

Working Group on Arbitrary Detention

February 1, 2022

Dear Mr. Larrondo,

I am pleased to address you in relation to the 92nd session of the Working Group on Arbitrary Detention, at which several opinions were adopted on cases brought to your attention.

Pursuant to paragraph 18 of the Group's working methods, I hereby transmit herewith the text of Opinion No. 63/2021 (Cuba), adopted on November 17, 2021, which considers a case referred by your organization.

In accordance with its working methods, the Group transmits its views to the sources of the communications within forty-eight hours of their transmission to the government of the country concerned.

This Opinion will be published on the Working Group's website, as well as mentioned in the annual report it will submit to the Human Rights Council. In the meantime, we kindly request that the information provided herein be treated with discretion.

Sincerely yours,



Lucie Viersma
Secretary

Working Group on Arbitrary Detention

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**Views adopted by the Working Group on Arbitrary Detention
at its 92nd session, November 15-19, 2021**

Opinion No. 63/2021, concerning Maykel Castillo Pérez (Cuba)

1. The Working Group on Arbitrary Detention was established by Commission on Human Rights resolution 1991/42. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was last extended for three years by the Council in its resolution 42/22.
2. In accordance with its methods of work¹, the Working Group transmitted a communication concerning Maykel Castillo Pérez to the Government of Cuba on 10 August 2021. 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 considers deprivation of liberty to be arbitrary in the following cases:
 - a) When it is manifestly impossible to invoke any legal basis to justify it (such as the continued incarceration of a person after having served his sentence or despite an amnesty law applicable to him) (category I);
 - b) When the deprivation of liberty results from the exercise of rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, with respect to States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - c) When the failure to observe, in whole or in part, the international standards relating to the right to a fair trial, as set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to confer on the deprivation of liberty an arbitrary character (category III);
 - d) When asylum seekers, immigrants or refugees are subject to prolonged administrative detention without the possibility of administrative or judicial review or appeal (category IV);
 - e) When the deprivation of liberty constitutes a violation of international law because of discrimination based on birth, national, ethnic or social origin, language, religion, economic status, political or other opinion,

¹ A/HRC/36/38.

gender, sexual orientation, disability or other condition, which leads or may lead to disregarding the principle of equality of human beings (category V).

Information received

Source communication

4. Maykel Castillo Perez is Cuban and based in Havana. Mr. Castillo is a freelance musician and writer. He is co-author of the song "Patria y Vida"². He is also co-founder of Movimiento San Isidro, together with a group of artists and intellectuals who suffer discrimination and who denounced Decree Law 349, of October 17, 2017, for imposing restrictions on the freedom of artistic dissemination. Mr. Castillo is not affiliated to any officially recognized organization, as the Government has prohibited his affiliation and, therefore, the possibility of showing his art publicly, being discriminated for his pro-democratic thinking and his human rights activism.

5. According to the information received, Mr. Castillo has suffered repressive police acts of all kinds. It has been documented that, from December 14, 2019, to May 18, 2021, Mr. Castillo was detained 121 times³. Mr. Castillo also suffered imprisonment of one year and one month, from September 23, 2018 until October 23, 2019, including preventive detention and a trial full of irregularities, accused of an alleged, although false, attack. This, for having filmed a police operation on the public road, with his cell phone and having refused to hand it over to the police. Mr. Castillo was fined, on April 22, 2020, 3,000 Cuban pesos, by means of Decree Law 370, for publishing on his Facebook that "a Cuban woman died in the street because of Covid-19". For this he was also deprived of liberty for 3 days, without charge and without judicial protection.

6. The source indicates that, prior to his arrest, Mr. Castillo was harassed in his home by police forces, who prevented him from leaving. On March 8, 2021, at 10:30 a.m., while he was walking in the street and transmitting a live video with his cell phone, at the intersection of San Miguel and Lucena streets, State Security agents were watching and waiting for him, assisted by a National Police patrol. Upon arriving at the surveillance point, Mr. Castillo asked one of the officers why he was being watched. One officer violently tried to take his cell phone away from him. Upon Mr. Castillo's refusal to hand over the phone, the State Security agent, dressed in civilian clothes, with no identification number, no police report filed for a prior or flagrant crime, and without a written order or rational justification, proceeded to violently deprive him of his liberty. Mr. Castillo was taken to the police station on Dragones Street in the Centro Habana municipality. The details of his location were not communicated to his family. Hours later, he was released without charge.

7. According to the source, on March 12, 2021, on a public street in Old Havana, Mr. Castillo was approached by a police patrol car and a uniformed officer and a State Security agent in civilian clothes got out of the car. They indicated to Mr. Castillo that he would be

² <https://www.youtube.com/watch?v=pP9Bto5IOEQ>

³ On the dates 12/14/2019, 12/16/2019, 12/26/2019, 12/26/2019, 01/18/2020, 01/20/2020, 02/14/2020, 03/16/2020, 04/15/2020, 04/17/2020, 04/24/2020, 05/14/2020, 05/23/2020, 06/11/2020, 06/12/2020, 06/12/2020, 16/06/2020, 17/06/2020, 30/06/2020, 30/06/2020, 02/07/2020, 02/07/2020, 20/07/2020, 30/07/2020, 03/08/2020, 11/08/2020, 18/08/2020, 24/08/2020, 26/08/2020, 27/08/2020, 27/08/2020, 31/08/2020, 09/10/2020, 14/10/2020, 20/10/2020, 13/11/2020, 14/11/2020, 15/11/2020, 16/11/2020, 17/11/2020, 18/11/2020, 19/11/2020, 19/11/2020, 20/11/2020, 21/11/2020, 21/11/2020, 22/11/2020, 26/11/2020, 28/11/2020, 01/12/2020, 02/12/2020, 04/12/2020, 05/12/2020, 06/12/2020, 07/12/2020, 08/12/2020, 09/12/2020, 10/12/2020, 15/12/2020, 17/12/2020, 17/12/2020, 21/01/2021, 27/01/2021, 27/01/2021, 29/01/2021, 30/01/2021, 31/01/2021, 01/02/2021, 06/02/2021, 09/02/2021, 15/02/2021, 20/02/2021, 06/03/2021, 06/03/2021, 08/03/2021, 08/03/2021, 12/03/2021, 12/03/2021, 21/03/2021, 03/04/2021, 03/04/2021, 04/04/2021, 04/04/2021, 05/04/2021, 11/04/2021, 12/04/2021, 12/04/2021, 12/04/2021, 14/04/2021, 15/04/2021, 16/04/2021, 16/04/2021, 17/04/2021, 18/04/2021, 19/04/2021, 20/04/2021, 21/04/2021, 22/04/2021, 23/04/2021, 24/04/2021, 25/04/2021, 27/04/2021, 29/04/2021, 30/04/2021, 03/05/2021, 04/05/2021, 05/05/2021, 06/05/2021, 06/05/2021, 08/05/2021, 09/05/2021, 10/05/2021, 11/05/2021, 12/05/2021, 13/05/2021, 13/05/2021, 13/05/2021, 14/05/2021, 15/05/2021, 16/05/2021, 17/05/2021, 18/05/2021 y 18/05/2021.

arrested and, without offering any resistance, he proceeded to get into the car, without knowing where he would be taken to. After hours of arrest at the Habana Vieja police station, he was released without charge.

8. On April 3, 2021, at approximately 5:30 pm, several activists, artists and intellectuals peacefully went to the vicinity of the Police Unit of Cuba and Chacón, to inquire about the whereabouts of a coordinator of the San Isidro Movement, who had been arrested hours earlier. After requesting information and transparency for two hours, they were dispersed with violence, beatings, arrests and arbitrary transfers. Mr. Castillo was allegedly taken by seven policemen to the Cuba and Chacón station. He was allegedly beaten by the police inside the unit. He was then taken by police patrol to the Cuarta Estación de Policía del municipio Cerro. After hours of threatening interrogations, he was released in the Cristo de La Habana park, without charges, but with injuries to his neck and hands as a result of the beating.

9. According to the source, on April 4, 2021, at 6:00 p.m., Mr. Castillo was the victim of a failed police kidnapping attempt, on Cuba and Acosta streets, when he was walking towards the headquarters of the San Isidro Movement. A few minutes earlier, he had managed to circumvent the police state of siege established against his freedom of movement in the vicinity of his home. Mr. Castillo reportedly observed several police officers harassing a female citizen. Mr. Castillo approached the officers to intercede, asking them to treat him with respect. This action, however, served as an excuse for one of the officers to attempt to arrest him. This attempted arrest was made under the false pretext that he was not carrying his ID card. However, Mr. Castillo does not possess this document, since it was confiscated by State Security, which was known to the police. Mr. Castillo was immobilized. However, the neighbors at the time confronted the agents to prevent the arrest.¹ The neighbors who spontaneously confronted the police, Mr. Castillo offered no resistance.⁵

8. The source indicates that this time there was no crime or formal accusation against Mr. Castillo either. The crimes attributed to him are those that the prosecution described as subsequent to the arrest, without any prior crimes appearing. That is to say, it is after the failed arrest that he is charged with crimes, not before, when the facts should be logically and chronologically concatenated. This proves that the detention was arbitrary and illegal, since the agents were not carrying out their duties, but were in violation of them. Furthermore, since there was provocation by the police officer, illegality or excess in his actions, there can be no crime of assault, resistance, contempt or disobedience, according to the Penal Code (Articles 142 to 144), as confirmed by the official bibliography of the National Organization of Collective Law Firms, called "Cuban Penal Code", and the jurisprudence of the bulletins of the People's Supreme Court.

9. On May 13, 2021, Mr. Castillo was reportedly arrested again while attempting to leave a home in 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 a crime. The arrest took place without notification of a police warrant and without warnings that he was accused of any new crime. Hours later he was released without charge.

10. The source indicates that Mr. Castillo was arrested on May 18, 2021. According to file 24/2021 of the Prosecution Unit for Crimes against State Security, Mr. Castillo was arrested because of a complaint filed against him by the alleged police officer who executed - with extreme violence and without complying with legal formalities - the failed arrest on April 4, 2021. In this case, Mr. Castillo is charged with the crimes of assault, resistance, evasion of prisoners and detainees, and public disorder.

11. It is indicated that, according to the police officer's statements, he was acting "within the scope of his duties" when Mr. Castillo physically assaulted him. In addition, the officer

¹⁵ <https://www.youtube.com/watch?v=JMJEYNpIx88>.
https://youtu.be/5_yMPwQfjN0?t=84.

falsely indicated that Mr. Castillo said that they were not going to put on the mask and began to shout "I am not going to put on the mask".

"down with the revolution", "Patria y Vida" and "that the dictatorship was over". The officer also indicated that the situation "caught the attention of the neighbors, which is why the officers got out of the car and proceeded to arrest" Mr. Castillo. The source points out that it was the officers who caused the disorder and indignation among the neighbors. There was no public disorder caused by Mr. Castillo, but by the officers. It is false that Mr. Castillo assaulted the police officer, since at all times he was with his hands raised or voluntarily carried behind his back, always in a peaceful attitude. The officer concluded by denouncing that Mr. Castillo assaulted him "by punching him, kicking him, taking away his regulation weapon and his whistle". Thus, according to the officer, Mr. Castillo managed to evade arrest.

12. The source alleges that it is false that Mr. Castillo incited the neighbors to public disorder. Dozens of people came out spontaneously to defend him from police abuse and excess, and were saved from violence thanks to their intervention, without Mr. Castillo's request. It is false that Mr. Castillo took the police officer's gun and whistle, and that he tore his uniform. For the source, the facts reveal yet another violent and repressive action by the authorities. By criminalizing behavior, they are trying to imprison a spokesman who has not ceased to denounce censorship, social injustice and police repression.

13. Mr. Castillo is also reportedly being charged with the crimes of spreading an epidemic and aggravated contempt. This indictment alleges that, on April 4, 2021, Mr. Castillo allegedly failed to comply with COVID-19 prevention measures, during the time he was shouting and singing songs, without properly wearing the corresponding mask, together with neighbors gathered in a public space. The source points out that the acts denounced against Mr. Castillo, of singing in public space using the mask incorrectly, cannot be considered more than a mere contravention, punishable with a fine.

14. On the other hand, it is argued that there is no crime of contempt. The State Security tries to qualify the aggravated crime, foreseen and sanctioned in article 144, paragraphs 1 and 2 of the Penal Code. The source considers that chanting with a crowd of dozens or hundreds of people on the public highway cannot constitute a crime.

15. The source alleges that the song in question has been public since the first half of 2019 and allegedly arises from words spoken by the President of Cuba in 2017. It is alleged that, if the song were likely to be criminalized, the authorities would have first charged the authors. The Government has not initiated any action against the song, which has circulated in the country through alternative channels, nor the authors. Criminalizing the singing of a work on which no legal action has been taken for more than two years would denote the fraudulent use of the criminal offense of desacato, in a selective and discriminatory manner.

16. It is alleged that the criminal offense of contempt that has been applied is not compatible with the right to personal liberty under international human rights law, because it can be used to limit freedom of expression in an arbitrary and discriminatory manner, in favor of private interests, in an illegitimate manner.

17. It is alleged that the Prosecutor's Office should have provided free and full access to file 24/2021 of the Prosecution Unit for Crimes against State Security, a body that does not have the power to investigate common crimes, thus failing in its role in the preparatory phase of the criminal proceedings. The source argues that Mr. Castillo has not received independent legal assistance since his arrest, despite having an appointed lawyer. His lawyer belongs, as required by law, to a collective law firm, under the Ministry of Justice and controlled by the State, through the National Organization of Collective Law Firms, whose degree of autonomy is subject to the Government.

18. On June 30, 2021, the public defender filed a complaint with the Attorney General's Office, requesting that the precautionary measure of preventive detention be modified, since Mr. Castillo is detained more than 160 kilometers from Havana, where he and his family members reside. In view of the distance, the lawyer has not been able to interview Mr. Castillo, despite the requests made. For all these reasons, the appeal claims that Mr. Castillo Pérez has not had due process, nor has he received legal assistance throughout the process. The Appeal states:

(...) the three requirements foreseen in article 253 of the law to modify the precautionary measure are configured (...), given that the alleged crime did not cause alarm, it is not frequent in the territory and there is no evidence that MAIKEL will try to evade the action of justice (...) there is no need for the precautionary measure of pre-trial detention since the defendant has a recognized domicile and family and social mobility is forbidden and the borders are closed.) there is no need for the precautionary measure of provisional imprisonment since the sponsored party has a domicile and recognized family and social mobility is prohibited and borders are closed, therefore we request the variation of the precautionary measure for that of cash bail or house arrest (...), nor has the 112th Agreement of the Governing Council of the People's Supreme Court on the exceptionality of the precautionary measure of provisional detention been complied with in accordance with Article 252 of the CPL and Instruction No. 53 of June 30, 1975 of the Governing Council of the People's Supreme Court.

19. The source alleges that the crimes of assault, resistance, evasion of prisoners and detainees and public disorder are not applicable, according to the interpretation of the Penal Code and case law. The police harassment suffered by Mr. Castillo, in a systematic and uninterrupted manner, is recalled. The false accusations arise only after police acts that violate constitutional rights.

20. It is alleged that Mr. Castillo has been detained without attempting to commit a crime, nor at the time of committing it. Until May 18, 2021, he owed no sanction or obedience to any precautionary measure. Therefore, it is arbitrary to accuse him of absconding for breaking a sanction of deprivation of liberty or a security measure he was serving. Neither was there a police arrest warrant against him, for having been accused, or sanctioned declared in absentia in a previous criminal proceeding. The criminal facts were established after the arbitrary arrest or as a result of the criminalization of his conduct.

21. The crimes charged are alleged to have been committed in the course of or after the arrest. None of them took place prior to the arrest. The crimes of assault and resistance charged against Mr. Castillo, as well as any other crime against the police administration and jurisdiction, are not qualified. The actions of the officers were unlawful, excessive, violent and therefore in violation of their duties under the law.

22. The source alleges that the crime of escape of prisoners and detainees lacks legal basis and legal qualification in this case, and has never been applied to circumstances such as those that occurred on April 4, 2021. Under Article 163.1 of the Penal Code, the crime exists when a person is in police captivity, in jail or a cell, or when it happens in the transfer from one jail to another, as well as to courts, the hospital, interrogations, etc. Mr. Castillo was not in confinement. He escaped from police custody, because he was not shown an arrest warrant, indictment, or driving communication.

23. The source points out that the charge against Mr. Castillo for the crime of evasion of prisoners or detainees seeks a penalty of up to 3 years of imprisonment. In order to keep him in prison for as long as possible.

24. It is indicated that there are no evidentiary and legal qualification elements to charge Mr. Castillo with the crime of public disorder, because the agglomeration of people and the beginning of the demonstrations, on April 4, 2021, did not incite, provoke or continue to

promote it. The source reiterates that, from the video taken at the time, it can be seen that it was the violent police action that provoked, stimulated and sustained the popular reaction against the actions of the agents at the time of the arrest. For the source, the Prosecutor's Office could not incriminate Mr. Castillo for exercising a human right, the peaceful demonstration, together with his neighbors, at the door of the headquarters of the San Isidro Movement.

25. It is indicated that, for the configuration of the crime of public disorder, the legislation requires that the defendant maliciously disturbs the order, without a justifying cause, shouts an alarm or makes threats of a common danger. Mr. Castillo did not execute any of the aforementioned governing verbs. Nor did he have the intent to provoke panic or tumult, and his songs and/or phrases did not disturb public order. Nor does the crime of public disorder exist, since it was found that he did not provoke fights or altercations, nor did he have the intention to do so, but rather the contrary.

26. The source indicates that one of the objectives of the Attorney General's Office is to act against dissidents or "counterrevolutionaries" who allegedly act against the independence and sovereignty of the State, as well as against the political, economic and social interests of the State, according to orders written in Article 7 (b) of Law 83 of the Attorney General's Office.

27. For the source, the precautionary measure of provisional detention ordered by the Prosecutor's Office against Mr. Castillo is arbitrary, because it does not comply with the requirements of articles 241 and 242 of the Criminal Procedure Act. This prohibits detention unless there is an alleged crime and it is executed with the prescribed formalities. Only some of the formalities, such as the filing of indictment and formal arrest warrant, may be omitted when attempting to arrest: 1) whoever attempts to commit a crime, at the moment of going to commit it; 2) delinquent infraganti; 3) who by escape has broken a sanction of deprivation of liberty or a security measure; 4) the accused declared in absentia. Not being Mr. Castillo's case, his arrest and preventive detention is illegal.

28. In addition, the source states that article 252 of the Criminal Procedure Law indicates that pre-trial detention is applicable when: 1) the existence of a crime is established in the proceedings; 2) there are sufficient grounds to assume that the accused is criminally responsible for the crime. Since the above assumptions have not been met, Mr. Castillo must be released, with the right to be repaired and compensated for the damages caused to him.

29. In the writ of Habeas Corpus filed before the Provincial Court of Havana on May 19, 2021, it was denounced that the facts narrated violated Articles 94 and 95 of the Constitution, where it is stated that individuals can only be arrested, prosecuted and convicted for qualified criminal offenses and through due process.

30. It is alleged that the rights and guarantees of due process have been disrespected. Mr. Castillo was deprived of his rights by an unfounded resolution of an authority that does not comply with the legal requirements to be taken into account for its issuance. He was detained by order of police authorities acting outside their competence and outside the legal framework of their functions. He was not treated with respect for his dignity and physical, psychological and moral integrity and was the victim of violence and coercion to force him to testify. The obligation to inform him of the charges against him was not complied with, he was denied communication with his family immediately after his arrest, and he was denied the minimum conditions to exercise his defense.

31. It was also denounced that, due to the systematic nature of the arbitrary arrests, the State Security, as a structure representing the Executive Power, as the body that coordinates the systematic surveillance and repression against Mr. Castillo, violated Articles 41, 51, 52 and 54 of the Constitution, since its excessive actions do not recognize, respect or guarantee personal freedom, free movement or freedom of thought, conscience and expression.

32. The purpose of the Habeas Corpus is to avoid the lack of judicial protection for the prisoner. The brief proposed that Mr. Castillo be heard in a public hearing so that the judges could examine and contrast his allegations. This would fulfill the essential purpose of the appeal: the exhibition before family members and interested parties. This could also demonstrate the injuries caused by the police treatment received.

33. Additionally, the Habeas Corpus requested the examination of books, documents, papers, records, official controls and other evidentiary means, in order to contribute to the clarification of the facts and the most certain determination of the truth. The objective was for the judges to verify that there was no previous accusatory order against Mr. Castillo.

34. However, none of the proceedings and actions requested in favor of truth and freedom were contemplated by the First Criminal Chamber of the People's Provincial Court of Havana. By means of a resolution of one page long, an order dated May 24, 2021, it rejected the request presented. The Court considered that the prosecutor's report and other documents, without distinguishing which ones or giving details, informed that Mr. Castillo was imprisoned by decision of a precautionary measure imposed by the Prosecutor's Office. It did not offer arguments or explanations as to the justification for denying the proceedings. The Criminal Chamber showed its inefficiency and disinterest in imparting justice to the parties under equal conditions.

35. The source further indicates that the Prosecutor's order of June 3, 2021, in response to the request for a change of precautionary measure, ratified the deprivation of liberty against Mr. Castillo, explaining that the original conditions that motivated the decision had not changed, without explaining what those causes and motives were.

It is indicated that the Government cannot invoke in its favor any legal basis to justify Mr. Castillo's arrest, criminal proceedings and the maintenance of the precautionary measure of deprivation of liberty. It is alleged that the repressive actions against Mr. Castillo show that the aim is to restrict the exercise of the rights or freedoms guaranteed by articles 1, 2, 5, 7, 8, 9, 13, 18, 19, 20 and 28 of the Universal Declaration. For the source, the total non-observance of the international norms related to the right to a fair criminal trial, established in the Universal Declaration and in the accepted international instruments, is of such gravity that, in the present case, it confers to the deprivation of Mr. Castillo's liberty the character of arbitrary. In addition, it is indicated that the detention constitutes a violation of international law because it involves discrimination on the grounds of political and other opinions, ignoring the principle of equality of human beings in terms of freedom of thought and expression. The source alleges that the detention and deprivation of liberty of Mr. Castillo should be considered arbitrary under categories I, II, III and V.

Government response

39. The Working Group transmitted the allegations of the source to the Government on 10 August 2021, requesting it to provide, by 11 October 2021, detailed information on Mr. Castillo's case, clarifying the legal and factual basis for the detention, as well as its compatibility with the State's international obligations. The Working Group requested the Government to guarantee Mr. Castillo's physical and psychological integrity. Taking into account the global pandemic context, in accordance with the recommendations of the World Health Organization of 15 March 2020, regarding the response to COVID-19 in places of detention, it urged the Government to prioritize the use of alternative non-custodial measures, at all stages of the process, including during the pretrial, trial, decision and execution of the sentence.

40. The Government replied on October 11, 2021, stating that the Cuban authorities carried out the necessary investigations, with strict respect for the rights and procedural guarantees that apply to all persons, without distinction. It is false that Mr. Castillo was arbitrarily detained. The Government denies that he suffered permanent surveillance by the police

authorities, that they prevented him from leaving his home or moving freely, or that he was detained on various occasions without rational justification, prior complaints or violence. It is regrettable that a person with a criminal record, including several criminal proceedings, is presented as an activist and human rights defender.

41. The Government states that Mr. Castillo has a deplorable anti-social behavior and multiple criminal records. He has been officially warned on 18 occasions and has been fined 12 times for disorderly conduct, illegal economic activity, prohibited gambling and failure to carry identification documents.

42. The Government informs that Mr. Castillo has been criminally punished to one year of deprivation of liberty, in 2003, for contempt of court; in 2004, for robbery with violence or intimidation, to 9 years of deprivation of liberty; in 2015, for resistance, to one year of deprivation of liberty.

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

44. The Government maintains that it is false that Mr. Castillo was fined and deprived of his liberty, on April 22, 2020, for making posts on Facebook. He was taken to the National Revolutionary Police Unit for the crime of disobedience, being officially warned for failing to comply with the epidemiological measures established for the prevention and control of COVID-19, after which he was released without charge.

45. The Government insists that Mr. Castillo exhibits poor social conduct, which is amply documented in police records. On April 3 and May 13, 2021, Mr. Castillo was found on public streets uttering vexatious and offensive phrases with the purpose of disturbing public order.

46. The Government affirms that it is false that Mr. Castillo was the victim of an attempted police kidnapping on April 4, 2021. Mr. Castillo, together with another citizen, provoked police officers, who requested a citizen who was violating the health protocols established for the prevention of COVID-19. Mr. Castillo adopted defiant and offensive attitudes towards the authorities, verbally and physically assaulted the police officers, tried to snatch the police weapon from one of the officers and, with the help of other citizens, evaded arrest.

47. The Government informs that, on May 18, 2021, Mr. Castillo was arrested as a result of complaint 18445/21, filed in investigative file No. 42 of 2021, for the crimes of assault, contempt and evasion of prisoners and detainees, related to acts of disobedience, aggression and offenses against officers of the National Revolutionary Police.

48. The Government stresses that Cuba, as a State Party to the International Convention for the Protection of All Persons from Enforced Disappearance, complies with the postulates established in these legal instruments. In Cuba there are no disappeared persons, there will never be room for impunity, nor laws or regulations that protect them.

49. The Government notes that immediately after his arrest, Mr. Castillo's family was informed that he would be taken to the Infanta and Manglar Police Unit, as well as the reasons for this.

50. The Government informs that, once arrested, and within the 72 hours established in the Criminal Procedure Law, the preliminary investigation and other investigative actions were presented.

51. The Government informs that on May 20, Mr. Castillo was transferred to the Department for the Investigation of Crimes against State Security. There, in compliance with health protocols, he underwent a COVID-19 test, and the Preparatory Phase File No. 24/2021 of the General Directorate of Criminal Investigation was opened. On May 24, a precautionary measure of provisional detention was issued, which was notified to Mr. Castillo that day. In addition, he has been provided with the necessary medical assistance during his internment.

52. The Government also indicates that on May 21, Mr. Castillo contacted his family by telephone. In the conversation, he informed about the place where he was being detained, requested personal hygiene, cigarettes and had an exchange with his daughter. He also communicated with another family member, to whom he informed about his state of health and personal needs.

53. According to the Government, Mr. Castillo was interviewed by the Prosecutor's Office, which ratified his legal status in the proceedings and informed him of the reasons for his detention. He was informed in writing of the charges against him, related to the events of April 4, and of his right to testify or refrain from doing so. He agreed to testify, but refused to sign the document, so the presence of two witnesses was required to attest to the execution of this procedure.

54. On May 31, Mr. Castillo was released from the penitentiary institution, for which he underwent a new COVID-19 test and was transferred to the "Kilo 5" penitentiary establishment in Pinar del Río. The detainee immediately notified his family by telephone.

55. Mr. Castillo communicates with family and friends by telephone two or three times a day, as does the entire prison population, given the impossibility of receiving visits in the prisons as a result of COVID-19. He has received food and personal care on four occasions, sent by family members.

56. It is false that Mr. Castillo did not receive independent legal assistance since his arrest. The National Organization of Collective Law Firms has among its functions the duty to guarantee the provision of legal services to the entire population, for which it has structures and offices throughout the territory, through which it provides legal services. During the process, Mr. Castillo has received legal advice and representation from the lawyers of the Bufete Colectivo de la Víbora.

57. The Government states that counsel appeared, on June 1, at the Department of Instrucción de los Delitos Contra la Seguridad del Estado for the purpose of reviewing the Preparatory Phase File. In full guarantee of the rights and procedural freedoms that his client has, on June 19, the lawyer reviewed the proceedings filed in the preparatory phase file, and filed a complaint appeal before the Investigation Body, which was rejected for having been filed outside the legally established terms, a decision that was notified on July 19.

58. On August 13, Mr. Castillo received a visit from his lawyer, who interviewed him at the penitentiary establishment. Subsequently, the detainee served a period of 14 days in solitary confinement, as scheduled by the prison authorities, and received the first dose of the anti-COVID-19 vaccine, "Abdala". He has not received any other visits from the lawyer, as he has not requested them.

Additional comments from the source

59. The Working Group transmitted the Government's reply to the source on 11 October 2021. The source refuted the Government's reply, stating that the Government has not conclusively refuted the assertions made with documents. The source cites the contents of articles 72 to 84 of Cuban criminal legislation, which define terms such as "antisocial conduct" and "dangerous state due to antisocial conduct" to which the Government refers in its response. In addition, the source provides an analysis of the statute of limitations for the offences of which Mr. Castillo is accused. It argues that Mr. Castillo's detention is the result of a trial riddled with irregularities and the fabrication of the crime.

Deliberations

60. Category I

61. The Working Group received information on the arrest of Mr. Castillo on 18 May 2021. According to file 24/2021 of the Unit for the Prosecution of Crimes against State Security, Mr. Castillo was arrested after a complaint was filed against him by the police officer who

attempted to carry out the failed arrest with violence and without complying with legal formalities.

62. The Working Group takes note of the arrests to which Mr. Castillo has been subjected. The source has documented that Mr. Castillo was detained 121 times, in a year and a half. Mr. Castillo further suffered imprisonment of one year and one month, from 23 September 2018 to 23 October 2019, for his opposition to Decree Law 34, related to freedom of expression.

63. The Government has insisted in its response that Mr. Castillo has a very bad social conduct, widely documented, and has also established the record of arrests and convictions to which Mr. Castillo has been subjected.

64. The Government confirms the source's assertion that Mr. Castillo has been detained as a result of complaint No. 18445/21 filed in investigative file No. 42 of 2021, for the crimes of assault, contempt and evasion of prisoners and detainees related to acts of disobedience, aggression and offenses against officers of the National Revolutionary Police.

65. The Working Group has previously determined that the criminalization of these offenses is excessively vague and overly broad, as they do not clearly define the criminal activity they are intended to punish.² The principle of legality requires that laws be formulated with sufficient precision so that the individual can access the norm, understand it, and regulate his or her conduct accordingly.³ The application of vague and overly broad provisions in the present case make it impossible to invoke a legal basis to justify Mr. Castillo's detention.

66. Nor has the Government presented any document supporting the detention order, or showing that Mr. Castillo was informed of the reasons for his detention, nor is there any record that this preventive detention order has been subject to judicial control, so as to constitute in itself a legal basis for the deprivation of liberty. The Government has informed that Mr. Castillo has been detained in compliance with the law, limiting itself to describing the actions that led to Mr. Castillo's preventive detention and stating the reasons why it is not arbitrary, establishing that he was granted the assistance of a lawyer and that he maintains communication with his family.

67. The Working Group has indicated that it is not sufficient that there is a law authorizing arrest. The authorities must invoke that legal basis and enforce it by means of an arrest warrant.⁴ In the present case, the arresting officers did not present an arrest warrant at the time,⁵ in violation of articles 3 and 9 of the UDHR.⁶ As a result, the authorities failed to establish a legal basis for Mr. Castillo's detention.

68. In addition, the Working Group is not convinced that Mr. Castillo was informed of the reasons for his detention. In order to invoke a legal basis for the deprivation of liberty, the authorities should have informed Mr. Castillo of the reasons for his arrest when it was executed. The failure to do so violated Article 9 of the Universal Declaration and Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

69. The source insists that the precautionary measure of provisional detention ordered by the prosecutor's office against Mr. Castillo is arbitrary, because it does not meet any of the requirements of articles 241 and 242 of the Criminal Procedure Act. The Law prohibits the detention and securing of persons unless there is an alleged crime and it is executed with the prescribed formalities, except in cases of flagrancy or escape. This is not the case of Mr. Castillo.

70. The source alleges that the crimes of assault, resistance, evasion of prisoners and detainees and public disorder are not applicable. It recalls the police harassment that Mr. Castillo has suffered, in a systematic and uninterrupted manner, without the prior commission of an alleged

² Opinions Nos. 4/2020, 63/2019 and 65/2020. See also Inter-American Commission on Human Rights, Annual Report 2019, chap. IV.B, Cuba, para. 22.

³ Opinion 13/2021, para. 65 and 41/2021, para. 109.

⁴ Opinion Nos. 46/2019, para. 51; 46/2018, para. 48; 36/2018, para. 40; and 10/2018, para. 45.

⁵ Opinion No. 45/2019, para. 50. See also Opinion No. 71/2019, para. 70.

⁶ Opinions Nos. 37/2020, para. 52; 33/2020, para. 54; 31/2020, para. 41; 82/2018, para. 29; 68/2018, para. 39; 30/2018, para. 39; 26/2018, para. 54; 10/2018, para. 46; and 3/2018, para. 43.

crime. The accusations arise only after Mr. Castillo has been subjected to police acts that violate human rights.

71. The Government has indicated that Mr. Castillo received legal advice when the lawyer appeared on June 1 at the Department for the Investigation of Crimes against State Security. He then appeared to review the Preparatory Phase File on June 19, when he reviewed the archived proceedings and filed a complaint. However, the lawyer interviewed Mr. Castillo at the penitentiary only on August 13, 2021.

72. However, the Working Group notes that Mr. Castillo was detained on 18 May 2021. This means that he remained without the possibility of being legally advised or preparing his defence for three months, which contravenes international standards of protection against arbitrary detention, which determine that all persons deprived of their liberty have the right to the legal assistance of a lawyer of their choice at any time during their detention, including immediately after arrest.⁷

73. In view of these circumstances, the Working Group considers that the detention of Mr. Castillo is arbitrary and falls under category I.

i. Category II

74. The source states that Mr. Castillo has been detained and prosecuted after a long campaign of harassment and persecution against him, for being a political activist against the Government, and for exercising his right to freedom of expression, opinion, association and participation in the public life of his country, through artistic/cultural expressions such as music. Mr. Castillo is also a co-founder of the San Isidro Movement.

75. The Working Group has been informed, in a documented manner, that Mr. Castillo, from December 14, 2019, to May 18, 2021, has been detained 121 times for his participation in various protest activities in Cuba, while remaining an active opponent of the Government.

76. Prior to the arrest that is the subject of this case, Mr. Castillo was subjected to imprisonment for one year and one month, from September 23, 2018 to October 23, 2019. This, for having filmed a police operation on the public road, with his cell phone and having refused to hand it over to the police. Mr. Castillo was fined on April 22, 2020, with 3,000 Cuban pesos, by means of Decree Law 370, for publishing on his Facebook that "a Cuban woman died in the street because of Covid-19". In addition, for this he was deprived of liberty for 3 days, without charge and without judicial protection.

77. The Government has denied these assertions, but has not provided any evidence to refute them, beyond stating that, in the present case, on May 24, 2021, Mr. Perez was ordered to be remanded in custody, based on the dangerousness of his conduct. The Government's response contains the analysis and list of a long history of crimes, but such assertions do not contain any basis to support its assertions.

78. The Working Group wishes to express its deepest concern at the reports it has received of the harassment, intimidation, threats and arrests to which Mr. Castillo has been subjected. The Working Group wishes to insist on the fact that it applies a higher standard of review in cases where freedom of expression and opinion are restricted or where social activists or human rights defenders are involved. The Working Group resolves to refer this case to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the right to freedom of opinion and expression.

79. The Working Group insists on recalling that citizens also participate in the conduct of public affairs by exercising influence through public debate and dialogue with their representatives or through their organizational capacity. Such participation is underpinned by the guarantee of freedom of expression, assembly and association. There is an essential link between the rights to freedom of expression, assembly and 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 complement to other rights protected by the Universal Declaration.

⁷ A/HRC/30/37, Principle 9 and Guide 8.

80. Freedom of artistic expression and its dissemination are part of the right to freedom of opinion and expression, protected by Article 19 of the Universal Declaration.⁸ The Special Rapporteur on freedom of opinion and expression has established that: "Freedom of expression may be exercised through any type of media. This includes the right to participate in peaceful demonstrations and protests led by social sectors or organizations wishing to show their discontent with public policies, natural resource development contracts, attitudes adopted by public officials or any other situation" 18. The Working Group resolves to refer the present case to the Special Rapporteur in the field of cultural rights.

81. The Working Group is convinced that Mr. Castillo Pérez has been persecuted and arbitrarily detained for exercising his fundamental rights to freedom of opinion, expression, assembly, association and participation, guaranteed in articles 19 to 21 of the Universal Declaration; thus constituting arbitrary detention under category II.

ii. Category III

82. In view of the conclusion that the detention of Mr. Castillo was arbitrary under category II, the Working Group considers that there would be no place for a criminal trial. However, since the trial is ongoing, the Working Group will proceed to analyze whether fundamental elements of a fair, independent and impartial trial have been respected during the course of these judicial proceedings.

83. The Government has stated that, during the process, the preliminary investigation and other investigative actions were presented after 72 hours. However, it does not establish Mr. Castillo's appearance before a court within the maximum period of 48 hours in which he must present the accused, nor does it justify an absolutely exceptional⁹ delay. In this sense, the Working Group notes that the right to Habeas Corpus was also denied, without taking into account that this constitutes an autonomous human right, whose essential legal purpose is to avoid the deprivation of judicial protection of the person deprived of liberty, which is indispensable during a fair trial, as stated by the Working Group and as is clear from articles 8, 9 and 10 of the Universal Declaration. 10

84. The Habeas Corpus petition was filed in order for Mr. Castillo to be heard in a public hearing and for the judges to examine and contrast his allegations, denouncing violations of Articles 94 and 95 of the Constitution, which guarantee that individuals can only be arrested, prosecuted and convicted for qualified criminal offenses and through due process. The appeal also sought that the injuries of the police treatment received could be observed. However, Mr. Castillo was denied Habeas Corpus, as well as other legal remedies, and alternative measures to imprisonment.

85. The Government has maintained that the process against Mr. Castillo fully respected the procedural guarantees of the Constitution and the laws, but has not provided any support for its assertions. The Government points out that a lawyer appeared on June 1 at the Department of Instruction of Crimes against State Security with the purpose of reviewing the Preparatory Phase File, and that on August 13 he was able to interview the accused. However, it has been established that the aforementioned professional belongs to a Collective Law Firm, dependent on the Ministry of Justice and controlled by the Government, through the National Organization of Collective Law Firms, so that it cannot be considered as an independent legal advisor.

86. The Working Group has held that in order to establish that a detention is lawful, the individual must have the right to challenge the lawfulness of the detention before a court. Mr. Castillo was denied legal assistance of his own choosing and thus the right to challenge the lawfulness of the detention, in contravention of articles 8 and 9 of the Universal Declaration

⁸ See: A/72/382, paras. 16-25; A/74/342, para. 23 and A/HRC/43/59, para. 18; and Opinion No. 37/2020 ¹⁸ A / HRC / 23/40 / Add.1 at para. 71.

⁹ Opinion Nos. 76/2019, para. 38; 56/2019, para. 80; 36/2019, para. 36; 26/2019, para. 89; and 20/2019, para. 66.

¹⁰ 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; A/HRC/13/30, paras. 71, 76-80, 92 and 96.

and principles 11 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

87. Challenging the legality of detention before a court is an autonomous human right, essential to preserve legality in a democratic society. This right is a peremptory norm of international law, which applies to all forms and situations of deprivation of liberty, including not only criminal detention, but also administrative and other detention. Since Mr. Castillo has been unable to challenge his detention before a court, his right to an effective remedy under Article 8 of the Universal Declaration has been violated.¹¹

88. The Working Group notes that the fundamental rules of due process were not observed with regard to the length of time Mr. Castillo has been held in pretrial detention and without access to a lawyer of his choice. This resulted in the denial of the guarantees of the protection of the law, preventing Mr. Castillo from promptly challenging the legality of his detention, as provided for in articles 3, 8 and 9 of the Universal Declaration and Principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

89. The Working Group also notes the allegations of both the source and the Government regarding the decisions taken by the Office of the Prosecutor in this case. The Working Group insists, as it has previously stated, that the Office of the Prosecutor cannot be considered an independent and impartial judicial authority for the purposes of article 10 of the Universal Declaration. This body fulfils the investigative and prosecutorial function, essential to justice, but incompatible with the power to decide independently and impartially on the legal merits of deprivation of liberty. In view of these circumstances, the Working Group refers the case to the Special Rapporteur on the independence of judges, prosecutors and lawyers.

90. A defining element of deprivation of liberty is the inability of detainees to defend and protect themselves, as their daily lives depend to a large extent on the decisions made by detention center personnel. In this context, persons deprived of their liberty not only have difficulty verifying the legality of their detention, but are also subjected to a lack of effective control over their other rights.

91. The Working Group wishes to recall that criminal charges refer, in principle, to acts declared punishable under domestic criminal law. In the case of Mr. Castillo, the source alleges a violation of the right to a fair and impartial trial. The Working Group has not been satisfied that Mr. Castillo was provided with access to an independent lawyer, nor was he able to appear in court on time or to prepare for trial on an equal footing. Furthermore, all remedies exercised, including Habeas Corpus, were consistently denied and he has been held in pre-trial detention for an inordinate amount of time, including prior to his appearance in court. In consideration of the above elements, Mr. Castillo's detention is arbitrary due to violations of due process and falls under category III.

iii. Category V

92. In the present case, the source has demonstrated that Mr. Castillo is a social activist and human rights defender, both for his artistic and political manifestations in favor of cultural rights, as well as for his involvement in political activities to promote social participation in public affairs. Additionally, the Working Group has been convinced that the deprivation of liberty of Mr. Castillo has taken place in a context of persecution and systematic detentions against him and other persons who have been identified as opponents of the Government.¹²

93. The Working Group insists on the right, under Article 21 of the Universal Declaration, to participate in the conduct of public affairs, exercising influence through debate and dialogue with representatives. Such participation is underpinned by the guarantee of freedom of expression, assembly and association. The manner in which Mr. Castillo has been detained is framed, given the pattern of persecution and harassment, and the lack of procedural guarantees, in a situation of discrimination because of his political position and his activities in the area of human rights. The Working Group has observed that the guarantee established in article 7 of the Universal Declaration has been violated, placing the case under category V.

¹¹ See Opinion Nos. 79/2017, 46/2017, 45/2017, 11/2018 and 35/2018.

¹² Opinions 41/2021; 13/2021; 65/2020; 63/2020; 50/2020; 4/2020; 66/2018; 64/2017 and 12/2017. See also: A/HRC/48/55, p.46-50.

94. The Working Group reminds the Government that States have a duty to protect individuals and groups, and to act with due diligence in doing so, since these acts or omissions are imputable to the State when carried out with the consent or acquiescence of a person officially representing it, against one who suffers persecution and harassment for his or her activities as a human rights defender or social activist. The Working Group insists that national authorities and international monitoring bodies should apply the highest standard of review of government action, particularly when there are allegations of a pattern of harassment.¹⁴ Therefore, the Government is requested to ensure that all acts of intimidation against Mr. Castillo are brought to an end and that an impartial and effective investigation into these acts is carried out and that those responsible are brought to justice.

95. The Working Group would welcome the opportunity to work constructively with the Government of Cuba to address problems concerning arbitrary detention. In view of the recurring pattern of arbitrary detentions noted by this international human rights protection mechanism in recent years, the Government of Cuba should give favourable consideration to inviting the Working Group to conduct an official visit to the country. Such visits are an opportunity for the Working Group to engage in a direct constructive dialogue with the Government, and with representatives of civil society, with a view to gaining a better understanding of the situation of deprivation of liberty in the country and the root causes of arbitrary detention.

Decision

96. In view of the foregoing, the Working Group issues the following opinion:

97. The deprivation of liberty of Maykel Castillo Perez is arbitrary, as it contravenes Articles 3, 5, 8, 9, 10, 11 and 12 of the Universal Declaration of Human Rights, and falls under categories I, II, III and V.

98. The Working Group requests the Government of Cuba to take the necessary steps to remedy the situation of Maykel Castillo Pérez without delay and bring it into conformity with the relevant international standards, including those set forth in the Universal Declaration of Human Rights.

99. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Castillo Pérez immediately and to grant him the effective right to obtain compensation and other types of reparation, in accordance with international law.

100. The Working Group urges the Government to carry out a thorough and independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Mr. Castillo Pérez and to take appropriate action against those responsible for the violation of his rights.

101. 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 on cultural rights.

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

Follow-up procedure

103. 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 the follow-up action taken on the recommendations made in this Opinion, in particular:

- a) Whether Maykel Castillo Perez has been released and, if so, on what date;
- b) Whether Maykel Castillo has been awarded compensation or other remedies

¹³ Opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20.

¹⁴ See Opinion No. 39/2012, para. 45 and General Assembly Resolution 53/144.

Perez;

- c) Whether the violation of Maykel Castillo Pérez's rights has been investigated and, if so, the result of the investigation;
- d) Whether legislative amendments have been adopted or modifications have been made in practice to bring Cuba's laws and practices in line with its international obligations in accordance with this opinion;
- e) Whether any other action has been taken to implement this opinion.

104. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in this opinion and to indicate whether it requires additional technical assistance, for example, through a visit by the Working Group.

105. The Working Group requests the source and the Government to provide the above-mentioned information within six months from the date of transmittal of the present Opinion. However, the Working Group reserves the right to undertake its own follow-up to the Opinion if new issues of concern are brought to its attention in relation to the case. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of the progress made in implementing its recommendations, as well as, where appropriate, of any shortcomings observed.

106. 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 into account its views and, if necessary, to take appropriate measures to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the measures they have taken¹⁵.

[Approved on November 17, 2021].

¹⁵ See Human Rights Council resolution 42/22, paras. 3 and 7.