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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. 28/2014 (Plurinational State of Bolivia)

Communication addressed to the Government on 4 June 2014

Concerning: Mario Francisco Tadic Astorga

The Government failed to respond to the communication of the Working Group.

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. 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 forwarded 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 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);

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(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative detention without the possibility of administrative or judicial review (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. Mario Francisco Tadic Astorga, born on 2 August 1954, holds Bolivian and Croatian citizenship and is a former officer of the Croatian army, having retired due to disability. His regular domicile is in Osijek (Croatia). He was arrested between 2 a.m. and 4 a.m. on 16 April 2009 in a room of the Las Américas Hotel in the city of Santa Cruz de la Sierra, by police officers of a special tactical unit known as Unidad Táctica de Resolución de Crisis (UTARC), who failed to identify themselves, were not accompanied by a public prosecutor and did not show an arrest warrant.

4. It is reported that members of UTARC broke into the hotel by force, using explosives against the doors of rooms on the fourth floor. Three people in those rooms were killed by gunshots fired by the police officers: Eduardo Rózsa Flores, a Bolivian-Hungarian citizen, Magyarosi Árpád, a Hungarian citizen, and Michael Dwyer, an Irish citizen. Mr. Árpád apparently received seven bullets in the back without himself having fired a shot. Two hours prior to the operation the hotel security cameras had been disconnected. According to government authorities and the police, the gunfight lasted 30 minutes, but hotel employees, neighbours and survivors declared that it lasted no more than 3 minutes and that there was no exchange of fire.

5. According to the source, when Mr. Tadic Astorga leapt out of bed and put his hands in the air a masked officer dressed in black and armed with an assault rifle shouted: "On the floor, you dog". Mr. Tadic Astorga was hit in the face with a rifle butt and kicked in the head. Subsequently the officer smashed Mr. Tadic Astorga's head against the wall of the room, fracturing his skull. A second group of officers wearing camouflage uniform then came into the room and took the place of the officers dressed in black.

6. Mr. Tadic Astorga was interrogated in various police vehicles, then in annexes of the airport of Santa Cruz. The beatings continued during the interrogations and he suffered a number of fractured ribs. He was then transported by plane to the city of La Paz, where he was taken to the Attorney General's Office. During the plane journey all he had to wear was a pair of trousers and he was covered by a sheet. He was interrogated by a public prosecutor on 17 April 2009. Despite the fact that his nose, mouth, teeth and ribs were smashed, he was not given medical attention until after the first interrogation had been completed. His fingerprints were taken and he was photographed. Then, after he was taken to the Copacabana Police Clinic, accompanied by officials of the Ministry of the Interior and of the Public Prosecution Service and police officers, his interrogation continued in the Attorney General's Office. At 2.15 a.m. on 18 April 2009, he was brought before the Seventh Criminal Court, where the presiding judge, Betty Yañiquez, ordered him to be held in pretrial detention (recently introduced) under article 239 of the Code of Criminal Procedure. This violated article 84 of the Code, according to which an accused must be brought before a judge within 24 hours.

7. Mr. Tadic Astorga was interned in the “Grulla” section of San Pedro Prison, where he was held incommunicado for several weeks, in violation of article 231 of the Code of Criminal Procedure, which limits incommunicado detention to a maximum of 24 hours. According to the source, the “Grulla” was a punishment unit reserved for highly dangerous inmates. Six weeks later he had to be taken to the Hospital del Tórax suffering from heart failure and blood pressure problems, and he remained there for 16 days. On his return to prison he was held in the rehabilitation centre, which is used to house drug addicts and alcoholics. On three occasions between April 2011 and August 2012, he was taken to the town of Cochabamba.

8. In May 2013, Mr. Tadic Astorga told the First Criminal Court of La Paz that he had been pressured by the authorities to incriminate himself and that he had been subjected to torture for that purpose. Those complaints, made before a court, have so far not been investigated.

9. According to the source, Mr. Tadic Astorga is one of only two survivors of the police operation carried out in the Las Américas Hotel in the early morning of 16 April 2009.

10. The Supreme Court of Justice ordered that the trial of Mr. Tadic Astorga take place in the town of Santa Cruz de la Sierra, where he lived and where he was arrested. However, the executive authorities decided that the proceedings should be held before the court of justice of Cochabamba. Seven hearings due to take place in that court were thwarted due to the absence of interpreters, representatives of the Public Prosecution Service and the judge.

11. The source reports that Mr. Tadic Astorga was held in pretrial detention under article 239 of the Code of Criminal Procedure, which sets a limit for such detention of 18 months. At the end of that period, Mr. Tadic Astorga should have been released. He continued to be held in prison, however, by the improper retroactive application of the amendment to the Code of Criminal Procedure contained in Act No. 007 of 2010, which raised the limit of pretrial detention to 36 months in the absence of a sentence. After 36 months had passed without a sentence, he was still not released, in breach of Bolivian national law.

12. The investigations began in the city of La Paz, but the case was transferred in 2011 for the final hearings to the jurisdiction of Cochabamba. The trial began in the city of La Paz but was transferred to the town of Tarija in October 2012. Currently, it is being held in Santa Cruz de la Sierra.

13. The public prosecutor in the case, Marcelo Soza, has claimed that he suffered pressure from Government to implicate opposition political leaders in the proceedings. On 11 March 2014, Mr. Soza applied for political asylum in Brazil. Judge Ricardo Maldonado has also complained that he had been subjected to government pressure.

14. Mr. Tadic Astorga has been held for more than five years without having been sentenced. A number of the injuries he sustained as a result of torture have not been properly healed. The provisions of the Code of Criminal Procedure, whereby detainees held for more than 36 months without being sentenced are entitled to have the conditions of their detention changed for a more favourable regime, have been ignored.

15. The source points out that the Plurinational Constitutional Court, in its rulings No. 1036-2002 of 29 August and No. 1430-2002-R of 25 November, confirmed that 18 months provide more than enough time to conclude the investigation stage, gather evidence and begin oral proceedings.

16. According to the source, the police operation which resulted in the arrest of Mr. Tadic Astorga was meticulously planned: the hotel’s video surveillance system was

disabled several hours beforehand and all information on persons entering and leaving the hotel was wiped from computers.

17. Mr. Tadic Astorga complains that he was tortured by former officers of the Directorate General of Security, the Ombudsman's Office and the Public Prosecution Service, both in Santa Cruz de la Sierra and in La Paz, in an attempt to force him to confess to charges of terrorism and being part of an irregular armed group, something which he refused to do. The acts of torture apparently resulted in lost dentition, broken ribs, bruises and lacerations. The complaints of torture were allegedly not investigated by the Public Prosecution Service, nor did the judge order the allegations to be investigated, despite formal complaints from the victim.

18. The source maintains that the Public Prosecution Service not only did not take part in the arrest of Mr. Tadic Astorga, but also subsequently proceeded to destroy the supposed evidence. Explosives found in the town of Santa Cruz de la Sierra were destroyed. Trial evidence was not securely stored and might therefore have been adulterated or tampered with. That evidence was never properly classified and there was no record of the date or time at which it was obtained. There are no witnesses' signatures and the legally required records were not drawn up.

19. Mr. Tadic Astorga has found it very difficult to arrange meetings with his lawyers and prepare his defence. Although his lawyers have been granted court permission to visit him on several occasions, they have been denied access to the prison because they lack authorizations from the Public Prosecution Service or Directorate-General of Prisons, which are not even required. Lawyers and international observers who have applied for visas and permits to interview Mr. Tadic Astorga have had their requests turned down. This is alleged to constitute a serious violation of his right to a defence.

20. According to the source, the pretrial detention in which Mr. Tadic Astorga has been held for more than 5 years is arbitrary. He has been detained without trial for a period far exceeding that allowed under the provisions of international law or of the Code of Criminal Procedure of the Plurinational State of Bolivia. His detention is politically motivated.

21. It is also alleged that Mr. Tadic Astorga was interrogated in the absence of his defence lawyer. His allegations of torture have not been duly investigated despite his formal complaints and the physical traces of his injuries.

22. The proceedings against Mr. Tadic Astorga reveal, according to the source, a total disregard for the norms of international human rights law and of Bolivian national law, especially as concerns his right to a fair trial and the presumption of innocence.

23. The source asserts that the daily press, government pamphlets, television programmes and statements made at press conferences all portray Mr. Tadic Astorga as a highly dangerous person, and even as a mercenary and a terrorist, in violation of the presumption of innocence and of his right to enjoy a fair trial. Mr. Tadic Astorga is deemed by the State authorities, the public prosecutors, the press and other media to be guilty even before having been sentenced.

24. The source maintains that a prosecution witness, Julio César Alonso Clerique, produced a fake, touched up photograph during the trial, in which Mr. Tadic Astorga was made to appear in the company of other accused. The public prosecutor allegedly referred to reports from the International Criminal Police Organization (Interpol) concerning Mr. Tadic Astorga's past but, despite being formally requested to do so, has never produced any evidence that such reports exist.

25. As regards the evidence against Mr. Tadic Astorga, the source affirms that the physical evidence was not correctly inventoried, that it is full of errors, that the dates on which it was gathered were not recorded and that the chain of custody cannot be

determined. Worse still, neither the prosecution evidence nor the records of the hearings were made available to the defence. Furthermore, the prosecutor did not give the order allowing the defence to present exculpatory evidence. All this has placed Mr. Tadic Astorga in a position of defencelessness.

26. Relatives, journalists and international observers were prevented from attending the final hearing held in Cochabamba. The public prosecutor, Marcelo Soza, did not bring charges within 18 months as required by article 134 of the Code of Criminal Procedure and the judge did not order him to do so.

27. Mr. Tadic Astorga was arrested without an arrest warrant from a competent authority and without being found in flagrante delicto. The fact that he was transferred to La Paz and from there to Cochabamba and Tarija deprived him of his right to appear before a competent court and to be heard by a natural judge. The terms of Act No. 007/2010 were applied to him retroactively in order to extend his detention beyond the legal limits. At various hearings, the court decided to postpone any complaints concerning defective legal proceedings, without offering any reason or legal grounds; such complaints included the fact that the accused were not brought to the hearings and that the public prosecutor was absent.

28. In Decision No. RD/00111/LPZ/2009 of 12 December 2009, the Bolivian Ombudsman concluded that fundamental legal criteria had been ignored in this case. He mentioned the absence of arrest and search warrants, the allowance of extra time and the use of torture. The Ombudsman concluded that the legal proceedings were entirely null and void.

29. All habeas corpus actions in favour of Mr. Tadic Astorga and applications to end his detention were delayed for more than a year, despite the fact that Bolivian law requires that they be considered within mandatory time limits. In the end, they were all rejected.

30. According to the source, this also represents discrimination against Mr. Tadic Astorga, who has been systematically denied rights which are granted to Bolivian citizens, in particular his rights to freedom, security, presumption of innocence and a fair and impartial trial before a competent court.

31. The source concludes that the detention of Mr. Tadic Astorga is arbitrary and consequently requests that he be released immediately.

Response from the Government

32. The Working Group communicated the aforementioned allegations to the Government on 4 June and deplores the fact that the Government has failed to respond.

33. In accordance with paragraph 15 of its methods of work, the Working Group asked the Government to respond within 60 days of the date the communication was transmitted. Under paragraph 16 of the methods of work, the Government could request an additional delay of not more than one month.

34. On 1 August 2014, the Working Group received a request from the Government for an extension of the deadline in order to respond to the allegations it had received. The request made reference to the fact that the Attorney General's Office was preparing the information required.

35. The Working Group considered the request during its seventieth session and concluded that it did not satisfy the requirement to explain how it was motivated, in accordance with paragraph 16 of the Working Group's methods of work.

36. In the first place, the Working Group considered that the Government had had sufficient time to prepare its response, particularly in the light of the national and

international publicity which the case has attracted. Secondly, the Working Group recalled that it had already held in its opinion No. 63/2011 (Plurinational State of Bolivia) that it believed the detention of Mr. Elöd Toásó — who survived the police operation of 16 April 2009 along with Mr. Tadic Astorga — to be arbitrary and had requested his release.

37. Furthermore, and as a matter of principle, an extension of the deadline for responding to allegations can only be granted when the Working Group is certain that there is no risk that the torture and ill-treatment will continue and has received assurances to that effect. This is not entirely clear in the case in question because no information has been received concerning investigations into the allegation of torture and ill-treatment and no official inquiries into those allegations have taken place.

Deliberations

38. In accordance with its methods of work, the Working Group considers that it is in a position to render an opinion on this case in the light of all the information it has received.

39. In the present case, the Government has not chosen to refute the *prima facie* reliable allegations submitted by the source. In its jurisprudence the Working Group has established the way it deals with allegations provided by a source:¹ if the source has established a *prima facie* case for the existence of arbitrary detention, the burden of proof falls upon the Government, which must, if it so decides, refute the allegations and the arbitrary nature of the detention. In the absence of any refutation from the Government, the Working Group bases its opinion on the *prima facie* valid allegations put forward by the source.

40. The Working Group notes with profound concern that Mr. Tadic Astorga has been held in pretrial detention for more than 5 years and 4 months, despite the fact that the charges of terrorism were made public on 17 December 2010, in other words 1 year and 8 months after his arrest.

41. The Working Group recognizes that Mr. Tadic Astorga was held in pretrial detention for an initial period of 18 months, in keeping with the provisions of article 239 of the Code of Criminal Procedure, which establishes 18 months as the maximum term for such detention. Since he was not sent for trial, he should have been released on 16 October 2010, but he remained in detention owing to the improper retroactive application of the amendment to the Code of Criminal Procedure contained in Act No. 007 of 2010, which increased the limit of pretrial detention to 36 months in the absence of a sentence. It is a general principle in law that lawfully no law should be applied retroactively unless it benefits the accused. In this regard, the Working Group recalls the provisions of article 15 of the International Covenant on Civil and Political Rights.

42. In any event, by 16 April 2012, the new deadline of 36 months, the maximum term of pretrial detention, Mr. Tadic Astorga should have been released. However, this did not happen and he remained in prison in violation of Bolivian national law.

43. It is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible.² Article 9 (3) of the Covenant lays down two interrelated obligations: anyone arrested or detained shall be brought promptly before a judge and shall be entitled to trial within a reasonable period of time or to release. The person concerned was not brought before a judge within 24 hours, as required under article 84 of the Code of Criminal Procedure, nor was he tried within a reasonable period of time.

¹ See, for example, paragraph 68 of the Report of the Working Group (A/HRC/19/57).

² See, for example, Human Rights Committee communication No. 1787/2008 (CCPR/C/107/D/1787/2008), paragraphs 7.3 and 7.4.

44. The provisions contained in article 9 (3) of the Covenant can be summarized as follows:

Any detention must be exceptional and of short duration and a release may be accompanied by measures intended only to ensure representation of the defendant in judicial proceedings.³

45. In the light of the foregoing, the Working Group considers that, since 16 April 2012, the detention of Mr. Tadic Astorga has absolutely no legal basis, neither in Bolivian law nor in the relevant norms of international human rights law, and therefore falls within category I of the categories applied by the Working Group when considering cases submitted for its attention.

46. Considering the gravity and detail of the allegations made by the source, the Working Group considers that the entire judicial process has been so severely flawed as to represent a denial of justice. It is alarming to note that essential items of proof have been damaged and evidence destroyed and that Mr. Tadic Astorga's defence counsels and international observers have encountered serious difficulties in accessing prosecution material, records of hearings, evidence, judicial proceedings and the detainee himself. As a result of the lack of search and arrest warrants, the denial of a natural judge and a competent court, and the limitations placed on the right to defence, this individual has been left defenceless. As the source points out, Mr. Tadic Astorga has been severely deprived of his right to presumption of innocence and to a fair trial with full procedural safeguards.

47. In the present case, the Working Group considers that the non-observance of international norms concerning the right to a fair trial, as set forth in article 10 of the Universal Declaration of Human Rights and in article 14 of the International Covenant on Civil and Political Rights, is of such gravity as to render the detention arbitrary. Therefore, the detention of Mr. Tadic Astorga is also arbitrary under category III of the methods of work of the Working Group.

Disposition

48. In the light of the foregoing, the Working Group renders the following opinion:

(a) The deprivation of liberty of Mr. Mario Francisco Tadic Astorga from 16 April 2012 to the date this opinion was adopted is arbitrary because it lacks legal foundation and, consequently, falls into category I of the categories applicable to the cases submitted to the Working Group;

(b) The entire deprivation of liberty of Mr. Mario Francisco Tadic Astorga, from the time of his arrest on 16 April 2009 to the date this opinion was adopted, is arbitrary because it constitutes a violation of the provisions of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, to which the Plurinational State of Bolivia is a party, and falls within category III of the categories applied by the Working Group when considering cases submitted for its attention.

49. Consequent upon the opinion rendered, the Working Group requests the Government of the Plurinational State of Bolivia to adopt whatever measures are necessary to remedy Mr. Tadic Astorga's situation without delay. Taking account of all the circumstances of the case, the Working Group considers that adequate remedy would consist in ordering the immediate release of the person concerned and granting him adequate reparation for the harm suffered during his detention.

³ See paragraph 56 of the Report of the Working Group (A/HRC/19/57).

50. Considering the allegations of torture and ill-treatment suffered by Mr. Tadic Astorga, and the alleged lack of investigation by the competent authorities, the Working Group, in keeping with article 33 (a) of its methods of work, deems it appropriate to bring them to the attention of the Special Rapporteur on the question of torture for such action as he may consider necessary.

[Adopted on 28 August 2014]
