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APPLICATION DE LA RÉSOLUTION 60/251 DE L'ASSEMBLÉE GÉNÉRALE DU 15 MARS 2006 INTITULÉE «CONSEIL DES DROITS DE L'HOMME»

Rapport du Groupe de travail sur la détention arbitraire

Président-Rapporteur: M^me^ Leïla ZERROUGUI

Additif

MISSION EN ÉQUATEUR*

* Le résumé de ce rapport est diffusé dans toutes les langues officielles. Le rapport lui-même, qui figure en annexe, n'est diffusé que dans la langue originale et en anglais.

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Résumé

Le Groupe de travail sur la détention arbitraire a effectué une visite en République d'Équateur du 12 au 22 février 2006 en réponse à une invitation ouverte adressée à tous les mécanismes thématiques de la Commission des droits de l'homme. Il s'est rendu dans la capitale de ce pays et dans les provinces d'Azuay et de Guayas. Tant à Quito qu'à Cuenca et à Guayaquil, des capitales de provinces, la délégation s'est entretenue avec des représentants des pouvoirs exécutif, législatif et judiciaire ainsi que d'organisations de la société civile. Le Groupe de travail a visité 13 centres de détention, y compris des centres de réadaptation sociale, des centres de détention provisoire, des centres de détention pour mineurs délinquants et des postes de police. Il a eu des entretiens, en privé et sans témoins, avec près de 200 détenus. Le Groupe de travail tient à remercier les autorités nationales et provinciales pour l'entière coopération dont il a bénéficié dans l'accomplissement de son mandat.

Le rapport présente les différentes institutions et normes établissant le cadre institutionnel et juridique de la détention dans le contexte du droit pénal, du droit administratif et des lois sur les migrations. Le Groupe de travail reconnaît les efforts que le Gouvernement équatorien a déployés pour surmonter la crise judiciaire de fin 2004 et d'avril 2005 ainsi que pour permettre la réinstitution et le fonctionnement effectif de la Cour suprême de justice, du Tribunal constitutionnel, du Tribunal électoral suprême et du Conseil de la magistrature. Il cite Cuenca comme exemple de respect des principes et des normes consacrés dans la Constitution et dans les instruments internationaux relatifs aux droits de l'homme, grâce au travail des magistrats et des juges, des procureurs, des membres du Bureau du défenseur du peuple, des directeurs des centres de réadaptation sociale et des autorités municipales de cette ville. Le Groupe de travail prend note par ailleurs avec satisfaction de l'élaboration et de l'application du Code de l'enfance et de l'adolescence et du bon fonctionnement du centre de réadaptation des mineurs délinquants Virgilio Guerrero de Quito. Il se félicite également que les autorités des centres de réadaptation sociale aient accordé aux détenus la possibilité d'avoir des contacts avec leurs proches de manière flexible.

Parmi les sujets de préoccupation, le Groupe de travail signale le décalage qui existe entre, d'une part, les principes et les normes consacrés dans la Constitution et, d'autre part, les lois en vigueur et les pratiques observées. Il dénonce le fait que, bien que la Constitution dispose que la durée de la détention provisoire ne peut en aucun cas être supérieure à un an, la loi n° 101 de 2003 prévoit l'obligatoriété de la détention avant mise en accusation («detención en firme») même après l'expiration du délai de la détention provisoire. Cette modification de la loi a entraîné une situation de surpopulation carcérale, plus de 6 000 personnes se trouvant, souvent depuis des années, incarcérées en attente de jugement. Il est fait mention également de la suppression des mesures de réduction de peine, ce qui a provoqué des tensions dans les centres de détention.

La majorité des personnes avec lesquelles le Groupe de travail s'est entretenu se sont plaintes d'avoir été maintenues en détention provisoire sans avoir jamais été présentées devant un juge; c'est-à-dire sans avoir eu la possibilité de contester leur détention. La délégation a pu observer que de nombreuses femmes enceintes et personnes âgées de plus de 65 ans se trouvaient en détention provisoire. Dans certains commissariats et centres de détention provisoire, les femmes n'étaient pas séparées des hommes. Dans plusieurs commissariats de police, les femmes en cellule de garde à vue étaient surveillées par des hommes. Le Groupe de travail a également

vu des mineurs détenus dans des cellules de garde à vue surpeuplées ainsi que dans des centres de détention provisoire dans l'attente de documents officiels attestant de leur âge.

L'application défaillante du système accusatoire, qui a été introduit en 2001 par le Code de procédure pénale, porte atteinte au droit à la défense et à un procès équitable avec toutes les garanties d'une procédure régulière, en particulier des personnes les plus vulnérables. Il n'existe pas de véritable service de défenseur du peuple. Il est peu commun et difficile d'avoir accès aux services d'un avocat. En raison de la délégation systématique et non contrôlée des pouvoirs du ministère public à la police judiciaire, l'étape de l'enquête préliminaire et de l'instruction sont entièrement entre les mains de cette dernière. Les «fiscales» avalisent automatiquement les rapports de la police et les juges remettent rarement en question leurs décisions. Cette situation constitue une atteinte grave au principe de l'égalité des armes entre l'accusation et la défense qui est essentiel dans tout système contradictoire.

Le rapport signale également le peu d'efficacité, dans la pratique, des recours constitutionnels existants contre les détentions arbitraires, principalement l'*habeas corpus* et la protection («amparo») de la liberté; l'existence de juridictions spéciales pour les militaires et les policiers en violation du principe de l'unité juridictionnelle; la mauvaise image du travail des juges et des membres des tribunaux auprès du public; le manque de ressources budgétaires nécessaires à l'administration de la justice et au système pénitentiaire, ainsi que les conditions matérielles de détention que le Groupe de travail juge déplorables et qui portent atteinte au droit des détenus à la défense et à un procès équitable. Le Groupe de travail se dit également préoccupé par la situation des immigrants placés en détention en attendant d'être expulsés qui ne disposent pas des ressources nécessaires ni de la possibilité de former un recours contre les décisions d'expulsion.

Dans ses recommandations, le Groupe de travail demande, entre autres, au Gouvernement équatorien d'allouer au pouvoir judiciaire les ressources dont il a besoin pour garantir la bonne administration de la justice dans le pays. Il le prie aussi d'allouer des crédits budgétaires supplémentaires au système pénitentiaire. Il faudrait également abroger les lois instituant la détention avant mise en accusation («detención en firme») et ainsi rétablir la durée maximale de la détention provisoire établie dans la Constitution. Il faudrait aussi créer au plus vite un véritable service de défenseur du peuple en lui allouant les ressources nécessaires et en le mettant sur un pied d'égalité avec le ministère public. Il faut garantir la comparution des personnes appréhendées devant un juge dans un délai de 24 heures; éviter la détention de mineurs dans les commissariats et les centres de détention provisoire; mettre un terme à la pratique généralisée de la délégation des pouvoirs du ministère public à la police judiciaire; enquêter immédiatement sur toutes les violations des droits des détenus; résoudre les problèmes de la surpopulation carcérale et du surpeuplement des cellules de garde à vue dans les commissariats de police et éviter de maintenir dans ces cellules des personnes en détention provisoire.

Annex

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO THE REPUBLIC OF ECUADOR

(12-22 February 2006)

CONTENTS

Introduction

1. The Working Group on Arbitrary Detention, which was established pursuant to Commission on Human Rights resolution 1991/42 and whose mandate was conferred under decision 2006/102 of the Human Rights Council, visited the Republic of Ecuador from 12 to 22 February 2006, at the invitation of the Government. The delegation was led by the Chairperson-Rapporteur of the Working Group, Ms. Leïla Zerrougui, and included Ms. Soledad Villagra de Biedermann, a 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 delegation visited the capital, Quito, and the cities of Cuenca and Guayaquil. During the visit it held meetings with various national and provincial authorities, members of the National Congress and the judiciary, officials of self-governing bodies, representatives of civil society organizations, members of the academic community and others. The Working Group visited 13 detention centres and held private interviews without witnesses with some 200 detainees.

3. The Working Group would like to express its thanks to the Government of Ecuador and the governments of the provinces of Azuay, Guayas and Pichincha, to the local office of the United Nations Development Programme, which helped to prepare the programme and provided logistic support for the visit, and also to Ecuadorian non-governmental organizations.

I. PROGRAMME OF THE VISIT

4. The Working Group visited the following places of detention: in Quito, the pretrial detention centre, Social Rehabilitation Centre No. 1 (formerly García Moreno Prison), Social Rehabilitation Centre No. 4, the Women's Social Rehabilitation Centre, the Virgilio Guerrero Youth Guidance Centre and the cells of the Judicial Police; in Guayaquil, the pretrial detention centre, the cells of the Judicial Police and the Narcotics Squad; the Metropolitan Police station and the cells holding police officers under criminal investigation; and in Cuenca, the pretrial detention centre and the Azuay Social Rehabilitation Centre.

5. The Working Group benefited from full cooperation and complete transparency on the part of the authorities, both national and provincial, at all levels, with the sole exception of the Coastal Prison in Guayaquil, which it was unable to visit: the authorities reported that it was unsafe. The Working Group spoke with all the persons with whom it wished to hold interviews: detainees in pretrial detention, sentenced prisoners, representatives of detainees, wives, minors, police officers in detention, persons held in disciplinary cells - all of whom were selected at random. It also held a meeting with former President Lucio Gutiérrez at Social Rehabilitation Centre No. 4 in Quito, and with former President Gustavo Noboa, who was under house arrest in Guayaquil at the time of the visit. Both were released by the Supreme Court a short time after the visit.

6. The Working Group held interviews with the President of the Supreme Court and the President of the Quito High Court. It held meetings with members of the legislative committees on human rights and civil and political law of the National Congress, with the vice-ministers for foreign and internal affairs and with the State Attorney-General. It also interviewed representatives of the Department of Social Rehabilitation, the Department of Migration and the authorities of the Judicial Police and of the offices of the Public Defender and of the Ombudsman. Meetings were also held with the authorities of the provinces of Azuay, Guayas and Pichincha, in particular with the governors of the first two, and with the mayor of Cuenca and the Metropolitan Police authorities in Guayaquil.

7. The Working Group also met representatives of various NGOs active in the fields of human rights, the correctional system and the rights of women and children, immigrants, persons of African ancestry and vulnerable groups in the criminal justice system.

II. LEGAL AND INSTITUTIONAL FRAMEWORKS

8. Since February 1997 Ecuador has overhauled both its domestic legal system and its political structure. The changes have had an impact both on the functioning of the State and on the protection of citizens' individual and collective rights. On 5 June 1998, the National Constituent Assembly adopted the Constitution as part of this process. The Constitution came into effect on 11 August 1998, when it was published in the Official Gazette. The constitutional reform process was accompanied by the adoption on 18 June 1998 of a national human rights plan, which was drawn up with the participation of civil society.

9. In recent years, however, this process of developing laws and regulations and the generous reforms undertaken have been affected by various bouts of political instability, which gave rise to the institutional crisis of 2004, leaving the judiciary leaderless. When a new Government came to power in 2005, the restoration of the judiciary began, starting with the appointment of the members of the Supreme Court.

A. Institutional framework

Division of powers

10. The executive function is carried out by the President of the Republic, who is the head of State and the head of Government.

11. The President, the Vice-President and the members of the National Congress are elected for a four-year term.

12. The legislative function is carried out by the National Congress, which consists of a single chamber. It is responsible, among other things, for reforming the Constitution and interpreting its comprehensive and mandatory scope, for adopting, revising and repealing laws and interpreting them, and for appointing the State Procurator-General, the Attorney-General, the Ombudsman and the members of the Constitutional Court and the Supreme Electoral Court.

13. The exercise of judicial power is the responsibility of the judicial branch: the Supreme Court, the courts and tribunals established under the Constitution and the law, and the National Council of the Judiciary.

14. Ecuador is a unitary State. Its territory is divided into 21 provinces on the mainland and one island province (Galápagos), and is also divided into cantons and parishes. Governors represent the President of the Republic in each province. The governors answer to the Minister of Internal Affairs.

Courts

15. The Supreme Court has jurisdiction over the entire national territory. It acts as a court of cassation through its specialized chambers. Its members do not serve set terms. The Supreme Court currently has 31 members.

16. In November 2004, the National Congress replaced most of the members of the Constitutional Court and the Supreme Electoral Court. In December 2004, in violation of the principle of independence of the judiciary established by the Constitution and the international treaties ratified by the State, the Congress replaced 27 of the 31 members of the Supreme Court. That measure gave rise to a serious political and social crisis, which culminated in the resignation of President Gutiérrez and the assumption of power by the Vice-President. Following a complex procedure carried out with the assistance of the United Nations, the Organization of American States, the Andean Community of Nations and other organizations, a new Supreme Court started functioning at the end of November 2005. The process for selecting its magistrates was transparent: competitive examinations were held and the 31 jurists with the best scores were appointed.

17. The National Council of the Judiciary too was restored. Under article 206 of the Constitution, this is the body responsible for the disciplinary and administrative management of the judicial branch. Its mandate is to appoint all magistrates and judges apart from those of the Supreme Court.

18. Challenges relating to the constitutionality - in terms of both form and substance - of organizational and ordinary laws, decree-laws, decrees, ordinances, statutes, regulations and resolutions, or of administrative acts, are decided by the Constitutional Court, which is composed of nine judges, elected for a four-year term. At the time of the Working Group's visit, its members had not yet been named.

19. In most cases the High Courts act as second-instance appeals courts for criminal cases. In each province there is a High Court, composed of two or more chambers. The judges in criminal courts represent the first instance. There are also circuit court judges who hear criminal cases. Misdemeanour judges and provincial police chiefs hear cases involving minor offences and misdemeanours.

20. Members of the armed forces and the police have their own courts. These courts are not part of the judiciary, and their decisions cannot be taken to the Supreme Court in cassation; the National Military Court or the National Police Court has the last word.

Public Prosecutor's Office

21. The Attorney-General legally represents the Public Prosecutor's Office and is elected for a six-year term by the National Congress, from a shortlist submitted by the National Council of

the Judiciary. The Public Prosecutor's Office is administratively and financially autonomous. It directs and promotes criminal pretrial and trial investigations, brings charges against the alleged perpetrators before the competent judges and courts, and sets out the charges underpinning the criminal case. It is among the Attorney-General's duties to ensure the protection of victims and witnesses and other participants in the criminal trial and to make sure that the sentence and social rehabilitation of the offender are applied and function properly.

22. Prosecutors have 90 days to carry out their investigations. They have broad discretionary powers. They may receive complaints, testimony and evidence; open investigations; draw up indictments; file and withdraw charges; choose whether to oppose requests for bail; and lodge appeals. Under article 216 of the Code of Criminal Procedure, they may delegate any of these functions to the Judicial Police, including the collection of evidence or testimony, but never the taking of suspects' or defendants' statements. The initiation of criminal investigations or procedures too may never be delegated.

Judicial Police

23. The Judicial Police consist of specialized officers of the National Police, who have to work under the authority of the State Attorney-General. Their main functions are to investigate crimes, working under the authority of the prosecutors, and to collect incriminating evidence. They are also responsible for enforcing decisions handed down by judges and courts, in particular arrest warrants.

Ombudsman

24. The Ombudsman is elected by a two-thirds majority of the National Congress, for a five-year term. Under article 96 of the Constitution, the Ombudsman's duties include initiating or sponsoring habeas corpus and *amparo* actions; defending the observance of the fundamental rights guaranteed by the Constitution; and monitoring the quality of public services. The Office of the Ombudsman is an autonomous institution, with national jurisdiction, which is also responsible for providing assistance to the victims of human rights violations, visiting detention centres and filing unconstitutionality suits with the Constitutional Court.

Office of the Public Defender

25. Article 24.10 of the Constitution stipulates that the State shall establish public defenders to assist indigenous communities, workers, women and minors who are abandoned or victims of domestic violence or sexual abuse, and any person lacking financial means. The number of lawyers working for the Office of the Public Defender is very low: 32 for the entire country; 4 in the capital and 4 in Guayaquil. By comparison, there are 323 public prosecutors. The National Congress is considering the establishment of a strong and independent legal aid institution, although certain existing institutions claim that they should provide that service.

26. Both the bar associations and the university faculties of law provide sponsored legal aid to people who cannot afford a private defence lawyer.

B. Legal framework for detention

International instruments ratified by Ecuador

27. The Republic of Ecuador has ratified the major international human rights instruments.

Political Constitution and the rights that it guarantees

28. The Constitution is the supreme law of the land and takes precedence over all other legal norms. Part III (arts. 16-96) sets out the rights that it guarantees, covering both civil and political rights and economic, social and cultural rights. The State guarantees and recognizes the right to freedom (art. 23.4) and the right to due process and to justice without delay (art. 23.27).

29. Article 24 of the Constitution establishes the basic guarantees to be respected to ensure due process, stipulating that no one may be interrogated without the presence of an attorney. Any judicial, pretrial or administrative proceedings that fail to comply with this requirement lack evidentiary effect.

30. Article 24 of the Constitution also establishes the principles of the presumption of innocence, of res judicata, of the right to be tried by a competent judge and of the right to a defence. It also establishes that no one may be deprived of liberty unless this is done pursuant to a written order by a competent judge, except in a case of arrest in flagrante delicto. Even then, the person may not be held without a court order for more than 24 hours.

31. Under article 24.8 of the Constitution, pretrial detention may not exceed six months for cases punishable by an ordinary prison term, or one year for cases punishable by long-term imprisonment.

Detention in the framework of the criminal proceedings

32. On 13 January 2000 the new Code of Criminal Procedure was adopted, which transformed the inquisitorial procedure into an adversarial one, with the use of oral proceedings in which each side has the right to submit its case and to reply to the case of the other side. This change was prompted by the need to halt abuses under the former, inquisitorial system and by a desire to increase the weight given to oral submissions in criminal proceedings.

33. Article 160 of the new Code establishes precautionary measures relating to both personal and material protection. Personal protection measures include detention and pretrial detention. *Detención en firme* was added at a later stage. Material protection measures include prohibiting defendants from disposing of their property and the confiscation, impoundment and distraint thereof.

(a) Arrest

34. A person caught in flagrante delicto or immediately after committing a publicly actionable offence may be apprehended and brought to the competent judge within 24 hours. Arrests in flagrante delicto may be carried out either by police officers or by any individual.

35. In addition to arrest in flagrante delicto, an arrest may be ordered by a competent judge at the request of the prosecutor, if there are grounds to presume that the person has committed a publicly actionable offence and thus to carry out an investigation. The detention may not last more than 24 hours, within which period an order must be issued either for the person's release or for the indictment and pretrial detention of the detainee.

(b) Pretrial detention and *detención en firme*

36. Pretrial detention may not exceed six months for cases punishable by an ordinary prison term, or one year for cases punishable by long-term imprisonment. The pretrial detention may be ordered by the judge when it is considered necessary to ensure the presence of the accused or the defendant at the trial, or to ensure that he or she serves the sentence (articles 167 and 169 of the Code of Criminal Procedure).

37. As alternatives to pretrial detention, the Code provides for house arrest, the obligation to report periodically to the authorities and restriction to a specified geographical area of the country (art. 171). Such measures are subject to appeal. Challenges lodged against such measures do not automatically suspend them, but they must be resolved within five days.

38. The final part of article 171 of the Code also establishes that pretrial detention must be replaced by house arrest as an alternative measure in all cases where the accused or the defendant is over 65 years of age, or is a pregnant woman within 90 days of expected delivery.

39. Under Act No. 2003-101 of 13 January 2003, article 160 of the Code of Criminal Procedure was revised, establishing a new form of restraining measure directed at individuals, *detención en firme*. This measure should be applied whenever a committal order is issued, which is to say when a judge considers that the prosecutor's investigation has resulted in a serious and well-grounded presumption that a crime has occurred and that the accused was involved as either the perpetrator, an accomplice or an accessory to the fact.

40. Under new article 173 A of the Code, which was inserted by Act No. 2003-101, *detención en firme* must be ordered by a judge familiar with the case, by means of an order of committal. The only possible exceptions concern people who have been qualified as presumed accessories and who have been sentenced for an offence punishable by less than one year of imprisonment (article 16 of Act No. 2003-101). The detention order is not suspended if an appeal is lodged against the order of committal. The use of *detención en firme* has been upheld by the Constitutional Court.

41. Act No. 2003-101 also establishes that, once the term of six months or one year set out in the Constitution lapses and the pretrial detention can no longer be applied, resulting in the release of the detainee, the competent judge or court is obliged immediately to hand the entire case file over to the National Council of the Judiciary.

(c) Constitutional guarantees

42. Article 93 of the Constitution establishes the remedy of habeas corpus. Persons who consider that they have been unlawfully deprived of their liberty may lodge an appeal of habeas corpus with the competent mayor. The mayor, within 24 hours of receipt of the

application, shall order the applicant to be presented immediately, along with the order depriving that person of his or her liberty. The mayor shall take a decision within the following 24 hours. Any official or employee who fails to obey the order or decision shall immediately be dismissed from his or her post or function, without further ado.

43. Articles 422-430 of the Code of Criminal Procedure set out the *amparo* proceedings for release, which may be filed with any judge or court at the location of the appellant, by any person deprived of his or her liberty or who believes that such liberty is under threat owing to an abuse of power or a violation of the law by a judge or a public authority. If the order for imprisonment is issued as part of a trial, the appeal is lodged with the next higher judge or court. If the judge or court recognizes it as unwarranted, the detainee's release must be ordered, or the order of committal revoked.

44. Article 95 of the Constitution establishes *amparo* proceedings. The aim of such proceedings is to require judicial bodies to adopt urgent measures to halt or prevent the commission by a public authority of illegitimate acts or omissions that are, or may be, in violation of any right enshrined in the Constitution or applicable international treaties, and that imminently threaten to cause serious harm. The proceedings may also require such bodies to immediately remedy the effects of such acts or omissions. The Constitution also establishes the remedy of habeas data, guaranteeing that everyone is entitled to have access to documents, databases and reports held in public or private entities which relate to them or their property, and to find out the reason for holding such information and the use made of it.

(d) Detention of convicts

45. Article 51 of the Criminal Code, as supplemented by article 1 of Act No. 2001-47, establishes, among other things, sentences of three levels of severity: *reclusión mayor* (long-term rigorous imprisonment), *reclusión menor* (medium-term rigorous imprisonment), and *prisión* (ordinary imprisonment). Sentences of *reclusión mayor*, which can range from 4 to 25 years, and *reclusión menor*, which range from 3 to 12 years, are served in State social rehabilitation centres, either for men or women. The sentence of *prisión*, which ranges from eight days to five years, is served in the prisons of the respective cantons or provinces, or in the appropriate sections of penitentiaries. Within the social rehabilitation centres inmates are classified by the risk that they pose to other inmates, the prison staff and visitors, and are placed in different wards depending on this classification.

46. Once three quarters of a *reclusión* sentence has been served, or two thirds of a *prisión* sentence, the prisoner may request parole, provided that the remaining sentence does not exceed three years (article 87 of the Criminal Code).

(e) Detention centres

47. Arrested persons are held in the cells of the Judicial Police. They should not remain there for more than 24 hours. In principle, persons in pretrial detention or *detención en firme* must be transferred to pretrial detention centres. Because of overcrowding at such centres, some persons in this situation will continue to be held in police cells, while others are sent to the social rehabilitation centres. Those sentenced to ordinary prison sentences (*prisión*) must be sent to provincial or cantonal prisons. Those sentenced to *reclusión*, be it *reclusión mayor* or *menor*,

must be sent to social rehabilitation centres, which exist in practically all provinces. Minors must be held at youth guidance centres, such as the Virgilio Guerrero Youth Guidance Centre in Quito.

48. Sentences for minor offences, which range from fines of 2-28 United States dollars to prison terms of one-seven days, are supposed to be served at parish and cantonal prisons, or in their absence, at provincial prisons (article 609 of the Criminal Code). In practice, they are served at police stations. Minors over 7 years of age who are guilty of offences must immediately be transferred to the Prosecutor for Juvenile Offenders. People who are unable to pay fines, those responsible for traffic accidents and undocumented foreigners too are held in police cells.

49. At the time of the Working Group's visit, the total number of persons deprived of their liberty in Ecuador was 12,693. In October 2005, it had been 10,721 (of whom 6,831 were in pretrial detention or *detención en firme* and 3,890 were serving sentences). Time spent in pretrial detention or *detención en firme* is usually counted toward the total duration of the sentence.

50. During the visit, the Working Group noted that some high-security cell blocks had been placed under the supervision of the Judicial Police. The Judicial Police's Narcotics Squad also supervises detention centres holding persons accused of offences related to drug trafficking.

Detention of minors

51. In 1990, Ecuador was the first Latin American country to ratify the Convention on the Rights of the Child. Following a drafting process and consultations in which over 18,000 people took part, the new Children's and Youth Code entered into force on 3 July 2003. The Code establishes that minors of 12 years and under who have committed a criminal offence are not to be put on trial, and that protection measures should be applied to them. Teenagers are subject to social and educational measures, and are only to be incarcerated in extreme cases. The Code also establishes a juvenile justice system in the judiciary, centred upon the office of the juvenile judge.

52. Once a teenager is arrested, the police must immediately inform the Prosecutor for Juvenile Offenders of the detention. If the Prosecutor so requires, the competent judge may order the minor's detention for 24 hours. Such detention may be extended to ensure that the minor appears at the preliminary hearing. Lastly, pretrial detention may be ordered for a maximum of 90 days in order to ensure that the minor appears at the trial. Once that time has lapsed, the warden of the detention facility must immediately release the minor, without waiting for a new order from the judge, under pain of dismissal. The minor must await the verdict while living at home, except in cases where the family is unable to provide accommodation or where there are situations of domestic violence.

53. The maximum time that a minor may spend serving a sentence is four years. If the minor turns 18 during that time, the sentence is served out at the juvenile detention centre. Under no circumstances may a minor be detained with adults.

Administrative detention of immigrants and asylum-seekers

54. The legislation on foreigners establishes no detention penalties for illegal aliens, aliens who enter without a visa or whose visas expire, or those found to be working while staying under a tourist visa. Such aliens are, however, subject to administrative detention while their identity or nationality is verified and while they await deportation.

55. Aliens awaiting deportation are generally held in the facilities of the Migration Service of the National Police, under the Ministry of Internal Affairs. Chapter 5 of the 1971 Migration Act establishes the administrative deportation procedure, which is based on a hearing held before the provincial Police Commissioner. The hearing must be held within 24 hours of the arrest of an illegal alien. The deportation order must be executed immediately by officers of the Migration Service of the National Police. If for any reason the deportation order cannot be executed, the alien is subject to internment at a penitentiary, for a maximum of three years. Once that time has lapsed, the alien's situation must be regularized.

III. POSITIVE ASPECTS

A. Efforts made to resolve the serious crisis in the judiciary that resulted from the dismissal of judges

56. The Working Group must underscore the efforts made by the Government to resolve the serious crisis that took place between November 2004 and April 2005 in the judiciary, resulting from the dismissal of the members of the Supreme Court, the Constitutional Court and the Supreme Electoral Court. It was possible, through a transparent process employing a merit-based competition, to appoint new members of the Supreme Court. The Constitutional Court, the Supreme Electoral Court and the Council of the Judiciary too have been restored and are in operation. The Working Group expects the Council of the Judiciary to proceed with the appointment of properly qualified and independent judges at all levels, without regard to any factors other than their personal capabilities.

B. Concern for ensuring international standards for the protection of human rights

57. The Working Group is aware of the difficulties encountered by Ecuador, and their consequences for the enjoyment of human rights. It is thus appropriate to emphasize the efforts made since 1997 to incorporate international human rights principles and standards in domestic law. These efforts are most evident in the Constitution, the national human rights plan and the laws governing the criminal justice system. Some of the domestic provisions even go beyond the requirements of international instruments.

58. The Working Group was able to witness an example of observance of the Constitution and criminal trial standards during its visit to Cuenca, the capital of Azuay province. Judges, prosecutors, representatives of the Office of the Ombudsman and prison wardens, including the director of the men's social rehabilitation centre, appear to be carrying out their work with full observance of the Constitution and the deadlines set by the legislation governing trials. The 24-hour limit for bringing an arrested person before a judge is generally respected. The Office of the Ombudsman presents habeas corpus and *amparo* requests whenever it deems it

necessary, and the mayor duly rules on the habeas corpus cases that are submitted. A judicial cooperation programme has been set up to strengthen institutions linked with the judiciary.

C. Example of the Virgilio Guerrero Youth Guidance Centre

59. Another positive aspect noted by the Working Group relates to the application of the Children's and Youth Code. The prohibition of the detention of minors with adults is apparently enforced at both detention centres and police cells, and the juvenile justice system functions separately from the one for adults, with its own principles and standards. The delegation visited the Virgilio Guerrero Youth Guidance Centre; it saw that minors were separated according to the their trial status, and that the atmosphere was healthy and facilitated their rehabilitation and the continuation of their studies. The Centre set an example that should be followed by the rest of the country's juvenile detention centres.

D. Detainees' contact with their families and other arrangements

60. During its visits to social rehabilitation centres the Working Group was able to see, in some more than in others, that arrangements had been made by the prison authorities for detainees to maintain contact with their families, thus ensuring the moral and emotional support so important in the rehabilitation process. Through family visits detainees can be kept supplied with food and toiletries that are in short supply because of a lack of appropriate budgetary support.

61. The detainees are also involved in organizing their daily schedules and can elect and take part in committees that put forward their concerns and suggestions.

E. Government cooperation following the visit

62. As is customary, at the end of its visit the Working Group held a meeting with government representatives to inform them of its first impressions, and held a press conference. The Working Group noted with satisfaction that the Government had begun to consider some of the subjects of concern that it had expressed during the visit. Executive Decree No. 1339 of 20 April 2006 established the Citizen Safety Unit, with the aim of ensuring respect for the human rights of detainees through the coordinated work of the National Police, the Office of the Attorney-General, the judiciary, the Department of Social Rehabilitation, provincial and cantonal councils and representatives of civil society.

63. Another important aspect is also being addressed: the lack of resources for detention centres. In Executive Decree No. 1330-A of 7 April 2006, the President declared a state of emergency in prisons, which makes it possible to earmark extra resources to cover urgent needs there. As a first step, 8 million United States dollars were appropriated to improve infrastructures and basic services and to relieve overcrowding.

IV. AREAS OF CONCERN

A. Discrepancies between the Constitution, the law and practice

64. In the opinion of the Working Group, there is a considerable discrepancy between the norms contained in the Constitution and some of the domestic laws and the practices that it observed. Despite the fact that the Constitution is the supreme law and takes precedence over any other law or regulation, some of the provisions of the Criminal Code, the Code of Criminal Procedure and decisions taken by the national or provincial authorities weaken the constitutional guarantees.

65. The Working Group would like to express its concern about the rules contained in articles 10 and 16 of Act No. 2003-101, which amend articles 160 and 173 of the Code of Criminal Procedure. These articles establish that judges are obliged to order the *detención en firme* of a suspect without taking into consideration whether the constitutionally established time limit for pretrial detention has elapsed. Since no limit has been set for *detención en firme*, and considering that such a ruling is not subject to appeal, the detainee will thus have to remain in prison until conviction and sentencing. The country's human rights and legal defence organizations have extensively challenged the introduction of *detención en firme*, as they consider it to be in open contradiction with article 24.8 of the Constitution. Under that article, even for the most serious crimes, pretrial detention must not exceed one year.

66. The Working Group would like to point out that *detención en firme* is actually a form of pretrial detention - the name that is used is immaterial - and that it establishes an indefinite period of detention that exceeds the limits established by the Constitution. It also undermines the discretionary power of judges to decide each separate case on its merits and specific characteristics and to take the measures that they deem to be the most appropriate, whether in the form of detention or alternative measures. Lastly, it affects the right of the accused to be presumed innocent until their guilt is proved.

67. In effect, *detención en firme* has brought about a situation in which thousands of people remain in detention for extended periods awaiting judgement, often for several years. Article 14, paragraph (c), of the International Covenant on Civil and Political Rights establishes that all persons must be judged without undue delay, or must be released. Over 64 per cent of the prison population is awaiting judgement in detention centres that are overcrowded to 170 per cent of their capacity.

68. While *detención en firme* is ordered systematically in Guayaquil and Quito, in Cuenca, judges make more use of the discretionary powers that they are given under the Constitution. The Working Group was informed that, with the exception of two particularly complex cases, the remaining detainees in Cuenca, the provincial capital of Azuay, had been judged and sentenced within the constitutionally established time frames.

69. The Working Group is also concerned about the increase in the number of sentences involving a deprivation of liberty for minor crimes and the suspension of certain sentence-reduction measures, which have been adopted as part of a policy aimed at getting tough with crime. For example, the "two-for-one" policy has been withdrawn. It had made it possible

to reduce a person's sentence by one day for every two days of work done in prison, and had clearly had a positive effect in facilitating convicts' rehabilitation and social reintegration. Its withdrawal and other such steps have led to an increase in the number of persons deprived of their liberty, which has risen from 8,500 in 2000 to the current level of 12,693. They have also resulted in a large number of people serving long sentences in detention centres for minor crimes. The physical impact of such measures in the detention centres is worsened by the fact that the country's 34 existing centres were built to house a maximum of 7,463 detainees. Social Rehabilitation Centre No. 2, in Quito, was built to accommodate 345 people, but housed around 1,000 at the time of the Working Group's visit. All this increases the tension at detention centres and greatly complicates the work of prison guards and the promotion of good conduct and rehabilitation on the part of the detainees. In 2004, 22 detainees died at the Coastal Prison.

70. The Working Group also noted discrepancies between the provisions and application in practice of the Criminal Code and the Code of Criminal Procedure. The provision that establishes that any arrested person must be brought before a judge within 24 hours is rarely observed. Outside Cuenca, the great majority of detainees said that they were not brought before a judge within the time frame set by the Constitution. Some judges interviewed by the Working Group stated that they ordered pretrial detention in the absence of the detainees. Other judges and prosecutors maintained that the physical presence of the detainee was not necessary, and that the presentation of the case file sufficed.

71. In the opinion of the Working Group, the physical presence of the detainee and the detainee's personal statement are essential requirements established by international law, in particular by article 9, paragraph 3, of the International Covenant on Civil and Political Rights. This provision is based on the right of the detainee to be heard and to express an argument against detention before a judicial decision is taken.

72. Despite provisions of domestic law to the contrary, the Working Group noted that there were pregnant women and many people over the age of 65 in pretrial detention. The Working Group was told that the only alternative measure possible would have been house arrest. In such cases, the detainees must cover the costs of their detention and surveillance, which was beyond the means of the great majority of them. In other cases, even when the court did order house arrest, the National Police refused to execute the order, arguing that they lacked the necessary resources and staff. The Working Group interviewed a pregnant woman held in police cells for over four months, far from her family, with no money or counsel and with no opportunity to contact the outside world. Most police cells are filthy, dark, overcrowded and unventilated. There is no budget to feed the detainees or to provide them with medical attention. The situation of this woman and its negative impact on both her and her unborn child require no more description. The Working Group also noted that, in some police stations, women detainees were overseen by male guards. In others, the women were detained together with the men.

73. By law, if a suspect is reported to be a minor, it must be presumed to be true. In such cases, persons stating that they are minors must be placed under the authority of the Prosecutor for Juvenile Offenders, and in the custody of the appropriate social services. The Working Group, however, met several persons who claimed to be minors and who were held in overflowing police cells and pretrial detention centres, awaiting documentary proof of their age.

74. The psychosomatic state of any arrested or detained person must be certified by a document issued by public health centres and hospitals (in Guayaquil, by a forensic physician). The age of minors or the pregnancy of a woman detainee must be confirmed by the police doctor, the sole authority competent to verify such a status. The judge is unable to order a release without such documentation. Certificates issued by private doctors are not acceptable. A similar situation arises when persons accused of drug trafficking claim that they are only users. The Narcotic Drugs and Psychotropic Substances Act establishes that persons who are found with drugs shall not be prosecuted or detained if they are only regular users (art. 62). But that must be certified by a psychosomatic examination carried out by experts from the National Council for the Control of Narcotic and Psychotropic Substances (CONSEP), and the cost must be covered by the detainees. If they cannot afford it, they remain in detention.

75. Many persons are either unaware that they may invoke the constitutional right of habeas corpus to be brought before the local mayor, or they are unable to pay the fee of 1 United States dollar to do so. Invoking *amparo* to request a release once detention has been ordered is even more costly, and is too complicated to do without the assistance of a lawyer.

76. The Working Group reaffirms that, under articles 163, 272, 273 and 274 of the Constitution, judges and magistrates at all levels must refrain from applying legal standards that are at variance with the supreme law of the land.

B. Failure to ensure proper application of the adversarial system and its effect on the right to defence of the most vulnerable

77. In many respects the Code of Criminal Procedure has not been applied appropriately. The changes introduced by the National Congress have generally distorted the Code's principles and weakened its institutions, thus undermining the positive effect of its adoption. With the new functions, powers and possibilities vested in the Public Prosecutor's Office, the principle of equality of arms between the two parties in an adversarial trial renders it essential to strengthen the right to a defence at all stages of criminal trial proceedings. In the case of Ecuador, most detainees are unable to hire a private defender or to provide the funds required for one to mount an appropriate defence. Accordingly, a strong and well-funded legal aid system is required.

78. There is no such system in Ecuador. There are just 32 public defenders. Most of the detainees interviewed said that they had not benefited from the assistance of a defence counsel during the initial stages of the pretrial inquiry and the public prosecutor's investigation, and that they had their first contact with an attorney during the preliminary hearing.

79. Detainees can be kept in police cells for months without ever being brought before a judge. Another serious problem noted by the Working Group is the common practice of delegating the tasks of the Public Prosecutor's Office to the police, which is done without any supervision or oversight, and without meeting the requirements set by law. As a result, in practice, the investigation remains in the hands of the Judicial Police, which also includes the bodies dealing with forensics, criminology and ballistics, as well as those that produce technical reports and certificates and gather evidence. The Office of the Attorney-General points out, however, that a prosecutor is still in charge of the investigation.

80. The above has an impact on the adversarial system. It is seriously detrimental to the right of defence. The Working Group's meetings with judges at various levels led it to conclude that they apparently do not enjoy the required independence to ensure the protection of detainees' rights and to resist pressure, in particular pressure brought to bear by political parties and the media. Some even expressed fear that they would be transferred, overruled, dismissed or even subject to criminal prosecution if politicians, reporters, the police authorities or prosecutors disagreed with their decisions.

81. If a decision was taken to move from an inquisitorial system to an adversarial one, then the adversarial system must work properly. A basic condition for this is that judges and magistrates must be, must be perceived to be, and must feel that they indeed are, fully independent and sufficiently strong to ensure the principle of equality of arms, to guarantee the rights of detainees and to protect them from any abuse by the authority detaining them.

C. Ineffectiveness of appeals against arbitrary detention

82. A large proportion of the habeas corpus appeals filed with mayors do not result in release orders, and are restricted to requesting the police to correct certain formalities. The same is true for judicial rulings on *amparo*.

83. There is still a parallel system of justice for members of the military and the police, in which the armed and security forces serve as both judge and jury. Even for alleged human rights violations, members of the military and the police are judged by their own courts, composed entirely of members of the institution in question. In the opinion of the Working Group, this impairs the principle, established in the Constitution, according to which one law applies to all. It also means that the population files few complaints in such cases, and that there is a high level of impunity.

84. The Working Group endorses the comments made on these special jurisdictions by the Inter-American Commission on Human Rights, in its 2005 annual report (chap. IV, para. 192). In general, the existence of such special jurisdictions is contrary to the provisions of international instruments.

85. The Working Group has been informed that the National Congress will soon consider a draft basic law on the judiciary, which will establish that common crimes committed by the military and the police should be heard in ordinary courts.

D. Corruption, abuse and ill-treatment

86. The Working Group noted that the public does not have a positive perception of the justice system and the police. In general, it is considered that the judiciary is manipulated by political and economic interests. Although the Constitution guarantees the independence of the judiciary (art. 199), in practice it is common to hear reports of the politicization of certain magistrates and judges, of the influence of interest groups outside the judiciary, of a lack of funding, of poor training and of cases of corruption. Recently, the Office of the Attorney-General called for the resignation of 17 public prosecutors because of allegations that they took part in illicit acts.

87. The Working Group met people in prison who said that they had received extremely long sentences of 8, 12 and up to 16 years of deprivation of liberty for being found in the possession of insignificant quantities of drugs. Some claimed that they were not dealers, but simply users.

88. The judiciary receives an extremely low level of funding. The Working Group was informed that the judiciary's share of the 2004 budget was just 1.79 per cent. The funding for the penitentiary system too is extremely low. The withdrawal of the "two-for-one" policy for reducing sentences, the introduction of *detención en firme* and the imposition of more severe sentences for certain offences have only aggravated the situation in detention centres.

89. The Working Group welcomes the fact that since the visit the Government has provided information on the appropriation of additional budget funding to improve the situation in detention facilities.

90. While the Working Group's mandate relates to the legality of detention, it must consider the extent to which conditions of detention adversely affect the right to a fair judgement, to due process and to a defence. At the detention centres visited by the Working Group, it saw no areas that would afford the necessary privacy for meetings between the detainees and those defending them. According to the detainees, interviews with their lawyers take place behind bars, and in the presence of other detainees.

91. Ill-treatment by officers of the Judicial Police, including torture, is apparently common during the initial phases of detention. The Committee against Torture noted in its conclusions and recommendations issued on 8 February 2006 (CAT/C/ECU/CO/3) that 70 per cent of detainees in Quito had reported being victims of torture or ill-treatment during their detention (para. 16). The purpose of such treatment is apparently not only to obtain forced confessions or information, but also to castigate and punish. The Working Group saw detainees who showed visible signs of torture and ill-treatment. The Judicial Police apparently acts without any oversight from an outside body and in complete impunity. Some inmates reported being struck and tortured with nightsticks or batons marked with the words "human rights" when they were being interrogated at the Judicial Police cells in Quito.

92. The only medical certificate considered valid as proof that torture, ill-treatment, assault or other abuse has taken place is that issued by the physician of the Judicial Police. Examinations or certificates issued by private doctors are not accepted. Consequently, it is extremely rare that violations and abuse are actually documented. The lack of a valid medical certificate makes it impossible to substantiate reports of such serious acts. Furthermore, at police cells, detainees' access to private medical care or even to contact with their families is at best extremely restricted and usually flatly refused.

93. The level of violence at the detention centres is also particularly high. There are regular reports of serious acts of aggression against the guards and between the inmates. Various detainees at the Guayaquil pretrial detention centre expressed serious concern at the prospect of being transferred to the Coastal Prison. It is apparently controlled by gangs, and the lives and safety of guards and detainees are seriously threatened there.

E. Situation of immigrants

94. The Working Group met various immigrants awaiting deportation who had no documentation or funds with which to return to their countries by their own means. At least 147 asylum-seekers or applicants for refugee status were detained in 2005. In accordance with article 9 of the Migration Act, convicted foreigners must be detained with a view to their deportation once their sentences are served, even if a release order has been issued in the criminal procedure. In addition, foreigners who are stateless, who cannot prove their identity or nationality or who do not have the funds to return to their countries of origin once their status becomes illegal may be held in detention for up to three years. After the three years in detention, they are permitted to remain in the country on a temporary basis.

95. Article 30 of the Migration Act establishes that the deportation order is not subject to any judicial or administrative appeal or review. The Constitutional Court has ruled that this provision is unconstitutional, but the Supreme Court has deemed that the Constitutional Court was not competent to issue such a ruling. This has exacerbated the situation of immigrants who do not have the funds with which to return to their countries and who are subject to a deportation order.

V. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

96. The Working Group expresses its thanks to the Government of Ecuador for the invitation that it extended to visit the country and for its openness, transparency and cooperation before, during and after the visit.

97. The Working Group emphasizes the efforts made since the adoption of the Constitution to incorporate the principles and norms of international human rights instruments in domestic law. It observes, however, that there is a discrepancy between the principles and norms contained in the Constitution and certain laws and the actual situation and current practices. It has noted reversals, such as the establishment in 2003 of *detención en firme*, the adoption of more severe sentences for minor offences and the use of detention in situations where alternative measures would be appropriate. The Working Group welcomes the fact that the crisis in the judiciary has been resolved and that the Supreme Court, the Constitutional Court, the Supreme Electoral Court, the Council of the Judiciary, the Public Prosecutor's Office and the Office of the Ombudsman are once again functioning normally.

98. The absence of a genuine administration in the judiciary, the lack of funds and the general perception of a lack of independence, of politicization and of corruption in the judiciary, the police and the prison system have had a real impact on the enjoyment of human rights, mainly affecting the most destitute people, who account for the large majority of the prison population. The conditions of detention in police cells, at pretrial detention centres and at social rehabilitation centres are deplorable and impair the rights of detainees to ensure their defence and to receive a trial with guarantees of due process. The prisons are overcrowded to 170 per cent of their capacity. The Working Group noted serious shortcomings in the provision of food, clothing, education services and medical assistance at the detention centres that it visited.

99. The implementation of the adversarial trial system requires that each side have the right to submit its case and to reply to the case of the other side and that the necessary equality of arms between the prosecution and the defence be ensured. In a country where the majority of the prison population cannot afford the services of a private defence attorney, it is absolutely essential to have a public defence system. There are only 32 public defenders in the country - just 4 in Quito and another 4 in Guayaquil - a number totally inadequate for the prison population. Notwithstanding the good will and dedication to service of these defenders, it is obvious that they cannot ensure an appropriate trial defence and that they serve basically to give a veneer of legality to a process that is essentially unjust.

100. The Working Group notes with appreciation that some of the concerns expressed at the end of its visit are already under consideration by the Government. It thus welcomes the information to the effect that the executive branch has decided to improve conditions of detention through additional budget appropriations, the recent instructions to prison wardens and other specific measures.

B. Recommendations

101. **In the light of its observations, the Working Group proposes that the Government of Ecuador consider the following recommendations:**

(a) The judiciary should be provided with the necessary funding to ensure an appropriate administration of justice. Additional funding should be given to police and penitentiary institutions to improve urgently the conditions of detention at police stations, pretrial detention centres and social rehabilitation centres. The prison system should no longer be run by the Ministry of Internal Affairs; it should be administratively autonomous and self-financing. The use of torture and ill-treatment of detainees must be eliminated, in particular during the initial phases of the investigation, and detainees must be provided with the conditions required to prepare and ensure their defence and to maintain proper contact with their defenders;

(b) Serious consideration should be given to repealing the provisions contained in Act No. 2003-101 which established detención en firme. The principles and norms enshrined in international instruments and the Constitution should prompt a review of the current legislation and the drawing up of new laws on the public defence system and the enforcement of sentences;

(c) Urgent measures must be adopted to establish a system of public defenders in the country, placing the defence on an equal footing with the Public Prosecutor's Office and furnishing it with the necessary resources. Detainees should be brought personally before the judge within 24 hours of arrest and must be provided with the assistance of an attorney from the very beginning of their detention. The criminal and administrative liability of officials who do not observe constitutional rules must be established, with the necessary enforcement;

(d) Urgent measures should be adopted to end the systematic and abusive delegation of the duties of the Public Prosecutor's Office to the Judicial Police and to set in

place the necessary safeguards and oversight. The necessary penalties should be established for prosecutors who delegate their duties abusively;

(e) Urgent measures appear necessary to ensure that any violation of detainees' human rights is immediately and properly investigated and that any official or employee found responsible is subject to the jurisdiction of the ordinary courts, and not the special parallel system of justice for the military and police;

(f) The overcrowding in police cells, pretrial detention centres and social rehabilitation centres must be appropriately remedied, in particular by making use of alternative measures to detention and by avoiding the placement of pretrial detainees in police cells;

(g) Special attention should be paid to the situation of children in conflict with the law. The practice of holding minors together with adults in police cells and at pretrial detention centres should be avoided. Any claims by detainees that they are minors must be responded to immediately, and such persons should be placed under the authority of the Prosecutor for Juvenile Offenders. It should be recalled that the pretrial detention of minors must be used only exceptionally and as a last resort;

(h) The Government and public policies should be inspired by the principles and norms contained in the Constitution and international human rights instruments ratified by Ecuador and in the national human rights plan. The human rights of detainees must be respected, even in situations in which there is public pressure or calls by the media for more severe criminal legislation and tougher policies against crime.
