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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventieth session, 25–29 August 2014

No. 23/2014 (Mexico)

Communication addressed to the Government on 20 June 2014

Concerning **Damián Gallardo Martínez**

The Government has not replied to the Working Group's communication.

The State is a party to the International Covenant on Civil and Political Rights, to which it acceded on 23 March 1981, and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it ratified on 23 January 1986.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

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 the detainee) (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);

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(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; or 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. Damián Gallardo Martínez, originating from the Mixe region of Oaxaca state, is a defender of the rights of indigenous peoples and a member of the National Coordination Body for Education Workers and the Popular Assembly of Peoples of Oaxaca. It is reported that Mr. Gallardo Martínez is active in the field of community education in the indigenous communities of the Mixe and Zapoteca regions of the Oaxaca hills, and that he has been a member of various committees for the release of prisoners.

4. According to the information received, Mr. Gallardo Martínez was arrested at 1.30 a.m. on 18 May 2013 in his home in Reyes Mantecón, in the Valles Centrales region of Oaxaca. A group of seven agents carrying weapons intended solely for army use apparently broke open the door of his home. He was arrested in the presence of his companion and daughter. His captors included police officers, employees of the Attorney-General's Office and civilians. The arrest had reportedly been ordered by the Office of the Assistant Attorney-General for Organized Crime Investigations. Nevertheless, the agents did not present an arrest or search warrant.

5. From his home, Mr. Gallardo Martínez was apparently transferred, with his face covered, to a private residence, where he was held incommunicado for approximately 30 hours, subjected to torture and forced to sign a confession. It is reported that he was beaten repeatedly, particularly in the genital area and on his stomach and feet, that he was denied food and access to the toilet, and that his captors threatened to rape and murder the members of his family. He was forced to squat for a prolonged period and watch other detainees being tortured. Under torture, Mr. Gallardo Martínez confessed to the offences of organized crime and abduction of minors.

6. According to the source, Mr. Gallardo Martínez was prevented from communicating with his family or his counsel.

7. Subsequently, Mr. Gallardo Martínez was transferred to Federal Social Rehabilitation Centre No. 2 (Occidente). The medical examination carried out in the detention centre certifies that Mr. Gallardo Martínez showed signs of physical violence and injuries on his body, including a "reddish bruise, 1.5 centimetres in diameter, on the left cheekbone, and swelling on the top of the right foot". The medical certificate apparently omitted, however, to mention the kind of instrument or object that had caused the injuries.

8. On 22 May 2013, the Federal Prosecution Service instituted criminal proceedings against Mr. Gallardo Martínez for the offence of organized crime, and reportedly sought an arrest warrant on the charge of abducting two minors. Mr. Gallardo Martínez was then

transferred to Puente Grande maximum security prison in Jalisco. On 25 May 2013, a detention order was issued against Mr. Gallardo Martínez for the offence of organized crime and, on 16 June 2013, for the offence of abduction of minors. Appeals were lodged against the rulings.

9. According to the source, on 18 May 2013, an application for *amparo* was filed for enforced disappearance, torture and incommunicado detention. On 24 May 2013, at the headquarters of the Attorney-General's Office in Jalisco, a criminal complaint was filed for the acts of enforced disappearance, abuse of authority, torture and other cruel, inhuman or degrading treatment.

10. Subsequently, an application was made to the Office of the Human Rights Ombudsman of Oaxaca for protective measures for Mr. Gallardo Martínez and his family, under file number DDHPO/7864/ (01) 2013.

11. On 23 January 2014, in her ruling on appeal No. 241/2013 lodged by Mr. Gallardo Martínez' defence, the judge of Jalisco Third Circuit Court No. 4 ordered his release after noting serious violations of due process in the case files of the Federal Prosecution Service. The ruling stipulated that the detention order of 28 May 2013 should be revoked and that the proceedings should be reconsidered from the time prior to the accused's preliminary statement, on the grounds that the federal judge had not informed the detainee of the guarantees granted by article 20 of the Constitution, the offences with which he was charged or the names of his accusers or the persons who had testified against him.

12. According to the judicial ruling, the trial judge failed to allow the defence team and the accused access to the evidence supplied by the Federal Prosecution Service during the investigation stage.

13. Nevertheless, Mr. Gallardo Martínez was not released. Instead, he has continued to suffer ill-treatment in detention. He has been subjected to administrative measures involving the imposition of solitary confinement and temporary incommunicado detention, and has been threatened and beaten. On 26 May 2014, Mr. Gallardo Martínez was insulted and physically assaulted by another prisoner because he was of indigenous origin, in the sports fields of Federal Social Rehabilitation Centre No. 2 (Oriente) in Jalisco. He was kicked in the face and other parts of his body. His assailant falsely declared that he had carried out the attack because he was a victim of extortion at the hands of Mr. Gallardo Martínez. As a result, the prison authorities separated Mr. Gallardo Martínez from the other inmates.

14. According to the source, these events were followed by more serious assaults, threats, harassment and systematic reprisals against Mr. Gallardo Martínez for having reported the torture and ill-treatment that he had suffered.

15. The detention order for the offence of abduction was revoked. Nevertheless, on 2 February 2014, the judge of the Sixth Federal Criminal Court of Jalisco issued another detention order against Mr. Gallardo Martínez for the same offence and on the basis of the same arguments used in the order that had been revoked. This order was also the subject of an appeal and is currently before Third Circuit Court No. 4 of Zapopán, Jalisco (docket No. 94/2014).

16. Criminal proceedings are continuing in the Sixth District Criminal Court of the state of Jalisco. According to the source, the proceedings are fraught with irregularities.

17. The source alleges that Mr. Gallardo Martínez was arrested violently in the absence of any arrest or search warrant. He was held incommunicado for more than 30 hours without being brought before the judge. He was coerced and tortured into signing a self-incriminating statement. There is a medical certificate confirming that Mr. Gallardo Martínez was brought before the judge with signs of injury to various parts of his body,

even though the records show that he did not resist arrest. The parents of the abducted minors have declined to confirm the judicial findings.

18. According to the source, Mr. Gallardo Martínez is suffering the consequences of the torture and assaults to which he was subjected. He is experiencing post-traumatic stress, lack of appetite, insomnia and other disorders.

19. According to the source, these allegations are made in a context of growing violence, insecurity and legal action affecting human rights defenders in Mexico. It is part of an effort to criminalize social protest by setting up fictitious offences and planting evidence to implicate protesters in offences that they have not committed.

20. The source concludes that the detention of Mr. Gallardo Martínez is arbitrary on the grounds that it runs counter to articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, to which the United Mexican States is a party.

Response from the Government

21. Although the Government has not replied to the communication transmitted to it on 20 June 2014, the Working Group considers itself to be in a position to issue an opinion on this case, in conformity with paragraph 16 of its methods of work.

Discussion

22. The case in hand involves serious allegations of violations, not only of human rights but also of the duty to protect human rights defenders, particularly of the rights of indigenous peoples, with the account of the facts mentioning intimidation, threats and repeated acts of torture. In the face of these serious allegations, formulated and supported by the source, the Government should have refuted them without delay by submitting information and counterarguments. The lack of response from the Government can only place it in an unfavourable light, which prima facie would validate the allegations submitted. Moreover, it may be noted that there are other cases in which similar allegations have been made, both of violations of the rights of indigenous peoples and of abuses committed in the Mexican prison system (see A/HRC/WG.6/17/MEX/2 and A/HRC/WG.6/17/MEX/3).

23. Mr. Gallardo Martínez was arrested and detained without any certainty that any legal basis existed for such action. Despite the fact that a court had revoked the detention order and ordered his release, he was kept in detention from 23 January to 2 February 2014, when a new detention order was issued to justify his continued detention. In the Working Group's view, there is no doubt that the detention of Mr. Gallardo Martínez during this 10-day period is arbitrary under category I of the categories applied by the Working Group in determining the arbitrariness of cases of detention.

24. In addition, the arrest and detention of this person appear to be motivated by the activities that he has conducted in favour of the indigenous peoples to whom he personally belongs. In pursuing those activities, Mr. Gallardo Martínez was merely exercising freedoms enshrined in 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 (General Assembly resolution 53/144, annex), particularly those proclaimed in the Universal Declaration of Human Rights. The arrest and detention of this person thus fall under category II of the categories applied by the Working Group.

25. It should be noted that Mr. Gallardo Martínez confessed to having committed the offences of which he was accused only after being subjected to threats, acts of intimidation

and torture, in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United Mexican States is a party. The Working Group considers that whenever torture results in the collection or establishment of evidence that is used against the victim, the impartial, fair and equitable nature of the criminal proceedings is compromised, rendering the detention arbitrary under category III of the categories applied by the Working Group.

26. The Working Group also notes that there has been a violation of the principle of *non bis in idem* insofar as a detention order has been issued against Mr. Gallardo Martínez for the same acts and on the basis of the same arguments and descriptions as had already been revoked by the judicial bodies. This violation affects the legal safeguards to which all persons are entitled, as well as the right of all detainees to a fair, impartial and equitable trial. Moreover, Mr. Gallardo Martínez has been denied access to all legal representatives as well as to his family, who should have been given the chance to provide support. This confirms the arbitrary character of his detention under category III.

27. Regarding the allegations of torture described in this Opinion, the Working Group deems it appropriate to refer them to the competent bodies of the United Nations system.

Disposition

28. In light of the foregoing paragraphs, the Working Group concludes the following:

(a) The arrest and detention of Damián Gallardo Martínez are arbitrary under categories I, II and III of the categories applied by the Working Group in the consideration of cases of detention brought to its attention, and as defined in paragraph 8 of its methods of work. The detention of this person is in violation of the provisions of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights and 9, 14, 19 and 21 of the International Covenant on Civil and Political Rights;

(b) The Working Group urges the Government to adopt the measures necessary to put an end to this situation involving multiple violations, and to take appropriate remedial measures in favour of this person;

(c) In conformity with paragraph 33 (a) of its methods of work, the Working Group decides to transmit the allegations of torture to the Special Rapporteur on the question of torture.

[Adopted on 26 August 2014]