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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Second periodic report due in 1993

Addendum

ECUADOR*

[21 April 1993]

1. Ecuador has taken part in efforts to strengthen an international policy for the protection of human rights by endeavouring to include provisions along these lines in a set of draft laws which are now under consideration.

2. Ecuador has welcomed the recommendations made in favour of respect for human rights in the administration of justice and calling for the assistance of member States in the implementation of international standards. With

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* The initial report submitted by Ecuador is contained in document CAT/C/7/Add.7; for its consideration by the Committee, see document CAT/C/SR.61 and the Official Records of the General Assembly, forty-sixth session, Supplement No. 46 (A/46/46), paras. 118-128. For the additional report of Ecuador, see documents CAT/C/7/Add.11 and 13. For their consideration by the Committee, see documents CAT/C/SR.89 and 90/Add.1 and the Official Records of the General Assembly, forty-seventh session, Supplement No. 44 (A/47/44), paras. 60-92.

regard to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty, the Government Procurator's Office stated: "It is not contrary to Ecuadorian public law and is, rather, in keeping with the individual rights provided for in title II, section I, of the Political Constitution of the Republic and, in particular, article 19, paragraph 1. Its acceptance by Ecuador is therefore essential".

3. These documents basically reflect the principles embodied in the Universal Declaration of Human Rights and those provided for in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ecuador has endeavoured to incorporate these universally applicable instruments in its internal legislation. Thus, on 12 November 1991, at the seventh session of the Committee against Torture held at the Palais des Nations in Geneva, my predecessor as Government Procurator submitted, in accordance with article 19 of the Convention, the report supplementing that introduced by the representatives of Ecuador at the fifth session on 14 November 1990.

4. That report, which I consider it necessary to refer to, since it contains an extensive and specific detailed analysis of criminal legislation, criminal procedure and their relationship with various legal provisions entitling certain administrative officials to order coercive measures, detention and penalties and enabling Ecuador's inhabitants to file complaints with the appropriate bodies and claim compensation for loss and injury, also deals with the measures adopted to prevent ill-treatment, torture and other cruel punishment during the investigation of an offence, especially in the first stage, when the possible offence still has not been brought to the attention of the court, whether ordinary or administrative (police court).

5. Ecuador has obviously not been able to avoid the underdevelopment that affects Latin America in every way. Strenuous efforts have been made by successive Governments in recent years and some restrictions have had to be placed on claims by nationals and foreigners filed with the competent authorities.

6. It is unfortunate that, in Ecuador, what happened with the Restrepo brothers is remembered with some uneasiness, since their deaths led to the adoption of a set of radical measures for pre-trial investigations and efforts to implement a criminal investigation system provided for only in title III of the Code of Penal Procedure.

7. Such changes nevertheless require reforms and amendments to the system of criminal justice in general and this means that greater efforts must be made and attention paid by all branches of the Government, particularly, the legislature.

8. The Memorandum of Understanding between the United States International Development Agency, the Supreme Court of Justice, the Government Procurator's Office, the Attorney-General's Office, the Office of the Under-Secretary for Justice and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders was signed on 4 June 1992. The purpose of the Memorandum is the preparation of draft texts of the Penal Code, the

Code on the Enforcement of Sentences, the Code of Civil Procedure and the Act on the Organization of the Public Prosecutor's Office and the Judicial Police, as well as research on the informal settlement of disputes.

9. In this context, work has been done initially on the Penal Code, the outline of which is still under review, but includes many of the measures adopted by the States that have signed the Convention against Torture, since many of the acts covered by the term "torture" in article 1 of the Convention have been included as offences in article 4, paragraph 1, and the penalties for each one are under consideration. However, the work is still going on and it is impossible for the time being to guarantee that the final draft will appear as a formal document.

10. Article 19, paragraph 17, of the Political Constitution of Ecuador provides for respect for liberty and security of person and, in referring to the guilt that may be attributed to a person, embodies the basic principle that everyone has the right to be presumed innocent until proved guilty under an enforceable judgement. At the same time, it must be admitted that there has been some moral and psychological ill-treatment in Ecuador as a result of the application of pre-trial detention, in accordance with article 177 of the Code of Penal Procedure, in cases where, in the opinion of the court, there are indications that there has been an offence punishable by imprisonment and that the accused person is the perpetrator of or accessory to the offence. Such imprisonment lasts until the evidence for the prosecution and for the defence has been produced during the first phase of the proceedings, i.e. the pre-trial phase, which ends with an order for a stay or dismissal of proceedings or with an initiating order. As a result of delays in proceedings, this problem has had some negative consequences: (i) prisons are overcrowded; (ii) accused persons are sometimes imprisoned for more time than they would have been if they had been sentenced as guilty of the offence; and (iii) in the event of the dismissal of the proceedings, the right to honour and reputation and the principle of equality before the law are violated.

11. In view of the seriousness of these problems, an in-depth analysis was made of the consequences of the absence of decisions in criminal cases without an appropriate and effective defence and, on 26 August 1992, the National Congress adopted the Act Amending the Penal Code, considering, in addition to the above-mentioned factors, that these irregularities were a "serious violation of human rights".

12. The amendments adopted provide that persons who were detained without a stay of proceedings or initiating order for one-third or more of the time provided for by the Penal Code as the maximum penalty for the offence for which they were being prosecuted are to be released immediately. Persons who were not tried within a period of time equal to or greater than half of the maximum penalty provided for by the Penal Code are also to be released immediately. The only exception is for persons accused of offences under the Narcotic Drugs and Psychotropic Substances Act, which provides for harsher treatment.

13. With a view to the implementation of these rules, prison directors are given administrative power to release a detainee when the court order for his release is not received within the prescribed time limit.

14. Work is also under way on the amendment of the rules governing criminal procedure. This revision of the procedural system for the administration of criminal justice is designed to eliminate the first phase of the investigation known as the "pre-trial proceedings" and to replace it by oral proceedings and a proper accusation in order to institute a "pre-trial". Contrary to what is provided for in the Political Constitution, the principle of innocence has been violated by the pre-trial detention provided for in article 177 of the Code of Penal Procedure that is still in force. The draft amendment now proposes proceedings conducted in full freedom by competent defence counsel, with a review of the evidence and direct monitoring of the proceedings by the accused.

15. The Public Prosecutor's Office has a leading role to play in the investigation of the offence. This role has been viewed as a better opportunity to ensure full respect for the basic guarantees of the human being and proper law enforcement. The draft amendment regards the Judicial Police as a body under the supervision of the Public Prosecutor's Office and as its assistant in the conduct of the pre-trial.

16. In this new approach to criminal proceedings, account has even been taken of the tricks that may be used to force an accused person to make a statement. Draft article 96 reads: "Methods prohibited for obtaining a statement. The accused person must not be required to make a sworn statement and may not be subjected to any kind of force or coercion. Any method that impairs the accused person's freedom of decision, memory or ability to understand and discern is prohibited; in particular, the following are prohibited: ill-treatment, threats, sleep deprivation, brutality, torture, deceit and the use of narcotic drugs and so-called "truth serums", lie detectors and hypnosis. Article 97 states: "Questioning. Deceitful and suggestive questions are not allowed and answers must not be demanded". Article 99 provides that the statement by the accused must be given freely, without the use of handcuffs or other security devices and only in the presence of authorized persons.

17. Special emphasis has been placed on the defense of the accused and, in accordance with internationally applicable provisions resulting from the agreement of nations to eliminate all forms of torture and ill-treatment, title III contains rules designed to prevent any type of violation of the personal integrity of the accused. To this end, article 223 provides for proportionality, according to which detention must be commensurate with the expected penalty and may in no case exceed the maximum penalty for the offence; it may not last longer than one year for offences for which the maximum penalty is up to five years or two years for offences for which the penalty is harsher.

18. The Public Prosecutor's Office is vested with authority which, in our system of criminal procedure, always has been and still is, the sole prerogative of the judge, namely, that of ordering pre-trial detention for a period of not more than 24 hours. The principle is established that detention may not be ordered by the police in any case. Pre-trial detention is ordered only to guarantee the appearance of the accused at the trial and to ensure the enforcement of the sentence. Such pre-trial detention cannot be allowed to become an advance penalty. Alternatives have been offered to prevent possible

flight. To replace pre-trial detention when it would be afflictive, provision has been made for house arrest, the obligation to submit to the supervision of a particular person or institution, the obligation to report periodically to the judge or court, etc.

19. One of the concerns that might not have been answered at the seventh session of the Committee against Torture was that of claims for compensation by persons unfairly accused. The draft amendments to the Code of Penal Procedure must take account of Book Seven, title III, stating that a person unfairly convicted or acquitted by dismissal of the proceedings may claim compensation for the days of detention served.

20. The draft amendments were referred to the National Congress and it is hoped that, with the revisions and changes under consideration by that branch of Government, they will be discussed soon. Ecuador's system of criminal justice requires urgent change in order to meet the objectives not only of universal conventions and principles, but also the exigencies of its own situation.

21. In accordance with the objectives of the international agreements to which Ecuador is a party, the Juvenile Code, whose structure and provisions are based on the principles of the international conventions ratified by Ecuador, the Declaration on the Rights of the Child and Ecuador's own social requirements, was published on 7 August 1992 in Supplement No. 995 of the Official Gazette, in which laws and decrees are enacted as provided for in title I, article 5, paragraph 2 (2), of the Civil Code. Another matter of great concern to persons in the legal profession that became a public problem when it got out of hand was an enterprise for the sale of abandoned children which turned children into products for export to European countries and the United States and which was a humiliation for the poorest and least educated sector of the population of Ecuador.

22. For the express purpose of preventing and putting an end to such irregularities, the National Government adopted more appropriate legal provisions, which reflect current circumstances and, above all, take a broader and more forward-looking approach designed to guarantee the life, identity, freedom and dignity of minors. Title II of the Juvenile Code thus establishes the system to which all inhabitants of Ecuador will be subject in respect of minors as subjects of law.

23. In accordance with the principles of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 22 and 23 of the Juvenile Code provide for the right of minors to the inviolability of their physical, mental and moral integrity and this necessarily means that they cannot be subjected to torture, cruel or degrading treatment or arbitrary detention.

24. The right of abandoned newborn children to an identity has also been provided for in the new legal system, but the penalties for persons who violate this right are still indicative. Book Two, title IX, chapter II, of the Penal Code classifies acts committed for that purpose and the corresponding penalties, which range from eight days to three months' ordinary imprisonment to three to six years' rigorous imprisonment.

25. Title IV of the new Juvenile Code provides for the protection of minors from ill-treatment. Types of prevention, the responsibility of the State and Government measures and policies of protection, rehabilitation and support for juvenile welfare programmes have been defined within this specific framework. According to article 148, as contained in chapter II, the juvenile courts are responsible for determining whether or not such an act is an offence, an investigatory process which, as a result of the new system, has the necessary probative value in court, as stated in article 149, paragraph 3. It should also be noted that article 150 (d), which relates to cases in which an official is responsible for the ill-treatment of a minor, does not provide for the corresponding penalty, but does allow the juvenile court to ask the competent authority for the penalty warranted by such an act or acts.

26. Under this new legal system, provision has been made for a special measure that is applied only in criminal cases, since a house search is now possible when it is necessary to rescue a minor who is known to be ill-treated. Any person is allowed to intervene to prevent such acts and save the minor.

27. Title IV, chapter IV, contains provisions which reflect the objective of article 2, paragraph 1, of the Convention against Torture. These provisions relate to the prevention of the torture of minors, even in cases where they engage in conduct that might be criminal, since a number of measures have been taken to guarantee the physical and psychological integrity of juvenile offenders, even in detention.

28. General emphasis is placed on article 172, paragraph 2: "Transferring minors by using handcuffs, rope or any other means contrary to their dignity shall be prohibited and physical or psychological pressure may also not be used".

29. Article 168 expressly states that the guarantees provided for in international conventions are incorporated.

30. Other important points are that any investigation in which a minor is involved must be preliminary in nature and not last more than one month; that the minor should be brought before the competent court within 24 hours and that the police report should contain the preliminary medical, social and psychological examinations; and that the minors' detention may not last more than four years, no matter what offence he might have committed.

31. On 28 January 1992, moreover, the National Congress adopted the Legislataive Organization Act, article 50 of which determines the special standing committees that are to be set up. Two are of particular interest: the Committee on Women, Children and the Family and the Human Rights Committee, which are entrusted with the task of preparing appropriate legislation in the matters of concern to them.

32. Although article 44 (k) of the Political Constitution provides that the National Congress may grant a general amnesty for political offences and pardons for ordinary offences on the basis of a justification of very important grounds, the procedure had been a dead letter, but the adoption of

the Act gave effect to this remedy and the right of every person to apply for a pardon or the reduction or commutation of his sentence.

33. The National Congress also considered it essential to amend the Political Constitution and, on 23 December 1992, adopted provisons to modernize and streamline the administration of justice and make it more efficient. For example, article 29 replaces the content of article 141 relating to the powers of the court of Constitutional Guarantees. Thus, although the Court still has the power to hear complaints filed by any natural or legal person against acts of Government officials that violate the rights and freedoms guaranteed by the Constitution, it also has the possibility, in the event of failure to take account of the observations it makes when it finds a complaint to be justified, to request the competent body to remove the official in question and apply the other penalties provided for by law "without prejudice to any criminal action that might be applicable". This is further evidence of the efforts being made in Ecuador to ensure respect for citizens' rights and to incorporate the principles embodied in the international conventions to which it has become a party and ratified.

34. As a result of the serious complaints made against the National Police responsible for the Criminal Investigation Service, the Government made every effort to eradicate all forms of torture, ill-treatment and humiliation of detainees. Thus, when the Criminal Investigation Service was dissolved, the Crime Investigation Office was established, although the National Police, whose conduct towards detainees has improved somewhat, continues to be responsible for it on a temporary basis.

35. The aim of reserving this task for a specialized technical body such as the Judicial Police, whose powers and duties are provided for in Book One, title III, of the Code of Penal Procedure, led to the establishment of committees composed of the bodies which, in view of the specific nature of the matter, are involved in proceedings and the enforcement of sentences and which agreed, after comparing institutional interests, to the training of the staff needed especially for pre-trial investigations. Technical experts from France were brought in to provide instruction for several months.

36. The Judicial Police Regulations were adopted with a view to achieving this aim. The 1983 report, as contained in title II of the Code of Penal Procedure dealing with the institution of criminal proceedings, served as a basis for the initiation of such proceedings. It should be noted that the starting point for 90 per cent of proceedings is the police investigation or police report, when the offence being investigated is one that is regarded as being publicly actionable. As stated, however, the Judicial Police did not come into being as an institution, despite the adoption of its regulations on 7 August 1992, because of many factors hampering its operation, the most important one being economic. The Regulations provide the necessary structure for the achievement of the desired objective.

37. The organizational structure of this technical body includes all investigatory branches: criminal cases, traffic and drug cases, the Central Naional Office of INTERPOL and the Technical and Scientific Office composed of laboratory, forensic medicine, computing and communications and central archives and dissemination sections. This technical service will be staffed

by police officers with academic training and civilians with the same qualifications. The services offered by the laboratories and their experts will be completely free of charge, a measure for the benefit of the poorest population group, which is the one most involved in criminal cases. The unification of the service is fully in keeping with the objective of having one investigatory body. Although each part should have its own specialization, the investigatory machine as a whole should be under the supervision of the Public Prosecutor's Office and the courts.

38. The revision of the Act on the Organization of the Public Prosecutor's Office is becoming essential. This Government body not only takes part in the proceedings, but, in view of the new role that will be assigned to it under the proposed reforms, there is a need to bring the legal system governing it into line with the aims of the new Penal Code and Code of Penal Procedure.

39. The amendment of the legislation governing it will give the Public Prosecutor's Office a new direction as a party to the proceedings; it will conduct investigations together with the Judicial Police, institute proceedings, bring evidence and be responsible for the proper administration of justice. It will therefore assume responsibility for monitoring full respect for the established legal order and the protection of citizens and the people in the administrative courts.

40. In view of our deep-seated belief in change, our aim is to ensure that the administration of criminal justice in Ecuador has a new structure based on the principles of human rights, the exigencies of our own situation and universal principles of respect for freedom.

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