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لجنة حقوق الإنسان

الدورة الستون

البند ١١(أ) من جدول الأعمال المؤقت

الحقوق المدنية والسياسية، بما في ذلك مسألتا التعذيب والاحتجاز

تقرير الفريق العامل المعني بالاحتجاز التعسفي

إضافة

الزيارة المضطلع بها إلى الأرجنتين*

موجز

* يعمم موجز هذا التقرير بجميع اللغات الرسمية. والتقرير نفسه، الذي يرد في مرفق هذا الموجز، يُعمم باللغة الأصلية التي قُدم بها وبالإنكليزية.

قـام الفـريق العـامل بـزيارة إلى جمهوريـة الأرجنتين في الفترة من ٢٢ أيلول/سبتمبر إلى ٢ تشرين الأول/أكـتوبر ٢٠٠٣ تلبية لدعوة من حكومة هذا البلد. وشملت الزيارة العاصمة الاتحادية ومقاطعات بوينس آيـرس وميندوسا وسالتا. وقام الفريق، في مدينة بوينس آيرس وكذلك في عواصم المقاطعات التي زارها، بعقد اجتماعات هامة مع السلطات التنفيذية والتشريعية والقضائية، وأيضاً مع ممثلي منظمات المجتمع المدني. وقد زار الفريق العامل ١١ مركز احتجاز، من بينها إصلاحيات وسجون ومؤسسات للقاصرين ومراكز للشرطة، وكان بعـض هـذه الزيارات مفاجئاً ودون إخطار مسبق. وعقد الفريق أيضاً لقاءات فردية، جرت في جلسات مغلقة ودون شهود، مع ٢٠٥ من المحتجزين.

ويأسـف الفريق العامل لكون مشاكل لوجيستية تخرج عن نطاق سيطرته قد حالت دون قيامه بزيارة مقاطعة سانتياغو ديل إيستيرو التي كان لدى الفريق اهتمام خاص بزيارتها.

وقـد أمكن للفريق العامل أن يلاحظ أن الحكومة الأرجنتينية الجديدة تقيم سياستها على حماية وتعزيز حقـوق الإنسان، ومكافحة كل من الإفلات من العقاب والفساد، بعد أن اعتمدت تدابير هامة في هذين المجالين أثناء الأشهر القليلة التي مضت على توليها السلطة. ومع ذلك يلاحظ الفريق، وهو يشعر بالقلق، اللجوء المفرط إلى الاحتجاز الوقائي والطول المفرط لهذا الاحتجاز الذي يمكن أن يمتد بصورة قانونية إلى ثلاثة أعوام بل يمتد في الواقـع إلى أكـثر من ذلك؛ وعدم وجود سبل انتصاف فعالة ضد هذا الاحتجاز؛ وقلة استخدام التدابير البديلة للاحتجاز؛ والمشاكل التي لوحظت فيما يتعلق بالحصول مجانا على مساعدة من محامٍ وفيما يتعلق باتصال المحتجزين بالمحـامين المدافعـين عـنهم؛ والسـلطات المفرطة الممنوحة لرجال الشرطة التي تخولهم القبض على الأشخاص واحـتجازهم عـند ارتكابهم مخالفات أو للتحقق من السوابق أو للتدقيق في الهوية؛ واللجوء المفرط إلى احتجاز الأطفال ليس فقط لارتكابهم جرائم أو أفعالاً جُرمية بل لدواعي الحماية أيضاً؛ والصلاحيات الممنوحة للسلطات الإدارية للأمر باحتجاز الأجانب لأسباب تتعلق بالهجرة، دون وجود إمكانية المراجعة القضائية الفعالة والمناسبة.

ويوصي الفريق العامل، في تقريره، حكومة الأرجنتين باعتماد تدابير عاجلة من أجل تحسين حالة حقوق الإنسـان للمحتجزين وخاصة حقهم في أن تُتبع الإجراءات القانونية الواجبة؛ وبمراجعة التشريعات والممارسات القائمـة فيما يتعلق بالاحتجاز الاحتياطي؛ وبأن تراقب على نحو صارم تصرفات ضباط ورجال الشرطة؛ وبدعم أعمـال وكلاء النيابة الذين يحققون في الممارسة الإجرامية المتمثلة في تزوير إجراءات الشرطة؛ وبالتطبيق الكامل لاتفاقية حقوق الطفل فيما يتعلق باحتجاز القاصرين؛ وبضمان وجود سبل انتصاف قضائية فعالة في حالة الأوامر الإدارية المتعلقة باحتجاز المهاجرين. ويشجع الفريق العامل الحكومة على مواصلة جهودها الرامية إلى إزالة تجريم الاحتجاجات الاجتماعية مع الحفاظ على النظام العام واحترام حقوق الآخرين.

Annex

REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO ARGENTINA

(22 September to 2 October 2003)

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Introduction

1. The Working Group on Arbitrary Detention, which was established pursuant to Commission on Human Rights resolution 1991/42 and whose mandate was extended by Commission resolution 2003/31, visited Argentina from 22 September to 2 October 2003 at the invitation of the Argentine Government. The delegation consisted of Mr. Tamás Bán, head of the delegation and Vice-Chairperson of the Working Group, and 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 visit included the Federal Capital and the provinces of Buenos Aires, Mendoza and Salta. Logistical problems prevented the Working Group from visiting the province of Santiago del Estero, a visit that was of particular interest to the Group. During its visit, the delegation met with various federal and provincial officials and with representatives of national and local non-governmental organizations (NGOs). It was able to visit 11 detention centres and had meetings, in private and without witnesses, with 205 detainees.

3. The Working Group would like to express its gratitude to the Argentine Government, particularly the Office of the Secretary for Human Rights of the Ministry of Justice, Security and Human Rights, the United Nations Development Programme, which helped draw up the programme of the visit, and the Argentine NGOs concerned.

4. The Working Group regrets that it was not able to visit the province of Santiago del Estero, for logistical reasons beyond its control.

I. PROGRAMME OF THE VISIT

5. The Working Group was able to visit the following detention centres: (a) the Sarmiento police station in the Federal Capital; (b) the Abastos police station in the Federal Capital; (c) Unit 2 of the Federal Prison Service (Villa Devoto) in the Federal Capital; (d) maximum security unit No. 29 in the province of Buenos Aires; (e) a police station in the city of La Plata; (f) the provincial penitentiary in Mendoza; (g) the Social and Educational Guidance Centre (COSE), a youth custody centre, in Mendoza; (h) the youth custody centre in Salta; (i) federal detention centre No. 7 - Salta branch of the Gendarmería Nacional; (j) operational unit No. 2 - provincial police headquarters; and (k) the headquarters of the Salta Criminal Investigation Division.

6. The Working Group met in Buenos Aires with the Minister for Foreign Affairs, the Minister of Justice, Security and Human Rights, the Vice-Chairperson of the Senate Commission on Rights and Freedoms, members of the Senate and Chamber of Deputies, the Ombudsman, a judge from the Supreme Court of Justice, the Attorney-General, the Secretary for Foreign Affairs, the Secretary for Human Rights, the Secretary for Justice and the Chief of Staff of the Office of the Secretary for Human Rights.

7. In the Federal Capital, the delegation met with representatives of the following NGOs: Asamblea Permanente por los Derechos Humanos; Asociación Americana de Juristas; Asociación de Abogados de Buenos Aires; Asociación de Lucha por la Identidad Travestí-Transexual; Central de Trabajadores Argentinos - Corriente Clasista y Combativa; Centro de Estudios Legales y Sociales (CELS); Coordinadora de Trabajo Carcelario de Rosario; Derechos Humanos - VIH; Federación Nacional de Trabajadores por la Tierra, la Vivienda y el Hábitat; Foro VIH Mujeres y Familia; Grupo de Mujeres de la Argentina; Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP); Minorías Sexuales; Servicio Paz y Justicia; and Situación de Encierro Cárceles.

8. In the province of Buenos Aires, the delegation had talks with the Minister of Justice and Security, the President of the Court of Cassation, the Secretary for Human Rights, the Attorney-General, the Criminal Cassation Defence Counsel and the Under-Secretary for Prison Policy and Social Rehabilitation. It also met with various NGOs.

9. In the province of Mendoza, the Working Group was received by the Governor and met with the Minister of Justice and Security, the Minister of the Interior and the Provincial Under-Secretary for Justice. It had meetings with members of the Bar Association's Commission on Criminal Law. It met with a number of NGOs, including the Coordinadora Provincial de Derechos Humanos and Familiares y Victimas Indefensas de Mendoza (FAVIM).

10. In the province of Salta, the delegation met with the Minister of the Interior and Justice, the Secretary for Human Rights and the Secretary for International Relations. In the parliamentary building (Palacio Legislativo), it met with the presidents of the Senate and the Chamber of Deputies and with the human rights committees of both chambers. Talks were held with representatives of the following civil society organizations: Asociación de Comunidades Aborígenes Lhaka Honhat, Red de Derechos Humanos de la Universidad de Salta and Unión de Trabajadores Desocupados.

II. GENERAL INFORMATION AND BACKGROUND

11. From 1976 to 1983, Argentina was under a military dictatorship. It was a tragic period in the nation's history. Tens of thousands of people were the victims of kidnappings, extrajudicial executions, disappearances, torture or capture by members of the armed forces or security forces. Others were forced to flee abroad. Since 1983, when the country returned to democracy, many reforms, including constitutional reforms, have been carried out to strengthen democracy and the rule of law. During its visit, the delegation observed specific measures that demonstrate that the new Government of President Néstor Kirchner has based its policy on efforts to combat impunity and corruption and on the promotion and observance of human rights.

12. Argentina has ratified and incorporated into its Constitution a considerable number of international human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the American Convention on Human Rights. These instruments take precedence over ordinary laws.

13. Federal legislation on human rights and fundamental freedoms appears to be well developed and sufficiently coordinated. During its visit, the Working Group concluded that the main shortcomings in the application of human rights lie in the failure of some domestic laws to comply with international standards and in certain long-standing practices, particularly at the provincial level.

14. The Working Group also observed that other factors have a negative effect on the population's enjoyment of human rights:

(a) First, the poverty level has increased considerably as a result of the recession that has affected Argentina for the past four years and the economic collapse that occurred in December 2001. The economic crisis at that time was so serious that it threatened to destroy the social fabric of the country. Today, over 50 per cent of the population is living below the poverty line; in some provinces, this percentage is as high as 80 per cent. This means that the impoverished segment of the population cannot afford the basic food basket. Some officials told the delegation that the average income of the

population was 512 pesos a month (about US$ 150). In 1955, 52 per cent of the population were from the middle class; today that figure is only 27 per cent;

(b) In Salta, poverty affects 70 per cent of the population, and in the province of Buenos Aires 60 per cent (over 6 million people). There are at least 10 million destitute people in the country who subsist on a dollar a day; 23 per cent of the economically active population is unemployed. Poverty has led to a considerable rise in crime, greater public insecurity and a series of social protests led by the unemployed; the protests mainly involve the occupation of public buildings and the blockading of roads. Previous Governments reacted by suppressing such actions, which led some NGOs that the Working Group met during its visit to refer to the "criminalization of poverty" and a "policy of zero tolerance" towards public displays of protest and discontent. The fact that the repressive measures were enforced by persons associated with the military dictatorship or by methods similar to those employed at that time has increased the feeling of insecurity and fear among the population, especially in certain provinces;

(c) Secondly, the federal structure of the State makes it more difficult to bring domestic legislation into line with the country's international obligations. Argentina is a federal State, consisting of the Federal Capital and 23 provinces. Legislative power is divided between the federation and the provinces:

(i) The national Constitution gives the provinces the power to legislate in all matters that fall outside the competence of the federation. This power extends to laws that affect the freedom of citizens, such as codes of criminal procedure. Although in substantive matters authority lies with the federation and there is therefore one criminal code for the whole country, the same cannot be said of procedural matters. There are provincial police forces that depend on the government of the respective province. Provincial legislation has given these forces a number of powers; for example, they can detain individuals for misdemeanours or minor offences;

(ii) Although article 50 of the International Covenant on Civil and Political Rights stipulates that the provisions of the Covenant extend to all parts of federal States without any limitations or exceptions, the Working Group was not convinced that the federal Government has the means or resources to ensure that all provinces comply, both in their legislation and in practice, with the provisions of the Covenant and other international human rights instruments ratified by Argentina;

(iii) During its talks, the delegation observed that many officials, judges and members of bar associations were not fully aware of, or did not attach sufficient importance to, the provisions of the International Covenant on Civil and Political Rights as the universal international instrument applicable to detention. Nor did there appear to be greater awareness among the detainees interviewed about the State's obligation to guarantee their right to an effective judicial remedy for their continued detention, or about the State's international responsibility arising from acts by its public servants acting in an official capacity. Nor had they been informed by the authorities, their lawyers or even by NGOs that they could take their case to international bodies such as the United Nations Human Rights Committee or the Working Group on Arbitrary Detention. Domestic remedies for arbitrary detention appear to be rather complex, long, onerous, slow and, consequently, ineffective.

III. LEGAL AND INSTITUTIONAL FRAMEWORK

A. Constitutional framework

15. Argentina has adopted a federal republican representative form of government. The federal Government consists of the executive, the legislature and the judiciary. The President is the supreme leader of the nation and head of Government and is politically responsible for the general administration of the country (Constitution, art. 99, para. 1). He is also commander-in-chief of the armed forces. Congress consists of two chambers, the Chamber of Deputies and the Senate. Judicial power is exercised by the Supreme Court of Justice and by the lower courts established by Congress (Constitution, art. 108). Argentina has a multiparty political system, in which the Justicialist Party and the Radical Civic Union have played a prominent part over the past 50 years.

16. Each province has its own congress; most provincial congresses consist of two chambers. Executive power is vested in the governor. The provinces retain all the power that the national Constitution does not delegate to the federal Government. The provinces set up their own local institutions and are governed by them, without intervention by the federal Government (Constitution, arts. 121 and 122). Provincial governors are responsible for enforcing the Constitution and laws on behalf of the federal Government (Constitution, art. 128). The city of Buenos Aires has an autonomous government with its own legislative and jurisdictional powers; in 1998, it adopted its own constitution. The provinces are responsible for the administration of justice and observance of the rights and guarantees contained in international instruments. The provincial police are administered by the governor.

17. The national Constitution is the supreme law. Treaties have higher status than laws. However, the principal international (regional American and universal) human rights instruments, including the two International Covenants, have constitutional status (Constitution, art. 75, para. 22). No law may be incompatible with a treaty and no treaty with the Constitution. Although the Criminal Code is applicable throughout the national territory, each province has its own code of criminal procedure.

18. The judicial system is organized on the basis of federal and provincial courts. Federal courts have jurisdiction over federal offences (drug trafficking, smuggling and so on). Judgements are public. The accused is entitled to counsel, either a private defence lawyer or one appointed by the court, and has the right to submit exculpatory evidence and call witnesses for the defence. While criminal proceedings vary from one province to another, they are generally divided into a criminal investigation phase or pre-trial examination and a hearing phase or oral proceedings. The old system of written, inquisitorial proceedings is gradually being replaced by oral, accusatorial proceedings. The legislation of the provinces of Córdoba and Mendoza reflects significant progress in this direction.

19. A competitive process for the selection of judges has been in place since 1994. The President of the Republic appoints the judges to the Supreme Court with the approval of two thirds of the members present in the Senate. He also appoints the other judges to the lower federal courts on the basis of a shortlist put forward by the Council of the Magistrature, with the agreement of the Senate (Constitution, art. 99, para. 4). Provincial governors have similar prerogatives. President Kirchner recently made the mechanism for appointing judges to the Supreme Court more democratic by limiting his own prerogatives and subjecting candidates to public scrutiny before making a formal proposal to the Senate. Candidates for judges of lower courts are selected by the Council of the Magistrature by means of public competitive examinations.

20. Responsibility for enforcing the law and maintaining order and public security lies with various institutions. The federal police, Gendarmería Nacional and the coastguard service report to the Ministry

of Justice, Security and Human Rights. Provincial police forces are administered by provincial executive bodies.

B. Rights and guarantees

21. The national Constitution establishes a number of rights and guarantees. Article 18 stipulates that no inhabitant may be punished without first being tried under a law in force prior to the act giving rise to the proceedings. No one may be arrested without a written order from the competent authority. A person's right to a defence before the courts is inviolable. No one may be tried by special commissions or removed from the jurisdictions designated by law prior to the act in question, or compelled to testify against themselves. The same article stipulates that the country's prisons shall be healthy and clean for the security, not for the punishment, of the prisoners detained in them. Judges shall be held responsible for any measure authorized by them as a precaution that causes suffering to detainees over and above that caused by their detention.

22. Article 107 of the Code of Criminal Procedure applicable in the Autonomous City of Buenos Aires provides that detainees may choose a lawyer as soon as they are arrested, at the first opportunity and before they appear before a judge. Article 89 of the Code of Criminal Procedure of the province of Buenos Aires stipulates that the accused has the right to be defended by lawyers of his or her choosing from the Bar Association or by a lawyer assigned to him or her. The accused may propose a defence lawyer by any means or through any person, even if the accused is being held incommunicado. The criminal investigation phase, or pre-trial examination, is confidential and not open to third parties but only to the parties involved. Its aim is to prove that an offence was committed, determine the extent of the harm caused and identify the perpetrators. In the province of Buenos Aires, this is the responsibility of the Public Prosecutor's Department. When prosecutors believe that they have sufficient evidence, they issue a written summons. The court then sets a date for the opening arguments. The hearing is an oral hearing that must be held in public on penalty of annulment, except in cases where publicity might affect the normal course of justice or public morality or the victim's or witnesses' right to privacy, or for reasons of security.

23. Judicial decisions may be challenged. The remedies available are appeals for reconsideration (of unsubstantiated decisions), appeals to higher courts, applications for judicial review (non-observance or erroneous application of a precept of law or precedent, or when new facts or evidence come to light), applications for review of final judgements, and extraordinary appeals on grounds that a law is unconstitutional, invalid or inapplicable.

24. The Argentine system of constitutional guarantees includes the remedy of habeas corpus for any act or omission that illegally or arbitrarily causes any kind of restriction or threat to personal freedom, as well as for any arbitrary aggravation of the conditions of legal detention. It is available without formalities and may be exercised by the person concerned or by third parties. The application may be made and should be resolved even if a state of siege is in force. A challenge to the administrative decision does not suspend the detention. The system also includes *amparo* proceedings for any act or omission that restricts, modifies or threatens, in a manifestly arbitrary or illegal manner, rights and guarantees recognized by the national Constitution, a treaty or a law. In any particular case, the judge may declare the rule on which the injurious act or omission is based to be unconstitutional (Constitution, art. 43). Judicial practice has established that it is only applicable to clear violations. It is not applicable to the expulsion of foreigners.

25. The Argentine criminal system allows a detainee to be held incommunicado for up to 48 hours on the basis of a reasoned decision by the prosecutor. This period may be extended by a further 24 hours or, in some provinces, 48 hours, on the basis of a reasoned decision by a judge at the request that the Public Prosecutor's Department. Incommunicado detention may be ordered when it is feared that the detainee

might conspire with third parties to hinder the investigation. A detainee who is held incommunicado may not be prevented from communicating with his or her defence lawyer immediately before beginning to make a statement or before any act requiring the detainee's personal intervention. The maximum periods for incommunicado detention and its extension vary from one provincial system to another.

IV. POSITIVE ASPECTS

26. Argentina's commitment to human rights in its foreign policy, which has been characterized by its cooperation with international organizations, has become more marked since the Government of President Kirchner took office. Key posts in the new administration are held by former officials of both the universal and inter-American human rights systems. Guidelines have been laid down for compliance with the recommendations of the international bodies of both systems, which refer above all to the continuing problem of impunity in Argentina and to a number of other aspects such as institutional reform. As far as individual cases are concerned, the Government's policy has been to favour friendly settlements when there is clear evidence of human rights violations. The Government is also complying with the recommendation contained in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 to prepare, with the assistance of civil society, a national plan of action in the field of human rights.

27. Argentina had been visited by several special rapporteurs of the Commission on Human Rights before the visit by this Working Group. It has deposited the instrument of ratification for the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and is moving towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A human rights group has been set up within the Southern Common Market (MERCOSUR); the group reports to the ministries of justice. The Government, through the Office of the Secretary for Human Rights of the Ministry of Justice, not only gave the Working Group a copy of its own report but also made available to it reports by non-governmental human rights organizations. This was the first time the Working Group had received from a government reports of this kind from NGOs. This demonstrates that the Government takes NGOs seriously and is looking into a number of alternative approaches to problems entailing State responsibility.

28. Some long-standing obstacles to efforts to combat impunity have been removed. The executive decree under which requests for extradition were automatically rejected in cases of serious and flagrant violations of human rights committed between 1976 and 1983 has been repealed; and Congress has adopted a law declaring the *Punto Final* Act (No. 23.492) and the Due Obedience Act (No. 23.521) irrevocably null and void. The repeal of these laws has paved the way for the prosecution of perpetrators of serious human rights violations during the military dictatorship. Although legal action has been taken to have the new provisions declared unconstitutional, the lower courts have opened a significant number of cases in which serious human rights violations committed during the dictatorship are being investigated. This progress against impunity now makes it easier to combat more effectively human rights violations committed by State agents.

29. The Government is also making efforts to decriminalize social protest. To this end, it has set up a commission of eminent jurists to propose solutions at the institutional level in order to reconcile the rights of third parties with the exercise of freedom of expression and the freedom to demonstrate and thus avoid criminalizing protesters' demands. No one has been detained on these grounds lately and work is under way on a bill to reform article 194 of the Criminal Code

to ensure that no one is detained on these grounds in the future. The Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are being incorporated into domestic legislation, and human rights observatories have been set up in the interior of the country to tackle urgent human rights problems; the observatories include a facility to deal with complaints.

30. While the Working Group was in Argentina, the Government dismissed the chief of the federal police. It had previously dismissed a dozen senior police superintendents from this force. The new Government had barely taken office before it dismissed 19 generals from the army, 14 from the navy and 10 from the air force. The Government has opened neighbourhood prosecutors' offices in Saavedra-Núñez, La Boca-Barracas and Nueva Pompeya-Parque Patricios. The Working Group was able to visit the Saavedra-Núñez office. The establishment of national prosecutors' offices in local neighbourhoods has increased the contact between locals and prosecutors.

V. AREAS OF CONCERN

31. Although the Working Group welcomes the new Government's concern for and interest in the promotion and protection of human rights, it is aware of the serious difficulties the Government has inherited in various areas, particularly legislation and practice concerning the deprivation of liberty. These areas of concern are summarized below.

A. Arrest and detention within the framework of criminal proceedings

32. The Working Group is extremely concerned about the physical conditions that it found in most of the detention centres that it visited in Argentina. The Human Rights Committee, in its concluding observations on Argentina's third periodic report (CCPR/C/ARG/98/3), expressed deep concern that prison conditions failed to meet the requirements of the International Covenant on Civil and Political Rights (CCPR/CO/70/ARG, para. 11). The Committee stated that severe overcrowding and the poor quality of the basic necessities and services provided to detainees, particularly with regard to food, clothing and medical care, were incompatible with Argentina's international obligations.

33. The Working Group endorses this conclusion. Although the Working Group's mandate does not cover conditions of detention or the treatment of prisoners, it must consider to what extent detention conditions can negatively affect the ability of detainees to prepare their defence as well as their chances of a fair trial. One of the circumstances that the Working Group took into consideration before giving an opinion on the arbitrariness of detention is the serious violation, in full or in part, of international standards relating to due process of law. Detention may then become arbitrary. One of the fundamental principles of due process is equality of arms between the prosecution and the defence. A detainee who has to endure detention conditions that affect his or her health, safety or well-being is participating in the proceedings in less favourable conditions than the prosecution.

34. The Working Group's position on this matter is shared by other human rights mechanisms.[1] When the Working Group visits a detention centre in any country, it requests permission to meet with detainees awaiting trial rather than with convicted criminals serving their sentences. For this reason, the questions that the Working Group asks detainees during such meetings concern their legal situation and the status of the judicial proceedings against them.

35. Representatives of the federal Government and the provincial governments used forceful language when talking about the situation in prisons, prison cells and police stations. Some even said that the prison system in Argentina had collapsed. While the Working Group is aware that this is a problem

that the current Government has inherited, it wishes to remind the Government that it needs to take urgent steps to improve the situation. The main problem appears to be overcrowding in detention centres. In many of the centres that it visited, the Working Group observed that cells were used to hold twice as many prisoners as they were designed to accommodate. The situation in the police station in La Plata and the Salta branch of the Criminal Investigation Division was of particular concern. The Working Group received reports that in one province containers and lorries without windows or ventilation had been used to accommodate detainees. At the Social and Educational Guidance Centre (COSE), a youth custody centre, visited by the Working Group in Mendoza, many inmates expressed their delight at the Working Group's visit, as it was the first time in months that they were allowed to go out into the yard and breathe some fresh air. At other centres, some officers complained that there were not enough staff to allow detainees to leave their cells. The delegation also observed poor sanitary conditions where inmates had no access to minimum washing or toilet facilities; where sick inmates were not given any medication; and where detainees suffered from scabies and mattresses were infested with ticks. In some of the detention centres visited, detainees had to defecate in plastic bags.

36. Under current legislation, persons accused of committing federal offences must be detained in federal centres and persons accused of non-federal offences, in provincial detention centres. However, in some provinces there are no federal detention centres. The authorities in Salta complained that the provincial government had transferred 100 hectares of land to the federal Government a few years earlier for the purposes of building a federal detention centre for federal criminals and that nothing had been done. As a result, the province's detention centres had to house 70 per cent of those accused of federal offences, mainly drug trafficking and smuggling; this seriously aggravated the problem of overcrowding in the province's prisons.

37. Under international law, any person who is arrested must be informed immediately of the charges against him or her and taken promptly before a competent judge or an official authorized to exercise judicial powers. The delegation was told that, under Argentine law, the judge must decide, after hearing the accused's statement, whether to order pre-trial detention or set the accused free. Most of the detainees interviewed by the delegation complained that they had been placed in pre-trial detention without a proper hearing with a judge. They had simply been taken before an "investigating judge" or clerk of the court, who had placed them in pre-trial detention, signing on behalf of the judge. Some detainees complained that the investigating judge had not listened to their arguments in favour of their release or against their detention and had listened only to the official from the Public Prosecutor's Office. Detention orders are communicated to prisoners through the prison authorities, without the accused being taken before a judge to be notified properly in person. One detainee told the delegation that, if he had had the opportunity to be heard in person by the judge, if only for 10 minutes, the judge would have released him.

38. International law also requires that any person who has been detained on suspicion of committing an offence should be brought to trial within a reasonable period or released. The general rule should be that the accused is not imprisoned but released, subject to guarantees that the person will stand trial, as determined by the judge. Government representatives told the delegation that the legislation on criminal procedure in the Federal Capital and in the provinces provided for various alternatives to pre-trial detention. For example, article 159 of the Code of Criminal Procedure of the province of Buenos Aires, as amended by Act No. 12.405, provides that the investigating judge may impose alternatives to pre-trial detention if the risk that the accused will abscond or interfere with the evidence can be reasonably avoided. However, such measures are rarely applied in practice, except in the province of Mendoza where, the Working Group was told, house arrest is commonly used.

39. The Working Group was surprised to find that many individuals are kept in pre-trial detention as a matter of course once the criminal investigation has been completed, even when it is not essential to keep them in detention in the interests of justice. Individuals are usually kept in prison until expiry of the two-year, or sometimes three-year, time limit established in the decision ordering their pre-trial detention.

Pre-trial detention is thus the rule and not the exception. The accused may request an alternative to imprisonment, but this is rarely granted. The legislation on criminal procedure generally stipulates that pre-trial detention is applicable only if the act of which the person is accused carries a minimum sentence of over three years' imprisonment and a maximum sentence of over eight years. It must be proved that an offence was actually committed and there must be sufficient evidence to consider the accused responsible for the act.[2] This limits the judge's capacity to exercise discretion in determining whether or not this measure is appropriate or to order alternative measures. This provision also affects the accused's right to be presumed innocent until proven guilty in criminal proceedings.

40. In the province of Buenos Aires, there are 2,380 convicted prisoners, as compared with 21,449 persons in pre-trial detention. In Unit 2 of the Federal Prison Service in Villa Devoto, there were 224 convicted prisoners and 2,237 persons awaiting trial in a prison designed to hold only 1,500 inmates. Most of the prisoners in pre-trial detention who were interviewed by the Working Group were being held for offences that for the most part did not appear to be serious and which, prima facie, would not appear to require that they be kept in detention.

41. Under international law, any person accused of committing an offence must be given the opportunity to communicate with a defence lawyer. The delegation is convinced that the prison authorities are not impeding contact between detainees and their lawyers. However, many of the prisoners interviewed complained that they were unable to communicate with their lawyers by telephone, either because there were not enough telephones at the detention centre or because they could not afford to buy telephone cards. This obviously has an effect on the preparation of their defence.

Detention at police stations

42. Article 18 of the National Constitution stipulates that "no one may be arrested without a written order from the competent authorities". However, in some provinces, such as Buenos Aires and Salta, police officers have the authority to arrest or apprehend individuals whom they believe are intending to commit an offence, as well as individuals caught in flagrante delicto or immediately after they have committed an offence. They may make arrests on the grounds of public order or security and for the purposes of identity and background checks. The maximum period of detention in these cases varies from province to province, from 10 hours in the city of Buenos Aires to 24 hours in the province of Buenos Aires. Provincial legislation on criminal procedure set out the grounds and conditions for this kind of arrest. There must be reasonable suspicion or probable cause with regard to the commission of an offence. Unfortunately, neither the federal nor the provincial authorities visited were able to supply the delegation with statistics on the number and length of such detentions.

43. A number of NGOs complained to the Working Group that police officers tended to abuse this power of detention. Act No. 23.950 of 1991 gives police officers broad discretion to detain individuals. However, this authority is contingent on the police officer's ability to demonstrate that there is a reasonable degree of suspicion. In practice, many individuals are arrested simply for loitering, or because they cannot give a good reason for being in a particular place or because they have no money in their pockets.

44. The most common cases involve identity checks. It was alleged that, although the police are supposed to have modern technology that allows them to check a person's identity or background in a matter of minutes, they often keep a person in detention for several hours, or sometimes all night. If the person is arrested on Friday evening, he or she may be kept in detention until Monday morning on the grounds that background checks can only be made on working days. The Working Group was told that the federal police does not institute proceedings in such cases: the police simply notify the correctional judge (the judge responsible for investigating and trying minor offences) on duty that the person has been

detained. In Salta, it was said that the police often arrest between 300 and 400 persons at weekends. In a meeting with the Working Group, some members of the congress of this province said that detention in such cases was a crime prevention measure.

45. Spokespersons for organizations representing sexual minorities, transvestites, transsexuals, gays, lesbians and prostitutes complained that they were continually being arrested and apprehended as a way of harassing and intimidating them for the sole reason that they belonged to minority groups. Transvestites complained that they were systematically detained and regularly subjected to physical attacks, sexual harassment and extortion. One transvestite said that, on his way to meet the Working Group, provincial police officers who wanted to detain him forced him to get out of the bus in which he was travelling in the province of Buenos Aires. Other transvestites complained that police officers often cut their hair and nails as a way of humiliating them.

46. According to the representatives of various social groups, this kind of police action has the effect of intimidating average citizens. It is alleged that the police stop and search vehicles and make the passengers get out of public transport vehicles in order to check their identities and search their belongings. Some provincial NGO representatives said that this kind of police action, which was justified as being necessary to maintain law and order, reminded them of the repressive methods used during the military dictatorship. Sometimes, the same officers were involved.

B. Irregular police procedures

47. The Public Prosecutor’s Office, through the Office of the Attorney-General for Criminal Policy, has had investigations carried out by the Commission of Inquiry into Irregular Police Procedures. The Commission uncovered many cases involving police officers who, eager to demonstrate their effectiveness in combating the crime wave, had invented and fabricated cases by detaining innocent individuals after reporting the successful prosecution of an offence. The 2002 report of the Office of the Attorney-General mentions 64 fabricated cases based on false accusations by the police. The ability of the victims of such situations to defend themselves is virtually non-existent, since most of them are from the most vulnerable groups on the fringes of society: the unemployed, beggars, illegal immigrants or individuals with a police record.

48. The pattern in these cases is to take the individuals to a particular place, “plant” evidence, accuse them of theft, and so on. Some 90 per cent of these fabricated cases reach the stage of oral proceedings, thus leaving less time for the handling of important cases involving a real offence. The victims of these false accusations are often released, but only after spending a year or a year and a half on average in arbitrary detention. They are then described in the media as criminals captured in “successful” police operations. Redress is difficult to obtain, since these vulnerable groups have little or no access to justice. The Working Group was informed that no police officer has been tried or imprisoned for these acts. One captain is even said to have been promoted.

C. Detention in connection with social protest (*piqueteros*)

49. The serious economic crisis in Argentina, the recession that has lasted for over four years and the economic collapse of December 2001 have led to widespread protests, first in rural areas and then in industrial areas where the number of unemployed has risen sharply. The protests basically involve the blockading of roads, some of which are major federal highways, and the occupation of bridges, streets, railway, bus and underground stations and even public buildings by groups called “*piqueteros*”. The disruption of transport by land, water or air is expressly defined as an offence in article 194 of the Criminal Code. There have been violent clashes between the *piqueteros* and the security forces, which use rubber bullets to stop demonstrations. Provincial officials from Buenos Aires and Salta told the Working Group that the actions of the *piqueteros* were often violent and infringed on other people’s

freedom of movement and transport. The Working Group was informed by federal officials that over 3,000 *piqueteros* face charges, some of them on 30 or 40 counts. In Salta, members of the provincial congress reported that in some cases the *piqueteros* allowed people to continue travelling if they paid a certain amount of money. Other members of congress complained that they were unable to arrive on time for sessions of the Salta congress because the *piqueteros* were continuing to block the roads. They said that the provincial authorities were unable to do anything if federal roads were involved.

50. On the other hand, representatives of *piquetero* movements who were interviewed said that most of their actions were peaceful. They took special care not to harm anyone: for example, they allowed ambulances to get through. They were not in the habit of demanding payment or tolls. The Working Group wishes to point out that, under international law, the right to peaceful assembly and the right to demonstrate peacefully must be recognized and guaranteed. No restrictions may be imposed on these rights other than those necessary in a democratic society, such as restrictions that are necessary in the interests of national security, public safety, public order, health or morals, or the protection of the rights and freedoms of others. The Working Group's concern arises from the complaints that it has received that the security forces usually make arrests and detain individuals during actions by *piqueteros* regardless of whether such actions are carried out in a peaceful or violent manner.

D. Detention for minor offences

51. In some provinces of Argentina, although not in the Autonomous City of Buenos Aires, police forces have the power to make arrests and apprehend individuals suspected of contravening certain specific laws. The contraventions concerned are more of an administrative than criminal nature. Normally, a person found guilty of committing a minor offence or misdemeanour should be punished by a caution or a fine. However, the delegation found legal provisions that authorize the police to detain individuals for up to 30 days for committing minor offences. "Edicts" are still in use in Córdoba and Salta. These edicts are issued by the local police chief. In the police stations visited, the delegation met with individuals who had been detained for over 30 days on such grounds. In the province of Buenos Aires, Act No. 8031 on minor offences and the Urban Coexistence Code authorize the police to take action against behaviour or acts considered contrary to public morality or decency. Transsexuals, transvestites and prostitutes (even though prostitution as such is not prohibited) are frequently punished for misdemeanours or minor offences.

52. The Working Group does not deny that the behaviour of certain individuals, whether or not they belong to sexual minorities, may at times be provocative or offend against public morality. However, Argentine legislation does not appear to define sufficiently clearly which behaviour it wishes to prohibit or punish, or the limits of such behaviour. This lack of clarity gives police officers a large amount of discretion, which often leads to arbitrary enforcement of the law. It has been alleged that it is not so much the act itself that they are targeting but individuals, because of their appearance or clothes or the threat that they might pose. In this context, the outcome is usually arbitrary detention.

53. Although it is possible to appeal against a detention order for a minor offence, the remedy is not usually effective and is usually a very slow process (often the outcome of the appeal is made known after the penalty has already been applied); it is also usually expensive, complicated and, ultimately, ineffective.

E. Detention of children

54. The constitutional reform of 1994 gave the Convention on the Rights of the Child constitutional status. However, the provisions of the Convention have not been duly incorporated into domestic legislation. The Working Group received complaints about the arrest and detention of children under the age of criminal responsibility, including children who were only 9 years old. In some of the police

stations visited, the delegation found children being held with adults; most of them were street children or beggars. Some children, faced with the need to help their families financially, had turned to small-scale drug trafficking or smuggling. Others had joined gangs of children or youths with whom they committed thefts, robberies and assaults. This is a growing social problem in Argentina. It should be borne in mind that children are especially vulnerable and that they have no opportunity to react or protest. The delegation visited youth custody centres in which children were held in detention in a manner that was incompatible with Argentina's international obligations. The delegation saw undernourished, not to mention starving, children in ragged clothes and shoes, suffering from scabies; such children were prevented for months on end from seeing daylight or breathing fresh air. This harsh treatment of children is completely counterproductive: instead of helping to rehabilitate them, it drives them to greater violence. Some of them are taught how to commit crimes by older children. Thus, the youth custody centres visited are becoming veritable schools of crime.

55. The situation is particularly serious in the province of Mendoza. The Working Group was told that the police in the province detain street children and child beggars in the city centre and take them to police station No. 3, not to institutions for juveniles. The provincial authorities told the delegation that the children were not being detained but apprehended, under article 16, paragraph 6, and article 122 of Act No. 6354. Preliminary investigations are carried out in the police stations and a judicial file is opened. The children's income is recorded for use as background information. The judge intervenes only a posteriori. In another province, the delegation was told that the children were not being detained but simply picked up and removed from thoroughfares.

56. In the opinion of the Working Group, the main problem is that the necessary distinction between various categories of children with problems is not being made either in legislation or in practice. Children who have broken the law are detained, but so too are completely innocent children, for their own protection. The delegation heard of the case of a child arrested on suspicion of committing a crime and who was declared innocent by the judge; nevertheless, the child was sent to a detention centre for his own protection. Thus, in the police stations and youth custody centres visited, the delegation observed children in conflict with the law living with children in need of protection, children at risk and child beggars. All of the children interviewed at the Social and Educational Guidance Centre (COSE) in Mendoza stated that they had never been taken before a judge. Attention must be paid to the individual circumstances of each case and to the different educational needs of each child. The Working Group does not need to emphasize that such practices are causing physical and psychological harm to those who are the future of the country.

F. Detention of foreigners

57. Act No. 22.439 on migration, which was adopted during the military dictatorship, authorizes the Ministry of the Interior or Migration Department to order the detention of any foreigner whose expulsion from the national territory has been ordered. Article 40 of the Act stipulates that "in no case may the period of detention be longer than that strictly necessary to give effect to the expulsion of the foreigner"; that is, it does not set precise limits for detention. Detention is enforced without the need for a judicial order. The issuance of a detention order is an administrative matter and in practice leaves the foreigner with no chance of lodging an appeal against it. Although it is in theory possible to appeal to a court, it is a long and onerous process that is usually completed only after the foreigner has been expelled. The Working Group was informed of the case of a Latin American, Alfonso Juárez Cribillero, who was unable to appeal against the decision to detain him with a view to expelling him. In 2002, the Argentine coastguard expelled 1,482 foreigners, and the Gendarmería Nacional 1,772. Officials told the Working Group that the Ministry of the Interior or the Migration Department had the authority to release detainees on bail or on parole, but only in cases where the expulsion could not be carried out within a reasonable time.

58. Those detained under an administrative expulsion order are kept with common criminals in the same detention centres and police stations. The Working Group concluded that the system for detaining immigrants in Argentina gives rise to arbitrary detention and does not comply with the provisions of international standards in this area. There is a conspicuous absence of a law to regulate refugee status in accordance with the Convention relating to the Status of Refugees.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

59. **The Working Group would like to express its gratitude to the Government of Argentina for its openness during the Working Group's official visit. Despite the logistical problems that arose, which, among other things, prevented the Working Group from completing its programme with a visit to the province of Santiago del Estero, the delegation was able to visit all the detention centres as requested and even to make unannounced visits to various police stations and juvenile detention centres.**

60. **The Working Group notes with satisfaction that one of the foundations of the new federal Government's policy is the defence and protection of human rights, and that the Government has made some promising changes to policy in this area with a view to combating impunity and corruption, and that these changes have been overdue since the restoration of democracy.**

61. **Although the Working Group noted some interesting federal initiatives to address problems regarding arbitrary detention, it did not observe such initiatives in some of the provinces that it visited, where measures also appear to be necessary.**

62. **The Working Group, which is more concerned with the legal framework for detention than with detention conditions, nevertheless observed overcrowding and poor conditions in the areas of security, health, food, clothing and sanitation in most of the detention centres that it visited. Such poor conditions, to which attention was drawn a long time ago, could, and in fact do, restrict the right of persons deprived of their liberty to a proper defence during their trial. Although the Working Group realizes that public insecurity is a major concern in Argentina, neglect and disregard for prisoners' rights do not constitute an effective means of dealing with this problem; on the contrary, it aggravates the problem.**

63. **Lastly, since the Government and civil society organizations agree that there are long-standing problems, some of which were encountered by the delegation, it is to be hoped that the Government, which has demonstrated a strong desire to approach human rights in a different way from previous Governments, will take urgent and significant steps that can be supported by civil society organizations to combat the practice of arbitrary detention and improve the situation of detainees with regard to their human rights, particularly their right to due process. Of particular concern to the Working Group are the excessive length and excessive use of pre-trial detention; the authority of the police to make arrests for minor offences in order to carry out background and identity checks; the detention of children, members of sexual minorities and foreigners; and detention in connection with social protest.**

B. Recommendations

64. **The Working Group invites the Government of Argentina to review its legislation and practices in the area of pre-trial detention at both the federal and provincial levels. Pre-trial detention should be the exception, not the rule, and should be as short as possible. It should not be used in cases of minor criminal offences, when there is merely a suspicion that an offence was**

committed or when there are other ways of ensuring that the accused appears in court and does not obstruct justice. Alternatives to pre-trial detention should be sought; these might include house arrest, release on bail or on parole, or electronic monitoring of a person's movements. These alternatives should be introduced in places where they do not already exist, and their use should be encouraged when they are authorized by law. At the legislative level, the Government should reconsider the provisions that restrict judges' discretion by obliging them to order pre-trial detention on the basis of the penalty for the corresponding offence. Bail should not be set too high. No one should remain in prison once the maximum period of pre-trial detention has lapsed if they have not yet been brought to trial.

65. **Judges should issue decisions ordering pre-trial detention after a substantive, not merely formal, analysis of each case. The decision should be taken by the judge himself after hearing the detainee in person, not by investigating judges or clerks of the court. The suspect should be notified of the decision by the judge in person, not by the prison or police authorities. In accordance with international standards, all detainees should have the right to argue their case against detention in person before the judge.**

66. **Once the criminal investigation is completed, the question of keeping the suspect in detention should be reconsidered if it is likely that, owing to an overload of cases, the hearing or oral proceedings will not be held immediately. Suspects should be released if this is not incompatible with the higher interests of justice and if some other way can be found of ensuring that the suspect will appear for trial.**

67. **Urgent attention should be paid at both the federal and provincial levels to improving the detention conditions of persons in pre-trial detention. Particular attention should be paid to compliance with article 10, paragraph 2, of the International Covenant on Civil and Political Rights.**

68. **Urgent measures should be taken with regard to the number of the prison population, since overcrowding in prisons and police stations is at the root of the problems identified with regard to detention conditions. The situation in the provinces of Buenos Aires and Salta is particularly serious. Consideration should be given to increasing the capacity of the prison system or reducing overcrowding by making use of alternative measures such as early release, release on bail, parole, house arrest, night imprisonment, daytime imprisonment, and furlough. No person whose pre-trial detention has already been ordered by a judge, much less a person convicted of an offence and serving a sentence, should be held in a police station.**

69. **As far as possible, efforts should be made to avoid holding children or foreigners detained under the immigration laws in police stations.**

70. **The right of detainees to communicate freely with their defence lawyer should be guaranteed. The shortage of telephones in detention centres, the lack of telephone cards or money to buy them and detainees' financial problems should not prevent them from communicating freely and easily with their lawyer. Access to a free or court-appointed defence lawyer or to one provided free of charge by a bar association or law faculty should be facilitated. Ownership of a property should not be an obstacle to the use of these services.**

71. **The Working Group invites the federal Government and the provincial governments to monitor closely the behaviour of senior and junior police officers, particularly with regard to their powers of arrest and detention. Particular attention should be paid to the criminal practice of falsifying procedures with the aim of improving the police's public image at the cost of sending innocent civilians to prison. The efforts of officials of the Public Prosecutor's Office to deal with**

this problem should be encouraged and supported. In addition, any manifestation of racist, xenophobic, homophobic or other behaviour that is incompatible with the full observance of human rights - which the police are expected to enforce - should be punished.

72. **The Working Group calls on the Government to ensure that there is an effective, accessible, rapid and straightforward judicial remedy available in the provinces where police edicts are still in use and where the police still have the power to arrest, apprehend or detain a person for committing a minor offence.**

73. **Particular attention should be paid to compliance with the Convention on the Rights of the Child with regard to the practice of arresting and detaining juveniles. The provisions of the international instruments regarding the minimum age of criminal responsibility should be observed. The practice of detaining children for their own protection and of detaining child beggars and street children should be reviewed, and the practice of taking them to police stations should be stopped. The judiciary should be invited to review the performance of judges who keep children in detention for months without giving them a hearing. The executive should review the situation of children in youth custody centres. A distinction should be made between the treatment of children in conflict with the law, treatment of children at risk or in irregular situations and treatment of children with special needs. Above all, there is a need to review whether it is necessary and appropriate to place such children in detention.**

74. **The Government should study carefully the police practice of detaining individuals involved in social protest, particularly the *piqueteros* who blockade roads and occupy public spaces. A distinction should be made between cases in which such actions are peaceful and those in which violence is used, and it should always be borne in mind that the protests emanate from sectors where jobs have been lost owing to the serious recession that Argentina has been experiencing for the past four years. The legitimate rights of the third parties affected need to be reconciled with the unrestricted observance of the freedom of expression, freedom of assembly and freedom to demonstrate, as guaranteed by international law.**

75. **An effective judicial remedy should be provided for administrative orders for the detention of foreigners with a view to their expulsion from the country. Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced. The current practice of detaining foreigners for reasons related to immigration together with individuals charged with ordinary offences should be halted.**

Notes

[1] See, for example, the judgement of the European Court of Human Rights in case No. 24/1986/122/171-173, dated 6 December 1988, in which the Court declared that: "Mr. Barberà, Mr. Messagué and Mr. Jabardo thus had to face a trial that was vitally important to them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance. Despite the assistance of their lawyers, who had the opportunity to make submissions, the circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel." Series A, vol. 146, para. 70.

[2] Article 316 of the Code of Criminal Procedure applicable in the Federal Capital. The codes of criminal procedure followed in other provinces contain similar provisions.