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Working Group on Arbitrary Detention

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No. 52/2011 (Argentina)

Communication addressed to the Government on 2 May 2011

Concerning: Iván Andrés Bressan Anzorena and Marcelo Santiago Tello Ferreyra

The State has been a party to the International Covenant on Civil and Political Rights since 8 August 1986

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate in its decision 2006/102 and extended it for a further three-year period in Council resolution 15/18 of 30 September 2010. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. 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 sentence or despite an amnesty law applicable to him) (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 International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

3. The Working Group welcomes the information provided by the Government in its communication of 30 June 2011.

Submissions

Communication from the source

4. The source states that Marcelo Santiago Tello Ferreyra, an Argentine citizen — born on 25 July 1970 — and businessman living in the city of Mendoza, was arrested there on 13 May 2008 by provincial police officers.

5. Iván Andrés Bressan Anzorena, an Argentine citizen and police officer, married and living in Mendoza, was arrested on 27 March 2008 in the city of Añatuya (Santiago del Estero) by provincial police officers. He was initially held in incommunicado detention for more than seven days, during which he was not allowed to contact either his family or a defence lawyer.

6. They were allegedly arrested in connection with the murder of Michel Agudelo Córdoba, a Colombian citizen, which occurred on 19 March 2007 in the city of Añatuya (Santiago del Estero).

7. Bressan Anzorena was tortured while in police custody. Once placed at the disposal of the court, he was subjected to torture and reprisals, which, although reported, were never investigated. He was beaten on various parts of his body and smothered with plastic bags placed over his head, and electric shocks applied to his testicles and legs. His jaw was dislocated as a result of the torture, according to a forensic medical certificate issued on 18 April 2008 at the Dr. Ramón Carrillo Regional Hospital. The certificate indicated multiple injuries with mandible dislocation, and injury to the abdomen and right leg.

8. According to the source, soon after the murder of Mr. Agudelo Córdoba the following persons were arrested in addition to Mr. Bressan Anzorena:

(a) Miguel Ángel Figueredo Taboada, a Paraguayan citizen;

(b) Stela Mendes Giménez, also a Paraguayan citizen;

(c) Cristián Alejandro Cardozo Bustos;

(d) Rafael Antonio Ciriani;

(e) Sandra Bravo, an unmarried Argentine citizen living in Añatuya. She was with the victim in the vehicle in which he was killed. She was held in incommunicado detention for 12 days after her arrest;

(f) Arturo Ernesto Uriarte, a mechanic.

9. Mr. Figueredo Taboada was held in incommunicado detention until 27 March 2008. Although he was accused of the murder, he twice gave statements as a witness, it being noted in the record that he was deprived of his liberty. In his statements he incriminated

Tello Ferreyra, Bressan Anzorena and Uriarte. Consular representatives of the Republic of Paraguay were not allowed to visit him during his detention. Days later he was released.

10. Figueredo Taboada and his fellow countrywoman, Mendes Giménez, were arrested on the basis of a simple verbal order issued by Judge Álvaro Mansilla. They were detained without a written and substantiated order, in clear violation of article 18 of the Constitution of the Republic and article 56 of the local Constitution, as well as article 255 of the Code of Criminal Procedure.

11. Mendes Giménez was also held in incommunicado detention without any visit from her consular representative until 27 March 2008, the day she was released. She was never informed of the reason for her arrest, nor was she called to give a statement.

12. Cardozo Bustos and Ciriani were arrested for background checks, transferred to different police stations and held in incommunicado detention. They were questioned without being told of what crime they were accused or the alleged evidence against them. They were released seven days after their arrest for lack of evidence.

13. All the detainees reported being tortured during their detention by agents from the Añatuya Brigade, led by Mr. Fructuoso Rodríguez and from the special police unit for high-risk operations (GETOAR). They also reported the theft of their personal belongings. These complaints were received by the Añatuya prosecutor's office, and yet no proceedings to establish the facts or identify the torturers were ever ordered.

14. The torture suffered by Ciriani, Cardozo Bustos and Uriarte consisted of blows to the ears, beatings with hoses and a mock execution by firing squad.

15. Tello Ferreyra was arrested on the basis of claims made by Mr. Figueredo Taboada. He was detained for 7 days in the sixth precinct police station and then transferred to the city of Santiago del Estero, where he was held for nearly 12 months in the basement of a judicial institution without natural light. He was beaten several times during his stay there. His complaints were not investigated, nor were his torturers identified. He was later transferred to the provincial prison, where he was held incommunicado, on the basis of a court-issued warrant, for more than 10 days in a cell without any light or bathroom facilities. He was placed inside the shower fully clothed.

16. Bressan Anzorena was transferred to the provincial prison, where he was held incommunicado and beaten on the forehead and back. He was later transferred to the Pinto prison in an outlying area of the province, some 200 kilometres from Añatuya.

17. Bravo was held at the offices of the Special Police Unit for Women in Añatuya. Her father, Raúl Medina, and her sister, María Isabel Gómez, were called to give witness statements, despite being close relatives of the person concerned. During her detention, Bravo attempted suicide by self-immolation. After more than 2 years in pretrial detention she was released.

18. Several habeas corpus proceedings, criminal charges and pleadings filed on behalf of the detainees over the course of their nearly three years in detention have not been successful.

19. According to the source, Tello Ferreyra and Bressan Anzorena are the only ones still in detention almost three years after their arrest. Their detention is arbitrary. They were arrested without a written arrest warrant, accused on the grounds of statements by persons charged with an offence, subjected to prolonged and illegal periods of incommunicado detention, and subjected to torture which, although reported, was not investigated, nor were those responsible punished. These persons were arrested on the basis of statements made by Figueredo and Mendes Giménez, who themselves were arrested without a written arrest warrant, charged, and denied their right to consular assistance as provided for in the Vienna

Convention on Consular Relations. The source states that, because the detention and questioning of Figueredo and Mendes Giménez were illegal, their statements, the sole ground for the arrest warrant against Tello Ferreyra and Bressan Anzorena, are also illegal and thus null and void.

20. According to the source, the right of Tello Ferreyra and Bressan Anzorena to be tried without undue delay has been violated. They should have been tried within a reasonable period of time or released. However, more than three years after their arrest they have still not been put on trial.

21. The source concludes by requesting the immediate release of these two persons, fair compensation measures for the physical and psychological damage they have suffered, and sufficient guarantees that they will not be arrested again. The source further requests that Judges Álvaro Mansilla and Liliana Lami be brought before a judges impeachment panel for violations of Argentine legislation and the rules of due process. The source also calls for investigations into the situations of illegal incommunicado detention and allegations of torture.

Response from the Government

22. In its response dated 30 June 2011 the Government challenges the Working Group's competence to hear the case at hand, given that it has also been submitted to the Inter-American Commission on Human Rights. The Government is of the view that, in the light of the aforementioned circumstances, the source's submission should be considered inadmissible.

23. The Government maintains that the Human Rights Council took over the functions and powers of the former Commission on Human Rights, which had established that a complaint would be considered inadmissible if it was pending before another human rights body, so as to avoid unnecessary duplication of international procedures. To support this position, the Government refers to the Fact Sheet on complaints procedures issued by the Office of the United Nations High Commissioner for Human Rights.[1]

24. In conclusion, the Government argues that the communication from the source should be declared inadmissible, and that it is therefore pointless to examine the merits of the case, since the conclusion reached is sufficient.

Considerations of the Working Group

On the Government's claim that the source's communication is inadmissible

25. Before analysing the content of the communication concerning Iván Andrés Bressan Anzorena and Marcelo Santiago Tello Ferreyra, the Working Group will address the claim of inadmissibility raised by the Government as its sole response.

26. Firstly, it should be clarified that the aforementioned Fact Sheet No. 7 issued by the Office of the High Commissioner states as follows: "If you have submitted the same claim to another treaty body or to a regional mechanism such as the Inter-American Commission on Human Rights, the European Court of Human Rights or the African Commission on Human and Peoples' Rights, the committees cannot examine your complaint, the aim being to avoid unnecessary duplication at the international level. This is another issue of admissibility that you should cover in your original complaint, describing any claims you

[1] See *Complaints Procedure*, Office of the United Nations High Commissioner for Human Rights, Human Rights Fact Sheet Series, No. 7. Geneva, 2003. Available at: http://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf. p. 10.

have made and specifying the body to which you applied, the date and the outcome." Obviously, the alleged inadmissibility is valid only if the communication is submitted to "another treaty body or to a regional mechanism", such as the Inter-American Commission on Human Rights, and if the second communication is also submitted to such a body. This point will be further addressed later on.

27. Secondly, it should be noted that the Working Group has consulted the website of the Inter-American Commission on Human Rights,[2] which shows no case involving allegations of arbitrary detention or torture brought by Tello or Bressan or their representatives. In its response, the Government mentions only a request for precautionary measures identified as MC-187-08 (08-2008), which has yielded no further action. The Inter-American Commission on Human Rights has not taken any measures to process the request, neither accepting nor rejecting it, nor has it requested information.

28. The above notwithstanding, the Working Group considers it advisable to adopt a stance on the Government's claims concerning a ban on duplication of procedures among treaty bodies, and a United Nations system procedure for information on situations of systematic human rights violations.

29. Many international human rights treaties, both universal and regional, contain clauses allowing the relevant treaty body to receive communications or complaints from individuals, provided that the matter has not been submitted to another international investigation or settlement procedure. Such clauses may be found in article 5.2 (a) of the First Optional Protocol to the International Covenant on Civil and Political Rights; article 4.2 (a) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; article 77.3 (a) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 22.5 (a) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 3.2 (c) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; articles 30.2 (e) and 31.2 (c) of the International Convention for the Protection of All Persons from Enforced Disappearance; and article 2 (c) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Within the inter-American system, article 46.1 (c) of the American Convention on Human Rights establishes the same principle, as does article 35.2 (b) of the Convention for the Protection of Human Rights and Fundamental Freedoms in the European system.

30. The principle underlying all the provisions cited in the preceding paragraph is that the same matter must not have been submitted to another international investigation or settlement procedure. International settlement implies a conflict between two or more States, when the States concerned agree on a procedure for reaching a peaceful solution. This includes, arbitration, bilateral or multilateral negotiations, mediation by other States or subjects of international law, conciliation efforts with or without the good offices of other States, or any other procedure agreed upon by the States concerned. An "international investigation or settlement procedure" implies a conflict involving two or more States.

31. Extra-conventional procedures, known as special, confidential or public procedures, are a very different thing and are established by the Economic and Social Council and the United Nations Human Rights Council — unconnected with any treaty — for the purpose of considering situations and cases not necessarily involving any conflict between States. Such is the case, for example, of resolutions 780 and 1235.

32. Indeed, what characterizes extra-conventional procedures is that their purpose is to examine the situation of respect for human rights in a given country (geographical

[2] Address: www.cidh.org.

procedures) or to conduct a universal review of respect for one or more specific rights (thematic procedures).

33. Thus, the United Nations General Assembly, in its resolution 2144 (XXI), invited the Economic and Social Council and the former Commission on Human Rights to "give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur". In compliance with this request, the Commission adopted its resolution 8/XXIII of 16 March 1967 in which it decided "to give annual consideration to the item entitled 'Question of the violation of human rights and fundamental freedoms', ... without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international covenants and conventions on the protection of human rights and fundamental freedoms". That resolution led the Council to adopt its resolution 1235/XLII, in which it decided that the Commission may "in appropriate cases, and after careful consideration of the information thus made available to it, [...] make a thorough study of situations which reveal a consistent pattern of violations of human rights". The resolution goes on to state that the Council would review those provisions "after the entry into force of the International Covenants on Human Rights", an obvious reference to the two international covenants concluded in New York in 1966.

34. The difference is therefore evident between, on the one hand, the mechanisms for individual complaints or communications established under human rights treaties, whether universal or regional, the aim of which is to adopt decisions that provide an individual right to compensation for the complainant and consequently an obligation on the State to provide compensation, and, on the other hand, mechanisms intended not for individuals but rather for the Commission, now the Human Rights Council, to perform an in-depth study of situations that reveal a consistent pattern of violations of rights and freedoms.

35. Jurists have maintained that, in order for a communication to be declared inadmissible on the ground that it violates the principle that the same matter must not have been submitted to another procedure of international investigation or settlement, the two bodies in question must be of a similar nature. The Human Rights Committee has interpreted the expression "another procedure of international investigation or settlement", arguing that the two procedures should be similar with regard to the nature of the body that examines the case (only intergovernmental bodies or those established by a treaty between States), and that under both procedures the investigation must lead to a settlement and/or a decision on the individual case.[3]

36. Another jurist argues that the same matter must not be submitted for simultaneous examination by the Inter-American Commission on Human Rights in Washington D.C. or the Inter-American Court of Human Rights in San Jose, Costa Rica, by the European Court of Human Rights in Strasbourg, or by the United Nations Educational, Scientific and Cultural Organization (UNESCO) complaint procedure. The matter may, however, be submitted for examination by the United Nations Commission on Human Rights in accordance with Economic and Social Council resolution 1503 on a confidential procedure, or by the working groups or special rapporteurs of the Commission, such as the Special Rapporteur on the question of torture or the Working Group on Arbitrary Detention.[4]

[3] C. Medina and C. Nash, *Manual de Derecho Internacional de los Derechos Humanos*, Centro de Derechos Humanos, 2003. It should be noted that Cecilia Medina was member and Chairperson of the Human Rights Committee.

[4] A.M. de Zayas, "Desarrollo jurisprudencial del Comité de Derechos Humanos en aplicación del Protocolo Facultativo del Pacto Internacional de Derechos Civiles y Políticos: Visión Práctica", in Carlos Jiménez Piernas (ed.), *Iniciación a la práctica en derecho internacional: derecho comunitario*

37. Article 33 of the rules of procedure of the Inter-American Commission on Human Rights establish the same criteria on the duplication of procedures. After reaffirming in subparagraph 1 that the Inter-American Commission on Human Rights shall not consider a petition if its subject matter "is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member", the article further states: "However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when: (a) the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement."

38. The Inter-American Commission on Human Rights reached the same conclusion in its report on case 11.026 (César Chaparro Nivia and Vladimir Hincapié Galeano, Colombia).[5] Colombia requested that the case be declared inadmissible on the ground that it failed to meet the requirement on duplication of international procedures set forth in article 46.1 (c) of the American Convention on Human Rights. It argued that the alleged torture of the victims was already under study by the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions,[6] both of whom formed part of the United Nations system. The Inter-American Commission on Human Rights considered as follows: "The aforementioned UN rapporteur and working group do not belong to the category of international bodies whose mandate could entail the duplication referred to in Articles 46 (1) (c) and 47 (1) (d) of the American Convention. These are mechanisms that do not lead to the effective settlement of the alleged violations. Furthermore, the State has not presented information demonstrating that these bodies have resolved the situation referred to by the victims in this case. For these reasons, the Commission finds that the requirements set forth in Articles 46 (1) (c) and 47 (1) (d) have been satisfied."[7]

On the arbitrary nature of the deprivation of liberty

39. The facts of the case that led to the complaint, which fall within the mandate of the Working Group, are the subject of criminal proceedings for the murder of Colombian citizen Michel Agudelo Córdoba, which occurred on 19 March 2007 in the city of Añatuya, Santiago del Estero. The proceedings are being held in the Court of Añatuya in the province of Santiago del Estero. The following irregularities have allegedly occurred during the criminal proceedings:

(a) Andrés Bressan Anzorena was arrested on 27 March 2008 and was held in incommunicado detention for more than seven days;

(b) Bressan Anzorena suffered various types of torture, which were neither investigated nor prosecuted;

(c) One of the persons initially accused was interrogated as a witness and not as a person accused of the offence, having been arrested without a written and substantiated order as required under the national Constitution and the provincial Constitution of Santiago del Estero. The same error was also made in the case of other persons who testified against Bressan Anzorena and Tello Ferreyra. It should be pointed out that one of

europeo, Marcial Pons, Madrid, 2003.

[5] Inter-American Commission on Human Rights, report No. 30/99. Available at: http://cidh.org/annualrep/98eng/Admissibility/Colombia%2011026.htm.

[6] Ibid, para. 15.

[7] Ibid, para. 26.

the witnesses, who was also accused at one point, attempted suicide and was not released until two years later;

(d) Tello Ferreyra and Bressan Anzorena, who after more than three and a half years are still deprived of their liberty without having been convicted, have been deprived of their right to be tried without undue delay and within a reasonable period of time;

(e) The complainants have not enjoyed the human right to an effective remedy to regain their freedom. It has been reported that several habeas corpus proceedings, criminal charges and pleadings filed on behalf of the detainees over the course of their nearly three years in detention have not been successful.

40. The Government has not responded to any of these allegations.

41. According to article 183 of the Code of Criminal Procedure and Corrections of Santiago del Estero, "the incommunicado detention of the accused may be ordered by the judge only when there is sufficient cause, which must be explained. Complete isolation may last for no more than 24 hours". The situation experienced by Bressan Anzorena constitutes the denial of a fundamental right, as it is more restrictive than the standards on detention set forth in international human rights treaties and declarations. Therefore, in accordance with article 5, paragraph 2, of the International Covenant on Civil and Political Rights, this situation constitutes a violation of the Covenant. Tello Ferreyra, who was arrested in Mendoza and transferred to Santiago del Estero to stand trial, was also held in incommunicado detention in that city for 10 days ahead of the trial.

42. It is also argued that the absence of a written arrest warrant for Bressan Anzorena, as required under the provincial Constitution of the place where the offence was committed and where the criminal trial is being held, also constitutes a violation of a basic procedural right.

43. The detainees Tello Ferreyra and Bressan Anzorena have been deprived of their liberty for more than three and a half years, the judge having once again requested an extension to the investigation. They have thus been deprived of their right to be tried within a reasonable period of time (International Covenant on Civil and Political Rights, art. 9, para. 3) and without undue delay (ibid., art. 14.3 (c)). The complainants have also been denied the right to be judged in liberty. According to article 9, paragraph 3, of the Covenant, "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement". After three and a half years of imprisonment, pretrial detention has exceeded any reasonable period of time. Article 56 of the provincial Constitution of 2005 even states that "deprivation of liberty during the proceeding is on an exceptional basis only", and it stipulates that a written arrest warrant must be provided.

44. It is further argued that the defendants Tello Ferreyra and Bressan Anzorena, in addition to submitting requests for release before the judge hearing the case, have also submitted at least two habeas corpus appeals for their provisional release, all of which have been rejected by the provincial courts and judges. The latest of these submissions was rejected on 8 August 2011. Thus, they have also been denied the rights enshrined in article 8 of the Universal Declaration of Human Rights and in article 2, paragraph 3 (a) and (b), and article 9, paragraph 4, of the Covenant. The Working Group considers that habeas corpus is a human right recognized in the Covenant.

45. The Working Group is of the view that the non-observance of the aforementioned international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, is of such gravity as to give the deprivation of liberty of Mr. Marcelo Santiago Tello

Ferreyra and Mr. Iván Andrés Bressan Anzorena an arbitrary character according to category III of its methods of work.

Opinion of the Group

46. In the light of the foregoing, the Working Group renders the following Opinion:

(a) The deprivation of liberty of Mr. Marcelo Santiago Tello Ferreyra and Mr. Iván Andrés Bressan Anzorena has violated the human rights protected under articles 3, 5, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights, and article 2, paragraph 3, and articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, and is therefore arbitrary in connection with category III of the Working Group's methods of work;

(b) Consequent upon the Opinion rendered, the Working Group requests the Government of Argentina to take the necessary steps to enable the above-mentioned persons to exercise their personal freedom, including the possibility of releasing them on bail which may be subject to guarantees to appear for trial, or at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgement;

(c) The Working Group also requests that an investigation be ordered into the torture suffered by Mr. Tello and Mr. Bressan according to the communication.

[Adopted on 17 November 2011]