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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

Opinion No. 19/2019, concerning Tomás Ramón Maldonado Pérez (Nicaragua)

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. 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 11 February 2019 the Working Group transmitted to the Government of Nicaragua a communication concerning Tomás Ramón Maldonado Pérez. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards the 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. Tomás Ramón Maldonado Pérez is a Nicaraguan national born in September 1954. He is a businessman and evangelical pastor, retired army major and former member of the Sandinista National Liberation Front.
5. According to the information received, Mr. Maldonado Pérez was arrested on 2 August 2018 by armed and hooded individuals who neither identified themselves nor presented a search or arrest warrant. The arrest took place in Los Brasiles, Managua, in the home of one of Mr. Maldonado Pérez' daughters, from which he was forcibly removed, dragged by the neck and thrown into a minibus.
6. His family reported the abduction to the National Police in Jinotepe, Carazo, and filed a missing person's report with the Institute of Forensic Medicine.
7. The source indicates that the fate and whereabouts of Mr. Maldonado Pérez following his arrest on 2 August 2018 are unknown. All the source knows is that he was violently abducted by about 10 individuals, allegedly paramilitaries, who beat him and grabbed him by the neck.
8. Mr. Maldonado Pérez reappeared in a court hearing on 24 August 2018, where he was charged with the crimes of terrorism, organized crime, obstruction of public services and aggravated damage to property, as set forth in articles 394, 393, 327 and 244, respectively, of the Criminal Code.
9. After the hearing, Mr. Maldonado Pérez was taken to the maximum-security wing 300 at La Modelo prison, where he has been detained under reportedly cruel conditions, including incommunicado detention, lack of medical care, detention conditions that do not meet basic requirements, and visiting restrictions. Mr. Maldonado Pérez is reported to be in ill health and only gets fresh air for 15 minutes once a fortnight.

Background

10. According to the source, Mr. Maldonado Pérez was a member of the Sandinista National Liberation Front during the insurrection to overthrow General Somoza. After the Revolution, in 1979, he founded the Sandinista People's Army and was awarded medals and certificates of recognition for his service. In 1990, he retired with the rank of major.
11. In civilian life, Mr. Maldonado Pérez was an active member of the ruling party, serving as municipal political secretary in Jinotepe and later as departmental political secretary of Carazo until 2007. During this time, he also served as alternate legislator in the Central American Parliament for the Sandinista National Liberation Front.
12. The source reports that, since 2007, Mr. Maldonado Pérez has been a member of the Full Gospel Business Men's Fellowship International, and was chairman of a chapter until the day of his arrest. He is also a member of the Evangelical Church with headquarters in Jinotepe. Two years ago, he was anointed pastor and founded a church in the city of Diriamba.
13. The source notes that in the past few years, Mr. Maldonado Pérez has been critical of the Government of Nicaragua, especially since the government crackdown on demonstrations and peaceful public protests in April 2018. As a pastor, Mr. Maldonado Pérez used to preach beside the roadblocks and barricades erected by the people of Jinotepe in the context of these protests.
14. The source also points out that, in this time of social unrest, Mr. Maldonado Pérez was approached by a group of pro-government acquaintances who tried to recruit him to participate in the army crackdown on the protests, which he outright refused to do.

Trial and sentencing

15. The source indicates that Mr. Maldonado Pérez has remained in detention without access to a lawyer. The only times he was allowed to speak with his lawyer were five minutes before the hearings began.

16. The hearings took place on 5 December 2018 and 31 January 2019. During the second hearing, Mr. Maldonado Pérez was convicted of the four crimes with which he was charged, namely: terrorism, organized crime, obstruction of public services and aggravated damage to property. He was sentenced to 34 years' imprisonment. The defence has filed an appeal with a domestic court, although with little hope of success.

Health issues and detention conditions

17. The source states that on the day of the trial, 31 January 2019, Mr. Maldonado Pérez' physical condition appeared to have deteriorated significantly and he mentioned that he had not been examined by a forensic clinician or doctor, although his lawyer had requested such an examination in conformity with article 53 of Act No. 745 on the enforcement and judicial oversight of criminal punishments and the granting of prison privileges. The deterioration of his health seems to have been the result of a failure to adhere to his medication regimen, malnutrition, lack of exercise and inadequate care.

18. The source states, for example, that on the day of the trial Mr. Maldonado Pérez was taken to the Managua courthouse at 6 a.m. without being given breakfast or his medication. At 2.30 p.m., he was at last allowed something to eat. That day, he said that he could no longer bear the hunger and the feeling of weakness.

19. Mr. Maldonado Pérez was examined by a doctor, who noted that he had swollen feet and skin lesions, two symptoms associated with diabetic neuropathy and circulation problems. The doctor asked for Mr. Maldonado Pérez to be examined by a forensic clinician without delay to ensure adequate monitoring and treatment.

20. The source reiterates that the place of detention and the treatment he receives are not appropriate for someone with his health condition and put his life at risk.

21. The source concludes by stating that, when Mr. Maldonado Pérez' family come to visit and talk to him, they are constantly surrounded by four to six prison guards, which prevents them from speaking their minds or communicating freely.

Allegations

22. The source considers that Mr. Maldonado Pérez' detention is arbitrary under categories I, II, III and V of the Working Group's methods of work. Firstly, because prior to his arrest he should have been presumed innocent until proven otherwise. In accordance with article 2 and the final paragraph of article 95 of the Code of Criminal Procedure of Nicaragua, any person charged with a criminal offence has the right to be presumed innocent and treated as such throughout the proceedings. This is underwritten by article 34 (1) of the Constitution.

23. In the case of Mr. Maldonado Pérez, it is alleged that both the constitutional principle and the Code of Criminal Procedure provision were clearly violated by the authorities, that is, by both the judiciary and government bodies (the National Police and the prison service, which come under the Ministry of the Interior). Mr. Maldonado Pérez was treated like a convicted criminal even before a public oral trial had been held. The source considers that the act of publicly presenting and portraying Mr. Maldonado Pérez in the government-controlled media as a convicted criminal, to the detriment of his reputation and the principle of the presumption of innocence, constitutes a violation of his rights.

24. The source also alleges a violation of his right to be informed of all information held on him by the State authorities and of the reasons for holding such information. The source submits that the National Police should have informed Mr. Maldonado Pérez at the moment it opened the investigation, so as to enable him to contest the charges, submit evidence and prepare his defence.

25. The source alleges that Mr. Maldonado Pérez' procedural rights were violated under article 3 and article 95 (3), (5), (6) and (8) of the Code of Criminal Procedure, which set out the fundamental rights of all accused persons deprived of their liberty, including the right to communicate with their family, a lawyer of their choosing or a legal advisory service, in order to notify them of the detention within three hours of arrest.

Response from the Government

26. On 11 February 2019, the Working Group informed the Government of the above allegations. In accordance with paragraph 15 of its methods of work, the Government was requested to furnish the Working Group, within 60 days from the date of the transmittal of this communication, with the fullest possible information regarding the case and the allegations. In accordance with paragraph 16, if the Government desires an extension of the time limit, it may be granted a further period of a maximum of one month in which to reply.

27. The deadline to respond expired on 12 April 2019. However, the Working Group received no response from the Government of Nicaragua.

Discussion

28. 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.

29. In its jurisprudence, the Working Group has established the way 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 with the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

30. The Working Group notes that Mr. Maldonado Pérez, a businessman and evangelical pastor, is also a retired army major and former member of the Sandinista National Liberation Front.

Category I

31. According to the information received, and not rebutted by the Government, Mr. Maldonado Pérez was arrested on 2 August 2018 by 10 armed and hooded individuals who neither identified themselves, nor presented a search or arrest warrant. The arrest occurred in Los Brasiles, in the home of one of Mr. Maldonado Pérez' daughters, from which he was forcibly removed, beaten and violently thrown into a minibus.

32. The Working Group was persuaded that, from the moment of his arrest, the fate and whereabouts of Mr. Maldonado Pérez were unknown, which means that he was held incommunicado and forcibly disappeared until the moment he was brought to trial on 24 August 2018.

33. The Working Group has indicated that anyone who is arrested must not only be informed, at the time of their arrest, of the reasons for their arrest,¹ but also of the judicial avenue for challenging the lawfulness of the deprivation of their liberty.² Moreover, detained persons have the right to be informed by the authority, at the time of arrest, of their right to counsel of their own choosing.³

34. The Working Group has also indicated that incommunicado detention violates the rights to have access to a lawyer of one's own choosing, to be brought promptly before a judicial authority and to challenge before a judge the lawfulness of the detention. For these reasons, the Working Group considers that incommunicado detention constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the

¹ International Covenant on Civil and Political Rights, art. 9 (2).

² 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 7 (Right to be informed).

³ Ibid., Principle 9 (Assistance by legal counsel and access to legal aid).

International Covenant on Civil and Political Rights.⁴ Furthermore, as the Working Group has stated on previous occasions,⁵ incommunicado detention amounts to a prima facie enforced disappearance, which has been universally condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international human rights instruments.⁶

35. In the light of the above, the Working Group considers the detention of Mr. Maldonado Pérez to be arbitrary in accordance with category 1.

Category II

36. In order to establish whether the deprivation of liberty of Mr. Maldonado Pérez resulted from the exercise of the rights and freedoms guaranteed in the Universal Declaration of Human Rights, the Working Group recalls that, according to its established practice, all persons have the right to freedom of expression, which includes the right to impart information and ideas of all kinds, either orally or through any other media of their choice. The Working Group further recalls that the exercise of those rights may be subject to restrictions such as those provided by law and necessary to ensure respect for the rights or reputations of others, or for the protection of national security, public order, or public health or morals.⁷

37. The Working Group shares the view of the Human Rights Committee that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.⁸ Both freedoms, as reflected in articles 18 and 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, provide the basis for the full enjoyment of a wide range of other human rights, such as the right to freedom of assembly and association, and for the exercise of the right to vote, as set forth in articles 20 and 21 of the Universal Declaration of Human Rights and articles 21, 22 and 25 of the Covenant.⁹

38. The Working Group recalls that the right to have a religion is an absolute right and can therefore not be subject to restrictions or derogations, whereas the right to manifest one's religion, set forth in article 18 (3) of the Covenant, may be subject to such limitations as are prescribed by law and necessary to protect public security, order, health, or morals or the fundamental rights and freedoms of others. The Human Rights Committee, in its general comment No. 22 (1993) on freedom of thought, conscience or religion, has noted that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.

39. The Working Group recognizes the importance of the right to freedom of opinion. No Government may infringe upon a person's other human rights as a result of the opinions – political, scientific, historical, moral or religious – expressed by or attributed to them. In the view of the Working Group, criminalizing the expression of an opinion is incompatible with the Universal Declaration of Human Rights and the Covenant. According to the Human Rights Committee, this implies that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of the Covenant. Any form of effort to coerce the holding or not holding of any opinion is prohibited.¹⁰

⁴ Opinion No. 53/2016, para.47.

⁵ Opinion No. 76/2017, para 59.

⁶ Declaration on the Protection of All Persons from Enforced Disappearance, art. 1, General Assembly resolution 47/133.

⁷ Opinion No. 58/2017, para.42.

⁸ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

⁹ Ibid., para. 4.

¹⁰ Ibid., paras. 9 and 10.

40. The Working Group has received credible information that Mr. Maldonado Pérez has been critical of the Government of Nicaragua, especially since the crackdown on demonstrations and peaceful public protests in April 2018.

41. The Working Group was persuaded that Mr. Maldonado Pérez was approached by a group of pro-government individuals who tried to recruit him to participate in the army crackdown on the protests, which he refused to do.

42. The Working Group was also informed that Mr. Maldonado Pérez, as a pastor, used to preach beside the roadblocks and barricades erected by the people of Jinotepe in the context of the protests.

43. The Working Group therefore considers that Mr. Maldonado Pérez was arrested as a result of the exercise of his right to freedom of opinion and expression – for his criticism of government policy – and as a result of the exercise of his right to freedom of religion – for preaching beside the roadblocks and barricades erected by the people during public protests. He was thus deprived of his liberty in violation of articles 18 and 19 of the Universal Declaration of Human Rights and of articles 18 and 19 of the Covenant, rendering his detention arbitrary in accordance with category II.

Category III

Incommunicado detention and enforced disappearance

44. In the present case, as discussed in paragraphs 31 and 32 above in relation to category I, the Working Group found that Mr. Maldonado Pérez was deprived of his liberty and held incommunicado (enforced disappearance) for 22 days, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the Covenant.

Presumption of innocence

45. Both the Universal Declaration of Human Rights and the Covenant recognize the right of anyone charged with a criminal offence to be presumed innocent. This right imposes a number of obligations on State institutions, including the prosecution services, to treat persons accused of a criminal offence as innocent until the charges have been proved beyond reasonable doubt. In the view of the Working Group, this carries an obligation for all public authorities to refrain from prejudging the outcome of a trial, which means refraining from making public statements affirming the guilt of the accused.¹¹

46. In the present case, the Working Group has received prima facie credible information, which was not rebutted by the Government, that various government officials publicly declared Mr. Maldonado Pérez guilty before any public oral proceedings had been instituted. The Working Group was persuaded that the government-controlled media presented and portrayed Mr. Maldonado Pérez as a convicted criminal, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant, which recognize the right to be presumed innocent.

Time and facilities for the preparation of the defence

47. The Working Group recalls that all persons charged with a criminal offence have the right to be informed promptly and in detail and in a language which they understand the nature of and cause of the charge against them, as well as to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.¹²

48. The Working Group shares the view of the Human Rights Committee that a person's right to be informed promptly of the nature and cause of the charges against him or her may be satisfied orally (verbally), provided that notification is subsequently confirmed in

¹¹ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30.

¹² International Covenant on Civil and Political Rights, art. 14 (3) (a) and (b).

writing, that the applicable law is stated and that the acts on which the charge is based are described.¹³

49. With regard to the right to defence counsel and to adequate time and facilities to mount a defence, the Working Group is of the opinion that accused persons should have adequate time and facilities for that purpose, which implies that they should have prompt access to lawyers, are able to communicate privately with them in conditions that fully respect the confidentiality of their communications,¹⁴ have adequate time to prepare their defence¹⁵ and are provided with access to the file containing all documents, evidence and other materials that the prosecution intends to submit to the court.¹⁶

50. The Working Group also considers that the factual and legal basis for the detention must be disclosed to the detainee and/or his or her representative without delay so that they have sufficient time to prepare a challenge. This disclosure includes supplying a copy of the detention order; providing access to, and a copy of, the case file; and disclosing any material in the authorities' possession, or to which they may have access, with regard to the reasons for the deprivation of liberty.¹⁷

51. The Working Group was persuaded that Mr. Maldonado Pérez was detained for at least 22 days without having access to counsel of his choosing, since the first time he had contact with a lawyer was five minutes before the trial in which he was tried on charges of terrorism, organized crime, obstruction of public services and damage to public property. The Working Group was also persuaded that Mr. Maldonado Pérez had no access to and was unaware of the evidence brought by the prosecution, which impaired the exercise of his right to a defence, especially as he was not given adequate time and facilities to prepare his defence.

52. In the light of the foregoing, the Working Group considers that the Government failed to guarantee Mr. Maldonado Pérez' right to adequate time and facilities for the preparation of his defence, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant.

53. The Working Group was persuaded that the 22-day incommunicado detention (enforced disappearance) of Mr. Maldonado Pérez, the remarks from government officials concerning his guilt, and the denial of adequate time and facilities to prepare a defence constitute a violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 9 and 14 of the Covenant, and are of such gravity as to render the detention arbitrary under category III.

54. The Working Group notes that, since the beginning of the protests in April 2018, the special procedures of the Human Rights Council have sent at least five different communications to the Government of Nicaragua expressing concern about numerous allegations of human rights violations, including excessive use of force during peaceful public demonstrations, resulting in death, arrests, damage to the physical integrity of persons and violations of the rights to freedom of expression and association. One of the communications, for example, relates to the collective detention of 40 persons on their way to a peaceful public protest. Smear campaigns and public stigmatization by State officials and the authorities against human rights defenders, political opponents or government critics were also mentioned.¹⁸

55. Lastly, in order for the Working Group to establish a direct dialogue with the Nicaraguan authorities, including the Government, representatives of civil society and detainees, with the aim of gaining a better understanding of the situation of deprivation of

¹³ Human Rights Committee, general comment No. 32, para. 31.

¹⁴ *Ibid.*, para. 34.

¹⁵ *Ibid.*, para. 32.

¹⁶ *Ibid.*, para. 33.

¹⁷ 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, Guideline 5 (Right to be Informed).

¹⁸ See communications NIC 1/2018, NIC 3/2018, NIC 4/2018, NIC 5/2018 and NIC 1/2019, available at: <https://spcommreports.ohchr.org/>.

liberty in the country and the reasons why arbitrary detention occurs, the Working Group suggests that the Government may wish to consider inviting the Working Group to make a country visit.

Health issues

56. In the light of the information received about the health of Mr. Maldonado Pérez and the supply of medicines, as well as his alleged ill-treatment while in detention, the Working Group, in accordance with paragraph 33 (a) of its methods of work, refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Disposition

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

The deprivation of liberty of Tomás Ramón Maldonado Pérez is arbitrary, being in contravention of articles 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights and articles 9, 14, 18 and 19 of the International Covenant on Civil and Political Rights, and falls into categories I, II and III.

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

59. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Maldonado Pérez immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

60. The Working Group urges the Government to ensure a full and independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Mr. Maldonado Pérez and to take appropriate measures against those responsible for the violation of his rights.

61. 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 and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

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

64. 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.

65. 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 action of its own 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.

66. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹⁹

[Adopted on 1 May 2019]

¹⁹ Human Rights Council resolution 33/30, paras. 3 and 7.