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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020**

### **Opinion No. 49/2020 concerning Fernando Aguirre-Urbina (United States of America)\*, \*\***

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 10 January 2020 the Working Group transmitted to the Government of the United States of America a communication concerning Fernando Aguirre-Urbina. 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 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,

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

\*\* Seong-Phil Hong did not participate in the discussion of the present case.

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. Fernando Aguirre-Urbina is a national of Mexico, born in 1988. He has lived in the United States of America since his arrival at the age of 3. He does not speak Spanish fluently and has no memory of nor ties to Mexico. He grew up in Washington, in a low-income household with seven siblings, all United States citizens. He has three children, all United States citizens, and is married to a United States citizen.

5. Mr. Aguirre-Urbina finished high school in 2007, but he lost in the contest for a college scholarship owing to his unsettled legal status. He received recognition from his city for community service, and also received a certificate of appreciation from the University of Washington and the Yakima community partnership programme. He worked in warehouses packing fruits and vegetables.

6. The source reports that Mr. Aguirre-Urbina has been mentally ill since he was 6 years old and has not received adequate care. Two different doctors diagnosed him with major depressive disorder with psychotic features, and it is also likely that he suffers from schizoaffective disorder. However, he has never exhibited violent behaviour.

7. According to the source, on 12 September 2009, Mr. Aguirre-Urbina was arrested for driving without a licence. He was taken to a county jail, but was not brought before a judge. On 14 September 2009, an officer of the Immigration and Customs Enforcement agency “encountered” him in jail and took him into the agency’s custody at the Northwest Detention Center in Tacoma, Washington. An immigration officer recommended that he remain there owing to limited equities and a risk of flight, pending section 240 removal proceedings, and opened deportation proceedings. All this allegedly occurred without a legal order or procedural safeguards to detain Mr. Aguirre-Urbina. On 18 September 2009, Mr. Aguirre-Urbina posted a \$5,000 bond and was released.

8. In January 2012, Mr. Aguirre-Urbina was arrested and charged for possession and delivery of, and intent to deliver, marijuana and methamphetamines. On 31 May 2012, he signed a plea deal; at the time, he had just been informed that one of his children would not survive birth. He could not have comprehended the plea’s ramifications or its impact upon his immigration case. His criminal defence attorney was informed of the need for a mental health evaluation; however, Mr. Aguirre-Urbina pleaded guilty to one year and a day in prison, serving only eight months owing to good behaviour. Nevertheless, following the conviction, his \$5,000 immigration bond was cancelled, and the money lost. In September 2012, officers of the Immigration and Customs Enforcement agency once again “encountered” him in jail and transferred him to the Northwest Detention Center without a warrant or order. Mr. Aguirre-Urbina informed the agency of his mental health status.

9. The source reports that, from the time that Mr. Aguirre-Urbina was transferred to the Northwest Detention Center, the Immigration and Customs Enforcement agency and the immigration judge knew that he had mental health disorders and that he could not afford an attorney. Prior to his criminal conviction, he had engaged an attorney to file for an adjustment of status, but the attorney withdrew it twice, citing lack of communication owing to the extended incarceration, advising Mr. Aguirre-Urbina to make other arrangements for legal representation.

10. On 11 January 2013, after Mr. Aguirre-Urbina appeared without counsel, the Department of Homeland Security presented a motion for the consideration of his medical and mental health records, requesting a hearing on his competency. On 5 June 2013, the Department of Homeland Security recommended that the immigration judge provide a qualified representative and that he could be part of the *Franco-Gonzalez v. Holder* class action lawsuit. In June 2013, a doctor diagnosed Mr. Aguirre-Urbina with major depressive disorder with severe psychotic features. On 9 September 2013, Mr. Aguirre-Urbina sent a letter requesting a pardoned appearance to the immigration judge, who rejected it,

requesting that the filing be carried through his attorney. The judge continued Mr. Aguirre-Urbina's proceedings, rejecting his attorney's withdrawals.

11. On 14 March 2013, Mr. Aguirre-Urbina filed an application for asylum, withholding of removal, and protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He reasonably feared he would be tortured and killed if removed to Mexico. He claimed, *inter alia*, that specific credible threats by members of the Sinaloa drug cartel had been expressed. Moreover, doctors stated that, if relocated, he would not have the necessary health care, and thus would be exposed to a risk of deterioration of health and indeed, a risk of suicide. Mr. Aguirre-Urbina also claimed that his sexual orientation would endanger him in Mexico.

12. The immigration judge held the first merits hearing on 4 March 2014, without adequate legal safeguards and without advising Mr. Aguirre-Urbina that he was entitled to free counsel. The attorney who was trying to withdraw from the case finally attended a hearing, requesting that the immigration judge first address the issues related to incompetency and mental health, stating that he didn't feel that his role as Mr. Aguirre-Urbina's attorney was safeguard enough, but that he was not sure what options were available for the respondent.

13. On 9 April 2014, the immigration judge deemed Mr. Aguirre-Urbina competent, denied his application for relief and ordered his removal to Mexico, concluding that there was inadequate proof of his claims. Mr. Aguirre-Urbina appealed without legal assistance. On 6 July 2015, after almost three years in detention, the Board of Immigration Appeals remanded the case back to the immigration judge, owing to failure to properly analyse the issue of competency. Mr. Aguirre-Urbina engaged another attorney to terminate proceedings. This motion was also denied.

14. On 17 January 2016, the immigration judge held a judicial competency hearing. An additional doctor reportedly diagnosed Mr. Aguirre-Urbina with major depression with psychotic features, and anxious distress, and one of the criteria for schizoaffective disorder, emphasizing the need for long-term treatment.

15. On 26 June 2016, after almost four years in detention and the diagnoses of multiple doctors, the immigration judge established that Mr. Aguirre-Urbina was not competent. However, his applications for asylum, for withholding from removal and for protection were denied. He again appealed *pro se*. The Board of Immigration Appeals remanded the case for another competency hearing to determine whether he could proceed *pro se* on appeal. Mr. Aguirre-Urbina appeared before the Board without counsel in two further competency hearings.

16. On 6 September 2016, the immigration judge again held a competency hearing without an attorney. When the judge asked if Mr. Aguirre-Urbina understood his rights, he responded "no, not really". He described his poor mental health and lack of treatment, stating, "I don't think you should be able to hold someone this long either. It's been pretty hard, and it should be illegal." At that point, the immigration judge ordered a court-appointed lawyer.

17. In March 2017, Mr. Aguirre-Urbina filed another appeal to the Board of Immigration Appeals, arguing lack of competency. On 8 September 2017, the appeal was denied, indicating that, while incompetent, he nevertheless had adequate safeguards through the "continuous" presence of counsel and had therefore not been denied a fundamentally fair hearing. The order claimed Mr. Aguirre-Urbina failed to fulfil the burden of proof for his protection claim because no proof had been established that the Government of Mexico was intentionally inflicting suffering upon him. The immigration judge ordered Mr. Aguirre-Urbina's removal.

18. On 18 September 2017, Mr. Aguirre-Urbina filed *pro se* a petition for review before the United States Court of Appeals for the Ninth Circuit. On 28 February 2018, the Ninth Circuit temporarily stayed Mr. Aguirre-Urbina's removal pending his appeal. The Court appointed counsel. On 26 March 2019, the proceedings were remanded to the Board of Immigration Appeals for further findings with respect to the claim for protection under the Convention against Torture.

19. The source argues that challenging the detention has been extremely difficult and has required extraordinary efforts, which is unreasonable to expect from an unwell individual such as Mr. Aguirre-Urbina. Allegedly, he has required six different legal teams for various aspects of his case.

20. Mr. Aguirre-Urbina was held in prolonged indefinite detention. The immigration judge denied bond at least four times, displaying bias against individuals with drug-related convictions, even if they are non-violent. The source submits that the denials were not properly motivated by evidence of flight risk or indication of any danger to the community.

21. The source explains that immigrants could access bond hearings before immigration judges through *Rodriguez* bond hearings, which make it possible to request a bond hearing after six months of detention, pending removal proceedings. A *Casas-Castrillon* bond hearing shifts the burden of proof to the Government to show that the person should not be released because they are a flight risk and/or a danger to the community. However, when Mr. Aguirre-Urbina had access to hearings, they were ineffective. Furthermore, the right to a *Rodriguez* hearing was recently struck down by the United States courts, and these cases are presided over by immigration judges, the very same administrative authorities who are defending their own decision to deport. The only available appeal is before the Board of Immigration Appeals, which is not a judicial body and is composed of former immigration judges. The source claims that this cannot be described as a neutral judicial review.

22. On 12 September 2013, after more than a year in detention, Mr. Aguirre-Urbina was provided with a bond hearing. He was represented by a different and unfamiliar counsel. The bond was denied as he was considered both a danger and a flight risk. However, the judge did not provide any reasoning, evidence or motivations for these determinations.

23. On 30 December 2014, after more than two years in detention, Mr. Aguirre-Urbina requested, through a different attorney, and was granted, a second *Rodriguez* bond hearing. The same immigration judge once again denied bond. At that point, however, Mr. Aguirre-Urbina had undergone two mental health evaluations by two doctors; the severity of his illness had been identified, as well as his lack of competency.

24. The source reports that, during this bond hearing, the Department of Homeland Security mischaracterized Mr. Aguirre-Urbina as a dangerous “armed drug dealer”. The source emphasizes that no charges relating to weapons were ever filed. However, on the basis of his 2012 criminal convictions, the immigration judge again determined that Mr. Aguirre-Urbina was a danger to the community and a flight risk.

25. Mr. Aguirre-Urbina did not appeal; instead, he was scheduled for another *Rodriguez* bond hearing on 11 February 2016. However, as he was unable to pay his lawyer, the request for the bond hearing was withdrawn.

26. Mr. Aguirre-Urbina appeared for the third *Rodriguez* bond hearing on 24 August 2016, but it was delayed until 8 November 2016. Once again, it was determined on the basis of his 2012 criminal conviction that he was a danger to the community and a flight risk. No reasoning for the determination was provided.

27. Mr. Aguirre-Urbina appealed the bond denial to the Board of Immigration Appeals, which sustained it and remanded the case to determine whether the Department of Homeland Security had met its burden. On 7 June 2017, the immigration judge determined that the Department of Homeland Security had not met its burden to establish flight risk, but found on the basis of his 2012 criminal conviction that Mr. Aguirre-Urbina was a danger to the community.

28. Mr. Aguirre-Urbina then filed a request for a *Casas-Castrillon* bond hearing. However, on 15 March 2018 the immigration judge denied the request, finding that the standards for *Casas-Castrillon* and *Rodriguez* bond hearings were the same, and Mr. Aguirre-Urbina had previously had *Rodriguez* bond hearings. The immigration judge also found that she no longer had jurisdiction to hold a *Rodriguez* bond hearing owing to a Supreme Court decision. On 14 November 2018, the Board of Immigration Appeals dismissed his appeal.

29. The source submits that Mr. Aguirre-Urbina cannot adjust his migratory status because of his criminal record. After pleading guilty, he appealed to the Washington Supreme Court, seeking post-conviction relief based on his lack of competency. On 5 September 2013, he filed a personal restraint petition on the grounds that the plea was not knowingly, intelligently and voluntarily made and that the attorney was ineffective in pursuing potential defences. This petition, however, was dismissed as time-barred.

30. On 9 November 2016, Mr. Aguirre-Urbina filed a habeas corpus petition to the Western District Court, against his criminal conviction, arguing his plea was not knowingly, intelligently and voluntarily made. He was not granted a hearing during the process. On 15 May 2017, the District Court dismissed the habeas corpus petition owing to a lack of jurisdiction.

31. On 4 December 2018, a pro bono attorney filed a writ of habeas corpus, challenging the prolonged detention of Mr. Aguirre-Urbina. On 20 March 2019, the magistrate judge reportedly recommended that the petition be denied and the Government's motion be granted.

32. On 5 April 2019, Mr. Aguirre-Urbina argued that the Government had failed to prove by clear and convincing evidence that he presented a danger to the community and that his detention was therefore unreasonably prolonged and indefinite.

33. On 17 May 2019, the district judge rejected the recommendations and ordered the immigration judge to show cause, within 14 days, why the court should not grant the petition and release Mr. Aguirre-Urbina on appropriate conditions, unless, at a new bond hearing held within that time frame, the Government presented clear and convincing evidence that he presented a danger. The court remanded the case back to the immigration judge who had repeatedly demonstrated reluctance to release Mr. Aguirre-Urbina.

34. On 28 May 2019, the immigration judge held a bond hearing based on the district court order, during which the judge was upset about the need to revise Mr. Aguirre-Urbina's detention. The judge allegedly indicated that he was obliged to set a bond, despite the gravity of past conviction, and set an extremely high bond of \$30,000, without consideration of Mr. Aguirre-Urbina's ability to pay. Mr. Aguirre-Urbina, his family and community supporters gathered together to raise the money for the bond. On 11 June 2019, Mr. Aguirre-Urbina was released from custody of the Immigration and Customs Enforcement agency.

35. The source claims that, since he was detained in 2009 and convicted in 2012, Mr. Aguirre-Urbina was denied a full judicial review of the legality of his detention. Since 2012, he had been denied an alternative to detention and when he succeeded in getting a bond, the amount was retaliatory and unreasonable, considering that he had not worked for more than \$1 per day for the last six years and his family had few resources. The immigration judge also did not provide any safeguard for his deteriorating health.

36. The source also submits that the Northwest Detention Center is a jail holding almost 1,600 immigrants, managed by the GEO Group, a contracted private corporation. During his detention there, Mr. Aguirre-Urbina was denied sufficient outdoor time; educational and working programmes; nutritious food and access to an appropriate diet; adequate physical and mental health care and treatment; interaction with his next of kin; and access to grievance mechanisms.

37. Reportedly, upon arrival at the Northwest Detention Center, he was classified as "dangerous" and dressed in a red uniform. Such a classification has an impact on detainee rights, including on the rights to circulate freely, to work in certain occupations and to enjoy visits and yard time. Mr. Aguirre-Urbina spent three years without yard privileges and was dressed as a criminal when he faced an immigration judge. He was held in solitary confinement multiple times, severely affecting his mental and physical health.

38. Mr. Aguirre-Urbina worked in the "volunteer programme" run by the GEO Group. It is alleged that detainees receive only \$1 per workday and that, despite multiple complaints, the Government has never requested that the GEO Group pay fair wages. On 6 August 2018, Mr. Aguirre-Urbina was appointed as the representative of a class-action lawsuit against the GEO Group for using detained migrants for unfairly compensated labour, urging

a court to find the GEO Group in violation of the Washington Minimum Wage Act. As the class-action lawsuit moved forward with Mr. Aguirre-Urbina at the forefront, he was in a vulnerable position, facing pressure and retaliation from the GEO Group and from Government officials.

39. Mr. Aguirre-Urbina has suffered retaliation for speaking up. As a consequence of his grievances against the GEO Group and the Immigration and Customs Enforcement agency, he was suddenly transferred back and forth between detention centres at least twice: once to the Mesa Verde Detention Center in Bakersfield, California, and once to the Northern Oregon Regional Correctional Center.

i. Category I

40. According to the source, Mr. Aguirre-Urbina's detention at the Northwest Detention Center has been an extension of his previous detention in the criminal justice context. It is also mandatory and punitive in nature. He was arbitrarily detained without an effective possibility to challenge his detention, violating the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture.

41. Mr. Aguirre-Urbina's personal liberty and human rights were affected by the Immigration and Customs Enforcement agency "encounters" in jail. The source claims that an "encounter" is not a warrant, nor a detainer, and therefore they were unconstitutional. In 2009, Mr. Aguirre-Urbina was detained by a traffic officer and taken to jail, without an order from a judge or notification of criminal charges. He was not taken immediately before a judge to review the legality of the detention. Furthermore, while in jail, an immigration officer "encountered" him and transferred him to detention, in an improper collaboration with law enforcement through the discriminatory Criminal Alien Program, allowing officers of the Immigration and Customs Enforcement agency to randomly look for immigrants in jails. This led to four days of arbitrary detention at the Northwest Detention Center, a \$5,000 immigration bond and the initiation of deportation proceedings without a lawyer.

42. Mr. Aguirre-Urbina's guilty plea and conviction for drug offences in 2012 was arbitrary because he was battling drug and alcohol addiction and mental illness, casting doubt on his understanding of his rights and the plea he entered. Mr. Aguirre-Urbina could not fight his criminal conviction, as he was transferred to immigration detention. His arrests and the discriminatory "encounters" with the Immigration and Customs Enforcement agency had the dire consequence of depriving him of his right to stay in the United States, criminalizing his immigration. The source stresses that all administrative detention, in particular of migrants in irregular situations, should be a measure of last resort, and should be necessary and proportionate, not punitive in nature. Alternatives to detention are to be sought whenever possible. The source argues that the United States is known for its systematic, arbitrary and prolonged detention of migrants. Mr. Aguirre-Urbina's immigration detention was allegedly arbitrary under category I because it was mandatory and punitive, was not limited in law, was prolonged and indefinite, and no alternatives to detention were considered.

43. Mr. Aguirre-Urbina's detention was mandatory. The source reports that the United States has attempted to justify immediate detention of migrants under Title 8 of the United States Code section 1226. Section 1226 (a) grants the Department of Homeland Security the discretionary authority to determine whether a non-citizen should be detained, released on bond, or released on conditional parole pending the completion of removal proceedings, unless the non-citizen falls within one of the categories of criminals described in section 1226 (c), for whom detention is mandatory. Mr. Aguirre-Urbina was kept at the Northwest Detention Center after he served the sentence that was imposed. His requests for bond were rejected four times by the same administrative judge, without clear and convincing evidence or motivation of present danger to society or of flight risk.

44. Mr. Aguirre-Urbina's detention was also punitive. Incarcerating migrants en masse contradicts international human rights norms on arbitrary detention. The Northwest Detention Center is reportedly a jail, part of a mass civil incarceration system, holding

almost 1,600 migrants. All detained migrants should be held in decent conditions and treated with respect. However, Mr. Aguirre-Urbina's inhumane conditions of detention aggravated the arbitrariness of his case because the Northwest Detention Center is run by a corporation, and there are conflicts of interest and insufficient government oversight in a profit-motivated business.

45. The source further argues the length of detention raises concerns. First, there is no maximum period of detention established by law or by the court for the administrative detention of a migrant. During one hearing Mr. Aguirre-Urbina reportedly asked the judge: "Do you know how much longer I have to be here? Because I mean, it is kind of getting depressing and it's getting a little too heavy." He received no reply and his detention continued.

46. Second, the length of his detention has already exceeded six years, which is prolonged and arbitrary, violating the principle of proportionality, especially considering that the proceedings continued for a period of time that was indeterminate. The source recalls that the Working Group, in the report on its country visit to the United States stated that immigrants who vigorously pursued claims for relief from removal (for example, by continuing to raise asylum claims) reportedly faced substantially longer detention periods than those who conceded to removability.<sup>1</sup>

47. Third, the detention was indefinite, as no upper limit for permissible period of detention had been set. For the Government, it was not a question of whether the detention had a certain end date; rather, whether it is possible to remove Mr. Aguirre-Urbina and when. The Government reportedly argued that Mr. Aguirre-Urbina would be "removed quickly" in the "reasonable [sic] foreseeable future", which justified his continued detention as temporary. However, he was imprisoned for over six years and was granted part of his claim pursuant to the Convention against Torture and withholding of removal. This cannot be said to satisfy the prompt removal requirement and contradicts the Constitution, which calls for detention to be narrow and not indefinite.<sup>2</sup>

48. The domestic law allows parole and bond as alternatives. However, the source reports that, in practice, such relief is routinely denied, combined with conditions that make release impracticable or extremely burdensome (i.e., excessive bond and lack of counsel), or barred through case law.

49. Mr. Aguirre-Urbina had a series of unsuccessful bond hearings, which extended his detention on false allegations of dangerousness and of flight risk. The decisions lacked motivation and clear and convincing evidence. When danger to society was determined, it was only on the basis of a past conviction.

50. In the recommendation to dismiss his habeas corpus petition, the magistrate measured his dangerousness using the maximum punishment for the crime, which is 12 years. However, Mr. Aguirre-Urbina demonstrated that he was not a danger in detention by means of his behaviour in custody, including by participating in the work programme for many years. His uniform colour was changed, from red (categorized as a serious offender who is ineligible to work) to orange (signifying a medium-level offender who is eligible to work). Nevertheless, the judge only considered the previous non-violent conviction, despite the law requiring an array of other factors.

51. In the past, a migrant in prolonged detention had the right to bond hearings every six months. This was reversed by the courts, which decided that only lawful permanent residents could benefit from such hearings, in violation of the principle of non-discrimination and equal protection under the law.

ii. Category II

52. The source stresses that seeking asylum or fighting to stay in a country is not a crime, but rather a human right under article 14 of the Universal Declaration of Human

<sup>1</sup> A/HRC/36/37/Add.2.

<sup>2</sup> Supreme Court of the United States, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Rights. Article 7 emboldens this claim by ensuring equality before the law. The Covenant echoes this standard in article 26.

53. Mr. Aguirre-Urbina had lived undocumented in the United States since the age of 3, in the shadows, without any special protection. Since he was detained in 2009, he struggled to change his immigration status, lacking the means for legal representation. Detained in 2012, he sought asylum, withholding of removal and protection under the Convention against Torture. His claims are based on specific and ongoing threats by the Sinaloa cartel and on his need of mental health care.

54. Furthermore, the source claims that domestic case law shows that Mr. Aguirre-Urbina's detention surpasses that of a typical period of detention for asylum seekers, which, according to the Supreme Court, is around six months to one year. Mr. Aguirre-Urbina was detained for more than six years. His indefinite detention owing to immigration status allegedly falls under category II, owing to the violation of substantive rights.

iii. Category III

55. The source argues that Mr. Aguirre-Urbina's detention falls within category III because authorities failed to observe the minimum international standards of due process under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights.

56. Mr. Aguirre-Urbina's first traffic arrest without a warrant was allegedly arbitrary, as were: his "encounter" with an immigration officer and transfer to the Northwest Detention Center in 2009; his plea deal while mentally incompetent in 2012; the substantial lack of judicial review; and his criminalization.

57. Being an undocumented migrant is not a matter of criminal law and therefore does not call for criminal punishment, especially with no fixed detention period. Systemic features of the detention structure, allegedly present in this case, per se violate category III. They include prolonged immigration detention on the grounds of criminal record, and unreasonable and unrealistically high bonds.

58. The source stresses that governments need to ensure that detained migrants have the right to free and effective legal counsel, immediately after they are apprehended. Reportedly, there is no right to free legal counsel when it comes to immigration cases, because of their civil nature, disregarding the dire consequences. Mr. Aguirre-Urbina had no access to effective free legal representation from the moment of his detention by the Immigration and Customs Enforcement agency, after he was arrested in a traffic stop in 2009, or after he served his sentence in 2012. His chances of defending himself were also affected by his transfers to different places of detention.

59. Additionally, the immigration judge disregarded the fact that Mr. Aguirre-Urbina had a right to a free court-appointed lawyer as a result of his mental illness. Although the Immigration and Customs Enforcement agency and the immigration judge knew of the right to free legal representation, they allowed the proceedings to go ahead, despite witnessing that Mr. Aguirre-Urbina was struggling to find, pay for and retain lawyers. In a hearing on the merits of his immigration case, the judge rejected the withdrawal of an attorney who filed a petition, claiming that Mr. Aguirre-Urbina had "money issues", and who further stated: "I haven't had client/attorney relationship for quite some time" and "I don't think I am the appropriate person to represent him."

60. Mr. Aguirre-Urbina was diagnosed by two separate doctors as suffering from a severe mental illness, resulting in him lacking legal capacity to engage in court proceedings. His competency was raised as a concern by the Department of Homeland Security starting in January 2013. The lack of free and effective legal assistance, therefore, reportedly demonstrates a violation of due process rights.

61. The source claims that Mr. Aguirre-Urbina could not challenge the legality of the Immigration and Customs Enforcement agency "encounters" in jail. During his detention, he was only able to access alternatives through bonds. Since 2012, the immigration judge persistently determined without evidence that he was a danger to society. The judge refused to review any of the Immigration and Customs Enforcement agency "arrests" and transfers.



Mr. Aguirre-Urbina was allegedly denied the due process right to appear before a competent, independent and impartial tribunal. He requested to be heard before an immigration court. However, this court is part of and serves the executive branch of the State, which is responsible for his detention. Since 2018, after the immigration judge denied jurisdiction to release him, he tried to get his prolonged detention reviewed by a district court. Although the district court judge partially granted Mr. Aguirre-Urbina's petition of habeas corpus, this involved another bond hearing in front of the same judge. There was no revision on the legality of the original detention and the damage caused by years of deprivation of liberty. Mr. Aguirre-Urbina could not challenge the legality of his detention before an independent and impartial body.

62. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the Eighth Amendment of the Constitution prohibit detaining an individual in conditions that amount to punishment, in both criminal and civil proceedings. The lack of care for Mr. Aguirre-Urbina's mental health during his detention reportedly worsened his illness and thus violated these provisions.

63. Allegedly, a complete disregard for the mental health of Mr. Aguirre-Urbina during his criminal case led to him entering a plea that he did not fully understand. The violation of his right to a fair trial also occurred when his lack of competency was handled by the courts. He was evaluated by two doctors, both of whom concluded that he requires long-term inpatient and outpatient psychotherapy treatment. However, he was still denied appropriate care, causing him to endure major depression with psychotic features for years. The lack of appropriate care not only rendered him incapable of meaningfully participating in proceedings, but it also caused extreme suffering during detention. The excessive length of detention and blatant disregard for his medical conditions only served to place pressure on him to relinquish his right to seek relief.

64. The source alleges that Mr. Aguirre-Urbina's undocumented status was criminalized in a traffic stop and inside the jails when he was "encountered" by the Immigration and Customs Enforcement agency, and then further when his criminal conviction was made the basis of his immigration detention. There was no clear and convincing evidence that he was dangerous or a flight risk to justify his prolonged detention.

65. The immigration judge failed to meaningfully consider the impact of the passage of time on his criminal history. Instead, the judge based the findings solely on the criminal conviction and did not consider that the offences were non-violent, that they had been committed over six years previously, and that Mr. Aguirre-Urbina had accepted a plea deal in a precarious mental state.

66. The source reports that, under the Constitution, the due process clause of the Fifth Amendment allows detention only under narrow and limited purposes. Civil detention equally violates the due process clause outside of certain special and narrow non-punitive circumstances. These procedural protections ensure that detention serves only the goals of preventing flight risk and danger to the community. A judge may not solely rely on the detainee's past criminal convictions to deny bond. Instead, a judge must show by clear and convincing evidence that the detainee is a danger to the community.

67. The length of Mr. Aguirre-Urbina's detention is reportedly the clearest proof of a violation of his due process rights, specifically his right to be tried within a reasonable time period or to be released. His indefinite detention is neither proportional nor reasonable. Mr. Aguirre-Urbina did not have a clear limit on the length of his detention, rendering it indefinite.

iv. Category IV

68. The source states that, recently the courts weakened the system of hearings and bonds through case law. In the past, a migrant detained for a prolonged period had the right to bond hearings every six months. However, in March 2019, the Supreme Court reportedly ruled that immigrants with certain criminal convictions, and who had already served their time, could nevertheless be detained indefinitely without a bond hearing, regardless of whether the Department of Homeland Security had taken the individual into immigration custody immediately upon release from criminal custody. This means mandatory

imprisonment as their deportation case winds its way through the immigration court system, with no hearing to determine if they need to be locked up in the first place.<sup>3</sup>

69. The Supreme Court held that detained migrants do not have a statutory right to periodic bond hearings. It also ruled that there is no provision limiting the length of immigration detention. The case law has allegedly created an automatic violation under category IV, because of the elimination of the effective remedy.

v. Category V

70. Mr. Aguirre-Urbina's arrests and detention were allegedly discriminatory owing to his undocumented status, Hispanic ethnicity, economic status, mental disability and sexual orientation. The obligation to respect and ensure the rights of individuals without discrimination, contained in articles 2 and 26 of the Covenant, applies to all persons within the territory of a State.

71. The source claims that Mr. Aguirre-Urbina was not granted the protections to his personal liberty that regular citizens, lawful permanent residents and people in criminal proceedings enjoy. The Eighth Amendment is excluded from immigration detention.

72. Mr. Aguirre-Urbina's detention was discriminatory owing to his economic and migration status. The Government and the GEO Group have discriminated against him by producing disproportionate compensation rates. Even if Mr. Aguirre-Urbina were to work every day in a year, he would only earn \$365 in compensation, a sum that would afford only one to two hours of an attorney's services, notwithstanding other expenses. Moreover, Mr. Aguirre-Urbina has been an undocumented migrant since a very young age, arriving in the United States as a child. He has been denied opportunities of social and economic mobility throughout his life, such as being deprived of the opportunity to receive a scholarship. This situation has been further exacerbated under detention.

73. Mr. Aguirre-Urbina has been discriminated against because of his mental disability, as he has been unable to properly represent himself in various proceedings. For a long time, he was denied an attorney and the court took no precautions or care to ensure that he be treated for his mental illness. His court appointed counsel for his ninth circuit appeal was fixed in 2018, more than two years after he had been found incompetent and six years after the Government had requested protection. He appeared alone at least three times before the immigration judge.

74. Finally, Mr. Aguirre-Urbina's detention is discriminatory owing to his sexual orientation. He self-identifies as bisexual and this identity has not been taken into account in the proceedings when evaluating the risk he would suffer if he were to be deported to Mexico. Therefore, his detention was allegedly arbitrary under category V.

*Response from the Government*

75. On 10 January 2020, the Working Group transmitted to the Government the allegations from the source, under its regular communications procedure. The Working Group requested the Government to provide, by 10 March 2020, detailed information about the current situation of Mr. Aguirre-Urbina, and to clarify the legal provisions justifying his continued detention, as well as the compatibility of his detention with the Government's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure Mr. Aguirre-Urbina's physical and mental integrity.

76. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. The Government has not provided a substantive response to the Working Group's communications for some time

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<sup>3</sup> American Civil Liberties Union, *Nielsen v. Preap*, case overview. Available at [www.aclu.org/cases/nielsen-v-preap](http://www.aclu.org/cases/nielsen-v-preap).

now.<sup>4</sup> The Working Group urges the Government to engage constructively with it on all allegations relating to arbitrary deprivations of liberty.

### Discussion

77. 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.

78. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

79. As a preliminary issue, the Working Group notes that Mr. Aguirre-Urbina was released on bail on 11 June 2019 and is not currently detained. However, the Working Group considers that the present case raises an important question regarding his different periods of detention and therefore shall proceed to consider the communication in accordance with paragraph 17 (a) of its methods of work.

#### i. Category I

80. The source argues that the detention of Mr. Aguirre-Urbina falls under category I, since he was arrested on 12 September 2009 without a warrant, was not presented before a judge and was subsequently taken into immigration detention on 14 September 2009. It also argues that his 2012 conviction and subsequent jail term were arbitrary, as he entered a plea without fully understanding the consequences of doing so. Finally, the source argues that the subsequent removal of Mr. Aguirre-Urbina to immigration detention in September 2012 was also arbitrary, as he was “encountered” by the Immigration and Customs Enforcement agency and moved to an immigration detention facility.

81. In the present case, there were two main sets of proceedings. One of these concerned the need for Mr. Aguirre-Urbina to remain in detention and his bond applications. These proceedings were directly relevant to his continued deprivation of liberty and as a result, they fall within the mandate of the Working Group. The second set of proceedings concerned the substance of his claim to asylum, which falls outside the mandate of the Working Group.<sup>5</sup> The Working Group therefore refers the case to the Special Rapporteur on the rights of migrants, for further consideration.

82. The Working Group recalls that a detention is arbitrary under category I if it lacks a legal basis. In relation to the 2009 arrest, Mr. Aguirre-Urbina may have been arrested during the commission of a traffic offence and therefore no warrant was presented to him. However, he was then detained by the immigration officials on 14 September 2009 while in police custody and was only presented to the judge on 18 September 2009. This means that Mr. Aguirre-Urbina was in immigration detention for four days without being presented before a judge.

83. Mr. Aguirre-Urbina was again taken into custody in 2012 and spent eight months in jail, following a plea bargain. Although the source has claimed that this was arbitrary as he entered the agreement without full understanding, the Working Group has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is requested to review the application of domestic law by the judiciary,<sup>6</sup> as this falls outside of its mandate.

<sup>4</sup> Opinions No. 72/2017, No. 70/2019 and No. 85/2019.

<sup>5</sup> Opinion No. 72/2017.

<sup>6</sup> Human Rights Committee, *Peraldi v. France*, communication No. 40/2005; see also opinions No. 15/2017, No. 16/2017, No. 30/2017, No. 49/2019, No. 58/2019 and No. 60/2019.

84. However, Mr. Aguirre-Urbina was once again detained as a result of his migratory status and transferred to immigration detention in September 2012. He then first appeared before a judge for a bond hearing only a year later, on 12 September 2013.

85. The Working Group wishes to recall that the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>7</sup> This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>8</sup> not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including migration detention and detention for extradition. Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>9</sup>

86. Mr. Aguirre-Urbina was detained owing to his migratory status twice, and the Government failed to present any reasons for the delay in presenting him before a judicial authority on both occasions. Judicial oversight of detention is a fundamental safeguard of personal liberty,<sup>10</sup> and such oversight essential in ensuring that detention has a legal basis.

87. Finally, the Working Group notes the allegation that the detention, which was not in the criminal justice system but rather in the context of migration, was in fact punitive in nature. As the Working Group has noted, this should never be the case.<sup>11</sup> Mr. Aguirre-Urbina was detained for some seven years, without being charged or tried, in what clearly was a punitive detention in breach of article 9 of the Covenant.

88. The Working Group therefore finds that, both in September 2009 and September 2012, Mr. Aguirre-Urbina was detained in violation of his rights under article 9 of the Covenant. Consequently, his detention lacked legal basis and was arbitrary under category I.

ii. Category II

89. The source submitted that the detention of Mr. Aguirre-Urbina was arbitrary under category II, as it was owing to his exercise of the right to seek asylum under article 14 of the Universal Declaration of Human Rights and the right not to be discriminated against, as envisaged in article 26 of the Covenant.

90. The source has submitted that Mr. Aguirre-Urbina arrived in the United States at the age of 3 and has lived there ever since, without a settled migratory status. He was first arrested following a traffic misdemeanour on 12 September 2009, and it was only after he was “encountered” in police custody by the Immigration and Customs Enforcement agency, on 14 September 2009, that he was transferred to immigration detention, from which he was released on a bond on 18 September 2009. This was nearly 20 years after his arrival in the United States.

91. Mr. Aguirre-Urbina was again detained on criminal charges in January 2012. He entered a plea bargain in May 2012 and, while serving a jail sentence, was once again “encountered” by the Immigration and Customs Enforcement agency and transferred to immigration detention, in September 2012, where he remained until 11 June 2019, when he was released on bail. The source has submitted that this detention was because of the immigration status of Mr. Aguirre-Urbina and his claim to asylum. The Working Group notes that the Government did not reply to this submission.

<sup>7</sup> A/HRC/30/37, paras. 2–3.

<sup>8</sup> *Ibid.*, para. 11.

<sup>9</sup> Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, guideline 1 (A/HRC/30/37, annex).

<sup>10</sup> A/HRC/30/37, para. 3.

<sup>11</sup> A/HRC/39/45, annex, paras. 9 and 14.

92. The Working Group reiterates that seeking asylum is not a criminal act;<sup>12</sup> on the contrary, it is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol. The latter of these constitutes international legal obligations that the United States has undertaken.

93. The Working Group recalls that it observed the practice of mandatory immigration detention during its 2016 visit to the United States and urged the Government to end the practice and to offer alternative administrative proceedings with individualized assessments.<sup>13</sup>

94. This coincides with the recommendation made by the Human Rights Committee, noting that mandatory detention of immigrants for prolonged periods of time without regard for the individual case could raise issues under article 9 of the Covenant.<sup>14</sup>

95. While detention in the course of proceedings for the control of immigration is not arbitrary in itself,<sup>15</sup> prolonged detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. It must not be punitive in nature and should be based on the individual circumstances of each individual.<sup>16</sup>

96. Mr. Aguirre-Urbina spent a lengthy seven years in immigration detention, appearing at yearly bail hearings, at which the same judge repeatedly assessed him as a flight risk and a danger to society, without any reasoning. The Government had the opportunity but failed to explain the reasons justifying the detention and did not identify how it was a necessary and proportionate measure.

97. In the absence of any explanation by the Government as to what individualized, specific reasons justified the need to deprive Mr. Aguirre-Urbina of his liberty, the Working Group concludes that the reason for his detention was his claim to asylum. Mr. Aguirre-Urbina was subjected to a blanket mandatory immigration detention, contrary to article 9 of the Covenant and in breach of the right to seek asylum under international law. Mr. Aguirre-Urbina was detained owing to his exercise of the right to seek asylum, and his detention therefore was arbitrary under category II.

### iii. Category III

98. The source has further submitted that the detention of Mr. Aguirre-Urbina falls under category III, since:

- (a) He was not able to defend himself properly, owing to a lack of proper access to legal counsel;
- (b) His right to an independent and impartial tribunal was violated;
- (c) He was not provided with adequate mental health care;
- (d) His migration status was criminalized;
- (e) His detention was punitive.

99. The Working Group recalls that it is not addressing Mr. Aguirre-Urbina's criminal detention. Against this background, not all parts of article 14 of the Covenant are applicable to non-criminal proceedings. However, as the Human Rights Committee notes, insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as

<sup>12</sup> Opinions No. 28/2017, No. 42/2017, No. 72/2017, No. 1/2019, No. 2/2019, No. 7/2019 and No. 74/2019.

<sup>13</sup> A/HRC/36/37/Add.2, para. 92.

<sup>14</sup> CCPR/C/USA/CO/4, para. 15.

<sup>15</sup> Opinions No. 28/2017, No. 42/2017 and No. 72/2017; see also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 18.

<sup>16</sup> Human Rights Committee, general comment No. 35, para. 18.

enshrined in article 14, paragraph 1, of the Covenant and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.<sup>17</sup>

100. Moreover, the Working Group has found that in cases involving excessive length of detention, the individual shall enjoy the same guarantees as in criminal cases, including those under article 14 of the Covenant, even if the detention is qualified as administrative.<sup>18</sup> Mr. Aguirre-Urbina was detained for some seven years in similar conditions to those serving a criminal sentence, and this detention was punitive in nature (see para. 87 above). Therefore, the Working Group will consider whether his detention met the requirements of article 14 of the Covenant and other relevant provisions. In doing so, the Working Group reiterates that the Government did not challenge any of the allegations made by the source.

101. Mr. Aguirre-Urbina was entitled to have his bond application hearing before an independent and impartial tribunal. All his bond hearings were presided over by the same judge who, after recommendation from the district judge on 17 May 2019, set the bond exceptionally high. The Working Group notes the unchallenged allegations that this judge was clearly and openly displeased at having to revise the earlier decision. It was also the same judge who failed to ensure that Mr. Aguirre-Urbina, a man assessed by medical experts as suffering from serious mental health conditions, had proper legal representation, thus failing to act in an impartial manner to ensure the equality of arms. It was also the same judge who failed to substantiate continuous decisions that he posed a risk of flight and a risk to the community.

102. Following his classification as “dangerous” in the immigration detention facility, Mr. Aguirre-Urbina was presented to the judge in a red suit, which he was always obliged to wear. This was a further breach of the principle of equality of arms.

103. Consequently, the Working Group finds a breach of articles 8 and 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. Noting that these violations had direct implications for Mr. Aguirre-Urbina remaining in detention, the Working Group considers that it was also arbitrary under category III.

iv. Category IV

104. Mr. Aguirre-Urbina was not standing trial in relation to criminal charges; rather, he was subjected to asylum proceedings, and his detention related to these. However, such detention in immigration proceedings must comply with basic international standards.

105. Detention in the course of immigration proceedings must be an exceptional measure of last resort and to ensure this, alternatives to detention must be considered.<sup>19</sup> In the present case, alternatives were indeed considered, as Mr. Aguirre-Urbina was granted bail. However, alternatives to detention should also be realistic and must not depend upon the ability of the individual to pay for them,<sup>20</sup> since otherwise they are not true alternatives. The bail in 2019 was set at \$30,000, a sum which Mr. Aguirre-Urbina indicated he was unable to pay. Although the requisite sum was eventually raised through a community effort, in the absence of any explanation from the Government, the Working Group nevertheless concludes that the bond was not realistic. This is a serious infringement of article 9 of the Covenant, as it fails to comply with the requirement of exceptionality of immigration detention.

106. The Working Group has already examined the numerous bail hearings spanning seven years and noted the various fair trial rights violations that occurred. Moreover, it was always Mr. Aguirre-Urbina who challenged his detention. It was not subjected to an automatic, periodic review to ensure that it remained justified as necessary and

<sup>17</sup> Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 62.

<sup>18</sup> Opinions No. 31/2017, No. 73/2018 and No. 12/2020.

<sup>19</sup> A/HRC/13/30, para. 59; E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (f); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81.

<sup>20</sup> A/HRC/36/37/Add.2, paras. 28 and 30; and A/HRC/39/45, annex.

proportionate.<sup>21</sup> The Working Group recalls that ensuring such automatic, periodic review was among its recommendations following its 2016 visit to the United States.<sup>22</sup> The absence of such review is an additional serious breach of article 9 of the Covenant.

107. The source alleges that Mr. Aguirre-Urbina, an individual who had been assessed as suffering from serious mental health conditions, had significant difficulties in accessing legal assistance. The Working Group is appalled at unchallenged allegations that at least one bail hearing was cancelled by Mr. Aguirre-Urbina's lawyer, owing to Mr. Aguirre-Urbina's inability to pay.

108. As the Working Group noted, migrants and asylum seekers in detention shall have the right to prompt and effective legal assistance in order to be able to challenge the necessity and proportionality of their detention.<sup>23</sup> These are further severe violations of article 9 of the Covenant, as Mr. Aguirre-Urbina's ability to challenge the legality of his continued detention was seriously adversely affected.

109. Mr. Aguirre-Urbina spent overall some seven years in immigration detention. While he was able to challenge his deprivation of liberty, efforts to do so were all initiated by himself, and the Government failed to comply with its obligation to ensure periodic, automatic review. Moreover, the bond hearings were replete with violations of fair trial rights and, when the bond was set in 2019, it was so high that, in the individual circumstances, it did not constitute a true alternative to detention.

110. The Working Group considers that the remedies afforded to Mr. Aguirre-Urbina were not effective, in breach of article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. It therefore concludes that his administrative detention as an asylum seeker was arbitrary under category IV.

v. Category V

111. The source submitted that the detention of Mr. Aguirre-Urbina was also arbitrary under category V as it was discriminatory on the basis of his economic status, minority status, disability status and sexual orientation.

112. In relation to the claim concerning his sexual orientation, the source presented it in connection to reasons why Mr. Aguirre-Urbina should not be deported, rather than as reasons for his detention. However, in relation to his health status, numerous reports were submitted to the court during various bond hearings throughout the seven years of Mr. Aguirre-Urbina's detention. These clearly indicated that he was suffering from serious mental health conditions and recommended treatment outside detention. These reports also questioned his ability to understand the ongoing proceedings and to fully participate in them. Yet, Mr. Aguirre-Urbina remained in immigration detention, which likely exacerbated his health condition and, in the absence of effective legal representation, which he continued to struggle with during the various hearings. The Working Group is appalled by the clearly discriminatory attitude of the courts towards Mr. Aguirre-Urbina and finds that his continued detention was discriminatory owing to his disability, in violation of article 26 of the Covenant.

113. The Working Group notes that the Government has expressed its understanding of articles 2 and 26 of the Covenant, and that distinctions based on factors such as race or religion are permitted when they are rationally related to a legitimate government

<sup>21</sup> Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, principle 21 (A/HRC/30/37, annex, para. 43); A/HRC/13/30, para. 61; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 11 (3) (General Assembly resolution 43/173, annex); E/CN.4/2003/8/Add.2, para. 64; A/HRC/13/30/Add.2, para. 79 (g); and A/HRC/16/47/Add.2, para. 120. See also opinion No. 72/2017.

<sup>22</sup> A/HRC/36/37/Add.2, para. 92; see also opinion No. 72/2017.

<sup>23</sup> Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, principle 21 (A/HRC/30/37, annex, paras. 42–43).

objective.<sup>24</sup> However, the Government has not explained how this case was compatible with either article 26 of the Covenant or its understanding of the provision.

114. Turning to the allegations of discrimination on the basis of economic status, the Working Group has observed first-hand many situations of asylum seekers in detention in the United States that are akin to the present case.<sup>25</sup> The Working Group remains concerned about the apparently prevalent practice of setting bail at such excessively high levels that those subjected to immigration detention are unable to pay. Such a practice cannot be said to meet the requirement of alternatives to detention as excessive bails do not provide a real alternative to detention.

115. Moreover, Mr. Aguirre-Urbina had to ensure his own legal representation and at least one bond hearing was cancelled by his lawyer owing to Mr. Aguirre-Urbina's inability to pay. Therefore, the Working Group concludes that the failure to ensure effective legal representation to Mr. Aguirre-Urbina, as well as the excessive levels of bail set, resulted in his continued detention. Consequently, his detention was arbitrary under category V.

116. The Working Group wishes to express its concern over the reported health issues of Mr. Aguirre-Urbina. The un rebutted allegations made by the source indicate severe mental health concerns, diagnosed and confirmed during numerous court proceedings by various physicians. The arbitrary deprivation of liberty to which Mr. Aguirre-Urbina has been subjected is likely to have exacerbated his condition, although he is no longer detained. The Working Group calls upon the Government to ensure that Mr. Aguirre-Urbina's right to health is duly respected and safeguarded and that he receives all appropriate treatment and medication, free of charge. The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the rights of persons with disabilities and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

117. The Working Group's mandate must consider to what extent detention conditions, including the treatment of detainees, can negatively affect the ability of detainees to prepare their defence as well as their chances of a fair trial.<sup>26</sup> The Working Group observed during its 2016 country visit that immigration detention in the United States often takes place in poor conditions. The Government must ensure that immigration detention is not punitive in nature and that all such detainees should be held in conditions and treated with the respect inherent to human dignity.

118. Moreover, the submissions from the source contain serious allegations concerning the work available to those in immigration detention facilities of the GEO Group and the conditions of work and inadequate remuneration they receive. The Working Group refers the case to the Working Group on the issue of human rights and transnational corporations and other business enterprises.

119. The Working Group notes that four years have passed since its visit to the United States in 2016, and it would now welcome an invitation to undertake a follow-up visit, in accordance with the terms of reference for country visits.

### **Disposition**

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

The deprivation of liberty of Fernando Aguirre-Urbina, being in contravention of articles 3, 8, 9, 10 and 14 of the Universal Declaration of Human Rights and articles 9, 14 (1) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III, IV and V.

121. The Working Group requests the Government of the United States of America to take the steps necessary to remedy the situation of Mr. Aguirre-Urbina without delay and

<sup>24</sup> See declarations and reservations to the Covenant at <https://indicators.ohchr.org/>.

<sup>25</sup> A/HRC/36/37/Add.2, paras. 21–46.

<sup>26</sup> E/CN.4/2004/3/Add.3, para. 33; see also opinions No. 1/2017 and No. 30/2017.



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.

122. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Aguirre-Urbina unconditionally and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the unconditional release of Mr. Aguirre-Urbina.

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

124. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the rights of persons with disabilities, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Working Group on the issue of human rights and transnational corporations and other business enterprises.

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

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

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

127. 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.

128. 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.

129. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>27</sup>

*[Adopted on 26 August 2020]*

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<sup>27</sup> Human Rights Council resolution 42/22, paras. 3 and 7.