

# No. 47/2011 (Argentina)

## Communication addressed to the Government on 28 March 2011

Concerning: **Carlos Federico Guardo**

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010. Acting in accordance with its methods of work the Working Group forwarded to the Government the above-mentioned communication.
2. 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);
  - (d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

#### **Submissions**

##### *Communication from the source*

3. Carlos Federico Guardo is an unmarried Argentine national who is a student in the Faculty of Law at the Universidad Nacional de Tucumán; his regular domicile is in the city of Santiago del Estero. He is being detained in block No. 1 in the men's prison in Calle Alsina 850, Santiago del Estero. Mr. Guardo has been deprived of his liberty without a conviction since 11 August 2005, in other words, for more than 6 years.
4. According to the information received, police officers of No. 4 police station in the province of Santiago del Estero detained Mr. Guardo at 7 a.m. on 28 July 2004 in order to take a statement from him in connection with a police investigation into a fire that had occurred at 4 a.m. of the same day at a house in which a friend of his, 22-year-old Silvia Alejandra Chávez, lived. Ms. Chávez died in the

fire, along with her mother, 56-year-old Estela Chávez. Mr. Guardo made his statement before the investigating judge and was then told that he was free to go.

5. On 10 May 2005, Mr. Guardo travelled to the city of Novo Hamburgo (Brazil) for personal reasons. On 7 August 2005, federal agents arrested him in the city of Porto Alegre (State of Rio Grande do Sul) as he was leaving the Argentine consulate; they informed him that a request for his extradition had been issued by Judge Gustavo Adolfo Herrera in Santiago del Estero. The grounds given for his arrest were arson, aggravated homicide and concealment. His extradition was requested under Act No. 17272, under which the extradition treaty between Argentina and Brazil was approved. After his arrest, he was taken to La Charqueada maximum security prison.

6. An application for the extradition order to be declared null and void was lodged with the Supreme Court in Argentina. The application was based on the fact that, until then, Mr. Guardo had neither been accused of a crime nor called upon to answer charges. He was not a fugitive from justice. The appeal was declared unfounded. On 19 January 2007, Mr. Guardo was extradited to Argentina and placed in No. 1 block of the Men's Prison, where he has remained ever since, although he has not been convicted.

7. Since Mr. Guardo's detention in Brazil, his lawyer has sought various legal remedies in order to obtain his release and to have his case heard promptly. Consequently, in addition to the application for annulment of the extradition order, he has sought the following remedies:

(a) Four applications for his release from prison, all of which were dismissed. On 20 December 2007, Criminal and Correctional Court No. 3 turned down an initial application for release. That ruling was upheld by the First Chamber of the Appeal Court and by the Supreme Court. The last application for release from prison was submitted before Criminal Trial Chamber No. 2 on 6 September 2010; to date there has been no ruling;

(b) Habeas corpus and cassation actions submitted following the unfavourable rulings in the first instance;

(c) A constitutional *amparo* action, which was heard on 19 October 2010 and dismissed.

8. The source points out that under article 1 of Act No. 25430, which governs the duration of pretrial detention, and which was approved on 9 May and promulgated on 30 May 2001, pretrial detention shall not exceed 2 years without judgement. Nevertheless, where the number of offences with which the defendant is charged or the complexity of the case has made it impossible to pass sentence within the specified period, detention may be extended for 1 year by a reasoned decision, which must be referred immediately to the competent higher court for review.

9. Under the relevant domestic legislation (Act No. 25430 on the duration of pretrial detention and its extension by a reasoned decision; powers of the Public Legal Service and their scope), Mr. Guardo's deprivation of liberty has exceeded the legally permissible maximum, given that under article 1 of the relevant law, pretrial detention may not exceed 2 years without a trial. In this case, that period has been considerably exceeded.

10. The source recognizes that the law allows for the extension of pretrial detention by 1 year, either because of the number of charges facing the defendant or because of the case's evident complexity. Such an extension of the deprivation of liberty must be decided by court order, which is then referred to the competent higher court. The source asserts that no action has been taken by the courts formally to extend the duration of the pretrial detention. Nor is there any indication that the number of charges against Mr. Guardo make his case especially complex. Lastly, the source points out that the investigating judge has not requested an extension of the 2-year period of imprisonment.

11. Article 9 of Act No. 25430 stipulates that if an accused person is deprived of his or her liberty for 2 years without a sentence, the court concerned must, within 48 hours, provide the Council of the Magistrature with the following information: the case number; the case file; the date set for the trial and the court hearing the case; the public prosecutors involved and any other details relevant to the case; the defendant's identity; the date of his or her arrest; the stage reached by the trial and the reasons for the failure to pass sentence. In Mr. Guardo's case, no formal justification has been given for the delay on the part of the court dealing with the case, nor has it at any time complied with its obligation to report to the Council of the Magistrature and to explain why it has not passed sentence. Under the law, such an omission or delay in reporting is considered serious misconduct.

12. The source underlines that Mr. Guardo has been deprived of his liberty for more than 6 years. It draws attention to the fact that the one and a half years that he spent in detention in Brazil prior to his extradition, from 11 August 2005 to 19 January 2007, should also be taken into account. The source points out that, even if it were not included, and only the period of deprivation of liberty in Argentina were counted as his pretrial detention, that detention nevertheless began on 19 January 2007.

13. Thus, under Act No. 25430, a request should have been made by January 2009 at the latest for the extension of his pretrial detention in order legally to justify the deprivation of liberty for a further year. No such request was made.

14. Even if the extension referred to in the previous paragraph had been granted, it would not have been for more than 1 year and would therefore have expired by January 2010. Nevertheless, Mr. Guardo is still deprived of his liberty, awaiting trial in pretrial detention to this day.

15. The source points out that pretrial detention may not be extended beyond the limits set by the Constitution and the law on the grounds that the accused might, if released, seek to evade justice. The source recalls that Act No. 25430 on the duration of pretrial detention is consonant with article 7, paragraph 5, of the American Convention on Human Rights, which establishes the right of a detained or imprisoned person to be tried within a reasonable time or to be released without prejudice to the continuation of the proceedings. Under that provision, release may be subject to guarantees to assure that the accused will appear in court.

16. The source also recalls that article 9, paragraph 3, of the International Covenant on Civil and Political Rights, to which Argentina has been a party since 1986, establishes that anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. The same article also states that it shall not be the general rule that persons awaiting trial shall be detained in custody.

17. The source recalls that article 14, paragraph 2, of the Covenant requires that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 14, paragraph 3 (c), adds that everyone is entitled to be tried without undue delay.

18. The case is at a standstill before Criminal and Correctional Examining Court No. 2. In the course of 2009, the judge made no ruling or decision to activate the proceedings. No ruling has yet been made on the application to Criminal and Correctional Court No. 3 to have the main case brought to trial.

19. The source points out that Mr. Guardo has been wrongly deprived of his liberty for more than 6 years while awaiting trial, in violation of both Argentine domestic law and international law, and that he can therefore be considered to be held in arbitrary detention.

20. According to the source, Mr. Guardo's detention contravenes the Universal Declaration of Human Rights and the Covenant.

#### *Response from the Government*

21. In its response of 28 July 2011, the Government, noting that it can provide only a preliminary reply because it has not yet been able to examine the cases being heard in Santiago del Estero, states that Act No. 25430, referred to by the authors of the communication, is a federal law that does not apply in provincial jurisdictions with their own rules of criminal procedure. With regard to limits on pretrial detention, it asserts that provincial legislation takes precedence and that, since it contains no regulations on the matter, there is no reason to assume there have been any irregularities.

22. The Government points out that in February 2011 a new Code of Criminal Procedure came into force in Santiago del Estero. The new Code sets no limit on pretrial detention and stipulates that it shall cease as a matter of right, in the absence of a conviction in the first instance, when 2 years have elapsed since the moment of arrest. Nevertheless, in complex cases its duration may be extended by 2 years by way of a reasoned decision, once the parties have been heard. However, if the extension period expires and no judgement in the first instance has been handed down, the accused shall be released on personal recognizance, without prejudice to the obligations that the judge or court may impose.

23. Moreover, in the Government's opinion, the time taken to complete the extradition process in Brazil cannot be included in the period of pretrial detention, as delays in that process are attributable

only to the procedures followed in the requested country in order to ensure compliance with the conditions for the extradition of the accused.

24. In its response of 28 July 2011, the Government enclosed internal legal documents from the Argentine courts, but they neither add anything of substance to its submission of the same date, nor invalidate the facts and arguments submitted by the source.

25. The source, in its comments, considers that:

(a) No credence can be lent to the statements by officials of the Ministry of Justice, given that they had not had access to the case trial documents in Santiago del Estero;

(b) Although Act No. 25430 is an integral part of the national Code of Criminal Procedure and applicable at the federal level and in the federal capital, it is equally true that it implements article 7 of the American Convention on Human Rights (Pact of San José, Costa Rica), which has been incorporated into the Constitution;

(c) Although provincial regulations in Santiago del Estero do not establish a limit for pretrial detention, they do impose a 3-month limit on pretrial investigations, with the possibility of a 2-month extension if the judge requests it from the relevant Court of Appeal. In exceptional cases, that extension may last up to 4 months;

(d) The extradition treaty between the States of Brazil and Argentina, signed in 1961 and approved in 1967, stipulates, inter alia, that a condition for extradition to the requesting country is that the time spent by the accused deprived of his liberty in Brazil, in this case 1 year and 5 months, shall be counted towards his time in detention. No trial took place in absentia during that time, but pretrial investigations were carried out in the province in the absence of the accused, who was not represented.

#### **Considerations of the Working Group**

26. The Working Group considers that the Government replied to the query submitted to it by the Chair-Rapporteur on 28 March 2011 by way of its response of 28 July of the same year. Therefore, it is in a position to issue its opinion on the case.

27. The Working Group finds that the extradition treaty concluded by Argentina and Brazil in 1961 does not contain the precept claimed by the complainant in his comments on the Government's response, and that the treaty was respected by Brazil when it granted Argentina's request for extradition.

28. However, Argentina's Act No. 24767 on International Cooperation in Criminal Matters, which was published in the official journal on 16 January 1997, establishes in article 11, section (e), that in the case of passive extradition, that is, when Argentina is requested by another State, the extradition request shall be denied if the requesting State does not guarantee that the period of deprivation of liberty resulting from the extradition process shall be counted as if the person being extradited had spent that time in detention in the course of the proceedings for which extradition was requested. Although that precept does not apply to active extradition, the source's view that Argentina cannot act contrary to the rules it applies itself when considering extradition requests from other States is reasonable. Therefore, the period of deprivation of liberty must be calculated from 7 August 2005.

29. Mr. Guardo's defence counsel applied for his release from pretrial detention on four occasions between December 2007 and 6 September 2010. The first three applications were dismissed and the last has met with no response. Counsel also filed various habeas corpus and cassation actions, all of which were dismissed, and an *amparo* action, which was dismissed on 19 October 2010.

30. Analysis of the facts clearly demonstrates that numerous rights of the accused, Carlos Federico Guardo, have been violated: the right to be tried without undue delay, or as soon as possible; the right to an effective remedy to safeguard his right to personal freedom; and the right to be tried in liberty, on the condition that he attend court and serve his sentence. All this means that his protracted pretrial detention constitutes non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III as set forth in the Working Group's working methods.

#### **Opinion of the Working Group**

31. In the light of the above, the Working Group renders the following opinion:

(a) The deprivation of liberty of Carlos Federico Guardo is arbitrary, falling within category III of the categories applied by the Working Group, given the violation of rights enshrined in articles 3, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and of article 2, paragraph 3, and articles 9, 10, 12, 13 and 14 of the International Covenant on Civil and Political Rights, to which Argentina is a party;

(b) Consequently, the Working Group requests the Government of Argentina to order, through the relevant judicial authorities, the release pending trial of Carlos Federico Guardo, if necessary subject to guarantees that he attend court and comply with its final judgement.

[Adopted on 2 September 2011]