

OPINION No. 12/2007 (ECUADOR)

Communication: addressed to the Government on 23 March 2006.

Concerning: Antonio José Garcés Loor.

Both States are parties to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006).
2. The Working Group conveys its appreciation to the Government for having provided the requested information.
3. (Same text as paragraph 3 of Opinion No. 322/2006).
4. Antonio José Garcés Loor, an Ecuadorian national born on 30 April 1951, a state schoolteacher with 31 years of teaching experience in Ecuador, residing in Quito, is detained in Quito's prison No. 3, C wing, cell No. 20. He was arrested by police officers on 21 January 2005 at his place of work, Escuela República de Chile in Quito, while he was teaching a class. The police officers did not produce a warrant for his arrest. Mr. Garcés Loor was taken to the premises of the judicial police.
5. Three days after his arrest, José Garcés Loor was remanded in custody on pretrial detention by the magistrate of the tenth court of investigation, Luis Mora, and charged with committing an

indecent act with a minor. After reports were received from the photographic laboratory where José Garcés Loor had taken his film to be developed, he was accused of having taken photographs of a pornographic nature of a girl. Garcés Loor denied having taken the photographs. He contended that two mischievous girls borrowed his camera during a trip to Guayllabamba zoo, and took photographs of him and of another man, Segundo Mogrovejo.

6. After his indictment, Garcés Loor was summoned to attend court hearings on three occasions. On each occasion, the hearings had to be adjourned because the prosecution did not appear, and they were postponed for two months. The accused has been held in pretrial detention for over a year without having been given the opportunity to be heard by a judge.

7. The source states that Garcés Loor's detention is, in any case, arbitrary and illegal, given that on 20 June 2006, the National Congress decriminalized the offence of indecent assault in a law amending the Criminal Code. Garcés Loor cannot therefore be tried under any statute, since the corresponding articles of the Criminal Code have been repealed.

8. The source also states that Garcés Loor was tortured on National Police premises by an employee of the prosecutor's office who works on the third floor of those premises, and who hit him repeatedly in the sacrum with a stick inscribed with the words "human rights". When Garcés Loor was subsequently taken to a cell where there were other detainees, the police officers told them that they were bringing them a rapist. This led the inmates to strip him and hit him brutally, insulting him and burning his left cheek with a cigarette. The source alleges that these acts have not been duly investigated. As a result of this treatment, Garcés Loor suffered severe injuries to the penis; he cannot bend down, and he coughs up blood when he stands up. He is not receiving adequate medical care.

9. The source alleges that Garcés Loor is a professional of good repute and that he is respected and trusted by his students, his colleagues, parents, neighbours and the community in general. He has no police record or previous convictions. The source considers that his arrest violated the principles of rationality, proportionality and predictability. It constituted an unreasonable act on the part of the authorities, in contravention of the State's general duty to protect, and violated his right to personal liberty and security.

10. In conclusion, the source considers that José Garcés Loor's right to personal liberty, judicial guarantees and the due process of law have been violated. He has been subjected to arbitrary detention, which has seriously jeopardized his health, his family life and his reputation.

11. The allegations contained in the foregoing paragraphs were submitted to the Government on 23 March 2006. On 13 November 2006, the Government responded as follows: José Garcés Loor was subject to ordinary criminal proceedings, in accordance with existing Ecuadorian criminal legislation and criminal procedure legislation; all constitutional guarantees were met and due process was strictly observed.

12. The judicial records provided contain serious and incontrovertible evidence that Garcés Loor committed a grave offence against a minor. It is therefore unreasonable to maintain that he was arbitrarily detained, since he was free to exercise his procedural guarantees and he was given a public, impartial and independent hearing.

13. The accusation is based on acts that clearly constitute indecent assault, which is consistent with the current criminal offence of sexual abuse. The act took place at a time when the criminal law and the criminal offence of indecent assault were fully valid. Under the reform of the Criminal Code, that offence was replaced by the criminal offence of sexual abuse. The earlier criminal offence of indecent assault was incorporated into the new Ecuadorian legislation under the new concept of sexual abuse. The act constituting the criminal offence did not disappear, but rather became an element of the new criminal offence.

14. No substantial procedural formalities that could have affected the validity of the criminal proceedings or that could have influenced the decision in the case were omitted. The case began when the staff of a photographic laboratory to which José Garcés Loor had taken his film to be developed noticed that a minor appeared naked in the photographs, and reported the situation to the sexual offences unit of the Public Prosecutor's Office. The Office requested the relevant judicial authorization, after which it apprehended José Garcés Loor in the street. The minor's mother said that José Garcés Loor had lost his reason, since he had just asked her permission to marry her 11-year-old daughter. José Garcés Loor declared on television that he was in love with the minor. During the judicial proceedings, the minor gave details of the sexual abuse to which she had been subjected, and added that she had been unable to report the acts earlier because Garcés Loor had threatened to kill her. The case file contains several pieces of evidence of these acts, including expert reports, testimonies and serious suspicions concerning José Garcés Loor's part as the perpetrator of the offence.

15. José Garcés Loor was given a fair and just trial; he was able to exercise his legitimate right to a defence and was afforded all procedural guarantees. Due process of law was implemented throughout the proceedings, and his case is currently before the second criminal court, pending a decision.

16. Mr. Garcés Loor is not accused of "having taken photographs of a pornographic nature of a girl", which is what the source led the Working Group to believe. He is accused of committing a serious offence against a minor. There is also no mention in the proceedings of the clumsy and paltry excuse given to the Working Group that "two mischievous girls borrowed his camera", which demonstrates the defendant's intention to avoid and distract the attention of the legally competent judges of the international body.

17. The Government concludes that the facts described in themselves constitute major harm with terrible consequences for the girl. According to the Convention on the Rights of the Child, to which Ecuador is a party, "the best interests of the child" should take precedence over all procedural considerations. This is included in the Ecuadorian Children's and Youth Code. Efforts must be made to combat sexual abuse of minors, child pornography and paedophilia. This is precisely the aim in this particular case, in which an 11-year-old child has been the victim of a deplorable act. The aim of judicial proceedings is to ensure the correct application of justice and punish the guilty parties.

18. Neither in this nor any other case does the Working Group seek to replace domestic courts or to decide whether a person is innocent or guilty. Its task is limited to establishing whether or not José Garcés Loor is a victim of arbitrary detention, and whether in his case the judicial guarantees of due process have been upheld in accordance with international principles, norms and standards.

19. According to the source, there were serious violations of the right to a fair and impartial trial, which the Government has denied. The source has not submitted its observations or comments on the Government's reply, despite having been invited to do so. The source asserted that José Garcés Loor was arrested without a court order, which the Government denied. The Government has, moreover, explained in detail the measures taken by the Public Prosecutor's Office to obtain the warrant required to arrest this person. The source also stated that José Garcés Loor was tortured on National Police premises, to which the Government simply replied that, since all constitutional and procedural guarantees have been respected, the criminal proceedings cannot be invalidated. The source has also said that José Garcés Loor was tried for a criminal offence that no longer exists, to which the Government replies by stating that the criminal offence in question has been incorporated into the new offence of sexual abuse. The Government submitted the relevant legislation and confirmed its ongoing validity.

20. The Government has not, however, refuted the allegation that José Garcés Loor was unable to appear before a judge for over a year and that he was held in pretrial detention for an unreasonable length of time. In this particular case, the period of over a year awaiting sentencing does not appear to be entirely disproportionate to the complexity of the offence, the fact that the victim is a minor and the course of the proceedings. During its visit to Ecuador in February 2006, the Working Group noted the excessive length of time that accused persons - who should be presumed innocent until proven guilty - spend in pretrial detention. The Group considered this to be a matter of serious concern.

21. As for the allegation of torture and the lack of medical care, the Working Group also considers that any allegation of torture should be duly investigated, particularly since, during its visit to Ecuador, the Working Group observed several detainees in police cells who showed visible signs of ill-treatment, beatings and torture. Some inmates reported to the Working Group that they had been beaten in police cells and forced to confess, through physical ill-treatment, to crimes and offences they had not committed (A/HRC/4/40/Add.2). In this particular case, since the criminal charges are not based on this person's confession, and the allegation of torture would not, in principle, affect the trial. Nevertheless, and although it is not within its mandate, the Working Group considers that the Government, the Public Prosecutor's Office and the judicial authorities should carefully examine all allegations of torture, and notifies the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of the Human Rights Council of the allegations that have been received.

22. In conclusion, the Working Group considers that the allegations made by the source have, in general, been refuted by the Government, which has submitted legal documents that detail and support its arguments and denials. The source has not made any comments or observations on the Government's reply, despite having been invited and given the opportunity to do so.

23. In conclusion, the Working Group considers that the material available to it did not contain any such serious lack of observance of the standards relating to a fair trial as to confer on the deprivation of liberty of José Garcés Loor an arbitrary character.

24. Based on the above, the Working Group considers that the detention of this person is not arbitrary.

Adopted on 11 May 2007.