

DECISION NO. 48/1993 (UNITED STATES OF AMERICA)

Communication addressed to the Government of the United States of America on 6 November 1992.

Concerning: Humberto Alvarez Machaín, on the one hand, and the United States of America, on the other.

1. The Working Group on Arbitrary Detention, in accordance with the methods of work adopted by it (see the report of the Working Group, E/CN.4/1992/20 and E/CN.4/1993/24) and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government the above-mentioned communication received by it and found to be admissible, in respect of allegations of arbitrary detention reported to have occurred in the country in question.

2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question, received with slight delay - 9 February 1993 - in terms of 90 days period from the date of transmittal of the letter by the Working Group.

3. (Same text as paragraph 3 of Decision No. 43/1992.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government of the United States of America. The Working Group believes that it is in a position to take a decision on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. The Working Group considers that:

(a) Regarding the facts, there are no substantial differences - which will in any case be pointed out - between the complainant's version and the version supplied by the Government. Accordingly, the Group holds it true that Dr. Humberto Alvarez Machaín, a doctor of Mexican nationality living in Mexico, was abducted (the expression used by the United States Government and in the ruling of the United States Supreme Court) on 2 April 1990 (the complaint says 7 April), at his medical office in Guadalajara, Mexico, and forcibly taken to the United States). According to the complainant, the persons who seized him were "paid agents of the DEA" (Drug Enforcement Administration, a United States Government agency to investigate and suppress drug trafficking). The Government does not say who the persons were, but on the basis of the decisions of the United States courts which heard the case, reports that "DEA agents were responsible for Dr. Alvarez Machaín's abduction, although they were not personally involved in it". According to the complaint, after being held incommunicado for over 20 hours and being physically and psychologically abused - something the Government denies - he was taken by private plane to the border town of El Paso, Texas, where he was arrested by DEA officials.

(b) Nor is there any controversy about the grounds invoked for the deprivation of freedom: on 31 January 1990 a United States Federal Grand Jury charged Dr. Alvarez Machaín with taking part in the kidnapping and murder of

DEA Special Agent Enrique Camarena Salazar in Mexico. Alvarez Machaín is said to have administered drugs to Camarena to facilitate his continued torture and interrogation. In the opinion of the Grand Jury, these acts constitute the crimes of murder, conspiracy to commit and committing violent acts in furtherance of an enterprise engaged in racketeering; conspiracy to kidnap a federal agent and aiding and abetting the kidnapping of a federal agent, all of which crimes are covered by United States federal laws.

(c) When he was brought before the court - the District Court for the Central District of California (Los Angeles) - to try him on these charges, Alvarez Machaín said that his abduction had constituted "outrageous government conduct" - an allegation which the District Court rejected - and that the abduction had been a violation of the 1978 Extradition Treaty between the United States of America and the United States of Mexico. This allegation was admitted by the Court, which therefore ordered Alvarez Machaín's release. The Government of the United States appealed to the Ninth Circuit Court of Appeals, which agreed with the District Court's findings and ordered Alvarez Machaín's repatriation to Mexico.

(d) The Government took the matter to the Supreme Court, which, on 15 June 1992, reversed the decisions of the lower courts and held that "forcible abduction does not prohibit ... trial in a United States court for violation of criminal law".

This ruling was adopted by a majority of six judges, with three dissenting opinions.

(e) Accordingly, Dr. Alvarez Machaín was tried on the charges mentioned in paragraph (b) above. The trial began in October 1992 and he was acquitted on all counts on 14 December 1992 and released to be returned to Mexico; repatriation was confirmed by the complainant in a communication dated 3 February 1993.

(f) In keeping with the methods of work adopted by the Group, cases are filed when the person has been released after the Working Group has taken up the case. "Nevertheless, the Working Group reserves the right to decide, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned" (E/CN.4/1993/24, annex IV, para. 14).

(g) In view of the importance of the question of principles presented by this case, the Working Group deems it advisable to declare whether or not the deprivation of freedom of Alvarez Machaín from 8 April 1990 to 14 December 1992, i.e. for 987 days, was arbitrary.

(h) To determine whether or not the deprivation of freedom is arbitrary, the Working Group must basically weigh up the following issues:

(1) Whether international treaty law governing relations between the United States of America and Mexico permits or prohibits the abduction of one person from the territory of one country to the territory of another, in order for him to be tried;

(2) If the matter is not resolved in treaty law, whether customary international law permits or prohibits abduction of this kind.

It should however be noted that those two issues arise only in the context of acts of abduction of persons accused of common crimes and not when such acts are committed against persons accused of crimes against humanity, as accepted by the international community.

(i) In determining the first issue, the Working Group has to bear in mind the terms of article 31 of the 1969 Vienna Convention on the Law of Treaties, which states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

(j) A treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". (Vienna Convention, art. 2, para. 1 (a).)

(k) In the absence of a treaty definition of extradition, in keeping with the principal writers on criminal law (Francesco Antolisei, Manual de Derecho Penal, p. 102; Luis Jiménez de Asúa, Tratado de Derecho Penal, vol. II, p. 894; Eugenio Cuello Calón, Derecho Penal, vol. I, p. 225; Giuseppe Maggiore, Derecho Penal, vol. I, p. 236), it may be defined as an act of international punitive cooperation consisting in the surrender by one State to another of an accused or convicted person who is on its territory, to be tried or to carry out a sentence imposed on him.

(l) Accordingly, an extradition treaty is an international agreement concluded between States in written form and governed by international law, in which those States undertake to surrender to one another, in accordance with the rules agreed on, individuals sought for an offence or subject to investigation, for the purposes of carrying out a sentence or an arrest warrant issued by the judicial authorities of the requesting party. This is apparent from article 1 of the European Convention on Extradition, signed at Paris on 13 December 1957, article 344 of the Convention on Private International Law and article 1 of the 1933 Montevideo Convention on Extradition.

(m) The object and purpose of an extradition treaty, consequently, is to regulate the means whereby the States concerned can request and contribute to international cooperation in trying offences committed by individuals who are on the territory of another Power, by surrendering them to the State Party that has been harmed. The "surrender" of the offenders, in other words, placing them in the hands of another State, is the key function of this institution.

This is rightly set out in the Extradition Treaty between Mexico and the United States, when the treaty establishes that it will make it possible to cooperate more closely in the struggle against crime and, to that end, mutually improve assistance in extradition matters (preamble). For this purpose, it describes the obligations both of the requesting party and the requested party, the principal obligation being to surrender the persons

requested; evidence is described (arts. 3, 7, 10, 12 and 13), with an enumeration of extraditable offences, leaving all other offences as non-extraditable (annex). This is Mexico's interpretation, as already pointed out.

(n) Consequently, it may be maintained that the Extradition Treaty does not explicitly prohibit abduction, just as it does not prohibit someone being held under an extradition application from being tortured or executed by the requested country. However, it is obvious that this is implicitly prohibited when the subject matter - cooperation in the struggle against crime by surrendering offenders - is regulated in all dimensions by the treaty in question.

Abduction is the opposite of surrender, for the basic element of the former is the unilateral wish of what should be the requesting party, whereas the basic element of the latter is the decision of the requested party.

It may therefore be inferred that the object and purpose of the Treaty, and an analysis of the context, lead to the unquestionable conclusion that abduction for the purpose of bringing someone in Mexico or in the United States before a court of the requesting party is a breach of the 1978 Treaty.

(o) Furthermore, both Mexico and the United States are also parties to the Convention on Extradition, adopted at the Seventh International Conference of American States, on 26 December 1933, which also stipulates that "Each one of the signatory States in harmony with the stipulations of the present Convention assumes the obligation of surrendering to any one of the States which may make the requisition, the persons who may be in their territory and who are accused or under sentence", provided certain circumstances are fulfilled. This, like all the conventions on the subject, is a comprehensive legal text which regulates the grounds and the procedures for surrendering wanted persons and it details cases in which extradition can be denied. Obviously, abduction is prohibited.

The deprivation of freedom, as a consequence of the arrest, is therefore arbitrary.

(p) The foregoing conclusion makes it pointless to analyse the second issue mentioned in paragraph (h) of this decision. Nevertheless, the importance of the matter is such that it needs to be resolved.

Of course, customary international law, as abundantly shown by the International Human Rights Law Group in its submission to the Inter-American Juridical Committee - an organ of the Organization of American States, is unquestionably part of the internal law of the United States of America and, therefore, application of such law is compulsory for all the courts in that country.

Another basic principle of international law and of international relations is respect for the territorial sovereignty of States, a principle which, in addition to prohibiting the use of force and intervention by one State in the affairs of another - includes refraining from committing acts of

sovereignty in the territory of another State, particularly acts of coercion or judicial investigation. In 1949 the International Court of Justice declared unlawful "Operation Retail", in which British naval vessels were seeking evidence in Albanian territorial waters in the Corfu Channel to demonstrate the guilt of the Government of Albania in laying mines hit by British vessels with loss of life and material damage. "Between independent States, respect for territorial sovereignty is an essential foundation of international relations", said the Court. In the Lotus case (1927) the Permanent Court of International Justice held that a State "may not exercise its power in any form in the territory of another State". What is more, intervention by one Power in the territory of another is not only a breach of international law but, in addition, if it is repeated, it may "endanger international peace and security" (United Nations Security Council, Claim by Argentina in the Eichmann case, resolution 138 (1960)).

Accordingly, with all the more reason it must be inferred that the deprivation of the freedom of Humberto Alvarez Machaín is not justified in customary international law.

(q) There are further considerations. First, the United States never tried to request the extradition of Alvarez Machaín or of any of the other participants. In the case of Rafael Caro Quinteros, also abducted, the District Court held that his abduction prevented him from being tried in the United States, and this was confirmed by the Court of Appeals and enforced. The same happened in the case of René Martín Verdugo-Urquidez.

In these two cases, the offenders were returned to the United States.

Nor did the United States have grounds for doubting the courts in Mexico. Indeed, everything indicates that Mexico scrupulously tried, in its courts, the persons responsible for the death of DEA agent Enrique Camarena and the Mexican pilot working with him, Alfredo Zavala Avelar, who also died. Rafael Caro Quinteros was sentenced on these counts to 40 years' imprisonment.

(r) In the case of Alvarez Machaín, no legal basis whatsoever can be found to justify the deprivation of freedom from the date of the abduction - 2 April 1990 - until his release on 14 December 1992 since this deprivation of freedom took place without the orders of any authority whatsoever and, indeed, both the District Court and the Court of Appeals declared it unlawful. In the circumstances, the deprivation of freedom is a breach of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Accordingly, the detention is arbitrary, falling within category I of the principles applicable in the consideration of the cases submitted to the Working Group.

6. In the light of the above, the Working Group decides:

The detention of Humberto Alvarez Machaín is declared to be arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights and principle 2 of the Body of Principles

adopted by the General Assembly in resolution 43/173, and falling within category I of the principles applicable in the consideration of cases submitted to the Working Group.

7. As a consequence of its decision to declare arbitrary the detention of the person in question, and in view of the fact that Dr. Humberto Alvarez Machaín has been released, the Working Group requests the Government of the United States of America to take the necessary steps to remedy the situation, in accordance with the provisions and principles embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 30 September 1993