



经济及社会理事会

Distr.
GENERAL

E/CN.4/2006/52/Add.2
31 January 2006

CHINESE
Original: ENGLISH

人权委员会

第六十二届会议

临时议程项目 11 (d)

公民权利和政治权利，包括司法机构的独立性、
司法、法不治罪问题

法官和律师的独立性问题特别报告员
莱安德罗·德斯波伊先生提交的后续报告

增 编

对厄瓜多尔的后续访问*

* 本报告的内容提要以所有正式语文分发。报告本身载于内容提要附件，仅以原文和英文分发。

内 容 提 要

本报告描述法官和律师的独立性问题特别报告员及其他国家和国际行为者就厄瓜多尔的司法和体制危机所进行的工作。报告报导期是，2004 年 11、12 月建宪解除宪法法院法官、最高选举法院法官和最高法院法官的职务直至 2005 年 11 月 30 日设立了新的最高法院。特别报告员密切注意这一事态的发展，并为此对厄瓜多尔进行了两次访问。第一次在 2005 年 3 月进行，并就此次访问向人权委员会第六十一届会议提交了一份简短的初步报告(E.CN.4/2005/60/Add.4)，第二次访问于同年 7 月进行。

厄瓜多尔当局为了落实特别报告员在初步报告中提出的建议，设立了一个资格委员会，以便通过透明的方式，在人民的管制及国际机构和国家机构的监督下，并由该地区的其他国家参与选举最高法院的新法官。同样应强调，联合国在此程序中进行国际监督的作法是有史以来第一次，乃是联合国在这一领域活动的一项真正的创新。

最后，特别报告员表示有决心密切注意新成的最高法院的工作，以及他建议在司法领域紧急进行的改革的落实情况。这项改革包括制订一项关于司法运作的组织法和关于保障司法专业的法律，落实司法统一的原则，以及设立一位具有实效的监察专员。特别报告员还建议，应优先设立宪法法院、使最高选举法院正常运作以及任命总主计长和总检察长。

Annex

**FOLLOW-UP REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR ON
THE INDEPENDENCE OF JUDGES AND LAWYERS, LEANDRO DESPOUY
(13-18 March 2005 and 11-15 July 2005)**

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Introduction

1. This report to the sixty-second session of the Commission on Human Rights traces developments in Ecuador from the institutional crisis caused by the unconstitutional dismissal of the members of the Constitutional Court, the Supreme Electoral Court and the Supreme Court up to the establishment of a new Supreme Court on 30 November 2005. Given that, to date, the Constitutional Court has not been set up, no rules have been adopted for the Supreme Electoral Court and urgently required and basic structural reforms of the Ecuadorian judicial system have not been carried out, it is advisable that the Special Rapporteur continue to monitor implementation of the recommendations put forward in this and earlier reports.

I. BACKGROUND

2. The members of the Constitutional Court and the Supreme Electoral Court were dismissed unconstitutionally on 25 November 2004. Then, on 8 December 2004, the National Congress went on to dismiss the 31 judges of the Supreme Court as well. The Special Rapporteur immediately requested Government explanations for this deterioration in the situation and informed the authorities that he would be interested in making an in situ visit, which ultimately took place from 13 to 18 March 2005.

3. As stated in his preliminary report submitted to the Commission on Human Rights at its sixty-first session (E/CN.4/2005/60/Add.4) and in the report submitted to the General Assembly at its sixtieth session (A/60/321), the Special Rapporteur on the independence of judges and lawyers visited Ecuador twice. In his preliminary report drawn up on the basis of his first visit, the Special Rapporteur noted that the country was no longer governed by the rule of law and that the conduct of the Congress and the Government was propelling the country into a deepening crisis. He urged that the normal working of the institutional channels provided for in the Constitution should be restored and suggested possible avenues and criteria for establishing an independent Supreme Court. Later in the year, from 11 to 15 July 2005, the Special Rapporteur made a second visit at the invitation of the Government. The purpose of the visit was to follow up on the recommendations made in the preliminary report, in particular to help find the most appropriate means of resolving the crisis caused by the unconstitutional dismissal of the members of the country's three high courts. Lastly, on 30 November, the Special Rapporteur went to Ecuador for a third time to attend the investiture of the new judges of the Supreme Court.

II. INSTITUTIONAL CRISIS

4. In his statement to the Commission on Human Rights in April 2005, the Special Rapporteur referred to the institutional crisis through which Ecuador was passing, drew the plenary Commission's attention to the risk of a further deterioration in the situation and called on the international community to follow developments closely. Unfortunately, the Special Rapporteur's recommendations were accepted only partially by the main political actors in Ecuador. First, the National Congress and the Government failed to reach agreement on a mechanism to overturn the unconstitutional decisions adopted in late 2004, as requested by the Special Rapporteur. At the same time, the new Supreme Court - labelled "de facto" by broad sections of the population - adopted a decision of enormous political significance, by declaring that the proceedings against two former Presidents of the Republic, Abdalá Bucaram and

Gustavo Noboa, and a former Vice-President, Alberto Dahik, were null and void. This decision aggravated the social and political tensions in the country, and the crisis spread to all institutions. In response to growing popular demonstrations and protests, President Lucio Gutiérrez, through an executive decree of 15 April 2005, dismissed the Supreme Court which had been appointed illegally on 8 December 2004 and declared a state of emergency in the city of Quito. Both decisions were rejected by the majority of the country's citizens as being manifestly high-handed. On 17 April, in line with the recommendations contained in the Special Rapporteur's preliminary report, the National Congress reversed the resolution of 8 December 2004 by which it had illegally appointed the members of the Supreme Court. However, it did not order the reinstatement of the members of the previous Court who had been removed on 8 December 2004. Ecuador was thus left without a Supreme Court and the decision by Congress was not sufficient to placate the citizenry. On 20 April, in an attempt to curb the wave of tension and violence which was becoming particularly intense in the capital, the National Congress declared that President Lucio Gutiérrez had left office and that, in accordance with the Constitution's provisions on presidential succession, the then Vice-President Alfredo Palacio, who is now the constitutional President, would assume the presidency. On 26 May, the National Congress adopted a draft reform of the Law on the Organization of the Judiciary in line with another of the Special Rapporteur's recommendations, in order to pave the way for the restructuring of the Supreme Court.

III. THE PROCESS OF SELECTING THE MEMBERS OF THE SUPREME COURT

5. The new Law on the Organization of the Judiciary provided for the establishment of an independent Qualifications Committee to screen and appoint the new judges and associate judges of the Supreme Court. The purpose of this ad hoc mechanism was to compensate for the fact that the constitutional clause on the principle of co-optation could not be applied because the body authorized to do so, namely the Supreme Court, was non-existent. The Law referred, inter alia, to the need for teams of national and international observers during the process. By virtue of the Law, the United Nations, the Andean Community and the European Union were invited to act as observers of the process.

6. The Qualifications Committee operated from mid-June to end November. It was composed of four members: one appointed by the country's law faculties, one by the country's superior and ordinary courts, one by legally constituted human rights organizations and one by civil society organizations, especially women's organizations. In line with the mandate established by the Law on the Organization of the Judiciary, the Committee adopted rules of procedure spelling out the application, evaluation, interview and appointment process whereby candidates are selected as Supreme Court judges and associate judges. These rules, along with an invitation for applications, were published on 11 July 2005 in the two daily newspapers with the largest national readership, thereby initiating the process.

7. Of the 310 applications received by the Committee, 181 passed the check on purely formal requirements, which was followed by the interview stage consisting of 58 public hearings at which interviewers and interviewees presented their arguments orally. By the end of this stage, the number of eligible candidates was down to 169.

8. The qualifications of the candidates were then examined. Their number of years of experience, studies and university degrees, the holding of high office, the number of scholarly works published and any distinctions conferred on them were some of the aspects evaluated. The candidates' final score was calculated, on the one hand, from the evaluation of their curriculum vitae in the light of the criteria set by the Law and the Rules of Procedure and, on the other, from marks they obtained in aptitude tests conducted by audit firms employed for that purpose. The candidates could ask for their qualifications to be reconsidered. The Committee approved the final ratings on 22 November.

9. As it proved impossible to achieve the unanimity required by the Law for the appointment of judges according to their background (11 from the judiciary, 10 university lecturers and 10 from the legal profession), on 28 November the Court was appointed by the alternative method laid down in the same Law, i.e. the 31 best-qualified candidates were appointed irrespective of their background. The Court will therefore have 18 judges who were formerly university lecturers, 8 from the legal profession and 5 from the judiciary.

10. The Committee decided that the investiture of the judges would take place on 30 November. The eminent figures who were invited included the Secretary-General of the United Nations, the Secretary General of the Organization of American States and the Secretary General of the Andean Community, along with the United Nations High Commissioner for Human Rights, the Special Rapporteur on the independence of judges and lawyers, the presidents of various Supreme Courts of the region and of Spain, the President of the International Association of Judges and international observers of the process.

A. Teams of international and national observers

11. The Law on the Organization of the Judiciary provided for the participation of teams of international and national observers during the process. The United Nations, the Andean Community and the European Union were invited to send teams. In the course of his second visit to Ecuador, the Special Rapporteur had, among other things, recommended that the United Nations and the international community should accept the Ecuadorian Government's invitation to observe the process of selecting judges.

12. As recommended by the Special Rapporteur, the Office of the United Nations Resident Coordinator in Ecuador and the Office of the United Nations High Commissioner for Human Rights, in conjunction with the Department of Political Affairs of the United Nations Secretariat and the Regional Bureau for Latin America and the Caribbean of the United Nations Development Programme (UNDP), set up a United Nations observer team. The operational coordination of this observer mission was handled by the Office of the United Nations Resident Coordinator in Ecuador, which received valuable support from the International Association of Judges, represented by its President Dr. Sidnei Beneti, and from procedural specialists. In October 2005, the Office of the High Commissioner also signed a joint contribution agreement with the UNDP office in Ecuador which led to the appointment of a consultant, Dr. Carlos Ayala, who accomplished an enormous amount of work in his capacity as United Nations observer and effectively coordinated with other teams of national and international observers. Mention must also be made of the excellent work done by the other United Nations observers: (a) Dr. Víctor Moreno Catena, Vice-Rector of the Carlos III University of Madrid (Spain); (b) Dr. Pablo Lanusse, lawyer, former Acting Governor of the

province of Santiago del Estero and former Attorney-General of the Argentine Republic; and (c) Dr. Claudio Baldino Maciel, judge of the Appeal Court of Río Grande del Sur (Brazil). The process also received support from Dr. Ricardo Gil Lavedra, former Minister of Justice of Argentina. The secretariats of the Organization of American States and the Andean Community likewise participated in the observer mission and did important work which, in many cases, encompassed cooperation in other areas of key significance for strengthening institutions and solving the country's current political crisis. The observer teams started work in July 2005. The Andean Community observers, the national observers and other monitoring activities carried out at the recommendation of the Special Rapporteur received support from the Spanish International Cooperation Agency, which played a lead role in this respect, and from UNDP through a joint project agreed in July 2005.

13. Along the lines of the terms of reference given to the United Nations observers, the objective of international observers was to support the conduct of a transparent national process that was free of undue influences and complied with national and international standards and principles regarding the independence of judges and lawyers. At all stages of the process, the observers were to remain impartial, refrain from interfering in matters for which national authorities has exclusive responsibility and focus on providing support of an eminently technical nature.

14. In accordance with the Law on the Organization of the Judiciary, various national teams were organized to observe the process of selecting judges. They included: Red de Justicia, Alianza Democrática Nacional, Organizaciones de Mujeres (women's organizations), Asamblea Popular and Asociación de Facultades de Derecho (Association of law faculties).

15. All these teams of observers played a crucial role in guaranteeing the transparency of the process of selecting judges, since some of them furnished additional technical and facilitation support which was acknowledged by the Committee.

B. Main comments and activities of the teams of international observers

16. Mention must be made of the following main points on which the international observers issued recommendations and comments:

(a) The need to ensure the supremacy of the Constitution and international treaties ratified by Ecuador, particularly those of their provisions which refer to the right to equality before the law, the right to defence in court and the principles governing the exercise of the legal profession. In view of the positions taken by the United Nations team of observers, which had been largely anticipated by the Special Rapporteur, the Committee held that a law and a regulation barring from the selection process lawyers who had defended persons found guilty of drug trafficking or who had initiated legal proceedings against the State in cases involving State property should not apply;

(b) The need to secure the budget for the process of evaluating judges and the transparency of financial management - the Ministry of the Economy and Finance reacted very positively to the observers' appeal;

(c) The importance of abiding by the time schedule for evaluation, given the urgent need to re-establish the Supreme Court;

(d) The need to adopt affirmative action fostering gender equality in accordance with the principles contained in the Ecuadorian Constitution and international treaties, in particular the Convention on the Elimination of All Forms of Discrimination against Women - the Qualifications Committee subscribed to the view of the observers and women's organizations regarding membership of the Court and agreed that a quota of 20 per cent, i.e. six members, should be set for women judges. In the end, however, the mechanism for giving effect to this affirmative action was not used and there will therefore be only two women judges;

(e) The permissibility of affirmative action to promote the participation of Afro-Ecuadorians in the Court - the Committee did not accede to the request of the Afro-Ecuadorian community;

(f) Recognition of the openness and transparency shown by the Committee;

(g) Concern over the deadlock which occurred within the Committee during the last week of the process and the offer of good offices to bring the parties closer together and to try to overcome the differences - these good offices were vital for achieving consensus within the Committee on 28 November.

IV. FIRST SUCCESS: ESTABLISHMENT OF THE NEW SUPREME COURT

17. The process of selecting judges, which started on 11 July and ended on 30 November, culminated in the appointment of 31 judges and 21 associate judges to the Supreme Court.

18. This process of selecting members of the Supreme Court has some singular and original aspects which could be applied in similar circumstances. The originality of this experience lies in the characteristics of the process: transparency, public monitoring, supervision by national and international observers and the participation of judges from other countries in the region and of international judicial bodies, such as the International Association of Judges. The fact that the Presidents of the Supreme Courts of Panama and Chile went to witness the investiture of the Court as guests of honour is a clear indication of international interest and solidarity.

19. The newly constituted Court is faced with the challenge of efficiently handling the sizeable backlog of cases which has built up over the past months. The level of independence with which it does so, especially in the most politically sensitive cases, will be the key to securing its social credibility. The rapid, consensual and clear manner in which it has proceeded to choose its President, appoint judges to the specialized chambers and draw lots to determine the new random distribution of the criminal caseload, is a signal which has been viewed positively by Ecuadorian society. It is to be hoped that this trend will continue when it comes to reorganizing the National Judicial Council.

V. CHALLENGES AND PENDING REFORMS

20. While emphasis must be placed on the high regard for and originality of the way in which the new Supreme Court has been established, failure to carry out certain reforms affecting the whole judicial system may have an adverse impact on the development of the new Court and affect the whole process. These reforms concern in particular:

A. Constitutional Court

21. Article 275 of the Ecuadorian Constitution lays down that the Constitutional Court shall be composed of nine members appointed by the National Congress from shortlists submitted by the President of the Republic (two members), the Supreme Court (two members), the National Congress itself (two members), mayors and prefects (one member), trade unions and organizations of indigenous and rural groups (one member) and chambers of industry (one member).

22. In the opinion of many people to whom the Special Rapporteur has spoken, the corporatist method of selecting members of the Constitutional Court has hampered its professionalism and independency. The need to amend these provisions of the Constitution is being debated at present in Ecuador and there is certainly an inescapable need to appoint members to this Court in the very near future, since it is the court of last instance with jurisdiction over cases connected with human rights and the fundamental guarantees set forth in the Constitution and the international treaties signed by Ecuador.

B. Supreme Electoral Court

23. According to the Ecuadorian Constitution, the Supreme Electoral Court is the body responsible for administering electoral processes and examining political parties' accounts in order to ascertain the amount, source and use of election campaign funds. The Court consists of members nominated by "the seven political parties, movements or alliances which have obtained the largest number of votes at the most recent multicandidate elections" (art. 209).

24. Just as the country is debating the Constitutional Court, so it is discussing the urgency of reforming the method of appointing the Supreme Electoral Court or its transformation into a genuine, juridical and impartial court for dealing with electoral offences.

C. Law on the Organization of the Judiciary

25. This Law would cover inter alia the principle that only judicial bodies may perform judicial functions, standards and safeguards for the judiciary, a legal aid system and the procedure for co-opting members of the Supreme Court. Although the Bill was tabled in Congress a long time ago it has not been debated. This situation reflects the Ecuadorian parliament's chronic neglect of subjects to do with justice.

VI. CONCLUSIONS AND RECOMMENDATIONS

26. The Special Rapporteur draws attention to the significance and originality of the process for selecting the members of the new Supreme Court, a process which combines the particular characteristics of transparency, public oversight, monitoring by international and national bodies and participation of judges from other countries in the region. The novel part played by the United Nations in the evaluation conducted by the Qualifications Committee and in the appointment of the judges of the Court constitutes a real innovation in United Nations activities in this field and, at the same time, it reflects the determination of the highest authorities in the country to ensure transparency.

27. The Special Rapporteur emphasizes the valuable lessons learned from the process of appointing members to the Supreme Court, especially with regard to the dovetailing and coordination of the various components of the United Nations system and the international community in general.

28. The Special Rapporteur regrets that, in the end, it was not possible to give effect to affirmative action to promote gender equality by setting a quota of 20 per cent of members of the court who should be women judges, in accordance with the principles contained in the Ecuadorian Constitution and in international treaties, and he recommends that this point should be borne in mind when applying the mechanism to co-opt members to fill vacant posts in the Supreme Court and in other processes to select judges for high courts in Ecuador. The Special Rapporteur also recommends the adoption of affirmative action to promote the participation of Afro-Ecuadorians or persons from indigenous groups in the above-mentioned institutions.

29. Congress has announced that it will soon debate the new draft Law on the Organization of the Judiciary. The Special Rapporteur considers that it should give priority to this subject in view of the crisis facing the judiciary. This discussion should be conducted in an open manner so as to obtain the opinions of law officers, lawyers and society in general.

30. Important international cooperation projects in the field of justice were suspended after the events at the end of 2004. It is to be hoped that those which have been in abeyance will be resumed quickly, but in a coordinated fashion. At all events, the focus of international cooperation in this respect will have to shift; greater heed will have to be paid to the views of stakeholders inside and outside the system for the administration of justice. The role of the United Nations as facilitator and coordinator might prove very useful.

31. The Special Rapporteur will draw up a specific report on the process of selecting members of the Supreme Court of Ecuador, as it offers valuable lessons for United Nations institutional capacity-building activities and, at the same time, constitutes an example of the beneficial linkage which can be established between the United Nations and other bodies, in this case the Organization of American States, the Andean Community and others.

32. **The Special Rapporteur proposes to monitor the activities of the new Supreme Court and the implementation of urgently required reforms in the sphere of justice.**
33. **The Special Rapporteur urges the putting in place of mechanisms to guarantee broad public participation in the process of reforming the administration of justice.**
34. **One of the first actions of the Supreme Court will be the handing over to Congress of two shortlists for the appointment of the members of the Constitutional Court. It is to be hoped that the Supreme Court, which has itself been elected through a demanding evaluation mechanism, will proceed with equal rigour when it compiles these lists. Assuming that rules and regulations so permit, it would be advisable for the other nominating entities to proceed in the same manner. That would be a step towards the appointment of a Constitutional Court of due standing, where the presence of eminent national jurists would be a safeguard of probity and independence.**
35. **Regarding the Supreme Electoral Court, and with a view to an electoral reform making it possible to hold the general elections scheduled for 2006, the Special Rapporteur considers that the opportunity should be seized to make headway towards an institutional framework guaranteeing the impartiality and professionalism of the Supreme Electoral Court.**
36. **The report points to the urgent need to reform the whole of the judicial system, in particular by:**
- (a) Enacting a new Law on the Organization of the Judiciary;**
 - (b) Enacting a law laying down standards and safeguards for the judiciary;**
 - (c) Giving practical effect to the principle that only judicial bodies may perform judicial functions;**
 - (d) Establishing an effective system of legal aid;**
 - (e) Promptly appointing a Comptroller General and an Attorney-General.**
