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Human Rights Council Working Group on Arbitrary Detention

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No. 63/2011 (Plurinational State of Bolivia)

Communication addressed to the Government of the Plurinational State of Bolivia on 27 April 2011, reiterated on 9 August 2012

Concerning: Mr. Elöd Tóásó

The State has been a party to the International Covenant on Civil and Political Rights since 12 August 1982.

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 the aforementioned 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 their sentence or despite an amnesty law applicable to them) (category I);

(b) When the deprivation of liberty results from a judgement or sentence issued in relation to 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 (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 status; 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).

3. Having examined the detailed response of the Government of the Plurinational State of Bolivia of 29 August 2011 and the source's concluding observations, the Working Group is in a position to adopt its Opinion.

Submissions

Communication from the source

4. The source maintains that Mr. Elöd Tóásó, an information technology teacher and web page designer living in Somogyi (Hungary) who has Hungarian and Romanian nationality and was born on 3 December 1980, was arrested on 16 April 2009 in room 458 of the Las Americas Hotel in the city of Santa Cruz de la Sierra by officers of the special police unit known as the Unidad Táctica de Resolución de Crisis (UTARC) without an arrest warrant being shown or the presence of a public prosecutor.

5. He recounts that officers of the special police unit who used explosives to enter the hotel by force, broke down the doors of rooms 456, 457 and 458. Three people in the room were killed by the police officers' shots: Eduardo Rózsa Flores, a national of Bolivia and Hungary; Magyarosi Árpád, a Hungarian national; and Michael Dwyer, an Irish national. Magyarosi Árpád was allegedly shot seven times in the back although he did not fire a single shot himself. Mr. Tóásó, together with Mario Tadic, who has joint Bolivian and Croatian nationality, was taken to a police holding centre in the city of Santa Cruz de la Sierra and held incommunicado for two days. He was later transferred to San Pedro prison in La Paz and remanded in custody of Ms. Beatriz Yaniquez, a La Paz Criminal Court judge.

6. The Supreme Court ordered Mr. Tóásó to be tried in Santa Cruz de la Sierra, the city in which he was arrested, but the executive authorities arranged for the judicial hearings to take place in Cochabamba before the Court of Justice. Seven hearings scheduled over the past two-and-a-half years have had to be called off for lack of interpreters, representatives of the Public Prosecution Service and even a judge and, as a result, not a single hearing has taken place to date. A hearing had been scheduled for the end of April 2011 in Cochabamba before the Ninth Investigating Criminal Judge, Mr. Rolando Sarmiento.

7. Mr. Tóásó has been detained without trial for more than two years, in violation of article 134 of the Code of Criminal Procedure, which stipulates that any person detained for more than 18 months without trial shall have the conditions of their detention changed to a more favourable regime. In judgement No. 1036-2002 of 29 August and judgement No. 1430-2002-R of 25 November, the Constitutional Court of Bolivia confirmed that a period of 18 months is more than sufficient for investigations, evidence-gathering and initiation of oral proceedings.

8. The source states that, at the end of Mr. Tóásó's first six months in pretrial detention, the Public Prosecution Service should have either requested an extension of the investigation phase or pressed charges, neither of which it did. The judge then had five days to ask the public prosecutor to close the file, which he also failed to do. He should then have ordered Mr. Tóásó's release, but again failed to do so.

9. According to the source, the police operation resulting in Mr. Tóásó's arrest was meticulously planned. The hotel's video surveillance system was disabled several days before and information on persons entering and leaving the hotel was wiped from its computers.

10. Mr. Tóásó claims to have been 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 belonging to an irregular armed group, which he refused to do. The acts of torture apparently resulted in lost teeth, broken ribs, bruises and knife lacerations. The allegations of torture were not investigated by the Public Prosecution Service and were disregarded during the judicial inquiries, despite a formal complaint from the victim.

11. The source maintains that the Public Prosecution Service not only took part in Mr. Tóásó's arrest but also subsequently proceeded to destroy the supposedly incriminating evidence that it held against him. Explosives found in Santa Cruz de la Sierra were destroyed. Trial evidence was not securely stored and could therefore have been contaminated or tampered with. The evidence was never properly classified and there was no record of the date and time at which it was obtained. There were no witnesses' signatures and the legally required records were not drawn up. It would appear, therefore, that the Public Prosecution Service lacks the incriminating evidence needed to bring Mr. Tóásó to trial. However, he remains in pretrial detention.

12. The principal witness against Mr. Tóásó is reported to be Ignacio Villa Vargas. However, this person has apparently stated that his incriminating testimony was extracted under torture by officers of the Public Prosecution Service.

13. Mr. Tóásó has found it extremely 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 for lack of 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 interview permits have had their requests turned down. This allegedly constitutes a serious violation of Mr. Tóásó's right to a defence.

14. According to the source, Mr. Elöd Tóásó's pretrial detention for over two years is arbitrary. He is subject to a jurisdiction that is not competent, according to the law and the Supreme Court's order, in violation of his right to be heard by the court determined by law. He has not been formally charged and the Public Prosecution Service has destroyed the incriminating evidence and has adduced no evidence. He has been detained without trial for far longer than the provisions of international law and the Code of Criminal Procedure of the Plurinational State of Bolivia allow. His arrest would appear to be politically motivated.

15. It is also alleged that Mr. Tóásó was questioned in the absence of a defence attorney or Hungarian interpreter. His claims of torture have not been duly investigated despite his formal complaint and the physical evidence supporting them.

16. The source concludes that Mr. Elöd Tóásó's detention is arbitrary, being contrary 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 Plurinational State of Bolivia is a party. The source therefore requests his immediate release.

Response from the Government

17. In its response of 29 August 2011 the Government states that the arrest warrant issued by the public prosecutor on 18 April 2009 complies with the provisions of the Code of Criminal Procedure (Act No. 1970 of March 2009) as there was sufficient evidence of

Mr. Tóásó's involvement and he was suspected of an offence carrying a sentence of more than 2 years' imprisonment. The offence in question was plotting to "overthrow a democratically elected government" and "the first case of terrorism in the country". The Government adds that the seriousness of the offence, terrorism being the scourge of humanity, justified the public prosecutor's action.

18. The Government adds that the public prosecutor's action followed an earlier inquiry conducted by the police and the public prosecutor's office on the basis of solid forensic evidence indicating that an explosive device had gone off at the home of Cardinal Julio Terrazas, Archbishop of Santa Cruz de la Sierra. The inquiry ascertained that the attack had been perpetrated by a group of people who, caught in the act, opened fire on the police officers. It was subsequently claimed that the suspects, including Mr. Tóásó, had gunshot residue on their hands. Firearms were also discovered in the rooms where they were found.

19. The Government recalls that in a statement issued on 29 April 2009 the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination said that it was "deeply concerned by reports that a group of five persons, including foreigners, were involved in a plot against the Bolivian Government"¹.

20. The public prosecutor ordered the suspects to be placed in incommunicado detention to prevent contact between them and other persons involved in the same illegal activities, as was permitted under Bolivian law in cases of "extreme gravity" such as the case at hand (Code of Criminal Procedure, arts. 232 and 235). The Government reports that the accused were permitted to meet with their lawyers while in incommunicado detention.

21. The offences with which they are charged, which, according to the Government, are proven, are terrorism, attempt on the life of the President of the Republic and other State officials, sedition and assumption of the rights of the people established in articles 133, 128, 223 and 124, respectively, of the Criminal Code.

22. The Government explains that numerous incidents occurred among the 39 defendants in the case, some of them being adversely affected by the climate and altitude of La Paz, and that it was why the trial venue had eventually been moved, so that the proceedings could take place in the warmer, lower altitude city of Cochabamba.

23. The Government assures the Working Group that Mr. Tóásó was provided with an interpreter and, moreover, that he had the right to pursue all legal remedies provided under Bolivian law, whether in the Constitution or in legal statutes. However, in his reply to the Government, the source insists that no interpreter was provided.

24. The Government is of the view that there have been no undue delays in the proceedings. The pretrial phase ended on 22 October 2010 and formal charges were filed on 17 December 2010, that is well under the legal deadline, especially when one considers that there are 39 defendants in the case.

25. The Government denies that the petitioner was tortured and states that, if injuries were sustained, they were due to the legitimate force that the police had to use when making the arrest. It adds that the record of injuries makes no mention of lost teeth, broken ribs, or other harm, nor are claims that other detainees were also tortured accurate; according to reports received by the Government, one of them even expressly stated that he had not been tortured.

¹ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9270&LangID=E (English only).

26. The Government is adamant that Bolivian law was rigorously respected, emphasizing that during questioning Mr. Tóásó was accompanied by the Honorary Consul of Hungary in Bolivia and had access to an interpreter at all times. The Government stresses that, when asked if he had been pressurized into making a statement, Mr. Tóásó said: “No, no one has pressurized me; I gave my statement voluntarily.”

27. Lastly, the Government adds that in its view there are no grounds for claiming that Mr. Tóásó’s detention was arbitrary, and that the events in which he was involved are also being investigated by the Chamber of Deputies.

Considerations of the Working Group

28. An Opinion on this case cannot be issued without consideration of the facts that led to Mr. Tóásó’s deprivation of liberty. The source’s account of events differs substantially from the Government’s.

29. According to the source, members of the special police unit (UTARC) in the city of Santa Cruz de la Sierra entered room 458 of the Hotel Las Américas by force and broke down the doors of rooms 456, 457 and 458 using explosives. Three people in the room were killed by the police officers’ shots: Eduardo Rózsa Flores, a national of Bolivia and Hungary, Magyarosi Árpád, a Hungarian national, and Michael Dwyer, an Irish national. Magyarosi Árpád was allegedly shot seven times in the back even though he did not fire a single bullet himself. Mr. Tóásó was taken to the local police station with Mario Tadic, who has joint Bolivian and Croatian nationality. Mr. Tóásó was held incommunicado for two days before being taken to San Pedro prison in the city of La Paz and remanded in the custody of a judge of La Paz Criminal Court.

30. The Government, meanwhile, affirms that police inquiries had resulted in the identification of the members of a terrorist group through the vehicle in which they were travelling, as the vehicle in question was being sought in connection with an attempt the previous day on the life of Cardinal Julio Terrazas, Archbishop of Santa Cruz de la Sierra and that the persons in question were staying at the Hotel Las Américas. The Government maintains that “the members of the alleged terrorist organization [...] were the first to open fire”, which would imply a situation of flagrante delicto requiring immediate action without a warrant, pursuant to Bolivian law.

31. Both the attack on the home of Cardinal Terrazas and the raid on the Hotel Las Américas had a resounding international impact both having been seen as an attempt — actual or presumed — to destabilize a democratically elected government and attracting harsh condemnations (see, for example, the above-mentioned statement of the Working Group on the use of mercenaries, of 29 April 2009). It should be added that, according to the Government, a further 39 persons, in addition to Mr. Tóásó and Mr. Tadic, were arrested and are standing trial and that all of them are — or were — being held in custody and underwent process.

32. The Working Group will not issue an opinion on all the facts taken together but solely on the situation of the person on whose behalf the complaint was brought.

33. With regard to the source’s allegation that the Bolivian police arrested the suspect without a warrant (the attempt on the Cardinal’s life having occurred 24 hours prior to the arrest and death of those involved, as described above), the public prosecutor should have been in possession of an arrest warrant issued either by the investigating judge or by the Public Prosecution Service, in accordance with article 227 of the Code of Criminal Procedure, which stipulates that the police may make arrests only in the following cases: (a) if the person is caught in flagrante delicto; (b) in compliance with an arrest warrant issued by a judge or court of competent jurisdiction; (c) in compliance with an order issued by the Public Prosecution Service, and; (d) if the person has absconded after being lawfully

detained. The source adds that the Public Prosecution Service may order a person's detention only "when the person's presence is essential and there is sufficient evidence that the person perpetrated or participated in a publicly actionable offence that carries a prison sentence of at least two years and that the person might otherwise attempt to hide, escape, abscond or impede efforts to establish the truth" (art. 226).

34. The Government maintains that the Public Prosecution Service issued an arrest warrant on 15 April 2009, on the ground that it was an emergency situation expressly provided for under article 226 of the Criminal Code and that in the case in question it was dealing not with an ordinary offence, but with an extremely serious offence: "the scourge against humanity that is terrorism". For this reason, there was no violation of "the guarantee of due process, as the public prosecutor's action was in line with the powers and provisions established by law".

35. The Working Group believes that, given the special circumstances surrounding the illegal attempt on the life of Cardinal Terrazas, the Public Prosecution Service's use of its prerogative to take action in situations of extreme urgency cannot be considered a violation of international legal provisions concerning the right to a fair trial so serious as to render Mr. Tóásó's deprivation of liberty arbitrary.

36. The source also challenges the competence of the court, sitting in the city of Cochabamba, since the events took place in the city of Santa Cruz de la Sierra, although the judicial investigation was initiated in the city of La Paz on 30 March 2009, after the Government received information of possible terrorist offences, attempts on the lives of the President of Bolivia and other State officials, sedition, and attempts to assume the rights of the people. The Government believed that in view of the altitude of the city of La Paz (which is 3,600 metres above sea level) and its low temperatures, the La Paz Court that had first heard the case should be moved to Cochabamba, purely as a means of safeguarding the health of the defendants, which hardly constitutes a violation of international law concerning the right to a fair trial.

37. The Government contests the source's claim that Mr. Elöd Tóásó was detained incommunicado for two days. According to the source, time during which Mr. Tóásó was alone in his place of detention and unable to communicate either with his family or, due to language barriers, with the State-appointed defence counsel, should be considered incommunicado detention.

38. In the Working Group's view, the only period of detention that can be considered incommunicado was the two days following his arrest.

39. Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment² states that: "Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days." Incommunicado detention is authorized when either of the two aforementioned exceptions, namely "exceptional needs of the investigation" and "exceptional circumstances" apply. The laws of the Plurinational State of Bolivia also permit incommunicado detention: article 231 of the Code of Criminal Procedure provides that "incommunicado detention shall not be permitted, except in manifestly serious cases where there is reason to fear that the accused might otherwise obstruct efforts to establish the truth. Incommunicado detention shall not under any circumstances exceed a period of 24 hours and shall not prevent defendants from being assisted by counsel in performing any act that requires action on their part. The

² General Assembly resolution 43/173, annex.

incommunicado detention shall be ordered by the public prosecutor in charge of the investigation, must be duly justified with reference to the grounds established in article 235 of this Code, and must be immediately notified to the examining magistrate, who shall either confirm or rescind the incommunicado detention order. Persons held incommunicado shall be permitted to use books and writing materials as well as to perform any urgent civil acts not detrimental to the investigation.”

40. The long period of deprivation of liberty, without the possibility of bail, is another instance of arbitrariness, according to the source. At the time of the communication’s submission (20 April 2011), Mr. Tóásó had been in pretrial detention for more than two years. At the time of issue of this Opinion his pretrial detention has lasted 31 months. The most recent judicial proceeding was the hearing held on 4 November 2011, still as part of the trial preparations, at which evidence was submitted to the judge for acceptance or rejection. In accordance with article 9, paragraph 3, of the International Covenant on Civil and Political Rights, “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”. Bolivian law respects this principle, providing that “pretrial detention shall be permitted only for offences carrying a prison sentence in excess of three years, and subject to strict compliance with various requirements (Code of Criminal Procedure, arts. 232 and 233). Article 239 of the Code of Criminal Procedure also provides that pretrial detention shall cease “when the period of detention exceeds 18 months and no verdict has been reached or when the period of detention exceeds 24 months and the verdict has not acquired *res judicata* status”. Once these deadlines have passed, the courts are required to adopt one or more of the precautionary measures offered as possible alternatives in article 240.

41. The source maintains that Mr. Tóásó’s rights under article 14, paragraph 3 (a), (b), (c) and (f) of the International Covenant on Civil and Political Rights were violated, since he was not informed in detail in a language which he understands of the nature and cause of the charge against him, he did not have counsel of his own choosing, he was not tried without undue delay and he did not have the assistance of an interpreter.

42. The Government’s explanation with regard to these points is unsatisfactory. At the time of his arrest, for obvious reasons, Mr Tóásó could not be informed without delay of the nature and cause of the charges of which he was accused. However, he was not informed in the days that followed either, despite having had the assistance of the Honorary Consul of Hungary in Bolivia. In addition, the public defence counsel provided did not meet the minimum standards necessary to inspire confidence and, moreover, was apparently a government official without the required knowledge of Hungarian, and the two people who served as interpreters were not well-versed in Mr. Tóásó’s language. Furthermore, the process has already lasted for 32 months, which cannot be reconciled with the notion that there have been no undue delays.

43. In addition, the judicial remedies attempted by the accused proved neither effective nor expeditious, as required under article 2, paragraph 3, and article 9, paragraph 4, of the International Covenant on Civil and Political Rights.

Opinion of the Working Group

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

(a) The deprivation of liberty of Mr. Elöd Tóásó violated the human rights enshrined in articles 3, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2.3, 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights, and, as a result, is arbitrary in accordance with category III of the Working Group’s methods of work;

(b) In keeping with the Opinion rendered, the Working Group requests the Government of the Plurinational State of Bolivia to provide reparation for the harm caused by the grievances described in this Opinion;

(c) The Working Group also suggests that the competent State authorities take appropriate action to provide for the adoption of non-custodial measures as an alternative to the pretrial detention of Mr. Elöd Tóásó, in accordance with the provisions of the Universal Declaration and the International Covenant, and with those of the Code of Criminal Procedure, without prejudice to acceleration of the judicial proceedings under way.

[Adopted on 22 November 2011]
