

**OPINION No. 20/2004 (COLOMBIA)**

**Communication addressed to the Government on 8 June 2004.**

**Concerning Mr. Orlando Alberto Martínez Ramírez.**

**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 clarified by resolution 1997/50 and extended by resolution 2003/31. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having provided the requested information.
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 by the Government to the source, but has not received any comments on it. 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 and the response of the Government thereto.
5. The former army major Orlando Alberto Martínez Ramírez is currently detained in Tolemaida military prison in the municipality of Melgar, department of Cundinamarca, in connection with case No. 53.918, which is being handled by the terrorism sub-unit of the ninth prosecutor's office at the criminal court of the Bogotá special circuit. He was arrested because his signature was found on three falsified end-user certificates used to import weapons from Bulgaria (end-user certificates Nos. 101, 102 and 103 of 7 April 1999). The certificates were used to import AK-47 rifles that ended up in the hands of Colombian paramilitary groups.

6. In his initial statement to the investigating judge, Mr. Martínez Ramírez insists that his signature was forged, alleging that it was copied from another official document which he had signed to authorize a donation of AK-47 spare parts to the army shooting club. The source points out that the court record contains references to intermediaries, or “brokers”, who use sophisticated techniques to falsify documents for the acquisition of weapons abroad. The record specifically refers to previous cases where falsified end-user certificates had been used to acquire weapons in Bulgaria.

7. According to the source, Mr. Martínez Ramírez’ arrest, while consistent with the legislation in force, was a violation of his rights, since it was carried out in violation of the principles of reasonableness, proportionality and predictability. It was an unreasonable measure on the part of the public authorities, was incompatible with the State’s general duty to provide protection and violated the human rights of the person concerned. Mr. Martínez Ramírez was charged with “manufacturing, trafficking and carrying weapons and ammunition reserved for the exclusive use of the armed forces”, a criminal offence under article 366 of Act No. 599 of 2000 (the Criminal Code).

8. According to the source, the following evidentiary proceedings went ahead at the investigation stage without a defence lawyer being present: the extension of the charges, the collection of handwriting samples; graphological tests; and fingerprinting. In principle, the defence lawyer must be informed of such proceedings and should be able to attend and challenge them. It is thus alleged that the right to legal counsel was violated.

9. The right to a legal defence, as set forth in article 8 of the Code of Criminal Procedure, was also allegedly violated. The prosecutor attached to the terrorism sub-unit of the criminal court of the Bogotá special circuit rejected the defendant’s application for leave to supplement his initial statement, arguing that the investigation stage had been completed, although at that point no notification of the initial decision to close the investigation had yet been served and, consequently, the time limit for executing the decision had not expired. The first stage of the proceedings, namely the investigation carried out by the public prosecutor, can only be taken as completed if this time limit is observed. According to the source, the above-mentioned procedural step could have been completed in the one-month period during which the file was with the prosecution service.

10. The decision to close the investigation was surprising and premature. This is why the defence did not apply earlier for leave to supplement the defendant’s initial statement. In any case, when this application was being prepared, other requests for evidentiary proceedings were still pending. Among them, the source mentions the request for a supplementary graphological report, which was ultimately used to justify the security measure (detention) applied to Mr. Martínez Ramírez. The prosecutor’s office has also failed to respond to other requests filed at this stage of the proceedings.

11. The application for leave to supplement his initial statement was submitted before the prosecutor’s office announced its decision to close the investigation and before this decision was implemented. The application states that the purpose of the supplementary statement was to introduce new evidence; supplement the information provided in the initial statement by the accused; fill in a number of gaps; and supplement the defendant’s version of the events. In the source’s view, the application should have been granted in order to guarantee the defendant’s

right to a legal defence. By denying the defendant the opportunity to supplement his initial statement and to introduce new evidence testifying to his innocence, the prosecutor's office violated Mr. Martínez Ramírez' right to a legal defence.

12. The source claims that Mr. Martínez Ramírez was denied the right to submit evidence that his signature had been forged, and that he was the victim of a set-up. No technical expert was allowed to examine the seals of the Ministry of Foreign Affairs that appear on the photocopied faxes of the end-user certificates. Such an examination would have been opportune, necessary and beneficial.

13. The source indicates that Mr. Martínez Ramírez' right to personal liberty and the principle of the presumption of innocence have also been violated. In their statements, both the accused and Mr. Jorge Ernesto Rojas Galindo, the owner of the company Equipos y Repuestos, assert that Mr. Martínez Ramírez' signatures on the aforementioned end-user certificates were forged. The graphological test raises doubts about the authorship of the signature, since the expert says he is unable to determine authorship with certainty on the basis of photocopies of a fax. The expert report itself points out that the test was not conducted in ideal circumstances, since the originals were unavailable. Nevertheless, this report was accepted as sufficient grounds and the sole basis for ordering the defendant's detention, which the source considers arbitrary.

14. The source also alleges that the defendant's right to equality has been violated. He was arbitrarily dismissed from the army when the charges were brought against him, whereas other army officers facing charges, and some convicted offenders, are still in active service, earning an income and living in their homes. Mr. Martínez Ramírez was held in a maximum security cell of the military police battalion, when he should have been restricted to the officers' barracks of the same battalion. Although he is merely a suspect, he was sent to Tolemaida military prison, where only convicted criminals are held. This transfer was carried out without the authorization of the National Institute of Prisons and Penitentiaries (INPEC).

15. As the proceedings are being conducted in Bogotá, the detention of the accused in Tolemaida military prison, which is in the department of Cundinamarca, has seriously infringed his right to a defence. His request to be transferred to a detention centre in Bogotá was turned down three times. Furthermore, the source indicates that the treatment ordered for the accused by the commander-in-chief of the army is discriminatory: he is subject to special surveillance; visits by reporters and journalists are prohibited; and prison guards have been instructed to keep a separate record of the visits he receives.

16. The defendant was also allegedly subjected to discrimination and ill-treatment by the prison authorities. When a mobile phone was stolen, the authorities ordered a search of all cells. In the case of Mr. Martínez Ramírez, they also ordered a body search, with special attention to the genital area. He was the only detainee subjected to such treatment, which caused him pain and suffering. His relatives and visitors are also subjected to more rigorous and extensive checks and can only enter with the special permission of the prison governor. His wife and 4-year-old child find it even more difficult to gain access to the premises. As a result, the child has psychological and educational problems, and is experiencing language and learning difficulties. Appeals and requests to the prison governor have gone unanswered.

17. In conclusion, the source considers that Mr. Martínez Ramírez' rights to personal liberty, legal guarantees and due process have been violated. The judicial proceedings against him have not been impartial and he has been subjected to discriminatory, humiliating and degrading treatment in detention. His right to equality and non-discrimination has also been violated.

18. The Government's response to the claims made by the source is summarized below.

19. In a decision dated 14 May 2002, the prosecutor in the case opened pretrial proceedings against Mr. Martínez Ramírez and others accused of manufacturing, trafficking and carrying weapons and ammunition reserved for the exclusive use of the armed forces. An arrest warrant was issued for Mr. Martínez Ramírez, who was accused of having signed three of the four end-user certificates used by the company Equipos y Repuestos to acquire and procure the weapons later seized from members of the United Self-Defence Forces of Colombia.

20. Mr. Martínez Ramírez was arrested on 16 May 2002. Under examination on 17 May, he denied having ordered weapons of any kind, as well as authorship of the signature on the end-user certificates, although he admitted that certain features of the signature in question were similar to his.

21. On 30 January 2003, the fourth criminal court of the Bogotá special circuit dismissed the application for a review of the legality of Mr. Martínez Ramírez' detention. The testimony of one witness was disregarded by the prosecutor's office because the statement by Jorge Ernesto Rojas had not yet been processed when Mr. Martínez Ramírez' legal status was determined. The legal status of the accused was determined on 24 May 2002; the statement in question was received on 6 June 2002.

22. According to the fourth criminal court, which is hearing the case, Mr. Martínez Ramírez prefers his own opinion of the expert report to that of the prosecutor's office. Thus it cannot be said that the expert report is incorrect. Rather, the appellant has an erroneous or different understanding of its merit.

23. Page 91 of Mr. Martínez Ramírez' case file describes the taking of handwriting samples on 11 July 2002 in the presence of his defence lawyer and the prosecutor.

24. The motion submitted by the lawyer Luis Castellanos requesting a supplementary graphological report was denied, in conformity with articles 254 and 255 of the Code of Criminal Procedure, as the request did not meet the requirements set out in these articles. The motion challenging the expert report was therefore not taken up. The lawyer appealed against this decision, but this appeal was not heard, since the motion challenging the report had been denied on procedural grounds. Mr. Castellanos was requested to identify the alleged errors in the report and to provide evidence for those allegations in accordance with the procedural requirements mentioned.

25. It is not true that Mr. Martínez Ramírez' request for an expert opinion on the seals of the Ministry of Foreign Affairs was denied. On the contrary, on 6 September 2002 it was decided to order a forensic test to determine the authenticity of the seals on the end-user certificates, as

requested by the defence lawyer, as well as other tests requested by the defence. A formal written request for the test to be carried out was submitted to the criminology section of the Technical Investigation Unit on 12 December 2002.

26. On 13 November 2002, Mr. Martínez Ramírez' lawyer requested leave to supplement his initial statement. The request was dealt with in a decision dated 14 November 2002: the request was found to be inadmissible, since the investigation had been completed. Moreover, from the time when Mr. Martínez Ramírez was detained, his lawyer had had six months to submit the request. The judge therefore rejected the request, arguing that it had been submitted only two months before the end of the period allowed for completing the investigation, as set forth in article 393 of the Code of Criminal Procedure.

27. On 18 November 2002, Mr. Castellanos submitted a petition calling for a review of the legality of the custodial measure to the criminal court of the Bogotá specialized circuit and submitted an appeal against the decision to close the investigation. These submissions were dealt with in decisions dated 26 November and 16 December 2002, which ruled that the evidence found to date was sufficient to decide on the merits of the case, in conformity with article 393 of the Code of Criminal Procedure.

28. On 15 January 2003, the decision was taken to prosecute Mr. Martínez Ramírez and others on charges of aggravated trafficking in weapons reserved for the exclusive use of the armed forces.

29. On 15 September 2004, the information provided by the Government was forwarded to the source, who has failed to respond.

30. In the light of the allegations made, which have been partly refuted by the Government without further comment from the source, the Working Group considers that the criminal proceedings against Mr. Orlando Alberto Martínez Ramírez were instituted on the basis of evidence that implicated him in a serious crime and that has been challenged by the defence from the start. The Government has denied allegations by the source that Mr. Martínez Ramírez provided handwriting samples for the graphological test without his lawyer being present, quoting entries in the court record testifying to the presence of defence counsel during the graphological test.

31. The Government also denies allegations by the source that no expert examined the seals of the Ministry of Foreign Affairs, and provides detailed information on the appeals filed by Mr. Martínez Ramírez' lawyer.

32. The Government acknowledges that the judge in the case denied the lawyer's request for a supplementary report by a handwriting expert, but justifies this decision using the judge's argument that the request had not been submitted in accordance with the relevant procedural rules.

33. The Government also acknowledges that the judge denied the request for leave to supplement his initial statement, but justifies this on the grounds that the investigation phase had been nearly completed and the defence lawyer had had six months to submit this request.

34. During the pretrial investigation arising from the accusations levelled against him, Mr. Martínez Ramírez had access to a lawyer, who represented him and was able to submit a number of procedural motions in his defence. The fact that some of these motions were denied by the investigating judge cannot be interpreted as a denial of the right to a defence.

35. The legitimate right to a defence must not be mistaken for an absolute right to have all kinds of tests performed. In conformity with the criminal procedure in each country, the investigating judge may refuse to have certain tests performed, provided that when the case comes to trial, the court trying the defendant decides there is sufficient evidence to justify the charges, and provided that the sentence, and thus the deprivation of liberty of the accused, are in conformity with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

36. Accordingly, in the light of the charges brought against the defendant and the length of time he spent in custody, his pretrial detention does not seem disproportionate.

37. In the light of the information received, the Working Group considers that neither Mr. Orlando Alberto Martínez Ramírez' right to personal liberty nor his right to a fair trial have been violated. The allegedly humiliating, degrading and discriminatory conditions of his detention do not fall within the remit of the Working Group.

38. In conclusion, the Working Group considers that there is insufficient evidence for it to consider the deprivation of liberty of Mr. Orlando Alberto Martínez Ramírez as arbitrary.

Adopted on 23 November 2004