



**International Convention for  
the Protection of All Persons  
from Enforced Disappearance**

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**Committee on Enforced Disappearances**

**Consideration of reports submitted by States  
parties under article 29, paragraph 1, of the  
Convention**

**Reports of States parties due in 2012**

**Ecuador\*\***

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## I. Introduction

1. The Republic of Ecuador hereby submits to the Committee on Enforced Disappearances its initial State report under article 29 of the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>1</sup>

2. In fulfilment of that obligation, and pursuant to Executive Decree No. 1317,<sup>2</sup> the Ministry of Justice, Human Rights and Religious Affairs and the Ministry of Foreign Affairs and Human Mobility jointly prepared and adopted the present report. In so doing, they took into account the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2), as well as the protocol on the preparation of periodic reports to international human rights treaty bodies.<sup>3</sup> On this basis, and once the road map for action in 2013 had been finalized, two workshops were held<sup>4</sup> along with more than 50 bilateral meetings,<sup>5</sup> both with civil servants working on the issue and with representatives of civil society and academics from Ecuador and abroad, so as to involve the participants in the drafting of the report and seek their input.<sup>6</sup>

3. Pursuant to articles 31, 32 and 35 of the Convention, its entry into force establishes the competence of the Committee to consider individual cases of enforced disappearance in Ecuador,<sup>7</sup> which extends to a more general consideration of the steps taken by Ecuador to fulfil its international obligations. This does not, however, prevent the present report from reflecting efforts over the past decade to promote and protect human rights in Ecuador, especially with regard to enforced disappearance.

<sup>1</sup> Favourable ruling on constitutionality by the full court, published in the supplement to Official Gazette No. 602 of 1 June 2009. The Convention was ratified by Ecuador on 20 October 2009 and entered into force on 23 December 2010. Prior to ratification, the National Assembly adopted the international treaty in accordance with article 120 (8) of the Constitution of the Republic of Ecuador (Legislative Resolution No. 1, published in Official Gazette No. 1 of 11 August 2009), after the Constitutional Court had ruled that it was constitutional, in accordance with article 438 (1) of the Constitution (Ruling No. 0006-09-DTI-CC of 14 May 2009). Thus, Ecuador reaffirms its commitment to the *jus cogens* obligation to respect, protect and fulfil international human rights standards and reiterates its willingness to work within the universal human rights system to prevent and punish acts of enforced disappearance of persons, which was the basis for its ratification in 2006 of the Inter-American Convention on Forced Disappearance of Persons of 9 June 1994.

<sup>2</sup> Executive Decree No. 1317 of 9 September 2008, Official Gazette No. 428 of 18 November 2008.

<sup>3</sup> The protocol was officially presented at the national level on 30 May 2013 and was used for the first time in the preparation of the present report. It divides the drafting work into 10 phases so as to facilitate the preparation of the report and provide forums for constructive dialogue with civil society.

<sup>4</sup> The workshop with public institutions took place on 11 June 2013 at the Ministry of Foreign Affairs and Human Mobility. The workshop with civil society took place on 30 October 2013 with the participation of the Human Rights Adviser in Ecuador of the Office of the United Nations High Commissioner for Human Rights.

<sup>5</sup> There are records of at least 50 bilateral meetings, which reflect all the issues raised in the course of gathering the information. In addition, there were internal communications within the Ministry of Justice, as well as meetings and communications between the ministries of justice and foreign affairs.

<sup>6</sup> All the information received was processed, analysed, sorted and classified in light of three considerations: (1) advances made in the guarantee and protection of Convention rights; (2) factors and difficulties, their nature and scope and origin; and (3) measures taken to overcome the difficulties described. The preparation of the report required further research into the current legal and social context surrounding enforced disappearance, which ultimately formed the basis for the present report.

<sup>7</sup> When it ratified the Convention, Ecuador declared that it recognized the Committee's competence to receive and consider communications submitted by individuals and States under the Convention.

## II. General legal framework under which enforced disappearances are prohibited

4. In addition to the Convention, the international normative framework governing enforced disappearance includes the following instruments: the Declaration on the Protection of All Persons from Enforced Disappearance;<sup>8</sup> the Inter-American Convention on Forced Disappearance of Persons;<sup>9</sup> the International Covenant on Civil and Political Rights;<sup>10</sup> the Rome Statute of the International Criminal Court;<sup>11</sup> and the American Convention on Human Rights.<sup>12</sup>

5. As for the domestic normative framework governing enforced disappearance, in the discussion below of the individual substantive articles of the Convention, specific reference is made to the relevant current provisions in each case. The norms on this subject in the Ecuadorian legal order are: the Constitution of the Republic of Ecuador;<sup>13</sup> the Criminal Code;<sup>14</sup> the Code of Criminal Procedure;<sup>15</sup> the Sentence Enforcement and Social Rehabilitation Code;<sup>16</sup> the Organic Code of the Judiciary;<sup>17</sup> the Organic Act on Judicial Safeguards and Constitutional Oversight;<sup>18</sup> and the recently adopted Comprehensive Organic Criminal Code, which was published in the supplement to Official Gazette No. 180 on 10 February 2014 and which establishes in its final provision that it “shall enter into force 180 days after its publication in the Official Gazette”.

6. In addition, it is important to point out one measure that has been crucial to the development, advancement and promotion of human rights in Ecuador over the past decade, namely the establishment in 2007 of the Truth Commission,<sup>19</sup> which was set up with a view to recognizing the victims, establishing responsibility under civil, criminal and administrative law, drafting policies to provide reparation and preventing impunity for human rights violations committed between 1984 and 1988 and during other periods,<sup>20</sup> as well as establishing mechanisms to prevent and punish such violations.

7. Accordingly, on 7 June 2010 the Truth Commission submitted its final report,<sup>21</sup> in which, following an analysis of 118 cases, it put forward 115 recommendations concerning reparation, as well as a legislative proposal<sup>22</sup> in the form of a bill to provide reparation for victims and ensure the prosecution of serious human rights violations and crimes against humanity committed in Ecuador between 4 October 1983 and 31 December 2008.<sup>23</sup>

<sup>8</sup> Adopted by the United Nations General Assembly in its resolution 47/133 of 18 December 1992.

<sup>9</sup> Convention No. 2, Official Gazette No. 343 of 28 August 2006.

<sup>10</sup> Executive Decree No. 37, Official Gazette No. 101 of 24 January 1969.

<sup>11</sup> Code No. 1272, supplement to Official Gazette No. 53 of 25 November 2005.

<sup>12</sup> Ministerial Decision No. 202, Official Gazette No. 801 of 6 August 1984.

<sup>13</sup> Official Gazette No. 449 of 20 October 2008.

<sup>14</sup> Supplement to Official Gazette No. 147 of 22 January 1971.

<sup>15</sup> Supplement to Official Gazette No. 360 of 13 January 2000.

<sup>16</sup> Supplement to Official Gazette No. 399 of 17 November 2006.

<sup>17</sup> Supplement to Official Gazette No. 544 of 9 March 2009.

<sup>18</sup> Supplement to Official Gazette No. 52 of 22 October 2009.

<sup>19</sup> Executive Decree No. 305, Official Gazette No. 87 of 18 May 2007.

<sup>20</sup> Executive Decree No. 305, art. 1.

<sup>21</sup> Ministerial Decision No. 287, Official Gazette No. 421 of 6 April 2011.

<sup>22</sup> The cases analysed in the report involve a total of 456 victims and six types of human rights violations, including enforced disappearance and false imprisonment (the other types are torture, sexual violence, violation of the right to life and extrajudicial execution). Truth Commission, “Report of the Truth Commission, Ecuador 2010”, *Ediecuadorial*, 2010, Executive Summary, p. 389.

<sup>23</sup> Supplement to Official Gazette No. 143 of 13 December 2013. The Bill is divided into two chapters: (1) the first chapter sets out the purpose, the recognition of State responsibility and the principle of

8. The Truth Commission's mandate was extended<sup>24</sup> so that it could take part in activities connected with the recommendations made in the final report, including efforts to improve the criminal justice system;<sup>25</sup> continuing the work of a specialized investigative unit within the Truth Commission; developing and implementing training programmes for various stakeholders in the justice system; establishing working groups and advisory groups involving human rights organizations, international experts, judges and prosecutors from other countries, as well as various other stakeholders; disseminating the Commission's report; and coordinating with the Victim and Witness Protection Programme operated by the Attorney General's Office, in accordance with the Act on Protection and Immunity of the Truth Commission.<sup>26</sup>

9. Of the cases analysed by the Truth Commission, it is worth highlighting the case of the Restrepo brothers (victims of torture, false imprisonment and enforced disappearance in 1988).<sup>27</sup> This is a landmark case in Ecuador, as it is an example of these types of violations being carried out in such a way that they clearly constitute crimes against humanity. The case has led to increased awareness in society and real change in the country's institutions.<sup>28</sup> The events that took place in Guayaquil in 2003 in the so-called Fybeca case should also be mentioned. This is another recent case that has had a significant impact on society; it meets the description of an act of enforced disappearance as a separate offence. In this connection, on 14 November 2013 Judge Jorge Blum (a judge at the Criminal Division of the National Court of Justice) opened the official criminal investigation requested by the Attorney General, Dr. Galo Chiriboga Zambrano, into the case of 31 persons accused of serious human rights violations, namely the alleged extrajudicial execution of eight individuals.

10. The cases documented by the Truth Commission that constitute human rights violations were submitted to the Attorney General's Office,<sup>29</sup> where a specialized unit has been working exclusively on elucidating the reported incidents and identifying the persons responsible for those criminal offences. In March 2012, this unit was renamed the Truth Commission and Human Rights Directorate.<sup>30</sup> The Directorate is responsible for dealing with and investigating human rights violations at the national level, without any time

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full reparation; (2) the second chapter provides for the establishment of a programme under the auspices of the Ombudsman's Office to grant reparation through administrative channels, defines who the beneficiaries will be, and affirms the right to individual measures of full reparation; it also recognizes the right of victims and their families to institute legal proceedings demanding full reparation, while prohibiting the granting or receiving of double compensation for the same act.

<sup>24</sup> Extensions: Ministerial Decision No. 219, Official Gazette No. 301 of 15 October 2010; Ministerial Decision No. 258, Official Gazette No. 421 of 6 April 2011; and Ministerial Decision No. 287, Official Gazette No. 533 of 13 September 2011.

<sup>25</sup> The project was carried out by the Coordinating Unit for Justice Reform in Ecuador, "Projusticia", which was dissolved on 14 July 2011 (Official Gazette No. 501 of 28 July 2011).

<sup>26</sup> Supplement to Official Gazette No. 128 of 11 February 2010.

<sup>27</sup> Truth Commission, *op. cit.*, p. 478.

<sup>28</sup> Once all domestic remedies had been exhausted, the case was submitted to the Inter-American Commission on Human Rights. Pursuant to an amicable settlement signed on 20 May 1998, Ecuador acknowledged its responsibility and agreed to provide reparation by: (a) paying compensation; (b) searching for the bodies of the Restrepo brothers; (c) agreeing not to interfere in the exercise of the constitutional and legal right to freedom of expression and assembly by the Restrepo family, their supporters and the human rights organizations working to further their cause in connection with commemorations of the deaths of Carlos and Pedro Andrés Restrepo or for other purposes related to the incident; and (d) resuming the investigations to determine the responsibility of the alleged perpetrators.

<sup>29</sup> Documentation submitted on 19 July 2010; Resolution No. 049-2010-FGE.

<sup>30</sup> Resolution No. 003-A-FGE-2012. Official Gazette, Special Edition, No. 268 of 23 March 2012.

limitations,<sup>31</sup> notwithstanding its other responsibilities as listed in section 2.1.5 of the Organic Statute on Procedures of the Attorney General's Office.<sup>32</sup> Thus, it should be stressed that the Directorate is tasked with issuing "reports on enforced disappearance" as one of the deliverables related to its monitoring activities (Organic Statute on Procedures of the Attorney General's Office, art. 12 (c), section 2.1.5.2).<sup>33</sup>

### **III. Information in relation to each substantive article of the Convention**

#### **Article 1**

11. Article 66 (3) (c) of the Constitution enshrines the right not to be subjected to enforced disappearance: "The following rights shall be recognized and guaranteed ... the right to integrity of the person, including ... the prohibition of enforced disappearance."

12. In turn, the exceptional circumstances that might be used to justify a restriction on constitutional rights are set out in articles 164 to 166 of the Constitution, which regulate "states of emergency". This term is understood to mean a military attack, an international or internal armed conflict, serious internal unrest or any public or natural disaster, including the situations referred to in article 1 (2) of the Convention. In any of these situations, the President of the Republic may declare a state of emergency, specifying, inter alia, which constitutional rights are to be suspended or restricted. However, such restrictions can apply only to the right to inviolability of the home, inviolability of correspondence, freedom of movement, freedom of association and assembly and freedom of information.

13. This constitutional provision is further developed in articles 28 and 37 of the Act on Public and State Security,<sup>34</sup> which in turn is further developed in articles 36 to 38 of its implementing regulations.<sup>35</sup> Article 28 of the Act on Public and State Security begins by stating that "a state of emergency is a legal regime and thus cannot be used as a pretext for arbitrary action". Article 30 of the Act is much more specific in that it sets out the formal and substantive requirements that must be met when declaring a state of emergency. With regard to the formal requirements, article 30 (1) stipulates that "the formal process for declaring a state of emergency is that described in [the Constitution], the law and international human rights instruments". As for the substantive requirements, article 30 (4) expressly states that "no measure may be taken that undermines the international obligations undertaken by Ecuador in international treaties and human rights instruments". It follows from this that no state of emergency may include any restriction on the right not to be subjected to enforced disappearance, given that article 66 (3) (c) of the Constitution cannot be changed.

14. As an additional safeguard, article 31 (1) of the Act on Public and State Security stipulates:

The National Assembly and the Constitutional Court must be notified of the declaration of a state of emergency and its renewal, if applicable. In addition, at the international level, the United Nations and the Organization of American States shall also be notified in the event of the suspension or restriction of any constitutional

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<sup>31</sup> Article 1 of Resolution No. 040-FGE-2012, Official Gazette No. 753 of 25 July 2012.

<sup>32</sup> Attorney General's Office Resolution No. 3, supplement to Official Gazette No. 268 of 23 March 2012.

<sup>33</sup> However, no such reports have as yet been published.

<sup>34</sup> Supplement to Official Gazette No. 35 of 28 September 2009.

<sup>35</sup> Executive Decree No. 486, supplement to Official Gazette No. 290 of 30 September 2010.

guarantees or rights. This notification must be given within 48 hours of the signing of the declaration or renewal of a state of emergency, explaining the rationale and causes that led to the declaration or renewal and the measures taken. If the President fails to give notification of the declaration of a state of emergency or its renewal, if applicable, it shall be deemed invalid.

15. With regard to responsibility for actions taken by the authorities during states of emergency, article 33 of the Act on Public and State Security stipulates that “the abuse of power by any State official or employee, if duly verified, shall be punished with administrative, civil and criminal sanctions, taking account of the provisions of international human rights instruments”. Further developing what is set out in the last paragraph of article 166 of the Constitution, article 33 of the Act also specifies that “the civilian, military and police authorities shall be responsible for the orders they issue” and that “obeying the orders of a superior shall not exempt those carrying out the orders from liability”.

## Article 2

16. The Criminal Code does not contain a definition of enforced disappearance that explicitly includes the elements set out in article 2 of the Convention, which is why there are specific constitutional, criminal and administrative norms that are applied in cases of enforced disappearance, as described below.<sup>36</sup>

17. There are three constitutional rights that would be directly violated in the event of an act of enforced disappearance, as defined in the Convention.

18. Firstly, any deprivation of liberty (regardless of the form it takes or the person who imposes it) would violate the right to move freely throughout the country, as enshrined in article 66 (14) of the Constitution. It would also violate paragraph 3 (c) of the same article, as it would constitute an attack on the right to integrity of the person.

19. Secondly, should the State refuse to acknowledge the deprivation of liberty or conceal the fate or whereabouts of the disappeared person, this would violate article 18 (2) of the Constitution, which enshrines the right of all persons to “freely access information produced by public or private entities that handle State funds or perform public functions” — a right that may not be restricted under any circumstances if there is evidence that human rights have been violated.

20. Thirdly and lastly, the act of removing the victim from the protection of the law violates article 75 of the Constitution, as the victim is denied the right to effective judicial protection, in its primary form of access to justice.

21. Such a declaration of constitutional rights, however, would not be backed up by any practical guarantees were it not for the “constitutional guarantees” that are expressly set out in articles 84 to 94 of Title III of the Constitution. These guarantees can be divided into legislative, policy-based and judicial guarantees. The legislative framework governing these guarantees is set out in the Organic Act on Judicial Safeguards and Constitutional Oversight<sup>37</sup> and in the corresponding Regulations on the Conduct of Proceedings before the

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<sup>36</sup> The Inter-American Court of Human Rights established a definition of enforced disappearance in its very early case law. In this regard, see the following cases: *Velásquez Rodríguez v. Honduras*, judgement of 29 July 1988; *Godínez Cruz v. Honduras*, judgement of 20 January 1989; and *Fairén Garbi and Solís Corrales v. Honduras*, judgement of 15 March 1989.

<sup>37</sup> Supplement to Official Gazette No. 52 of 22 October 2009.

Constitutional Court.<sup>38</sup> According to article 6 of the Act, “judicial guarantees are intended to provide immediate and effective protection of the rights recognized in the Constitution and in international human rights instruments, identify violations of one or more rights, and provide full reparation for the harm caused by such violations”.

22. Victims or their family members may defend their constitutional rights by bringing an action for a writ of habeas corpus (see section on article 17 of the Convention), filing an application for access to public information (see section on article 18 of the Convention) or bringing an action for a writ of habeas data (see section on article 19 of the Convention), as well as by submitting an application for a protective remedy or, where applicable, a special protective remedy (see section on article 10 of the Convention) or by bringing an action for non-compliance (see section on article 22 of the Convention).

23. At the legislative level, there are both criminal and administrative provisions to protect citizens from possible acts of enforced disappearance, mainly by punishing the perpetrators of such acts.

24. In this regard, the Criminal Code defines offences that violate liberty of the person in articles 180 to 190, as well as offences that violate constitutional guarantees. For example, article 213 expressly sets out criminal penalties for “any other arbitrary act that infringes the rights and freedoms guaranteed by the Constitution and that is ordered or carried out by a State official or employee or by a holder or agent of State authority or member of the police or armed forces”, thereby clearly penalizing any conduct that violates any of the rights protected under Title II of the Constitution.

25. In addition, with regard to minor offences, article 602.8 of the Criminal Code criminalizes “abuse of power” by punishing any “member of the military or police force who, in the exercise of their power or authority: ... 2. illegally or improperly takes on, retains, or extends a military or police command, position, post or function”. Also, article 602.18 of the Criminal Code punishes “any police officer who carries out ... illegal detention ... or deprives anyone of their right to a regular and fair trial”. Articles 114.3 to 114.8 of the Criminal Code set out a number of “common standards for applying the penalties established for offences committed in the course of duty by members of the military or the police force”.

26. In the past, there was both a Criminal Code of the National Civil Police<sup>39</sup> and a Military Criminal Code,<sup>40</sup> but these were repealed in 2010.<sup>41</sup> Their repeal was based on the principle of jurisdictional unity set out in article 168 (3) of the Constitution of 2008, whereby all criminal offences set out in special laws pertaining to the military and police were to be incorporated into the Criminal Code. Accordingly, article 10 (a) and article 13 (4) of the transitional provisions in the Organic Code of the Judiciary establish that “all proceedings initiated in the criminal courts and military and police courts prior to the entry into force [of the Organic Code of the Judiciary] shall be referred to the National Court of Justice, provincial courts, criminal courts or tribunals as appropriate to the subject matter of the case”. This is reflected in the resolution of the Council of the Judiciary on rules and procedures governing military and police proceedings.<sup>42</sup>

27. At the administrative level, article 60 (62) of the National Police Disciplinary Regulations establishes disciplinary sanctions for “giving orders that are incompatible with

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<sup>38</sup> Constitutional Court resolution in supplement to Official Gazette No. 127 of 10 February 2010. Last amended on 14 May 2013.

<sup>39</sup> Supplement to Official Gazette No. 1202 of 20 August 1960.

<sup>40</sup> Supplement to Official Gazette No. 356 of 6 November 1961.

<sup>41</sup> Supplement to Official Gazette No. 196 of 19 May 2010.

<sup>42</sup> Official Gazette No. 95 of 24 December 2009.



legal or regulatory provisions, provided that the act does not constitute a more serious infraction or a crime”.<sup>43</sup> Similarly, article 64 (15) of the Regulations establishes sanctions for any member of the police force who “fails to inform his or her superior about the commission of a crime that entails State responsibility or seriously jeopardizes the reputation and moral standing of the institution, without prejudice to the criminal proceedings that may be brought against him or her as an accomplice or accessory to the crime”. It is also important to mention the Military Disciplinary Regulations, which, in general terms, set out strict rules that require members of the military to fully respect the entire Ecuadorian legal order.<sup>44</sup>

28. Lastly, article 84 of the Comprehensive Organic Criminal Code criminalizes enforced disappearance as a separate offence, as follows:

Any State official or other person acting with their consent who deprives a person of his or her liberty by any means and subsequently fails to provide information about or refuses to acknowledge the deprivation of liberty or to report on the individual’s fate or whereabouts, thereby preventing the exercise of constitutional or legal guarantees, shall be punished with 22 to 26 years’ imprisonment.

### Article 3

29. Under national legislation, acts of disappearance committed by individuals without the authorization, support or acquiescence of State agents must also be punished. These are criminal acts and will be investigated, prosecuted and punished on the basis of the appropriate criminal offences established in the Criminal Code, thereby fulfilling the State’s obligations under article 3 of the Convention.

30. In this context, it should be pointed out that, in Ecuador, individuals (and not just State officials) have the legal authority to detain another person.<sup>45</sup> Thus, according to articles 161 to 163 of the Code of Criminal Procedure, an individual may detain a person caught in flagrante delicto, a person who has escaped from prison, a person subject to a pretrial detention order or a fugitive convict; in any of these cases, the individual “shall immediately turn the detainee over to an officer of the Judicial Police or the National Police”.<sup>46</sup>

31. With regard to the duration of investigations into cases of disappearance, article 585 (3) of the Comprehensive Organic Criminal Code provides that “in cases of disappearance, the investigation cannot be closed until the person is found or the evidence necessary to bring charges for the relevant offence has been gathered, at which point the statute of limitations shall start to run”.

<sup>43</sup> Ministerial Decision No. 1070, Official Gazette No. 35 of 28 September 1998.

<sup>44</sup> Ministerial Decision No. 1909, Official Gazette 2008 of 15 December 2008.

<sup>45</sup> Article 9 of the general provisions of the Act published in the supplement to Official Gazette No. 555 of 24 March 2009, which provides that “in articles 163, 197, 205 and 280, the words ‘arrest’, ‘arrested’ and ‘arrest’ shall be replaced with the words ‘detention, ‘detained’ and ‘detain’ respectively”.

<sup>46</sup> Article 528 of the Comprehensive Organic Criminal Code states as follows: “However, in addition to in flagrante delicto cases, anyone may arrest: 1. A fugitive who has escaped from a social rehabilitation centre where he or she is serving a sentence, being detained or being held in pretrial detention. 2. An accused person subject to a pretrial detention order or a convicted person who is at large. If the person who makes the arrest is a private individual, he or she must immediately hand over the arrested person to a police officer.”

## Articles 4 and 5

32. The Government of Ecuador has made significant executive and legislative efforts to classify enforced disappearance as a criminal offence, in accordance with the international standards established not only in article 2 of the Convention but also in article II of the Inter-American Convention to Prevent and Punish Torture.

33. As a regulatory guarantee of constitutional rights, article 84 of the Constitution stipulates that the National Assembly is to bring into line, “formally and substantively, all laws and other legal rules with the rights set forth in the Constitution and international treaties”.

34. Article 426 (2) of the Constitution (in accordance with article 11 (3) of the Constitution) establishes the following: “Judges, administrative authorities and civil servants shall directly apply the norms set out in the Constitution, and those set out in international human rights instruments when they are more favourable to rights holders than those set out in the Constitution, even if they are not expressly invoked by the parties.” This is reaffirmed in article 5 of the Organic Code of the Judiciary.

35. Thus, article 11 (3) and article 426 (2) of the Constitution ensure that the right not to be subjected to enforced disappearance is protected, including during states of emergency, and that the Convention rights (such as the right of foreigners to seek consular assistance) are recognized.

36. Article 89 of the Comprehensive Organic Criminal Code defines the offence of enforced disappearance as a crime against humanity when carried out in a widespread or systematic manner. Such cases carry a punishment of 26 to 30 years’ imprisonment.

## Article 6

37. With regard to the criminal liability of perpetrators of enforced disappearance (which is determined solely by assessing the concurrence of offences that gave rise to the enforced disappearance), article 41 of the Criminal Code establishes that the persons responsible for such violations are the perpetrators, accomplices and accessories after the act, while articles 46 to 50 of the Criminal Code describe the applicable penalties. These three types of criminal liability, together with the distinctions made according to the level of completion of the offence, are applicable in all cases of enforced disappearance without exception. Thus, according to the Criminal Code, the term “perpetrator” includes direct perpetrators, indirect perpetrators and co-perpetrators<sup>47</sup> and covers a range of nuances, including persons who propose that the act should be committed, allow the act to happen by

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<sup>47</sup> Article 42 of the Criminal Code provides as follows: “When the court determines that an offence has been committed, the perpetrators are defined as those who committed the offence, whether directly and immediately or by advising or abetting another; those who obstructed or sought to obstruct efforts to prevent it from being carried out; those who took the decision to commit the offence and did so by making use of other individuals — regardless of whether or not the offence can be attributed to those individuals — by means of a payment, gift, promise, order or any other fraudulent and direct means; those who played an important role in helping to commit the offence by deliberately and intentionally carrying out some action without which the offence could not have been committed; and those who, through physical violence, abuse of authority, threats or other coercive means, forced another person to commit the punishable act, even if the force used to achieve that end cannot be described as irresistible.”

omission or facilitate the act.<sup>48</sup> As for who is considered to be an “accomplice”, article 43 of the Criminal Code states that “an accomplice is anyone who indirectly and subsidiarily cooperates in the performance of the punishable act through acts prior to or simultaneous with the act in question”.<sup>49</sup> And lastly, the Criminal Code also describes being an “accessory after the act” as a form of participating in the crime, as set out in the relevant section of the Code.<sup>50</sup> In addition, with regard to punishing the various stages of the planning of a crime, article 16 of the Criminal Code makes punishable any attempt to commit a crime, regardless of whether the crime was completed or not.<sup>51</sup>

38. With regard to the prohibition on invoking orders from a superior (including orders from military authorities) as a justification for committing an act of enforced disappearance, article 80 of the Constitution clearly stipulates: “The fact that [the enforced disappearance] was committed by a subordinate shall not exempt from criminal liability either the superior who ordered it or the subordinate who carried it out.” Moreover, article 159 of the Constitution states that: “The Armed Forces and the National Police shall confine themselves to complying with orders and shall have no decision-making capacity. They shall carry out their mission in strict compliance with civil authority and the Constitution. [Officers] shall be responsible for the orders they give. Obeying the orders of a superior shall not exempt those carrying out the orders from liability.”

39. In full accordance with these constitutional provisions, article 114.7 of the Criminal Code, titled “Due obedience”, provides that:<sup>52</sup>

<sup>48</sup> Article 41 of the Comprehensive Organic Criminal Code states that “anyone who participates in the offence as a perpetrator or accomplice” is subject to criminal liability. In turn, article 42 of the Code provides that perpetrators include direct perpetrators, indirect perpetrators and co-perpetrators.

<sup>49</sup> Article 43 of the Comprehensive Organic Criminal Code provides that: “Anyone who intentionally facilitates or cooperates in the performance of the punishable act through acts carried out subsidiarily, prior to or simultaneous with the act in question, in such a way that the offence would have been committed even without those acts, is considered to be an accomplice.”

<sup>50</sup> Article 44 of the Criminal Code provides that: “An accessory after the act is anyone who, being aware of the criminal conduct of the offenders, habitually supplies them with lodging, hiding places or meeting places or supplies them with the means for them to benefit from the offence committed, or who aids them by hiding the instruments or the material evidence relating to the offence or by covering up the traces or indications of the offence to avoid punishment, and anyone who, by reason of their profession, employment, practice or occupation, conducts an examination of the traces or indications of the offence, or elucidation of the punishable acts, and hides or alters the truth with the aim of assisting the offender.” Article 45 of the Code further states that: “Anyone who carries out such actions for his or her spouse, ascendants, descendants or siblings, or other relatives up to the second degree, cannot be punished as an accessory after the act.” The Comprehensive Organic Criminal Code does not provide for this type of participation in an offence.

<sup>51</sup> Article 16 of the Criminal Code provides as follows: “Anyone who commits acts that are likely to result in the commission of an offence shall be held responsible for an attempt to commit an offence if the act is not committed or not proven. If the perpetrator voluntarily desists from the act, he shall be subject only to the penalties applicable to the acts performed, provided that such acts constitute an offence, except where, as provided for by law, in special circumstances an attempt to commit an offence is itself deemed to constitute an offence. If the perpetrator voluntarily prevents the act, he shall be subject to the penalty provided for in respect of an attempted offence, reduced by one third or one half.” Article 39 of the Comprehensive Organic Criminal Code states as follows: “An attempted offence is the commission of an offence that could not be carried out to completion or could not be proven due to circumstances beyond the perpetrator’s control, even though the perpetrator wilfully initiated the offence by carrying out relevant actions that would unequivocally have led to the commission of an offence. In such cases, the person shall be held liable for an attempted offence, and the applicable penalty shall be one to two thirds of the penalty that would have applied if the offence had been completed. Minor offences are punishable only when carried out to completion.”

<sup>52</sup> Supplement to Official Gazette No. 196 of 19 May 2010.

Senior officers of the Armed Forces and National Police shall be held responsible for the orders they give. Obeying the orders of a superior shall not exempt those carrying out the orders from liability. No subordinate can escape criminal responsibility for the perpetration of an offence by claiming that he or she was following the orders of a superior. All superiors are responsible for the orders they issue and for the consequences of failing to fulfil their duties.

40. Article 214 of the Criminal Code further establishes that:

Due obedience may exempt from responsibility someone who has carried out an order that runs counter to constitutional rights, provided that the order, issued by the subordinate's immediate superior and falling within the superior's jurisdiction, could not have been disobeyed by the subordinate without violating discipline. Under these circumstances, the superior who issued the order shall be held fully responsible.

41. In this context, article 20 of the Military Disciplinary Regulations provides that "in the performance of their duties, subordinates owe immediate obedience to their superiors in all areas where authority has been delegated to the latter under laws and regulations in the line of duty". At the same time, article 38 of the Military Disciplinary Regulations states that "inciting subordinates to commit an infraction through an abuse of authority is a serious infraction, provided that the act does not constitute an offence". In any case, it should be noted that, within the military disciplinary regime, constitutional law is applied only when prosecuting disciplinary infractions. Thus, in cases of enforced disappearance, it is the responsibility of the justice system to prosecute.<sup>53</sup>

42. Lastly, it should be pointed out that article 129 (1) of the Constitution provides for a specific procedure in cases where the National Assembly (at the initiative of the bodies given locus standi in article 131 of the Constitution) takes the view that the President or Vice President of the Republic can be prosecuted for crimes of enforced disappearance. In such circumstances, "in order to initiate impeachment proceedings, an admissibility ruling must be issued by the Constitutional Court, but no prior criminal prosecution is necessary" (Constitution, art. 129 (2)). The Constitution further provides that, once these proceedings have been completed and the person has been censured by two thirds of the National Assembly: "If the censure indicates criminal responsibility, the case shall be referred to the competent court" (Constitution, art. 129 (4)). In article 30 of the Comprehensive Organic Criminal Code, "due obedience" is covered by the concept of a "legitimate order", which is seen as a ground for precluding unlawfulness: "Nor does the act constitute a criminal offence if the person was acting pursuant to a clear and legitimate order from a competent authority or in fulfilment of a legal duty." This is in strict accordance with article 31 of the

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<sup>53</sup> The Constitutional Court ruled on this subject in its Resolution No. 22 of 31 December 2009, published in the supplement to Official Gazette No. 99: "The plaintiff was reluctant to obey the order, as he was acting in accordance with [article 3 of the Military Disciplinary Regulations]. In this situation, there is a conflict between two principles: upholding the law ... versus obeying orders from a superior... Orders from a superior must also comply with the law and with military discipline; thus, when the two principles are weighed against each other, it can be concluded that in the present case the plaintiff did not show any lack of discipline, much less insubordination or disobedience of a superior, as his intention or aim was ... to fulfil his duties and respect the law." Accordingly, the Court upholds all of the classic doctrine on "remonstration" and "post-remonstration disobedience" already accepted in other continental criminal systems. This is also reflected in the dissenting opinion included in the ruling of the Constitutional Court, which states that, in accordance with articles 43 and 45 of the Military Disciplinary Regulations: "In the military, subordinates are required to follow orders issued by their superiors, provided that the orders are lawful under national legislation. The subordinate retains the right to request a clarification or explanation of an order they find difficult to understand, which is what happened in the case at hand when the plaintiff, exercising this right, asked his superiors ..."

Comprehensive Organic Criminal Code, which provides that: “Anyone who exceeds the limits of the grounds for precluding unlawfulness shall be subject to a penalty that is one third of the minimum penalty established for the criminal offence.”

## Article 7

43. In the criminal sphere, specific penalties are provided for in articles 180 to 190 of the Criminal Code on offences against individual liberty. Under article 180, the offence of arbitrary deprivation of liberty carries a sentence of 6 months’ to 2 years’ imprisonment and a fine of US\$ 12-31, and those found guilty may also face a loss of civil rights for two to three years. Article 181 sets out the penalty of 6 months’ to 2 years’ imprisonment for illegal confinement, while article 182 stipulates that perpetrators of illegal detention are liable to 6 months’ to 2 years’ imprisonment. The penalty for irregular detention is 6 months’ to 2 years’ imprisonment and a fine of US\$ 6-12. Pursuant to articles 184 and 185, illegal or arbitrary detention carries a penalty of 6 months’ to 3 years’ imprisonment and a fine of US\$ 6-16 if it lasts more than 10 days, and 1 to 4 years’ imprisonment and a fine of US\$ 16-47 if it lasts more than one month. The aggravated offence carries a penalty of 3 to 6 years’ rigorous imprisonment (standard regime) (arts. 186 and 187 (1)), or 6 to 9 years in the event of injuries resulting from torture (art. 187 (2)). Where deprivation of liberty leads to torture that results in death (art. 187 (3)), the penalty is 16 to 25 years’ special long-term imprisonment. The offence of abduction,<sup>54</sup> provided for in article 188, can apply in the context of enforced disappearance and carries the penalties set forth in articles 189, 190 and the subsequent unnumbered articles of the Criminal Code. Article 213 prescribes 3 to 6 months’ imprisonment for “any other arbitrary act or breach of the freedoms and rights enshrined in the Constitution, ordered or committed by a State official or employee or by a holder or agent of State authority or member of the police or armed forces”. Article 602.8 of the Criminal Code provides for 3 months’ to 1 year’s imprisonment<sup>55</sup> for certain cases of abuse of authority.

<sup>54</sup> Article 188 of the Criminal Code establishes that: “The offence of abduction consists in seizing a person using violence, threats, seduction or subterfuge for the purpose of selling him or her or placing him or her in the service of a third person against his or her will, obtaining favours, forcing the person to pay ransom or hand over property, extending, submitting or signing a document that has or may have legal effects, forcing the person to do or omit to do something, or forcing a third party to perform one of the aforementioned acts in order to secure the release of the abductee.”

<sup>55</sup> Article 160 of the Comprehensive Organic Criminal Code stipulates that: “A public servant who unlawfully deprives a person of his or her liberty shall be liable to 1 to 3 years’ imprisonment. A public servant who arranges for a person’s deprivation of liberty in places other than those intended for this purpose by law shall be liable to 3 to 5 years’ imprisonment.” Furthermore, article 161 states that: “A person who deprives one or more persons of their liberty or who detains, conceals, abducts or transfers them to a different location, against their will, shall be liable to 5 to 7 years’ imprisonment.” Article 162 establishes that: “Where the aim of the person committing the offence defined in article 161 of this Code is to commit another offence or to obtain from the victim or victims or third persons money, goods, deeds, documents, favours, actions or omissions which have legal effects or in any way alter their rights in exchange for their freedom, that person shall be liable to 10 to 13 years’ imprisonment. The maximum penalty shall be imposed if any of the following circumstances apply: (1) the deprivation of liberty lasts more than 8 days; (2) the person has complied with one of the conditions imposed for his or her release; (3) the victim is under 18 years of age, over 65 years of age or pregnant or is a person with disabilities or life-threatening illnesses; (4) the offence is committed by hijacking a ship, aircraft, vehicle or any other form of transport; (5) the offence is committed in part or in full from abroad; (6) the victim is handed over to third parties in order to obtain a favour or guarantee the fulfilment of a condition in return for release; (7) the offence is committed with the participation of a person with whom the victim has a professional, commercial or other similar connection, a trusted person, a blood relative up to the fourth degree or a relative by marriage up to

44. The offence defined in article 213 of the Criminal Code carries a sentence of 3 to 6 months' imprisonment, while article 602.8 stipulates imprisonment for 3 months to 1 year.<sup>56</sup>

45. In the administrative sphere, article 77 of the regulations implementing the National Police Personnel Act,<sup>57</sup> in conjunction with article 108 of the National Police Personnel Act itself,<sup>58</sup> provides for the possible discharge of a member of the National Police on any of the grounds listed in the law. Regarding the regime established in the National Police Disciplinary Regulations, minor or class 1 offences covered in article 60 (62) of the Disciplinary Regulations carry a sentence of detention or menial labour for 8 days, simple reprimand or an additional 24 hours' work. Serious or class 3 offences defined in article 64 (15) incur the disciplinary sanction of discharge or demotion, 30 to 60 days' detention, 21 to 30 days' menial labour or harsh punishment.

46. The provisions of the Statute on the Legal and Administrative Regime of the Executive<sup>59</sup> should be noted. Specifically, articles 192 to 204 supplement the administrative sanctions regime governing the actions of the public authorities.

47. The maximum penalty provided for in the Criminal Code is 25 years' deprivation of liberty, referred to as "special long-term imprisonment for 16 to 25 years" (art. 53). In addition, article 59 of the Comprehensive Organic Criminal Code explicitly states that "deprivation of liberty may last up to 40 years", while article 70 (14) and (15) provides for the imposition of the following fines:

(14) For offences that carry a sentence of 22 to 26 years' deprivation of liberty, the fine imposed shall be 800 to 1,000 unified minimum wages.

(15) For offences that carry a sentence of 26 to 30 years' deprivation of liberty, the fine imposed shall be 1,000 to 1,500 unified minimum wages.

48. Regarding the possibility of establishing mitigating or aggravating circumstances to evaluate the severity of the sentence,<sup>60</sup> in accordance with article 7 (2) of the Convention, article 29 of the Criminal Code provides for the following mitigating circumstances:

(3) Where the offender has attempted to repair the harm caused or prevent the adverse effects of the acts, spontaneously and with determination; ... (5) Where the offender turns him or herself in to the authorities when there is a possibility of fleeing or hiding; (6) Where the offender demonstrates exemplary behaviour after committing the offence; (7) Where the offender's prior behaviour clearly shows that he or she is not a dangerous person.

49. The above can be deduced from the unnumbered article following article 29-A of the Criminal Code, which stipulates that: "For the imposition of penalties for offences committed by military or police personnel in the course of their duties, the mitigating

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the second degree; (8) the victim is illegally confined for political, ideological, religious or propaganda reasons; (9) the victim is physically or psychologically tortured during confinement, causing temporary injuries, provided that such treatment does not constitute another offence to be tried independently; (10) the victim is subjected to physical, sexual or psychological violence causing permanent injuries. Where the victim dies during or as a result of illegal confinement, the penalty shall be 22 to 26 years' imprisonment."

<sup>56</sup> See previous footnote.

<sup>57</sup> Executive Decree No. 898, Official Gazette No. 200 of 28 May 1999.

<sup>58</sup> Supplement to Official Gazette No. 378 of 7 August 1998.

<sup>59</sup> Executive Decree No. 2428, Official Gazette No. 536 of 18 March 2002.

<sup>60</sup> Articles 44 to 78 of the Comprehensive Organic Criminal Code establish the mechanisms for the application of mitigating and aggravating circumstances, the mitigating and aggravating circumstances of offences, an overriding mitigating factor, and the aggravating circumstances for offences against sexual and reproductive integrity and against individual integrity and liberty.

circumstances provided for [in the Criminal Code] in respect of ordinary offences shall apply where appropriate.”

50. Regarding potential generic aggravating circumstances, the provisions of article 30 of the Criminal Code are in line with the general guidelines contained in the Convention. For example, paragraph 5 cites situations where a perpetrator has increased or sought to increase the harmful effects of an offence, which could include the death of a disappeared person. Other aggravating circumstances cover situations where the perpetrator is in a position of superiority over “especially vulnerable persons”; for example, the sixth aggravating circumstance is where the offence is committed “for reasons of discrimination on grounds of birthplace, age, sex, ethnicity, colour, social origin, language, religion, political affiliation, economic status, sexual orientation, health condition, disability or a difference of any other kind”. It should be noted that article 30 of the Criminal Code is followed by two new unnumbered articles that define a general aggravating circumstance for police and military personnel, which could, in cases of enforced disappearance, entail a higher penalty because of the use of a weapon.

51. A different situation arises when there is a lack of responsibility (in cases where the alleged offender is incapable of conscious and voluntary control of his or her actions). Articles 32 to 40 of the Criminal Code refer explicitly to lack of responsibility on grounds of a psychiatric disorder (arts. 34 and 35)<sup>61</sup> or for reason of drunkenness or intoxication due to narcotics (arts. 37 (1) and 38).<sup>62</sup>

## Article 8

52. Under article 80 of the Constitution, actions and penalties for offences, including crimes against humanity and enforced disappearance, are not subject to a statute of limitations<sup>63</sup> and cannot under any circumstances be subject to amnesty, as is reiterated in article 114.8 of the Criminal Code.

<sup>61</sup> Article 35 stipulates that: “A person with a proven mental disorder cannot be held criminally responsible.” Article 36 states that: “A person who, at the time of the offence, is incapable of understanding the unlawfulness of his or her behaviour or of determining whether he or she is acting lawfully, owing to a mental disorder, shall not be held criminally responsible. In such cases, the judge shall order a security measure. A person who, at the time of the offence, is limited in his or her capacity to understand the unlawfulness of his or her behaviour or to determine whether he or she is acting lawfully shall be considered to have diminished criminal responsibility and shall be liable the minimum penalty for the offence reduced by one third.”

<sup>62</sup> Article 37 contains the following rules regarding responsibility in situations of drunkenness or intoxication: “Except in the case of traffic offences, a person who, at the time of the offence, is under the influence of alcohol or narcotics, psychotropic drugs or preparations containing them shall be punished in accordance with the following rules: (1) where the drunkenness or intoxication is fortuitous and deprives the perpetrator of his or her faculties at the time of the offence, he or she shall not be held responsible; (2) where the drunkenness or intoxication is fortuitous and not complete, but does considerably diminish the perpetrator’s faculties, he or she shall be considered to have diminished criminal responsibility and shall be liable to the minimum penalty for the offence reduced by one third; (3) where the drunkenness or intoxication is not fortuitous, responsibility shall not be excluded, reduced or aggravated; (4) where the drunkenness or intoxication is premeditated with a view to committing or excusing the offence, responsibility shall be always be aggravated.”

<sup>63</sup> This constitutional norm does not in itself constitute the rule on non-applicability of the statute of limitations but has the force of a declaration, given that the principle was already established by international norms already in force in Ecuador. It is worth noting the other international instruments that strengthen the basic concept of non-applicability of the statute of limitations: the “Updated set of principles for the protection and promotion of human rights through action to combat impunity”, issued by the Human Rights Commission under the auspices of the United Nations Economic and

53. Article 16 (4) of the Comprehensive Organic Criminal Code stipulates that: “Crimes of aggression against a State, genocide, crimes against humanity, war crimes, enforced disappearance, embezzlement, bribery, extortion, illicit enrichment and legal actions for environmental harm are not subject to the statute of limitations with regard to either legal action or punishment.” Furthermore, article 75 states that: “The penalties defined for the crimes of aggression, genocide, crimes against humanity, war crimes, enforced disappearance, aggression against a State, embezzlement, bribery, extortion, illicit enrichment and environmental harm are not subject to the statute of limitations.”

## Article 9

54. Matters of jurisdiction and competence, as procedural prerequisites, are primarily governed by articles 150 to 169 of the Organic Code of the Judiciary. However, in accordance with article 18 of the Code of Criminal Procedure and article 5 of the Criminal Code, the jurisdiction of Ecuadorian criminal courts extends to territories and persons. Articles 400 and 401 of the Comprehensive Organic Criminal Code list the persons who come under the criminal jurisdiction of Ecuador and universal jurisdiction in cases of crimes against humanity.

## Article 10

55. Regarding the detention regime for persons suspected of committing the offence of enforced disappearance, article 77 of the Constitution guarantees their right “to be fully informed, in plain language, of the reasons for their arrest, the identity of the judge or authority ordering the arrest, the identity of the officers making the arrest and the identity of those conducting the questioning” (para. 3). They must also be informed of their right “to remain silent, to seek the assistance of a lawyer, or a public defender if they are unable to designate their own counsel, and to communicate with a family member or any other person of their choosing” (para. 4). Moreover, if the detained person is a foreign national, “the person who carried out the arrest shall immediately inform the consular representative of the detainee’s country” (para. 5).

56. Articles 164 and 165 of the Code of Criminal Procedure define detention as one of the personal protective measures available for the purpose of investigating a prosecutable offence and establish that, for a detention to be enforced, an order of the competent due process judge in criminal matters and a committal warrant are required, and that detention cannot exceed 24 hours. Regarding the time of the detention, article 166 of the Code of Criminal Procedure reproduces the aforementioned paragraphs of article 77 of the Constitution. Under article 522 of the Comprehensive Organic Criminal Code, the purpose of detention (considered as one of various protective measures) is to ensure the presence of the accused. Articles 530 to 533 clearly state that detention should be carried out on the prior order of a judge and strictly for the purposes of the investigation, that a committal warrant is necessary and that detention cannot under any circumstances exceed 24 hours. Concerning a detainee’s right to be informed of his or her rights, article 533 reads as follows:

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Social Council on 8 February 2005, the Rome Statute and article 7 of the Inter-American Convention on Forced Disappearance of Persons. In addition, the Inter-American Court of Human Rights has handed down many judgements reaffirming this fundamental principle (see, for example, paragraph 151 of the judgement in *Almonacid Arellano v. Chile* of 26 September 2006).



The judge shall ascertain that a detainee has been informed of his or her rights, including the right to be notified clearly and in simple language of the reasons for his or her detention and the identities of the judge or authority who ordered the detention, the persons charged with enforcing it and the persons in charge of the questioning. A detainee shall also be informed of his or her right to remain silent, to request the presence of a public defender or private counsel and to communicate with a family member or any other person of their choosing. Communication with a trusted person chosen by the detainee and with his or her public or private counsel shall be facilitated ... The rights of victims and detained persons shall be clearly displayed in a visible place in all police stations, prosecutors' offices, courts and the public defender services.

57. Notwithstanding the above, articles 522 to 526 and 534 of the Comprehensive Organic Criminal Code provide for other types of personal protective measures to ensure the presence of an accused person, including: "(1) Prohibition on leaving the country; (2) obligation to report periodically to the trial judge or to the authority or institution appointed by the judge; (3) house arrest; (4) electronic monitoring; ... (6) pretrial detention." It should be emphasized that the latter can be replaced in specific cases, as provided for in article 537, which states:

Pretrial detention may be replaced by house arrest and the use of an electronic surveillance device in the following cases: (1) when the accused is pregnant or within 90 days of having given birth. In cases where the child is born with an illness that requires special care by the mother, this time limit may be extended to a maximum of a further 90 days; (2) when the accused is over 65 years of age; (3) when the accused is in the terminal phase of an incurable illness, has a severe disability or is suffering from a catastrophic, highly complex or extremely rare illness that prevents him or her from representing him/herself, in which case a medical certificate delivered by the relevant public body is required.

58. The obligation to provide consular assistance to Ecuadorians abroad is the responsibility of the consulate of Ecuador in a given country, in keeping with the Vienna Convention on Consular Relations.<sup>64</sup> More specifically, article 5 (a) of the Convention states that consular functions consist in "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law". In this connection, the Organic Act on the Foreign Service<sup>65</sup> stipulates that:

As part of their duties, consular staff shall intervene above all in actions that produce effects in Ecuador, whether the persons concerned are Ecuadorian or foreign. To this end, consular staff are authorized to intervene in the following matters: ... (d) actions to ensure the protection of Ecuadorians, assistance and representation before the authorities.

59. When a foreigner is detained in Ecuador, there is an obligation to inform the relevant consulate or embassy of the person's home country and administrative authority is conferred on the Office of the Under-Secretary for Migration, Consular Affairs and Refugees of the Ministry of Foreign Affairs and Human Mobility, in accordance with article 8, paragraph 1.2.4.5, of the Organic Statute on Procedures of the Ministry of Foreign Affairs.<sup>66</sup>

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<sup>64</sup> Convention of 24 April 1963, in force in Ecuador since 19 March 1967. Supreme Decree No. 2830, Official Gazette No. 472 of 5 April 1965.

<sup>65</sup> Supplement to Official Gazette No. 262 of 3 May 2006.

<sup>66</sup> Ministerial Decision No. 118, Official Gazette supplement No. 139 of 2 May 2011.

60. In this connection, article 553 (4) of the Comprehensive Organic Criminal Code provides that: “Where the person detained is a foreigner, the person responsible for enforcing the detention shall immediately inform the consular representative of the detainee’s country or, in the absence of such a representative, shall follow the rules contained in the relevant international instruments.”

61. The above notwithstanding, it is worth noting that article 94 of the Constitution establishes that “extraordinary action for injunction may be taken against final rulings or edicts that by action or omission violate rights recognized in the Constitution, and will be brought before the Constitutional Court”. Under article 58 of the Organic Act on Judicial Safeguards and Constitutional Oversight, injunctions “are designed to protect constitutional rights and due process in the context of rulings, final edicts and operative resolutions in which constitutional rights have been infringed by action or omission”. The Constitutional Court hears injunction applications directly (Constitution, art. 94), although applications must be made within 20 days to the court that issued the decision being challenged; the court will refer the corresponding file to the Constitutional Court (Organic Act, art. 62). However, injunctions are a subsidiary and exceptional remedy and therefore applications can only be processed once ordinary and extraordinary remedies have been exhausted (Constitution, art. 94; Organic Act on Judicial Safeguards and Constitutional Oversight, art. 61 (3)). Moreover, the eight admissibility criteria enumerated in article 62 (2) of the Organic Act also need to be taken into account. The above is supplemented by the provisions of articles 34 to 39 of the Regulations on the Conduct of Proceedings before the Constitutional Court, on admissibility, process and decisions.

## Article 11

62. Neither the Criminal Code nor the Code of Criminal Procedure make any explicit provision for extending Ecuador’s criminal jurisdiction to the universal sphere. In response to the requirements of article 11 of the Convention, article 401 of the new Comprehensive Organic Criminal Code explicitly states that: “Crimes against humanity may be investigated and prosecuted in Ecuador, provided that they have not been prosecuted in any other State or by international criminal courts, in keeping with the provisions of this Code and the international treaties that Ecuador has signed and ratified.” Therefore, the decision to activate universal jurisdiction under the Comprehensive Organic Criminal Code is limited to the commission of the offence of enforced disappearance in cases where the elements of the crime as set out in article 89 are present.

63. Article 32 of the Code of Criminal Procedure stipulates that, “from the point of view of the initiator, there are two categories of criminal action: public and private”. Pursuant to articles 36 and 37, the commission of acts of enforced disappearance is subject to a public criminal action that cannot under any circumstances be converted into a private one. However, it should be explained that the investigation conducted by the public prosecutor is based on the actions of the judicial police.<sup>67</sup> Pursuant to the amendments of the Criminal

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<sup>67</sup> The regulations on the National Police and the Judicial Police are set forth in article 163 of the Constitution, articles 207 to 214 of the Code of Criminal Procedure, the Organic Act on the National Police (Official Gazette No. 368 of 24 July 1998), the Regulations on the Judicial Police (Executive Decree No. 1651, Official Gazette No. 368 of 13 July 2001) and the Organic Functional Regulations of the Public Prosecution Service. In addition, the Attorney General’s Office has a department for coordination with the Judicial Police; the department’s functions are governed by article 21 of the Organic Functional Regulations of the Public Prosecution Service. Article 6 (3) and (8) of the Organic Statute on Procedures of the Attorney General’s Office defines as general strategic objectives “to include and highlight a rights-based approach in all procedures” and “to proactively reduce current levels of impunity”, respectively.

Code and the Code of Criminal Procedure, in the case of an enforced disappearance, whether it takes the form of a separate offence or a crime against humanity, the criminal action is public and, in accordance with article 411 of the Comprehensive Organic Criminal Code, is brought by the public prosecutor when the latter “has sufficient evidence that an offence has been committed and that the accused is responsible”. Pursuant to article 412, “the public prosecutor may not refrain from initiating a criminal investigation in cases of serious human rights violations and infringements of international humanitarian law”. As regards the support of the National Police, article 448 of the Comprehensive Organic Criminal Code stipulates that:

Regarding the preliminary investigation and the criminal proceedings, the Attorney General’s Office shall set up and manage the comprehensive specialized system of investigation and forensic medicine and science to provide expert services and technical and scientific support to the justice system. The specialized system shall have the support of the specialized body of the National Police and civilian investigators, who shall take the necessary steps to achieve the purposes set forth in this Code, carry out their tasks on the instructions of the Attorney General, and report, for administrative purposes, to the relevant ministry.

64. The regulations currently governing the Attorney General’s Office are primarily contained in the Constitution,<sup>68</sup> the Code of Criminal Procedure,<sup>69</sup> the Organic Code of the Judiciary,<sup>70</sup> the Organic Functional Regulations of the Public Prosecution Service,<sup>71</sup> the Organic Statute on Procedures of the Attorney General’s Office, and the Code of Ethics for Employees of the Attorney General’s Office.<sup>72</sup> The Code of Ethics also covers the obligations of provincial public prosecutors, who are required to “(a) ensure that human rights are always respected; (b) apply the law strictly without discrimination on grounds of race, sex, religion, age, appearance, social status or political affiliation, without prejudice to the benefits provided for by law to groups that require them; (c) immediately report any human rights violation to superiors”.

65. In this connection, article 26 of the Code of Criminal Procedure states that: “A public prosecutor who, as a result of a preliminary investigation or by any other means, finds cause to accuse a certain person of being involved in an offence subject to public criminal action shall initiate the judicial investigation ... and immediately notify the competent due process judge in criminal matters.” In addition, article 217 of the Code of Criminal Procedure stipulates that: “When a public prosecutor has the necessary information and sufficient cause to assign responsibility for an offence”, he or she shall petition the due process judge for an “indictment hearing” to be conducted by the judge, who, at the request of the public prosecutor, may order the notification of the parties to the proceedings and set a deadline for completion of the judicial investigation.<sup>73</sup>

66. As mentioned in paragraph 10 of this report, the Truth Commission and Human Rights Directorate was established in the Attorney General’s Office to conduct preliminary

<sup>68</sup> Articles 194 to 197 of the Constitution refer to the Attorney General’s Office as a body that is independent of the judiciary, define its areas of responsibility, establish the criteria for becoming Attorney General, and recognize and guarantee the career structure of prosecutors.

<sup>69</sup> Code of Criminal Procedure, art. 25.

<sup>70</sup> Organic Code of the Judiciary, arts. 281-284.

<sup>71</sup> Ministerial Decision No. 1, Official Gazette No. 289 of 21 March 2001.

<sup>72</sup> Ministerial Decision No. 5, Official Gazette No. 560 of 31 March 2009.

<sup>73</sup> On 1 October 2013, for the first time in Ecuador, an indictment hearing was held before the National Court of Justice in a case of crimes against humanity in the form of torture, sexual violence and enforced disappearance, at which the Attorney General brought accusations against 10 high-ranking officials of the National Police and Armed Forces, resulting in the adoption of personal and real protective measures, in keeping with article 160 of the Code of Criminal Procedure.

and judicial investigations; its functions and goals are described above. Furthermore, pursuant to Ministerial Decision No. 3338 (Official Gazette No. 58, 14 August 2013), the Ministry of the Interior set up the National Directorate for Offences against Life, Violent Death, Disappearance, Extortion and Illegal Confinement. The Directorate is part of the National Police, operates at the national level and is responsible for building up the evidence in the investigations and substantiating the charges brought in criminal proceedings (Ministerial Decision No. 3338, arts. 1 and 2).

67. While the judicial investigation is the responsibility of the public prosecutor, the competent due process judge is responsible not only for authorizing certain aspects of the procedure (Code of Criminal Procedure, arts. 119-221) but also for overseeing the investigation from beginning to end.

68. The end of the judicial investigation is governed by articles 224 et seq. of the Code of Criminal Procedure, which allow the public prosecutor to petition the due process judge to hold a new hearing at which the public prosecutor will present a report on the findings of the investigation (which may be accusatory or not) and at which any strictly procedural matters that may have arisen during the investigation will be settled. The findings of the competent first-instance judges are addressed in the Organic Code of the Judiciary; any investigations into acts of enforced disappearance are generally covered by articles 224 and 225, on “ordinary criminal judges”, who are known as criminal trial judges<sup>74</sup> in both the current Criminal Code and the Comprehensive Organic Criminal Code, or, exceptionally, by articles 226 and 228, which refer to “specialized criminal judges” who hear only cases involving offences committed by young offenders.

69. Regarding the degree of legal certainty required to determine responsibility for acts of enforced disappearance, article 215 (4) and (5) of the Code of Criminal Procedure stipulates that: “Where there is no evidence to demonstrate criminal responsibility, the investigation shall remain open for no more than one year. After this period, the public prosecutor shall provisionally shelve the case or shall request the judge to close it definitively, as appropriate ... However, where the public prosecutor receives evidence that a specific person has committed or participated in an offence, he or she shall initiate an investigation irrespective of the fact that the one-year period has ended ...” The above is supplemented by what takes place in the indictment hearing (Code of Criminal Procedure, art. 217), so that all statements made by public prosecutors are ratified by the court.

70. Regarding the degree of legal certainty required to initiate a criminal trial,<sup>75</sup> once the intermediate stage is complete, article 224 (2) and (3) of the Code of Criminal Procedure stipulates that:

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<sup>74</sup> Articles 16 to 18 of the Code of Criminal Procedure mandate exclusive jurisdiction in criminal matters, as follows: “Only due process judges in criminal matters and criminal courts established in accordance with the Constitution and the other laws of the Republic have jurisdiction over criminal matters”, bodies of the criminal justice system and the spheres of criminal law. Articles 19 and 20 cover the principles of legality and non-extendibility, while article 21 establishes the territorial competence of due process judges in criminal matters. Lastly, articles 27 and 28 define the jurisdiction of such judges and courts. Articles 192 to 194 of the Organic Code of the Judiciary deal with the determination of competence *ratione personae* in all cases involving special jurisdiction, and articles 376 to 382 of the Code of Criminal Procedure set forth the procedure in such cases.

<sup>75</sup> Article 589 of the Comprehensive Organic Criminal Code lists the following stages of ordinary proceedings in cases of enforced disappearance: (1) investigation; (2) evaluation and preparations for trial; and (3) the trial. Regarding the degree of legal certainty, the pretrial hearing is based on the indictment (arts. 603 and 604). As to the degree of legal certainty required to convict through an executory judgement, articles 621 and 622 describe the elements that the judgement must contain, in particular “full and sufficient reasoning regarding both criminal responsibility and the determination of the penalty and comprehensive reparation to the victim, or the rejection of these considerations”.

When the public prosecutor considers that the investigation has uncovered relevant facts that indicate that an offence has been committed and provided serious grounds for believing that the accused perpetrated or participated in the offence, he or she is required to bring charges and petition the due process judge in criminal matters to convene a trial. The indictment must include the following: ... (3) the evidence on which the charges against the accused are based. Where there are several accused persons, the reasoning must refer to each one individually, describing the acts in which he or she participated.

71. As to the degree of legal certainty required to convict through an executory judgement, article 312 of the Code of Criminal Procedure states that: “The guilty verdict shall mention how the commission of the offence and the accused’s responsibility were demonstrated in accordance with the law; and it shall clearly specify the offence for which the accused is being convicted and the penalty imposed.” Consequently, the degree of legal certainty required to charge, try and convict any person suspected of having committed acts of enforced disappearance brings together items of evidence that are also weighed in national criminal law (whether or not the person concerned holds Ecuadorian nationality).

72. Thus arises the mandatory judicial duty to establish reasons, coherence and exhaustiveness (Constitution, art. 76 (7) (1)) so that the grounds for conviction (*ratio decidendi*) connect the proven facts of the case with the operative part of the judgement (Code of Criminal Procedure, art. 309 (4)) in order to ensure that the certainty of the conviction is absolute and not based merely on evidence of the likelihood that an offence was committed (*fumus boni iuris*) — as is the case at the beginning of the investigation. A conviction must be based on evidence that was submitted and weighed during the trial phase and that demonstrates the accused’s guilt (Code of Criminal Procedure, art. 209 (2)). If the judge has any doubt as to the truth of the accusation, the principle of *in dubio pro reo* applies, based on the presumption of innocence (Constitution, art. 76 (2)).

73. For the general rules on evidence, reference is made to articles 79, 85 and 86 of the Code of Criminal Procedure, which require that each piece of evidence be produced “at the trial before the relevant criminal courts, except for urgent testimony, which is produced by the due process judge in criminal matters”; that “both the commission of the offence and the accused’s responsibility” must be established; and that all evidence must be “weighed by the judge or court in accordance with the rules of sound judgement”. It should be noted that article 89 distinguishes between material evidence, documentary evidence and testimony, and that article 498 of the Comprehensive Organic Criminal Code lists “(1) documents, (2) testimony and (3) expertise” as forms of evidence to be produced during the trial phase, in keeping with article 615 of the Code.

74. Regarding the fair treatment of alleged offenders, article 76 of the Constitution protects the right to due process, including the fundamental safeguards enumerated in the article’s seven paragraphs.<sup>76</sup> This article is supplemented by article 77 (7), which defines the right to a defence, and by article 82, which guarantees the right to legal certainty, the

<sup>76</sup> The rights covered in this article are: the right to the presumption of innocence; the principle that both the offence and the penalty must be prescribed by law; the right to be tried by the competent ordinary judge provided for by law; the principle that the evidence produced at trial must have been obtained lawfully; the right to a defence and the related prohibition of trying a person without a defence; the right to be informed of the charges in order to avoid inquisitorial proceedings; the right to a hearing and to appeal at every stage of the trial; the right to equality of arms; the principle that the proceedings must be public, except in specific cases defined by law; the right to the assistance of an interpreter and lawyer of the defendant’s choosing, or public defender; the right to be tried under an adversarial system and to have the opportunity for rebuttal; the principle of double jeopardy (*non bis in idem*); the right to be tried before an impartial and independent judge or court; and the right to a consistently reasoned judgement.

basis of which is “the existence of prior and clear rules of law that are published and enforced by the competent authorities”. All these aspects are further developed in the Code of Criminal Procedure, the Organic Act on Judicial Safeguards and Constitutional Oversight and the Organic Code of the Judiciary. Article 4 of the Comprehensive Organic Criminal Code states that: “The persons involved in a criminal trial enjoy the human rights enshrined in the Constitution of the Republic and in international instruments ... Overcrowding is prohibited.” Articles 5 and 6 of this Code in turn describe the procedural principles and safeguards in cases of deprivation of liberty.

75. As noted in paragraph 67 of this report, under Ecuadorian law, military authorities do not have jurisdiction over the investigation and prosecution of persons accused of enforced disappearance. Article 188 of the Constitution protects the notion of jurisdictional unity, while article 160 stipulates that “members of the Armed Forces and National Police shall be tried by organs of the judiciary”. To this end, on 10 February 2014, article 227 of the Organic Code of the Judiciary on the jurisdiction of military and police judges in criminal cases was repealed.<sup>77</sup> The National Court of Justice is currently composed of six specialized divisions, one of which deals with criminal, military criminal, police criminal and transit matters.

## Article 12

76. Any individual who believes that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities. This right is established in articles 42 and 43 of the Code of Criminal Procedure, which provides that:

Any person who becomes aware that a publicly actionable offence has been committed [except for those prohibited from taking such action under article 45 of the Code of Criminal Procedure] shall file a complaint with the competent public prosecutor, the Judicial Police or the National Police ... If the complaint is submitted to the Judicial Police, it shall be forwarded immediately to the public prosecution service — the only authority empowered to consider such cases — together with the relevant documentation.

77. The complaint may be submitted orally or in writing (Code of Criminal Procedure, arts. 48 and 49) but must in all cases be officially documented (Code of Criminal Procedure, art. 47) and comply with the requirements established in article 50 of the Code of Criminal Procedure. However, as provided for in both the Code of Criminal Procedure and the new Comprehensive Organic Criminal Code (arts. 421-431), the public prosecutor may instigate criminal proceedings without a complaint having been submitted.

78. Procedures for the dismissal of complaints are established in article 39 of the Code of Criminal Procedure, which provides that:

By means of a duly substantiated request, the public prosecutor shall ask the due process judge in criminal matters to dismiss the complaint should it become clear that the act in question does not constitute an offence or there is an irremediable legal obstacle to continuing the proceedings. The due process judge shall hear the complainant’s testimony before taking a decision and his or her decision shall not be subject to appeal.

79. Dismissals requested by the public prosecutor are regulated by article 587 of the Comprehensive Organic Criminal Code, which establishes the following rules:

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<sup>77</sup> Supplement to Official Gazette No. 180 of 10 February 2014.

(1) The decision to discontinue proceedings shall be duly substantiated and must be approved by the due process judge in criminal matters. The judge shall notify the victim or complainant, either at the address they have provided or by electronic means, that they have a period of three days in which to challenge the decision. At the end of this three-day period, the judge shall issue a reasoned decision without needing to hear the parties. If the judge decides to grant the request, the investigation shall be pronounced closed and, where justified, the complaint shall be declared malicious or frivolous. If the judge does not agree with the request to discontinue proceedings, the documents under examination shall be referred to the senior prosecutor, who shall either confirm or withdraw the request. If the request is confirmed, the proceedings shall be stayed; if the request is withdrawn, a new prosecutor shall be appointed to continue the investigation. (2) The judge's decision shall not be subject to appeal.

80. Protection for complainants, witnesses, relatives of the disappeared person and their defence counsel is guaranteed under article 198 of the Constitution, which provides that: "The Attorney General's Office shall be responsible for managing the national protection and support scheme for victims, witnesses and other participants in criminal proceedings, and for this purpose shall coordinate the work of public sector bodies with an interest in the concerns and objectives of the scheme, as well as the participation of civil society organizations."

81. In application of this constitutional provision, articles 118 and 295 of the Code of Criminal Procedure provide that:

To guarantee their physical well-being, their presence in court and the veracity of their testimony, witnesses shall have the right to the protection of the Attorney General's Office ... The most senior official of the Attorney General's Office shall organize this protection and establish appropriate procedures for its provision on the basis of the relevant regulations. Protection activities shall in all cases be guided by [the principles of voluntariness, confidentiality, due investigation, liaison, oversight and timeliness]. Admission to the protection scheme for victims, witnesses and other participants in criminal proceedings shall be regulated on the basis of the above principles and obligations, with mechanisms being established to prevent revictimization of the persons involved and to guarantee respect for their fundamental rights. The scheme shall be governed by the principles of accessibility, responsibility, complementarity, opportuneness, effectiveness and efficiency.

82. In line with the above, article 1 of the regulations governing the protection and support scheme for victims, witnesses and other participants in criminal proceedings<sup>78</sup> provides that: "The protection provided by the scheme shall be of a multidisciplinary nature. The authorities shall ensure that victimological, criminological, legal, medical and psychological approaches, as well as social assistance and security considerations, among others, are all taken into account."<sup>79</sup> Article 11 (8) states that: "In all criminal proceedings,

<sup>78</sup> Executive Decree No. 528, Official Gazette No. 150 of 17 August 2007.

<sup>79</sup> Article 6 of the regulations governing the protection and support scheme for victims, witnesses and other participants in criminal proceedings stipulates that the protection provided under the scheme might take the form of: immediate shelter; community police protection; round-the-clock police protection; police escort operations; changes of residence; help in leaving the country; measures to guarantee safety in social rehabilitation centres; medical, psychological and social assistance; help in finding employment or continuing studies; supporting prosecutors by providing accommodation and escort services for persons under protection, preparing victims, witnesses and other participants in criminal proceedings and changing their appearance for the court hearing, or using judicial mechanisms to shield victims from face-to-face confrontations with the alleged perpetrators of the offence.

the victim of the offences shall have the following rights ... (8) to be admitted to the national protection and support scheme for victims, witnesses and other participants to criminal proceedings”, in line with article 445 of the Comprehensive Organic Criminal Code, which provides that: “The Attorney General’s Office shall manage the national protection and support scheme for victims, witnesses and other participants in criminal proceedings, through which all parties involved in the pretrial investigations or any stage of the trial may avail themselves of specialist protection and support measures to safeguard their physical well-being and prevent their revictimization, whenever they may be in danger ...”

83. Article 10 of the Code of Ethics for Employees of the Attorney General’s Office establishes procedures that allow its employees to report pressure or acts of intimidation. These procedures may be used to report or file complaints about:

... any kind of influence that private individuals or other employees of the Attorney General’s Office might attempt to exert upon them, in connection with matters under the Office’s jurisdiction, to which end they shall: (a) bring to the immediate attention of their superior or the Attorney General any action taken by other employees of the Office or by third parties with the aim of influencing the pretrial or trial proceedings or the content of statements or obtaining unofficial information about them; and (b) avoid situations which might reveal their personal interest or expose their judicial involvement or any other kind of contribution to cases or proceedings that the Attorney General’s Office is pursuing through other employees.

### **Article 13**

84. In Ecuador, all requests for the passive extradition of suspected offenders are decided principally in accordance with the principles established in the Constitution and the requirements and procedures set out in the Extradition Act.<sup>80</sup>

85. Article 79 of the Constitution provides that: “Ecuadorian nationals shall not be extradited under any circumstances and shall be judged under the laws of Ecuador.” This provision is supplemented by article 66 (14) (2) of the Constitution, which stipulates that: “Foreign nationals may not be expelled or returned to a country where the life, freedom, security or safety of the persons involved or of members of their families would be threatened on account of their ethnic origin, religion, nationality, membership of a particular social group or political opinion.”

86. In accordance with article 2 of the Extradition Act, the double criminality principle must be applied to the offence or offences for which extradition is being sought by the requesting foreign State. This means that the offences in question must be criminal offences both in the requesting State and in Ecuador (the requested State). It is also necessary to take account of the “seriousness of the offence” principle, which dictates that extradition shall be agreed only in the case of offences which carry a custodial sentence of at least one year or a more severe penalty, without prejudice to the due process judge’s obligation to request the extradition of fugitives evading pretrial detention or a firm prison sentence (Code of Criminal Procedure, art. 7). Article 230 (8) of the Organic Code of the Judiciary affirms this obligation: “Besides having the responsibilities established in the Comprehensive Organic Criminal Code, due process judges shall have competence for ... all other cases determined by law.”

87. In view of the reasons for refusing an extradition request, which are analysed in the section on article 16 of the Convention, and the fact that enforced disappearance is not

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<sup>80</sup> Official Gazette No. 152 of 30 August 2000.



defined as a criminal offence in the Criminal Code, requests to extradite a person alleged to have committed such acts on the basis of the charges brought against them are not admitted, except in cases where the alleged offence is classified as a crime against humanity under the Rome Statute. Thus, in these cases, the passive extradition of persons assumed to have committed acts of enforced disappearance would be admitted, provided that the application from the requesting foreign State is based on the supposition that they have committed offences which, when joined with others, amount to enforced disappearance (for example, offences of arbitrary deprivation of liberty or unlawful imprisonment). However, with enforced disappearances being expressly criminalized in the new Comprehensive Organic Criminal Code, such offences may henceforth constitute grounds to admit an extradition request, since the offences in question would be classified as ordinary non-political offences (whether committed in isolation or as part of a widespread, systematic attack).

88. The passive extradition procedure consists of a number of processes; to admit an extradition request, firstly a judicial order and subsequently a Government decision issued by the President of Ecuador are required. The judicial process is regulated by article 13 of the Extradition Act (in accordance with article 199 (3) of the Organic Code on the Judiciary), which stipulates that responsibility for decisions on whether to admit or refuse extradition lies with the Presiding Judge of the National Court of Justice and that such decisions may be appealed before the corresponding specialist division of the National Court of Justice.

89. Final decisions of the Presiding Judge of the National Court of Justice declaring the extradition request inadmissible are binding on the Government, which cannot therefore grant the request (Extradition Act, art. 14 (1)). However, decisions declaring the extradition request admissible are not binding on the President of Ecuador (who “may refuse the request in exercise of national sovereignty, in accordance with the principle of reciprocity, for security reasons or for other reasons of fundamental importance for the State” — Extradition Act, art. 14 (2)), since in the case of Government decisions no appeals of any form are permitted (Extradition Act, art. 14 (4)).

## Articles 14 and 15

90. In the field of international judicial cooperation in criminal cases related to enforced disappearance, the three principal international treaties ratified by Ecuador are: (1) the Inter-American Convention on Mutual Assistance in Criminal Matters;<sup>81</sup> (2) the Inter-American Convention on the Taking of Evidence Abroad;<sup>82</sup> and (3) the Inter-American Convention on Execution of Preventive Measures.<sup>83</sup> With regard to mutual legal assistance, article 497 of the Comprehensive Organic Criminal Code states:

Public prosecutors may request direct assistance from their foreign counterparts or from foreign police forces for the completion of procedural formalities, collection of expert information and investigation of offences defined in this Code. Such assistance may entail, inter alia, arresting and transferring suspects and defendants, taking statements, disclosing documents such as bank statements, searching crime scenes, providing evidence and identifying and analysing listed substances that are subject to control, seizure and confiscation.

<sup>81</sup> Supplement to Official Gazette No. 153 of 25 November 2005.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

In addition, with a view to collecting evidence about the acts that constitute an offence, public prosecutors may take action overseas by availing themselves of international assistance in criminal matters.

The evidence thus collected shall be incorporated into the proceedings, and submitted and appraised during the trial.

91. With regard to the provision of assistance, article 130 of the Code of Criminal Procedure regulating oral evidence indicates that: "If the witness is in a foreign country, proceedings must be carried out in accordance with the conventions on judicial cooperation concluded by the State or with customary international practice." Similarly, article 488 of the new Comprehensive Organic Criminal Code provides that:

Without prejudice to the conduct of joint investigations and provision of mutual legal assistance, public prosecutors shall contact the foreign law enforcement and judicial authorities directly to request the surrender of the evidence that is necessary to attest the act constituting the offence and the alleged criminal responsibility of the persons being investigated in their country, in accordance with the applicable international instruments, and shall likewise provide the foreign authorities with such evidence, should they request it.

92. With regard to evidence obtained through statements, article 502 (3) of the Comprehensive Organic Criminal Code provides that: "If the person is resident in a foreign country, the authorities shall proceed in accordance with international or national standards for judicial assistance and cooperation. Whenever possible, an electronic communication link shall be established." Furthermore, article 565 allows "electronic testimony and other similar means of giving evidence":

When necessary for reasons of international cooperation, security or procedural expediency and in cases where it is impossible for persons due to give evidence to appear in court, and subject to prior authorization from the judge, evidence may be given via electronic communication media, video link or other similar technical means, subject to the following rules: (1) the audio and visual communications method used must allow the judge to observe and communicate orally in real time with the defendant, the victim, the private or public defence counsel, the prosecutor, the expert or the witness. The defendant shall be permitted to engage in private conversations with his or her private or public defence counsel; (2) communications between those appearing by these methods and the judges, the parties to the proceedings and others present at the hearing must be direct, reliable and in real time, for both images and sound; and (3) the judge shall take the measures deemed necessary to guarantee the right to a defence and the adversarial principle.

93. In addition, pursuant to article 12 (3.4) of the Organic Statute on Procedures of the Attorney General's Office, the Director of International Affairs has the following responsibilities:

(1) To coordinate the implementation of policies related to international cooperation and promote the active involvement of the Attorney General's Office in projects related to its mission and management that are spearheaded by international organizations; (2) to coordinate international assistance which helps in the fight against organized crime and improves criminal prosecution and cooperation mechanisms in areas within the remit of the Attorney General's Office; (3) to strengthen internal and external coordination and cooperation with a view to improving criminal investigations and prosecutions; (4) to strengthen international legal assistance which facilitates the exchange of information and evidence and renders criminal investigations more effective.

94. According to an official communication from the Attorney General's Office,<sup>84</sup> in the period referred to in article 35 of the Convention, Ecuador has requested assistance in criminal investigations and has received requests for such assistance in three cases of alleged enforced disappearance.<sup>85</sup>

## Article 16

95. Expulsion is dealt with in article 60 (12) of the Comprehensive Organic Criminal Code, which states that: "Non-custodial sentences include ... the expulsion of foreign nationals, with a prohibition on their return to Ecuador." Article 61 of the Code specifies that:

Expulsion shall be admitted in the case of criminal offences that carry a custodial sentence of more than five years. Upon completion of the sentence, the foreign national's return to Ecuador shall remain prohibited for a period of 10 years. Expelled foreign nationals who return to Ecuador before the end of the period stipulated at the time of their conviction shall be committing a further offence, that of failing to comply with the lawful decisions of the competent authority. However, if they are intercepted at the border, port, airport or, more generally, any point of entry or admission to the country, they shall be expelled directly by the police and a further period of prohibition on their return shall commence as of that date. Expulsion shall not be admitted in cases where, prior to the date on which the offence was committed, the foreign national in question had married or been in a recognized *de facto* union with an Ecuadorian national or has Ecuadorian children.

96. However, article 9 of the regulations governing the application of refugee law in Ecuador contains an express prohibition on expulsion (principle of non-refoulement), stipulating that:

No person shall be turned back or refused entry at the border, returned, expelled, extradited or subjected to any measure which forces them to return or exposes them to the risk of return to a country in which their life, freedom, safety or security are at risk, in accordance with [the Constitution] and the 1951 United Nations Convention relating to the Status of Refugees. However, in accordance with articles 32 and 33 of the 1951 Convention relating to the Status of Refugees, on refoulement, expulsion and extradition, the benefit of the above provision may not be claimed by a refugee or asylum seeker whom there are reasonable grounds for regarding as a danger to the

<sup>84</sup> Memorandum sent to the Ministry of Justice, Human Rights and Religion, under reference No. 08414-DCVDH-FGE, on 27 August 2013.

<sup>85</sup> (1) Case file No. 370 -2010-BOES concerning passive international assistance in criminal matters states that, in November 2010, the Attorney General of Colombia asked the Attorney General of Ecuador to investigate the alleged disappearance of M.E.C.L. The Office of the Provincial Prosecutor of Sucumbíos is in charge of this investigation but there has been no progress to date. (2) Case file No. 162-2012-CERM concerning active international assistance in criminal matters states that, in May 2012, the Truth Commission of Ecuador issued a request for international assistance in criminal matters to the competent authorities of Colombia in the hope of bringing fresh evidence to the investigations into the unlawful detention, torture and enforced disappearance of C.S.R.A. and P.E.R.A., both Colombian nationals; in June 2012 the Attorney General of Ecuador received the report on the results of the investigations conducted. (3) Case file No. 226 -2012-MECM concerning active international assistance in criminal matters states that the Truth Commission of Ecuador asked the Attorney General of Ecuador to request from the competent authorities of Peru a copy of the case file and the results of the proceedings brought against O.H.V. and others on the charge of the enforced disappearance of M.R.B.T., since these criminal proceedings were linked to the enforced disappearance of E.R.D.H., an Ecuadorian national.

security of the country or to public order or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of Ecuador.

97. With regard to the latter exception, it should be emphasized that returns admitted for any of the reasons mentioned above are not carried out arbitrarily, but are effected on the basis of grounds expressly provided for in the regulations and in accordance with the procedures for expulsion and, where appropriate, deportation established in the Migration Act.

98. Since the notion of “refusal of entry” as defined in the Migration Act is not applicable to the situations envisaged under article 16 of the Convention from the moment a person is refused admission or entry to Ecuador (e.g. by being refused a visa), the person shall for legal purposes be considered never to have entered Ecuador. It is therefore relevant to consider the regulations governing deportation, as described below.

99. In this connection it is necessary to take account, firstly, of article 66 (14) (3) of the Constitution, which establishes that: “The collective expulsion of foreign nationals shall be prohibited. Migration cases shall be dealt with on an individual basis.” To support the implementation of this constitutional provision, the permitted grounds for deportation, depending on personal circumstances, are set out in article 19 of the Migration Act. In order to ensure that persons subject to deportation proceedings instigated by the Police Commissioner are not extradited to a country in which they could be subjected to enforced disappearance, the Migration Act establishes specific procedures for the surrender of such persons to the judicial authorities (Migration Act, arts. 23-25), under which the competent judge dealing with infractions (after the hearing provided for in article 26 of the Migration Act) is required to issue a decision either refusing or admitting the deportation.<sup>86</sup> If deportation is refused, the decision will be referred to the relevant minister for confirmation or revocation. If deportation is ruled admissible, the decision may be appealed before the ordinary courts (Migration Act, arts. 28-30).

100. Ecuador complies with article 16 of the Convention in that the return of refugees and asylum seekers is prohibited (non-refoulement principle) under article 41 of the Constitution, which stipulates that: “Refugees and asylum seekers shall be entitled to special protection to guarantee the full exercise of their rights. The State shall respect and guarantee the principle of non-refoulement and provide emergency humanitarian and legal aid.”

101. There is no prohibition on the “surrender” of persons to another State in which there is a risk that they could be subjected to enforced disappearance, because situations of “surrender” are not envisaged *stricto sensu* under Ecuadorian law, even analogously. Accordingly, the transfer of a person to another State as a result of their “surrender” would not be possible.

102. As regards the prohibition of the “extradition” of persons to another State in which there is a risk that they could be subjected to enforced disappearance, the circumstances in which passive extradition requests may be refused are set out in articles 5 and 6 of the

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<sup>86</sup> The Comprehensive Organic Criminal Code contains various provisions dealing with migration. Article 24, for example, stipulates that: “If the foreign national subject to deportation proceedings is arrested, before initiating proceedings the judge dealing with infractions shall ask the due process judge to adopt the interim protection measures applicable pursuant to the Comprehensive Organic Criminal Code.”

Migration Act. The grounds for refusing passive extradition requests may be obligatory (Migration Act, art. 5<sup>87</sup>) or discretionary (Migration Act, art. 6<sup>88</sup>).

103. In conclusion, the above analysis shows that, in extradition cases where there is risk that the person whose extradition is requested may be subjected to enforced disappearance in the requesting State, the discretionary grounds for refusal set out in article 6 (1) of the Migration Act may be applied, as well as the obligatory grounds for refusal set out in article 5 (7) of the Migration Act.

## Article 17

104. The Government of Ecuador's compliance with article 17 of the Convention is evidenced in the provisions of article 77 of the Constitution:

(1) Deprivation of liberty shall not be the general rule and shall be used to ensure the presence of the suspect or defendant at the trial, the right of the victim to prompt and timely justice without delays, and the enforcement of the sentence. It shall be used subject to a written order issued by the competent judge in the cases, for the period and in accordance with the procedures established by law, except in cases of flagrante delicto, in which case detainees may be held without a judicial order for no more than 24 hours ... (2) Except in cases of flagrante delicto, no person may be placed in a detention facility without a written order issued by the competent judge. Suspects and defendants in criminal proceedings who are deprived of their liberty shall be held in legally established remand centres. (3) Any person who is arrested shall, at the time of the arrest, have the right to be fully informed, in plain language, of the reasons for their arrest, the identity of the judge or authority ordering the

<sup>87</sup> Article 5 of the Migration Act sets out the following circumstances in which refusal is obligatory: "(1) The extradition of foreign nationals for offences which should be heard in the courts of Ecuador before Ecuadorian judges, according to domestic law ... (2) When the offences concerned are of a political nature. The following shall not be considered political offences: acts of terrorism; the crimes against humanity set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations; and attempts on the life of a Head of State or any member of their family. Likewise, ordinary offences shall not be considered political offences, even if they have been committed for political motives ... (5) When it has been confirmed that the offence or the penalty is time-barred under Ecuadorian law or the law of the requesting State. (6) When the person whose extradition is requested is on trial or has been tried, convicted or acquitted in Ecuador for the same acts on which the extradition request is based ... (7) When the requesting State has failed to issue a guarantee that the person whose extradition is requested will not be executed and will not be subjected to punishment that undermines their physical integrity or to inhuman or degrading treatment. (8) When the requesting State has failed to provide adequate assurances [that the person whose extradition is requested will have a new trial at which they will be required to be physically present and all other guarantees of due process will be satisfied (Migration Act, art. 3)]. (9) When the person whose extradition is requested has been granted asylum, provided that the person is not wanted in connection with another offence that warrants their extradition. A decision not to grant asylum, for whatever reason, shall not preclude a refusal to extradite the person based on any other reasons set out in this Act ..."

<sup>88</sup> Article 6 of the Migration Act lists the following situations in which refusal is discretionary: "(1) When there are substantive grounds for believing that a request for extradition based on an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of their race, religion, nationality, political opinion or sexual orientation, or that the person's position may be prejudiced for any of these reasons. (2) When the person whose extradition is requested is under the age of 18 years at the time of the extradition request and, because the person is habitually resident in Ecuador, it is believed that extradition could impede their social reintegration, without prejudice to the adoption, in agreement with the authorities of the requesting State, of the most appropriate measures."

arrest, the identity of the officers making the arrest and the identity of those conducting the questioning. (4) At the time of the arrest, the person arrested shall be informed by the arresting officer of their right to remain silent, to seek the assistance of a lawyer, or a public defender if they are unable to designate their own counsel, and to communicate with a family member or any other person of their choosing. (5) If the detained person is a foreign national, the person who carried out the arrest shall immediately inform the consular representative of the detainee's country. (6) No person shall be held incommunicado ... (9) Under the responsibility of the judge hearing the case, pretrial detention shall not exceed six months in the case of offences punishable by detention, or one year in the case of offences punishable by imprisonment ... (10) Without exception, detainees shall be released immediately once a dismissal order has been issued or an acquittal decision reached, even if an inquiry or appeal remains pending ... Anyone who has detained a person in breach of these provisions shall be punished. The law shall establish criminal and administrative penalties for cases of arbitrary detention involving excessive use of police force, the improper application or interpretation of criminal provisions or other regulations, or any form of discrimination. Where members of the Armed Forces or the National Police are arrested for disciplinary reasons, the relevant provisions of law shall apply.

105. To support implementation of these constitutional provisions, the Code of Criminal Procedure provides for the possibility that, in exceptional circumstances, any person may be deprived of their liberty, provided that due grounds exist and the legally established procedure is followed. Article 160 of the Code of Criminal Procedure sets out various personal protective measures, including arrest (Code of Criminal Procedure, arts. 161-163), detention (arts. 164-166) and pretrial detention (arts. 167-173), which may be used for persons suspected of committing acts of enforced disappearance. In the new Comprehensive Organic Criminal Code, "arrest" is covered in articles 526 to 529, "detention" in articles 533 to 530 and "pretrial detention" in articles 534 to 541.

106. With regard to jurisdictional oversight of the lawfulness of deprivation of liberty, articles 89 and 90 of the Constitution and articles 43 to 46 of the Organic Act on Judicial Safeguards and Constitutional Oversight provide for the possibility of instituting habeas corpus proceedings. In accordance with article 89 of the Constitution, the aim of such proceedings is:

... to restore the liberty of any person who has been illegally, arbitrarily or illegitimately deprived of it by order of a public authority or any person, and to protect the life and physical integrity of those deprived of liberty ... If the custody order was issued in a criminal trial, the writ shall be filed with the Court of Justice of the province concerned.

107. Article 90 of the Constitution and article 46 of the Organic Act on Judicial Safeguards and Constitutional Oversight make express reference to the procedure to be followed in cases where an offence of enforced disappearance is thought to have been committed:

When the place of deprivation of liberty is unknown and it appears that a public official, other agent of the State, or other persons acting with their authorization, support or acquiescence might have been involved, the judge shall call the most senior officer of the National Police and the competent minister to the hearing. After they have been heard, the measures necessary to locate the person and those responsible for his or her detention shall be taken.

108. The above provision is in turn supplemented by the provisions of article 430 of the Code of Criminal Procedure, which provides that, in such cases, the "judge or court shall

order an urgent investigation to locate [the forcibly disappeared person]. This investigation may be entrusted to the Ombudsman, who must report the findings within five days. The person or group of persons who have filed the *amparo* application may be designated as auxiliaries in the investigation.” Pursuant to article 585 (3) of the Comprehensive Organic Criminal Code, in all cases of disappearance of persons, whatever the circumstances, the investigation shall be the responsibility of the public prosecutor.

109. With regard to the right to be assisted by a lawyer, in addition to the above mechanism, there are two State institutions tasked with protecting the rights of citizens in general and the rights of persons deprived of their liberty in particular: the Ombudsman’s Office and the Public Defender Service. The Ombudsman’s Office, regulated by the Organic Act on the Ombudsman’s Office, forms part of the social control branch of government while the Public Defender Service, regulated in articles 285-294 of the Organic Code on the Judiciary,<sup>89</sup> is part of the judicial branch.

110. Consequently, the roles assigned to each of the two institutions under the Constitution also differ. Article 191 stipulates that the purpose of the Public Defender Service is to ensure “full and equal access to justice for persons who, because of their vulnerability or economic, social or cultural situation, are unable to retain the services of a defence counsel to protect their rights”; while article 215 provides that the Ombudsman’s Office “shall be responsible for protecting and safeguarding the rights of people living in Ecuador and defending the rights of Ecuadorians outside the country”. The Office is empowered to support constitutional legal actions, order immediate mandatory measures for the protection of rights, investigate and appraise the conduct of public servants, and monitor compliance with due process safeguards, thereby preventing “torture, and cruel, inhuman and degrading treatment in all its forms”.

111. According to information provided by the Ombudsman’s Office,<sup>90</sup> the national preventive mechanism for the prevention of torture<sup>91</sup> is composed of an interdisciplinary team of four persons who between them conduct at least two visits to places of deprivation of liberty each month. The national preventive mechanism is still in the start-up phase. At present, its efforts are focused on preparing an amendment to the organic act regulating its status with a view to establishing a national directorate for the prevention of torture. A draft will be submitted to the National Assembly as soon as a final version of the revised text is available.

112. Whenever the Ombudsman’s Office receives complaints concerning a failure to surrender or share information, investigations may be initiated in any of its provincial offices. The first step in this process is to urge the party concerned to surrender the information requested. If the party persists in refusing to do so, an action for access to public information is initiated with a view to securing a judicial order for the surrender of

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<sup>89</sup> Official Gazette No. 7 of 7 February 1997.

<sup>90</sup> Memorandum No. DPE-DP-2013-0446-0 sent to the Ministry of Justice, Human Rights and Religion on 23 August 2013.

<sup>91</sup> Ecuador ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2010 and, in fulfilment of articles 3 and 17 to 23 of the Optional Protocol, the Ombudsman’s Office established the national preventive mechanism of Ecuador in October 2012. The national preventive mechanism has its own budget, material and personnel resources and procedures for conducting visits and keeping records of its inspections. Its duties include conducting regular reviews of the treatment of persons deprived of their liberty in places of detention; issuing recommendations to the competent authorities with the aim of improving the treatment and conditions of detention of persons deprived of their liberty; preventing torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; and submitting proposals and observations concerning existing or draft legislation.

the information. However, the Ombudsman's Office has not received any complaints of refusals to disclose information contained in the records of places of deprivation of liberty. Moreover, no complaints of enforced disappearances have been submitted to the Office.

113. Article 40 of the Sentence Enforcement and Social Rehabilitation Code provides that: "All social rehabilitation and remand centres shall keep a register containing, for each detainee, the following information: (a) personal details; (b) the grounds for detention, the authority that ordered it and the period of detention; (c) the date and time of admission; and (d) any other information specified in the regulations". Article 44 of the regulations implementing the Code provides that the body responsible for keeping the register of detainees released from social rehabilitation centres shall be the Released Detainees Unit of the Assessment and Evaluation Department of the National Directorate.<sup>92</sup> Article 681 of the Comprehensive Organic Criminal Code provides that: "All places of deprivation of liberty shall keep a record of each inmate in order to facilitate the provision of specialist rehabilitation and reintegration treatment. Should a detainee die in custody, the death shall also be recorded." It should be noted that article 683 stipulates that all persons must undergo a compulsory medical check-up before being admitted to the place of deprivation of liberty.

114. Responsibility for maintaining the register of persons deprived of their liberty lies with the Ministry of Justice, Human Rights and Religion. Through the intermediary of the deputy minister for adults and adolescents in conflict with the law, and using an integrated software platform (e-SIGPEN, the prison management information system) which it supports and oversees, the Ministry collates and monitors the information gathered by each place of deprivation of liberty, in accordance with article 5, concerning compulsory record-keeping, of Ministerial Decision No. 315 of the Ministry of Justice, Human Rights and Religion.<sup>93</sup>

115. When a person is deprived of liberty by agents of the State, the person in question must be placed in a prison facility and, at the time of their admission, three separate files should be opened. The first file concerns the detainee's registration in the e-SIGPEN system. The second is the fact sheet (*prontuario*) containing the detainee's fingerprints and photographs, which is also entered in e-SIGPEN and is managed by the Prisons Secretariat. The third file records the detainee's criminal profile, in line with the technical criteria established in articles 17 and 18 of the regulations implementing the Sentence Enforcement and Social Rehabilitation Code. This third file is of particular importance, since detainees for whom no such file exists are unable to access the benefits established in article 32 of the Sentence Enforcement and Social Rehabilitation Code. Article 32 is implemented by specific regulations governing the allocation of merit time to prisoners, which stipulate, in article 2, that:<sup>94</sup>

As soon as a person is admitted to a social rehabilitation centre or a remand facility, the centre's assessment and evaluation department shall open an individual file, in

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<sup>92</sup> In 2012, the Ministry of Justice, Human Rights and Religion developed a prison management model that envisages a comprehensive overhaul of centres of deprivation of liberty, drawing on comparable examples.

<sup>93</sup> Ministerial Decision No. 315 of the Ministry of Justice, Human Rights and Religion of 21 October 2011, on the revision of the Organic Statute on Procedures of the Ministry of Justice, Human Rights and Religion and other additional provisions. Article 5 of the Decision stipulates that: "In order to ensure proper record-keeping within the prison system, use of the e-SIGPEN software system shall be compulsory in all social rehabilitation centres, remand facilities, halfway houses and young offender centres throughout the country. To this end, the Information Technology Directorate of the Ministry, in conjunction with the General Planning Coordination Unit, shall be responsible for implementing, monitoring and verifying compliance with this article."

<sup>94</sup> Official Gazette No. 434 of 26 September 2008.



both hard and soft copy, in which the detainee's personal details and sentence shall be recorded. All documents related to their conduct and active participation in rehabilitation processes during detention and the monthly reports issued by the assessment and evaluation department shall be entered in these files. When a detainee is transferred between centres, the director of the rehabilitation centre in which they were being held shall forward the individual file with the transferee, maintaining a certified copy for the centre. The file shall be available for consultation by the detainee and their defence counsel at all times.

116. Lastly, article 35 of the regulations implementing the Sentence Enforcement and Social Rehabilitation Code and article 33 of the Code itself<sup>95</sup> provide that: "All social rehabilitation centres shall keep a file containing the personal records of each detainee in which the merit time accumulated during their detention shall be recorded. This record shall be publicly and freely accessible to the detainee and their defence counsel."

## Article 18

117. In cases of enforced disappearance, the interested parties (including the disappeared person's relatives, legal representative and lawyer) have various possible means of accessing available information on all issues related to the detained person who has allegedly been disappeared.

118. By way of introduction, it should be highlighted that article 18 (2) of the Constitution provides that:

All persons have the right, individually or collectively, freely [to access] the information generated by public sector institutions and private sector entities which manage State funds or provide public services. No information shall be excluded from this rule except in the cases expressly established by law. In cases of human rights violations, no public sector institution shall withhold information.

119. The main mechanisms available to support implementation of this constitutional provision are the administrative procedure for access to public information and the subsequent appeal procedure for access to public information provided for in the Organic Act on Transparency and Access to Public Information<sup>96</sup> and its implementing regulations.<sup>97</sup> In practice, however, the appeal procedure has been replaced by the possibility of bringing an action for access to information as provided for in the Constitution and the Organic Act on Judicial Safeguards and Constitutional Oversight.

120. In the first instance, interested parties may pursue an administrative procedure for access to public information, which is initiated by written application to the head of the institution in question (article 19 of the Organic Act on Transparency and Access to Public Information and article 2 of its implementing regulations). This application does not carry an obligation for the institution in question to "create or generate information", nor does it "entitle the applicant to demand that the institutions evaluate or analyse the information in their possession, except for such assessments or analyses which they should perform in order to meet their institutional objectives" (Organic Act on Transparency and Access to

<sup>95</sup> In addition, the third general provision of the Comprehensive Organic Criminal Code provides that: "All processes, actions and procedures related to the enforcement of custodial sentences that are under way at the time this Code enters into force shall continue to be regulated under the Sentence Enforcement Code and other regulations in force at the time they were initiated and until they are completed."

<sup>96</sup> Supplement to Official Gazette No. 337 of 18 May 2004.

<sup>97</sup> Official Gazette No. 507 of 19 January 2005.

Public Information, art. 20). Article 14 of the regulations implementing the Organic Act states that: “The head of the institution receiving the application for access to information or the official delegated to provide this service in their respective province or region shall respond to the application within a period of 10 days, which can be extended for a further 5 days where justified grounds exist and have been duly explained to the applicant.” If the information is expressly refused or the application is unanswered (tacit refusal), the relevant administrative, judicial and constitutional remedy may be initiated and the public officials involved become subject to “the penalties established in this Act” (article 21 of the Organic Act on Transparency and Access to Public Information and article 15 of its implementing regulations).

121. In the second instance, the right to access information through the court is guaranteed by means of an “action for accessing public information through the judicial system”. Such actions “may be brought before any civil judge or court with jurisdiction in the place of domicile of the holder of the information requested”. Article 22 of the Organic Act on Transparency and Access to Public Information establishes the course of action to be followed when the authority to which the application has been submitted refuses to provide the information, whether tacitly (by failing to respond within the required time period) or expressly (which includes cases in which the refusal is based on the “classified or confidential nature” of the information requested). Article 16 of the regulations implementing the Organic Act further provides that:

Actions for access to public information through the judicial system may be initiated when: (a) the authority to which the request for access has been submitted has refused to process the request or denied physical access to the information; and (b) the information is thought to be incomplete, altered or falsified, even if the refusal had been attributed to the classified or confidential nature of the information.

122. In the third instance, once the interested parties have availed themselves of the mechanisms provided for under the Organic Act on Transparency and Access to Public Information and its implementing regulations, and without being required to use the administrative and judicial procedures provided for in the Organic Act,<sup>98</sup> they may also bring an action for access to public information as defined in article 91 of the Constitution and regulated in articles 47 and 48 of the Organic Act on Judicial Safeguards and Constitutional Oversight. In such cases (as in the case of writs of habeas data), jurisdiction over the action falls, in the first instance (pursuant to article 7 of the Organic Act on Judicial Safeguards and Constitutional Oversight), to the first instance court of the judicial district in which the events took place or their consequences were felt or, if several districts were involved, to a court selected randomly, and, in the second instance, to the corresponding Provincial Court of Justice (Organic Act on Judicial Safeguards and Constitutional Oversight, art. 168 (1)).

123. An action of this kind may be initiated: (1) when public information has been refused expressly or tacitly (including when the refusal is based on the “confidential or classified nature” of the information); (2) when the information provided is thought to be incomplete or to have been altered; and (3) when physical access to the sources of information has been refused. The second and third paragraphs of article 47 of the Organic Act on Judicial Safeguards and Constitutional Oversight further provide that:

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<sup>98</sup> Judgement of the Supreme Court of Justice, Administrative Litigation Division, cassation appeal No. 278, published in Official Gazette No. 127 of 16 July 2007. In application of the principle of effective judicial protection and the associated right to have access to a proper defence, the Court imposes no requirement for an administrative appeal to have been pursued prior to taking action to enforce a right through the judicial channel.

All information which is generated by or under the control of public sector institutions or private sector entities that work with the State or hold State concessions in the areas to which the information relates, shall be considered public information. Access to public information that is defined as confidential or classified according to the terms established by law shall not be permitted. Access to strategic information that is sensitive to the interests of public sector enterprises shall also be prohibited.

124. However, the last two restrictions established in article 47 (classified or confidential information and strategic, sensitive information) shall not apply in cases of enforced disappearance, in accordance with article 18 (2) of the Constitution.

125. The Organic Act on Judicial Safeguards and Constitutional Oversight further provides that:

For the purpose of filing the action, the legal violation shall be deemed to have occurred in the place in which the information requested is, or is presumed to be, held. If the information is not held in the records of the institution receiving the request, the public sector institution must indicate the place or the file in which the information requested may be found. The judge shall proceed in accordance with the Constitution and the law regulating this area.<sup>99</sup>

## Articles 19 and 20

126. In order to prevent personal information (including medical and genetic data) that is collected or transmitted during the search for a disappeared person from being used or disclosed for purposes other than the search, the Constitution provides for an action for a writ of habeas data. The aim of such a writ, unlike that of an action for access to information, is to protect private information about both the person him/herself and his or her assets.<sup>100</sup>

127. Accordingly, article 92 of the Constitution states:

Everyone shall be entitled, whether acting for themselves or as representatives authorized for the purpose, to ascertain the existence of and obtain access to documents, genetic data, personal data banks or files and reports held on them or their property by public or private organizations on any physical or electronic storage medium. They shall also be entitled to ascertain the purpose of these and the uses to which they are put, the origin and destination of personal information and the time for which such data banks or files are to be held. Those in charge of personal data banks or archives may disclose the stored information with the authorization of the owner of the data or the law. Upon application to those holding the data, their owner may access them free of charge and have them updated, rectified, removed or

<sup>99</sup> Article 26 of the Organic Act on Judicial Safeguards and Constitutional Oversight provides that the purpose of such precautionary measures “shall be to prevent or eliminate the threat to or violation of the rights recognized in the Constitution and in international human rights instruments”.

<sup>100</sup> Article 6 of the Act on the National Public Records System (published in the supplement to Official Gazette No. 162 of 31 March 2010) states:

Data of a personal nature on, for example, ideology, political or trade union affiliation, ethnicity, health status, sexual orientation, religion, immigration status and other information pertaining to individual privacy, and especially information whose public use would infringe upon the human rights enshrined in the Constitution and international instruments, are confidential. Access to such data shall be possible only with the express authorization of the person concerned, by authority of the law or by court order.

deleted. In the case of sensitive data, which may only be held with the authorization of their owner or the law, the necessary security measures must be adopted. If the application is disregarded, the owner of the data may seek a court order. The person affected may sue for damages.

128. Article 50 of the Organic Act on Judicial Safeguards and Constitutional Oversight states the following about this specific action:

The action for the writ of habeas data may be brought in the following cases: (1) when access to documents, genetic data, personal data banks or files and reports held by public entities or private individuals or entities is denied; (2) When a request to update, rectify, remove or delete data that are inaccurate or affect a person's rights is denied; (3) when personal information is used in such a way as to violate a constitutional right, without express authorization, except by order of a competent court.

129. In the area of protecting information obtained about persons in custody, and with specific reference to the procedures for obtaining genetic data, the Attorney General's Office states:<sup>101</sup>

Samples of bodily fluids for DNA analysis aimed at obtaining genetic profiles of persons involved in civil or criminal proceedings are taken at the specific request of the competent authorities (judges or prosecutors) after the person involved or his or her legal representatives have provided informed consent in writing. The genetic profiles are used by the respective judicial authorities to establish biological links, based on DNA analysis, between people; in addition, they can be used to identify the remains of persons disappeared in different circumstances, after comparing the profiles of close relatives, as well as to determine the involvement of alleged offenders in various crimes. Genetic data are stored on information systems accessible only to the personnel of the DNA laboratory and the Information Technology Directorate of the Attorney General's Office. The DNA obtained is stored by freezing it in microvials at appropriate temperatures; in some cases, the primary samples are stored on filter paper. The data are protected indefinitely, and the storage of physical samples depends on the applicable national standards.

130. In addition, there are specific regulations, with their respective exceptions, on the protection of information on youth offenders. Article 317 of the Code on Children and Adolescents,<sup>102</sup> for example, states:

The adolescent's right to privacy shall be respected at every stage of the process. The proceedings in which the adolescent is involved shall be conducted in confidence ... Information that could identify the adolescent or members of his or her family may not be disclosed in any way. Natural or legal persons contravening the provisions of this article shall be subject to the penalties provided for in [this Code and] other laws. Criminal justice, administrative and police officials shall observe the duty of secrecy and confidentiality regarding the criminal and police records of adolescent offenders, who, once discharged, shall be entitled to have their files closed and destroyed.<sup>103</sup>

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<sup>101</sup> Memorandum No. 08414-DCVDH-FGE of 27 August 2013 sent to the Ministry of Justice, Human Rights and Religion.

<sup>102</sup> Official Gazette No. 737 of 3 January 2003.

<sup>103</sup> Article 52 of the Code on Children and Adolescents states that publication of the name or image of minors charged with or convicted of crimes or offences is prohibited. Article 54 states:

The criminal or judicial records of adolescents who have been investigated, tried, detained or subjected to social rehabilitation measures as a result of a criminal offence may not be made

## Article 21

131. Article 77 (10) of the Constitution states: “Without exception, detainees shall be released immediately once a dismissal order has been issued or an acquittal decision reached, even if an inquiry or appeal remains pending.”

132. In line with the Constitution, article 47 of the Sentence Enforcement and Social Rehabilitation Code establishes the procedure that must be followed to process the release of persons deprived of their liberty:

Prisoners shall be released as soon as they have served their sentences or when they have been granted amnesty or a pardon, or in implementation of the Amnesty Act, after the competent authority has issued the release order [or papers]. Officials or employees who, without just cause, delay compliance with this provision shall be removed from their posts, without prejudice to any corresponding civil and criminal penalties.<sup>104</sup>

133. According to information provided by the Office of the Undersecretary for Social Rehabilitation at the Ministry of Justice, Human Rights and Religion, practical verification of the release is carried out as follows: once the detention centre secretariat receives the corresponding release papers, their receipt is recorded in a manual register that lists the papers received in the box for the previous day. The release papers are sent immediately, together with a copy of the prisoner’s criminal record, to the detention centre’s legal department, where the website of the judiciary is checked; if there is no pending case against the detainee, a favourable report is issued and sent to the secretariat for it to make the change to e-SIGPEN [the prison management information system]. Once the prisoner has been through the fingerprinting department, an interview is held with the prison director, who, once all the requirements have been checked, directs the prison guards to release the inmate. The release is recorded in a register referred to as the “release log” after submission of all documentation. Article 12 (15) of the Comprehensive Organic Criminal Code states:

When the person deprived of liberty has served his or her sentence or received amnesty or a pardon, or when the custodial measure is revoked, he or she shall be released immediately, with the sole requirement therefor being submission of the release order issued by the competent authority. Any public servants who delay

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public and the confidentiality of the relevant court proceedings shall be observed as provided for in this Act, unless the competent judge authorizes otherwise in a decision setting out with clarity and precision the circumstances that justify making the information public.

<sup>104</sup> Article 114-A of the Criminal Code states:

Anyone detained and not in receipt of a decision for stay of proceedings or referral to trial for a period equal to or greater than one third of the period established by the Criminal Code as the maximum sentence for the offence for which they were prosecuted shall be released immediately by the trial judge. Similarly, anyone who has remained in detention without having been sentenced for a period equal to or greater than half that provided for by the Criminal Code as the maximum sentence for the offence for which they were prosecuted shall be released immediately by the criminal court conducting the trial.

Article 114-B states:

In any event, the director of the [detention centre] in which the detainee is held shall, on the day following the deadline ... notify this fact to the judge or court hearing the case so that the immediate release of the detainee may be ordered. Should [the release order] not be received within 24 hours of the notification being given, the director of the rehabilitation centre shall immediately release the detainee, and shall communicate this fact in writing to the [competent] judge or court.

compliance with this provision shall be removed from their posts after an administrative inquiry, without prejudice to any ensuing civil or criminal liability.

134. The above provision is in accordance with article 230 (4) of the Organic Code of the Judiciary, which gives the judges responsible for upholding prisoners' rights the authority to review the rights and guarantees enjoyed by convicted prisoners under certain legal scenarios, including when the prisoner is granted immediate release upon completion of their sentence.

## Article 22

135. First, in the event that tactics are used to delay or obstruct actions for writs of habeas corpus, access to information or habeas data (mentioned in the comments under articles 17, 18 and 19 of the Convention respectively), the Ecuadorian State has a whole arsenal of disciplinary measures that are applicable, under article 102 of the Organic Code of the Judiciary, to "all judicial officials, regardless of whether they are judges, prosecutors, public defenders or administrative personnel", in accordance with the provisions of articles 41 to 46 of the Organic Act on Public Service<sup>105</sup> and articles 78 to 100 of its implementing regulations.<sup>106</sup>

136. Article 103 (3) and (8) of the Organic Code of the Judiciary prohibits the persons mentioned from "unreasonably delaying or refusing to process cases or provide a service they are required to provide", and "participating in activities that lead to the interruption or partial provision of the service." In accordance with article 107 (5), refusing to provide a required service or delaying its provision without cause will therefore be a minor infraction. A judicial official's repeated failure to transmit the information he or she is required to transmit will be a serious infraction, and if it occurs three times in a year it is cause for dismissal (art. 108 (5)). In accordance with article 109 (16), disclosing information on investigations that can, by its nature, favour or harm one of the parties illegitimately is a very serious infraction.<sup>107</sup>

137. Second, if the obligation to register all deprivations of liberty is not met, or if the information from the various official files is recorded inaccurately, the Organic Act on Public Service and its implementing regulations are applicable, in accordance with the principles enshrined in the Statute on the Legal and Administrative Regime of the Executive (mentioned in the comment under article 7 of the Convention).

138. To protect the right of all prisoners to be registered and to ensure fulfilment of that obligation by all the public servants concerned, a prisoner may bring the action for non-compliance provided for in article 93 of the Constitution and articles 52 to 57 of the Organic Act on Judicial Guarantees and Constitutional Oversight. It is brought directly before the Constitutional Court (Constitution, art. 436 (5)). Articles 32 and 33 of the Regulations on the Conduct of Proceedings before the Constitutional Court establish a specific procedure for hearing the case. The Constitutional Court has recently had occasion to rule on compulsory registration in places of detention in the context of the decision on an action for non-compliance with article 33 of the Sentence Enforcement and Social

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<sup>105</sup> Supplement to Official Gazette No. 294 of 6 October 2010.

<sup>106</sup> Supplement to Official Gazette No. 418 of 1 April 2011.

<sup>107</sup> In this regard, article 105 of the Organic Code of the Judiciary distinguishes among several types of possible penalties for the infractions mentioned. They include written censure, a fine not exceeding 10 per cent of the person's salary, suspension without pay for up to 30 days and dismissal; these penalties are designated, processed and imposed in accordance with the procedure set out in articles 110 to 119 of the Organic Code of the Judiciary.

Rehabilitation Code,<sup>108</sup> and the normative content of that court ruling has been circulated to the country's places of detention by the Office of the Undersecretary for Social Rehabilitation at the Ministry of Justice, Human Rights and Religion.<sup>109</sup>

139. Third, in the event of unwarranted denial of access to information on a case of detention or the provision of inaccurate information, Ecuador has mechanisms to prevent such practices (as discussed in the comments on article 18) and punish those responsible.

140. In addition to the possibility of starting a disciplinary procedure under the Organic Act on Public Service, its implementing regulations and the Statute on Legal and Administrative Regime of the Executive, article 23 of the Organic Act on Transparency and Access to Public Information establishes the following disciplinary regime for public servants:

The officials [referred to in article 1 of the Organic Act on Transparency and Access to Public Information] who unlawfully refuse or fail to provide access to public information ... shall be punished in accordance with the seriousness of the offence and without prejudice to any ensuing civil and criminal actions, as follows: (a) a fine equivalent to one month's salary ...; (b) suspension without pay for 30 calendar days; and (c) dismissal in the event that, despite the imposition of a fine or suspension, the official persists in refusing to provide the information. These penalties shall be imposed by the authority or body that appointed them.

## Article 23

141. With regard to the training of the police and military to prevent them from committing acts of enforced disappearance, article 158 (4) of the Constitution states: "The members of the Armed Forces and the National Police shall be trained in the basic principles of democracy and human rights." This provision is expanded in article 163 (2), which states that "the members of the National Police shall receive training based on human rights ... in the use of methods of deterrence and conciliation as alternatives to the use of force". With regard to the possible impact on the training of prosecutors and judges, one of the functions of the Council of the Judiciary is to organize and administer judicial training schools (Constitution, art. 181 (4)); and article 234 of the Constitution specifically establishes that "the State shall guarantee the continuing education and training of public servants by means of schools, institutions, academies and public sector education or

<sup>108</sup> Constitutional Court Ruling No. 001-13-SAN-CC, case No. 0014-12-AN, handed down on 25 April 2013. The Court states:

The creation of a record for every new prisoner should be seen as one of the first obligations of the directors of social rehabilitation centres; the obligation is to create the record, which will include the documentation attesting to the prisoner's behaviour, when he or she is admitted, so that when the prisoner believes he or she has earned time off for good behaviour, he or she may petition the judge for it. To do otherwise — that is, to create the record when a prisoner believes that he or she is entitled to time off for good behaviour and is requesting it of the judge — is to refuse to recognize the fundamental obligation of the rehabilitation centres' authorities.

The Court, stating that there had been a violation of the right to legal certainty, ordered comprehensive reparation involving public apologies to the injured party, the creation of the record that was missing and punishment of the persons responsible for failing to create it.

<sup>109</sup> Memorandum No. MJDHC-SAPCL-DAPACL-2013-2526 of 17 September 2013.

training programmes; and coordination with national and international institutions that operate on the basis of agreements with the State”.<sup>110</sup>

142. Training of the personnel involved in the custody of detainees is carried out mainly by the training unit of the Office of the Undersecretary for Social Rehabilitation at the Ministry of Justice, Human Rights and Religion (Organic Statute on Procedures of the Ministry of Justice, Human Rights and Religion, art. 12 (2.1.4.2)). In the specific field of human rights training, the unit receives support from the training unit of the Office of the Undersecretary for Human Rights and Religion (art. 12 (2.1.1.1)).<sup>111</sup> These responsibilities are complemented by the provisions of the Standard Minimum Rules for the Treatment of Prisoners,<sup>112</sup> which state: “The personnel shall possess an adequate standard of education and intelligence. Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests. After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals” (rules 47.1, 47.2 and 47.3). In light of the above norms, the Prison Training School<sup>113</sup> was established in 2013.<sup>114</sup> It runs on the semester system.<sup>115</sup> Concurrently, in 2013, the Undersecretary for Human Rights at the Ministry of Justice, Human Rights and Religion conducted various training sessions on human rights for prison officials, in accordance with article 677 of the Comprehensive Organic Criminal Code, which states:<sup>116</sup>

<sup>110</sup> In 2010, the National Education Directorate of the National Police established a comprehensive ongoing training programme whose overarching objective is to train all police personnel in the basics of police work, with a focus on human rights. In 2011, some 23,516 members of the police were trained under the programme; in 2012, 17,554 were trained; and from April to July 2013, 5,600 were trained nationwide. The Office of the Undersecretary for Human Rights and Religion has worked with this programme on the certification and training of its human rights instructors. Similarly, it has trained programme instructors on the subject of the rights of children and adolescents, in addition to those already mentioned. The Directorate is currently working with other institutions on a revision to the third handbook on human rights for use by the police.

<sup>111</sup> The seventeenth transitional provision of the Comprehensive Organic Criminal Code states:

The Council of the Judiciary, the Ministry of Justice, Human Rights and Religion, the Attorney General’s Office and the Public Defender Service shall, within 30 days of the publication of this Code in the Official Gazette, initiate the training of judges, prosecutors, national police personnel, specialized civilian personnel, judicial officials, personnel from the National Social Rehabilitation System, public defenders and private lawyers in the legal regulations contained in the Comprehensive Organic Criminal Code.

<sup>112</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>113</sup> The rationale for this public policy is embodied in Goal 9 of the National Plan for Good Living (2009-2013), the aim of which is “to strengthen the institutions with overall responsibility for persons deprived of their liberty by establishing a career path for prison officers and providing comprehensive training to counsellors and other parties with a stake in social rehabilitation”.

<sup>114</sup> The school was inaugurated on 24 January 2013 and is located in the city of Bahía de Caráquez in the province of Manabí.

<sup>115</sup> Since its establishment, the school has trained a total of 668 officials. In the first semester of 2013, 415 officials received training in prison administration; in the second, 103 were trained in the proper use of technical tools and in how to intervene in situations where persons with disabilities are deprived of their liberty. In addition, the induction process was conducted for the 150 public servants who passed the merit-based examination for new corrections officers.

<sup>116</sup> Nine training workshops on human rights have been held for 284 corrections officers, administrative personnel of social rehabilitation centres and members of the Alpha Special Groups. The course load for the training comes to more than 50 hours in all.



The prison training and education centre shall be run and regulated by the technical board. Its functions shall be to: (1) develop and implement the training and education plan for corrections officer candidates; (2) select, train and evaluate corrections officer candidates; (3) enhance, update, develop and evaluate the skills of corrections personnel on a regular basis, in all occupational areas.

## Article 24

143. The regulations governing the protection and support scheme for victims, witnesses and other participants in criminal proceedings define the “victim” as the passive subject of the offence or a person who suffers the direct or indirect effects of the offence. In addition, article 68 of the Code of Criminal Procedure defines the following as “injured parties”:

(1) The person directly affected by the offence and in the absence of this person his or her spouse or partner, ascendants or descendants and blood relatives up to the fourth degree or relatives by marriage up to the second degree; (2) business partners, in respect of offences affecting a company that are committed by those who manage or control it; (3) legal entities, in respect of offences detrimental to their interests; (4) any person with a direct interest in the case of offences detrimental to interests.

144. Article 441 of the Comprehensive Organic Criminal Code gives a broader definition of “victim”:

The following persons ... are considered victims: (1) the natural persons or legal entities and other subjects of rights that individually or as a group have directly or indirectly suffered harm to a legal right as a result of the offence; (2) anyone who has experienced physical, psychological or sexual assault or any kind of damage to or violation of his or her rights as a result of a criminal offence; (3) the spouse or partner, including in same-sex unions; ascendants or descendants up to the second degree by blood or relatives by marriage up to the first degree of the persons identified in the preceding paragraph; (4) those who share the home of the abuser or the abused person, in cases of crimes against sexual and reproductive integrity, integrity of the person or violence against women or members of the nuclear family; (5) the business partner or shareholder in a legally constituted company that has been harmed by offences committed by its managers; (6) the State and public- or private-sector legal entities that are harmed as a result of an offence; (7) any person with a direct interest in the case of offences affecting common or collective interests; (8) indigenous communities, peoples, nationalities and communes in the event of offences affecting the members of the group as a class. Victim status does not depend on the identification, capture, prosecution, punishment or release of the perpetrator of the offence or on the existence of family ties to the latter.

145. As for victims’ rights, article 78 of the Constitution states:

Victims of crime shall enjoy special protection, including measures to ensure that they do not fall victim to further crimes, especially in the process of gathering and assessing evidence, and they shall be protected from threats and any other form of intimidation. Mechanisms shall be introduced to provide comprehensive redress, including immediate measures to establish the truth and to provide restitution, compensation, rehabilitation, assurances of non-repetition and satisfaction of the right violated. A system for the protection and support of victims, witnesses and participants in the proceedings shall be established.

146. Currently, article 11 of the Comprehensive Organic Criminal Code states that, in criminal proceedings, victims have the following rights:

(1) To bring a private prosecution, not to participate in the process or to stop participating at any time, in accordance with the provisions of this Code. In no case shall the victim be obliged to appear; (2) to the introduction of mechanisms for comprehensive redress, including immediate measures to establish the truth and to provide restitution, compensation, rehabilitation, assurances of non-repetition, satisfaction of the right violated and any other form of redress justified in each case; (3) to redress for violations committed by State agents or non-State agents who act with their authorization; (4) to special protection, safeguarding their own privacy and safety and that of their family members and witnesses; (5) not to fall victim to further crimes, particularly in the pursuit and assessment of evidence, including their statement. Protection from all threats and other forms of intimidation shall be afforded, and, to that end, technological tools may be used; (6) to be assisted by a public or private defender before and during the investigation, in the different stages of the proceedings and in seeking comprehensive redress; (7) to be assisted free of charge by a translator or interpreter if they do not understand or speak the language in which the proceedings are conducted, as well as to receive specialized assistance; (8) to be admitted to the national protection and support scheme for victims, witnesses and other participants in criminal proceedings, in accordance with the provisions of this Code and the law; (9) to receive comprehensive assistance, according to their needs, from relevant specialists during criminal proceedings; (10) to be informed by the prosecutor about the initial inquiries and preliminary investigation; (11) to be notified of the outcome even if they have not participated in the proceedings, at their home address if known; (12) to equal treatment and, when warranted, to the application of affirmative action measures that ensure an investigation, trial and redress compatible with their human dignity. If the victim is not of Ecuadorian nationality, his or her temporary or permanent stay in the country shall be allowed for humanitarian and personal reasons under the terms of the national protection and support scheme for victims, witnesses and other participants in criminal proceedings.

147. All the steps taken by the Attorney General's Office to find the victims of enforced disappearance and ensure that their remains are returned to their families are carried out in accordance with article 76 (7) (d) of the Constitution, which states: "Procedures shall be public except for those exceptions provided for by law. The parties shall have access to all documents and proceedings connected with the procedure." Meanwhile, the regulations governing the protection and support scheme for victims, witnesses and other participants in criminal proceedings, for which the Attorney General's Office is responsible, establish measures for victims of all types of crimes, paying particular attention to international human rights standards for victims.

148. To ensure full redress for the victims of enforced disappearances that took place from 1983 to 2008, Ecuador passed the Redress for Victims Act, which states:

The Ecuadorian State recognizes its objective responsibility for the human rights violations documented by the Truth Commission and recognizes that the victims endured unjustifiable attacks on their lives, liberty, well-being and dignity, as a result of which they and Ecuadorian society must be assured immediately of their right to know the truth and to justice, redress and non-repetition of the acts.<sup>117</sup>

149. In the same vein, article 6 of the Redress for Victims Act provides for measures for individual redress for both the direct victim of the human rights violations documented by

<sup>117</sup> Act to provide redress for victims and ensure the prosecution of serious human rights violations and crimes against humanity committed in Ecuador between 4 October 1983 and 31 December 2008 (art. 2).

the Truth Commission and, in his or her absence, the direct victim's spouse or partner and blood relatives to the second degree. These measures fall under the responsibility of the Redress Programme, administered by the Ombudsman's Office, and are detailed below:

(1) Physical rehabilitation and psychosocial care; (2) the deletion, at the request of the party, of all data and personal records found in the various judicial, police, military or other archives related to the events documented by the Truth Commission; (3) the search for and location and release of the disappeared person, which is the responsibility of the National Police, under the leadership of the Attorney General's Office; should the person have died, these institutions shall be responsible for the exhumation, identification and return of remains to their relatives, who shall have the right to be informed of progress in the search for the person and to participate in the related actions; (4) a declaration, at the request of the party, of presumed death and of definitive possession of the property of the victims of enforced disappearance, as a result of the presumption of death by disappearance, in accordance with articles 68 to 80 of the Civil Code. For this purpose, articles 66 and 67 of the Civil Code shall not apply; (5) job training, technical training or counselling aimed at economic inclusion; (6) the restitution of the paternal and maternal surnames of the children of victims who had been registered with the Civil Registry as other people's children in order to prevent their being persecuted or abused by the perpetrators of the serious rights violations committed against their biological parents. Once the situation has been confirmed, the competent Civil Registration, Identification and Documentation Office shall make the change to the birth register.

150. With regard to compensation for material and non-material damage, article 7 of the Act states:

Where compensation for material or non-material damage resulting from the serious human rights violations documented by the Truth Commission is called for, the State of Ecuador shall make the payment of such compensation either under a compensation agreement reached by the victims with the Ministry of Justice and Human Rights or in application of an enforceable court judgement. The Ministry of Justice and Human Rights, in coordination with the Redress Programme referred to in this Act, shall regulate the procedure for compensation agreements, the amounts to be paid in compensation and the measures for their enforcement. The amounts of compensation shall be determined on the basis of the latest parameters and criteria developed to that end by the inter-American system for the protection of human rights.

151. Comprehensive redress for harm, which includes restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, is covered in articles 77, 78 and 628 of the Comprehensive Organic Criminal Code.

152. With regard to the participation of associations representing disappeared persons in the drafting of legislation, the Truth Commission has a committee of victims and relatives of victims of human rights violations and crimes against humanity,<sup>118</sup> whose members include relatives of disappeared persons, the Asociación de Familiares de Desaparecidos en el Ecuador (Association of Relatives of Disappeared Persons in Ecuador), the Asociación Nacional de Asesinados y Desaparecidos del Ecuador (National Association of Murdered and Disappeared Persons of Ecuador) and the Asociación Nacional de Familiares de Jóvenes y Niños Desaparecidos (National Association of Relatives of Disappeared Young People and Children<sup>119</sup>). These organizations may exercise the right to participation

<sup>118</sup> Truth Commission, *op. cit.*, p. 22.

<sup>119</sup> The association was established by Ministerial Decision No. 649 of 7 September 2007.

enshrined in articles 95 and 96 of the Constitution, as well as to exercise the “people’s initiative” enshrined in article 103, which authorizes the submission of legislative proposals to the Assembly when the signatures of a specified number of persons have been collected (Code of Democracy, art. 193<sup>120</sup>).

## Article 25

153. The Criminal Code, the Code on Children and Adolescents and the Redress for Victims Act address the preventive and punitive measures that the State may take to combat rights violations affecting children and adolescents involved in some way in a case of enforced disappearance.

154. For instance, articles 541 to 546 of the Criminal Code refer specifically to offences aimed at “destroying the evidence of a child’s civil status or preventing the verification thereof”, thus penalizing “anyone who, having found a newborn child, fails to turn it over to the parish commissioner or the police authority” in the place where the baby was found, anyone found guilty of “substituting one child for another, feigning childbirth or usurping another person’s civil status”, and anyone who has “snatched a child or caused a child to be snatched, provided that the offence does not constitute abduction ... even if the child has followed the accused party voluntarily”.

155. In addition, article 211 of the Comprehensive Organic Criminal Code criminalizes identity theft:

Any person who unlawfully prevents or tampers with the registration of data on his or her identity or that of another person in software, records, index cards, identity cards or any other document issued by the Directorate-General for Civil Registration, Identification and Documentation or its subsidiary offices, or who registers another person’s child with the Directorate-General as his or her own, shall be punished by imprisonment for 1 to 3 years. Any person who illegally alters a child’s identity, replaces it with another, gives false or specious information about a birth, usurps the legitimate paternity or maternity of a child or makes a false declaration of the death of a newborn child shall be punished by imprisonment for 3 to 5 years.

156. With regard to the registration issues that could be linked to enforced disappearances, article 98 of the Act on Civil Registration, Identification and Documentation<sup>121</sup> states that the identity card is a public document, and on this basis article 337 of the Criminal Code penalizes any public servants who, in the exercise of their duties, falsify a document by means of “forged signatures; alterations to certificates, deeds or signatures; identity fraud; writing added to or inserted in registers or other public documents and in legal documents or records after they have been drafted or finalized”.

157. Article 74 (2) and (3) of the Code on Children and Adolescents, for its part, requires the State to take the necessary legislative, administrative, social, educational and other measures to protect children and adolescents from the behaviour and acts described, such as abuse, sexual abuse and exploitation, trafficking, deprivation, kidnapping and unlawful transfer.

158. Regarding mechanisms for searching for and identifying missing children and procedures for returning them, the Ministry of Economic and Social Inclusion, as the lead agency for the comprehensive protection and development of children and adolescents, provides institutional and family-based care services through which children and

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<sup>120</sup> Supplement to Official Gazette No. 578 of 27 April 2009.

<sup>121</sup> Official Gazette No. 70 of 21 April 1976.

adolescents whose psychological, social and family situation is being verified are placed temporarily in homes, until their families are located or they are found eligible for adoption. These services are provided by the services department of the Office of the Undersecretary for Special Protection at the Office of the Deputy Minister for Inclusion, the Life Cycle and the Family. With a view to ensuring the quality of these services, the Ministry of Economic and Social Inclusion has issued various technical standards.<sup>122</sup>

159. In addition, the Council of the Judiciary, in its resolution No. 169-2012, decided to issue the Search, Investigation and Location Protocol for Disappeared, Missing or Lost Persons.<sup>123</sup> Article 1 of the Protocol states that its purpose is:

... to establish the processes to be followed by the special units of the National Police, as first responders, the public prosecution service, the courts and other auxiliary services, within their areas of competence, to ensure that persons who have disappeared or are lost or missing in the country are searched for and found, in order to protect their life, physical integrity and liberty of person.

160. In addition, under article 9 of the Protocol, “When the special units of the National Police, as first responders, learn that a person has disappeared or gone missing, they are to proceed without delay to obtain from the complainant the information necessary to begin their search and investigation”. If the victim is a child or adolescent, the Protocol recognizes the concept of the “missing person” as set forth in the Code on Children and Adolescents, under which children or adolescents are considered missing when they are “voluntarily or involuntarily absent from their home, educational establishment or other place where they are supposed to be, without the knowledge of their parents or the persons responsible for their care” (Protocol, art. 3). In these cases, in addition to following the procedure set out in articles 71 to 80 and article 267 of the Code, article 17 of the Protocol provides for a prohibition on leaving the country as the most effective way to find the child or adolescent and article 16 sets out the measures to be taken by the National Police in such cases.

161. The forensics unit of the Judicial Police notes that the latter’s forensic genetics laboratory does not currently have a DNA database for missing children and adolescents.<sup>124</sup> However, a database for matching genetic profiles will be set up once the project DNA-Prokids Ecuador<sup>125</sup> has been launched and will be used as an identification tool in efforts to counter child trafficking in Ecuador.<sup>126</sup>

<sup>122</sup> Other mechanisms that ensure that the fact-finding process is implemented as provided for in the Code on Children and Adolescents are: (a) family assignment committees, which have currently been set up in three provinces in Ecuador — Quito, Cuenca and Guayaquil — and are composed of members of the Council on Children and Adolescents and the Ministry of Economic and Social Inclusion; and (b) adoption units established in the provinces of Quito, Cuenca and Guayaquil.

<sup>123</sup> Resolution of the National Council of the Judiciary No. 160, Official Gazette No. 875 of 21 January 2013.

<sup>124</sup> Memorandum No. MDI-MDI-SGD-DPD-2013-0098-OF of 20 September 2013 sent to the Ministry of Justice, Human Rights and Religion.

<sup>125</sup> This project will provide the support necessary to confirm identity by using DNA testing to obtain genetic profiles for: (1) children up to 14 years of age who are not living with their families (but in orphanages, shelters or institutions run by the State or NGOs) and whose family background is unknown, or those who are given up for adoption by their presumed families; and (2) mothers, fathers and other relatives of children who have disappeared from their homes.

<sup>126</sup> This kind of scientific testing will make it possible to determine with near-total certainty the biological tie between children and parents or blood relatives who give them up for adoption (domestic or international) or family reunification. In addition, it will enable children eligible for adoption abroad to be identified genetically, which would ensure they can be identified in any circumstance. The forensic genetics laboratory of the Judicial Police is also working with the National

162. Within its sphere of competence, the Directorate-General for Civil Registration, Identification and Documentation is making constant efforts to ensure that newborn children throughout the country are registered at registry offices. This is a parental duty that implies recognition and the guarantee of the right to personal and collective identity enshrined in article 66 (28) of the Constitution.<sup>127</sup> In addition, article 6 (6) of the Redress for Victims Act provides for a measure of individual reparation regarding the right of victims to recover their true identity.

163. The Code on Children and Adolescents contains specific provisions (arts. 284-289) on the procedure for domestic adoptions. Furthermore, the Council of the Judiciary has issued instructions on the elucidation of the social, family and legal situation needed to declare children eligible for adoption.<sup>128</sup> At the executive level, Ministerial Decision No. 194 regulates the procedure for determining the social, legal and psychological status of children and adolescents in public and private care facilities.<sup>129</sup>

164. With regard to the cooperation of Ecuador with other States in the search for and identification of the children of disappeared persons, it should be recalled that in 1992, Ecuador acceded to the Hague Convention on the Civil Aspects of International Child Abduction.<sup>130</sup> The executive secretariat of the National Council on Children and Adolescents, as the central authority of Ecuador, is responsible for the implementation of the Inter-American Convention on International Traffic in Minors, ratified on 20 May 2002.<sup>131</sup>

165. With regard to domestic legislation that provides for the best interests of the child, article 44 of the Constitution and article 11 of the Code on Children and Adolescents guarantee children's right to an identity on the basis of that principle. In addition, article 33 of the Code on Children and Adolescents states: "Children and adolescents have the right to an identity and its constituent elements, particularly a name, nationality and family relations, in accordance with the law."

166. Article 36 of the Code specifically states: "When the parents' identity is unknown, the name by which the child or adolescent has been known shall be respected, and where possible his or her views shall be taken into account." Article 60 states: "Children and adolescents have the right to be consulted on all matters affecting them. Their views shall be taken into account, in accordance with their age and maturity." Finally, according to article 164: "In the administrative and legal phases of all adoption procedures, the views of a child who is capable of expressing them and of all adolescents shall be taken into consideration."

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Directorate of Special Police for Children and Adolescents to develop a standardized national protocol on the functions that the various types of police should perform in the event of the disappearance of children under 14 years of age.

<sup>127</sup> In the case of adults who believe that they are the children of disappeared parents, article 54 et seq. of the Act on Civil Registration, Identification and Documentation establish the administrative procedure for late registration under certain conditions and parameters. If these are not met, a ruling on paternity or maternity by the competent judicial authority is necessary.

<sup>128</sup> Council of the Judiciary Resolution No. 006-2013 of 12 January 2013.

<sup>129</sup> Official Gazette No. 6 of 3 June 2013.

<sup>130</sup> The Convention was ratified on 25 October 1980. Pursuant to Resolution No. 014-CNNA-2008 of 8 May 2008, the National Council on Children and Adolescents, with the support of its executive secretariat, was designated as the central authority of Ecuador for the implementation of the Convention. The objectives of the Convention are: (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

<sup>131</sup> Resolution No. 014-CNNA-2008 of the National Council on Children and Adolescents.

## IV. Challenges

167. The challenges described below are the result of dialogue with representatives of academia and civil society organizations that took place between 30 May and 25 September 2013, in accordance with the protocol on the preparation of periodic reports to international human rights treaty bodies:

- Urge the Attorney General to continue investigating the offences categorized as enforced disappearances and providing guarantees of effective protection to victims, witnesses and other participants in criminal proceedings;
- Implement a policy on crime that is supported by a legal culture in which the solution is not stiffer penalties but effective sanctions compatible with the rule of law;
- Implement a public policy, under the leadership of the Council of the Judiciary, on in-service, organized human rights training for personnel involved in the administration of justice;
- Urge the Ministry of Defence, the Ministry of the Interior and the Attorney General's Office to continue monitoring the conduct of their representatives in border areas and to conduct ongoing training programmes on human rights, ethics and codes of conduct in those areas;
- Refer to the Attorney General's Office the cases of alleged enforced disappearances that the Ministry of Justice, Human Rights and Religion learned about during the process of collecting information from civil society for the report on enforced disappearances;<sup>132</sup>
- Urge the ministries responsible for the National Police and the Armed Forces to provide the necessary information on investigations into possible cases of human rights violations;
- Train members of the judiciary on human rights legislation;
- Call on public institutions to coordinate their efforts to develop policies and mechanisms for the protection of human rights in Ecuador;
- Conduct ongoing and in-depth monitoring of public and private care centres, by creating a comprehensive and efficient information system for the collection and appropriate storage of data, so that the provisions of the Code on Children and Adolescents, Ministerial Decision No. 194 and other laws aimed at the comprehensive protection of children and adolescents may be fully implemented;
- Urge the relevant bodies, in accordance with the principles of the separation of powers, the independence of criminal investigations and the impartiality of public proceedings, to ensure that the Judicial Police, at least in the investigation of alleged enforced disappearances, no longer answers to the National Police and therefore to the Ministry of the Interior.

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<sup>132</sup> Memorandum of 1 July 2013 sent to the Ministry of Justice, Human Rights and Religion, submitted by the Federación de Mujeres de Sucumbíos (Sucumbíos Women's Federation).