

OPINION No. 15/2001 (AUSTRALIA)

Communication addressed to the Government on 18 May 2001

Concerning Mr. Marco Pasini Beltrán and Mr. Carlos Cabal Peniche, both of whom are Mexican nationals

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

1. The Working Group on Arbitrary Detention was established by Commission on Human Rights resolution 1991/42. The mandate of the Working Group was extended and clarified by resolutions 1997/50 and 2000/36, and reconfirmed by resolution 2001/40. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group expresses its appreciation to the Government for having provided the information requested promptly and in full.

3. 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).

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, but to date the latter has not provided the Working Group with its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made, summarized below, and the response of the Government thereto.

5. Marco Pasini Beltrán, a 34-year-old married businessman, a Mexican citizen, was according to the source, taken into custody by the Australian Department of Immigration and Multicultural Affairs on 11 November 1998 in Melbourne, Victoria. On 27 November 1998,

he was arrested, pursuant to a provisional arrest warrant under the Extradition Act (Cth) 1988. On 20 January 1999, Mexico made a formal request for his extradition in respect of two alleged offences relating to the operation of a bank and one of concealment.

6. On 17 December 1999, a magistrate determined, pursuant to article 19 (9) of the Extradition Act 1988, that Mr. Pasini Beltrán was eligible for surrender to Mexico. By a warrant, the magistrate ordered that Mr. Pasini Beltrán should be committed either to the Melbourne Assessment Prison or to the Port Phillip Prison to await surrender to Mexico or release pursuant to an order under section 22 (5) of the Extradition Act. On 20 April 2000, the Federal Court of Australia dismissed Mr. Pasini Beltrán's bail application. According to the source, the Federal Court did not permit him to lead evidence which, in accordance with international human rights jurisprudence, showed that his rights were being contravened by his being kept with and in the same manner as convicted men.

8. On 19 June 2000, Mr. Pasini Beltrán filed an application with the Federal Court of Australia contending that his non-segregation from convicted men and non-separate treatment in Sirius East Prison were unlawful as they were in contravention of the Extradition Act 1988 and the International Covenant on Civil and Political Rights. The Federal Court dismissed the application on 14 July 2000. On 20 December 2000, Mr. Pasini Beltrán was granted bail by the Court because of his fragile psychological state. On 18 April 2001, he was returned to custody at the Port Phillip Prison, principally owing to the statutory limitations placed on the Court pursuant to the Extradition Act 1988. He is allegedly incarcerated as a maximum security prisoner together with and subject to the same conditions as the most hardened criminals.

9. Carlos Cabal Peniche, a 44-year-old businessman, a Mexican citizen, married for 20 years, with four children aged 9 to 16, was reportedly taken into custody by the Australian Department of Immigration and Multicultural Affairs on 11 November 1998 in Melbourne, Victoria. He was arrested pursuant to a provisional arrest warrant issued under the Extradition Act (Cth) 1988. On 31 December 1998, Mexico made a formal request for the extradition of Mr. Cabal Peniche in respect of a number of alleged offences relating to the operation of a bank and other offences relating to fraud, taxation and money-laundering.

10. On 17 December 1999, a magistrate determined, pursuant to article 19 (9) of the Extradition Act 1988, that Mr. Cabal Peniche was eligible for surrender to Mexico. By a warrant, the magistrate ordered that he should be committed to the Melbourne Assessment Prison or Port Phillip Prison to await surrender to Mexico or to be released pursuant to an order under section 22 (5) of the Act. On 20 April 2000, the Federal Court of Australia dismissed Mr. Cabal Peniche's bail application. According to the source, the Court did not permit him to lead evidence which, in accordance with international human rights jurisprudence, showed that his rights were being contravened by his being kept with and in the same manner as convicted men.

11. On 19 June 2000, Mr. Cabal Peniche filed an application with the Federal Court of Australia contending that his non-segregation and non-separate treatment in Sirius East Prison was unlawful as it was in contravention of the Extradition Act and the International Covenant on Civil and Political Rights. On 14 July 2000, the Federal Court dismissed the application, holding that Mr. Cabal Peniche was lawfully detained under the Extradition Act.

12. On 20 November 2000, Mr. Cabal Peniche sought again to be granted bail pursuant to article 21 (6) (f) (iv) of the Extradition Act 1988. On 20 December 2000, his application was dismissed.

13. In conclusion, it is said that both Mr. Pasini Beltrán and Mr. Cabal Peniche are being held as criminals. They are not convicted prisoners. However, they are incarcerated as, and together with and subject to the same treatment as, high-risk criminals. It was also said that, due to the current state of the Victorian prison system, they have no effective recourse to procedure to determine the conditions of their incarceration. There is no remedy available to the applicants whereby they can seek to ensure that the deprivation of their liberty is in accordance with international human rights standards.

14. According to the source, the two above-mentioned persons are the subject of extradition proceedings but are not guilty of any offence, either in Australia, in Mexico or anywhere else. The procedure by which their conditions of detention are determined is an internal, administrative or management procedure and they are deprived of the opportunity of questioning the grounds for their detention. This detention has now lasted two and one half years.

15. Lastly, it is said that their detention is arbitrary and is constituting a serious danger to their health and indeed their life. Their prolonged incarceration has had a serious adverse effect on their health, as attested by the finding of the Federal Court of Australia in December 2000 and expert reports from psychologists. In addition, several of the convicts with whom they are imprisoned are said to be suffering from serious and contagious diseases.

16. The source considers that, in the cases under consideration, several provisions of the international instruments relied upon by the Working Group in the examination of cases brought to its attention have been violated, in particular articles 5, 9 and 10 of the Universal Declaration of Human Rights and articles 7, 9 and 14 of the International Covenant on Civil and Political Rights.

17. In its reply dated 10 September 2001, the Government explained that besides the request from the Working Group on Arbitrary Detention, Australia also received a request from the Special Rapporteur on the question of torture for information in relation to the conditions of detention of Mr. Cabal and his brother-in-law Mr. Pasini, both Mexican citizens, who have been detained since November 1998 under section 12 of the Extradition Act 1988.

18. According to the Government of Australia, the length of detention of Mr. Cabal and Mr. Pasini was a result of their refusal to accept their eligibility for surrender to Mexico and their instigating legal proceedings to oppose this. It added that once the magistrate had found them eligible for surrender to Mexico, he was required under the Extradition Act 1988 to detain them unless there were "special circumstances".

19. As far as their detention in a maximum security unit as protected prisoners is concerned, the Government explains that Mr. Cabal and Mr. Pasini were initially detained in the "mainstream" prison community but, after threats to their safety, they were moved to a maximum security wing in August 1999. Their conditions of detention were the same as those of other protected prisoners.

20. Lastly, the Government reports that, on 2 August 2001, Mr. Cabal notified the Attorney-General's Department that he would be discounting his High Court appeal against the Federal Court decision upholding the magistrate's decision regarding his eligibility for surrender to Mexico and would not otherwise be opposing his extradition. It is proposed that Mr. Cabal will be surrendered to Mexico in September 2001. According to the Government, Mr. Pasini continues to oppose his extradition, but is not currently being detained.

21. The Working Group notes that the two communications contain allegations relating to:

- (i) The legal aspects of the detention of the persons in question;
- (ii) Their treatment in detention.

22. Since only the first category of allegations comes within its mandate, the Working Group has transmitted the allegations in the second category to the Special Rapporteur on the question of torture, before whom, moreover, the facts have already been brought, but it has not considered them, since they might relate to inhuman or degrading treatment.

23. With regard to the legal aspects of the detention, the Working Group notes that Mr. Pasini and Mr. Cabal are being held under an extradition procedure pursuant to a warrant and that, although it is undeniable that the length of their detention for the purposes of extradition is abnormally long, this is the result of the fact that they have availed themselves of all the guarantees to a fair trial provided for by law and have instituted all the proceedings for which Australian law provides in their situation, so that the length of their detention cannot be attributed to the Government of Australia.

24. Consequently, the Working Group is in a position to render the following opinion:

In the light of the foregoing, the Working Group declares that the detention of Mr. Pasini and Mr. Cabal is not arbitrary.

Adopted on 13 September 2001