to sunlight for half an hour every two days, in a cell with poor ventilation, little light and a surveillance camera filming her at all times.

45. The source claims that Ms. Pineda was held in a space that measured 3 m by 3 m. She was allowed to open the curtains on the two high windows only from 10 a.m. to 2 p.m. The bed she slept on had a metal frame and a very thin mattress; her family offered to donate a mattress, but the authorities refused, arguing that she already had one.

46. The source adds that Ms. Pineda was not allowed to receive a single visit from her lawyer while she was in prison. The only time that she could meet with him was immediately before the hearings. Although she asked several times to be able to meet with him or call him, she was never allowed to do so. On 9 April, her lawyer submitted to the judge an urgent request for the prison authorities to allow him to meet with his client. The judge never ruled on this request.

47. The source reports that Ms. Pineda had circulatory problems that were aggravated by the conditions in which she was detained. She also suffered from difficulty walking, trembling of the arms and legs, a urinary tract infection, fluid retention, loss of appetite and dizziness. While she was in detention, she had only three medical examinations. The general examination was carried out by a paediatrician, not by a specialist, and the results of the examinations were contradictory. On 26 March 2019, her lawyer requested the court to authorize a visit from a private doctor who knew her medical history, but this request was ignored.

48. On 11 February 2019, the Inter-American Commission on Human Rights requested that precautionary measures be taken in favour of Ms. Pineda. In view of the Government's failure to respond, and at the request of the Inter-American Commission, on 21 May 2019, the Inter-American Court of Human Rights requested urgent measures with respect to 17 detainees, including Ms. Pineda. Based on the allegations and evidence submitted, the Court was able to note the extreme gravity of the conflict and to establish that people who had taken

part in the protests were being prosecuted and that it was common practice to impose pretrial detention. In the decision, the Government was ordered to provide the necessary conditions and security to enable a delegation from the Court to visit the country's prisons. However, the Government replied that its agenda and commitments prevented it from hosting such a delegation.

(h) Release of prisoners under the Amnesty Act

49. On 7 June 2019, the National Assembly passed the Amnesty Act, which provided for the release of political prisoners arrested during the April 2018 protests in exchange for a decision not to investigate those responsible for the lethal violence that claimed the lives of 325 people. On 11 June 2019, Ms. Pineda was released under the Act, along with 105 other prisoners.

50. The legal situation following the amnesty is considered one of legal uncertainty, since the proceedings against the persons concerned have not been definitively dismissed. In addition, the Amnesty Act itself seeks to restrict freedom of expression and association by establishing that a person who commits a repeat offence under the Act may be taken back into custody.

51. On 13 June 2019, Ms. Pineda left Nicaragua for Costa Rica, where she continues to work for 100% Noticias. She is frequently denigrated on social media, where she is called a terrorist and a putschist, among other things. She continues working as a journalist via the Internet. As a member of 100% Noticias, she faces significant constraints on her work.

(i) Allegations of human rights violations

52. The source claims that Ms. Pineda was arbitrarily arrested and detained for 172 days for exercising her right to freedom of expression and denouncing and reporting on human rights violations and abuses in her role as a journalist. The way in which she was treated in prison violated her right to security of person and her right to receive decent treatment and was contrary to the Body of Principles and the Nelson Mandela Rules. Furthermore, the conditions of detention to which she was subjected violated her right to physical and mental health and put her life and physical integrity at risk. Her case clearly reflects a broader pattern of protests being criminalized through the use of violence and prosecution.

(i) Category I: No legal basis

53. The source claims that Ms. Pineda's detention was arbitrary under category I. After being charged with inciting, instigating and conspiring to commit terrorist acts, she was automatically placed in pretrial detention under Act No. 952, in violation of her right to challenge the lawfulness of her detention. Moreover, automatically ordering pretrial detention without a case-by-case examination of the need for it is contrary to article 9 (3) and (4) of the Covenant; it is further evidence that there was no legal basis for the detention.

(ii) Category II: Exercise of fundamental rights and freedoms

54. The source claims that Ms. Pineda's detention was arbitrary under category II because it resulted from the exercise of her right to freedom of opinion and expression. Ms. Pineda is an independent journalist who works for 100% Noticias. She gave continuous daily coverage to the Government's attempts to repress and subdue the protests until the channel was shut down and its directors arrested. In the television broadcasts in which she participated before she was arrested, Ms. Pineda also demanded justice and the restoration of democracy in her country.

(iii) Category III: Due process

55. The source claims that Ms. Pineda's detention was also arbitrary under category III because it demonstrated a failure to observe the international norms relating to the right to a fair trial.

56. The source claims that when the authorities entered the 100% Noticias building on 21 December 2019, they did not show a warrant of any kind, thus failing to comply with the

legal requirements governing the search of the premises and the arrest of Ms. Pineda. The source also notes that the raid took place at a time of day at which such raids, under article 217 of the Code of Criminal Procedure, are not permitted.

57. In addition, the source claims that the authorities violated Ms. Pineda's right to be informed of the reasons for her arrest at the time of the arrest. When they arrested her on 21 December 2018, they gave her no explanation. Not until the hearing on 23 December 2018 did she learn of the serious charges being brought against her.

58. The source also claims that, after Ms. Pineda was arrested, her whereabouts were unknown for more than 30 hours, leaving her helpless and deprived of legal protection. Her family had no information about where she was being held.

59. The source claims that the Government violated Ms. Pineda's rights by failing to treat her with respect for the inherent dignity of the human person. While she was in El Chipote, she was forced to relieve herself in a degrading way because the toilet was in a state of disrepair. Ms. Pineda publicly denounced the commissioner and the police officer who subjected her to cruel, inhuman and degrading treatment during her first week of detention in El Chipote, sometimes interrogating her seven times in a single day. On one occasion, her glasses were confiscated for 24 hours, even though she could not see without them. Ms. Pineda was interrogated more than 30 times. Every time, she was asked the same questions and told that she was not going to get out of prison.

60. After being transferred to La Esperanza prison, she was kept in solitary confinement, with limited access to sunlight and physical exercise, and without the medical care that she needed for her circulatory problems. The authorities also rejected a request from her family to allow visits from a private doctor.

61. In addition, the source claims that the authorities violated Ms. Pineda's rights by not giving her the opportunity to challenge the lawfulness of her detention or to prepare a proper defence. The solitary confinement to which she was subjected, together with the restrictions that she faced when trying to meet with her lawyer and the Public Prosecution Service's refusal to provide access to the evidence, constitute a violation of her right of defence. Likewise, her right to receive legal assistance from counsel of her choice at any time, including immediately after her arrest, was not respected.

62. Her defence lawyer had no opportunity to refute or contest the evidence submitted by the Public Prosecution Service, since the trial never took place; moreover, he was not given access to the evidence that supposedly incriminated her and he was not even allowed to visit her in prison or to speak to her on the telephone. The source argues that the circumstances of Ms. Pineda's detention suggest a concerted effort by the State authorities to cause her additional suffering.

63. The source claims that the authorities violated Ms. Pineda's right to be presumed innocent until proven guilty, since they arrested her and placed her in pretrial detention based on the legal requirement arising from her being charged with terrorism. Ordering pretrial detention without assessing whether it is necessary in the specific case in question amounts to premature punishment that violates the principle of the presumption of innocence.

64. The source also claims that Ms. Pineda's right to consular protection from Costa Rica, a country of which she is a national, was violated because the Nicaraguan authorities did not allow her to enter into contact with the Embassy of Costa Rica, in violation of article 36 (1) (c) of the Vienna Convention on Consular Relations. The source notes that officers of the Consulate General of Costa Rica submitted more than 10 requests for a consular visit in an attempt to exercise their right to visit Ms. Pineda; they also requested that a consular representative be able to attend the trial that was scheduled to begin on 18 March. However, the authorities ignored all of these requests.

(iv) Category V: Discrimination based on political opinion

65. The source claims that Ms. Pineda's detention was arbitrary under category V because it reflected discrimination on the basis of her political opinion. In addition, the fact that she had no access to alternatives to detention violated her right to equality before the law and non-discrimination and amounted to ignoring the equality of human beings. The source

claims that the charges brought against Ms. Pineda fit into the broader pattern of persecution of journalists and human rights defenders by the authorities. The solitary confinement to which she was subjected, the harassment suffered by her family and the irregularities in the criminal proceedings should serve as evidence that the authorities were doing everything in their power to make an example of her in order to send a clear message to their opponents. For these reasons, the source considers that Ms. Pineda was deprived of her liberty on discriminatory grounds – namely, for being an independent journalist, for which she is considered an opponent and therefore an enemy of the Government.

Response from the Government

66. The Working Group transmitted the source's allegations to the Government on 9 December 2019 and requested that it submit a response by 7 February 2020. The Working Group regrets that the Government did not respond to the communication within the time limit. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

Discussion

67. The Working Group has been informed that 105 persons, including Mr. Mora and Ms. Pineda, were released on 11 June 2019 following the adoption of the Amnesty Act.¹ According to the information received by the Working Group, which has not been disputed by the Government, the legal situation arising from the application of the Act is uncertain because the criminal proceedings against the persons concerned have not been definitively dismissed and because the Act itself creates legal uncertainty by establishing that those who commit repeat offences may be deprived of the benefits provided for in the Act. For this reason, and since the present case illustrates a pattern of detention in Nicaragua, the Working Group will assess whether or not the deprivation of liberty was arbitrary, in accordance with paragraph 17 (a) of its methods of work.

68. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.² In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

69. The Working Group is convinced by the claim that Mr. Mora is a journalist and the director of 100% Noticias, a national television channel that gave round-the-clock coverage to the repression of the protests of April 2018 and the months that followed. Similarly, the Working Group has received convincing information to the effect that Ms. Pineda is a journalist and that she covered the protests personally, working as a reporter on the ground.

70. The Working Group is also aware that, as a result of this coverage, Mr. Mora, his family and other members of 100% Noticias were threatened, and several incidents and attacks targeting the staff and premises of the news channel took place between 5 and 10 December 2018.

71. The Working Group notes that the Inter-American Commission on Human Rights accepted an application to request precautionary measures in favour of Mr. Mora in December 2018³ and in favour of Ms. Pineda in January 2019.⁴ In addition, the Inter-American Court of Human Rights called for urgent measures of protection;⁵ it requested that

¹ Act No. 996, the Amnesty Act, adopted by the National Assembly on 8 June 2019 and published in *La Gaceta* No. 108 of 10 June 2019.

² A/HRC/19/57, para. 68.

³ Resolution 90/2018, precautionary measures 873-18, Miguel Mora Barberena, Leticia Gaitán Hernández and their families (journalists for 100% Noticias), Nicaragua, 13 December 2018.

⁴ Resolution 5/2019, precautionary measures 873-18, Lucía Pineda Ubau and her family, Nicaragua (extension), 11 February 2019.

⁵ Order of the President of the Inter-American Court of Human Rights of 21 May 2019, adoption of urgent measures, case involving 17 persons deprived of their liberty, Nicaragua.

Nicaragua immediately adopt the measures needed to effectively protect the health, lives and personal safety of the detainees and assess whether there might be alternatives to detention.

Category I

72. The Working Group is aware that, during the evening of 21 December 2018, dozens of police officers broke into and raided the premises of 100% Noticias, arrested Mr. Mora and Ms. Pineda and took them to the premises of the National Legal Cooperation Directorate, known as El Chipote. The Working Group is convinced by the claim that neither Mr. Mora nor Ms. Pineda was informed of the reasons for the arrest, in violation of article 9 (2) of the Covenant.

73. The Working Group is convinced by the claim that Mr. Mora was brought before a judge on 22 December and only then learned of the charges being brought against him. Ms. Pineda was missing for more than 30 hours – from 21 December, when she was arrested, to 23 December, when she was brought before the judicial authorities – in violation of article 9 (2) and (3) of the Covenant. Neither Mr. Mora nor Ms. Pineda was arrested in flagrante delicto.

74. Under article 9 of the Covenant, anyone who is arrested must be informed of the reasons for the arrest at the time of arrest and of the judicial avenue for challenging its lawfulness.⁶ The reasons given for the arrest must include not only the general legal basis of the arrest but also factual specifics indicating the substance of the complaint and the wrongful act committed. The reasons concern the official basis for the arrest, not the subjective motivations of the arresting officer.⁷

75. Moreover, persons deprived of their liberty must be informed by the authorities, upon apprehension, of their right to legal assistance by counsel of their choice.⁸ They also have the right to be informed promptly of the charges against them.⁹ The Working Group also recalls that, in cases where arrested persons have a foreign nationality, they must be informed of their right to consular notification, which enables them to have proper legal representation.

76. The Working Group is convinced by the claim that both Mr. Mora and Ms. Pineda were automatically placed in pretrial detention after being charged with inciting, instigating and conspiring to commit terrorist acts. The Working Group recalls that, in its opinion No. 1/2018, it examined this matter in detail and concluded that mandatory pretrial detention is in violation of article 9 (3) of the Covenant, which requires that detention pending trial should be the exception rather than the rule and must be based on an individualized determination that it is reasonable and necessary.¹⁰

77. The Working Group considers that automatic pretrial detention for specific offences deprives detainees of their right to seek alternatives to detention, such as bail, and violates their right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. Imposing pretrial detention for specific offences is contrary to the principle of the presumption of innocence, as persons charged with those offences are detained automatically, without balanced consideration of non-custodial alternatives. The Working Group wishes to emphasize that international standards, in particular article 9 (3) of the Covenant, do not preclude the imposition of pretrial detention in certain cases. However, they do stipulate that such detention may be ordered only once a judicial authority has carried out an individualized assessment of the case.

78. In the present case, the Working Group considers that automatically imposing pretrial detention on Mr. Mora and Ms. Pineda without a case-by-case examination of whether it was

⁶ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, principle 7, right to be informed. See also opinions No. 1/2018 and No. 64/2019.

⁷ General comment No. 35 (2014) on liberty and security of person, para. 25.

⁸ A/HRC/30/37, principle 9, assistance by legal counsel and access to legal aid.

⁹ Covenant, art. 9 (2).

¹⁰ Opinions No. 64/2019, No. 53/2018, No. 16/2018, No. 1/2018, No. 24/2015 and No. 57/2014; A/HRC/19/57, paras. 48–58, and general comment No. 35 (2014), para. 38.

necessary was contrary to article 9 (3) and (4) of the Covenant and demonstrated that there was no legal basis for the detention.

79. The Working Group is of the view that the detention was arbitrary under category I, since Mr. Mora and Ms. Pineda were neither informed of the reasons for their arrest nor shown any charges against them during the arrest on 21 December 2018, Mr. Mora was held incommunicado and Ms. Pineda's whereabouts were unknown, and they were automatically placed in pretrial detention.

Category II

80. The Working Group emphasizes that everyone has the right to freedom of expression, which includes the right to impart information and ideas of all kinds, whether orally or in any other form. The Working Group also reiterates that the exercise of this right may be subject to restrictions, provided that they are expressly established by law and are necessary to ensure respect for the rights or reputation of others, or for the protection of national security, public order, or public health or morals.¹¹

81. The Working Group is of the view that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.¹² Freedom of expression is of such great importance that no Government may infringe other human rights because of a person's actual or perceived opinions, whether of a political, scientific, historical, moral, religious or any other nature. Consequently, categorizing the peaceful expression of an opinion as an offence is not compatible with the Universal Declaration of Human Rights or the Covenant, and nor is it permissible for persons to be harassed, intimidated or stigmatized, arrested, detained, tried or imprisoned for their opinions or dissemination of news.¹³

82. In the present case, the Working Group is convinced by the claim that both Mr. Mora and Ms. Pineda were working for the channel 100% Noticias as media professionals and were detained against the backdrop of a campaign of harassment waged against the channel by the authorities and by private citizens who supported the Government. In this context, the Working Group is of the view that their detention, prosecution and trial resulted from the exercise of their right to freedom of opinion and expression and freedom to impart information of all kinds, particularly information relating to the repression of the April 2018 protests.

83. In the light of the foregoing, the Working Group considers that the detention of Mr. Mora and Ms. Pineda was carried out in violation of the right to freedom of opinion, expression and information and the right to take part in public affairs, which are enshrined in articles 19 and 21 of the Universal Declaration of Human Rights and articles 19 and 25 of the Covenant; the detention is therefore arbitrary under category II.

Category III

84. In view of its finding under category II that the detention resulted from the exercise of the right to freedom of opinion, expression and information, the Working Group considers the pretrial detention and prosecution to be disproportionate and unjustified. However, since criminal proceedings were brought against Mr. Mora and Ms. Pineda for offences that are punishable by imprisonment, and in view of the source's allegations and the lack of response from the Government, the Working Group will proceed to analyse whether, in the course of the judicial proceedings, the fundamental components of a fair, independent and impartial trial were respected.

85. As stated above, the Working Group is convinced by the claim that, when Mr. Mora and Ms. Pineda were arrested, their right to be informed promptly of the reasons for their arrest was not respected, they were not shown an arrest warrant at the time of the arrest, they were held incommunicado and they were unable to challenge the lawfulness of their detention before a court. The Working Group also notes that both persons were automatically placed

¹¹ Opinion No. 58/2017, para. 42.

¹² General comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

¹³ Ibid., para. 9.

in pretrial detention, in violation of their right to be presumed innocent. All of the above is in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. Other alleged violations of due process will be discussed below.

86. The Working Group recalls that all persons charged with a criminal offence have the right to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them, as well as to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.¹⁴ The Working Group emphasizes that persons charged with a criminal offence have the right to be assisted and defended by such counsel.¹⁵

87. The Working Group shares the view of the Human Rights Committee that a person's right to be informed promptly of the nature and cause of the charges against him or her may be satisfied orally, provided that the charges are later confirmed in a written document that specifies both the applicable law and the facts on which the charges are based.¹⁶

88. As regards the right to be assisted by counsel and to have adequate time and facilities for the preparation of a defence, accused persons must be granted prompt access to counsel, the ability to communicate with counsel privately and in conditions that ensure the confidentiality of their communication,¹⁷ adequate time to prepare their defence¹⁸ and access to the case file containing all the documents, evidence and other materials that the prosecution plans to offer in court.¹⁹

89. The Working Group also takes the view that:

The factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay so as to provide adequate time to prepare the challenge. Disclosure includes a copy of the detention order, access to and a copy of the case file, in addition to the disclosure of any material in the possession of the authorities or to which they may gain access relating to the reasons for the deprivation of liberty.²⁰

90. In the present case, the Working Group is convinced by the claim that Mr. Mora and Ms. Pineda had no access to counsel upon their arrest or during the initial period of detention, as described above. It is also convinced by the claim that they were only granted access to counsel immediately before the initial hearing, in violation of the right of all persons to be assisted by counsel of their own choosing and to have adequate time and facilities for the preparation of a defence, under article 14 (b) and (d) of the Covenant.

91. Furthermore, the Working Group notes that, according to the source's allegations, which have not been contested by the Government, Ms. Pineda was interrogated at least 30 times in one month and was forced to record a video of herself apologizing to the President. These facts support the Working Group's finding that there was a failure to safeguard the principle of the presumption of innocence, which is protected under article 14 (2) of the Covenant.

92. Lastly, the Working Group finds that Ms. Pineda's right to consular protection from Costa Rica, a country of which she is a national, was not respected by the Nicaraguan authorities, in violation of article 36 (1) (c) of the Vienna Convention on Consular Relations. According to the information received, which has not been contested by the Government, officers of the Consulate General of Costa Rica submitted more than 10 requests for a consular visit in an attempt to exercise their right to visit Ms. Pineda and requested that a consular representative be able to attend the trial that was scheduled to begin on 18 March; however, the authorities ignored all of these requests.

¹⁴ Covenant, art. 14 (3) (a)–(b).

¹⁵ Covenant, art. 14 (3) (d).

¹⁶ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 31.

¹⁷ Ibid., para. 34.

¹⁸ Ibid., para. 32.

¹⁹ Ibid., para. 33.

²⁰ A/HRC/30/37, guideline 5 (right to be informed), para. 56.

93. Consequently, the Working Group considers that the non-observance of the international norms relating to the right to a fair trial established in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant is of such gravity as to give the detention of Mr. Mora and Ms. Pineda an arbitrary character under category III.

94. In the light of the information received about the disappearance of Ms. Pineda, the conditions of detention, the need for medical care and the allegations of torture and other cruel, inhuman or degrading treatment suffered by Mr. Mora and Ms. Pineda, the Working Group, in accordance with paragraph 33 (a) of its methods of work, refers the present case to the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

95. Lastly, in order to allow the Working Group to establish a direct dialogue with the authorities of the three branches of government (the executive, the legislature and the judiciary), representatives of civil society and detainees, with the aim of gaining a better understanding of the situation of deprivation of liberty in the country, the Working Group suggests that the Government may wish to consider inviting it to make a country visit, as requested in its notes verbales of 24 April and 21 November 2018. The Working Group recalls that on 26 April 2006 the Government extended an open invitation to the special procedures of the Human Rights Council and that its most recent visit to Nicaragua was from 15 to 23 May 2006.²¹

Disposition

96. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Miguel Mora and Lucía Pineda, being in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

97. The Working Group requests the Government of Nicaragua to take the steps necessary to remedy the situation of Mr. Mora and Ms. Pineda without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

98. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Mora and Ms. Pineda an enforceable right to compensation and other reparations, in accordance with international law.

99. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Mora and Ms. Pineda and to take appropriate measures against those responsible for the violation of their rights.

100. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

101. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

²¹ A/HRC/4/40/Add.3.

Follow-up procedure

102. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Mr. Mora and Ms. Pineda;
- (b) Whether an investigation has been conducted into the violation of the rights of Mr. Mora and Ms. Pineda and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Nicaragua with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

103. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

104. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

105. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²²

[Adopted on 1 May 2020]

²² See Human Rights Council resolution 42/22, paras. 3 and 7.