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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 63/2019 concerning Josiel Guía Piloto, Marbel Mendoza Reyes and Iván Amaro Hidalgo (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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 17 May 2019 the Working Group transmitted to the Government of Cuba a communication concerning Josiel Guía Piloto, Marbel Mendoza Reyes and Iván Amaro Hidalgo. The Government replied to the communication on 16 July 2019, within the established deadline. 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. The source describes the case of three arrests of political activists – Josiel Guía Piloto, Marbel Mendoza Reyes and Iván Amaro Hidalgo – and claims that their deprivation of liberty resulted from the exercise of their human rights and that they were subjected to proceedings in which the minimum guarantees of a fair, independent and impartial trial were not upheld.

Mr. Guía Piloto

5. Mr. Guía Piloto is a Cuban national who was born in 1982 and has his home in Havana. As the President of the Partido Republicano de Cuba, he has been repressed and harassed by the authorities for his refusal to stop his political work in support of democracy and elections, for which he was arrested at least 22 times between March 2011 and January 2014.

6. According to the source, Mr. Guía Piloto and various members of his family had been followed by the police for years. On 1 December 2016, he was stopped by one of the officers who had been following him on a public road and was asked to show his documents. Mr. Guía Piloto was told that he was being arrested and that he would be taken to a police station along with another activist who was with him. The police officers, who were dressed in civilian clothes, seized Mr. Guía Piloto without reading him his rights or explaining why he was being deprived of his liberty. In response, Mr. Guía Piloto began to criticize the Government and its leaders, at which point the officers physically assaulted him. His transfer to police premises was later justified by the fact that he had verbally criticized the Government and the authorities. According to the source, the sequence of events reveals the legal inconsistency of the arrest, which took place before the allegedly criminal act was carried out.

7. According to the source, Mr. Guía Piloto was accused during the trial of improper conduct for attempting to promote free and democratic elections and consorting with individuals of interest to the police, i.e., other pro-democracy political activists. Mr. Guía Piloto acknowledged that he had criticized the Government when the officers had begun to arrest him but denied that he had offered resistance or used violence. The defence lawyer did not object to the charges, but merely requested the minimum penalty, whereas he should have questioned the legality of Mr. Guía Piloto's having been followed and arrested and the harm that he had suffered and should have challenged the contradictions in the statements made by the police officers as witnesses for the prosecution.

8. The source states that, in the proceedings brought against Mr. Guía Piloto, he was defended by a lawyer who reports to the Ministry of Justice, the main body responsible for the prosecution. For this reason, it is alleged that he was not afforded an adequate defence. In Cuba, both prosecutors and defence lawyers are on the side of the State, working together to ensure that the court rules against the defendant, even if he or she denies the charges.

9. On 8 August 2017, Mr. Guía Piloto was sentenced to 5 years' imprisonment for the offences of contempt of authority and disorderly conduct. The offence of contempt of authority is addressed in article 144 (1) of the Criminal Code:

Any person who, orally or in writing, threatens, slanders, libels, insults, abuses or in any way outrages or offends the dignity or decorum of an authority or public official, or the agents or assistants thereof, in the exercise of their duties or in connection with them shall be liable to a term of imprisonment of between 3 months and 1 year or to a fine of 100 to 300 penalty units or both.

10. The source states that, in Cuba, contempt of authority is understood to include criticizing the Government publicly and that this supports the supposition that Mr. Guía

Piloto was arrested and tried for political reasons. The offence of disorderly conduct is defined in article 200 of the Criminal Code:

Any person who, without justifiable cause, raises the alarm or claims a threat to public safety in a public place or at an event or large gathering shall be liable to a term of imprisonment of between 3 months and 1 year or to a fine of 100 to 300 penalty units or both.

If the acts referred to in the previous paragraph are intended to cause panic or unrest or to otherwise disturb public order, they shall be punishable by a term of imprisonment of between 1 and 3 years or by a fine of 300 to 1,000 penalty units or both.

11. The source points out that, according to the definition of this offence, the disorder must affect a group of citizens; the ruling presumably refers to this requirement in stating that about 40 persons were passing through the place in question. However, the source criticizes the fact that the court refused to take statements from these persons and considered only the contradictory statements made by the police officers. Moreover, the source states that the only public disorder was that created by the police officers when they violently seized the detainees, thereby attracting the attention of passers-by.

12. The source states that Mr. Guía Piloto's health has deteriorated during his stay in prison and that the prison authorities have refused to allow his transfer to hospital or to provide him with the necessary medicines. In addition, there is a concern that new charges may be brought against him in order to arbitrarily extend his sentence. On 22 March 2019, Mr. Guía Piloto was severely beaten in prison for refusing to wear the uniform of an ordinary inmate. He was later transferred to Taco Taco prison.

Ms. Mendoza Reyes

13. Ms. Mendoza Reyes is a Cuban national who was born in 1984 and has her home in Havana. She is an active member of the Unión Patriótica Cubana and has participated in peaceful public activities held by that organization to call for democratic reforms.

14. According to the information received, Ms. Mendoza Reyes was accused of the offence of pre-criminal social dangerousness under articles 72, 76 (1) and 78 of the Criminal Code, which stipulate that:

72. "Dangerousness" refers to an individual's particular proclivity to commit offences, as demonstrated by conduct that is manifestly contrary to the norms of socialist morality.

76.1 Security measures may be ordered to prevent the commission of offences or by reason of their commission. In the former case, these are called pre-crime security measures and, in the latter, post-crime security measures.

78. A person found to be dangerous in the corresponding trial may be subjected to pre-crime security measures.

15. According to the source, such measures are used to detain political opponents or critics of the Government. They do not require evidence, only the suspicion that, at some hypothetical point in the future, the accused person may become involved in activities that are contrary to "socialist morality". Sentences handed down in this regard are allegedly intended to "re-educate" the detainees in respect of their political convictions. In addition, the accusation is used as a warning to dissuade convicted persons' relatives and colleagues from taking part in pro-democracy activities. The source argues that this situation has resulted in a violation of articles 9, 10, 11, 18, 19 and 20 of the Universal Declaration of Human Rights.

16. The source points out that, during the trial, the defendant was represented by a lawyer who was subordinate to the Ministry of Justice. She therefore did not receive adequate legal protection. The lawyer accepted the charges brought by the prosecutor's office and did not plead or introduce evidence in favour of his client. This allegedly violated the principles of adversarial proceedings and equality between the parties.

17. On 18 December 2017, Ms. Mendoza Reyes was sentenced to 2.5 years' imprisonment for pre-criminal social dangerousness.

18. On 30 July 2018, Ms. Mendoza Reyes's sentence was extended by 6 months because she had allegedly committed the offence of contempt of authority, as defined in article 144 (1) of the Criminal Code. The source states that this measure was taken on the basis of a mere accusation made by an official, making it impossible for her to defend herself or seek a legal remedy, and that sentences have often been extended in order to keep political prisoners or prisoners of conscience in prison if they do not take part in political re-education activities in places of detention.

19. Lastly, the source claims that, following Ms. Mendoza Reyes's arrest, her son was expelled from an elementary music school in Havana, without any explanation or justification, as part of a campaign to persecute her and retaliate for her activism.

Mr. Amaro Hidalgo

20. Mr. Amaro Hidalgo is a Cuban national who was born in 1973 and has his home in Matanzas. He is an activist in the Partido por la Democracia Pedro Luis Boitel.

21. According to the information received, police officers arrested Mr. Amaro Hidalgo and another active member of his party on 13 August 2016. Police officers reportedly approached Mr. Amaro Hidalgo and his companion to confirm that they were both wearing T-shirts bearing the slogans "Democracy YES! Dictatorship NO!" and "Down with You Know Who". The officers reportedly demanded that Mr. Amaro Hidalgo either stay out of public places or take off his T-shirt. When both activists refused, a large number of police officers arrived at the scene, arrested the two individuals and took them to a police station. While they were being arrested, Mr. Amaro Hidalgo voiced strong criticisms of the Government and its leaders.

22. At the police station, the police officers reportedly used violent means to force Mr. Amaro Hidalgo and his companion to remove their T-shirts. The officers then offered to release them if they handed over a sum of money and agreed to the confiscation of the T-shirts. Mr. Amaro Hidalgo requested a document attesting to the confiscation of his T-shirt and specifying the reason why it was being taken from him. In response, the officers forcibly locked Mr. Amaro Hidalgo in a cell.

23. Mr. Amaro Hidalgo was charged with the offences of contempt of authority and assault. The former charge was brought under article 144 (1) of the Criminal Code while the latter was brought under article 142 (1), which provides that:

Any person who uses violence or intimidation against an authority or a public official, or the agents or assistants thereof, in order to prevent them from performing or demand that they perform an act that forms part of their duties shall be liable to a term of imprisonment of between 1 and 3 years.

24. Mr. Amaro Hidalgo was represented in court by a lawyer who, like all lawyers, reported to the Ministry of Justice. The source points out that lawyers who mount an excessively robust defence against the prosecution risk losing their professional licence. It is surprising to note that, although the defence lawyer did not obtain an acquittal, he did deny the charges.

25. According to the information provided, the trial was held in camera. In addition, the court ignored the statements made by the witnesses who were briefly detained in the hours before the oral hearing held on 7 March 2017 and whose statements proved Mr. Amaro Hidalgo's innocence. The court took into account only the police officers' statements to the effect that Mr. Amaro Hidalgo had assaulted them when he was being locked in a cell at the police station, which had happened after he had demanded a document attesting to the confiscation of his T-shirt.

26. On 15 March 2017, Mr. Amaro Hidalgo was sentenced to 3 years' imprisonment for contempt of authority and assault.

27. He was transferred to Agüica prison. His state of health is extremely fragile and he is being subjected to beatings and mockery by officials, who deny him access to health care.

28. On 15 February 2019, a few months before he was to have been released, Mr. Amaro Hidalgo's sentence was increased by 5 years because he had allegedly committed an assault in prison. The source states that the unjustified extension of sentences is a tool used to continue detaining dissidents who do not show a submissive attitude during their stay in prison. This new judgment for assault is based on an assault allegedly committed by Mr. Amaro Hidalgo against the officers responsible for forced labour in the prison. According to the source, what really happened was that Mr. Amaro Hidalgo refused to undertake forced labour.

Response from the Government

29. On 17 May 2019, the Working Group transmitted the allegations outlined in the foregoing paragraphs to the Government. The Working Group requested the Government to provide detailed information on these cases, including on the alleged facts, the applicable legislation and any investigations undertaken, within 60 days. The Government responded on 16 July 2019.

30. The Government states that no one in Cuba is detained, persecuted, harassed, threatened or intimidated for exercising his or her human rights, which are fully recognized and protected by law. Furthermore, the defence of human rights is not criminalized and acts of retaliation are not committed.

31. Cuba is a socialist State, governed by the rule of law, where the principle of legality prevails and the authorities and police officers responsible for ensuring security and internal order are strictly required to comply with that principle, as are judicial bodies, lawyers and prosecutors. The threatening and intimidation of citizens, as well as any attack on life or on integrity of person, are outlawed. In addition, mechanisms for filing disciplinary and criminal complaints about such acts have been established.

32. In Cuba, criminal investigation procedures, legal proceedings and victim protection measures are governed by legal regulations and backed by legal safeguards. The design of these procedures is in full compliance with the State's international obligations.

33. The Government states that there is no truth in the claims that Mr. Guía Piloto is a political activist or human rights defender or that he was accused of improper conduct for attempting to work for free and democratic elections and consorting with individuals of interest to the police.

34. It is not true that Mr. Guía Piloto has been subjected to official repression and harassment or that he and members of his family have been followed by police authorities. It is also not true that he has been arrested 22 times because of his alleged political activism. In Cuba, no one is detained for exercising his or her human rights and there are no political prisoners. Arrests are conducted in accordance with the Criminal Procedure Act (No. 5 of 1977), which is applied to persons who have committed an offence defined and punishable under the Criminal Code (Act No. 62 of 1989), irrespective of their political opinions. Mr. Guía Piloto was arrested and prosecuted for an ordinary offence.

35. When he committed the offence, Mr. Guía Piloto was on probation as part of a 3-year custodial sentence for attempted theft that had been handed down on 15 September 2014 and which he served between 17 December 2014 and 12 June 2017. As he was serving a sentence at the time of the events, the extraordinary aggravating circumstance provided for in article 54 (4) of the Criminal Code was applicable.

36. On 1 December 2016, at approximately 11 a.m., Mr. Guía Piloto and another person were at a bus stop, where they were being observed by two law enforcement officers who were watching to ensure that no acts of theft were committed. As the persons in question were acting suspiciously and might have been intending to commit an offence, the police authorities asked them to produce their identity documents, which they did. When the officers told the two individuals to accompany them to a territorial police unit, the two individuals began to insult them. Mr. Guía Piloto, acting in an offensive manner and

showing disrespect for authority, insulted the family of one of the officers and threatened to spit on him. The second individual's attempts to resist arrest created a complex situation that the law enforcement officers resolved in a professional manner.

37. It is not true that the arrest on 1 December 2016 was violent or that the detainee was physically harmed. The authorities responsible for internal security do not assault, repress or beat members of the public.

38. Once the individuals had been arrested, in compliance with all the safeguards provided for in criminal law, the preliminary case file was opened, which included a record of the arrest of 1 December 2016, citing public disorder as the ground for the arrest; the warrant issued by the municipal prosecutor's office of La Habana Vieja, ordering the corresponding precautionary measure of pretrial detention; and the notification of the decision to the defendant, informing him of his right to counsel of his choice, which was signed by Mr. Guía Piloto.

39. In the Government's view, it is not true that Mr. Guía Piloto was defended by a lawyer who reported to the Ministry of Justice. Lawyers belong to the National Organization of Collective Law Practices. Article 5 of the Decree-Law on the Practice of Law and the National Organization of Collective Law Practices (No. 81 of 1984) defines this institution as an independent national voluntary professional association in the public interest, with legal personality and its own assets.

40. It is also untrue that the lawyer did not dispute the charges set out in the indictment. In his response, the lawyer denied that the defendant had committed the acts for which he was charged. After Mr. Guía Piloto had confessed, the lawyer changed his pleas, accepted the offence of contempt of authority and requested the court to hand down a minimum penalty.

41. The Government points out that it is not true that the municipal court refused to hear the 40 persons who had gathered at the spot where the events had taken place. The court admitted the evidence put forward by the prosecution and the defence, all of which was produced at a public oral hearing. The witnesses who belong to the Ministry of the Interior are responsible for tackling theft and are not employed by the State Security Department.

42. The allegations concerning the nature of the offence of contempt of authority under article 144 (1) and (2) of the Criminal Code are false. This offence is not constituted when an individual criticizes the Government but when he or she, orally or in writing, threatens, slanders, libels, insults, abuses or in any way outrages or offends the dignity or decorum of an authority or public official, or the agents or assistants thereof, in the exercise of their duties or in connection with them. It is not true that Mr. Guía Piloto's arrest and subsequent criminal trial were politically motivated.

43. Ms. Mendoza Reyes, the Government submits, is not an activist. It is completely untrue that pre-crime measures are used to arrest political opponents or critics of the Government. Dangerousness arising from antisocial behaviour is discernible in those individuals who habitually break the rules of social coexistence by committing acts of violence, who violate the rights of others, whose behaviour breaches the rules of community life or disturbs community order, or who engage in socially reprehensible vices, which is the case of Ms. Mendoza Reyes.

44. The Government reports that Ms. Mendoza Reyes was detained on 18 December 2017 after all the relevant preventive measures had been exhausted and she had been officially warned 43 times, individually and for her edification, to desist from actions that violate the prevailing moral standards in society. The measure subsequently imposed on her was 2 years' internment in a work or study centre, as prescribed in the Criminal Code.

45. While Ms. Mendoza Reyes was complying with this security measure, she became involved in an internal disturbance and threatened the officer responsible for her. For this incident, she was sentenced to 6 months' imprisonment for contempt of authority in case No. 24/2018, heard by the municipal court of San Antonio de los Baños. Upon the imposition of this penalty, the requirement for her to comply with the pre-crime security measure was suspended in accordance with article 77 (2) of the Criminal Code. This measure was to have resumed when the sentence handed down had been served.

46. In May 2019, the municipal court of Artemisa decided to change this sentence to a non-custodial measure, under which she has been released and is under the supervision of the sentence enforcement judge.

47. In the Government's view, it is not true that Ms. Mendoza Reyes was defended by a lawyer who reported to the Ministry of Justice because lawyers belong to the National Organization of Collective Law Practices. It is also untrue that the Ministry of Justice is responsible for the prosecution. The exercise of criminal proceedings for offences that are prosecuted *ex officio* is the responsibility of the prosecutor's office, as stipulated in the Criminal Procedure Act.

48. With regard to the claim that a son of Ms. Mendoza Reyes was expelled from a music school following her arrest, no student whose mother is listed as Ms. Mendoza Reyes appears in the school's enrolment, attendance, evaluation, transfer or dismissal records.

49. With regard to Mr. Amaro Hidalgo, the Government notes that, at around 10.30 p.m. on 13 August 2016, this individual and another citizen were taken by two law enforcement officers to the National Revolutionary Police unit in Jovellanos because they had both refused to comply with the officers' instructions. It is not true that Mr. Amaro Hidalgo was forced to take off his clothes or that the police offered to release the two individuals in exchange for 30 pesos and the relinquishing of the garment in question.

50. According to the Government, Mr. Amaro Hidalgo struck one of the officers in the face and insulted him in a manner that outraged the integrity, dignity and decorum of the police officers, thereby causing a major disturbance in the police station.

51. For these incidents, the People's Municipal Court of Jovellanos sentenced Mr. Amaro Hidalgo to a single combined penalty of 3 years' imprisonment as the perpetrator of the offences of assault and contempt of authority.

52. The Government states that the allegations that Mr. Amaro Hidalgo's custodial penalty was unjustifiably extended in order to prolong his time in detention are untrue. A new penalty was handed down because he had committed violent acts in the work area, where a task had been assigned to him. When the officer responsible for discipline and order issued him with a warning, an extremely agitated and defiant Mr. Amaro Hidalgo threatened to kill him with the machete he was holding.

53. In Cuba, there are no officers responsible for forced labour in prisons, since no such labour is carried out and no one is required to perform it. Article 30 (12) of the Criminal Code stipulates that sentenced persons who are fit to work may carry out useful work if they agree to do so, as Mr. Amaro Hidalgo had done. The Government stresses that Cuba complies with its obligations under international instruments, since the work carried out by prisoners is remunerated and the years that they work count towards their pension.

54. During the trials, the relevant safeguards were not violated. The trials were oral, public and adversarial, as stipulated in Cuban law on criminal procedure and as reflected in the judgments.

55. In the Government's view, the allegations concerning the individual's state of health, alleged subjection to beatings and mockery by officials and lack of access to assistance and health care are false. The Cuban internal security authorities do not attack, repress or beat members of the public or detainees. Article 60 of the Constitution provides that the State is required to comply with rules governing the treatment of persons deprived of their liberty.

56. It is not true that these individuals were defended by lawyers who report to the Ministry of Justice. There is also no basis to the claim that lawyers who mount a strong defence risk losing their licences to practise the profession. It is not necessary to hold a licence to practise law in Cuba; lawyers need only hold the relevant qualification and be admitted to practise by the National Organization of Collective Law Practices.

Additional comments from the source

57. The Working Group transmitted the Government's response to the source on 17 July 2019. The source transmitted its observations and comments on 27 July 2019.

58. The source provides detailed information on the dates, places and grounds on which Mr. Guía Piloto had been arrested in the past. It also provides information on his work as a pro-democracy activist and human rights defender.

59. The source highlights discrepancies between the statement of facts and legal considerations set out in the judgment and those provided in the Government's response, and points out that these discrepancies reveal that there were irregularities in the proceedings from the outset.

60. For example, the judgment acknowledges that Mr. Guía Piloto was injured during the arrest, while the Government states that the arrest was not violent. The judgment also indicates that, during the trial, Mr. Guía Piloto acknowledged that he had been exercising his freedom of expression but denied the charge of resisting arrest, while the Government's response states that he accepted this charge.

61. According to the source, the judgment acknowledges inconsistencies between the witnesses' account of the events, as recorded in the investigation report, and the statements made at the oral hearing. The Government states that it is untrue that the court refused to hear any of the 40 persons who witnessed the events, but the judgment and the file contain no reference to any witness testimony. The conviction was based solely on the arresting officers' testimony, which contained inconsistencies.

62. In the case of Ms. Mendoza Reyes, the source provides information to support the claim that she is a community activist, including descriptions and examples of the activities undertaken by the Unión Patriótica Cubana as an organization and the work carried out by Ms. Mendoza Reyes.

63. The source asserts that, by definition, neither the "dangerousness" arising from antisocial behaviour nor pre-crime security measures are applicable to situations involving the commission of an offence. In the source's view, Ms. Mendoza Reyes's detention is arbitrary because she was deprived of her liberty when she had neither committed an offence nor been accused of attempting to commit one.

64. In relation to the Government's reference to the rules of social coexistence or community life, the source cites article 72 of the Criminal Code, which provides that dangerousness is demonstrated by conduct that is manifestly contrary to the norms of socialist morality. The source alleges that anyone who behaves in a manner contrary to socialist morality, as defined by the Government, may be charged and deprived of liberty. Pre-crime detention measures are applied to all persons whom the executive considers to be acting in accordance with a morality other than the prevailing one, repressing diversity of thought and the expression of ideas.

65. As to the additional sentence for becoming involved in an internal disturbance and threatening the authorities, which was handed down while Ms. Mendoza Reyes was in prison, the source affirms that it was based on statements fabricated by witnesses in a State-controlled environment and that its purpose was to extend her detention by 6 months.

66. In the case of Mr. Amaro Hidalgo, the source emphasizes that the Government has neither refuted nor contradicted any aspect of the facts recounted by the source concerning the arrest; namely, that it occurred in a public place while Mr. Amaro Hidalgo and a companion were exercising their freedom of expression by wearing T-shirts bearing political slogans.

67. Regarding the incident that allegedly occurred later at the police station and provided the grounds for Mr. Amaro Hidalgo's current deprivation of liberty, the source states that he should not have been arrested in the first place. The source also notes that the only witnesses to the alleged offence committed at the police station are the arresting officers themselves and that the accusation is not supported by any evidence besides their testimonies, which the source alleges to be false.

68. With regard to the incident that led to the extension of the sentence, the source states that, on 17 September 2018, Mr. Amaro Hidalgo reportedly refused, in the presence of the lieutenant-colonel in charge of Agüica prison, to carry out any further work in the prison

after his workday was over. In response, he was allegedly handcuffed and severely beaten by prison authorities in front of the other prisoners.

69. The source reiterates that, pursuant to Decree-Law No. 81 on the Practice of Law and the National Organization of Collective Law Practices and its implementing regulations, the legal profession is subordinate to the executive. In cases involving the State, assigned lawyers who mount a strong defence risk losing their licence to practise the profession because they are opposing the State, which not only pays their salaries but also decides on dismissals from collective law practices, funds their payrolls and oversees their statutes and functions. The admission process is ideologically based and the Minister of Justice directly oversees admissions, separations and dismissals.

Discussion

70. The Working Group thanks the parties for the information provided and for their cooperation.

71. 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. The mere assertion that lawful procedures have been followed is not sufficient to rebut the allegations made in each case.¹

Category I

72. The Working Group is convinced that Mr. Guía Piloto had been followed by authorities and even deprived of his liberty on previous occasions because of his political activity as an opponent of the Government.²

73. In the present case, the Working Group has found that, on 1 December 2016, Mr. Guía Piloto was requested by plainclothes police officers to identify himself. Following an exchange of words, Mr. Guía Piloto was deprived of his liberty.

74. The Working Group found that, at the time of his arrest, Mr. Guía Piloto was requested by law enforcement officials to identify himself even though he had done nothing to justify this request. In other words, the police officers' decision to inconvenience Mr. Guía Piloto by asking for his identity documents was not made because he was acting as if he had committed, or was about to commit, an offence. This initial contact led to a discussion or exchange of words, after which Mr. Guía Piloto was arrested and subsequently prosecuted.

75. The Working Group has not received any information indicating that Mr. Guía Piloto was brought before the judicial authorities on a charge of theft or attempted theft, nor has it received any evidence that Mr. Guía Piloto was arrested in *flagrante delicto* or on the basis of a court order.

76. On the contrary, the Working Group has been informed by the parties that it was Mr. Guía Piloto's exchange of words with the authorities that resulted in his being charged with, and convicted for, contempt of authority and disorderly conduct under articles 144 (1) and 200 of the Criminal Code.

77. With regard to the detention of Ms. Mendoza Reyes, the Working Group has received convincing information indicating that, in December 2017, she was sentenced to 2 years' internment for pre-criminal social dangerousness under articles 72, 76 (1) and 78 of the Criminal Code and was subsequently sentenced to 6 months' imprisonment for contempt of authority under article 144 (1).

¹ A/HRC/19/57, para. 68.

² Inter-American Commission on Human Rights, resolution 29/2019, precautionary measures Nos. 306-19, 307-19 and 326-19, 11 June 2019.

78. As for Mr. Amaro Hidalgo, the Working Group is convinced that police officers arrested him and a fellow party activist in August 2016. Although the Government's response stated only that he and another citizen had been taken by two law enforcement officers to the police station because they had refused to comply with the officers' instructions, it did not specify the reasons why the officers had approached them or the grounds for the initial arrest. The Government also has not refuted the allegation that the authorities asked them to remove T-shirts that bore slogans criticizing the authorities. The source states that the police officers asked Mr. Amaro Hidalgo to either stay out of public places or take off his T-shirt, which he refused to do, giving rise to an exchange of words that led to his arrest and subsequent prosecution. He was sentenced to 3 years' imprisonment for contempt of authority and assault under articles 144 (1) and 158 (1) of the Criminal Code.

79. The Working Group wishes to point out that the definitions of the criminal offences of contempt of authority, disorderly conduct, social dangerousness and assault contained in the Criminal Code are extremely vague and lack the requisite degree of precision to ensure legal certainty for the public.³ The Working Group wishes to recall that the Inter-American Commission on Human Rights has recommended that Cuba eliminate the references to "dangerousness" and "special proclivity of a person to commit crimes", as set forth in the Criminal Code.⁴

80. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and regulate his or her conduct accordingly. In this regard, the Working Group finds that the very vague definitions of the criminal acts for which Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo were tried and deprived of their liberty do not make it possible to discern their meaning or to identify the conduct to be regulated. These provisions are thus in breach of the international obligations of Cuba and are not a valid legal basis for arrest, meaning that it is impossible to invoke any legal basis justifying the detention, which is therefore arbitrary.⁵

81. For this reason, the Working Group finds that the detentions of Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo, having been imposed in violation of article 9 of the Universal Declaration of Human Rights, are arbitrary under category I.

Category II

82. The Working Group emphasizes that everyone has the right to freedom of expression, which includes the right to impart information and ideas of all kinds, whether orally or in any other form. The exercise of this right may be subject only to such restrictions as are expressly established by law and necessary to ensure respect for the rights or reputations of others, or to protect national security, public order, or public health or morals.⁶

83. Freedom of opinion and freedom of expression are indispensable prerequisites for the full development of the person and constitute the cornerstone of all free and democratic societies. Both freedoms are the basis for the effective exercise of a wide range of human rights, including the right to political participation, as set forth in article 21 of the Universal Declaration of Human Rights.

84. The importance of freedom of expression is such that no Government may infringe other human rights on the basis of a person's actual or perceived opinions, whether of a political, scientific, historical, moral, religious or any other nature. It is neither compatible with the Universal Declaration of Human Rights to criminalize the expression of an opinion nor permissible for a person to be harassed, intimidated, stigmatized, arrested or subjected to pretrial detention, trial or imprisonment on account of his or her opinions.

³ Opinions Nos. 8/2017, para. 36, and 20/2017, para. 35.

⁴ *Annual Report 2018*, chap. IV.B (Cuba), para. 122 (6).

⁵ Opinions Nos. 8/2017, 20/2017, 62/2018 and 32/2019.

⁶ Opinion No. 58/2017.

85. The Working Group is aware that Mr. Guía Piloto is a political activist and that, as pointed out in the previous section, he was detained, charged and tried on the basis of a suspicion fabricated by police officers who were following him, which led to his arrest and subsequent sentence for an offence that is vaguely defined under criminal law. The information received by the Working Group also indicates that, during the trial, Mr. Guía Piloto was accused of improper conduct because he was attempting to promote free and democratic elections and was consorting with individuals of interest to the police; that is, other political activists. In view of the foregoing, the Working Group considers that Mr. Guía Piloto was detained in order to curtail his rights to freedom of expression and political participation.

86. Ms. Mendoza Reyes is a member of the Unión Patriótica de Cuba whom the authorities detained under a vague provision of criminal law, without her having committed an offence, after she had received repeated warnings to change her behaviour and activities, affecting her freedom of expression. In view of that situation, the Working Group considers that she was detained because of the political opinions she held and expressed and because she was exercising her right to political participation by taking part in the activities of the aforementioned political party.

87. The Working Group has received extensive information that allows it to conclude that Mr. Amaro Hidalgo, who belongs to an opposition political party and was wearing a T-shirt bearing political slogans, was detained because he had exercised his right to political participation and his right to freedom of thought and expression in order to oppose the Government.

88. Moreover, the Working Group notes that the detentions of Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo took place against a backdrop of systematic arbitrary detentions of political opponents carried out by the Cuban authorities in recent years. In this regard, the most recent report of the Inter-American Commission on Human Rights states that, between January and November 2018, human rights organizations documented 2,150 to 2,697 arbitrary detentions.⁷ The Commission also recognized, in processing requests for precautionary measures, that arbitrary detention is used systematically in Cuba as a “method of harassment” against opposition political organizations such as the Unión Patriótica de Cuba and that the persons concerned are accused of disorderly conduct, pre-criminal social dangerousness and contempt of authority. It also noted that persons deprived of their liberty in this context have been subjected to assaults, threats and ill-treatment and that their access to health care and medical treatment in prisons is restricted.⁸

89. In view of the foregoing, the Working Group finds that the Cuban authorities deprived Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo of their liberty for exercising their rights to freedom of thought, conscience, opinion, expression, association and political participation, as recognized in articles 18, 19, 20 and 21 of the Universal Declaration of Human Rights, which renders the detention arbitrary under category II.

Category III

90. In the light of the findings in relation to category II, under which it was concluded that the detention resulted from the exercise of human rights, the Working Group considers that the detention, and therefore the prosecution, of the persons concerned to be disproportionate and unjustified. However, as the trials did in fact take place and resulted in judgments and custodial penalties of several years, and in view of the claims made by the source and the Government’s response, the Working Group will proceed to analyse whether, in the course of the judicial proceedings, the fundamental components of a fair, independent and impartial trial were respected.

⁷ *Annual Report 2018*, chap. IV.B (Cuba), para. 30.

⁸ Resolution 29/2019, precautionary measures Nos. 306-19, 307-19 and 326-19, para. 22.

91. In accordance with customary international law⁹ and articles 9, 10 and 11 of the Universal Declaration of Human Rights, everyone has the right not to be arbitrarily deprived of liberty, and persons accused of an offence are entitled in full equality to a public hearing by an independent and impartial tribunal for the examination of any charges against them. Persons charged with an offence have the right to be presumed innocent and to have a public trial with all due process guarantees. One aspect of this right is that national judicial authorities must ensure that the parties to the proceedings in question have “the right to equal access to present their full case, and equality of arms”.¹⁰

92. The Working Group has also indicated that, to preserve the equality of arms:

Every individual deprived of liberty shall 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 unfairness to the detained person.¹¹

In this regard, both the prosecution and the judiciary have a duty to ensure that lawyers have access to appropriate information in their possession, such as statements for the prosecution, in sufficient time to enable lawyers to provide effective legal assistance.¹²

93. The foregoing implies that accused persons have the right to present relevant evidence and testimony for their defence and that evidence and witnesses alike should be examined by the parties to the trial. Once the evidence has been thoroughly examined, the court must weigh it in an objective and reasoned manner and must rule in accordance with the legislative provisions of the State.¹³

Presumption of innocence

94. Article 11 (2) of the Universal Declaration of Human Rights provides that no one may be held guilty of any penal offence “on account of any act or omission which did not constitute a penal offence ... at the time when it was committed”. In this regard, the Working Group has established in its jurisprudence that international law requires that the deprivation of a person’s liberty be based on a specific act justifying his or her arrest. This specific act must be an offence defined as such in law. Detention based on the risk that a person may commit an offence has no grounding in international human rights law.¹⁴ The Working Group has considered detentions in Cuba to be arbitrary when persons are deprived of their liberty for a long period on the basis of their alleged dangerousness, with no reference to specific acts defined with the rigour required by criminal law.¹⁵

95. The Working Group also notes that the Committee against Torture has expressed concern about the inclusion of the concept of pre-criminal social dangerousness in the Criminal Code, “in particular the definition, based on subjective and extremely vague concepts”. The Committee against Torture also points out that these measures “can entail internment in specialized labour, educational, care, psychiatric or detoxification institutions for a period of between 1 and 4 years”. The Committee recommended that the State should amend the provisions of the Criminal Code relating to pre-criminal social dangerousness “with a view to ending the use of administrative detention on the basis of vague, subjective and imprecise criminal concepts”.¹⁶

96. In the present case, the detention of Ms. Mendoza Reyes on the basis of the criminal law provisions on pre-criminal social dangerousness constitutes a violation of the

⁹ A/HRC/22/44, paras. 37–75.

¹⁰ A/HRC/30/37, principle 12, para. 19.

¹¹ Ibid., para. 20.

¹² Basic Principles on the Role of Lawyers (A/CONF.144/28/Rev.1), principle 21.

¹³ See opinions Nos. 1/2015, 14/2017 and 15/2017.

¹⁴ Opinion No. 9/2014.

¹⁵ Ibid.; see also opinion No. 17/2013.

¹⁶ CAT/C/CUB/CO/2, para. 12.

fundamental safeguard of the presumption of innocence. Ms. Mendoza Reyes was deprived of her personal liberty despite not having been convicted of any offence. Furthermore, the criminal concept applied in the case relieved the authorities of their duty to conduct an investigation and an independent and impartial trial to determine whether the defendant had committed an offence, in violation of her fundamental right to be considered innocent until proven otherwise and of article 11 of the Universal Declaration of Human Rights.

97. In the case of Mr. Guía Piloto, the information provided by the Government has enabled the Working Group to conclude that he was stopped, asked for his identity documents and ordered to accompany the officers who arrested him to a police station because they suspected, on the basis of his conduct, that he might have been intending to commit an offence. Subsequently, Mr. Guía Piloto was criminally convicted of an offence that took place after the offence that he had supposedly been intending to commit. However, the arrest carried out by the police officers, which the Government acknowledges to have taken place, reveals that the detainee was treated as guilty in that he was asked for his identity documents and taken to a police station before he had even committed the offence for which he was eventually sentenced. This demonstrates that his guilt, and the intention of detaining him, were determined in advance, which constitutes a breach of the fundamental safeguard of the presumption of innocence, in violation of Mr. Guía Piloto's procedural rights under article 11 of the Universal Declaration of Human Rights.

Equality of arms

98. With regard to the cases of Mr. Guía Piloto and Mr. Amaro Hidalgo, the Working Group is convinced that not all of the evidence that might have been used to prove that they bore no responsibility for the acts in question was examined during the trial. In both cases, only the statements made by official witnesses were used and the other persons who allegedly witnessed the events were not called on to give their testimony. This lack of access to evidence also affected the defendants' right to defend themselves and receive effective legal assistance, in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights.

99. In the case of Ms. Mendoza Reyes, the source alleges that her sentence and deprivation of liberty were extended on the basis of an accusation made by an official responsible for her, but she was not given the opportunity to participate in the corresponding trial. The Government merely states that, in case No. 24/2018 of the municipal court of San Antonio de los Baños, the sentence was extended because she had committed the offence of contempt of authority. However, the Working Group received no information from the Government showing that in those proceedings Ms. Mendoza Reyes was able to defend herself against the accusation made by the prison official.

Public nature of hearings

100. The Working Group wishes to recall that article 10 of the Universal Declaration of Human Rights states that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

101. With regard to the detention of Mr. Amaro Hidalgo, the Working Group has been informed by the source that the trial took place in camera. The Government denies this but does not provide any convincing or verifiable information to support its position. The Working Group wishes to recall that, in accordance with the evidentiary rules established in its practice, the burden of proof rests with the Government if it wishes to refute the source's allegations and, in this case, to claim that the requirement to hold a public hearing was met. In view of the fact that the Government has chosen not to do so in the present case, the Working Group is of the view that the trial was conducted in violation of the obligation to hold a public hearing in accordance with article 10 of the Universal Declaration of Human Rights.

Legal assistance

102. The Working Group has been informed that the three detainees' right to legal assistance was violated. The source has stated that the legal profession in Cuba is organized in such a way as to preclude the independent practice of law. Legal professionals are supervised by the Ministry of Justice through the National Organization of Collective Law Practices. Consequently, it is alleged that the lawyers representing Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo did not defend or represent them adequately during the proceedings. They did not put forward arguments in their defence or object to the procedural irregularities or violations of legal safeguards and were not effective in putting forward evidence or in lodging appeals.

103. The Working Group recalls that the right to legal assistance is a fundamental safeguard of a fair trial. It not only enables accused persons to know their rights and exercise a legal defence during the proceedings by formulating relevant arguments and submitting evidence; it also enables defence lawyers to anticipate or object to violations of due process and risks to, or violations of, detainees' integrity of person and health, thereby serving as a safeguard of public trust in the criminal justice process.¹⁷

104. The Basic Principles on the Role of Lawyers establish that:

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.¹⁸

Governments must also ensure that:

lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.¹⁹

105. In addition, the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court establish that:

Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment. Authorities shall respect the privacy and confidentiality of legal counsel-detainee communications.²⁰

106. In the present case, the Government has denied that lawyers report to the Ministry of Justice, pointing out that article 5 of Decree-Law No. 81 on the Practice of Law and the National Organization of Collective Law Practices defines this institution as an independent national voluntary professional association in the public interest, with legal personality and its own assets.

107. On the basis of the information provided by the source, and in the absence of contradictory information from the Government, the Working Group has confirmed that, under Decree-Law No. 81 on the Practice of Law and the National Organization of Collective Law Practices and its implementing regulations (issued by the Ministry of Justice), the Ministry of Justice plays a key role in regulating and supervising the legal profession. This includes overseeing the National Organization of Collective Law Practices,

¹⁷ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187), principle 1.

¹⁸ Principle 14.

¹⁹ Principle 16.

²⁰ A/HRC/30/37, principle 9, para. 15.

setting fees for legal services, acting as an administrative body that considers appeals against decisions to deny individuals entry to the legal profession or to remove them from it, receives reports from the Organization's national board of directors, is empowered to authorize lawyers to practise, authorizes the establishment and dissolution of collective law practices and supervises the training of newly qualified lawyers, among many other duties (see articles 3, 11, 20 and 29 and the first special provision of the Decree-Law and articles 20 and 42 of its implementing regulations).

108. This is not the first time that the Working Group has considered a case in which detainees in Cuba have allegedly faced serious irregularities in obtaining access to legal assistance. On the contrary, there have been recent cases in which detainees have not benefited from the fundamental safeguard of access to a lawyer who can defend them without constraints or interruptions.²¹ The Working Group has even received reports of cases in which lawyers have been subjected to arbitrary detention.²²

109. The Working Group also notes that the Committee against Torture has expressed concern that:

there have been no significant changes in the State party's justice system since its initial report was submitted in 1997. It is particularly concerned about the lack of independence from the executive and legislative branches within both the judiciary and the legal profession.²³

110. With regard to the detention and trial of Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo, the Working Group concludes, on the basis of all the information available to it, that they did not benefit from the fundamental safeguard of an independent legal counsel who represented their rights and defended them freely in accordance with the aforementioned international standards.

111. In short, the Working Group is convinced that the Cuban authorities committed serious breaches of international norms relating to the right to a fair and impartial trial, including articles 9, 10 and 11 of the Universal Declaration of Human Rights, adversely affecting Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo and rendering their detention arbitrary under category III.

112. In view of the additional allegations submitted by the source, the Working Group has decided to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the independence of judges and lawyers.

113. The Working Group notes that the State has not ratified the Covenant and is therefore not a party to it. However, in view of the fact that Cuba signed the treaty in 2008, the Working Group urges the Government to respect the object and purpose of that instrument and to ratify it as soon as possible.²⁴

114. 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, and improving that situation, the Working Group suggests that the Government consider inviting it to conduct an official country visit.

²¹ Opinions Nos. 12/2017, 24/2018, 59/2018 and 66/2018.

²² Opinion No. 64/2017.

²³ CAT/C/CUB/CO/2, para. 18.

²⁴ Vienna Convention on the Law of Treaties, 1969, art. 18.

Disposition

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

The deprivation of liberty of Josiel Guía Piloto, Marbel Mendoza Reyes and Iván Amaro Hidalgo, being in contravention of articles 9, 10, 11, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and III.

116. The Working Group requests the Government of Cuba to take the steps necessary to remedy the situation of Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

117. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to fully release Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

118. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of these individuals and to take appropriate measures against those responsible for the violation of their rights.

119. 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, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the independence of judges and lawyers.

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

Follow-up procedure

121. 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. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo;
- (c) Whether an investigation has been conducted into the violation of the rights of Mr. Guía Piloto, Ms. Mendoza Reyes and Mr. Amaro Hidalgo 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, in particular the Criminal Code, with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

122. 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.

123. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of 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.

124. 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.²⁵

[Adopted on 19 November 2019]

²⁵ See Human Rights Council resolution 42/22, para. 3.