United Nations A/HRC/WGAD/2017/19

General Assembly

Distr.: General
28 June 2017
English
Original: Spanish

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 19/2017 concerning Pedro César Pestana Rojas and Antonio de Jesús Martínez Hernández (Colombia)

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/33/66), on 6 February 2017 the Working Group transmitted to the Government of Colombia a communication concerning Pedro César Pestana Rojas and Antonio de Jesús Martínez Hernández. 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);

(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. Pedro César Pestana Rojas and Antonio de Jesús Martínez Hernández are indigenous Colombians of the Zenú people from the indigenous reservation in the Departments of Córdoba and Sucre. Mr. Pestana Rojas, a physician, was born on 7 September 1961. Mr. Martínez Hernández, an administrator, was born on 9 March 1964.

5. The source alleges that, as part of the conflict among illegal armed groups in Colombia, Mr. Pestana Rojas and Mr. Martínez Hernández were forced by paramilitaries to attend a meeting in the Sierra Nevada de Santa Marta with the head of the paramilitary group on 10 January 2006. On 26 September 2006, after receiving news of the meeting and of the participation of Mr. Pestana Rojas and Mr. Martínez Hernández in that meeting, the Attorney General's Office initiated a criminal investigation against them.

6. As a result, representatives of the Zenú indigenous reservation sought sole jurisdiction over the case for the indigenous authorities, in accordance with article 246 of the Colombian Constitution, which states: "The authorities of the indigenous peoples may exercise jurisdictional functions within their territory and in accordance with their own rules and procedures." On 3 November 2006, in a reverse for the indigenous reservation, the dispute over jurisdiction was decided in favour of the Office of Prosecutor No. 5 for Human Rights and International Humanitarian Law, a decision that would be upheld by the High Council of the Judiciary on 31 January 2007.

7. The source reports that on 21 November 2006, the Office of Prosecutor No. 5 ordered the pretrial detention of the persons under investigation. The next day, Mr. Pestana Rojas and Mr. Martínez Hernández surrendered voluntarily to the authorities of the Zenú indigenous community and were confined to the Cacique Mexión Centre for Reflection and Remorse. On 29 November 2006, Mr. Pestana Rojas's and Mr. Martínez Hernández's lawyer informed the Prosecutor's Office that his clients were in detention on the indigenous reservation, at the disposal of the authorities responsible for the investigation. On 15 December 2006, the Chief of the reservation provided confirmation of that situation to the relevant authorities, indicating that the two men would remain in his custody and under his supervision for the duration of the investigation and possible trial. The Chief also requested the suspension of any attempt to take Mr. Pestana Rojas and Mr. Martínez Hernández into custody. On 31 January 2007, the High Council of the Judiciary, in ruling on the dispute over jurisdiction, acknowledged that the indigenous persons under investigation were in fact being held in a detention facility.

8. The source goes on to note that on 22 May 2007, the prosecution brought criminal charges against Mr. Pestana Rojas and Mr. Martínez Hernández for the alleged commission of the crime of conspiracy. The initial hearing of the case fell to Sincelejo Circuit Court No. 1. However, the prosecution requested that the venue for the trial be changed to Bogotá, a request that was granted on 29 August 2007 by the Supreme Court of Justice, thereby moving the case to Specialized Criminal Court No. 2 of the Expedited Procedure Circuit of Bogotá. At that time, the Supreme Court of Justice recognized that the two men were effectively deprived of their liberty.

9. On 28 September 2009, the court hearing the case sentenced Mr. Pestana Rojas and Mr. Martínez Hernández to 6 years' imprisonment, while reissuing the detention orders and failing to acknowledge that they had been in detention for 2 years and 10 months. Mr. Pestana Rojas and Mr. Martínez Hernández appealed the decision, and the appeal was heard by the Criminal Division of the Bogotá Judicial District High Court. Mr. Pestana Rojas and Mr. Martínez Hernández noted before the High Court judge that because they were indigenous persons, they were entitled to serve their sentences in special centres in their community. They also stated that the earlier judicial decision on the dispute over jurisdiction concerned jurisdiction (which court had jurisdiction over the case) alone, not the enforcement of sentences (which authority was responsible for incarceration). On 5

March 2010, the Bogotá Judicial District High Court stated that Mr. Pestana Rojas and Mr. Martínez Hernández were not deprived of their liberty and reissued the warrants for their arrest.

10. On 27 January 2011, according to information received, the Technical Investigation Corps of the Attorney General's Office inspected the Cacique Mexión indigenous detention centre and confirmed that it met the requirements for the safety, confinement, isolation and rehabilitation of prisoners.

11. On 16 February 2012, within the framework of the petition for *amparo* filed in June 2011 by the Zenú indigenous reservation, the Constitutional Court, in ruling T-097, recognized that the indigenous persons Mr. Pestana Rojas and Mr. Martínez Hernández had been in detention since 22 November 2006. However, the Court rejected the petition, as it found that the judgment it was contesting was not being enforced.

12. The source notes that on 8 May 2012, the Bogotá Judicial District High Court, acting as an appellate court, upheld the conviction of Mr. Pestana Rojas and Mr. Martínez Hernández.

13. On 11 May 2012, and in view of supervening jurisprudence of the Supreme Court of Justice (the judgment of 8 November 2011 in a case involving a member of the Nasa indigenous community), Mr. Pestana Rojas and Mr. Martínez Hernández evidently requested their release. In the jurisprudence in question, it was established that a restrictive interpretation of indigenous jurisdictional authority violated indigenous people's fundamental right to due process. On 15 May 2012, however, the Bogotá High Court rejected their request for release.

14. According to the source, Mr. Pestana Rojas and Mr. Martínez Hernández completed their full sentences of 6 years' imprisonment on 22 November 2012.

15. On 29 May 2013, the Criminal Division of the Supreme Court of Justice, arguing that it did not find that there had been any violation of the fundamental rights of Mr. Pestana Rojas and Mr. Martínez Hernández, rejected their appeals.

16. The source states that on 9 August 2013, Mr. Pestana Rojas and Mr. Martínez Hernández applied to a lower-court judge for their release, on the grounds that they had served their sentences. On 6 September 2013, the lower court stated that it was not competent to consider the application and forwarded it to the Sincelejo Sentence and Security Measures Enforcement Court. On 5 November 2013, the Sincelejo Court refused to recognize that the two convicted men had actually been deprived of their liberty and, putting forward its lack of territorial jurisdiction, referred the proceedings to the sentence enforcement courts of Bogotá.

17. On 18 February 2014, Mr. Pestana Rojas and Mr. Martínez Hernández filed *amparo* proceedings and petitioned for their immediate and unconditional release for time served. On that occasion, attention was drawn to the Constitutional Court's finding, laid down in judgment T-921/2013, that the deprivation of liberty of members of indigenous communities should take place in detention facilities of their own to prevent them from being culturally uprooted. The source contends that the findings of an international mission of independent experts convened by the United Nations in 2001 to study the prison situation in Colombia were highlighted. In its report, the mission had noted that Colombian judges and prosecutors had ignored international obligations in the field of indigenous rights by trying and imprisoning indigenous persons under the ordinary jurisdiction system.

18. According to the information received, on 19 February 2014 the Ordinary Circuit Court of Chinú undertook to hear the petition for *amparo*, and on 5 March 2014 it upheld the constitutional rights of the petitioners. The Court specifically noted that forcing them to serve their sentences again, in an ordinary prison, would be a violation of the principle *non bis in idem*. As a result, on 21 March 2014, the Bogotá Sentence and Security Measures Enforcement Court No. 2 granted the two men their freedom and voided the warrants for their arrest.

19. On 27 March 2014, the Criminal Division of the Bogotá High Court challenged that decision. The source contends that the Criminal Division did not have the authority to

mount that challenge and that its decision to do so was evidence of an unusual interest in having the protection that had been granted revoked. The Chinú Court refused to involve the Bogotá High Court in the proceedings on the grounds that the *amparo* decision did not affect fundamental rights. On 9 April 2014, however, the High Court insisted on being involved in the proceedings, and on 25 April it was refused once again.

20. On 25 June 2014, Selection Division No. 6 of the Constitutional Court ordered the return of the case file to the Chinú Court, so that the challenge of the Bogotá High Court could be initiated. On 11 June 2015, the Chinú Court decided to deny the request for involvement, review and annulment made by the Bogotá High Court and then referred the case to the Constitutional Court for possible review.

21. The source states that on 23 January 2015, in another case involving a member of the Zenú indigenous community who was tried by the ordinary courts, the Attorney General's Office requested that the accused be handed over to the authorities of his indigenous reservation, a request that, it is claimed, demonstrates the discriminatory treatment of the alleged victims in the present case.

22. According to the information received, on 11 June 2015, the Constitutional Court gave initial consideration to the measure of protection granted by the Chinú Court but did not select it for further review. On 16 July 2015, however, the provisional judge petitioned for the measure to be selected for review. The source contends that at that point the judge, with a view to ensuring that the measure was reviewed, made a set of considerations that amounted to prejudgment of the case. On 31 July 2015, Selection Division No. 7 accepted the petition, and after the cases for review were distributed, the case ended up being assigned to the judge who had filed the petition, an assignment that, according to the source, is prohibited by domestic law and calls into question the impartiality of the review.

23. On 24 November 2015, in judgment T-685-2015, Review Division No. 2 overturned the ruling of 5 May 2014 whereby the two indigenous men had been granted a remedy of *amparo*. This decision was reportedly the judge's final action, as that very day the Senate elected the permanent judge. The source argues that such proceedings call into question the independence of the official who decided the case. As a result of the decision, on 25 January 2016 new warrants for the arrest of Mr. Pestana Rojas and Mr. Martínez Hernández were issued. They turned themselves in to the Zenú indigenous authorities on 10 February 2016 and were again deprived of their liberty in the Cacique Mexión detention centre.

24. On 3 March 2016, the Bogotá Sentence and Security Measures Enforcement Court No. 28 refused to recognize that Mr. Pestana Rojas and Mr. Martínez Hernández had been taken into custody and requested that they be turned over to the ordinary authorities.

25. The source states that on 1 April 2016, Mr. Pestana Rojas and Mr. Martínez Hernández, alleging that their right to due process had been violated, that the judge had not been impartial, that the reasoning in support of the judgment had contained inconsistencies and that the applicable jurisprudence had been disregarded, sought the annulment of judgment T-685-2015. On 7 July 2016, however, the Constitutional Court rejected their petition for annulment. On 20 September 2016, the Constitutional Court reportedly reviewed a petition for *amparo* brought by indigenous persons from the Emberá Chamí reservation and ordered the petitioners to serve their sentences on their reservation, a different outcome that, according to the source, was additional evidence of discriminatory treatment.

26. According to the information received, Mr. Pestana Rojas and Mr. Martínez Hernández are still deprived of their liberty in the Cacique Mexión detention centre.

27. The source argues that the detention of Mr. Pestana Rojas and Mr. Martínez Hernández is arbitrary under the criteria of the Working Group, because there is no justification for continuing to deprive them of their liberty after they have completed their sentences (category I); because this situation is a consequence of the exercise by members of the Zenú ethnic minority of their right to enjoy their own culture without discrimination, in accordance with article 7 of the Universal Declaration of Human Rights and articles 26 and 27 of the Covenant (category II); because the right to a fair trial, in particular the right to be tried by the appropriate judge (category III), has not been observed; and because the

detention constitutes a violation of the right to equality and non-discrimination (category V).

Response from the Government

28. On 6 February 2017, the Working Group, under its regular communications procedure, transmitted the allegations made by the source to the Government. The Working Group requested the Government to provide detailed information on the circumstances of the detention of Mr. Pestana Rojas and Mr. Martínez Hernández and on their current situation by 8 April 2017. The Working Group also requested from the Government a clarification of the legal basis for the ongoing detention and details on the conformity of that deprivation of liberty with international human rights law and, in particular, with the treaties to which Colombia is a party. However, the Government did not provide its response during the period stipulated.

Discussion

29. 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.

30. 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.

31. Pedro César Pestana Rojas, a physician, and Antonio de Jesús Martínez Hernández, an administrator, are indigenous Colombians of the Zenú people from the indigenous reservation in the Departments of Córdoba and Sucre.

32. The Attorney General's Office, having received information on the alleged participation of Mr. Pestana Rojas and Mr. Martínez Hernández in a meeting with paramilitary groups, opened a criminal investigation against them for the offence of "conspiracy" on 26 September 2006.

33. In accordance with the Constitution of Colombia (art. 246), representatives of the Zenú indigenous reservation sought exclusive jurisdiction over the case for the indigenous authorities; however, the dispute over jurisdiction was decided in favour of the Office of Prosecutor No. 5 for Human Rights and International Humanitarian Law, a decision that would be upheld by the High Council of the Judiciary on 31 January 2007.

34. The Working Group received credible information, which was not contested by the Government, that on 21 November 2006, the Office of Prosecutor No. 5 issued an order to detain Mr. Pestana Rojas and Mr. Martínez Hernández until their trial and that on the next day (22 November 2006) they were confined to the Cacique Mexión Centre for Reflection and Remorse, under the administration of indigenous authorities. On 29 November 2006, the Prosecutor's Office was informed that Mr. Pestana Rojas and Mr. Martínez Hernández were in the indigenous detention facility, at the disposal of the authorities responsible for the investigation.

35. On 31 January 2007, the High Council of the Judiciary, in ruling on the dispute over jurisdiction, acknowledged that the indigenous persons under investigation were in fact being held in pretrial detention. Likewise, on 16 February 2012, the Constitutional Court recognized that the indigenous persons Mr. Pestana Rojas and Mr. Martínez Hernández had been in detention since 22 November 2006. The Cacique Mexión Centre for Reflection and Remorse had the features required for the safety, detention, isolation and rehabilitation of prisoners according to the Office of the Attorney General's Technical Investigation Corps, which inspected it on 27 January 2011.

36. On 22 May 2007, the prosecution charged Mr. Pestana Rojas and Mr. Martínez Hernández with the offence of "conspiracy", and on 28 September 2009, the court hearing the case sentenced the two men to 6 years in prison. In its judgment, the Court failed to

recognize that they had been deprived of their liberty in the Cacique Mexión indigenous detention centre since 22 November 2006.

37. The Working Group emphasizes the provisions of articles 8 to 10 of the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169), to which Colombia has been a party since 7 August 1991, in particular article 9 (1), which states that "to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected".

38. The Working Group was persuaded that the detention of Mr. Pestana Rojas and Mr. Martínez Hernández should have been calculated using 22 November 2006, the date on which they entered the Cacique Mexión indigenous detention centre, as a starting point. In that regard, the Working Group is of the view that the detention exceeding the period of 6 years' imprisonment, as from 22 November 2006, has no legal basis and is therefore arbitrary under category I of its methods of work.

39. On the other hand, the Working Group did not receive enough information for it to be persuaded that the prosecution of the offence of "conspiracy" should have fallen to the indigenous justice system in conformity with the provisions applicable in its own rules and procedures or, therefore, that the right of Mr. Pestana Rojas and Mr. Martínez Hernández to a fair trial, including the right to an appropriate judge, was violated either fully or in part. The Working Group also did not have sufficient evidence to conclude that the detention was arbitrary because it occurred as a result of the exercise of human rights recognized in the Universal Declaration of Human Rights or that it was based on their Zenú origins. Accordingly, the Working Group, with the information before it, was unable to conclude that the detention of Mr. Pestana Rojas and Mr. Martínez Hernández could be considered arbitrary under categories II, III and V of its methods of work.

Disposition

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

> The deprivation of liberty of Pedro Pestana Rojas and Antonio de Jesús Martínez Hernández, being in contravention of articles 3 and 9 of the Universal Declaration of Human Rights and of article 9 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category I of the Working Group's categories of arbitrary detention.

41. The Working Group requests the Government of Colombia to take the steps necessary to remedy the situation of Mr. Pestana Rojas and Mr. Martínez Hernández without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

42. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Pestana Rojas and Mr. Martínez Hernández immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

43. 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 Mr. Pestana Rojas and Mr. Martínez Hernández have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Pestana Rojas and Mr. Martínez Hernández;

(c) Whether an investigation has been conducted into the violation of the rights of Mr. Pestana Rojas and Mr. Martínez Hernández and if so, what the outcome of the investigation was;

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

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

44. 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.

45. 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.

46. 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.[1]

[*Adopted on 24 April 2017*]

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