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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session (30 November-4 December 2015)

Opinion No. 55/2015 concerning Enrique Guerrero Aviña (Mexico)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate by resolution 1997/50. The Human Rights Council assumed the mandate by its decision 1/102 and extended it for a period of three years by its resolution 15/18 of 30 September 2010. It extended the mandate for a further period of three years by resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 19 August 2015, the Working Group transmitted a communication concerning Enrique Guerrero Aviña to the Government of Mexico. The Government has not replied to the communication. The State is 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 maintaining a person in detention after the completion of his or her sentence or despite an amnesty law applicable to him) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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(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

4. Mr. Guerrero Aviña, age 28, is a Mexican national. He is domiciled at Tlacotlpan 135 Colonia Roma Sur, Código postal 06760, Mexico D.F. and is registered as a student of philosophy at the Faculty of Philosophy and Letters of the National Autonomous University of Mexico under number 404054674.

5. Mr. Guerrero Aviña has participated in the organization of human rights forums at the National Autonomous University of Mexico. He has supported the development of ecological farming cooperatives and has been a proponent of local initiatives to promote development and ecology. He is a founding member of Colectivo Liquidámba, which promotes economic, social, cultural and environmental rights, as well as an active member of various social and cultural movements and a professional chess player.

6. The source reports that, on 17 May 2013, at 10.45 p.m., when Mr. Guerrero Aviña was driving in his car on Eje 8 Sur Calzada Ermita-Iztapalpa and Circuito Interior Avenida Rio Churubusco in Mexico City, he was rammed by unmarked white vans whose occupants were armed men in civilian clothes. The attackers opened fire repeatedly on Mr. Guerrero Aviña's vehicle, causing it to break down. Mr. Guerrero Aviña got out of his car and ran up to Avenida Rio Churubusco, where he sought help from some workers operating a crane, but to no avail. His pursuers caught up with him. When Mr. Guerrero Aviña asked them to identify themselves, he was beaten. A few minutes later, some patrol officers of the Federal District Ministry of Public Security arrived; they put him into one of the vehicles and checked his identity. Following this, the police officers from the Ministry allowed the men who had been pursuing Mr. Guerrero Aviña to arrest him and take him away in one of the vans that had been involved in the chase.

7. The source provides documents issued by the General Office for the Coordination of Expert Witness Services (Folio 34318, PGR/SEIDO/UEIDMS/270/2013), which confirm that various parts of the body and interior of Mr. Guerrero Aviña's vehicle had been hit by bullets from a firearm.

8. Mr. Guerrero Aviña had been reported missing for more than 30 hours before being brought before the Assistant Attorney General's Office for Organized Crime Investigations, which is attached to the Attorney General's Office, on 19 May 2013 at 4 a.m. At the time of his arrest, he was not shown a warrant for his arrest, nor was he informed verbally of the reason for his arrest, which was purportedly carried out in connection with the preliminary investigation (PGR/SEIDO/UEIDMS/270/2013) initiated by the Assistant Attorney General's Office.

9. The source alleges that, from the time Mr. Guerrero Aviña went missing to the time he was brought before the Assistant Attorney General's Office, he was systematically subjected to torture. He was threatened, beaten, suffocated and subjected to a mock execution with the aim of obtaining his confession to the offence for which, purportedly, he had been arrested. The source adds that Mr. Guerrero Aviña was asked about the persons who participated in the social movement to which he belonged and that his family was subjected to threats. On the day of his arrest, Mr. Guerrero Aviña was blindfolded and taken to an unknown location (probably close to Tlatelolco). He was slapped in the face,

punched in the back of the neck and kneed in the ribs. He was furthermore subjected to repeated insults while being tortured. On the same day, his thumb was dislocated and he was threatened with sexual assault, intimidated with guns and suffocated repeatedly by having his head covered with a plastic bag.

10. Mr. Guerrero Aviña was held in solitary confinement and was denied contact with a lawyer of his choice. The defence attorney appointed to him was present only at the end of the accused's statement, on 19 May 2013. The source adds that Mr. Guerrero Aviña's relatives did not succeed in seeing him until four days after his disappearance, on 21 May 2013. In addition, the authorities initially denied that Mr. Guerrero Aviña was to be found in their facilities. When his relatives were able to have access to him, they had it placed on record that Mr. Guerrero Aviña showed multiple signs of having been beaten.

11. The source further alleges that Mr. Guerrero Aviña was also subjected to torture after having been brought before the Assistant Attorney General's Office. It claims that Mr. Guerrero Aviña was handcuffed and shackled and forced to remain standing without having food or water for more than 24 hours. While being subjected to those conditions, Mr. Guerrero Aviña had to confront questions, threats and insults aimed at getting him to confess to charges of abduction and membership in a criminal gang.

12. The source alleges that the doctor who examined Mr. Guerrero Aviña refused to document all the injuries that had been inflicted upon the accused during the torture and the psychological harm resulting from that situation. The medical report of the General Office for the Coordination of Expert Witness Services¹ remains incomplete.

13. The source indicates that, on 28 May 2013, the Federal Prosecution Service initiated criminal proceedings on charges of organized crime, requested an arrest warrant on charges of abduction (which took effect on 18 June 2013) and placed Mr. Guerrero Aviña, together with 12 other persons, in pretrial detention in Federal Social Rehabilitation Centre No. 2, which is a maximum security prison located in Puente Grande, Jalisco. When announcing Mr. Guerrero Aviña's arrest at a press conference, representatives of the Ministry of Defence, Ministry of the Navy and the National Security Commission presented an official statement explaining it as the result of an investigation carried out by Federal Police officials, under the authority of the Commission, and in close coordination with the Office of the Attorney General of the Republic. It alleges that this press conference caused moral injury to Mr. Guerrero Aviña, given that a picture of him was displayed publicly. At the press conference, Mr. Guerrero Aviña was accused of the offence of aggravated kidnapping of the minors Juan José Álvarez Benfield and Alexa Álvarez Benfield on 14 January 2013.

14. The source alleges that, in order to justify the arrest of Mr. Guerrero Aviña, the officers relied on an order to locate and arrest the holders of certain telephone numbers, one of which had been attributed to Mr. Guerrero Aviña (5519329669). As to the telephone device, it reports that it was not locked up as evidence and does not appear in the chain of custody.

15. An appeal was filed before the Appeal Court of Guadalajara against the pretrial detention orders issued on 28 May and 18 June 2013. The appeal was heard on 27 August 2013 (Bar V, Fourth Single-Judge Court of the Third Circuit, Guadalajara, Jalisco). The presiding judge overturned the decision in the case of 9 of the 13 persons charged, including Mr. Guerrero Aviña. She found a violation of article 20 of the Constitution, as well as a failure to comply with article 161 of the Criminal Code.

¹ Directorate of Medical Forensic Specializations, Folio 34785, Official letter PF/DINV/CITO/DGAT/1996/2013.

16. Despite the judicial decision referred to in the previous paragraph, Mr. Guerrero Aviña remains in prison at this writing.

17. The source alleges that Mr. Guerrero Aviña's rights to access to justice, due process, communication, liberty and security of the person, health, integrity of the person and the presumption of innocence have been violated.

18. The source lists the following violations of due process: no arrest warrant was provided, the persons who arrested Mr. Guerrero Aviña failed to identify themselves at the time of the arrest and Mr. Guerrero Aviña was not immediately brought before a recognized authority. In addition, his testimony was obtained under torture and without the presence of a defence attorney. Similarly, it establishes that Mr. Guerrero Aviña suffered administrative neglect, owing to the fact that he was subjected to solitary confinement and held incommunicado and that he was given an incomplete medical report.

19. The source points to negligence on the part of the relevant authority in implementing the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The source also cites the commission of arbitrary acts against Mr. Guerrero Aviña that are consistent with those described in the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Mexico (A/HRC/28/68/Add.3, paras. 23, 25, 26, 29, 42, 47 and 54). In addition, the source maintains that there are some aspects that coincide with the report of the Working Group on Arbitrary Detention on its visit to Mexico (E/CN.4/2003/8/Add.3, paras. 38, 41, 42 and 52-55).

20. The source concludes that the detention of Mr. Guerrero Aviña is arbitrary, owing to the above-mentioned grave violations of his right to due process and to judicial guarantees.

Response from the Government

21. On 19 August 2015, the Working Group sent a communication to the Government of Mexico. In accordance with the methods of work of the Working Group, the Government has a period of 60 days to respond. The Working Group may grant an extension of 30 days, provided that the State requests it. Despite the fact that this initial period has already expired, the Government has not sought any extension.

22. The lack of a response to the communication is unfortunate, but the deadline for its submission has already expired, and the Working Group is consequently authorized to consider the case.

Discussion

23. As has been the practice, and in accordance with the Working Group's methods of work, the lack of a response on the part of the respondent State does not preclude the Working Group from issuing an opinion. In the present case, the Working Group finds the lack of cooperation from the State to be regrettable and will proceed with the analysis of the case and consider its merits.

24. The source has provided detailed factual allegations supported by some relevant evidence. Consequently, the Working Group is convinced that there are prima facie claims in this case. The silence of the respondent State implies that the State has waived its right to refute such evidence and therefore implicitly confirms the allegations. The Working Group concludes that Mr. Guerrero Aviña is a 28-year-old student who is a human rights activist, in particular with regard to the farming community. On 19 May 2013, he was arrested by the police in an exceptionally violent manner, held incommunicado for some 30 hours, subjected to physical and psychological abuse and was ultimately accused of being a member of an organized crime network and of having committed the offence of

kidnapping. Mr. Guerrero Aviña was also deprived of legal assistance, and his attorney only appeared when he was asked to sign the accused's statement. Last but not least, a judicial order had been issued to close his case, which, had it been implemented, would have led to his immediate release.

25. In the opinion of the Working Group, the facts give rise to three forms of arbitrary detention. First, Mr. Guerrero Aviña was arrested without any notification that charges were pending against him, which amounts to a violation of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. Secondly, given the existence of a court order that dismisses the case, his detention no longer has any legal basis, thereby constituting a violation of the above-mentioned provisions. The failure to comply with that order is a violation of principle 6 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex). The lack of a legal basis for detention falls under category I of the Working Group's methods of work.

26. The failure to allow Mr. Guerrero Aviña to be assisted by an attorney as from the moment of his arrest violates his right to a fair trial. This is a violation of principle 9 of the aforementioned Basic Principles and Guidelines. In addition, it constitutes a violation of article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, and consequently falls under category II of the methods of work. Furthermore, the circumstances in which Mr. Guerrero Aviña's statement was obtained give rise to a series of doubts, and as a result, the statement cannot be used against him in any proceedings,² and the allegation of torture will be referred to the relevant special procedure.

27. Finally, Mr. Guerrero Aviña has been persecuted for his human rights activism on behalf of other persons in his region. As a result, he is a human rights defender who, as a result of his work, has been a victim, which amounts to a violation of his right to freedom of expression and opinion. It therefore falls under category II, in accordance with the methods of work. This abuse should also be reported to the relevant special procedure.

Disposition

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

The arrest and subsequent deprivation of liberty of Mr. Guerrero Aviña corresponds to categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

29. Consequently, on the basis of the opinion rendered, the Working Group requests the Government of Mexico to take the necessary steps to remedy the situation by means of releasing Mr. Guerrero Aviña and providing him with appropriate compensation.

30. The Working Group will also refer the situation to the Special Rapporteur on the situation of human rights defenders and to the Special Rapporteur on the question of torture.

[Adopted on 4 December 2015]

² See guideline 12 of the Basic Principles and Guidelines, which concerns the admissibility of evidence obtained by torture or other prohibited treatment.