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Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America)

1. The Working Group on Arbitrary Detention was established in 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/36/38), on 8 September 2017, the Working Group transmitted to the Government of the United States of America a communication concerning Marcos Antonio Aguilar-Rodríguez. 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 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);

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(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. Marcos Antonio Aguilar-Rodríguez is a national of El Salvador born in 1978. In 2001, he fled his native country for the United States, where he sought asylum, non-removal and protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He was arrested in 2011 and, without being convicted of a crime, remained in detention for almost six years, from 31 August 2011 to 24 July 2017. For the majority of that time, he was held in Eloy Detention Centre, in Arizona, United States, by Immigration and Customs Enforcement, an agency of the Department of Homeland Security.

5. According to information received by the Working Group, Mr. Aguilar-Rodríguez was released on 24 July 2017. In accordance with paragraph 17 (a) of its methods of work, however, it reserves the right to render an opinion, on a case-by-case basis, as to whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group is of the view that the allegations made by the source are extremely serious. It shall therefore avail itself of its right to render an opinion.

Background information

6. According to the source, Mr. Aguilar-Rodríguez, then in his early teens, was forced to join a gang and get a gang tattoo on his back. He reportedly left the gang in 1992, when he was around 14. The gang, however, does not allow its members to leave, and from 1992 to 2001 he was forced to become an inactive member of the gang and pay a so-called inactivity tax of $100 a month. During that time, the police and rival gang members continued to identify him as a member of his former gang as a result of the tattoo on his back. They also allegedly harassed and threatened him. The source reports that on some occasions, when he fell behind on his monthly “tax” payment, members of his former gang would harass and beat him. He reportedly lived in constant fear that the police, a rival gang or his former gang would kill him. After about 10 years living under such circumstances, Mr. Aguilar-Rodriguez fled El Salvador for the United States. He entered the United States around January 2001.

7. The source indicates that, after entering the United States, Mr. Aguilar-Rodríguez settled in Arizona, found work and met his partner, with whom he began to cohabit and had a daughter. Mr. Aguilar-Rodríguez’s daughter, then 2 years old, was diagnosed with borderline autism in 2009, a condition that requires special therapy. Furthermore, the source reports that, before leaving for the United States, Mr. Aguilar-Rodríguez had another daughter in El Salvador, to whom he provided financial support until he was detained.

8. In 12 August 2011, Mr. Aguilar-Rodríguez was pulled over by the police in Phoenix, Arizona, apparently for speeding. However, he did not receive a speeding ticket. The police alleged that Mr. Aguilar-Rodríguez was intoxicated and charged him accordingly. The source reported that Mr. Aguilar-Rodríguez pleaded guilty to driving without a licence, a misdemeanour, and received a sentence of 13 days in jail. After serving the sentence, he remained in detention at the Maricopa County Jail. On 29 August 2011, he was interviewed by an official from Immigration and Customs Enforcement. On 31 August 2011, Mr. Aguilar-Rodríguez was placed in the custody of Immigration and Customs Enforcement. He remained in custody until 24 July 2017. The source indicates that because immigration and customs officers failed to bring Mr. Aguilar-Rodríguez before a court to enable him to answer to the charge of driving under the influence, the charge was later dismissed.

9. According to the source, Mr. Aguilar-Rodríguez would face substantial harm or even death at the hands of his former gang, its rival criminal organizations or the police if he were forced to leave the United States and returned to El Salvador.

Asylum and removal proceedings

10. The source indicates that in the initial custody decision, Immigration and Customs Enforcement chose to hold Mr. Aguilar-Rodriguez without bond. Mr. Aguilar-Rodriguez requested that an immigration court review his custody status. He was allegedly held for more than a month while waiting for his first bond hearing, which was finally held on 6 October 2011, during which the immigration judge set bond at $6,000. The judge, according to the source, found that Mr. Aguilar-Rodriguez presented a moderate flight risk, despite his employment history, the United States citizenship of his child and his fear of returning to El Salvador. Moreover, the source claims that the judge did not consider Mr. Aguilar-Rodriguez's inability to afford the $6,000 bond.

11. Mr. Aguilar-Rodriguez appealed the judge's decision, which had been handed down on 25 October 2011. On 5 December 2011, the Board of Immigration Appeals upheld the immigration judge's decision, allegedly without providing reasons for its ruling.

12. The source indicates that on 5 December 2011, Mr. Aguilar-Rodriguez formally filed an application for asylum with the immigration court. Mr. Aguilar-Rodriguez was not scheduled for a final hearing on his asylum application until 4 May 2012.

13. Mr. Aguilar-Rodríguez represented himself at his asylum hearing on 4 May 2012. Despite being found credible, the immigration judge apparently determined that Mr. Aguilar-Rodríguez had failed to show either that an exception to the rule requiring applying for asylum within one year should be made in his case or that he had been persecuted or faced a clear probability of future persecution or torture in El Salvador. The judge therefore ordered his removal. As a result of his detention, language barriers and a lack of access to legal counsel, Mr. Aguilar-Rodríguez was, according to the source, able to gather only limited evidence to support his asylum application over the course of his immigration proceedings. Mr. Aguilar-Rodríguez appealed the immigration judge's decision to the Board of Immigration Appeals. However, on 7 September 2012, his appeal of the decision was rejected. He appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The appeal was not decided until 29 May 2014.

14. On 15 September 2012, Mr. Aguilar-Rodríguez filed a petition for review with the Ninth Circuit Court of Appeals with a request to stay. On 20 September 2012, the Court granted the temporary stay. At that point, Mr. Aguilar-Rodriguez became eligible to request a Casas-Castrillon bond redetermination hearing, as he had been held without bond by Immigration and Customs Enforcement and as the Ninth Circuit had issued a stay of removal pending the disposition of his petition for review before that court.

Casas-Castrillon and Rodriguez bond redetermination hearings

15. The source notes that the procedures relating to bond determination are completely separate from the main asylum application. Bond determination decisions, including the so-called Casas-Castrillon and Rodriguez decisions, are made separately from decisions on main removal cases and asylum applications. The same immigration judge usually presides over both the bond and the merit hearings. However, the main asylum application and appeals of rejections are relevant to the Casas-Castrillon and Rodriguez hearings, as those rejections and appeals were what made Mr. Aguilar-Rodríguez eligible to request bond under the Casas-Castrillon and Rodriguez rules.

16. The source notes that in *Casas-Castrillon v. Department of Homeland Security et al.*, the Ninth Circuit held that non-citizens in prolonged detention who were previously ineligible for bond hearings but who have been granted a stay of removal pending the disposition of a petition for review or had their case remanded to the Board of Immigration Appeals after obtaining judicial review are eligible for a bond hearing. In Casas-Castrillon hearings, the burden is on the Government to show that an individual is a flight risk or a danger to the community. An individual is reportedly entitled to a Rodriguez bond redetermination hearing when he or she has been detained for six months or more. The

Government must justify the person's continued detention, according to the information provided to the Working Group.

17. The source indicates that, on 29 November 2012, the immigration court held the Casas-Castrillon hearing. The immigration judge did not make a decision until 3 January 2013, more than one month after the hearing. On that occasion, according to the source, the judge who had initially ordered a $6,000 bond raised the amount of the bond demanded to $20,000. Although the judge had again found that Mr. Aguilar-Rodríguez was not a danger to the community, he was deemed to pose a flight risk as his case for asylum was considered weak and he had "limited" ties to the United States. The source claims that the judge once again failed to consider Mr. Aguilar-Rodríguez's ability to pay the amount demanded.

18. Mr. Aguilar-Rodríguez appealed the judicial bond decision of 3 January 2013 to the Board of Immigration Appeals. On 12 February 2013, the Board affirmed the judge's bond decision, apparently without providing any reasoning for its judgment.

19. According to the source, on 30 September 2013, Mr. Aguilar-Rodríguez requested a bond redetermination hearing pursuant to the Rodriguez rule. On 9 October 2013, the immigration judge denied Mr. Aguilar-Rodríguez's request for a change in custody status and found, in the alternative, that if Mr. Aguilar-Rodríguez was eligible for the Rodriguez hearing, the Department of Homeland Security had met its burden to show by clear and convincing evidence that Mr. Aguilar-Rodríguez was either a danger to the community or a flight risk.

Continuation of the asylum and removal proceedings

20. The source notes that Mr. Aguilar-Rodríguez's appeal of the main removal proceedings instituted against him in his asylum case was decided on 29 May 2014, when the Ninth Circuit Court referred the case to the Board of Immigration Appeals in view of intervening case law on the eligibility for asylum of members and opponents of criminal gangs. On 7 October 2014, the Board returned the case to the immigration judge.

21. On 13 March 2015, the immigration judge, stating that the intervening case law had no impact on the original analysis, reaffirmed the initial decision to reject Mr. Aguilar-Rodríguez's application for asylum. The source notes that during the hearing Mr. Aguilar-Rodríguez was not allowed to submit additional evidence or challenge many of the immigration judge's original findings. At that point, Mr. Aguilar-Rodríguez, with the assistance of counsel pro bono, appealed the decision to the Board of Immigration Appeals.

22. On 30 July 2015, the Board dismissed Mr. Aguilar-Rodríguez's appeal and his motion to remand on the grounds, according to the source, that he did not fit into a particular social group.

23. Mr. Aguilar-Rodriguez filed a petition for review with the Ninth Circuit Court of Appeals on 10 August 2015. On 20 August, the Department of Homeland Security determined that Mr. Aguilar-Rodríguez should continue to be held without bond. On 17 December 2015, the Ninth Circuit granted Mr. Aguilar-Rodríguez's request for a stay of removal.

24. On 16 February 2016, Mr. Aguilar-Rodríguez requested a new custody review hearing on the basis of *Rodriguez v. Robbins*. The immigration court held the Rodriguez hearing on 14 April 2016 and found that Mr. Aguilar-Rodríguez could be released on a $20,000 bond. In that hearing, the court found that the Department of Homeland Security had not shown that Mr. Aguilar-Rodríguez was a danger to the community but that he did pose a serious flight risk. According to the source, the court again found that Mr. Aguilar-Rodríguez had limited ties to the United States and that the rejection of his application for asylum left him without sufficient incentive to appear for future immigration proceedings. Once again, the judge failed to take into consideration Mr. Aguilar-Rodríguez's ability to pay the bond.

25. The source notes that Mr. Aguilar-Rodríguez appealed the judge's bond decision of 14 April 2016 to the Board of Immigration Appeals. On 19 July 2016, the Board dismissed his appeal. In that decision, the Board explicitly found that Mr. Aguilar-Rodríguez's

inability to post the bond did not mean that the conditions imposed by the immigration judge were not reasonably calculated to ensure his presence at further proceedings.

26. After the dismissal of his appeal on 19 July 2016, Mr. Aguilar-Rodríguez appeared for another bond hearing, at which the $20,000 bond was reaffirmed. Mr. Aguilar Rodríguez's counsel appealed in March 2017, but the appeal was dismissed.

27. The source reports that a sponsor recently paid the $20,000 bond on Mr. Aguilar-Rodríguez's behalf. As a consequence, on 24 July 2017, he was released. In this context, Mr. Aguilar-Rodríguez's status is uncertain and he remains in removal proceedings. Although there are no major restrictions on his liberty, he cannot work in the United States or travel abroad.

Conditions of detention

28. The source notes that Eloy Detention Centre is run by Corrections Corporation of America, a private company. The Centre is reportedly notorious for human rights violations. Fifteen detainees, according to reports, have died in the Centre since 2003. Furthermore, the source submits that Eloy Detention Centre has unacceptably low standards of medical care. It does not always respond promptly to medical emergencies. In the summer of 2016, for example, an outbreak of measles had affected 22 detainees and employees. In addition, Corrections Corporation of America has apparently been criticized for its treatment of detainees and for not allowing them to meet with their lawyers.

29. The source reports that Mr. Aguilar-Rodríguez was subjected to ill-treatment and verbal violence and that he was not permitted to work. He repeatedly faced abuse from the guards and witnessed guards abuse other detainees.

Category II

30. The source submits that Mr. Aguilar-Rodríguez's detention fell within category II of the Working Group's categories of arbitrary detention, given that his placement in immigration detention was a result of his exercise of his right to seek asylum. In view of Mr. Aguilar-Rodríguez's background, it was also, according to the source, a violation of his right to equality and non-discrimination, as enshrined by articles 7 and 14 of the Universal Declaration of Human Rights and articles 26 and 27 of the Covenant.

Category III

31. According to the source, the deprivation of liberty of Mr. Aguilar-Rodríguez also fell within category III of the Working Group's categories of arbitrary detention, given that it purportedly violated international norms related to the right to a fair trial, as established by article 14 of the Covenant. The source argues that Mr. Aguilar-Rodríguez has been unable to defend himself properly and in a fair manner during the asylum proceedings. He apparently had no access to legal counsel, the evidence required to support his claim or adequate means of preparing his defence. In addition, the authorities reportedly failed to provide Mr. Aguilar-Rodríguez, a Spanish speaker, with access to material in Spanish or to translation services, including for court-related information that was available only in English.

32. The source notes that the immigration judge is a part of the executive branch of the Government of the United States, which was both holding Mr. Aguilar-Rodríguez in detention and determining his rights. The source submits that Mr. Aguilar-Rodríguez's case has therefore not been assessed by an independent and impartial body. In addition, the same immigration judge usually presides over both the bond and the merit hearings, and the length of the asylum proceedings, during which Mr. Aguilar-Rodríguez remained in detention, may constitute a violation of the guarantees of due process, in particular of the right to be tried within a reasonable time or released.

33. The source also notes that undocumented immigration is considered a civil rather than criminal matter in the United States. Immigration detention is therefore not a criminal punishment. Because of its civil nature, however, it affords detainees far fewer rights than are afforded to those held under criminal charges. In addition, as immigration detainees,

unlike defendants in criminal proceedings, are not given fixed terms of detention, they are often subject to long and unjustified periods of detention that are neither proportional nor reasonable. The source claims that the length of detention depends on the length of the immigration proceedings and, as in Mr. Aguilar-Rodríguez's case, the amount of time it takes the detainee to collect the money for the bond.

34. The source submits that bond amounts are not set in such a way as simply to ensure an individual's appearance at future proceedings and do not account for the individual's ability to pay, thereby resulting in an effective decision to deny bond. Many immigrants, not subject to mandatory detention, are deprived of their liberty because they cannot afford to post bonds in the amounts required of them.

35. The source argues that although Mr. Aguilar-Rodríguez had committed nothing more than a misdemeanour traffic violation and fled his country to seek asylum in the United States, where he has developed ties, the bond he was asked to post was initially set at $6,000 and then at $20,000. As he was unable to work during his detention, he could not afford to post the bonds. In view of the amounts he was asked to pay, there was no realistic and true alternative to his remaining in detention.

36. Furthermore, the source states that, other than the misdemeanour traffic violation, Mr. Aguilar-Rodríguez has no criminal record and therefore does not pose a danger to society, as concluded by the immigration courts during the bond proceedings. The Government, according to the source, claimed that the detention of Mr. Aguilar-Rodríguez was justified because he posed a flight risk and did not have close ties to the United States, despite his submission of evidence that he had lived in the country for more than 10 years, had a daughter with medically certified special needs who is a United States citizen and was committed to seeing the appeals of the rejection of his application for asylum through to the end. The source submits that these factors demonstrate that Mr. Aguilar-Rodríguez is not a flight risk and intends to remain in the United States.

Category IV

37. The source submits that because Mr. Aguilar-Rodríguez was subjected to prolonged administrative detention without an effective remedy, his detention also fell within category IV of the Working Group's categories of arbitrary detention. Mr. Aguilar-Rodríguez was deprived of his liberty for almost six years, pending his asylum application, and effectively denied a remedy by the imposition of an arbitrary and excessive bond set without considering the specific circumstances of the case or Mr. Aguilar-Rodríguez's ability to afford it.

Category V

38. Finally, the source submits that the detention of Mr. Aguilar-Rodríguez was also arbitrary under category V, as he was subjected to it because of his economic status and his status as a member of a linguistic minority. Mr. Aguilar-Rodríguez, according to the source, was forced to defend himself without legal counsel and with limited access to legal material in Spanish. The source also submits that Mr. Aguilar-Rodríguez's minority status has affected his right to seek asylum and that the arbitrary determination of a bond that was impossible for him to post constituted discrimination on the basis of his economic status.

Response from the Government

39. On 8 September 2017 the Working Group transmitted the allegations from the source to the Government through its regular communications procedure. The Working Group requested the Government to provide detailed information about the current situation of Mr. Marcos Antonio Aguilar-Rodríguez and any comments on the source's allegations by 7 November 2017.

40. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

41. At the outset, the Working Group notes that Mr. Aguilar-Rodríguez was released on 24 July 2017. However, the Working Group notes that in accordance with its methods of work (para. 17 (a)), it reserves the right to render an opinion, on a case-by-case basis, as to whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group holds the view that the allegations made by the source are extremely serious. It shall therefore avail itself of its right to render an opinion.

42. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

43. 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). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

44. The source, as noted, submits that the detention of Mr. Aguilar-Rodríguez fell within categories II, III, IV and V of the Working Group's categories of arbitrary detention. The Working Group will consider those claims one by one.

45. In the source's view, the detention of Mr. Aguilar-Rodríguez fell within category II because he was detained for exercising the right to seek asylum enshrined in article 14 of the Universal Declaration of Human Rights and on the basis of his nationality and origin, in breach of the right not to be subjected to discrimination, established in articles 26 and 27 of the Covenant.

46. The Working Group notes that, as the source has submitted and the Government of the United States has not disputed, Mr. Aguilar-Rodríguez arrived in the United States in January 2001. However, he was first arrested following a misdemeanour traffic violation only on 12 August 2011, and it was only after serving the sentence for that misdemeanour that his immigration detention began. The Working Group notes that this was some 10 years after he had arrived in the United States and that, during those 10 years, Mr. Aguilar-Rodríguez did not apply for asylum and that the authorities did not attempt to deport him.

47. The source has submitted and the Government has not rebutted that Mr. Aguilar-Rodríguez was interviewed by an official from Immigration and Customs Enforcement in the Maricopa County Jail upon completion of his sentence for the traffic violation, that he was subsequently transferred to Immigration and Customs Enforcement custody and that he remained in detention until 24 July 2017. The source submits that this detention was based solely on Mr. Aguilar-Rodríguez's immigration status and application for asylum. The Working Group notes that while the Government had an opportunity to reply to this submission, it has failed to do so.

48. The Working Group reiterates that seeking asylum is not a criminal act;[1] on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, the Convention relating to the Status of Refugees and its 1967 Protocol. The Working Group notes that the latter of the two instruments establish international legal obligations that the United States has undertaken to fulfil.

49. The Working Group observed the practice of mandatory immigration detention in the United States during its 2016 country visit and recommended that the Government put an end to the mandatory detention of immigrants and asylum seekers because of their irregular status and provide a prompt administrative procedure for an individualized assessment of their circumstances and a timely decision on their status.[2]

[1] See opinions No. 28/2017, No. 42/2017 and No. 71/2017.

[2] See A/HRC/36/37/Add.2, para. 92.

50. The Working Group observes that that recommendation coincides with a concern expressed by the Human Rights Committee, which noted in its concluding observations on the fourth periodic report of the United States, in 2014, that "mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant".[3]

51. In the present case, the Government had the opportunity to explain the reasons for the detention of Mr. Aguilar-Rodríguez and show how his detention was a necessary and proportionate measure. It did not avail itself of the opportunity, however.

52. In the absence of any indication by the Government of the reasons for depriving Mr. Aguilar-Rodríguez of his liberty, the Working Group must conclude that the reason was his application for asylum. Mr. Aguilar-Rodríguez was subjected to a mandatory immigration detention policy that is contrary to article 9 of the Covenant and breaches the right to seek asylum as envisaged in international law, article 14 of the Universal Declaration of Human Rights in particular. The Working Group therefore concludes that the detention of Mr. Aguilar-Rodríguez, which, as noted, was a result of his attempt to exercise his right to seek asylum, fell within category II of the Working Group's categories of arbitrary detention.

53. The source also submits that the detention of Mr. Aguilar-Rodríguez fell within categories III and IV, as he was unable to defend himself properly. In addition, the source contends that the indefinite detention to which immigration detainees are subjected is neither proportional nor reasonable. The length of detention, according to the source, depends on the length of the immigration proceedings. The source also submits that Mr. Aguilar-Rodríguez was required to post a bond he could not afford, that bond is set unreasonably and that, as a result, bond is effectively denied. Mr. Aguilar-Rodríguez was detained for six years, during which he was denied a remedy by the requirement to post bond in an amount set with no consideration given to the specifics of the case, including his ability to afford the bond.

54. The Working Group notes that Mr. Aguilar-Rodríguez was not answering in court to criminal charges. He was involved in proceedings conducted to consider his asylum application. He was detained in relation to those proceedings. Detention in the context of immigration proceedings, however, must also comply with basic international standards.

55. As is noted in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right that is essential to the preservation of legality in a democratic society (principles 2 and 3). This right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty (principle 8), and it applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including migration detention. Moreover, it applies "irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary" (guideline 1).

56. In the present case, the Working Group observes that there were two main sets of proceedings involving Mr. Aguilar-Rodríguez. One, which consisted of bond hearings, concerned his continued detention. These proceedings were directly relevant to the deprivation of liberty of Mr. Aguilar-Rodríguez and, as such, fall within the mandate of the Working Group. The second set of proceedings concerned the substance of his application for asylum in the United States and, as such, fall outside the mandate of the Working Group. The Working Group refers this case to the Special Rapporteur on the human rights of migrants.

57. The first bond hearing took place on 6 October 2011, more than a month after Mr. Aguilar-Rodríguez had served his sentence for the traffic violation and become an immigration detainee. The Working Group observes that in order to ensure that an individual is not being deprived of his or her liberty without being given an effective

[3] See CCPR/C/USA/CO/4, para. 15.

opportunity to be heard without delay by a court of law, no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention (see guideline 7 of the Basic Principles and Guidelines). This was not observed in the case of Mr. Aguilar-Rodríguez.

58. Moreover, following that hearing, the bond for Mr. Aguilar-Rodríguez was set at $6,000, an amount he could not afford. He appealed this decision, but the appeal was rejected on 5 December 2011. After a bond redetermination hearing nearly a year after the rejection of that appeal, bond was set at $20,000, a decision that Mr. Aguilar-Rodríguez unsuccessfully challenged on 12 February 2013. Unable to pay the bond, he remained in custody. On 30 September 2013, Mr. Aguilar-Rodríguez requested another bond redetermination hearing, but his request for a change in custody status was denied on 9 October 2013. On 16 February 2016, Mr. Aguilar-Rodríguez again requested a review of his status. The review was conducted on 14 April 2016, and the bond was again set at $20,000. His appeal of that decision was rejected on 19 July 2016. At yet another bond hearing, the bond was again set at $20,000, a decision that Mr. Aguilar-Rodríguez challenged unsuccessfully in March 2017.

59. To ensure that detention in the course of immigration proceedings is, as it must be, an exceptional measure used only as a last resort, consideration must be given to alternatives.[4] In the present case, such consideration was given, as Mr. Aguilar-Rodríguez was granted bail. However, the alternatives should also be realistic. They should not depend on an individual's ability to pay for them,[5] or they are not real alternatives to detention. In the absence of any explanation from the Government, the Working Group must conclude that in Mr. Aguilar-Rodríguez's case the alternative to detention, bail, was set so high that it was unrealistic, since Mr. Aguilar-Rodríguez could not afford it. To offer only unrealistic alternatives to detention in cases such as his, which is to disregard the requirement to make detention in the course of immigration proceedings an exception, is a serious breach of article 9 of the Covenant.

60. Moreover, the Working Group notes that it was always Mr. Aguilar-Rodríguez who challenged his detention. In other words, his detention was not subject to automatic, periodic review to ensure that it was compatible with article 9 of the Covenant.[6] Ensuring such automatic, periodic review at set time limits was among the recommendations the Working Group made to the United States following its 2016 country visit.[7] In the present case, the absence of such review is an additional serious breach of article 9 of the Covenant.

61. Furthermore, the Government failed to contest the allegations made by the source to the effect that Mr. Aguilar-Rodríguez had no access to legal assistance in preparing for his bond hearings and that, as a Spanish speaker involved in English-language proceedings and provided with documentation in English, he had no access to translation services. The lack of legal assistance in the course of immigration proceedings in the United States was also of concern to the Working Group during its 2016 country visit.[8]

62. As the Working Group noted in principle 21 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court:

> Non-nationals, including migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty shall be informed of the reasons for their detention and their rights in connection with the detention order. This includes the right to bring proceedings before a court to

[4] See A/HRC/13/30, para. 59; E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (f); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81.

[5] See A/HRC/36/37/Add.2, paras. 28 and 30.

[6] See principle 21 of the Basic Principles and Guidelines; A/HRC/13/30, para. 61; principle 11.3 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; E/CN.4/2003/4, para. 86; E/CN.4/2003/8/Add.2, para. 64; A/HRC/13/30/Add.2, para.79 (g); and A/HRC/16/47/Add.2, para. 120.

[7] See A/HRC/36/37/Add.2, para. 92.

[8] Ibid., para. 37.

challenge the arbitrariness and lawfulness and the necessity and proportionality of their detention, and to receive without delay appropriate and accessible remedies. It also includes the right of the above-mentioned persons to legal assistance in accordance with the basic requirement of prompt and effective provision of legal assistance, in a language that they use and in a means, mode or format they understand, and the right to the free assistance of an interpreter if they cannot understand or speak the language used in court.

63. Failing to provide Mr. Aguilar-Rodríguez with the assistance of counsel and access to the services of a translator or interpreter, a failure that adversely affected his ability to challenge the legality of his continued detention, also constitutes a serious violation of article 9 of the Covenant.

64. Although Mr. Aguilar-Rodríguez was able to challenge his continued deprivation of liberty on a number of occasions during the nearly six years he spent in immigration detention, he himself initiated the challenges. The Government failed to comply with its obligation to ensure periodic, automatic review of detention in the course of immigration proceedings. Moreover, the bonds he was asked to post were repeatedly set at such high levels that, in his particular circumstances, they did not constitute real alternatives to detention. Mr. Aguilar-Rodríguez's ability to challenge his detention was further limited by the lack of legal assistance and translation services.

65. The Working Group consequently considers that the remedies afforded to him were not effective and therefore concludes that the administrative detention of Mr. Aguilar-Rodríguez as an asylum seeker fell not within category III of the Working Group's categories of arbitrary detention, as argued by the source, but within category IV.

66. Lastly, the source contends that the detention of Mr. Aguilar-Rodríguez also fell within category V, as he was subjected to it because of his economic status, which made it impossible to post the bond required of him, and his status as a member of a linguistic minority, which forced him to defend himself without legal counsel and with limited access to legal material in Spanish. The Government failed to challenge those allegations, although it had the opportunity to do so.

67. During its recent visit to the United States, the Working Group observed first-hand many cases of detention akin to that described in the present case.[9] The Working Group remains concerned about what appears to be the common practice of setting bail so high that those subjected to detention in the course of immigration proceedings are unable to pay it. Requiring the posting of excessively large bonds does not provide an alternative to detention to those who are detained. Moreover, the practice is discriminatory, as it disproportionately affects those of humble economic backgrounds.

68. Although the United States has made a declaration in relation to article 26 of the Covenant, it has not explained how that declaration applies to the present case. In the absence of an explanation from the Government, the Working Group concludes that the excessively large bonds required of Mr. Aguilar-Rodríguez, which resulted in his continued detention, and the failure to provide him with legal and translation services, which limited his ability to challenge his detention, were discriminatory. Accordingly, his detention fell within category V of the Working Group's categories of arbitrary detention.

69. Although the Working Group's mandate does not cover conditions of detention or the treatment of detainees per se, it must consider to what extent those conditions, including the treatment of detainees, can negatively affect the ability of detainees to prepare their defence or their chances of a fair trial.[10] The present case does not concern a criminal trial. Nevertheless, as it observed during its 2016 visit to the United States, detention in the course of immigration proceedings in the United States often takes place in poor conditions. The Working Group takes this opportunity to remind the Government that such detention must not be punitive and that all persons in immigration detention should be held in decent conditions and treated with respect.

[9] See A/HRC/36/37/Add.2, paras. 21–46.

[10] See E/CN.4/2004/3/Add.3, para. 33, and opinions No. 1/2017 and No. 30/2017.

Disposition

70. Although Mr. Aguilar-Rodríguez has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Marcos Antonio Aguilar-Rodríguez, being in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, was arbitrary and fell within categories II, IV and V.

71. The Working Group requests the Government of the United States to take the steps necessary to remedy the situation of Marcos Antonio Aguilar-Rodríguez without delay and bring it into conformity with the relevant international norms, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

72. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Marcos Antonio Aguilar-Rodríguez an enforceable right to compensation and other reparations, in accordance with international law.

73. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants.

Follow-up procedure

74. 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 reparations have been made to Mr. Aguilar-Rodríguez;

(b) Whether an investigation has been conducted into the violation of Mr. Aguilar-Rodríguez'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 the United States with its international obligations in line with the present opinion;

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

75. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

76. 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. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

77. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.[11]

[*Adopted on 21 November 2017*]

[11] See Human Rights Council resolution 33/30, paras. 3 and 7.