

Opinion No. 19/2009 (Colombia)

Communication addressed to the Government in June 2009, reiterated on 12 November 2009

Concerning Mr. Andrés Elías Gil Gutiérrez

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 former Commission on Human Rights. Its mandate was clarified and extended by Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.
2. The Working Group regrets that the Government did not provide the information requested on the allegations transmitted.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).

4. According to the facts presented, Mr. Andrés Elías Gil Gutiérrez is a leader of a farmers' association, Asociación Campesina del Valle del Río Cimitarra (ACVC), the purpose of which is to ensure respect for the human rights of farmers. Since 2002, the association has been accused of being a support agency for the Fuerzas Armadas Revolucionarias de Colombia (FARC). The accusations originate from the intelligence services of the Calibío Battalion of the Fourteenth Army Brigade, which is said to have admitted that it instituted proceedings against ACVC on the basis of paid participation by "reintegrated" persons, an expression used to refer to demobilized members of guerrilla and paramilitary groups in Colombia.

5. As a leader, Mr. Gil took part in farmers' marches in 1998, in which his movement secured the signing of agreements with social organizations and with the then President of the Republic, Andrés Pastrana. In 2002 he participated in proceedings that resulted in the Cimitarra Valley being declared a reserved agricultural area by the Colombian Agrarian Reform Institute.

6. Mr. Gil was detained on 29 September 2007 in the hamlet of Cagui in the municipality of Cantagallo, department of Bolívar, by officers from the Bucaramanga Regional Office of the Department of National Security (DAS) in a joint operation with troops from the Colombian Army and Navy. However, it was a civilian who identified the persons to be detained. The arrest took place pursuant to a warrant issued by the Third Public Prosecutor's Office of Barrancabermeja on 12 July of the same year. However, the police process aimed at bringing him before the courts, which included investigations and even the interception of his telephone, had begun in 2005, and from that time his status was that of an accused person, even though he was never formally informed that that was the case; other leaders also found themselves in the same situation. The fact that those affected were not informed of their status as accused persons meant that the Public Prosecutor's Office was able to receive testimony without their being present, and they were not able to cross-examine the persons who had presented themselves as witnesses.

7. At the time of his detention, Mr. Gil was taken to the offices of the Department of National Security, then to Modelo prison in Bucaramanga and subsequently to other prison facilities.

8. On 8 May 2008, Mr. Gil was summoned to court by the Office of the Special Prosecutor for Human Rights and International Humanitarian Law. The Barrancabermeja Circuit Criminal Court refused him bail on at least two occasions, 18 November 2008 and 22 April 2009. Under Colombian law, an accused person must be released if he or she is not brought to trial within six months of being charged (in this case, 8 November 2008); however, Mr. Gil was denied the benefit of this right on every occasion on which he requested it. The reason for refusal was that the case was not closed; it had merely been suspended on the grounds that the defence had not paid photocopying costs, which the accused is not obliged by law to pay.

9. A second bail application was also refused on the grounds that the Public Prosecutor's Office had not been able to summon "witnesses under protection in secure conditions", which is entirely the responsibility of the Public Prosecutor and under no circumstances that of the accused. These decisions are contrary to the views of the Colombian Constitutional Court.

10. The second part of article 9, paragraph 3, of the International Covenant on Civil and Political Rights provides that "it shall not be the general rule that persons awaiting trial

shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement". Neither the prosecutors nor the judges involved in the proceedings nor the Government have stated that any measures are needed to ensure that Mr. Gil appears at the judicial proceedings, to prevent his escape or to ensure his compliance with the court's ruling. The grounds adduced are very different: difficulties or lack of expertise on the part of the prosecution, and alleged failure to fulfil an obligation that does not exist.

11. The accused has also been deprived of the right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it", pursuant to article 14, paragraph 3 (d), of the Covenant. In the investigation by the Public Prosecutor's Office, Mr. Gil was accused of certain acts by witnesses whom he does not know and has never seen and whom he has not been able to cross-examine. He was not even informed that an investigation was being conducted against him.

12. The facts submitted constitute infringements of the rules of due process of law that are of such gravity as to give the deprivation of liberty of the person in question an arbitrary character under category III of the categories considered by the Working Group.

13. Moreover, in the absence of any information to the contrary, the Working Group considers that the motive for detaining Mr. Gil was his work as a leader of legitimate farmers' trade unions for the benefit of members. The purpose of ACVC is to defend the human rights and overall welfare of the farmers of the Cimitarra Valley. This is noble work that was recognized by the General Assembly when it adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Assembly resolution 53/144 of 9 December 1998). It is also a manifestation of the human rights to freedom of thought, opinion and expression, freedom of association, privacy and peaceful assembly – rights and freedoms recognized both in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

14. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Andrés Elías Gil Gutiérrez is arbitrary, being in contravention of articles 9, 10, 11, 12, 18, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 10, 14, 17, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

15. Consequent upon the Opinion rendered, the Working Group requests the Government to remedy the situation of this person, in conformity with the provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, by granting bail up to the end of the trial and, in addition, by taking measures to ensure that the proceedings against him do not suffer further undue delays.

Adopted on 19 November 2009