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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

#### Opinion No. 48/2018 regarding Omar Rosabal Sotomayor (Cuba)

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

2. In accordance with its methods of work (A/HRC/36/38), on 9 May 2018 the Working Group transmitted to the Government of Cuba a communication concerning Omar Rosabal Sotomayor. The Government replied to the communication on 6 July 2018. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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



## Submissions

### *Communication from the source*

4. Mr. Rosabal Sotomayor is a Cuban citizen, born in 1966, residing in the municipality of Pilón, Granma province, Cuba. He is a professional photographer and farmer and also manages a hostel that he owns.

5. The source explains that, as Mr. Rosabal Sotomayor's siblings had moved from Granma province to Havana or had left the country and he was the only one of the six children to have stayed in the municipality of Pilón, he inherited the family's house and land. Mr. Rosabal Sotomayor has received regular financial support from his family members living abroad, which has enabled him to import high-quality photographic equipment for his business and to set up a professional studio. These foreign remittances also enabled him to renovate and extend the house he inherited from his father and to set up a hostel on the upper floor of the house. In addition, it is reported that Mr. Rosabal Sotomayor has worked arduously to make the family farmland fully productive.

6. The source alleges that the improvement in Mr. Rosabal Sotomayor's standard of living, as a result of his work as a photographer, farmer and hostel owner, enabled him to accumulate property. It is therefore asserted that Mr. Rosabal Sotomayor's life attracted the attention of the local authorities, the police, State security forces and political organizations, such as the Committees for the Defence of the Revolution. Mr. Rosabal Sotomayor was reportedly verbally accused in public of maintaining a "capitalist" lifestyle that set a bad example for the rest of the population. It is claimed that, as a result, the authorities sought to accuse him of a crime so that he could be dispossessed of all his property, including his house, despite the fact that it was the family home of his two minor children.

7. According to the information received, Mr. Rosabal Sotomayor was arrested at his home on 21 April 2016 by the municipal police of Pilón and the State security forces as part of a large security deployment. He was not shown an arrest warrant and was handcuffed in front of his two minor children before being taken to the cells of the provincial police in the city of Bayamo. The municipal police officers stated that they were acting on superior orders. At that time, he was informed that he was being arrested for the offences of procuring and trafficking in persons and it was claimed that his house was being used for prostitution.

8. The source notes that a group of sex workers had previously been coerced by the police into declaring that they engaged in prostitution with foreign tourists in Mr. Rosabal Sotomayor's hostel.

9. The source alleges that Mr. Rosabal Sotomayor has remained deprived of his liberty since the day of his arrest. He was initially held in various police cells and Ministry of the Interior facilities until 26 October 2016, when he was officially declared a prisoner and transferred to Las Mangas prison in Bayamo. He was later transferred to the prison in Manzanillo and then to San Román prison, where he has been detained in allegedly inhuman conditions and subjected to a range of insults by prison officials and agents of the Ministry of the Interior. He is being held in an isolation cell and denied the right to visits from his family or to the treatment he needs for the heart problems he has had since childhood.

10. It is noted that Mr. Rosabal Sotomayor's legal counsel on several occasions requested that the pretrial detention be substituted with release on bail, but these requests were all denied by the Public Prosecutor's Office without explanation.

11. According to the information received, on hearing of his imprisonment, one of Mr. Rosabal Sotomayor's brothers travelled to the municipality of Pilón and, on the recommendations of the lawyer, met with the women who had made statements concerning the detainee's involvement in alleged acts of procuring and trafficking in persons. The women denied the facts of their own volition and made written statements contradicting the police version. The women then attended the trial to confirm their later testimony, as a result of which they were allegedly sentenced to 4 years' house arrest.

12. The source reports that Mr. Rosabal Sotomayor's brother went to the municipal police to request an explanation for the detention and to submit the new written statements by the supposed witnesses. In rejecting the requests by Mr. Rosabal Sotomayor's brother, the authorities said that they already had the statements made by the women and that they were not interested in the ones he was providing. As of that point, Mr. Rosabal Sotomayor's brother was subjected to persecution by the police authorities, who accused him of coercing the women into making the statements.

13. On 14 July 2016, Mr. Rosabal Sotomayor's brother was reportedly arrested in Havana and, after being handcuffed, was taken to the police station, pending his transfer to the municipality of Pílon, where he was supposed to make a statement to local police officers. It is reported that during the transfer his feet and hands were tied and he was not given anything to eat or drink, just like the other prisoners who were travelling in the same vehicle. Once they reached Granma province, he was taken to a dark cell in San Ramón prison, where he remained until 17 July 2016. The following day, he was taken to the police station in Pílon, where officers said that they would not take him in and that he should be placed under house arrest at his brother's home and should report to the authorities in the city of Bayamo the next day. After making his statement the following day, he was released and left to fend for himself, which meant he had to sell his shoes and a pair of trousers in order to pay for the return journey in a truck to Havana. Mr. Rosabal Sotomayor's brother was implicated in the same proceedings, on charges of coercion.

14. The source reports that, a few days before the trial, officials and police officers informed Mr. Rosabal Sotomayor's family that the hearing would be held in the public park in Pílon in order to serve as a deterrent to others and to make an example of him.

15. On 11 November 2016, the trial took place behind closed doors in order to prevent any interference from the almost one thousand people who had gathered around the court, presumably in support of the accused. The trial lasted 12 hours, during which it is alleged that only officers and officials of the Public Prosecutor's Office, the police, agents of the Ministry of the Interior and representatives of official agencies, such as the Federation of Cuban Women, were allowed to testify. The source states that whenever the defence lawyer tried to speak during the hearing, he was told to be quiet by the president of the court, and that he was hindered throughout, leaving the defendant completely defenceless.

16. The source further notes that all of the statements by the witnesses proposed by the defendant were rejected, and very few of those witnesses were allowed to testify; this is apparently evident in the judgment that was handed down, in which only the prosecution testimony is assessed, particularly that of the head of the Lacra police operation to crack down on prostitution and the Public Prosecutor's Office. Witnesses who would have been key to the accused's defence were not allowed to testify, such as the staff working in Mr. Rosabal Sotomayor's hostel; the bus drivers on the Havana-Pílon line, who stayed in the hostel on a daily basis; the immigration officer who carried out occasional inspections of the hostel; or the president of the Committee for the Defence of the Revolution in the neighbourhood where Mr. Rosabal Sotomayor's home and hostel are located. It is claimed that the reason these witnesses were not allowed to testify at the trial was that they would have told the truth about the accused's impeccable behaviour.

17. According to the information provided by the source, Mr. Rosabal Sotomayor was convicted by judgment of 21 November 2016 and sentenced to 8 years' imprisonment for the offence of procuring. In addition, accessory penalties were imposed, such as the loss of the right to vote and to stand for election, disqualification from public office and, most importantly, the seizure of all of Mr. Rosabal Sotomayor's property linked to the alleged offences. As a result of the seizure, he lost ownership of his father's house, computers, printers, cameras, mattresses and wardrobes, among other things.

18. The source notes that the judgment contains major irregularities that prove the arbitrariness of the detention. The source notes that the omissions allegedly committed by Mr. Rosabal Sotomayor in carrying out the offences for which he was convicted consisted of failing to register the entry of women to his hostel between 11 p.m. and 5 a.m. In addition, he was accused of the criminal omission of failing to request evidence that there was a family or romantic relationship between hostel guests and the women who visited

them (e.g. marriage certificate). The source claims that these omissions do not constitute the offences of procuring and trafficking in persons but could constitute administrative offences under regulations governing tourism activities.

19. The source stresses that the main evidence on which the decision is based is testimony obtained through coercion by public officials from alleged sex workers – statements they subsequently withdrew, denied or did not confirm during the trial.

20. Another of the irregularities in the judgment highlighted by the source is the failure to consider the statements and evidence the defence sought to present during the trial; this irregularity was evident throughout the pretrial procedures, the evidentiary stage and the hearing, and was reflected in the judgment. It is claimed that the statements of government officials and other evidence presented by the prosecution were treated as irrefutable and as having full evidentiary value, whereas those that supported Mr. Rosabal Sotomayor's defence were minimized, dismissed or even ignored, thus constituting a violation of the principle of equality of arms.

21. The source further stresses that, according to the judgment, the municipal authorities had allegedly been aware that prostitution was taking place in the hostel since 2014, that is, two years before the accused was prosecuted in 2016; this is inconsistent with the duty of those officials to investigate the criminal acts at the time they occurred. The fact that they waited more than two years to initiate the investigation and prosecution shows that the authorities' real objective was not to prevent or punish offences but rather to prosecute Mr. Rosabal Sotomayor.

22. The source states that on 28 December 2016 Mr. Rosabal Sotomayor's defence appealed his conviction to the Supreme Court, which upheld the judgment of first instance on 4 July 2017. An application for a review of the proceedings was subsequently filed on 24 October 2017 with the Ministry of Justice; this was rejected on 11 April 2018, with a note highlighting the good work done by the Provincial Court, the Public Prosecutor's Office and the Supreme Court.

23. The source claims that there is no legal basis for Mr. Rosabal Sotomayor's detention and that it therefore falls under category I. It argues that the offence in question is covered by national legislation but that it has not been proven that this offence was committed given that the witnesses who had been coached by the police retracted their statements during the trial and acknowledged that they had been pressured and tricked into testifying against Mr. Rosabal Sotomayor, as a result of which they were sentenced to house arrest and payment of fine.

24. The source also states that for the offence of procuring to have taken place, the offence of prostitution must first have been committed; however, the alleged clients – foreign tourists – were not accused of or prosecuted for this offence, and all returned to their home countries free of all wrongdoing, while Mr. Rosabal Sotomayor was sentenced to 8 years in prison. It is argued that this further reveals the absence of a legal basis, in accordance with category I.

25. The source also argues that the detention is arbitrary under category II, as Mr. Rosabal Sotomayor's case is in violation of article 7 of the Universal Declaration of Human Rights, which states that all are equal before the law. This allegation is made on the basis that the foreign tourists (the alleged perpetrators of the offence of prostitution) were exempted from all blame, whereas Mr. Rosabal Sotomayor, a Cuban citizen, was sentenced to 8 years' imprisonment, and the source's conclusion that there has been discriminatory treatment on the basis of nationality.

26. According to the source, given that Mr. Rosabal Sotomayor's trial involved the violation of international standards in relation to a fair trial, as his defence was unable to present evidence and witnesses, the detention is arbitrary under category III. The source asserts that, as can be seen in the judgment itself, the court only accepted the testimony of officials, police officers, prosecutors, the Federation of Cuban Women and others linked to the Government, while defence witnesses and the defence lawyer were disparaged and their testimony dismissed or ignored.

27. Finally, the source claims that Mr. Rosabal Sotomayor was deprived of his liberty for discriminatory reasons relating to his economic status, and thus argues that the detention is arbitrary under category V.

*Response from the Government*

28. The Working Group transmitted the source's allegations to the Government on 9 May 2018, requesting detailed information regarding the case of Mr. Rosabal Sotomayor to clarify the factual and legal basis justifying his detention as well as its compliance with the international human rights obligations of Cuba. The Government replied to the communication on 6 July 2018.

29. In its reply, the Government states that it is not true that Mr. Rosabal Sotomayor is being detained arbitrarily. He is serving a criminal sentence, in accordance with applicable legislation, following an investigation and judicial proceedings during which all legal guarantees were respected.

30. The Government reports that the Provincial Court of Granma sentenced Mr. Rosabal Sotomayor to 8 years' imprisonment for the offence of procuring, as provided for in article 302 (1) of Act No. 62 of 1987, the Criminal Code. Under this provision, the charge of procuring applies to any person who induces another person or in any way cooperates or encourages another person to engage in prostitution; owns, manages, administers, operates or finances a business, establishment or dwelling in which prostitution is practised; or benefits in any way from the exercise of prostitution by another person.

31. As a result of the investigations carried out and the evidence given in the trial, it was reliably proven that from 2014 until his arrest, Mr. Rosabal Sotomayor on multiple occasions facilitated, organized and gained financially from the prostitution of young Cuban women with foreign nationals in his home, where he was duly authorized to lease rooms.

32. The Government notes that, on the basis of the evidence provided, the Provincial Court of Granma imposed the sentence applicable to the least severe form of procuring, although the Public Prosecutor's Office had charged him with a more aggravated form that carried a heavier penalty.

33. Mr. Rosabal Sotomayor's arrest by the competent authorities in 2016, which took place once his alleged criminal conduct came to light, was in strict compliance with Act No. 5 of 1977, the Code of Criminal Procedure, and the broad legal guarantees applicable in criminal cases, particularly during the arrest, house search and seizure of property.

34. The Government does not agree that there is no legal basis for Mr. Rosabal Sotomayor's detention. His arrest was in compliance with the law and with respect for his dignity. The corresponding investigation was conducted and judicial proceedings were held in compliance with the broad legal guarantees provided for by law in criminal cases, including the right to a defence. During the trial, the criminal liability of the individual for an act defined as an offence in the Criminal Code was established.

35. The hearing was held on 11 November 2016. On 26 October 2016, the Provincial Court of Granma had issued a decision that the trial would be closed to the public, in accordance with article 305 of the Code of Criminal Procedure. That article provides that the court may decide to hold the trial in camera if this is warranted for reasons of morality or respect for the victims or their families. This decision, which was reported in a timely manner to all the parties to the proceedings, did not prevent the exercise of the right to a defence and legal representation.

36. The Government notes that Mr. Rosabal Sotomayor's defence was led by a lawyer who presented to the court the evidence that he considered appropriate and necessary for the accused's defence, including documentary evidence and the testimony of 16 witnesses. All of this evidence was admitted and taken into account. There were no restrictions on the exercise of the functions of the defence in a trial, nor was there any disruption to public order.

37. The Government rejects the allegation that the accused was left defenceless, that his defence lawyer was not allowed to properly exercise the defence and that only the witnesses put forward by the prosecution were allowed to testify. It also refutes that the hearing was closed to the public to prevent the entry of “almost one thousand people who had gathered around the court”, as the source alleged.

38. The Government also notes that the claim that the police authorities coerced a group of young women into testifying against Mr. Rosabal Sotomayor, in order to support the charges, is false. The invalidity of any statement obtained through violence or coercion is one of the principles of the justice system and one of the guarantees enjoyed by all persons involved in an investigation or judicial proceedings.

39. The Government points out that, in the course of the investigation and on the basis of the evidence provided during the trial, it was established that Mr. Rosabal Sotomayor’s brother had gone to the home of two of the witnesses and ordered them to sign a document denying their involvement in the acts with which Mr. Rosabal Sotomayor was charged. Although they signed the document under duress, both witnesses then reported him to the authorities.

40. On the basis of the evidence establishing responsibility for a criminal act, Mr. Rosabal Sotomayor’s brother was also prosecuted in case No. 208 of 2017, in his case for the offence of coercion, provided for in article 286 of the Criminal Code. The charge of coercion applies to any person who uses violence against or threatens another person to make him or her do something he or she does not want to do or to prevent him or her from exercising his or her rights. The penalty imposed was a 1-year prison sentence substituted by correctional labour without imprisonment.

41. The defence filed an appeal in cassation before the People’s Supreme Court against the judgment in case No. 208 of 2017 by the Provincial Court of Granma, by which both defendants had been convicted. Having completed all the formalities, carried out the necessary evaluations and verified that the Provincial Court of Granma had acted diligently and in accordance with the law, the Criminal Chamber of the People’s Supreme Court dismissed the appeal in cassation through judgment No. 746 of 17 May 2017.

42. The Government states that, following his conviction, Mr. Rosabal Sotomayor was transferred to San Román camp, a minimum security facility, to serve his sentence. At this institution he has been provided with the necessary medical attention and has been allowed visits by family members. In response to complaints from his family about alleged irregularities, the competent authorities carried out three investigations, finding no evidence that any of his rights had been violated. The family members were informed of the results of the investigations. It is therefore not true that Mr. Rosabal Sotomayor is being held in inhuman conditions and that he is being denied the right to family visits or to receive necessary medical treatment. It is also untrue that he has been insulted by prison officials.

43. The living conditions in Cuban prisons and the treatment provided to detainees and persons serving criminal sentences are fully in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules). The prison authorities and officials have an obligation to guarantee the provision of medical treatment required by an inmate, either because the inmate has requested it, because it is obvious or because it is known to the prison authorities; this obligation is subject to very strict control and those who fail to comply shall be held accountable. The concept of holding a detainee or prisoner incommunicado is alien to criminal and procedural practice in Cuba.

44. The Government also refutes the allegation that Mr. Rosabal Sotomayor has been discriminated against on the basis of his nationality. In Cuba, practising prostitution is not a crime, and persons who engage in prostitution or solicitation may not be prosecuted, regardless of whether they are nationals or foreigners. However, procuring is a criminal offence under the law. It is also untrue that this person has been discriminated against for economic reasons or that he was previously harassed because of his lifestyle or purchasing power.

45. In summary, the Government concludes that Mr. Rosabal Sotomayor has not been and is not being arbitrarily detained. He is serving a criminal sentence because he

committed a crime. His criminal responsibility was proven in a fair trial, in which he had access to legal representation and a defence as well as to the remedies provided by law to challenge the judicial decision. All the guarantees provided for by law were complied with during and after his arrest. He is currently serving the sentence handed down by the competent court in a minimum security facility, where he is provided with medical attention and allowed visits by his relatives. There have been no irregularities and none of his rights have been violated.

*Additional comments from the source*

46. The Working Group transmitted the Government's response to the source on 17 July 2018 for comment. The source replied with its final observations concerning the Government's response on 20 July 2018.

47. The source indicates that, in its response, the Government attempts to justify the injustices, abuses and unfair treatment committed against Mr. Rosabal Sotomayor and his family merely by denying the alleged violations and claiming they are fabrications. The source considers that one cannot speak of procedural guarantees in Mr. Rosabal Sotomayor's trial, as it took place in the context of a lack of separation of powers. It alleges that the Communist Party has authority over the country's judges.

48. The source refers to a report by a lawyer affiliated with the National Organization of Collective Law Offices who, after reviewing the file, concluded that the entire process had been manipulated and rigged, such that the record of the trial, on which only one unidentified signature appears, does not reflect certain aspects cited as evidence in the judgment.

49. In the report, the authorities are accused of letting the only foreigner whose identity had been confirmed, who was presumably involved in the acts of prostitution and could have been a key witness in clarifying the facts, leave the country freely and without punishment. The source notes that the authorities forced the witness to sign a document in Spanish, although he does not know the language, and did not ask him to give testimony at the hearing. Upon returning to his country, Canada, the alleged witness confirmed that he had been threatened and coerced into signing documents without understanding them.

50. It is noted that the authorities' real objective in instituting the judicial proceedings was to dispossess Mr. Rosabal Sotomayor of the house he owned because of its economic and historical value. In the source's view, the house is the envy of many officials, and owning it was the real crime committed by Mr. Rosabal Sotomayor, together with his lifestyle, which differed from that of most Cubans as a result of his efforts and the financial assistance he received from his siblings living abroad.

51. According to the source, the Government assumed that the accused had committed the crime but did not demonstrate that he had done so; for example, no evidence was provided to show that he had gained financially from the prostitution of third parties. The source considers that there is absolutely nothing to prove that Mr. Rosabal Sotomayor obtained any economic benefit other than the income from his work as a photographer, his agricultural production and room rental. Documentation showing his income was submitted to the court but was not taken into account by the Provincial Court of Granma in determining the profile of a potential procurer. According to the source, renting rooms to foreigners, who may be accompanied by whomever they consider appropriate, is a perfectly lawful and normal activity; it is not the landlord's responsibility to meddle in the private lives of his guests.

52. The source does not believe that the guilt of the accused has been reliably proven. The persons put forward as witnesses by the police in the trial were coached, threatened and coerced into testifying against Mr. Rosabal Sotomayor. Those women acknowledged the sham during the trial and said that they had been deceived and pressured into testifying against an innocent person; they were subsequently punished with fines and house arrest. The Government did not include any of those points in its response. The source notes that it has become common practice in Cuba to accuse individuals of procuring in order to dispossess them of their assets.

53. The source stresses that the defendant and his lawyer were given very little opportunity to speak at the hearing. The real protagonists in this case are the Public Prosecutor's Office, the police, the representatives of the Federation of Cuban Women (an organization with ties to the Government) and a prominent official who is usually named as the head of Operation Lacra. Not even the president of the Committee for the Defence of the Revolution was admitted as a witness, since he would have testified on behalf of the defendant, who was his neighbour.

54. According to the source, a document issued by the Military Prosecutor's Office notes that Mr. Rosabal Sotomayor was the victim of degrading, humiliating and offensive treatment in San Ramón prison, and that the officer who committed the acts should have been punished.

55. The source refutes the argument that Mr. Rosabal Sotomayor was not a victim of discrimination. It reiterates that the male foreign national, accused and identified as having participated in an act of prostitution, was released without charge and allowed to return to his country. Meanwhile, Mr. Rosabal Sotomayor was tried and sentenced, without any evidence to prove that he committed the crime with which he was charged.

56. The source concludes by mentioning the reprisals against Mr. Rosabal Sotomayor's family following his detention, which include removal from his home, acts of physical violence, humiliations and alleged human rights violations. It claims that such attacks go uninvestigated and that the perpetrators enjoy total impunity.

### Discussion

57. The Working Group acknowledges the willingness of the Government and the source to cooperate with this procedure of the Human Rights Council, expressed through the exchange of communications, documentation and information relating to the present case.

58. In determining whether Mr. Rosabal Sotomayor's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence regarding how to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international standards on the protection of personal liberty and the prevention of arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions that lawful procedures have been followed will not be sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

59. Based on the information provided by the parties, the Working Group has noted that Mr. Rosabal Sotomayor is a Cuban citizen and a professional photographer, as well as a farmer and the owner and manager of a hostel, which is also his family's main residence.

60. On 21 April 2016, Mr. Rosabal Sotomayor was arrested at his home by the municipal police of Pílon and State security agents, in a large security deployment. No arrest warrant was presented, but Mr. Rosabal Sotomayor was verbally informed of the reasons for his arrest.

61. The parties agree that the trial, which lasted 12 hours, took place on 11 November 2016 and that Mr. Rosabal Sotomayor was sentenced on 21 November 2016 to 8 years' imprisonment for the offence of procuring.

62. The source requests the Working Group to find the detention arbitrary under categories I, II, III and V of the methods of work. With regard to categories I, II and V, the Working Group has not received sufficient information to reach a final conclusion on the absence of a legal basis for the detention and the grounds for discrimination.

63. In relation to category I, while the source alleges the absence of a legal basis for the detention, and has informed the Working Group of the failure to produce a warrant at the time of arrest, it also indicates that Mr. Rosabal Sotomayor was informed of the reasons for his arrest at the time of his deprivation of liberty. Furthermore, the source has not alleged or provided information to the Working Group demonstrating that Mr. Rosabal Sotomayor was not brought before a judge during the first 48 hours of detention, or that he was denied



the right to legally challenge the reasons for detention. As a result, the Working Group is unable to conclude that the detention is arbitrary under category I.

64. The source argues that the detention is discriminatory, invoking categories II and V. In this regard, the source notes that Mr. Rosabal Sotomayor did not receive fair and equal treatment from the justice system in comparison to foreign nationals who allegedly participated in the crime of prostitution and were released. In addition, it alleges that Mr. Rosabal Sotomayor was detained on account of his economic status, as the proceedings sought to deprive him of his property. The Working Group considers that it does not have sufficient information to enable it to analyse these arguments under categories II and V.

65. With regard to category III, the source alleges that the defence was severely impeded during the criminal trial, when only agents and officials of the Public Prosecutor's Office, the police, agents of the Ministry of the Interior and representatives of official bodies, such as the Federation of Cuban Women, were given the full right to testify. The source also points out that the defence lawyer was hindered in defending the accused, since the statements of defence witnesses that were proposed and relevant to the trial were rejected, and very few of those witnesses were able to testify. For example, Mr. Rosabal Sotomayor's hostel staff, the bus drivers of the Havana-Pilón line, who stayed at the hostel daily, the immigration official who occasionally inspected the hostel, and the neighbour and president of the Committee for the Defence of the Revolution in the neighbourhood where the hostel is located were denied the opportunity to present their testimony. The testimony of these individuals appears to have been central to the discussion of the case, and the Government did not provide the reasons that could have justified the judge's refusal to allow them to testify.

66. The Government alleges that Mr. Rosabal Sotomayor's defence counsel presented to the court the evidence that he considered appropriate and necessary for the accused's defence, including documentary evidence and the testimony of multiple witnesses. According to the Government, all of the defence's testimony was admitted and considered by the court and there were no restrictions on the exercise of the functions of the defence. However, the Working Group notes that judgment No. 238 issued by the Second Criminal Chamber of the Granma Provincial People's Court on 21 November 2016 states that "in the proceedings, the defendants did not seek to find and present evidence, but instead intended to fabricate it", while documentary evidence provided by the accused, such as recordings, documents and complaints against the police, was rejected, and various witnesses were denied the opportunity to testify.

67. The Working Group is aware that the national courts are the entities empowered to analyse and assess the evidence presented by the parties in domestic criminal proceedings. Furthermore, the Working Group does not have the mandate to assess the sufficiency or insufficiency of evidence in cases in order to conclude that in reaching a decision a court erred in assessing the facts or the law. As is clear from its mandate, its working methods and its consistent practice over 27 years, the Working Group is not a supranational body empowered to review the judicial evaluation of evidence in the application of domestic law. However, it has the power to investigate and analyse whether national proceedings were conducted with respect for human rights relating to a fair trial and due process, in accordance with internationally recognized standards. Therefore, in making such an analysis, the Working Group may conclude that violations of the right to due process are of sufficient gravity to conclude that the detention is arbitrary.

68. In this context, the Working Group wishes to recall that, under customary international law, everyone has the right not to be arbitrarily deprived of his or her liberty,<sup>1</sup> and persons accused of a crime are entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of any charges against them.<sup>2</sup> Similarly, it recalls that, under applicable international law, persons accused of a crime

<sup>1</sup> Universal Declaration of Human Rights, art. 9. See also A/HRC/22/44, paras. 37 to 75 (Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law).

<sup>2</sup> Universal Declaration of Human Rights, art. 10.

have the right to be presumed innocent and to have all the guarantees of due process respected in a public trial.<sup>3</sup> As part of this right, the national judicial authorities must ensure for the parties to the proceedings in question the right to equal access to present their full case, and equality of arms.<sup>4</sup>

69. In addition, the Working Group has noted that, in order to preserve equality of arms, every individual deprived of liberty must be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other injustice to the detained person.<sup>5</sup>

70. This implies that defendants have the right to submit evidence and testimony relevant to their defence and to have witnesses questioned and examined by the parties to the proceedings before the judge. Once this testimony and evidence has been produced, the court shall evaluate it in an objective and reasoned manner, in accordance with the provisions of the State's legislation.<sup>6</sup>

71. In the present case, the Working Group has ascertained that during Mr. Rosabal Sotomayor's trial, his defence counsel was not allowed to present all the documentary evidence he considered relevant concerning the innocence of the accused and the essential testimonial evidence was not examined by the parties to the proceedings, which constitutes a serious violation of the right to a fair trial, equality of arms and the right to defend oneself against criminal charges, as recognized under international law, in particular articles 9, 10 and 11 of the Universal Declaration of Human Rights. Consequently, the Working Group considers that Mr. Rosabal Sotomayor's detention is arbitrary under category III.

72. The Working Group is also struck by the heavy-handedness of the justice authorities in dealing with Mr. Rosabal Sotomayor, taking into consideration his profile as a defendant and the offence with which he was charged. The Working Group notes that both municipal police officers and State security forces were involved in his arrest – a major security deployment despite the fact that there were no signs that he would resist arrest or try to evade the authorities. It is also noteworthy that the accused was deprived of his liberty for approximately six months during the proceedings before he was convicted, and that the Government has not provided any justification for this.

73. The Working Group also takes note of the response of State agents when the accused's brother learned of his detention and trial and tried to intercede on his behalf, resulting in his also being arrested and later convicted. Mr. Rosabal Sotomayor sought to clarify the facts with witnesses who had been called by the Public Prosecutor's Office, obtaining from them signed documents that refuted the accusation and showed the accused's innocence. Those documents were neither admitted to the trial nor considered in the judgment.

74. In connection with the foregoing, the Working Group is concerned about the information received from the source, and not denied by the Government, concerning the circumstances in which that testimony was obtained and the consequences suffered by the women who testified. The allegation that they were forced by the police to testify against Mr. Rosabal Sotomayor outside the trial is worrying. It is also striking that this testimony was later denied and that the authorities did not ensure that it was confirmed by the witnesses during the hearing.

75. The Working Group also takes note of the information provided by the source, which was not refuted by the Government, concerning the treatment of Mr. Rosabal Sotomayor by the authorities. It is a matter of concern that Mr. Rosabal Sotomayor has been held in cells in inhuman conditions, in solitary confinement, denied family visits, and

<sup>3</sup> Ibid, art. 11.

<sup>4</sup> 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, principle 12, para. 19.

<sup>5</sup> Ibid., para. 20.

<sup>6</sup> See opinions Nos. 1/2015, 14/2017 and 15/2017.

subjected to insults and ill-treatment from the authorities. Mr. Rosabal Sotomayor received an 8-year prison sentence, with accessory penalties including political disqualification and dispossession of his assets and property, which appears to be a harsh sentence that is not commensurate with the charges, as no victim has been identified and there is no individual complainant or person claiming to have suffered harm as a result of the alleged offence.

76. The Working Group considers it unusual that Mr. Rosabal Sotomayor was the only individual convicted of procuring, when this practice would seem to require the participation of more than one person. In this regard, the Working Group notes the information received regarding the favourable treatment received by other individuals, of foreign nationality, who are presumed to have participated in the acts of prostitution that were a prerequisite for the procuring.

77. The points noted above (paras. 73 to 76) lead the Working Group to conclude that the justice authorities did not act independently and impartially towards Mr. Rosabal Sotomayor, who at all times appears to have been treated as a dangerous criminal who was guilty of the charges against him. This conclusion reinforces the Working Group's view that Mr. Rosabal Sotomayor's detention is arbitrary under category III, as he was denied his right to be tried through a fair, independent and impartial procedure, where fundamental guarantees of due process are followed, including especially those relating to humane treatment and the presumption of innocence.

78. The Working Group notes that, although Cuba has not ratified the Covenant and is thus not a party to it, it did sign it in 2008. The Working Group thus urges the Government to respect the object and purpose of the Covenant and expresses the hope that Cuba will ratify it promptly.<sup>7</sup>

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

### **Disposition**

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

The deprivation of liberty of Omar Rosabal Sotomayor, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights, is arbitrary and falls within category III.

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

82. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Rosabal Sotomayor. In addition, the Working Group considers that, under applicable international law, victims of arbitrary detention have the right to seek and obtain reparation from the State, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Working Group therefore requests the Government to make appropriate reparation to Mr. Rosabal Sotomayor, including his immediate release.

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for information and possible action.

84. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

<sup>7</sup> 1969 Vienna Convention on the Law of Treaties, art. 18.

**Follow-up procedure**

85. 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. Rosabal Sotomayor has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Rosabal Sotomayor;
- (c) Whether an investigation has been conducted into the violation of Mr. Rosabal Sotomayor's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Cuba with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

86. 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.

87. The Working Group requests the source and the Government to provide the above-mentioned 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 of any failure to take action.

88. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>8</sup>

*[Adopted on 22 August 2018]*

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<sup>8</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.