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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016

#### Opinion No. 58/2016 concerning Paulo Jenaro Díez Gargari (Mexico)\*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/30/69), on 23 June 2016 the Working Group transmitted a communication to the Government of Mexico concerning Paulo Jenaro Díez Gargari. The Government replied to the communication on 24 August 2016. The State is a party to the International Covenant on Civil and Political Rights.

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

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

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

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

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

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

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\* In accordance with paragraph 5 of the methods of work, José Antonio Guevara Bermúdez did not participate in the discussion of the present case.



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. Díez Gargari, born on 25 May 1967, is a Mexican national residing in Mexico City, Federal District. He is a lawyer and works as a corporate legal adviser at Tecnología Aplicada Infraiber S.A. de C.V., which owns an independent system for vehicular capacity, revenue and level of service verification (SIVA) on toll roads.

5. The source notes that, in 2011, Infraiber signed a contract with the government of the Estado de Mexico for the installation and operation of SIVA on the state's toll roads. In 2013, Infraiber began to install SIVA on the highway known as the "Circuito Exterior Mexiquense" (Estado de Mexico ring road). The concession to operate the toll road had been granted to a subsidiary of the concessions and construction group headed by Obrascon Huarte Lain S.A. (OHL). Prior to the launch of the operational phase of SIVA on the ring road, Infraiber had identified significant discrepancies between the figures for the remaining unrecovered investment in the ring road, as publicly reported by the OHL Group through the Mexican Stock Exchange, and the figures for the investment approved by the state government. The source notes that Infraiber then requested confirmation from the state government of the amount of the OHL Group's investment, but no such confirmation was ever received, and the attitude of both the OHL Group and the state government towards Infraiber changed radically.

6. The source notes that, on 9 May 2013, Infraiber personnel who were in the process of installing SIVA were violently removed from the ring road by staff of the OHL Group, leading to various legal proceedings, which remain under way. Infraiber subsequently notified the authorities that the OHL Group had already recouped its investment in the ring road, which, should, therefore, revert to the state government at no cost. In addition, Infraiber reported that the OHL Group had engaged in accounting manipulation at the expense of investors and the treasury of the Estado de Mexico. The source also notes that, in August 2015, Mr. Díez Gargari was threatened by the authorities of the Estado de Mexico.

7. According to the information received, on 7 September 2015, the Attorney General's Office led an operation involving more than 10 officers of the Federal Criminal Investigation Police to find Mr. Díez Gargari and bring him in to the Federal Prosecution Service to provide a witness statement in response to a preliminary investigation initiated on the basis of a complaint brought by the OHL Group. The source notes that the operation was conducted in the street at around 2.30 p.m. when Mr. Díez Gargari had left his office and was driving in his car. According to the information received, two trucks stopped Mr. Díez Gargari's vehicle. The agents showed Mr. Díez Gargari a copy of the order requiring his presence to make a witness statement.

8. The source notes that the police officers put a firearm in Mr. Díez Gargari's car while it was being searched, which gave the Attorney General's Office a sufficient pretext — once Mr. Díez Gargari had been brought in to give his witness statement — to change his legal status and consider him a suspect in a new preliminary investigation and to detain him for 52 hours on the premises.

9. The source alleges that the weapon was planted, an allegation corroborated by surveillance footage taken by a closed-circuit camera of a commercial establishment near where Mr. Díez Gargari was arrested. On the basis of the video footage, the Attorney General's Office subsequently conducted a brief investigation and initiated criminal action against its agents, whom it suspected of having committed the offences referred to in articles 248 bis and 255 of the Federal Criminal Code. The source notes that the competent court issued an order for the pretrial detention of 10 officers of the Federal Criminal Investigation Police on charges of evidence tampering with the intent to frame Mr. Díez Gargari on a charge of unlawfully carrying a firearm. The source stresses that this was a ploy to legitimize Mr. Díez Gargari's arrest and clearly demonstrates its arbitrary character.

10. The source notes that this finding was not, however, sufficient for the official of the Prosecution Service heading the inquiry to decide, during the preliminary investigation of Mr. Díez Gargari for the alleged unlawful carrying of a firearm, not to bring criminal proceedings against him, since the official claims that evidence is still being gathered and that the matter will be resolved at the appropriate stage of the procedure. Officials of the Prosecution Service told Mr. Díez Gargari's lawyers that they would withhold any decision not to prosecute until such time as a criminal court judge convicted the officers of the Federal Criminal Investigation Police, a process that could take years.

11. Consequently, Mr. Díez Gargari continues to be suspected of the offence of unlawfully carrying a firearm. With regard to his legal status, he has been temporarily released on bail, and his freedom of movement remains limited by the Federal Criminal Investigation Police. The source notes that Mr. Díez Gargari cannot leave Mexico City without requesting authorization from the Prosecution Service. The source maintains that there is still a strong chance that Mr. Díez Gargari will be arrested again for the offence of unlawfully carrying a firearm, despite sufficient evidence to prove his innocence. According to the source, this situation seriously jeopardizes the safety of Mr. Díez Gargari and his family.

12. The source adds that the authorities have committed other irregularities, including the illegal retrieval of data from Mr. Díez Gargari's mobile telephone without a warrant and the alleged illegal search of Infraiber's offices on 11 September 2015 by over 20 officers of the Federal Criminal Investigation Police, agents of the Prosecution Service and experts. The source indicates that both the investigation of Mr. Díez Gargari as the party suspected of the offence of unlawfully carrying a firearm and the investigation into the offence of unlawfully intercepting private communications are being led by a unit of the Attorney General's Office called the General Directorate of Special Affairs. The source contends that, according to the law, the alleged offences do not fall within this Directorate's remit. The source specifies that it is precisely the Prosecution Service — from which Mr. Díez Gargari was required to request permission to leave the country — that he accuses of having illegally intercepted data from his mobile telephone while it was in the Service's custody.

13. The source notes that Mr. Díez Gargari lodged several complaints regarding his detention as well as regarding evidence tampering by the federal agents who planted the weapon and the illegal retrieval of data from his mobile telephone. These complaints were referred to the Attorney General's Office and to the National Human Rights Commission. In addition, a request for precautionary measures was filed with the Inter-American Commission on Human Rights.

14. The source contends that the case of Mr. Díez Gargari falls within categories I, II and III of the categories applicable to the consideration of cases by the Working Group.

#### *Response from the Government*

15. The Working Group transmitted a communication to the Government of Mexico on 23 June 2016, indicating that it expected a response no later than 22 August 2016. Although the Government did not request an extension of this time limit, it did not reply until 24 August 2016. Given that its response was submitted late without an extension request, the Working Group cannot accept it as having been submitted on time. However, as indicated in paragraphs 15 and 16 of its methods of work, and in accordance with its practice, the Working Group will use all relevant information to assess the facts in this case.

#### *Comments from the source*

16. The late response of the Government was transmitted to the source, but the source's subsequent reply did not contain any new information that would justify the transmittal of further communications to the State.

#### **Discussion**

17. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work. The same applies when a Government's response is not received within the time limit, except

that the Working Group may rely on any relevant information it believes to be critical to its assessment of the source's allegations. The Working Group then shares the late response with the source for its further comments.

18. In the present case, the source has provided a very detailed set of the facts alleged, together with accompanying evidence. Mr. Díez Gargari is a lawyer working for a company contracted to help the Estado de Mexico oversee a toll road with a view to ensuring that, once the return on the investment has been made, the local government receives the proceeds from the toll road and that, at the same time, user fees are reduced. In this context, Mr. Díez Gargari's employer uncovered a sizeable corruption scheme — a discovery that has led to the systematic harassment of Mr. Díez Gargari and his employer. The facts alleged were presented in a coherent and credible manner and were not refuted in the Government's belated response. Consequently, the source has established a *prima facie* case.

19. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has failed to submit its reply within the time limit and has therefore forfeited its right to challenge the *prima facie* credible allegations made by the source.

20. The Working Group considers that the facts alleged by the source have been established. Mr. Díez Gargari was arrested on 7 September 2015 and was released on bail on 9 September 2015. At the time of his arrest, the law enforcement officers served Mr. Díez Gargari with an order requiring his presence to make a witness statement. However, following his arrest, the officers mysteriously discovered a firearm in his vehicle. Consequently, Mr. Díez Gargari was accused of breaking the law on the use of firearms and was taken into custody on those grounds. Mr. Díez Gargari subsequently filed a complaint against the officers for planting the firearm in his car in order to charge him with an offence and submitted as evidence a video from a closed-circuit camera. These facts fit perfectly into the pattern of harassment to which Mr. Díez Gargari has been subjected in recent years. As such, they provide further examples of his being singled out and subjected to political persecution for his work and the work of his employer, in violation of international laws, especially article 26 of the Covenant, on discrimination. These facts constitute a violation falling within category V.

21. At the time of Mr. Díez Gargari's arrest, there appear to have been legitimate grounds for it: his role as a witness. However, the circumstances that led to his being charged with possession of a firearm support the conclusion that there were no justified grounds for his arrest — only a plan to entrap him. Accordingly, it must be concluded that Mr. Díez Gargari's arrest and detention have no legal basis and are in violation of article 9 (1) of the Covenant, thereby constituting an arbitrary deprivation of liberty that falls within category I. The Working Group notes that Mr. Díez Gargari was held for two days and was later released on bail. Any detention, however brief, which lacks a legitimate basis is arbitrary. In the present case, however, it should be noted that his initial detention has been continued in the form of restrictions on his freedom that, to date, lack any foundation in law.

### **Disposition**

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

The deprivation of liberty of Paulo Jenaro Díez Gargari, being in contravention of articles 9 (1) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories V and I.

23. The Working Group requests the Government of Mexico to take the necessary measures to remedy Mr. Díez Gargari's situation without delay and to fulfil its international obligations under the Universal Declaration of Human Rights and the Covenant.

24. Taking into account all the circumstances of the case, in particular the fact that the victim was released on bail, the Working Group considers that an appropriate remedy

would be to terminate the proceedings currently under way against Mr. Díez Gargari, including the immediate removal of the restrictions on his freedom, and to satisfy the right to compensation, as set forth in article 9 (5) of the Covenant.

#### **Follow-up procedure**

25. 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 the proceedings currently pending against Mr. Díez Gargari have been terminated and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Díez Gargari;
- (c) Whether an investigation has been conducted into the violation of Mr. Díez Gargari'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 the Government with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

26. 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.

27. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

28. 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>1</sup>

*[Adopted on 25 November 2016]*

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<sup>1</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.