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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021

Opinion No. 63/2021 concerning Maykel Castillo Pérez (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,¹ on 10 August 2021 the Working Group transmitted to the Government of Cuba a communication concerning Maykel Castillo Pérez. The Government replied to the communication on 11 October 2021. 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 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 any other status, that aims towards or can result in ignoring the equality of human beings (category V).

¹ [A/HRC/36/38](#).



Submissions

Communication from the source

4. Maykel Castillo Pérez is a Cuban national who resides in Havana. Mr. Castillo is an independent musician and writer. He is one of the co-writers of the song “Patria y Vida” (Homeland and Life) and is also a co-founder of Movimiento San Isidro, which he started with a group of fellow artists and intellectuals who are facing discrimination and who opposed the adoption of Decree-Law No. 349 of 17 October 2017 on the grounds that it imposes restrictions on freedom of artistic expression. Mr. Castillo is not affiliated with any officially recognized organization, as the Government has prohibited him from joining any such organization, thus preventing him from performing his artistic work publicly. He is being discriminated against because of his pro-democracy stance and his human rights activism.

5. According to the information received, Mr. Castillo has been subjected to repressive acts of all kinds at the hands of the police. It has been documented that, between 14 December 2019 and 18 May 2021, Mr. Castillo was arrested 121 times.² He was imprisoned for 1 year and 1 month, from 23 September 2018 to 23 October 2019, including time spent in pretrial detention, after a trial fraught with irregularities, in which he was falsely accused of assault for having filmed a police operation on a public street with his cellular telephone, which he refused to hand over to the police. On 22 April 2020, Mr. Castillo was fined 3,000 Cuban pesos pursuant to Decree-Law No. 370 for stating on his social media accounts that a Cuban woman had died in the street from coronavirus disease (COVID-19). In relation to the same incident, he was also detained for three days, without charge and without judicial protection.

6. The source indicates that, prior to his arrest, Mr. Castillo was being harassed at his home by police officers, who were preventing him from leaving the house. On 8 March 2021 at 10.30 a.m., as Mr. Castillo was walking down a public street and streaming a live video from his cellular telephone at the intersection of San Miguel Street and Lucena Street, State security agents, accompanied by National Police officers, were watching and waiting for him. When he arrived at the surveillance point, Mr. Castillo asked one of the agents why he was being watched. An officer attempted to confiscate his cellular telephone by force. When Mr. Castillo refused to hand over the telephone, a State security agent dressed in plain clothes with no identification number violently arrested him, although he was not apprehended in flagrante delicto nor was there any police report of a prior offence, any written order or any rational justification. Mr. Castillo was taken to the police station on Dragones Street, in the municipality of Centro Habana. The details of his location were not communicated to his family. Hours later, he was released without charge.

7. According to the source, on 12 March 2021, on a public street in La Habana Vieja (Old Havana), a police patrol car pulled up alongside Mr. Castillo and a uniformed officer accompanied by a State security agent dressed in plain clothes got out of the vehicle. They informed Mr. Castillo that he was under arrest. Mr. Castillo put up no resistance and got into the car, without knowing where he would be taken. After spending hours in detention at the La Habana Vieja police station, he was released without charge.

8. On 3 April 2021, at approximately 5.30 p.m., several activists, artists and intellectuals gathered peacefully near the police station in Cuba y Chacón to enquire about the whereabouts of one of the coordinators of Movimiento San Isidro, who had been arrested hours earlier. Having spent two hours demanding information and transparency, they were violently dispersed, beaten, arbitrarily arrested and taken to police stations. Mr. Castillo was reportedly taken by seven police officers to the police station in Cuba y Chacón. He was allegedly beaten by the officers inside the station. He was then transferred in a police patrol car to police station No. 4 in the municipality of Cerro. After hours of threatening interrogations, he was released without charge in Cristo de La Habana park, having sustained injuries to his neck and hands from the beating he had received.

9. According to the source, on 4 April 2021, at 6 p.m., Mr. Castillo was the victim of a failed abduction attempt by the police at the intersection of Cuba Street and Acosta Street, as

² The source provided the Working Group with the specific dates of each of the 121 arrests.

he was walking to the headquarters of Movimiento San Isidro. Moments earlier, he had managed to circumvent the police cordon set up around his house to prevent him from leaving. Mr. Castillo reportedly observed that several police officers were harassing a woman in the street and approached them to intervene, asking the officers to treat the woman with respect. This served as a pretext for one of the officers to attempt to arrest Mr. Castillo, under the false pretence that he was not carrying his identity card. Mr. Castillo does not have an identity card, because it was confiscated by the State security service, a fact known to the police. When Mr. Castillo was immobilized, local residents confronted the police officers in an attempt to prevent the arrest. This confrontation happened spontaneously; Mr. Castillo did not resist arrest.

10. The source indicates that, as in previous cases, Mr. Castillo was not committing an offence at the time of the attempted arrest, nor had he been formally accused of any offence. The offences with which he has now been charged were described by the Prosecutor's Office as having occurred after the arrest, not before it. In other words, he was charged with offences that were supposedly committed after the failed arrest attempt, not before it, whereas these events should have proceeded in logical and chronological order. This proves that the arrest was arbitrary and unlawful, insofar as the officers were not acting in accordance with their duties; rather, they failed to discharge their duties. Moreover, since the police officer concerned provoked the incident, acted unlawfully and abused his position, the offences of assault, resistance, contempt and disobedience under articles 142 to 144 of the Criminal Code are not applicable, as confirmed by the National Organization of Collective Law Firms in its publication on the Cuban Criminal Code and by the People's Supreme Court in the jurisprudence set out in its bulletins.

11. On 13 May 2021, Mr. Castillo was reportedly arrested again while trying to leave a house on Plaza de la Revolución, where he had been under police surveillance for more than a month. At the time of the arrest, Mr. Castillo was neither committing nor attempting to commit an offence. Mr. Castillo was arrested without being shown a police warrant and was not informed of any new charges against him. Hours later, he was released without charge.

12. The source indicates that Mr. Castillo was arrested on 18 May 2021. According to case file No. 24/2021 of the Prosecution Unit for Offences against State Security, Mr. Castillo was arrested pursuant to a complaint filed against him allegedly by the police officer who had attempted – in an extremely violent manner and without following proper legal procedure – to carry out the failed arrest on 4 April 2021. He was charged with the offences of assault, resistance, escape from custody and disorderly conduct.

13. According to the source, the police officer stated that he was acting “in accordance with his duties” when Mr. Castillo had physically assaulted him. In addition, the officer falsely stated that Mr. Castillo had refused to wear a protective face mask and had begun shouting “*abajo la Revolución*” (down with the Revolution), “*patria y vida*” (homeland and life) and that the dictatorship was over. The officer also stated that the situation had attracted the attention of local residents, which is why he and his fellow officers had got out of their car and arrested Mr. Castillo. The source claims that it was the police officers themselves who caused the disorder and outrage among the local residents. The officers, not Mr. Castillo, were behind the disorderly conduct. It is not true that Mr. Castillo assaulted the police officer as claimed; in fact, he had his hands raised or voluntarily placed behind his back and maintained a peaceful demeanour at all times. The officer concluded his report by stating that Mr. Castillo had assaulted him by “punching and kicking him” and had stolen his service weapon and whistle, which, according to the officer, had allowed Mr. Castillo to evade arrest.

14. The source claims that it is untrue that Mr. Castillo incited his neighbours to disorderly conduct. Dozens of people spontaneously came out to defend him from the excessive use of force and abuse by the police officers, and he was saved from this violent behaviour thanks to their intervention, which he did not solicit. It is untrue that Mr. Castillo took the police officer's gun and whistle and tore his uniform. According to the source, the incident in question is yet another example of the violent and repressive behaviour of the authorities. The aim of the criminal charges brought against Mr. Castillo is to imprison a spokesperson who has continuously denounced censorship, social injustice and police repression.

15. Mr. Castillo is also being charged with the offences of spreading an epidemic and aggravated contempt. These charges are based on the allegations that, on 4 April 2021, he failed to comply with COVID-19 prevention measures by shouting and singing without correctly wearing a protective face mask, together with his neighbours in a public space. The source points out that the act of which Mr. Castillo has been accused, namely singing in a public space without correctly wearing a mask, cannot be considered more than a mere infraction, punishable by a fine.

16. The source also contends that Mr. Castillo did not commit the offence of contempt. The State security service is attempting to have Mr. Castillo convicted of the offence of aggravated contempt, which is defined in and punishable under article 144 of the Criminal Code. The source is of the view that singing in the street in front of a crowd of a few dozen or perhaps a few hundred people cannot constitute a crime.

17. The source claims that the song Mr. Castillo sang was released in early 2019³ and that it was reportedly inspired by a statement made by the President of Cuba in 2017.⁴ According to the source, if releasing this song were an offence, the authorities would already have pressed charges against the songwriters. The Government has not taken any action in respect of the song, which has been shared throughout the country through alternative channels, nor has it taken action against the songwriters. To make it a criminal offence to sing this song, in respect of which no legal action has been taken since its release over two years ago, would be a fraudulent, selective and discriminatory application of the criminal offence of contempt.

18. The source maintains that the criminal offence of contempt is not compatible with the right to liberty of person protected by international human rights law, as it can be used to limit freedom of expression in an arbitrary and discriminatory manner, illegitimately and in favour of private interests.⁵

19. The source asserts that the Prosecutor's Office should have had free and unlimited access to case file No. 24/2021 of the Prosecution Unit for Offences against State Security, which does not have the authority to investigate ordinary offences, and that the Office is thus failing to fulfil its role in the preliminary phase of the criminal proceedings. The source argues that Mr. Castillo has not received independent legal assistance since his arrest, despite having been appointed counsel. As required by law, his lawyer belongs to a collective law firm attached to the Ministry of Justice and controlled by the State through the National Organization of Collective Law Firms. The firm's degree of autonomy is determined by the Government.

20. On 30 June 2021, the public defender petitioned the Attorney General's Office, requesting a change to the preventive measure imposed, namely pretrial detention, since Mr. Castillo is being detained more than 160 km from Havana, where he and his family members reside. Given this distance, Mr. Castillo's lawyer has been unable to consult with him, despite having made various requests. It is therefore argued in the petition that the rules of due process have not been followed in Mr. Castillo's case and that he has not received legal assistance at any point during the proceedings.

21. The source claims that the offences of assault, resistance, escape from custody and disorderly conduct are not applicable, based on the source's interpretation of the Criminal Code and jurisprudence, and insists that Mr. Castillo has been systematically and continuously harassed by the police. The false accusations levelled against him arose only after the police had violated his constitutional rights.

22. The source affirms that Mr. Castillo was arrested even though he was neither committing nor attempting to commit a crime. Until 18 May 2021, no sanctions or preventive measures had been imposed on him. The accusation that he escaped from custody or evaded a security measure imposed on him is therefore arbitrary. No arrest warrant had been issued against him as a result of his having been charged, sanctioned or declared to be in contempt of court in the context of a previous criminal proceeding. The criminal acts of which Mr.

³ <https://www.youtube.com/watch?v=MU-4QKiWwBI>.

⁴ <https://www.youtube.com/watch?v=jdr3A5LLaKE>.

⁵ See A/HRC/20/17.

Castillo is accused were concocted after his arbitrary arrest, with a view to criminalizing his behaviour.

23. The offences with which he is charged are alleged to have been committed during or after the arrest. None are alleged to have taken place before it. Neither the offence of assault nor resistance with which Mr. Castillo is charged, nor any other offence against the police, is applicable. The actions of the officers were unlawful, abusive and violent and were thus contrary to their legal duties.⁶

24. The source claims that there is no legal basis for the application of the offence of escape from custody in this case, that none of the constituent elements of the offence were committed and that the offence has never been applied to circumstances such as those of the incident that occurred on 4 April 2021. According to article 163 (1) of the Criminal Code, this offence may be committed by persons being held in police custody in a prison or police cell, or by persons being transferred from one prison to another, or from prison to a court, a hospital or a place of questioning, or similar circumstances. Mr. Castillo was not in custody. He avoided capture by the police because he was not shown an arrest warrant, charge sheet or transfer order.

25. The source indicates that the offence of escape from custody carries a penalty of up to 3 years' imprisonment, and claims that Mr. Castillo has been charged with this offence in an attempt to keep him in prison for as long as possible.

26. According to the source, there is no evidence to support the charge of disorderly conduct and none of the constituent elements of the offence were committed, as Mr. Castillo did not incite, provoke or encourage the gathering of people or the subsequent demonstrations that occurred on 4 April 2021. The source reiterates that a video taken at the time of the events shows that, in fact, it was the violent behaviour of the police officers that provoked, stoked and sustained the public backlash against the officers' actions at the time of the arrest. The source is of the view that the Prosecutor's Office cannot prosecute Mr. Castillo for exercising his human right to peaceful demonstration together with his neighbours outside the headquarters of Movimiento San Isidro.

27. The source indicates that the legal definition of the offence of disorderly conduct requires that the accused deliberately disrupt the public order, without a justifiable cause, by raising an alarm or claiming a threat to public safety. Mr. Castillo did not engage in any such act. Moreover, he had no intention of causing panic or unrest, and neither his songs nor his statements disrupted the public order. Mr. Castillo clearly did not commit the offence of disorderly conduct, given that he did not provoke any fights or altercations and had no intention of doing so. In fact, the opposite is true.

28. The source indicates that, in accordance with article 7 (b) of Act No. 83, on the Attorney General's Office, one of the aims of the Office is to take action against dissidents or "counter-revolutionaries" who allegedly act against the independence and sovereignty of the State or against its political, economic and social interests.

29. According to the source, the preventive measure of pretrial detention ordered by the Public Prosecution Service against Mr. Castillo is arbitrary because it does not comply with the requirements set out in articles 241 and 242 of the Criminal Procedure Act, which prohibit detention that is not imposed in connection with an alleged offence and in accordance with the procedure established by law. Certain formalities, such as the filing of an indictment and the presentation of a formal arrest warrant, may be omitted only when a person is caught attempting to commit an offence; in cases of flagrante delicto; when a person violates a custodial sentence or security measure by means of escape; or when a defendant is found to be in contempt of court. According to the source, since Mr. Castillo's detention does not fall into any of these categories, his arrest and pretrial detention are unlawful.

30. In addition, the source states that article 252 of the Criminal Procedure Act provides that pretrial detention may be imposed only when the existence of an offence is established and there are sufficient grounds to assume that the accused is criminally responsible for that

⁶ See judgments of the Criminal Division of the Supreme Court of Cuba No. 3325 of 22 September 2010, No. 955 of 26 April 2013 and No. 1782 of 23 July 2013.

offence. In Mr. Castillo's case, these conditions have not been met, and he should therefore be released and awarded reparations and compensatory damages.

31. A writ of habeas corpus was filed with the Provincial Court of Havana on 19 May 2021, in which it was alleged that the facts of the case amounted to a violation of articles 94 and 95 of the Constitution, which provide that a person may be arrested, prosecuted and convicted only for an established criminal offence and in accordance with due process.

32. The source claims that due process rights and guarantees have been violated. Mr. Castillo was deprived of his rights pursuant to an unsubstantiated decision issued by the authorities that does not comply with the applicable legal requirements. He was arrested on the order of police officers acting outside their authority and the legal framework of their mandate. He was not treated with respect for his dignity and his physical, psychological and moral integrity and was subjected to violence and coercion in an attempt to force him to testify against himself. He was not informed of the charges against him, as is required, and was denied both communication with his family immediately after his arrest and the minimum conditions necessary to mount a defence.

33. The source also maintains that, in view of the systematic nature of the arbitrary arrests, the State security service, which represents the executive branch and is responsible for coordinating the systematic surveillance and repression of Mr. Castillo, violated articles 41, 51, 52 and 54 of the Constitution, since its abusive actions infringed his rights to personal freedom, freedom of movement and freedom of thought, conscience and expression.

34. The purpose of the remedy of habeas corpus is to prevent persons deprived of liberty from being denied judicial protection. In the writ of habeas corpus mentioned above, it was requested that Mr. Castillo be given a public hearing so that he could be heard by and present his allegations to a court, which would fulfil the essential purpose of the remedy, i.e., the presentation of Mr. Castillo to family members and interested third parties. He would also have been able to show how he had been injured at the hands of the police.

35. In the writ of habeas corpus, it was also requested that the relevant registers, documents, files, records, official monitoring reports and other pieces of evidence be examined to help establish the facts of the case and determine the truth. The aim was to have the court verify that no prior charges had been brought against Mr. Castillo.

36. However, none of the proceedings and actions requested in order to establish the truth and secure Mr. Castillo's freedom were considered by the First Criminal Division of the Provincial People's Court of Havana. In a one-page decision issued on 24 May 2021, the Court dismissed the writ. The Court found that, according to the prosecutor's report and other unspecified documents, Mr. Castillo had been imprisoned pursuant to a decision on preventive measures issued by the Prosecutor's Office. It offered no arguments or explanations justifying its decision to deny the requested measures, thus demonstrating its ineffectiveness and lack of interest in ensuring justice for all parties on an equal footing.

37. The source further indicates that a prosecutor's order issued on 3 June 2021 in response to the request for a change to the preventive measure upheld Mr. Castillo's detention on the grounds that the original circumstances that had motivated the decision had not changed, with no explanation of what those circumstances were.

38. The source argues that there are no legal grounds that the Government can invoke to justify Mr. Castillo's arrest, the criminal proceedings launched against him or his placement in detention as a preventive measure. According to the source, the repressive actions taken against Mr. Castillo show that the aim of his detention is to restrict his exercise of the rights and freedoms guaranteed in articles 1, 2, 5, 7 to 9, 13, 18 to 20 and 28 of the Universal Declaration of Human Rights. The source claims that in Mr. Castillo's case, the total non-observance of the international standards relating to the right to a fair criminal trial, enshrined in the Universal Declaration of Human Rights and in accepted international instruments, is of such gravity as to give his deprivation of liberty an arbitrary character. The source also claims that the detention is a violation of international law, in that it constitutes an act of discrimination on the basis of political and other opinions and ignores the principle of equality of human beings with regard to freedom of thought and expression. The source argues that Mr. Castillo's arrest and detention are arbitrary under categories I, II, III and V.

Response from the Government

39. On 10 August 2021, the Working Group transmitted the allegations from the source to the Government and requested detailed information by 11 October 2021 clarifying the factual and legal grounds for Mr. Castillo's detention and explaining how it was compatible with the State's international obligations. The Working Group called on the Government to ensure Mr. Castillo's physical and mental integrity. In the context of the global pandemic, and in accordance with the World Health Organization recommendations of 15 March 2020 concerning the response to COVID-19 in places of detention, the Working Group urged the Government to prioritize the use of non-custodial measures at all stages of criminal proceedings, including during the pretrial phase, the trial, sentencing and sentence enforcement.

40. The Government replied on 11 October 2021, stating that the Cuban authorities had carried out the necessary investigations, with full respect for the rights and procedural guarantees to which all persons are entitled without any distinction. The Government asserts that it is untrue that Mr. Castillo was arbitrarily detained. It denies that he was under constant police surveillance, that he was prevented from leaving his home or travelling freely, and that he was violently arrested on several occasions without a rational justification or prior complaint. It finds it regrettable that a person with a criminal record that includes a number of criminal trials is being presented as a human rights activist and defender.

41. The Government claims that Mr. Castillo has exhibited lamentable antisocial behaviour and has a long criminal record. He has received official warnings on 18 occasions and has been fined 12 times for disorderly conduct, illicit economic activities, unlawful gambling and failure to carry an identity document.

42. The Government reports that Mr. Castillo was sentenced to 1 year's imprisonment for contempt in 2003, 9 years' imprisonment for robbery using force or intimidation in 2004 and 1 year's imprisonment for resistance in 2015.

43. On 23 September 2018, Mr. Castillo was sentenced by the Provincial Court of Havana to 1 year and 6 months in prison for assault, a sentence he served in prison until he was granted parole on 23 October 2019. His sentence ended on 25 November 2019.

44. The Government claims that it is untrue that Mr. Castillo was arrested and fined on 22 April 2020 for posts that he had published on social media. He was taken to the National Revolutionary Police station for the offence of disobedience and given an official warning for failure to comply with the epidemiological measures in place to prevent and control the spread of COVID-19, after which he was released without charge.

45. The Government reiterates that Mr. Castillo exhibits antisocial behaviour that is amply documented in police records. On 3 April and 13 May 2021, Mr. Castillo was caught making insulting and offensive statements on a public street for the purpose of disrupting the public order.

46. The Government claims that it is untrue that Mr. Castillo was the victim of an attempted abduction by the police on 4 April 2021. Mr. Castillo, together with another individual, provoked police officers who were questioning a woman who had violated COVID-19 health protocols. Mr. Castillo adopted a defiant and aggressive attitude towards the officers, verbally and physically assaulted them, attempted to snatch an officer's service weapon and, with the help of various other persons, managed to evade arrest.

47. The Government reports that Mr. Castillo was arrested on 18 May 2021 on the basis of complaint No. 18445/21, contained in investigative file No. 42 of 2021, for the offences of assault, contempt and escape from custody arising from acts of disobedience, aggressive behaviour and insulting language towards officers of the National Revolutionary Police.

48. The Government underlines that Cuba is a party to and respects the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance. There are no disappeared persons in Cuba and there will never be room for impunity, or for laws or regulations that allow it.

49. The Government indicates that, immediately after Mr. Castillo's arrest, his family was notified that he would be taken to the Infanta y Manglar police station and informed of the reasons for his arrest.

50. The Government states that the preliminary investigation and other investigative measures were initiated within 72 hours of the arrest, in accordance with the Criminal Procedure Act.

51. The Government reports that Mr. Castillo was transferred to the Department for the Investigation of Offences against State Security on 20 May 2021. There, in compliance with health protocols, Mr. Castillo was tested for COVID-19, and the Directorate General for Criminal Investigation opened preliminary case file No. 24/2021. On 24 May, a pretrial detention order was issued, of which Mr. Castillo was notified that same day. Mr. Castillo has been provided with all necessary medical assistance during his detention.

52. The Government also indicates that Mr. Castillo communicated with his family by telephone on 21 May 2021. During this conversation, he informed them of where he was being held, asked for toiletries and cigarettes and spoke with his daughter. He also contacted another family member, whom he informed of his health condition and personal needs.

53. According to the Government, Mr. Castillo was questioned by the Prosecutor's Office, which confirmed his legal status in the proceedings and informed him of the reasons for his detention. The charges against him in relation to the events of 4 April 2021 were indicated in a written indictment and he was informed of his right to make or refrain from making a statement. He agreed to make a statement but refused to sign the relevant document, so the presence of two witnesses was required to attest to the procedure.

54. On 31 May 2021, Mr. Castillo was released from the custodial facility, for which purpose he underwent a new COVID-19 test, and was transferred to "Kilo 5" prison in Pinar del Río. Mr. Castillo immediately notified his family of the transfer by telephone.

55. Mr. Castillo communicates by telephone with family and friends two or three times a day, like all other prisoners, since prison visits are currently prohibited owing to the COVID-19 pandemic. He has received food and toiletries from family members on four occasions.

56. It is untrue that Mr. Castillo did not receive independent legal assistance from the moment of his arrest. One of the duties of the National Organization of Collective Law Firms is to provide legal services to the entire population, for which purpose it has facilities and offices offering legal services throughout the country. During the proceedings, Mr. Castillo has received legal advice and representation from the lawyers of the La Víbora Collective Law Firm.

57. The Government states that Mr. Castillo's counsel arrived at the Department for the Investigation of Offences against State Security on 1 June 2021 to review the preliminary case file. In full compliance with the procedural rights and freedoms of his client, on 19 June his counsel reviewed the proceedings recorded in the preliminary case file and lodged a challenge (*recurso de queja*) before the investigating body, which was rejected because it had been filed after the legally established deadlines. Notification of this decision was issued on 19 July 2021.

58. On 13 August 2021, Mr. Castillo received a visit from his lawyer, who met with him at the prison. Subsequently, Mr. Castillo spent 14 days in isolation, in accordance with the rules set by the prison authorities, and received his first dose of the Abdala COVID-19 vaccine. He has not received any further visits from his lawyer, because he has not asked to see his lawyer.

Additional comments from the source

59. The Working Group transmitted the Government's response to the source on 11 October 2021. The source challenges the Government's response, on the grounds that it has not conclusively refuted the source's allegations with documentary evidence. The source cites articles 72 to 84 of the Cuban Criminal Code, which define terms such as "antisocial behaviour" and "dangerousness arising from antisocial behaviour", to which the Government refers in its response. In addition, the source provides an analysis of the statute of limitations

applicable to the offences with which Mr. Castillo has been charged. According to the source, Mr. Castillo's detention is the result of a trial fraught with irregularities and fabricated charges.

Discussion

60. The Working Group thanks the source and the Government for their cooperation.

61. In determining whether Mr. Castillo's detention was arbitrary, the Working Group takes account of the principles established in its jurisprudence on 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.⁷ Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations.

62. The Working Group reaffirms that States have an obligation to respect, protect and uphold all human rights and fundamental freedoms, including liberty of person, and that, consequently, any national law or procedure allowing deprivation of liberty should be made and implemented in conformity with the standards set forth in the Universal Declaration of Human Rights. Even if the detention does conform to national law, regulations and practices, the Working Group is mandated to assess the judicial proceedings and the law itself to determine whether such detention is compatible with the relevant provisions of international human rights law.

Category I

63. The Working Group received information about Mr. Castillo's detention on 18 May 2021. According to case file No. 24/2021 of the Prosecution Unit for Offences against State Security, Mr. Castillo was arrested pursuant to a complaint filed against him by a police officer who had violently attempted and failed to arrest him without following proper legal procedure.

64. The Working Group takes note of the arrests to which Mr. Castillo has been subjected. The source has documented that Mr. Castillo was arrested 121 times within the space of one and a half years. In addition, he was imprisoned for 1 year and 1 month from 23 September 2018 to 23 October 2019 for his opposition to Decree-Law No. 349 on freedom of expression.

65. The Government has insisted in its response that Mr. Castillo exhibits extremely antisocial behaviour, which has been amply documented, and has also provided a record of Mr. Castillo's prior arrests and convictions.

66. The Government confirms the source's claim that Mr. Castillo was arrested on the basis of complaint No. 18445/21, contained in investigative file No. 42 of 2021, for the offences of assault, contempt and escape from custody arising from acts of disobedience, aggressive behaviour and insulting language towards officers of the National Revolutionary Police.

67. The Working Group has previously found the definitions of these offences to be excessively vague and overly broad, as they do not clearly specify the criminal activity that is punishable.⁸ The principle of legality requires laws to be formulated with sufficient precision to give individuals access to and an understanding of the law and enable them to regulate their conduct accordingly.⁹ The application of vague and overly broad provisions in the present case makes it impossible to invoke a legal basis to justify Mr. Castillo's detention.

68. The Government has not submitted any documentary evidence justifying the detention order or showing that Mr. Castillo was informed of the reasons for his arrest, nor is there any record that the pretrial detention order issued against him has been subjected to judicial review to ensure that it constitutes a legal basis for the deprivation of liberty. The Government has reported that Mr. Castillo is being detained in accordance with the law and has limited

⁷ A/HRC/19/57, para. 68.

⁸ Opinions No. 63/2019, No. 4/2020 and No. 65/2020. See also Inter-American Commission on Human Rights, Annual Report 2019, chap. IV.B, Cuba, para. 22.

⁹ Opinions No. 13/2021, para. 65, and No. 41/2021, para. 109.

itself to describing the actions that led to his pretrial detention and stating why it is not arbitrary, indicating that he was afforded the assistance of a lawyer and is in contact with his family.

69. The Working Group has indicated that it is not sufficient for there to be a law under which the arrest may be authorized. The authorities must state the legal basis for the arrest and apply it by means of an arrest warrant.¹⁰ In the present case, the arresting officers did not show a warrant at the time of the arrest,¹¹ in violation of articles 3 and 9 of the Universal Declaration of Human Rights.¹² Consequently, the authorities did not establish a legal basis for Mr. Castillo's arrest.

70. In addition, the Working Group is not convinced that Mr. Castillo was informed of the reasons for his arrest. In order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Castillo of the reasons for his arrest when it was carried out. Their failure to do so constituted a violation of article 9 of the Universal Declaration of Human Rights and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

71. The source insists that the preventive measure of pretrial detention ordered by the Public Prosecution Service against Mr. Castillo is arbitrary because it does not comply with any of the requirements set out in articles 241 and 242 of the Criminal Procedure Act. The Act provides that a person may be arrested and detained only in connection with an alleged offence and in accordance with the procedure established by law, except in cases of flagrante delicto or flight. This was not the case for Mr. Castillo.

72. The source claims that the offences of assault, resistance, escape from custody and disorderly conduct are not applicable and recalls that Mr. Castillo has been systematically and continuously harassed by the police, despite the fact that he had not been accused of committing any prior offence. The accusations levelled against Mr. Castillo arose only after he had been the subject of police actions that violated his human rights.

73. The Government has indicated that Mr. Castillo received legal advice when his lawyer appeared at the Department for the Investigation of Offences against State Security on 1 June 2021. On 19 June, Mr. Castillo's lawyer again appeared to reviewed the proceedings recorded in the preparatory file and filed a challenge (*recurso de queja*). However, this lawyer consulted with Mr. Castillo at the prison only once, on 13 August 2021.

74. The Working Group notes that Mr. Castillo was arrested on 18 May 2021. This means that he received no legal advice and was unable to mount his defence for three months, in violation of international standards of protection against arbitrary detention, which determine that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after arrest.¹³

75. In the light of the foregoing, the Working Group is of the view that the detention of Mr. Castillo is arbitrary under category I.

Category II

76. The source states that Mr. Castillo has been detained and is being prosecuted after having been subjected to a long campaign of harassment and persecution for being a political activist who is critical of Government and for exercising his right to freedom of expression, opinion, association and participation in the public life of his country through artistic and

¹⁰ Opinions No. 10/2018, para. 45, No. 36/2018, para. 40, No. 46/2018, para. 48, and No. 46/2019, para. 51.

¹¹ Opinion No. 45/2019, para. 50. See also opinion No. 71/2019, para. 70.

¹² Opinions No. 3/2018, para. 43, No. 10/2018, para. 46, No. 26/2018, para. 54, No. 30/2018, para. 39, No. 68/2018, para. 39, No. 82/2018, para. 29, No. 31/2020, para. 41, No. 33/2020, para. 54, and No. 37/2020, para. 52.

¹³ [A/HRC/30/37](#), 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 9 and guideline 8.

cultural expression, including music. Mr. Castillo is one of the co-founders of Movimiento San Isidro.

77. The Working Group has been informed, with documentary evidence, that between 14 December 2019 and 18 May 2021, Mr. Castillo was arrested 121 times for his participation in various protests in Cuba and was actively opposed to the Government.

78. Prior to the arrest that is the subject of the present case, Mr. Castillo was imprisoned for 1 year and 1 month, from 23 September 2018 to 23 October 2019, for filming a police operation on a public street with his cellular telephone and refusing to hand the telephone over to the police. On 22 April 2020, Mr. Castillo was fined 3,000 Cuban pesos under Decree-Law No. 370 for stating on social media that a Cuban woman had died in the street from COVID-19. In relation to the same incident, he was also detained for three days without charge and without judicial protection.

79. The Government has denied these claims but has not provided any evidence to refute them beyond stating that, in the present case, on 24 May 2021, an order to remand Mr. Castillo in pretrial detention was issued on the basis of the dangerousness of his behaviour. The Government's response contains an analysis of a long criminal record, but its claims are not accompanied by substantiating evidence.

80. The Working Group is deeply concerned about the reports it has received of the harassment, intimidation, threats and arrests to which Mr. Castillo has been subjected. The Working Group also reiterates that it applies a heightened standard of review in cases in which freedom of expression and opinion is restricted or in which social activists or human rights defenders are involved. The Working Group has decided to refer the present case to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

81. The Working Group recalls that citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association. There is an essential link between the rights to freedom of expression, of assembly and of association, since freedom of association, including the right to form and join organizations and associations concerned with the political and public affairs of the State, is an essential adjunct to the rights protected by the Universal Declaration of Human Rights.

82. Freedom of artistic expression and the dissemination of artistic works fall within the framework of the right to freedom of opinion and expression, protected under article 19 of the Universal Declaration of Human Rights.¹⁴ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that: "Freedom of expression can be exercised through any sort of medium. This includes the right to participate in demonstrations and peaceful protests staged by social sectors or organizations that wish to show their discontent with public policies, natural resource development contracts, the attitudes adopted by civil servants or other situations."¹⁵ The Working Group has decided to refer the present case to the Special Rapporteur in the field of cultural rights.

83. The Working Group is convinced that Mr. Castillo has been persecuted and arbitrarily detained for exercising his fundamental rights to freedom of opinion, expression, assembly, association and participation in the public life of his country guaranteed by articles 19 to 21 of the Universal Declaration of Human Rights. His detention is therefore arbitrary under category II.

Category III

84. In view of its finding that the detention of Mr. Castillo was arbitrary under category II, the Working Group is of the view that no trial should take place. However, since a trial is taking place, the Working Group will proceed to analyse whether, in the course of the judicial

¹⁴ [A/72/382](#), paras. 16–25; [A/74/342](#), para. 23; [A/HRC/43/59](#), para. 18; and opinion No. 37/2020.

¹⁵ [A/HRC/23/40/Add.1](#), para. 71.

proceedings, the fundamental components of a fair, independent and impartial trial have been respected.

85. The Government has indicated that, during the proceedings, the preliminary investigation and other investigative measures were initiated within 72 hours. However, it has not established that Mr. Castillo was brought before a court within 48 hours and has not explained how this delay was the result of absolutely exceptional circumstances.¹⁶ The Working Group further notes that the right to habeas corpus was also denied, with disregard for the fact that it is a self-standing human right, the essential purpose of which is to prevent persons deprived of liberty from being denied judicial protection, which is indispensable to a fair trial, as has been stated by the Working Group and in accordance with articles 8, 9 and 10 of the Universal Declaration of Human Rights.¹⁷

86. A writ of habeas corpus was filed in an attempt to give Mr. Castillo the opportunity to be heard at a public hearing at which the court could assess his allegations of violations of articles 94 and 95 of the Constitution, which provide that a person may be arrested, prosecuted and convicted only in respect of an established criminal offence and in accordance with due process. The application was also intended to ensure that the injuries that Mr. Castillo had sustained at the hands of the police could be verified. However, Mr. Castillo was denied the remedy of habeas corpus and other legal remedies and alternatives to imprisonment.

87. The Government has claimed that Mr. Castillo's trial fully respected the procedural safeguards recognized by the Constitution and the law, but it has not provided any evidence to support its claims. The Government indicates that a lawyer arrived at the Department for the Investigation of Offences against State Security on 1 June 2021 to review the preliminary case file and that he consulted with Mr. Castillo on 13 August. However, it has been established that this lawyer belongs to a collective law firm that comes under the authority of the Ministry of Justice and is controlled by the Government through the National Organization of Collective Law Firms. He therefore cannot be considered to be an independent legal adviser.

88. The Working Group has held that in order to establish that their detention is legal, all detainees have the right to challenge the lawfulness of their detention before a court. Mr. Castillo was not afforded the possibility of receiving legal assistance from counsel of his choice and was thus denied his capacity to exercise his right to challenge the lawfulness of his detention, in violation of articles 8 and 9 of the Universal Declaration of Human Rights and principles 11 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

89. The right to challenge the lawfulness of detention before a court is a self-standing human right that is essential to preserve legality in a democratic society. This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty, not only to detention in criminal proceedings, but also to administrative and other forms of detention. Given that Mr. Castillo has been unable to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights has been violated.¹⁸

90. The Working Group notes that the fundamental rules of due process have not been observed, given the length of time that Mr. Castillo has been held in pretrial detention and the fact that he has not had access to a lawyer of his choice. Mr. Castillo was denied the safeguards recognized by law when he was prevented from challenging the lawfulness of his detention without delay, as provided for in articles 3, 8 and 9 of the Universal Declaration of

¹⁶ Opinions No. 20/2019, para. 66, No. 26/2019, para. 89, No. 36/2019, para. 36, No. 56/2019, para. 80, and No. 76/2019, para. 38.

¹⁷ [E/CN.4/1993/24](#), para. 43 (c); [E/CN.4/1994/27](#), para. 36; [E/CN.4/1995/31](#), para. 45; [E/CN.4/1996/40](#), paras. 110 and 124.5; [E/CN.4/2004/3](#), paras. 62, 85 and 87; [E/CN.4/2005/6](#), paras. 47, 61, 63, 64, 75 and 78; [A/HRC/7/4](#), paras. 64, 68 and 82 (a); [A/HRC/10/21](#), paras. 53, 54 and 73; and [A/HRC/13/30](#), paras. 71, 76–80, 92 and 96.

¹⁸ Opinions No. 45/2017, No. 46/2017, No. 79/2017, No. 11/2018 and No. 35/2018.

Human Rights and principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

91. The Working Group also notes the claims of both the source and the Government with regard to the decisions made by the Prosecutor's Office in the present case. The Working Group insists, in line with its previous statements, that the Prosecutor's Office cannot be considered an independent and impartial judicial authority for the purposes of article 10 of the Universal Declaration of Human Rights. This body has an investigative and prosecutorial function that is essential to the administration of justice but incompatible with the power to make independent and impartial decisions on the legal grounds for deprivation of liberty. In view of the above, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

92. A core defining element of deprivation of liberty is the inability of those who are detained to defend and protect themselves, as their daily life is largely dependent on the decisions taken by the personnel in detention facilities. In this context, persons deprived of their liberty not only face difficulties in verifying the lawfulness of their detention; they also lack effective control over their other rights.

93. The Working Group reiterates its view that criminal charges refer, in principle, to acts that are punishable under domestic criminal law. The source alleges that Mr. Castillo's right to a fair and impartial trial was violated. The Working Group has not been convinced that Mr. Castillo was provided with access to independent counsel. He was not brought before a court in a timely manner or afforded the opportunity to prepare for his trial in accordance with the principle of equality of arms. In addition, all the remedies filed, including a writ of habeas corpus, have been denied without exception, and Mr. Castillo has been held in pretrial detention for an excessive length of time, including before being brought before a court. In the light of the foregoing, the detention of Mr. Castillo contravenes the rules of due process and is therefore arbitrary under category III.

Category V

94. In the present case, the source has demonstrated that, in view of his artistic and political demonstrations in support of cultural rights and his participation in political activities promoting social participation in public affairs, Mr. Castillo is a social activist and human rights defender. In addition, the Working Group is convinced that the deprivation of liberty of Mr. Castillo took place in a context of persecution and the systematic arrest of persons, including Mr. Castillo, who have been identified as opponents of the Government.¹⁹

95. The Working Group reiterates that, in accordance with article 21 of the Universal Declaration of Human Rights, all persons have the right to participate in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives. This participation is supported by ensuring freedom of expression, assembly and association. The circumstances of Mr. Castillo's detention, given the pattern of persecution and harassment and the lack of due process, reveal a situation of discrimination based on his political stance and human rights activities. The Working Group finds that the guarantee established in article 7 of the Universal Declaration of Human Rights has been violated and that the case falls under category V.

96. The Working Group reminds the Government that States have a duty to protect individuals and groups and to exercise due diligence in doing so, since acts or omissions resulting in the persecution or harassment of any person based on his or her activities as a human rights defender or social activist are imputable to the State when they are carried out with the consent or acquiescence of an official State representative.²⁰ The Working Group affirms that national authorities and international supervisory bodies must apply a heightened standard of review of government action, especially when there are allegations of a pattern

¹⁹ Opinions No. 12/2017, No. 64/2017, No. 66/2018, No. 4/2020, No. 50/2020, No. 63/2020, No. 65/2020, No. 13/2021 and No. 41/2021. See also [A/HRC/48/55](#), paras. 46–50.

²⁰ Opinions No. 64/2011, para. 20, No. 54/2012, para. 29, No. 62/2012, para. 39, No. 41/2017, para. 95, and No. 57/2017, para. 46.

of harassment.²¹ The Government is therefore requested to ensure that all acts of intimidation against Mr. Castillo cease, that an impartial and effective investigation is carried out and that those responsible are brought to justice.

97. The Working Group would welcome the opportunity to work constructively with the Government of Cuba to address issues related to arbitrary detention. In the light of the recurrent pattern of arbitrary detention identified by this international human rights mechanism in recent years, the Government of Cuba is urged to consider inviting the Working Group to make an official country visit. Such visits are an opportunity for the Working Group to engage in direct constructive dialogue with the Government and with representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

Disposition

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

The deprivation of liberty of Maykel Castillo Pérez, being in contravention of articles 3, 5, 8, 9, 10, 11 and 12 of the Universal Declaration of Human Rights is arbitrary and falls within categories I, II, III and V.

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

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

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

102. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur in the field of cultural rights.

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

Follow-up procedure

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

²¹ Opinion No. 39/2012, para. 45, and General Assembly resolution 53/144.

105. 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.

106. 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.

107. 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.²²

[Adopted on 17 November 2021]

²² Human Rights Council resolution 42/22, paras. 3 and 7.