

OPINION No. 28/1998 (MEXICO)

Communication addressed to the Government on 22 April 1994; new information transmitted to the Government on 28 March 1998

Concerning José Francisco Gallardo Rodríguez

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.
2. In its Opinion No. 20/1994, the Working Group considered that it was not in a position to render a judgement on the deprivation of liberty in question since neither the complaint nor the Government provided sufficient facts and so it decided that “The case remains pending for further information” (28 September 1994).
3. On 13 March 1995, the Government forwarded information, while the source added new information which was transmitted to the Government on 26 March 1998. The Government did not request an extension of the time limit for transmitting its reply, but finally sent it on 17 September 1998.
4. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
  - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
  - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
5. In the light of the complaints made, the Working Group has taken the Government’s reply into consideration. Thanks to the new information transmitted to it, the Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.

6. According to the complaint and the new facts provided by the source and the Government, army General José Francisco Gallardo Rodríguez was arrested on 9 November 1993 and charged with offences allegedly committed in 1989. Despite having been acquitted, he was kept in detention on new charges, but was subsequently acquitted of all of these. He was charged with the offences of defamation and offences against the army's honour, which he had allegedly committed in a letter addressed to the Secretary for National Defence and other authorities, in which he called for the appointment of an ombudsman within that branch of the armed forces. It is maintained that the joint or successive charges that have been made against him have given rise to some 15 preliminary investigations (28/89; 30/89; 42/91; 54/93; 157/93; 4/93-E; SC/168/93/I; SC/94/93/II, in which the charges were defamation and slander through statements on human rights in the army; SC/12/94/I; SC/59/94/I and SC/59/94/VI, for abusive language allegedly contained in a document found in the course of an examination of his wife's belongings in their home).

7. The criminal proceedings against him began in 1983, and he was acquitted in the following cases: (1) case No. 1860/83 before the Third Military Court for abuse of authority, proceedings being dismissed on the abandonment of the plaintiff; (2) case No. 1140/90 before the judge of the Seventh Military Zone for fraud, abuse of authority, misappropriation of funds, of which he was acquitted on 30 November 1992; (3) case No. 1120/91, for abuse of authority, acquitted on 11 November 1992; (4) case No. 1196/92, before the Fourth Military Court, for desertion through abandonment of post, acquitted; (5) case No. 3079/93, Second Military Court, for defamation of the army and non-performance of military duties, acquitted; (6) case No. 3188/93, Second Military Court, for proposing the appointment of an ombudsman for the army, which was alleged to constitute, contempt for authority, defamation and slander, acquitted; (7) case No. 2389/94, First Military Court, for unlawful enrichment, acquitted on 7 March 1995.

8. The following cases are pending: (1) case No. 2949/93, Second Military Court, for misappropriation and destruction of army property. This case results from administrative investigation No. 28/89, in which he was found not to have incurred responsibility, the investigation being closed and reopened in 1993. Of the seven charges against him, five were dropped as a result of amparo proceedings; (2) case No. 443/97/VI, for unlawful enrichment. In these two cases he has been sentenced to imprisonment for 14 years and 14 years and 8 months respectively, in enforceable judgements. Nevertheless, and in response to recommendations by the Inter-American Commission on Human Rights, applications for judicial review have been reopened and are currently pending.

9. During the time he has been in prison, General Gallardo has lodged standing complaints with the (governmental) National Human Rights Commission, which, considering that they involve judicial matters, has taken no decisions.

10. General Gallardo has claimed that, since the beginning of his persecution, he has been harassed. The most recent assault was perpetrated on 20 April 1998, in the prison in which he is being held, by a group of about 15 men, led by an infantry lieutenant colonel, who attacked him, beat him up and stole various personal possessions from his room. On other occasions his relatives have been threatened.

11. In its report 43/96, the Inter-American Commission on Human Rights stated that the human rights to personal freedom and due process of law had been violated.
12. The Mexican Government has reported the above-mentioned convictions, stating that internal remedies have not been exhausted, the applications for amparo initiated on the recommendation of the Inter-American Commission still awaiting a decision.
13. General Gallardo has now been deprived of liberty for five years. The reason simply seems to be the lawful exercise of his freedom of expression and opinion, as manifested in the published article in which he called for the appointment of an ombudsman for the army. This right is established in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.
14. In any event, there also appear to have been violations of articles 9, 10 and 11 of the Universal Declaration and articles 9 and 14 of the International Covenant, which establish the right of every defendant to be promptly informed of the charges against him in order to be able to prepare his defence, and to be tried within a reasonable time, pre-trial release being subject to guarantees to appear for trial. In the current case, the constant changes in the charges and keeping the defendant in pre-trial detention for five years constitute violations of the above-mentioned principles relating to due process of law.
15. The Working Group cannot omit to take account of certain special circumstances in the present case, such as the fact that the defendant has been recognized by numerous international organizations as a prisoner of conscience, that he is a member of PEN International, and that in April 1997 he was awarded the Sergio Mendes Arceu National Human Rights Prize.
16. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of José Francisco Gallardo Rodríguez is arbitrary, since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.
17. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998