

Opinion No. 55/2017

concerning Manuel Rodríguez Alonso (Cuba)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 17 May 2017 the Working Group transmitted a communication concerning Manuel Rodríguez Alonso to the Government of Cuba. The Government replied to the communication on 13 July 2017. Cuba is not a party to the International Covenant on Civil and Political Rights.

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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Manuel Rodríguez Alonso is a 60-year-old Cuban national whose habitual residence is located on Pijirigua Highway in the town of Abraham Lincoln, Artemisa Province.

5. According to the information received, Mr. Rodríguez is a human rights defender. As a member of the Corriente Martiana association, he ran projects focusing on the distribution of the Universal Declaration of Human Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) and other documents on United Nations standards to prisoners and their Cuban relatives.

6. Mr. Rodríguez also carried out other activities for the defence and promotion of human rights at the local level, such as taking water samples and filing claims in relation to the contamination of the water in neighbours' wells, producing videos on social issues and infrastructural shortcomings and attempting to resolve the drinking water supply problem with the help of donations from an international organization. In addition, Mr. Rodríguez is the representative of the Independent Trade Union Association of Cuba for the Province of Artemisa.

7. The source notes that, on 5 November 2016, two days before Mr. Rodríguez's arrest, in the course of events during which one of his colleagues at Corriente Martiana was arrested, members of the security forces sent Mr. Rodríguez an intimidating message in which they warned him to stop videotaping. The source also notes that Mr. Rodríguez had told his colleagues on prior occasions that members of the security forces had threatened to send him to prison if he did not cease his activities.

8. According to the information received, Mr. Rodríguez was arrested by officers of the National Revolutionary Police on the morning of 7 November 2016 at Angosta plantation in Mariel, Artemisa. Officers later took him to his residence, which he shares with members of his family, and searched the property.

9. The source notes that the police officers stated that they were searching for "subversive material" pursuant to an order of the counterintelligence unit of the Ministry of the Interior issued in accordance with article 221 of the Code of Criminal Procedure. However, the source contends that the execution of the search did not meet the corresponding legal requirements, as the authorities did not produce a judicial order or decision by a public authority authorizing the arrest and search, nor were neighbours present as required to witness the search of the property.

10. The source notes that, during the search, the following items were seized: a portable radio, an amateur video camera, a flash drive, a mobile telephone and a fuel injector that had apparently been converted into a homemade gun, which belonged to a relative of Mr. Rodríguez. The source further notes that, when the homemade gun was discovered, at first Mr. Rodríguez said that he was its owner in order to protect the real owner, a relative who is ill and has a disability.

11. Mr. Rodríguez was initially held in a cell at the Technical Investigation Department of the National Police in San Antonio de los Baños, Artemisa. He was then transferred to the prison of Taco Taco, where he is being held to this day.

12. The source notes that Mr. Rodríguez's hearing was held on 29 March 2017 at the People's Municipal Court of Mariel, Artemisa. At the hearing, Mr. Rodríguez denied owning the homemade gun. In addition, his defence attorney submitted evidence showing that Mr. Rodríguez's brother had admitted to owning the weapon and had said that Mr. Rodríguez had had no knowledge of its existence. A police document was also submitted that showed that criminal charges against the brother for illegal ownership of the weapon had been dismissed. The source argues that there were no grounds to hold Mr. Rodríguez given that the defence had shown at the trial that the case dealt with gun possession and that Mr. Rodríguez had been found to be neither the owner of the seized gun nor to bear legal responsibility in that respect.

13. The source also notes that, during the hearing, the prosecutor argued that Mr. Rodríguez exhibited morally and socially reprehensible behaviour and that he "spoke ill of the revolutionary process".

14. In decision No. 16/2017 of 6 April 2017, the Criminal Chamber of the People's Municipal Court of Mariel sentenced Mr. Rodríguez to 3 years' imprisonment for illegal carrying and possession of a firearm. In addition, his active and passive voting rights, as well as his right to hold senior public office, were revoked.

15. The source notes that, in 2014, Mr. Rodríguez was convicted of contempt and sentenced to imprisonment for 1 year, which he served from December 2014 to December 2015. The decision of 6 April 2017 states that this prior conviction was not taken into account because it was considered a subsidiary penalty. However, the decision, which was transmitted to the Working Group, states, in at least three different places, that Mr. Rodríguez "continues to exhibit deviant moral and social behaviour, does not take part in the activities of the people's organizations and expresses his opposition to the revolutionary process".

16. According to the information received, Mr. Rodríguez's legal defence filed an appeal with the Superior Court against the conviction of 6 April 2017 and is currently waiting for a hearing date. However, the source claims that the appeal procedure is a formality because due process is not respected and appeals are not heard by an independent and impartial court; therefore, the conviction is expected to be upheld.

17. The source alleges that the judiciary in Cuba is subordinate to the Council of State, which has the authority to impose a mandatory general interpretation of laws on the courts and to issue general instructions to the courts through the Governing Council of the People's Supreme Court (art. 90 of the Constitution). Furthermore, the Council of State is the highest court of appeals for certain types of offences, which means that the judiciary is under its authority. Thus, according to the source, the judiciary is controlled by the executive branch of the central Government. The source notes that the Attorney General's Office, which should ensure the oversight and enforcement of the law in an independent and impartial manner, answers only to the National Assembly of People's Power and the Council of State (arts. 90, 127 and 128 of the Constitution).

18. The source claims that Mr. Rodríguez's detention is arbitrary under categories I, II, III and V of the methods of work. Category I applies given that, as was established at the trial, there were no grounds to charge him with the offence of illegal carrying and possession of a firearm. Moreover, no arrest warrant issued by a competent court was produced at the time of the arrest.

19. In terms of category II, the source claims that Mr. Rodríguez has been detained for exercising human rights enshrined in articles 7, 18, 19, 20 and 21 of the Universal Declaration of Human Rights relating to equal protection before the law, the freedoms of thought, conscience, opinion, expression, assembly and association, and the right to participate in political life.

20. As to the application of category III, on international standards regarding the right to a fair trial, the source asserts that the justice system under which Mr. Rodríguez was prosecuted is organizationally and structurally part of the government apparatus and cannot, therefore, be considered independent or impartial within the meaning of the international standards set forth in articles 10 and 11 of the Universal Declaration of Human Rights.

21. Lastly, the source contends that the detention is arbitrary under category V because it constitutes a discriminatory measure inasmuch as Mr. Rodríguez's freedom of expression has been restricted on the basis of his political views.

Response from the Government

22. The Government states that no one in Cuba is arrested for peacefully exercising any of their rights, including freedom of expression, opinion and association, as guaranteed by the Constitution and the law, which are in line with international human rights instruments.

23. The Government indicates that Mr. Rodríguez was arrested for the offence of illegal carrying and possession of a firearm or explosives, as provided for under article 211.1 (3) (a) of the Criminal Code. A search of Mr. Rodríguez's home was carried out on 7 November 2016 after information was received that illegally obtained items were being kept on the property.

24. It is inaccurate to claim that the search procedures and requirements were not fulfilled, since a search warrant was duly issued in accordance with the Criminal Procedure Act. Moreover, a police investigator, an official and two witnesses were present. A search report was drawn up and signed by all those involved, including Mr. Rodríguez.

25. During the search, various objects were temporarily confiscated, including a flash drive, radio, camera charger, camera and homemade pistol. The seized objects, except for the weapon, were returned to one of Mr. Rodríguez's sons.

26. The Government notes that the search led to the opening of investigation No. 707/16 and, subsequently, of case No. 14/17 before the People's Municipal Court of Mariel in relation to the offence of illegal carrying and possession of firearms or explosives.

27. The Government also states that, given the dangerous nature of the offence and in order to prevent the accused from evading justice, the prosecutor ordered his pretrial detention as a preventive measure on 12 November 2016, which was within the time frame defined in articles 245 to 247 of the Criminal Procedure Act.

28. The Government indicates that Mr. Rodríguez stated, on the day of his arrest, that he owned the pistol and kept it to defend himself against burglars who might enter through the patio. He signed his statement, in which he also admitted to having fashioned the weapon using a drill and grinding stone. It was only later, on 9 January 2017, that Mr. Rodríguez first asserted that the weapon belonged to his brother, explaining that he had incriminated himself in order to protect his brother because he was ill.

29. Mr. Rodríguez's defence attorney requested the discontinuation of his pretrial detention on 3 January 2017; the prosecutor rejected the request on the grounds that the accused constituted a flight risk.

30. At the trial, which was held on 29 March 2017, evidence was submitted by the prosecution and the defence attorney. In decision No. 16 of 6 April 2017, the court sentenced Mr. Rodríguez to 3 years' imprisonment.

31. The Government notes that the defence attorney later filed an appeal with the People's Court of Artemisa. The appeal hearing was held on 6 June 2017. The Court, in addition to reviewing the evidence considered at the trial, heard testimony from one of the witnesses to the search of the accused's house with a view to obtaining a clearer picture of the events and conducting a more comprehensive assessment of the case. The Government notes that the Court's analysis bore out the accused's responsibility for the offence and that, accordingly, the Court dismissed the appeal and upheld the penalty handed down by the People's Municipal Court of Mariel.

32. The analysis and the comprehensive assessment of the evidence underscore the fact that a search warrant (legal document) was issued for the accused's home; that the homemade gun was seized and the seizure recorded in the search report; that the accused had admitted in his initial statement to owning the gun and to having assembled it; that the accused provided details of how he had assembled the gun and of particular features of the gun, the fuel injector and other materials used to make it; and that when the gun was seized on 7 November, the brother did not dispute the accused's statement about the ownership of the gun. Moreover, during the trial, it became clear that Wilfredo Rodríguez Alonso did not know anything about the features of the weapon or its ownership. In addition, the forensic, ballistic and chemical tests run on the gun confirmed that it was functional.

33. The Government specifies that judicial independence is first and foremost a constitutional mandate, further reinforced by People's Courts Act No. 82 of 1997, which sets out, as the foundational principle of the Cuban judiciary, the tenet that judges, in discharging their adjudicatory function, are independent and accountable only to the law; in other words, adherence to the law is a professional duty.

34. In the Government's view, the independence of the judicial system is assured by the following: the fact that judges of the various courts in each district are elected and have the authority to interpret the law and draft legislation; the fact that the justice system is a system of the people in that the judiciary is composed of both professional and lay judges, with the latter embodying the participation of the people in the administration of justice; the collegial nature of the work, whereby decisions are adopted following a collective analysis; the possibility for recusal; and the Code of Judicial Ethics, which sets out fundamental values and ethical principles. These elements are intended to guarantee effective legal protection, public safety and trust in the administration of justice. The regulation of judicial independence in domestic law is fully in line with international standards, in particular those reflected in the decisions taken at the United Nations Congresses on Crime Prevention and Criminal Justice and in the Basic Principles on the Independence of the Judiciary.

35. The Government notes that the fact that, pursuant to article 128 of the Constitution, the Attorney General's Office is an organ of the State does not limit its ability to discharge its duty as guarantor of the law as set forth in article 127. This constitutional tenet provides a basis for the exercise of criminal legal action by the Office with complete independence from the courts.

Additional comments from the source

36. The source submitted additional comments on 10 June 2017. It stresses that, while in detention, Mr. Rodríguez has been questioned and has been pressured to become an informant for the security forces in exchange for the dismissal of the charges against him. It goes on to say that his life was threatened by officials of the security forces if he continued his work as a human rights defender.

37. The source notes that the alleged reason for the search was to find subversive material. The items that were seized were later returned to one of Mr. Rodríguez's sons, which demonstrates that they were not the type of material being sought. Furthermore, it was during the search of a drawer in the brother's cupboard that the homemade gun was found; it was not among Mr. Rodríguez's

belongings. At that time, the brother immediately said that the weapon was his. Mr. Rodríguez explains that it was to protect his brother, who has diabetes and is nearly blind, that he said that he owned the weapon and that he had fashioned it using a drill and grinding stone. He later retracted this admission when he changed his initial statement; his new statement was corroborated by his brother, who went to the police station in Mariel a few days later and stated that the weapon was his. 38. Lastly, the source notes that, during Mr. Rodríguez's transfer, a police officer put his hand on his shoulder, telling Mr. Rodríguez that if he cooperated with him, nothing bad would happen; when Mr. Rodríguez refused, the officer told him that nothing could be done for him.

Discussion

39. The Working Group will consider the present case in accordance with paragraph 17 (a) of its working methods.

40. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights, as well as to the relevant international legal instruments, in accordance with its working methods.

41. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

42. The Working Group acknowledges the Government's willingness to cooperate with this procedure of the Human Rights Council, as expressed in its official response to the communication from the source. In addition, the Working Group notes that, although Cuba has not ratified the International Covenant on Civil and Political Rights and is therefore not a party to that instrument, it did sign the Covenant in 2008 and is therefore favourable to its early ratification.

43. Based on the concurrent information provided by the parties concerned, the Working Group notes that Mr. Rodríguez was arrested by officers of the National Revolutionary Police on the morning of 7 November 2016 on Angosta plantation in Mariel, Artemisa, and, from there, was taken to his brothers' house, where a search was conducted for subversive material.

44. The Working Group did not receive information from the State party concerning the search warrant that led to the discovery of the homemade gun, the reasons why an investigation was launched or the reasons for the arrest and subsequent presence of State officials at the plantation on 7 November 2016, which resulted in Mr. Rodríguez's detention for the offence of illegal carrying and possession of firearms or explosives. Consequently, the Working Group has not been convinced that the arrival of the security forces was preceded by the issuance by a competent judicial authority of a reasoned search warrant in connection with the investigation of an offence.

45. The legal document identified by both parties as the basis for the search and subsequent seizure of the weapon is the search report. That report, in addition to having been called into question because it was not issued in accordance with established procedure, attests to the fact that the officials were at the home and searched it. The report does not, in the Working Group's opinion, constitute a sufficient legal basis for the search or for Mr. Rodríguez's subsequent detention.

46. The Government indicated that the arrest was carried out pursuant to a warrant issued by a competent authority. However, it does not specify which judicial authority issued the warrant or provide supporting documentation, such as a copy of the warrant. The Working Group has been unable to determine whether Mr. Rodríguez was clearly informed at the time of his arrest, on the morning of 7 November 2016, of the reasons for his arrest or whether there were any pending charges against him. The above constitutes a violation of article 9 of the Universal Declaration of Human Rights.

47. In the light of the foregoing, the Working Group finds that Mr. Rodríguez's detention was arbitrary given that the State officials in question did not justify or explain the legal basis for his deprivation of liberty at the time of his arrest and transfer to the home where they conducted the search. In the present case, the Working Group has been unable to find any legal basis for Mr. Rodríguez's detention by the authorities on the morning of 7 November 2016 and therefore considers the

detention as contrary to articles 3 and 9 of the Universal Declaration of Human Rights and classifies it as arbitrary under category I.

48. In addition, the Working Group received convincing information that Mr. Rodríguez is a human rights defender and member of an association called Corriente Martiana and that he ran projects focusing on the distribution of the Universal Declaration of Human Rights, the Nelson Mandela Rules, the Bangkok Rules and other documents on United Nations standards to inmates and their relatives. In addition, he has documented the contamination of water in wells used by neighbours, has produced videos about social issues and infrastructural shortcomings and is a representative of the Independent Trade Union Association of Cuba for the Province of Artemisa. The Working Group recalls that both the dissemination of information on human rights instruments and the right to freedom of association with a view to promoting these rights are protected under international law, in particular the Universal Declaration of Human Rights.

49. The Working Group also received information, which has not been refuted by the State, that two days before the arrest (5 November 2016), a colleague at Corriente Martiana conveyed a threat to Mr. Rodríguez from public officials intending to stop him from conducting filming activities as part of his role as a human rights defender. The State has not denied the report that Mr. Rodríguez was warned by members of the security forces to cease his activities on penalty of prison. The above constitutes a violation of the human rights enshrined in articles 19 and 20 of the Universal Declaration of Human Rights.

50. In view of the way in which Mr. Rodríguez was arrested and detained, the intimidating messages that he received prior to his arrest, what public officials said to him from the moment of his arrest onward and his human rights activism, the Working Group considers that Mr. Rodríguez's detention has been motivated by his work to defend and promote human rights, which renders it arbitrary under category II.

51. In the light of the allegations made by the source concerning the lack of judicial independence and attacks on the rights of human rights defenders, the Working Group has decided to forward the information to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

52. Lastly, in order for the Working Group to establish a direct dialogue with the Government and representatives of civil society with the aim of gaining a better understanding of the situation of deprivation of liberty in the country and the reasons why arbitrary detention occurs, the Working Group suggests that the Government consider inviting it to conduct a visit to the country.

Disposition

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

The deprivation of liberty of Manuel Rodríguez Alonso, being in contravention of articles 3, 9, 19 and 20 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and II as set forth in its methods of work.

54. The Working Group requests the Government of Cuba to take the steps necessary to remedy the situation of Manuel Rodríguez Alonso without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

55. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Manuel Rodríguez Alonso an enforceable right to compensation and other reparation in accordance with international law.

56. The Working Group transmits the present opinion to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

57. The Working Group invites the authorities to consider ratifying the International Covenant on Civil and Political Rights.

Follow-up procedure

58. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparation has been made to Manuel Rodríguez Alonso;

(b) Whether an investigation has been conducted into the violation of Manuel Rodríguez Alonso's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Cuba with its international obligations in line with the present opinion;

(d) Whether any other action has been taken pursuant to the present opinion.

59. The Government is invited to inform the Working Group of any difficulties it may have encountered in acting upon the recommendations made in the present opinion and whether further technical assistance is required which could be provided, for example, by means of a visit by the Working Group.

60. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council apprised of progress made in applying its recommendations, as well as of any failure to take action.

61. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they have taken.

[Adopted on 24 August 2017]