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Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo

Informe del Grupo de Trabajo sobre la Detención Arbitraria

Adición

Misión al Brasil*

Resumen

El Grupo de Trabajo sobre la Detención Arbitraria llevó a cabo una visita oficial al Brasil del 18 al 28 de marzo de 2013 por invitación del Gobierno.

Durante la visita, el Grupo de Trabajo se reunió con altos cargos de los poderes ejecutivo y judicial, así como con autoridades estatales y locales. El Grupo de Trabajo visitó lugares de privación de libertad en Brasilia, Campo Grande, Fortaleza, Río de Janeiro y São Paulo.

El Grupo de Trabajo observó la existencia de distintas iniciativas positivas, como las enmiendas introducidas en 2011 al Código de Procedimiento Penal que disponen que la prisión provisional debe considerarse como el último recurso y aplicarse a quienes hayan cometido delitos que se castiguen con una pena de prisión inferior a cuatro años.

No obstante, el Grupo de Trabajo señala una serie de cuestiones que deben abordarse de manera efectiva para garantizar una protección rigurosa contra la privación arbitraria de libertad. Observó que, pese a las reformas legales positivas que se han introducido en el sistema de justicia penal, en la práctica el acceso de las personas arrestadas y detenidas a la justicia presenta graves deficiencias en muchos aspectos.

* El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe propiamente dicho, que figura en el anexo del resumen, se distribuye únicamente en el idioma en que se presentó.

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El Grupo de Trabajo manifiesta su preocupación por el uso excesivo de la privación de libertad en el Brasil, que tiene una de las poblaciones penitenciarias más numerosas del mundo, y por el número de personas que en la actualidad están en prisión preventiva. En los últimos años ha aumentado un 33% el número de personas indígenas en el conjunto de la población penitenciaria, que a menudo son víctimas de discriminación, tanto en la aplicación de medidas preventivas como en la imposición de castigos, hecho que frecuentemente conlleva un endurecimiento de las condiciones de reclusión. Se observa una tendencia preocupante a recurrir a la privación de libertad como primera medida en lugar de como último recurso, tal y como requieren las normas internacionales de derechos humanos.

Como consecuencia del uso excesivo de la detención, el hacinamiento es un problema frecuente en los lugares de detención. En algunos casos, el número de detenidos duplica la capacidad del centro.

La falta grave de una asistencia letrada efectiva, y en ocasiones su ausencia, ha debilitado el acceso a la justicia de los detenidos. La mayoría de los reclusos son jóvenes, afrodescendientes de escasos recursos que no pueden costearse un abogado privado. La gran carga de trabajo de los defensores públicos también plantea un grave problema que incide negativamente en el derecho de los detenidos a un trato igualitario y a un juicio justo.

La reclusión obligatoria de consumidores de drogas y sustancias químicas también es un motivo de preocupación que plantea cuestiones en relación con varios derechos humanos fundamentales, en particular porque no hay posibilidad de revisión judicial una vez que el consumidor de drogas ha sido encarcelado.

El Grupo de Trabajo reconoce los desafíos a los que debe hacer frente el Brasil para reprimir el número cada vez mayor de delitos, y que a menudo la opinión pública apoya unas leyes y unas políticas que son implacables con la delincuencia. No obstante, el Grupo de Trabajo recuerda que las políticas y las medidas relativas a la privación de libertad a nivel federal y estatal deben ajustarse plenamente a las normas internacionales de derechos humanos, a las que el Brasil se ha adherido mediante los acuerdos que ha firmado y ratificado. Estas normas internacionales protegen claramente contra la privación arbitraria de libertad.

Anexo

[Inglés únicamente]

Report of the Working Group on Arbitrary Detention on its visit to Brazil (18 to 28 March 2013)

Contents

I. Introduction

1. The Working Group on Arbitrary Detention conducted an official visit to Brazil from 18 to 28 March 2013 on the invitation of the Government. The delegation comprised two members of the Working Group, Roberto Garretón (Chile) and Vladimir Tochilovsky (Ukraine). They were accompanied by staff members of the Working Group secretariat.

2. The Working Group thanks the Government of Brazil for the invitation to visit the country. The visit was the eighteenth to Brazil by a human rights mechanism of the United Nations. The Working Group was able to carry out the various stages of the visit thanks to the full cooperation of the Government. It also thanks the United Nations Development Programme for its assistance in preparing the visit. The Working Group also extends its appreciation to the civil society organizations that it was able to meet in Brazil.

3. The Working Group benefited from various meetings held with federal and State authorities and the valuable information they provided.

II. Programme of the visit

4. The Working Group met with senior authorities from the executive and judicial branches of the State, including the Minister for Justice; the Minister for Health; the Minister and Chief of the General Secretariat of the Presidency of the Republic; the Minister and Chief of the Human Rights Secretariat of the Presidency of the Republic; the Minister and Chief of Staff of the Presidency of the Republic; members of the Superior Tribunal of Justice and the National Council of General Public Defenders; a representative of the Federal Council of Lawyers Guild of Brazil; the National Council of the Public Ministry; the National Council of Justice; the National Secretariat of Public Security; the National Penitentiary Department; the National Ombudsman on Human Rights; the Human Rights Defence Council; the Secretariat for Policies on Women; the Secretariat for Policies on Promotion of Racial Equality; the Health Provision Secretariat; the National Secretariat for the Promotion of Children's and Adolescents' Rights; and the National Secretariat for the Promotion and Defence of Human Rights.

5. In all the cities that it visited, the Working Group met with officials of ministries, first-instance judges and prosecutors, and local authorities. In the Federal District, it met with representatives of the Tribunal of Justice, the Public Ministry and the Public Defence Office, as well as with representatives of the State Secretariats of Public Security, Children and Minors, and Justice, Human Rights and Citizenship. In the State of Ceará, the Working Group met with representatives of the Tribunal of Justice and the Public Ministry and Public Defence, as well as with the Ceará Secretariat of Justice and Citizenship. In Rio de Janeiro, it met with representatives of the Tribunal of Justice, the Public Ministry and the Public Defence, as well as with the Secretariat of Social Assistance and Human Rights and the Secretariat of Security.

6. During its visit to São Paulo, the Working Group conducted meetings with the State Secretariat of Public Security and the State Secretariat of Penitentiary Administration, as well as with representatives of the Tribunal of Justice, the Public Ministry and the Public Defence Office. Lastly, in Mato Grosso do Sul, the Working Group held meetings with representatives of the Tribunal of Justice, the Public Ministry and the Public Defence Office, as well as the State Secretariat for Justice and Public Security and the State Agency of Administration of the Penitentiary System. In the States visited, the Working Group also met with members of Parliament, with representatives of bar associations, representatives of international organizations and Brazilian civil society organizations.

7. The Working Group appreciates the fact that it was able to visit all the places of detention it had requested and to conduct private interviews with the detainees of its choice, without restriction.

8. The Working Group visited places where persons are deprived of their liberty in Brasilia, Campo Grande; Fortaleza; Rio de Janeiro; and São Paulo. In Ceará, the Working Group made an unannounced visit to a police station, and visited the III Detention Facility "Professor Juca Neto" (Complejo Penitenciario Estadual Itaitinga II) and the Psychiatric Unit of the Sanatory and Penal Hospital Ota Lobo. In Rio de Janeiro, it visited the Penitentiary Complex of Gineciro in Bangu "Vicente Piravige", as well as the Centre Belford Roxo (CAI-Baixada). In the State of São Paulo, the Working Group visited the Experimental Health Unit (Unidade Experimental de Saúde) as well as the Temporary Detention Facility I de Pinheiros. Lastly, In the State of Mato Grosso de Su the delegation visited the Colónia Agrícola of Campo Grande.

III. Overview of institutional and legal frameworks

A. Political and institutional system

9. The law provides for an independent judiciary. There are specialized courts for military, police, labour, juvenile, family matters and elections. Article 92 of the federal Constitution establishes that the judiciary is made up of the Federal Supreme Court of Justice, the Superior Court of Justice, the federal regional courts, labour courts, electoral courts, military courts, federal and State district courts, and judges.

10. The States have the authority to organize their own justice system within the federal system, provided that they respect the principles set forth in the Constitution.

11. Military courts at the federal level comprise a Superior Military Court, military courts and judges. Ten judges of the Superior Military Court are active-service military, while five of them are civilians. Sentences handed down by the Superior Military Court may be appealed before the Federal Supreme Court of Justice. Military courts are not competent to tried civilians.

12. The National Council of Justice (Conselho Nacional de Justiça) is the main supervising body of the judiciary at the federal level. Within the Council, the Mutirão Carcerário monitors and oversees prisons. Every State has a local prison council (conselho penitenciário) that makes recommendations to judges on whether individual prisoners should be paroled, pardoned or have their sentences commuted, as well as whether they should be moved to a lower level of security.

13. The Working Group was informed that the judiciary was underfunded and often subject to political and economic influence. The backlog in federal and State cases frequently led courts to dismiss old cases unheard. At the same time, the Working Group noted the efforts made by the judiciary, the National Council of Justice and other organs to guarantee access to justice throughout the country.

14. The Office of the Public Prosecutor (Promotor Público) is responsible for bringing criminal charges under federal or State law. Prosecutors rely solely on the investigations of the Federal Police and the State Civil Police to establish whether enough evidence exists to lay criminal charges. Prosecutors do not have their own investigative capacity.

15. Military prosecutors are responsible for bringing criminal charges under federal or State law for violations of the Military Penal Code.

16. Complementary Law No. 80 of 12 January 1994 provides for the creation of public defenders' offices (Defensoria Pública) in each State. In Brazil today, there are approximately 5,500 public defenders, 12,000 prosecutors and 16,000 judges.

17. The Secretariat for Human Rights of the President of the Republic (Secretaria de Direitos Humanos da Presidência du Republica) is responsible for elaborating projects and coordinating tasks to promote and protect human rights. The office of the National Human Rights Ombudsman has received, since its establishment, more than 170,000 complaints of alleged human rights violations, including cases of arbitrary detention.

18. The Federal Police, operating under the Ministry of Justice, is a small, primarily investigative, force.

19. Most police forces come under the control of the States. The State police acts under the authority of the governors of the State, and is divided into the uniformed military police, charged with maintaining order and repressing behaviour that might affect the security of citizens, and the civil police, composed of plain-clothed officers who have an investigative function.

20. The military police is considered an army auxiliary and reserve force. A special police court exercises jurisdiction over State military police, except for police members those charged with "wilful crimes against life" (in which case, common civilian courts are competent). Delays in the proceedings of this court have allowed many cases to expire due to the statute of limitations.

21. Military police officers are tried in military courts, in which judges and penal prosecutors hearing cases are military officers.

22. The civil police force is responsible for initiating police inquiries (enquérito policial), which is the first step of a criminal prosecution. The force has a judiciary function and operates at State level. The infrastructure of the force includes the agencies responsible for identification, criminology and forensic medical examination.

23. Municipalities may constitute their own municipal police to protect property, services and facilities.

24. The offices of the police Ombudsmen (Ouvidorías de Policia) in the States were created in the 1990s to fill the void left by the lack of action taken by the Public Prosecutor's offices in overseeing police agencies. They are external control mechanisms tasked with disciplinary oversight of the State police.

25. The Internal Affairs Units (Corregedorías) of the military and civil police forces in the States have real investigative capacity for police misconduct, including cases of ill-treatment or torture.

26. The National Penitentiary Department (Departamento Penitenciário Nacional), which comes under the Ministry of Justice, supervises corrections facilities in each State, including their funding needs, and maintains maximum security federal prisons.

27. Brazil does not have a centralized prison authority with executive powers; most prisons are under State-level authorities. The Law on Criminal Execution No. 7.210 of 11 July 1984 regulates the organization of the penitentiary system. The Law on Criminal Execution established community councils (*conselhos da comunidade*) to monitor prisons through unannounced visits. Membership in the Council is an unpaid voluntary position

28. The Law on Criminal Execution also outlines the functions of the organs of criminal prosecution, such as the judge on the application of sentences (Juiz da Execução), the Public Prosecution Office (Ministerio Publico) and the Public Defence Office (Defensoria

Publica). This law regulates all aspects relating to the treatment of prisoners, their rights and duties.

29. The Law on Criminal Execution provides for three penitentiary regimes: closed regime (prisons); semi-open regimes (farming and industrial colonies) and open regimens (half-way houses).

B. International human rights obligations

30. Human rights treaties have a superior hierarchic level than ordinary domestic laws.

31. With regard to the protection of human rights, Brazil is a party to the core universal international and regional human rights treaties and agreements, including the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It has recognized the specific competences contained in article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (individual complaints); in articles 8 and 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (inquiry procedure); and in articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Inter-State complaints and individual complaints).

32. Brazil is a party to the Convention on the Rights of Persons with Disabilities, the Optional Protocol thereto, and to the International Convention for the Protection of All Persons from Forced Disappearance. It is not a Party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

33. Concerning the Second Optional Protocol to the International Covenant on Civil and Political Rights, Brazil has submitted declarations or reservations to its article 2.

34. Brazil has also adhered to the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, the Geneva Conventions and the Protocols additional thereto, the fundamental conventions of the International Labour Organization, the Rome Statute of the International Criminal Court, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization.

35. The Working Group was informed during its visit that Brazilian domestic legislation and jurisprudence only rarely refer to international human rights principles and norms.

C. Judicial guarantees

36. At the national level, the Constitution of the Federative Republic of Brazil of 1988 affirms, in its Title I, that the dignity of the human person is a fundamental principle of the State and central to its commitment to the rule of law. The Constitution also indicates that the State's international relations are governed by the prevalence of human rights.

37. The Constitution provides protection for core fundamental rights, including the right not to be arbitrarily deprived of one's liberty. Title II of the Constitution defines the fundamental rights of all persons, and outlines the State's commitment to protecting those rights.

38. The Constitution also provides, inter alia, for the right to free legal assistance for the indigent; the right of arrested persons to specific judicial remedies, such as habeas corpus; the right of an arrested person to be informed of his or her rights; the right to have a judicial order revoking an illegal arrest and the right not to be imprisoned where the law permits release on one's own recognizance. Various laws have been enacted in recent years that have strengthened the constitutional right to liberty.

39. The Constitution prohibits arbitrary detention. Only judges may decide on the validity of any deprivation of liberty. Arrests must be made with a warrant, with the exception of suspects caught in the act. Police officers must bring a person detained before a judge no later than the day after the person's arrest. They may arrest an individual only on the basis of a judicial warrant issued by a competent judicial authority, with the exception of cases *in flagrante delicto*. Suspects must be informed of their rights at the time of the arrest or before being taken into custody for interrogation. Arrest warrants must be based on sufficient evidence.

40. The Criminal Procedure Code of 1941 was substantially reformed in 2011. It regulates preventive imprisonment and detention. Its article 283 establishes that no person may be imprisoned except for *flagrante delicto* or if decreed in writing, with due justification by the competent judicial authority.

41. Provisional detention is limited to five days under specific conditions, although a judge may extend this period. Temporary detention is for an additional five-day period for processing. Preventive detention is for an initial period of 15 days.

42. Article 311 of the Criminal Procedure Code establishes that preventive detention may be ordered by the judge, ex officio, as a result of a criminal lawsuit or upon the request of the Public Prosecutor, the plaintiff or attendee, or by a representative of the police authority. According to article 313, preventive detention may also be ordered as a guarantee for public order, economic order or if deemed convenient for criminal instruction.

43. If a detainee is caught *in flagrante delicto*, the police are required to inform a judge thereon within 24 hours. Use of force during arrest is prohibited unless the suspect attempts to escape or resists. The court must charge the individual at the latest by the end of the day following the arrest. The chief judicial officer determines whether it should proceed and, if so, assigns it to a State prosecutor, who decides whether to issue an indictment.

44. The police inquiry (*enquérito policial*) is non-accusatorial and is conducted confidentially. At the end of the police inquiry, when the police have gathered enough information, the evidence is handed over to a judge, who then passes the case to a public prosecutor, who reviews the file and decides whether to file charges.

45. The judge may impose precautionary measures, including detention. Detention is imposed in order to (a) uphold the public or economic order; (b) allow the criminal investigation to proceed without inhibition; and (c) guarantee the future application of criminal law.

46. Detainees arrested *in flagrante delicto* must be charged within 30 days of their arrest; other defendants must be charged within 45 days. This period may be extended. Bail is available for most crimes, but is granted infrequently.

47. The law does not provide for a maximum period of pretrial detention, although it is estimated at being usually between 80 and 120 days. Authorities may hold detainees for the duration of the investigation and subsequent trial, subject to judicial review. If a court acquits a defendant who was previously held in detention, the Government must compensate the defendant for financial losses as well as for moral prejudice incurred due to incarceration.

48. The Constitution provides for the right to a fair and public trial. The law entitles a detainee to prompt access to an attorney. Defendants and their attorneys have access to all court-held evidence related to their cases.

49. Defendants enjoy the presumption of innocence. They have the right to confront and question witnesses. Defendants have a right of appeal to State superior courts and to appeal State court decisions to both the Federal Superior Justice Court and the Federal Supreme Court on constitutional grounds.

50. Cases involving capital crimes are tried before a jury. Judges try those accused of lesser offences. Confessions are allowed as evidence, with few restrictions on their use in courts.

D. Asylum seekers, refugees and migrants

51. Refugee Law No. 9474/97 provides for the granting of asylum or refugee status in accordance with the Convention relating to the Status of Refugees and the Protocol thereto. The Government also provides temporary protection to persons who may not qualify as refugees. Refugee status is granted to approximately 35 per cent of those who apply. The Government affords protection against refoulement.

52. Provisions for the imprisonment of foreigners for reasons of irregular migration, and deportation and extradition procedures, are set out in Law No. 6.815/1980. No detention centres for migrants in an irregular situation or asylum seekers are available. In practice, if a foreigner detained for immigration purposed declares her or his will to apply for political asylum in Brazil, that person is immediately released.

53. CONARE, the National Committee for Refugees, is an interministerial body chaired by the Ministry of Justice that comprises representatives of the Ministries of Foreign Affairs, Education, and Labour and Health, in addition to representatives of the federal police and civil society organizations. The Office of the United Nations High Commissioner for Refugees in Brazil is also a member of the Committee, although without a right to vote; the Federal Public Defender's Office (Defensoria Publica da União) is a consultant member.

54. Brazil is also a party to the Convention on the Reduction of Statelessness and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession. No procedures for determining statelessness status have, however, been established.

55. National migration laws seem to be outdated, which results in migrants using the asylum process in an attempt to legalize their stay in the country.

56. In 2012, CONARE signed an agreement with the Federal Public Defender's Office to allow public defenders to interview asylum seekers and recognized refugees and to represent them in judicial procedures.

57. In 2010, a new law granted permission to the military forces at State borders to make arrests and to search persons, vehicles, vessels and aircraft. The inability of border agents and migratory authorities to identify persons with international protection needs can lead to the detention of asylum seekers, prevention from entering the territory or return to their country of origin. Refugees may thus be intercepted as illegal migrants, especially in the Amazon region.

IV. Findings

A. Positive aspects

58. The Working Group recognizes that the Brazilian authorities are confronting an authoritarian culture, the legacy of colonial times and of 21 years of military dictatorship (from March 1962 to March 1985). Nonetheless, the federal Constitution of 1988 is a modern instrument that consecrates and incorporates international human rights principles and norms. IN paragraph 2 of article 5, the Constitution includes among its fundamental rights and guarantees other rights that derive from the international treaties to which Brazil is a party. The Constitution gives particular force to the writ of *habeas corpus*.

59. The Working Group observed a number of positive recent initiatives, such as the amendments made in 2011 to the Criminal Procedure Code stipulating that preventive detention is to be considered a last resort and applicable solely to those who have committed crimes punished with more than four years of imprisonment. The provision on precautionary measures is also progressive, providing alternative measures to the deprivation of liberty.

60. Law No. 12.403 on precautionary measures, approved in 2011, proposes nine alternatives to pretrial detention, such as bail and electronic monitoring. Offenders who commit non-violent crimes, which in the case of conviction could carry up to four years in prison, are not placed in pretrial detention.

61. The Law on Penal Execution, amended in 2011, envisages benefits, such as a reduction in a prison sentence if the prisoner has taken the initiative to pursue educational studies. Positive legislative reforms regarding adolescents who are in conflict with the law and in relation to persons with mental disabilities have been enacted as well.

62. The Working Group also observed good practices that have the potential to be strengthened, which would offer further protection for the right to be free from arbitrary deprivation of liberty. Some include existing institutions that can be strengthened, such as the National Council of Justice task force, which visits prisons and has assisted in recent years in the release of many detainees who were illegally detained. The task force conducted reviews of more than 295,000 criminal cases in 2010 and 2011, resulting in the release of almost 22,000 prisoners. Similar independent task forces could assist in protecting against arbitrary detention if they were to be established at the level of the States in Brazil.

63. In the State of Rio de Janeiro, a task force was created to address overcrowding in prisons. It reviews the sentences and status of inmates to determine whether any should or could be released. In July 2011, in the State of São Paulo, the National Council of Justice began to review the sentences of 94,000 inmates.

64. The Working Group commends the Government for the positive efforts it has made, particularly through legislative reforms, to improve the situation of deprivation of liberty in Brazil.

B. Excessive recourse to the deprivation of liberty

65. Despite the positive initiatives observed, the Working Group draw the attention of the Government to a number of issues that need to be addressed effectively in order to ensure rigorous protection against arbitrary deprivation of liberty.

66. The Working Group observed that, in practice, access to justice for arrested persons and detainees is severely deficient in many aspects. Several prerequisites provide fundamental protection against the arbitrary deprivation of liberty; they include core rights of arrested and detained persons at the pretrial and trial stages, and after conviction. Deprivation of liberty is thus considered to be arbitrary if particular rights to a fair trial are violated. These rights relate to the right to be presumed innocent until proven guilty by law, the right to effective legal defence, the right to be tried without undue delay and the right to appeal to a higher court.

67. Throughout their visit, the members of the Working Group consistently referred to international human rights standards, particularly those enshrined in the International Covenant on Civil and Political Rights, to which Brazil has acceded. In particular, article 9 of the Covenant envisages safeguards against the arbitrary deprivation of liberty.

68. Although there is no legal maximum fixed term for pretrial detention, a period of between 80 and 120 days is normally cited in case law. This period corresponds to the sum of all terms legally provided for in criminal proceedings from initial investigation through to imprisonment.

69. With a prison population of more than 549,000, Brazil has the largest in Latin America and is one of the largest in the world. There are approximately 248 detainees per 100,000 inhabitants. Even more troubling, around 217,000 detainees (43.5 per cent) are awaiting trial in pretrial detention. This percentage is especially significant in the States of Amapá, Minas Gerais, Pernambuco, Amazonas, Sergipe and Piauí. Some 91,600 convicts work; 3,392 prisoners are foreigners.

70. The female prison population, currently around 38,430 (7 per cent), has, in recent years, been growing at twice the rate as that of men. The proportion of indigenous persons in the prison population has also increased by 33 per cent. Many people in prison have been accused of drug trafficking (24.3 per cent) and offences against property (4 per cent).

71. The members of the Working Group were also informed that indigenous persons were often discriminated against both when preventive measures were applied and when punishment was imposed, which often involved harsh imprisonment.

72. The Working Group received serious allegations concerning ill-treatment and abuse during apprehension and arrest, as well as during detention in police stations, particularly in tort of young Afro-descendants.

73. A study presented in 2012 by the Instituto Terra, Trabalho e Cidadania and the Pastoral Carcerária in the Centro de Detenção Provisória I of São Paulo found that, in Rio de Janeiro and São Paulo, pretrial detention was not sufficiently justified in 93 per cent of cases (the authority limited itself to invoking *in flagrante delicto*), and that, in 63 per cent of them, the legal argument given to prolong detention was “public order”.

74. In addition, the backlog and overwhelming number of cases as resulted in increasing delays in the judging of cases. Judges hear several criminal cases in a single day as a routine practice, which has significantly affected the right to a fair trial.

75. The Working Group observed that judges routinely imprison large numbers of people who have been accused of minor offences, such as petty theft. More than one third of all persons detained on this charge spend more than 100 days in custody, and many spend more time on remand than serving the term to which they are actually sentenced.

76. There are 33,000 people in the prisons of the State of Rio de Janeiro, including 1,600 women. Around 14,000 are in pretrial detention. Some 2,700 people are in a semi-open regimen.

77. Approximately 202,000 people are in detention in the State of São Paulo, including 12,600 women. Some 16,000 people are subjected to alternative measures.

78. According to the Law of Penal Execution modified on 30 June 2011, inmates have a day removed from their sentence for every 12 hours that they attend classes.

79. One worrying trend observed by the Working Group was that deprivation of liberty is being used as the first resort rather than the last, as required by international human rights standards.

80. Detainees are commonly held in police custody and later released without any registration, sometimes without being informed of the offences of which they are accused or of their rights as detainees.

81. Many detainees interviewed by the Working Group complained that judges and prosecutors rarely visited them. They referred to having been victim of the excessive use of force, ill-treatment and beatings during apprehension and their detention in police stations.

82. The excessive use of pretrial detention contributes to overcrowding, the lack of effective separation between convicted prisoners and pretrial detainees, and excessive resort to condemnatory sentences.

83. In addition, owing to poor record keeping and systemic and bureaucratic failings, many inmates remained in detention beyond the term of their sentences.

C. Overcrowding

84. Brazil has four federal prisons and 1,124 State prisons, 55 of which exclusively for women. The total capacity is of these facilities is 355,000;. However, the penitentiary system, however, currently holds some 549,000 detainees and prisoners. Most prisons are in a precarious situation. Their infrastructure is sub-standard, often inadequate, and the number of education, health and welfare professionals working in them is insufficient.

85. As a result of excessive detention, detention facilities are usually overcrowded. In some cases, the number of detainees was found to exceed the capacity by 100 per cent. In addition, this situation could be further exacerbated if the estimated 192,000 arrest warrants currently pending were to be executed.

86. Despite the amendment made to the Criminal Procedure Code in 2011 to allow for alternative measures to detention, the Working Group observed that there had been no substantial reduction in the use of detention since the introduction of the amendment. In incidences where measures such as bail were applied, the detainee was not able to pay the amount required. It should not be assumed, however that these amounts are systematically established at a level higher than the paying capability of individuals.

87. The Working Group found that deprivation of liberty was imposed even in situations where the offence was regarded as minor, such as petty non-violent theft or for non-payment of child support, raising serious concerns with regard to the application of the principle of proportionality.

88. Severe overcrowding in prisons and detention centres is prevalent, particularly in the States of Rio de Janeiro and São Paulo. In a penitentiary system designed to hold 211,255 prisoners, there are currently 342,388. The Pinheiros Women's Facility in the city of São Paulo held 1,261 detainees in a building designed to hold 512. There is no a semi-open centre for women in Brasilia.

89. In the semi-open Agro-Industrial Penal Centre of Gameleira (Mato Grosso do Sul), there were, at time of the Working Group's visit, 630 people deprived of their liberty. Of

them, 470 were working, 240 outside the centre. Each of them was receiving an amount equivalent to the general minimal salary.

90. Overcrowding often requires holding convicted prisoners in pretrial detention centres.

91. In 2010, 57,195 people (12 per cent of the total Brazilian prison population) were imprisoned in police precincts (*delegacías*). Detainees tend to stay for longer than 24 hours because of the lack of space in prison facilities. Police stations were never designed to host detainees for long periods. Police officers thus assume guarding functions. In police stations, detainees have very limited access to medical care and doctors.

92. Public policies that are "tough on crime" lead to a harsh trend of mass incarceration, while most States have neither the capacity nor the structure to deal with the consequences. Endemic overcrowding leads to the mistreatment of prisoners and inadequate facilitates for inmates.

93. In June 2008, the National Penitentiary Department determined that the number of prisoners exceeded the capacity for which the prisons were designed by 40 per cent.

94. Overcrowding has led to inmate unrest and a rising number of riots and killings in prisons.

95. The Working Group considers that overcrowding should be reduced by increasing the use of alternative measures of constraint and alternative sentences, particularly for less serious offences.

D. Prolonged pretrial detention

96. In the fourth largest prison population in the world, 44 per cent are pretrial detainees. During its visit, the Working Group came across cases where prolonged pretrial detention lasted for many months, even years. During that period, detainees were often unaware of the status of their case.

97. The Working Group was constantly informed that a backlog in court cases caused substantial and serious delays in trials. Appeals to the higher courts also took a long time to be settled.

98. The Working Group points out that the excessive recourse to pretrial detention contradicts basic rule of law principles and also has implications for detainees, who are exposed to threats against their life, physical integrity and health, and to abuses and ill-treatment by guards and police officers.

99. Many pretrial detainees were found to be held in a security level inappropriate for the offences that they had allegedly committed. Others had been detained for far longer as pretrial detainees as they would have expected if actually sentenced.

100. The presumption of innocence enshrined by the Constitution seems to be a practice that has been abandoned by judges. Public pressure resulting from the drawn-out nature of judicial trials has led to an increasing number of people in pretrial detention. The Working Group considers that the high number of detainees in pretrial detention could be a consequence of the inability of the criminal justice system to process cases efficiently.

E. Absence of effective legal assistance

101. Access to legal counsel is guaranteed by article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights from the outset of detention.[1] If a detainee cannot afford an attorney, Brazilian law requires the court to provide a public defender or private attorney at public expense. Indigents must be provided by a defence lawyer paid by the State.

102. In its interviews with detainees and prisoners, the Working Group found that free legal assistance was not available to all those who needed it. The problem with access to justice for detainees has been worsened by a severe lack and, in some cases, the absence of effective legal assistance.

103. In the State of São Paulo, which used to employ private attorneys, a State public defender's office was established in 2006. Since then, 610 public defenders have been working in 41 municipalities. The Public Defender's Office of the State of Goiás was opened in June 2011. The first exam for the recruitment of 40 public defenders is under way. In the State of Paraná, 87 candidates were approved and posted. In Santa Catarina, the system of recruitment of lawyers hired by convention (*non concursados*) was declared unconstitutional. At present, 56 public defenders are on duty and operate in 15 municipalities of the State. The State of Rio de Janeiro has a 60 year-old and experienced public defender's system, with more than 800 public defenders (73 exclusively focusing on criminal cases), but it constitutes an exception in the context of the whole country.

104. Public defenders assigned to the penitentiary system should, by law, visit prisons and detention centres at least once a week. A common complaint heard from all parties interviewed, including members of the judiciary, was that there were not enough public defenders or sufficient legal assistance available for those in detention. The majority of those in prison are young, indigenous people and Afro-descendants with poor backgrounds who cannot afford private lawyers. The Working Group observed in general that the majority of those disadvantaged in the criminal justice system, including adolescents and women, were poor and could not afford proper legal defence.

105. The lack of institutional autonomy and of financial and human resources has curtailed the work of public defenders. Their sheer workload is also a critical problem. Public defenders who provide free legal aid can have as many as 800 cases at a time, which has an adverse impact on the right of a detainee to equality and fair trial. Even in States where there is a public defence system, rural areas often do not have public defenders assisting those in detention. The heavy work load also prevents public defenders from carrying out their responsibilities efficiently.

106. The detainees interviewed by the Working Group claimed that they only met their public defender at the beginning of their trial (arraignment), which could be months after their arrest. In some cases, it took years for a detainee to appear in court. A detainee's chance of meeting and discussing his or her case before trial was higher if the detainee could afford a private lawyer.

107. Public defenders do not lack the necessary competency and qualification to carry out their responsibilities; the problem relates mainly to the sheer workload that they have to manage. Furthermore, *pro bono* services are often not available to detainees, such as in the State of São Paulo. Judges informed the Working Group of their own difficulties in handling increasing caseloads. In some places, there are insufficient judges to deal with

[1] See A/CONF.144/28/Rev.1, p. 117.

criminal cases. In Brasilia, there are only nine public defenders to handle the demands of a penal population of 11,500.

108. The Working Group encountered many cases where detainees, although entitled to such benefits as moving from a closed regime to a semi-open one could not do so owing to the absence of legal assistance. Delays in obtaining a judicial order to initiate a process were an issue raised constantly throughout the visit of the Working Group.

109. The mass release of prisoners by the National Council of Judges in recent years shows that the criminal justice system is largely incapable of providing effective and adequate legal assistance in following up on the cases of detainees.

110. The Working Group was also informed of problems experienced by detainees and prisoners in communicating with their relatives and lawyers owing to the absence of telephones or appropriate channels of communication. It learned of several cases in which persons deprived of their liberty had not been able to inform a third person of their choice about their detention for prolonged periods of time. To contact their lawyer, detainees were often forced to communicate through family members during visits. Detainees without a family had no way of contacting their lawyer to obtain information on their case.

F. Compulsory confinement of drug users

111. The compulsory confinement of drug users and chemical dependents is also an issue of concern. Compulsory confinement is one of the three types of confinement provided for in article 6 of Federal Law 10.216/2001; the remaining two are voluntary and involuntary confinement. The latter may only be authorized by a medical doctor and at the request of a third party, usually a family member or legal representative. This type of confinement is to be notified to the Public Prosecutor within 72 hours.

112. The excessive use of detention as a punitive measure for drug users raises questions regarding various fundamental human rights.

113. In the State of São Paulo, compulsory confinement of addicts of crack cocaine and other drugs has been introduced in an effort to bring users on the street into detention. At the time of the Working Group's visit, 5,335 persons were detained in compulsory confinement.

114. On 4 January 2013, the Governor of the State of São Paulo announced a new regional plan to fight drug consumption whereby crack users would be put in compulsory psychiatric confinement. To manage confinement, a standing court (Plantão Judiciário) was established. In a police operation in a neighbourhood of São Paulo, more than 2,000 crack users were arrested.

115. In the State of Rio de Janeiro, most of those targeted under compulsory drug treatment are children and adolescents living on the streets. Those detained in this context are often placed in facilities unknown to their families or lawyers, who therefore had serious difficulties visiting them.

116. Habeas corpus is established by law but difficult to apply in practice in the case of, for instance, those detained for drug addiction, given that information concerning their identity and where they are being held is often difficult to obtain.

117. Police agents are said to target drug users in order to arrest them, and have often carried out arrests indiscriminately. These measures are also strongly enforced in view of the Football Association World Cup in 2014 and the Summer Olympics Games in 2016, which Brazil will host. According to the Government, compulsory admission of chemical dependents, particularly crack users, does not constitute a punitive measure, since neither

drug use nor drug addiction are considered crimes in Brazil. The purpose of the compulsory admission measures applied is to provide emergency treatment to chemical dependents that are in a particularly vulnerable situation.

118. The Working Group noted that judicial periodic reviews are often not carried out once a drug user has been put in detention. If no judicial review is conducted, a person may be detained for prolonged periods, even when that person is eligible for release. This is a cause for concern, given that the number of those arrested for drug-related offences in the country is particularly high.

119. The Working Group considers that, in all cases, drug addicts should be held in compulsory confinement only by judicial order and consent has been sought, if the person has refused medical treatment and undergone a medical examination. It should be applied for only short periods of time, and only when the drug addict is considered a threat to society.

G. Detention of minors

120. The Law on Children and Adolescents (No. 8069) of 1990 makes a distinction between a child under the age of 12 and an adolescent, between the age of 12 and 18. In exceptional cases, the law applies to those between 18 and 21 years of age (young adults). It establishes that no child or adolescent should be deprived of her/his liberty unless arrested *in flagrante delicto* or by written and well-founded order of a judicial authority.

121. Pretrial detention of minors may last a maximum of 45 days. Detention is not to be applied in cases where adequate alternative measures are possible. The maximum period of detention may not exceed three years, after which the adolescent is released or placed in a system of semi-liberty or assisted liberty. Release is compulsory when the offender reaches 21 years of age. Continued detention should be re-evaluated every six months.

122. The Working Group was informed that crimes, offences and misdemeanours committed by adolescents and children are considered infractions and recorded in the National Registry of Adolescents in Conflict with the Law. Between January and June 2011, 29,506 adolescents were subjected to socio-educational measures, and 91,321 were placed on the National Registry for various infractions.

123. In Brasilia, the proportion of minors in detention is five times higher than that in the rest of the country.

124. The Working Group reiterates the need to employ alternative measures to detention only as required by international human rights standards, particularly when dealing with minors. It was informed of many cases where minors had been placed in detention for minor offences or infractions that did not justify deprivation of liberty.

125. One of the most serious findings of the Working Group related to six adolescents currently detained at the Experimental Health Unit (Unidade Experimental de Saúde) in São Paulo, which the Working Group was able to visit. The adolescents were originally detained for serious and dangerous crimes, and were close to the maximum sentence of three-years prescribed by law when they were transferred to the Experimental Health Unit, where they were institutionalized without due legal process.

126. The Working Group is concerned at the absence of a legal basis for the detention of the above-mentioned individuals, particularly in the light of the fact that there is no clear deadline to the length of their detention. It was also informed that no effective judicial review of these cases had been conducted. Some members of the judiciary interviewed believed that their detention might even be unconstitutional. To justify the deprivation of

liberty of these individuals and to respond to the social and media pressure to keep them in detention, a law dating back to the 1930s has been used to provide legal support for the detention. The law does not comply with the principles and norms enshrined in the Constitution of Brazil and in international human rights law.

127. The Working Group is of the view that the above-mentioned type of deprivation of liberty is arbitrary under international human rights standards, particularly if it is without legal basis.

128. The Working Group observed that the health and sanitary conditions in the juvenile detention centres it visited in Rio de Janeiro were poor.

H. Deprivation of liberty of persons with mental disabilities

129. Custodial care of persons with mental disabilities is gradually being abolished; the system now provides care in the community, allowing free access to a variety of mental health services. Federal Law No. 10.216/2001 on Psychiatric Reform (based on Italian legislation) makes it illegal to construct new psychiatric institutions, and provide for progressively closing existing structures. Four psychiatric hospitals have been closed in the State of Ceará.

130. The Working Group was able to gather information regarding the deprivation of liberty of persons in the context of psychiatric institutions, and was informed that some of these institutions are often used to detain drug addicts as well.

131. Currently, some 4,500 persons are deprived of their liberty for mental disabilities.

132. Hospitalization in a psychiatric institution is a security measure of an undefined duration. In order to leave the psychiatric hospital, relatives of the interned patient must sign a commitment to submit the patient to ambulatory treatment for one year.

V. Conclusions

133. **The Working Group acknowledges the difficult challenges that Brazil faces in confronting an authoritarian culture, the legacy of its colonial past and of 21 years of military dictatorship. Authorities are also tackling increasing incidents of criminal activities, such as homicide, gang violence, drug and human trafficking. In this context, the general public often supports governmental laws and policies that are tough on crime.**

134. **The Working Group nonetheless cautions that government policies and actions relating to the deprivation of liberty at the federal and State level should adhere and conform fully to international human rights standards, the same ones that Brazil has endorsed in the agreements that it has signed and ratified. These international standards clearly provide protection against arbitrary deprivation of liberty.**

135. **The Working Group recognizes that the problems described in the present report require cross-cutting and collective action, and should mobilize government authorities, representatives of civil society and other stakeholders.**

136. **The Working Group notes that the problems it witnessed during its visit have already been discussed in various forums. Indeed, most of those interviewed both in both government and non-governmental meetings agreed that these challenges need to be addressed. Members of the judiciary also recognized that there is a need for robust changes in order to restructure the justice system and to improve access to justice.**

This is a positive revelation, as a clear understanding of the problems and challenges faced will, it is hoped, drive actions and initiatives to address these issues effectively.

137. **The fact that deprivation of liberty is being used as the first resort rather than the last, as would be required by international human rights standards, is a worrying trend. Brazil has one of the world's largest prison populations, and the largest in Latin America.**

138. **The excessive use of pretrial detention contributes to overcrowding, little effective separation of convicted prisoners from pre-trial detainees, and excessive resort to condemnatory sentences. It should be recalled that excessive recourse to pretrial detention also contradicts basic rule of law principles, and also has greater implications for detainees, who are exposed to threats against their life, physical integrity and health, and of abuse and ill-treatment by guards and police officers.**

139. **Indigenous persons and Afro-descendants are often discriminated against both when preventive measures are applied and when punishment is imposed, which often involves harsh imprisonment.**

140. **The Working Group received serious allegations concerning ill-treatment and abuse during apprehensions and arrest, as well as during detention in police stations, particularly in tort of young Afro-descendants.**

141. **The Working Group observed that judges routinely imprison large numbers of people who have been accused of minor offences, such as petty theft.**

142. **Public policies that are "tough on crime" lead to a harsh trend of mass incarceration, while most States have neither the capacity nor the structures to deal with the consequences. Overcrowding should be reduced by increasing the use of alternative measures of constraint and alternative sentences, particularly for less serious offences.**

143. **The Working Group encountered many cases where detainees entitled to penitentiary benefits could not do so owing to the absence of legal assistance. Delays in obtaining a judicial order to initiate a process was an issue constantly raised throughout the visit of the Working Group.**

144. **Periodic judicial reviews are often not carried out once a drug user or a chemical dependent has been put in detention. In the absence of judicial review, a person may be detained for prolonged periods, even when the person is eligible for release. This is a cause for concern, given that the number of those arrested for drug-related offences in the country is particularly high.**

145. **The Working Group reiterates the need to employ alternative measures to detention of minors as required by international human rights standards. The Working group is concerned at the detention of six adolescents at the Experimental Health Unit (Unidade Experimental de Saúde) in São Paulo, and at the absence of legal basis for their detention, particularly in the light of the lack of any clear deadline for their detention. In addition, there has been no effective judicial review of their cases.**

VI. Recommendations

146. **The Working Group encourages the Government to ensure that the positive legislative and administrative developments described in the present report are**

accompanied by effective implementation measures, in strict compliance with international human rights principles and standards.

147. **The Working Group encourages the Government to continue its efforts to ensure that its institutional and legal frameworks regarding deprivation of liberty conform fully to the human rights standards enshrined in international human rights standards and in its legislation.**

148. **On the basis of its findings, the Working Group recommends that the Government:**

(a) Pay particular attention to reforming military jurisdiction and re-organizing the police, at both the federal and State levels, including the military police, and strengthening the community police (policia comunitária) and the proximity police (policia de proximidad);

(b) Take appropriate measures to ensure that deprivation of liberty is only used as a measure of last resort and for the shortest possible time;

(c) Ensure that States consider the model of independent special commissions for investigation of police officers in cases of alleged misconduct or ill-treatment;

(d) Take measures alternative to detention for chemical dependents and drug users;

(e) Ensure that foreign prisoners serve their sentences in their country of origin, so that they are able to enjoy the support of their relatives. The authorities should also make further efforts to reach bilateral transfer agreements with other States similar to those already signed with more than 23 countries;

(f) Ensure that authorities expedite the effective implementation of a public defence system in the States of Goiás, Paraná, Santa Catarina y São Paulo;

(g) Ensure that the State of Rio de Janeiro makes further efforts to transfer detainees from police stations to penitentiary institutions;

(h) Ensure that all prisoners who have fulfilled the requisites to be transferred to a semi-open regimen are effectively transferred;

(i) Ensure that, in all cases, drug addicts are held in compulsory confinement only by judicial order and after consent has been sought, if the person has refused medical treatment and has undergone a medical examination. It should be applied only for a short period of time, and only when the drug addict is considered a threat to society;

(j) Gradually abolish custodial care of persons with mental disabilities.

149. **The Working Group reiterates the need to employ measures alternative to detention, as required by international human rights standards, particularly when dealing with minors.**