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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention

Addendum

Mission to El Salvador*, **, ***

Summary

The Working Group on Arbitrary Detention visited El Salvador from 23 January to 1 February 2012 at the invitation of the Government of El Salvador. The Working Group visited various penal institutions, prisons and detention centres in the Departments of San Miguel, San Salvador and Santa Ana, including the Western Prison in Santa Ana; the "La Esperanza" Prison in Mariona; the Women's Prison of the Capital; the Ciudad Barrios Prison in San Miguel; the Apanteos Prison; the Izalco Prison Farm; and the *bartolinas* (police jails) in Soyapango. It also visited the National Psychiatric Hospital and the Centre for the Comprehensive Care of Migrants. In addition, the Working Group made an unannounced visit to the general headquarters of the police in San Miguel.

In its report, the Working Group notes that, 20 years after the signing of the Chapultepec Peace Accords under the auspices of the United Nations, there is widespread awareness among Salvadoran authorities and Salvadoran civil society of the need to continue to make progress as regards the observance and promotion of human rights and the establishment of democracy and the rule of law. However, the country now has to deal with the organized violence of the *maras*, other gangs and the groups involved in drug trafficking that has driven crime rates in El Salvador up to particularly high levels. In 2011, there were 4,374 homicides and 3,185 reported cases of extortion.

* The summary of the report is being circulated in all official languages. The report itself, contained in the annex to the summary, is being circulated in the language of submission and English only.

** The appendix is being circulated in Spanish only.

*** Late submission.

The Working Group notes the failure of the repressive policies implemented by the police, namely the "iron fi/st" and "super iron fist" policies (*Plan Mano Dura* and *Plan Mano Súper-Dura*) of 2003 and 2005, respectively.

The Working Group also mentions the widespread impunity and the failure to properly investigate crimes that are considered less serious. The report examines the observance of the right of a detainee to be brought promptly before a judge and to be tried without delay, noting that 970 detainees had been held in detention for longer than the maximum period of pretrial custody permitted by law. The report criticizes the excessive use of detention and the difficulties detainees have gaining access to and communicating with a defence lawyer. It also analyses the failure to use scientific and documentary evidence and the reliance on statements and informers, in particular on defendants or convicts who turn state's evidence (*testigos criteriados*) in exchange for reduced sentences or other benefits, as well as the lack of reliable statistical data. The report denounces the severe overcrowding in prisons, which are at more than 313 per cent capacity, and in police jails, where capacity is exceeded by 63 per cent. It also notes that police jails are used to hold not only suspects during their first 72 hours in detention, but also persons awaiting trial.

In this report, the Special Rapporteur focuses in particular on topics related to the recognition and protection of land and natural resources, including: the cadastral survey programme and the extractive and agricultural industries; access to justice, evictions and social protest; and the social and economic situation of indigenous peoples, including their education, health and development.

The report also examines the situation as regards juvenile justice and the detention of migrants, asylum seekers and refugees.

In its conclusions, the Working Group points out that the right to security is an important human right that is linked to the right to life, as well as to the right to liberty and not to be arbitrarily deprived of liberty. It recalls the principle that criminal responsibility is always individual and that nobody may be detained on the mere suspicion of having links to criminal organizations or gangs. The Working Group criticizes the fact that the exercise of the right to an effective defence has been curtailed by the intrusive and even degrading measures to which attorneys and public defenders are subjected when they visit prisons by the Armed Forces personnel responsible for controlling entry to prisons.

In its recommendations, the Working Group proposes that action be taken, inter alia, to immediately release all prisoners who have served their sentences; increase the number of judges who supervise prisons; improve victim and witness protection programmes; establish a remedy of habeas corpus in domestic legislation that is truly effective; and encourage visits by NGOs to prisons and detention centres. The Working Group also recommends that measures be taken to update the legislation on migrants, to pass laws to regulate detention in psychiatric hospitals and, as part of the fight against impunity, to strengthen the Judicial Investigation Department of the Supreme Court of Justice and the Office of the Inspector-General of the National Civil Police.

Annex

[*Spanish and English only*]

Report of the Working Group on Arbitrary Detention on its visit to El Salvador (23 January to 1 February 2012)

Contents

I. Introduction

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council took over the mandate in its decision 2006/102 and extended it for a further three years in its resolution 15/18 of 30 September 2010. The Working Group on Arbitrary Detention was established in 1991 in resolution 1991/42 of the former Commission on Human Rights and given the mandate to investigate allegations of arbitrary deprivation of liberty. The Working Group's mandate was extended in 1997 to include the detention of irregular migrants, asylum seekers and refugees. The Human Rights Council took over the mandate in its decision 2006/102 and extended it for a further three years in its resolution 15/18.

2. The Working Group was invited to visit El Salvador from 23 January to 1 February 2012 by the Salvadoran Government. The delegation was headed by Mr. El Hadji Malick Sow (Senegal), the Chairperson-Rapporteur of the Working Group, and included Mr. Roberto Garretón (Chile) and Mr. Vladimir Tochilovsky (Ukraine), as well as the Secretary and secretariat staff of the Working Group from the Office of the United Nations High Commissioner for Human Rights and interpreters from United Nations Headquarters in New York.

3. The Working Group wishes to express its sincere gratitude to the Government of El Salvador for the invitation to visit the country and for the full cooperation and support provided during the visit. The Working Group also wishes to acknowledge the support provided by the United Nations Development Programme (UNDP) and the Regional Office of the United Nations High Commissioner for Human Rights in Panama. In addition it wishes to thank the Salvadoran civil society organizations, as well as the magistrates, judges, lawyers, prosecutors, defence attorneys and human rights advocates with whom it met.

II. Programme of the visit

4. During the visit, the Working Group was received by various authorities, including the Ministries of Foreign Affairs, of Justice and Public Security and of Health; members of the Justice and Human Rights Committee and the Public Security Committee of the Legislative Assembly; the President of the Supreme Court of Justice and the President of the Criminal Division of the Supreme Court; the Deputy Attorney General; the Counsel-General of the Republic and the Human Rights Advocate (Ombudsman).

5. The Working Group also met with the Director-General of the National Civil Police, the Director of the National Public Security Academy, the Executive Director of the Salvadoran Institute for Child and Adolescent Development (ISNA), the Director-General of Prisons and the Director-General for Migration and Alien Affairs.

6. During its visits to the cities of Santa Ana and San Miguel, the Working Group held several meetings with members of the judiciary, specifically magistrates and judges, and with members of the Attorney General's Office. In San Salvador, the Working Group also spoke with the Director-General for Human Rights of the Ministry of Foreign Affairs, the Director-General for Intermediate Detention Centres, the Deputy Counsel for Criminal Affairs and the National Coordinator of the Public Defence Unit (both attached to the Counsel-General's Office), the Deputy Director-General of Prisons, the Counsel for Children and Youth, and the Head of the Prisons Unit of the Ombudsman's Office.

7. The Working Group also visited the following prisons and detention centres: the Ciudad Barrios Prison in San Miguel; the Izalco Prison Farm; the "La Esperanza" Prison in Mariona; the Juvenile Detention Centre of Ilobasco; the Western Prison in Santa Ana; the Apanteos Prison; the Women's Prison in San Salvador; and the *bartolinas* (police jails) in Soyapango. The Group also visited the Centre for the Comprehensive Care of Migrants and the National Psychiatric Hospital. In accordance with the Working Group's method of work (A/HRC/16/47, annex), the Group also made an unannounced visit to the general headquarters of the police in San Miguel.

8. The Working Group was able to fulfil its mandate in the prisons and detention centres it visited since it was able to interview detainees and prisoners in complete privacy and without guards present. In that regard, it wishes to reiterate its gratitude to the Government for all the arrangements made during its visits to the detention centres, particularly for the respect shown towards its methods of work, most notably in the withdrawal of prison guards which enabled the Working Group to conduct its interviews in private.

III. Institutional and legal framework

A. The institutional and political system

9. El Salvador is a democratic republic with over 7 million inhabitants. The territory is divided into 14 departments. The Government structure is republican, democratic and representative. The indigenous population, which represents around 12 per cent of the total population, lives in 13 of the country's 14 departments.

10. The three fundamental organs of Government are the legislature, the executive and the judiciary. The executive is headed by the President of the Republic and comprises 1 Vice-President and 14 ministers, as well as deputy ministers and their subordinates. The President and the Vice-President of the Republic are elected for terms of five years.

11. The legislature comprises the Legislative Assembly, a unicameral collegiate body composed of 84 deputies. Its fundamental responsibility is to legislate. The members of the Assembly are elected every three years and may be re-elected.

12. The political system is a pluralist one that operates through political parties, which, according to article 85 of the Constitution, are the only instrument for representing the people in the Government. The main political parties now represented in parliament are Frente Farabundo Martí para la Liberación Nacional (FMLN), which is currently in power; Alianza Republicana Nacionalista (ARENA), in power from 1989 to 2009, i.e. during and after the signing of the 1992 Peace Accords sponsored by the United Nations; Partido Demócrata Cristiano (PDC); Partido Conciliación Nacional; Cambio Democrático (CD) and Gran Alianza por la Unidad Nacional (GANA).

13. The judiciary is headed by the Supreme Court of Justice, which consists of 15 judges, 1 of whom acts as the President of the Court. The Supreme Court tries constitutional, criminal, civil, mercantile, labour, agricultural and administrative matters. It has a Constitutional Division, which hears and rules on constitutional challenges to laws, decrees or regulations as well as on *amparo* and habeas corpus proceedings and disputes between the legislature and the executive; a Criminal Division and a Civil Division, which rule on appeals, including appeals in cassation, filed against court rulings; and an Administrative Division.

14. The Supreme Court plenary comprises the President of the Court and at least seven judges. Resolutions must have a minimum of eight assenting votes in order to pass. In the

case of a tie, the President casts the deciding vote. The Constitutional Division comprises five judges appointed by the Legislative Assembly and is presided over by the President of the Supreme Court of Justice.

15. When the Criminal Division acts as an appellate court, its decisions may be contested in an appeal in cassation before the Supreme Court meeting in plenary. When the Criminal Division acts as a court of cassation, extraordinary remedies of *amparo* can be pursued only before the Constitutional Court.

16. The judges of the Supreme Court are elected by the Legislative Assembly for a period of nine years. To be elected, they must obtain at least two thirds of the vote of the Deputies in the Assembly. They may be re-elected. One third of the seats in the Supreme Court come up for election every three years (articles 173 and 186 of the Constitution). Under the Constitution, the Supreme Court receives an annual budget allocation of no less than 6 per cent of the State's budget revenue (articles 172 and 182, paragraph 13, of the Constitution). In 2011 the Supreme Court's allocation was US$ 226 million.

17. Below the Supreme Court of Justice, which is the highest court in El Salvador, there are courts of second instance. These have jurisdiction in a specific territory and rule on appeals, both merits appeals and judicial review proceedings, filed against decisions handed down by courts of first instance. Each appeal court has two judges. There are currently 27 such courts.

18. The 207 courts of first instance each have one judge. For criminal cases, there are investigating courts and sentencing courts. Some courts are multifunctional, i.e. they have jurisdiction in two or more matters. There are also 556 magistrates courts. These handle civil claims for less than a certain amount in relation to various matters. They also handle the initial stages of criminal proceedings and oversee judicial conciliation procedures. Eight courts specialize in enforcing the anti-gang laws.

19. The judiciary is a professional service. There are 3,223 lawyers who are eligible to be appointed judges. The Working Group was told that altogether there are 135 vacant posts for judges in the magistrates' courts, trial courts of first instance and appeal courts.

20. Article 192 of the Constitution states that the Attorney General's Office, the Counsel-General's Office and the Human Rights Advocate's Office together comprise the Public Legal Service. The Attorney General's Office is an autonomous entity. Pursuant to article 193 of the Constitution, it is responsible for defending the interests of the State and society, instituting and undertaking criminal and other legal proceedings in defence of the law, and conducting criminal investigations in collaboration with the National Civil Police, the law-enforcement agency that was established under the Peace Accords. The National Civil Police has 21,300 officers, of whom 8 per cent are women.

21. The Attorney General's Office, pursuant to article 13 of the Act governing its organization, carries out its work completely independently of the other State agencies and has the authority to act throughout the national territory. The Attorney General is elected by a two-thirds majority of the Deputies of the Legislative Assembly for a period of three years and is eligible for re-election. The Attorney General appoints and removes the Deputy Attorney General, the Auditor-General and the Secretary-General. The Public Legal Service is a professional service.

22. The Counsel-General ensures the defence of the family and individuals, as well as of the interests of minors and other persons without legal capacity, and provides persons of limited financial means with legal aid, including legal representation in court to defend their personal liberty and their labour rights.

23. The Office of the Human Rights Advocate is mandated by the Constitution to ensure that human rights and fundamental freedoms are upheld and safeguarded through the

promotion and protection of those rights and freedoms and by educating people about them. It also oversees public administration. The Office was established under the 1992 Peace Accords and has been given "A status" by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

24. The Office of the Human Rights Advocate is divided into sub-offices responsible for defending human rights, the rights of the child and young people, environmental rights, women's and family rights, civil and personal rights, and economic and social rights. It also has Departmental and local offices in Apopa, Soyapango, Metapán and Santa Rosa de Lima.

25. Article 216 of the Constitution establishes military jurisdiction with special courts and procedures, for purely military offences, whether minor or serious. Members of the military who are accused of ordinary offences are tried by the ordinary courts.

B. International human rights obligations

26. Article 144 of the Constitution states that if a conflict arises between an international treaty and domestic law, the treaty takes precedence.

27. El Salvador is party to the main international human rights instruments. It is not, however, party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Rome Statute of the International Criminal Court or International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169).

C. Legal safeguards

28. Article 2 of the Constitution recognizes that everyone has the rights to liberty and security, among others. Article 11 specifies that no one may be deprived of the right, inter alia, to liberty without first being tried and found guilty in accordance with the law. Nor may a person be tried twice for the same offence. The second paragraph of the same article establishes that everyone has the right to habeas corpus when their liberty has been unlawfully restricted by an authority or an individual.

29. Anyone charged with an offence is presumed innocent until proven guilty under the law and in a public hearing, during which they must be afforded all the safeguards required for their defence, as stipulated in article 12, paragraph 1, of the Constitution. Paragraph 2 of the same article states that arrested persons must be informed immediately and in a manner they understand of their rights and the reasons for their arrest and may not be forced to make a statement. All arrest warrants and committal orders must be issued in writing and in accordance with the law (art. 13).

30. Under article 13, paragraph 2, of the Constitution, a person may not be held in police custody for longer than 72 hours, during which time they must be brought before the competent judge. The corresponding court is obliged to take under review the statement made by the accused in answer to the charges and to order either the release or the detention of the accused pending trial within that period.

31. In 2008, a new Code of Criminal Procedure was adopted and came into force on 1 January 2010. It was not fully implemented at the time of the Working Group's visit, however, since sufficient training had yet to be given to court officials and members of the

legal profession. The new Code replaces the 1998 Code, which had established a mixed system for criminal proceedings largely based on adversarial procedures and underwent several amendments during its lifetime. The 1998 Code of Criminal Procedure did contain provisions aimed at safeguarding human rights.

32. The new one, in force since 2010, reaffirms the status of the Attorney General's Office as the body responsible both for prosecuting crime and for guaranteeing people's fundamental rights. The purpose of the new Code is to ensure the swifter and more effective administration of justice, while maintaining a fair balance between protecting the rights of victims and protecting the rights of the accused. The protections and safeguards established in the previous Code have not been weakened in the new one.

33. Article 82 of the new Code of Criminal Procedure, for example, establishes the right of detainees to be informed at the time of their arrest or capture of the reasons for their detention, to be assisted by a lawyer of their choice or by a public defender, to be brought before a competent judge and to answer the charges against them within the time frames mentioned above.

34. Article 270 of the new Code of Criminal Procedure states that as soon as the Attorney General's Office learns that a punishable act has been committed, either ex officio or by means of a criminal complaint lodged by a victim or another person or by means of a report, it must initiate the corresponding investigation and ensure that not only circumstances that might incriminate, but also those that might exonerate the accused are investigated. All arrests must be made in accordance with a warrant duly issued for that purpose by a court, unless a person is caught in flagrante delicto.

35. The Constitution provides that all detainees must have the opportunity to challenge the legality of their arrest without delay. Before being questioned, a suspect must be asked the name of their defence attorney (Code of Criminal Procedure, art. 274), and before answering any questions, a suspect must have the opportunity to meet with their attorney.

36. The Attorney General's Office has the power to set a provisional charge until the initial hearing is held. Once the application for the prosecution to proceed has been filed by the prosecutor, the initial hearing is held within the time established for questioning. That period is 72 hours maximum and commences the moment the accused is brought before the judge to whom the case is assigned (Code of Criminal Procedure, art. 328, para. 3). At the initial hearing, the accused is obliged to enter a plea. The judge must then rule whether the accused is to be held in custody pending trial or to be released with or without conditions (Code of Criminal Procedure, art. 298).

37. The maximum duration of the investigation stage of the proceedings is six months. That period may, however, be extended for a further three months in the case of minor offences or a further six months in the case of serious offences, if the investigation of the offences in question is particularly complex (Code of Criminal Procedure, art. 310).

38. At the end of the investigation stage, the prosecutor or the plaintiff may call for the case to be prosecuted, definitively dismissed or dismissed without prejudice; for public right of action to be declared applicable; for a conditional stay of proceedings; for summary proceedings to be instituted; or for any approval of any conciliation or mediation agreements reached (to avoid the case going to trial).

39. Once formal charges have been filed, the judge must, within 24 hours, make all writs and evidence available to all the parties for consultation during a period of five days. At the end of that period, the judge shall set the date and time at which the preliminary hearing will take place, which must be within 3–15 days. The judge will admit or reject the evidence submitted for the preliminary hearing. The evidence is produced at the preliminary hearing itself.

40. If at the end of the preliminary hearing the judge decides to allow the prosecutor's or plaintiff's application for the prosecution to proceed, the trial stage per se will begin, and the trial will open before the trial court (Code of Criminal Procedure, arts. 355, 357, 360 and 361).

41. As far as precautionary measures are concerned, the general principle established in article 320 of the Code is that such measures may only be applied in a reasoned decision, and for the time absolutely necessary. For the accused to be remanded in custody pending trial, there must be sufficient evidence to reasonably maintain that an offence has been committed and that the accused was probably involved, and the offence in question must incur a prison sentence of at least 3 years (Code of Criminal Procedure, art. 329). If there are reasons for believing that the accused will not try to escape justice, the judge may order an alternative precautionary measure, except in the case of particularly serious charges (simple and aggravated homicide; kidnapping; sexual offences; aggravated robbery; extortion; fraud; trafficking in persons; public order offences; drug-related offences; and money and assets laundering).

42. Pursuant to article 8 of the new Code of Criminal Procedure, nobody may be held in custody pending trial for longer than 24 months.

43. There are military courts, but their jurisdiction is limited to exclusively military offences, whether minor or serious. Members of the military who are accused of committing ordinary offences are tried by the ordinary courts.

44. On 1 September 2010, Decree No. 458, the Act outlawing *maras* and other criminal gangs, groups, associations and organizations, was passed into law. The Act banishes the following gangs and *maras* and declares them unlawful: the self-styled Mara Salvatrucha, MS-Trece, Pandilla Dieciocho, Mara Máquina; Mara Mao Mao, as well as other criminal associations and organizations, such as the Sombra Negra.

IV. Observations

A. Positive aspects

45. The Working Group notes with satisfaction that 20 years after the signing of the Chapultepec Peace Accords, there is widespread awareness among Salvadoran authorities and Salvadoran civil society of the need for the State and society to continue to make progress as regards the observance and promotion of human rights and the establishment of democracy and the rule of law.

46. This positive development is now threatened, however, by a series of challenges facing the country, largely associated with organized crime and violence, the activities of the *maras* and the other gangs and drug trafficking.

47. The Working Group acknowledges the truly difficult situation that the Government faces in safeguarding its citizens' right to security. Violence has been a structural problem for the past 40 years and has become more complex and more organized with the increase in the activity of organized crime, the *maras* and other gangs. In the last seven years, there have been 27,162 homicides in El Salvador, which represents an average of over 10 homicides a day.

48. The so-called "Anti-Maras Act" of 2004 was declared unconstitutional, as were the "iron fist" and "super iron fist" policies (*Plan Mano Dura* and *Plan Mano Súper-Dura*) of 2003 and 2005, respectively, which, as the Working Group was able to verify, also failed to address this difficult problem. The policies continued to be implemented in practice,

however, despite having been legally abolished, and a high number of arrests and detentions were recorded in 2005–2011 as a result. Meanwhile the crime and the delinquency that El Salvador needs to tackle have become more complex and better organized.

49. The Working Group would like to mention, as one positive development, the improvement in the ratio between the number of detainees in police custody or pretrial detention and the number of persons sentenced or convicted. Twenty-five years ago, 90 per cent of persons in detention were awaiting trial and only 10 per cent had been sentenced. Today, the proportion is 29 per cent (7,376 persons) awaiting trial and 71 per cent (18,035 persons) serving sentences.

50. Mention should also be made of the positive effort to improve the security situation in the country through the establishment of a Security Cabinet and a Tripartite Board comprising representatives of the Attorney General's Office, the Institute of Forensic Medicine, and the National Civil Police.

51. Another positive step has been the opening, in 2009, of the Prison Staff Training College whose specialized training programme for future prison guards includes human rights training. So far, 608 students have graduated from the College.

52. In the interests of furthering the constructive dialogue that the Working Group has entered into with the Government of El Salvador and in the spirit of collaboration that characterized its visit, the Working Group would like to draw attention to the following issues which it views with concern.

B. The level of insecurity

53. The Working Group was told that 64 per cent of Salvadoran citizens consider insecurity to be the main problem facing the country. Various joint policy initiatives have been developed by the different branches of Government and State agencies in response to the problem. These include the establishment of a Security Cabinet comprising representatives of various sectors. The Group was informed during its visit, however, that problems coordinating the sectors mean that the security situation has not improved substantially.

54. In 2009, 4,382 homicides were committed in El Salvador. That figure dropped slightly to 4,004 in 2010 but rose again to 4,374 in 2011. In November 2011, the average homicide rate was 16 per day. The number of women murdered in 2011 was 581, which represents a 14 per cent increase on the previous year.

55. The average homicide rate fell after the Group's visit, however, to five per day from March 2012 onwards as a result of the talks held with and between the *maras* and other gangs.

56. The Working Group was told that in 2011 Sonsonate, Santa Ana and San Salvador were the most violent departments, recording homicide rates of 110, 84 and 83 homicides per 100,000 inhabitants, respectively.

57. In the last five years, 17,000 cases of extortion were reported. Extortion seems to have declined slightly, however, with 3,992 cases being reported in 2010 and 3,185 in 2011.

58. The talks between the *maras* and other gangs, which have been under way since March 2012 with the backing of Archbishop Fabio Colindres and the former guerrilla leader Raúl Mijango, resulted in a truce or non-aggression pact being reached between

several *maras* and gangs. *Mara* gang members held in the Western Prison of Santa Ana handed over their weapons under the supervision of international organizations.

59. Gang extortion continues to make whole families suffer. Some find themselves forced to hand over their properties to the gangs under threats of violence. The gangs then turn them into so-called "destroyer houses". They cover them in graffiti and use them as bases for their operations. Rapes and other crimes are commonly committed in these houses.

C. Impunity

60. The Working Group also notes the serious problem of impunity in El Salvador. Priority is given by the investigation agencies and criminal prosecution services to the more serious crimes and offences. Less serious offences are therefore not properly investigated and the perpetrators are not brought to justice.

61. Victims of human rights abuses, including victims of the armed conflict that devastated the country during the 1980s, have the right to know the full truth and to obtain justice and reparation. Effectively combating impunity and preserving historical memory are fundamental ways to ensure that those abuses are never repeated.

62. The weakness of judicial institution, the Public Legal Service and the security forces, as well as the corruption that pervades various levels of the judiciary, were cited among the main reasons for the widespread impunity that is currently prevalent in the country. The Working Group was told that 3,846 court cases are currently frozen and not being dealt with by the three divisions of the Supreme Court.

63. The Working Group also received reports that 29,062 warrants for arrest or capture are waiting to be executed by the Division for Compliance with Judicial Orders of the National Civil Police.

64. In the view of the Working Group, the Judicial Investigation Department of the Supreme Court of Justice and the Office of the Inspector-General of the National Civil Police should be strengthened as part of the fight against impunity.

D. The right to be brought promptly before a judge

65. Article 9 of the International Covenant on Civil and Political Rights states that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (para. 3). Article 9 also states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them (para. 2). The time frame for being brought before a judge should be no more than a few days. Specific deadlines on the matter are usually established in domestic legislation.

66. In El Salvador the deadline established in the Constitution is 72 hours. The Working Group observed, however, that a person can spend up to 6 days in detention without appearing before a judge. Several detainees interviewed by the Working Group stated that they had been held in custody without being brought before a judge for longer than permitted by law.

67. Another important issue is the total time that the judicial process lasts. Articles 9 and 14 of the Covenant specify that anyone who is arrested must be tried within a reasonable time or be released. This refers not only to the time that lapses between the laying of charges and the start of the trial, but also the time up to the moment when the executory

sentence is handed down, in other words, when all the deadlines for filing appeals and appeals in cassation have passed. In El Salvador, the time frame established for sentencing a person is six months. That period may be extended for another six months, and in certain cases it may be extended to up to 24 months.

68. At the time of the Working Group's visit, 7,376 persons were in pretrial custody nationwide. Of those, 970 had been in detention for longer than the maximum period permitted by law. The Working Group wishes to stress that all stages of the judicial process, whether first-instance or appeals proceedings, must take place without undue delays.

E. Excessive use of detention

69. The Working Group wishes to emphasize that deprivation of liberty must be used against a person as a measure of last resort and only in exceptional cases and for the shortest possible time. It notes that in El Salvador, however, it is widely used in criminal proceedings, which produces overcrowding in prisons.

70. In 2007, 14 members of various social organizations who were participating in a peaceful protest were detained and charged with acts of terrorism under the Special Anti-Terrorism Act of 2006. That Act grants discretionary powers to the authorities, which can result in them classifying mass protests and the rallies as acts of terrorism.

71. The Armed Forces of El Salvador are responsible for public security in rural areas. They regularly detain persons on the grounds that they resisted a house search, a body search or arrest. The Armed Forces are also responsible for guarding the perimeters of prisons and for controlling entry to prisons.

72. The Working Group saw for itself the public security duties performed by the Armed Forces at the Apanteos Prison, which included guarding the outside perimeter and searching visitors. Women visitors complained of having been subjected to indecent and even degrading searches when trying to enter the prison to visit relatives, including inspections of their private parts. Complaints were also made about the restrictions on bringing medicines, clothing, personal hygiene items and bedding into the prison.

F. Difficulties obtaining and communicating with a defence lawyer

73. To safeguard the right to a fair trial, detainees must be provided with an adequate legal defence from the first moment of their arrest. This means that detainees must be allowed to meet with their attorneys in private and that the confidentiality of attorney-client communication must be respected.

74. The Working Group noted that lawyers do not tend to come to police stations. The Group also received numerous reports that, both in detention centres and prisons, lawyers and public defenders are subjected to rigorous searches when entering and leaving the establishments. Those searches are performed by members of the Armed Forces who even check the notes taken by defence lawyers during their interviews with their clients.

75. These practices deter defence lawyers from visiting prisons and consequently seriously undermine the right to a defence. The situation for women lawyers is even worse because they are sometimes also subjected to an improper, intrusive and even humiliating search. The absence of a bar association in El Salvador since obligatory membership of professional associations was declared unconstitutional could explain the lack of formal objections and complaints filed about this treatment, and indeed there is no procedure for lodging and recording complaints about these searches. The difficulties detainees have in

obtaining a defence lawyer and communicating with their lawyers seriously undermines the right to a fair and impartial trial, as well as the right to due process.

76. The situation is similar as far as prosecutors of the Attorney General's Office, public defenders of the Counsel-General's Office, representatives of the Office of the Human Rights Advocate, human rights advocates and members of NGOs are concerned.

77. The Working Group received numerous complaints that the public defenders of the Counsel-General's Office have an excessive workload and that the high number of cases that each defender has to handle seriously undermines their ability to effectively defend their clients.

G. Juvenile justice

78. The Working Group has several concerns about the administration of justice to children and adolescents. The procedures should take into account both age and the ultimate aim of educating and rehabilitating the minor, as set forth in article 14 of the International Covenant on Civil and Political Rights. The best interests of the child must always be a priority, as established in the Convention on the Rights of the Child, which has been ratified by El Salvador. The internment of minors must be a measure of last resort.

79. The new Child and Adolescent Protection Act has been in force for over a year. The Working Group views the use of open prison regimes as a positive step, but is concerned by the delays in the administration of justice to children and adolescents. Minors may only be detained if caught in *flagrante delicto* or else by warrant, not upon the orders of the Attorney General's Office. In 2010, the National Civil Police arrested 7,746 minors; in 2011, they arrested 6,558.

80. The total time taken to sentence a minor should not exceed 90 days. However, in November 2011, 148 minors were still in custody even though the 90-day deadline had passed. The judge has 30 days to set a date for the hearing. In El Salvador, minors may not be held in custody pending sentencing for longer than 120 days.

81. The Working Group is concerned that some minors (as well as many adults) report that they were not able to meet with their attorneys or public defenders until practically the day before the trial. This violates the right of minors to an effective legal defence.

82. Minors who belong to the *maras* or other gangs may receive prison terms of 3 to 5 years.

83. The Working Group takes a positive view of the Intermediate Youth Detention Centres and the work done by the Social Rehabilitation Centre for Minors in Ilobasco, particularly the primary and secondary education and the pottery, clothes-making and baking workshops provided to the minors. However, the Group is seriously concerned about the conditions in these facilities, particularly the dormitories for minors in the Ilobasco Centre, which are in urgent need of repair.

84. The Social Rehabilitation Centre for Minors in Ilobasco, which can house up to 250 minors, currently houses 179 (134 of whom are serving definitive sentences and 45 of whom are still on trial). The conditions in which minors in pretrial detention are held are extremely worrying and can even be classified as inhumane, especially considering that those minors are innocent until proven guilty.

H. The failure to use scientific evidence and the reliance on witness statements and informers

85. The Working Group noticed that great weight is attached to witness statements in court proceedings, to the detriment of other evidence, such as scientific, documentary or forensic evidence. The excessive weight given to witness statements stems from the lack of resources for obtaining other more concrete, substantial or conclusive evidence. This has resulted in the emergence of a special kind of witness, known as *testigos criteriados* (defendants or convicts who turn State's evidence), and of informers, who receive benefits, such as release from custody, withdrawal of the charges against them or a reduction in their sentence in exchange for testifying against others. This mechanism was introduced under the so-called "Anti-*Maras* Act" of 2004. Although the Act was declared unconstitutional, the use of these types of witnesses continues to this day.

86. The divide between the Institute of Forensic Medicine (responsible for DNA analyses, psychiatric evaluations and autopsies) and the Scientific-Technical Division of the National Civil Police means that it is difficult to centralize the compilation and processing of documentary and expert evidence as is required.

87. Often those who turn State's evidence are used against their co-defendants in the courts. Serious doubts surround the credibility of statements obtained in this manner. This could undermine the fairness of trial proceedings. Some detainees reported not knowing who had testified against them since the identities of the witnesses had not been disclosed. This made it impossible to cross-examine them. The defence team must be informed of the identity of all witnesses and, save in exceptional cases, so must the defendant.

I. The absence of information and lack of reliable statistics

88. Reliable statistics are required to fully understand the reality of the situation regarding deprivation of liberty in El Salvador, as well as to design adequate and effective policies for addressing the country's problems. The absence of reliable information and the lack of communication within the national justice system distort perceptions of how the system really works and makes measures to tackle the various problems less effective.

89. The Working Group has received statistical information from various Government and judicial institutions that reveal serious discrepancies in data on important matters, such as the percentage of offences that can be attributed to members of the *maras* or other gangs. Representatives of the Ministry of Justice told the Working Group that approximately 10,000 prisoners were active or former members of *maras* or other gangs, mainly the MS-13 (Mara Salvatrucha) and Mara-18 (M-18). Officials from the Attorney General's Office, however, set the number at 13,000. Other authorities maintain that the *maras* and other gangs have no less than 64,000 members between them and can count upon the potential support of a further 400,000 persons linked to them, for family reasons, on account of where they live or as a result of threats or pressure.

90. In the meeting with the judges of the Supreme Court, the Working Group was told that there is no computerized system for following up on criminal cases or on prisoners and detainees.

91. Several convicts complained to the Working Group that they had never received written notification of their sentences. Some never saw their sentences. Prison authorities stated that often they have to petition the court clerk's office several times for a copy of the sentences or judicial decisions. This means that they often do not know what the real status of a prisoner is. It also prevents prisoners from claiming their entitlements, such as conditional or early release.

92. In some cases, prison authorities do not know whether a prisoner has already served their sentence and consequently whether they should be released. Some detainees complained to the Working Group that they should already have been released. Prison authorities replied that they habitually petition the courts for information on the legal status of prisoners but their requests for information usually remain unanswered.

J. Absence of information on prison transfers

93. The Working Group is concerned by the total lack of information given to detainees when they are transferred to other prisons. In some reported cases, detainees were transferred at night to prisons far from their homes. They were not allowed to take any belongings with them, and their families were not notified. Other prisoners complained that they had been transferred from a prison with a less restrictive regime to one with a closed and more rigid regime.

94. During the Working Group's visit, on 27 January 2012, 580 prisoners were transferred from the Apanteos, San Vicente and Usulután prisons to sector 5 of the "La Esperanza" Prison in Mariona without having been informed of the reasons for the transfer.

K. Extreme overcrowding of prisons and police jail cells

95. According to the information provided by the Directorate-General of Prisons, El Salvador has 21 prisons, including 3 penitentiaries and 4 establishments for juveniles. The Working Group observed very serious overcrowding in both prisons and police jail cells. The maximum capacity of the jail at the general headquarters of the National Civil Police in the central area of San Salvador, for example, is 30 persons, but 70 persons were being held there, in other words, more than twice as many as there should be. In other police jails, overcrowding is more than 200 per cent of capacity. Nationwide, the number of persons in police jails exceeds maximum capacity on average by 63 per cent.

96. This overcrowding means that conditions of detention amount to inhuman and degrading treatment. The situation of women detainees in police jails is particularly worrying since they have practically no access to personal hygiene items.

97. The prison population rose by 47 per cent between 2005 and 2010, and is now 313 per cent of the capacity of the country's prisons. With a total prison population of 25,411 inmates (including 2,440 women) and an installed capacity of only 8,100, it is fair to say that the prison system has collapsed. Those awaiting trial or sentencing are housed in the same cells as those who have been convicted, due to the chronic lack of space.

98. The "La Esperanza" Prison in Mariona held, at the time of the Working Group's visit, 5,234 inmates (4,231 convicts and 1,003 persons with proceedings pending), who were divided into 5 sectors. Each sector has 30 cells, which were built to hold 20 inmates each. However, during its visit, the Working Group observed that some cells housed up to 60 inmates. The "La Esperanza" Prison was designed to hold 800 prisoners in total.

99. The Women's Prison in San Salvador houses 1,864 prisoners. The four juvenile detention centres in the country have 460 places, but actually house over 655.

100. More than 2,300 persons awaiting trial are held in police cells, whose combined capacity nationwide is no more than 600. These cells were not designed to hold people for more than 72 hours, but are being used to hold persons who are awaiting trial, as well as persons remanded in custody during their trials.

101. The Working Group also observed serious overcrowding in the National Psychiatric Hospital.

102. It should be noted that in the juvenile detention centre in San Miguel, minors who have not been convicted of any offence are housed together with those who have. The two police jails available for minors do not have the capacity to hold them in adequate conditions. There is no special police jail for young or adolescent girls. The Office of the Human Rights Advocate complained that some female minors are kept handcuffed to a bed.

103. In the prisons it visited, the Working Group detected serious problems regarding bathroom facilities, access to drinking water, waste disposal, electricity, heating and ventilation. Lawyers and relatives are subjected to rigorous checks and searches by members of the Armed Forces, which control access to the prisons. Relatives are kept at a distance from prisoners, and contact, even during visits, is often only visual.

104. Particularly worrying are the cramped conditions in the Ciudad Barrios Prison and the high-security and isolation cells of the prison in Mariona, not to mention the hygiene conditions in these establishments.

105. As a result of these problems and the overcrowding, as well as the control that the gangs wield inside the prisons, fights are commonplace. Two days prior to the Working Group's visit, for example, a fight broke out among inmates of the Usulután Prison that left five dead. On 6 January 2012, two prisoners died after a fight in the prison of Cojutepeque, which was built for 320 inmates, but currently houses over 1,000.

106. In 2011, 18 prisoners died violent deaths in Salvadoran prisons.

107. The Government acknowledged the serious problem of overcrowding in prisons and police jails and told the Working Group that it was trying to encourage civil society to participate in the search for solutions to this pressing problem.

108. One positive aspect that the Working Group would like to mention are the activities arranged for female inmates of the Ilopango detention centre, which include music workshops and concerts. The shoe factory in the Apanteos Prison in Santa Ana, which is part of the Metamorphosis Project, and the projects under way in the Izalco Prison Farm are also commendable initiatives.

L. Arrests without a warrant

109. The Working Group was informed that mass arrests are made without warrants, particularly of young persons suspected of being gang members. The Working Group understands that officers of the National Civil Police have the power to arrest without a court order if they find someone in *flagrante delicto*. Flagrancy should not be used, however, to justify mass detentions.

110. The Working Group was informed that, in such situations, neither the Attorney General's Office nor the judiciary has the capacity to investigate and process such a large number of cases one by one, and the detainees are usually released before the deadline for bringing them before a judge.

111. The Working Group received reports that in 2011, the National Civil Police made over 56,000 arrests: of these, only 7,000 were made on the basis of a warrant.

M. Complaints against officials of the judiciary and police officers

112. According to information provided by the Office of the Human Rights Advocate, the Armed Forces and the National Civil Police are the institutions that are most frequently denounced for violating the right to personal liberty. The Office of the Human Rights Advocate reported that it receives on average 82 complaints against National Civil Police officers every day. Of 30,240 complaints against the National Civil Police received in 2011, 2,701 involved the right to personal liberty and 98 the right to security of person. During the Working Group's visit, 86 National Civil Police officers had been placed in detention; 107 officers were dismissed from the police force in 2011.

113. The Working Group was also informed that 1,085 complaints filed against court officials were pending review and analysis in the Judicial Investigation Department of the Supreme Court of Justice.

114. The Public Comptroller of the Attorney General's Office also processes complaints filed by victims of abuses committed by prosecutors and agents of the Public Legal Service.

115. In total, 92 complaints have been lodged against members of the Armed Forces who guard prison perimeters and control access to prisons.

116. The judges of the Supreme Court of Justice are elected by the Legislative Assembly after arduous consultations among the political parties represented in the Assembly. Various representatives of Salvadoran civil society reported that the judiciary is hampered by partisan politics, corruption and institutional weakness at various levels.

N. Migrants, asylum seekers and refugees

117. It is not an offence to enter El Salvador illegally. Foreigners who must be expelled from Salvadoran territory are placed in administrative custody and, since 2008, sent to the Centre for the Comprehensive Care of Migrants. The Centre, which has a budget of US$ 128,000, receives support from a team of psychologists, social workers and legal assistance providers. NGOs can visit the Centre when they wish.

118. The Working Group noted that the five-day time limit for deporting a foreigner to their country of origin or the country they came from is not observed. Foreigners remain at the Centre for up to weeks and even months. They may apply for a writ of habeas corpus before the Constitutional Division of the Supreme Court of Justice, but, this is rare in practice. A College for Migration Affairs was set up in 2011.

119. Legislation on migration is out of date. It dates back to 1958 and consequently fails to take into account the increase in migration witnessed in Central America, including El Salvador.

120. As far as political asylum is concerned, asylum may be applied for at the border or once inside Salvadoran territory, including in the Centre for the Comprehensive Care of Migrants. A committee has to rule on a petition for political asylum within 72 hours.

121. The Office of the United Nations High Commissioner for Refugees (UNHCR) is represented by the Anglican Church in El Salvador. A committee decides whether applications for refugee status should proceed. If so, the foreigner is given a provisional accreditation or identity card and allowed to leave the Centre.

V. Conclusions

122. **The Working Group has observed that, despite the numerous legislative reforms and policies implemented in the last few years, El Salvador has yet to find an adequate balance between its public security needs and the need for citizens' security on the one hand, and respect for the rights to liberty and due process and the rights of detainees on the other.**

123. **The Working Group considers the need to address the problem of insecurity in El Salvador to be a legitimate State concern. The right to security is an important human right, linked to the right to life. At the same time, the right to liberty and the right to not be deprived arbitrarily of one's liberty are also important human rights of extraordinary value and must be safeguarded. Public security cannot be achieved without due consideration and respect for the right to liberty and the right to be free from arbitrary arrest or detention.**

124. **In the past seven years, the general public security policy in El Salvador has mainly centred on police action to control and repress crime. The Working Group notes that this approach, which revolves around increasing the use of police custody and repressive police action and has been based on, first the "iron fist" policy, and then the "super iron fist" policy, has not produced the positive results hoped for. Although the average number of homicides fell from 14 per day at the time of the Group's visit to 5 in mid-2012, El Salvador is still considered to be one of the most dangerous countries in the region, having recorded a total of 27,162 homicides between 2005 and 2011. The situation would seem to have improved given that, since the negotiations between the *maras* or gangs began in March 2012, the daily murder rate has fallen to four or five per day.**

125. **The Working Group recalls the principle that criminal responsibility is always individual. That principle must not be forgotten in the implementation of the Act outlawing *maras* and other criminal gangs, groups, associations and organizations. It is unacceptable for persons to be detained simply because their relatives, friends or neighbours are linked to the *maras* or other gangs.**

126. **Use of pretrial detention is excessive. Detention must be an exceptional precautionary measure used solely when there are no other measures to ensure the presence of the accused at trial or to prevent tampering with the evidence.**

127. **The right to be tried without delay includes the right to a prompt ruling on appeals and cassation proceedings.**

128. **The right to an effective defence has been undermined by the intrusive and even degrading measures to which defence lawyers and even public defenders and prosecutors and members of the Attorney General's Office and the Office of the Human Rights Advocate have been subjected by members of the Armed Forces responsible for controlling entry to prisons.**

129. **The right to a defence has also been undermined by the practice of holding persons awaiting trial in police jails (*bartolinas*), which were designed for holding people for up to 72 hours, not for weeks, let alone months.**

130. **The Attorney General's Office must always bear in mind that its legal duty is to investigate by seeking both incriminating and exonerating evidence. Its mission is justice. It must obtain evidence and evaluate it objectively, without seeking solely to secure a conviction.**

VI. Recommendations

131. **In addition to the general recommendation to tackle the problems identified and described above, the Working Group wishes to make the following recommendations regarding deprivation of liberty in El Salvador. This list of recommendations is not exhaustive and is intended to help solve the problems that the Working Group thinks need to be addressed.**

132. **The recommendations are as follows:**

(a) Incorporate the elimination of overcrowding in prisons, the fight against impunity for human rights abuses and the restoration of public confidence in the National Civil Police, as established in the Peace Accords, into the new general security policy announced by the Government;

(b) Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to help solve the problems of overcrowding and the inhuman conditions observed in prisons and detention centres;

(c) Enact legislation to regulate detention in psychiatric hospitals and thus safeguard the human rights of patients;

(d) The detention of minors must always be viewed as an exceptional measure;

(e) Review and update the legislation on irregular migrants, refugees, asylum seekers and alien affairs. The current legislation dates back to 1958. National legislation on refugees must fully comply with the Convention relating to the Status of Refugees and other relevant international instruments;

(f) Take urgent measures and, if necessary, establish special mechanisms, to identify and immediately release all persons who have served their sentences but remain in custody;

(g) Increase the number of judges appointed to supervise prisons so that they can effectively control the legal status of detainees;

(h) Maximize the number of convicted persons released on probation or sentenced to semi-open regimes, thereby increasing opportunities for rehabilitation;

(i) Consider, as applicable, ratifying or acceding to the International Convention for the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court and the ILO Indigenous and Tribal Peoples Convention No. 169 (1989);

(j) Maintain the budget allocated to the judiciary at least 6 per cent of State revenue and ensure that the allocated funds are fully utilized;

(k) Strengthen the Judicial Investigation Department of the Supreme Court of Justice and the Office of the Inspector-General of the National Civil Police as part of the fight against impunity;

(l) Strengthen the victim and witness protection programmes, but without in any way impairing the right to a defence;

(m) Strengthen police stations in terms of staff and equipment and improve the investigative capacity of the National Civil Police;

(n) Improve the gathering of scientific, expert and documentary evidence, possibly by establishing a forensic agency that would combine the functions currently performed by the Institute of Forensic Medicine and the Scientific-Technical Division of the National Civil Police;

(o) Observe the peremptory deadlines for bringing a person before a judge (72 hours), for convening the initial hearing (72 hours), and for concluding the trial (6 months);

(p) Establish a remedy of habeas corpus in domestic legislation that is truly effective. Although that remedy already exists in Salvadoran law, it does not seem to work in practice;

(q) Encourage visits by NGOs to prisons and detention centres.

Appendix

[*Spanish only*]

Centros visitados

Centros penales o de detención

- Centro Penal de Ciudad Barrios, San Miguel
- Granja Penitenciaria de Izalco
- Centro Penal de Mariona
- Centro de Menores de Ilobasco
- Penitenciaría Occidental de Santa Ana
- Centro Penal de Apanteos
- Cárcel de Mujeres de San Salvador
- Bartolinas policiales en Soyapango
- Delegación General policial de San Miguel

Otros centros

- Centro de Atención Integral al Migrante
- Hospital Nacional Psiquiátrico