



General Assembly

Distr.: General
2 October 2019
English
Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 47/2019 concerning Ricardo Martinelli (Panama)

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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 22 March 2019 the Working Group transmitted to the Government of Panama a communication concerning Ricardo Martinelli. The Government replied to the communication on 22 May 2019. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group considers that deprivation of liberty is arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Mr. Martinelli is a Panamanian citizen born on 11 March 1952. He was the President of Panama from 2009 to 2014 and is currently a candidate for election to the national parliament. According to the source, he could be a future candidate for the 2024 presidential elections. Until June 2018, he was a member of the Central American Parliament.

5. The source reports that, during his term as President, Mr. Martinelli had various differences of opinion and conflicts with the then Vice-President and current President of Panama, who has openly demonstrated his political rivalry towards Mr. Martinelli.

6. The source also reports that, as a result, more than 20 cases were initiated against Mr. Martinelli. According to the source, the majority of these cases were brought by the National Security Council, a body under the oversight of the President's Office. Because of this alleged persecution, Mr. Martinelli applied for political asylum to the Government of the United States of America, where he was living on 21 December 2015, on which date the Plenum of the Supreme Court of Panama issued an order for his "provisional" detention.

7. The source maintains that the proceedings against Mr. Martinelli were initiated on the basis of information provided by anonymous witnesses. According to the source, the prosecuting judge issued the bill of charges against Mr. Martinelli, on 9 November 2015, without having requested an arraignment hearing. As evidence, he cited the testimony of protected witnesses. The source adds that, in unofficial forums, some of these witnesses subsequently admitted that they had been blackmailed or bribed into giving these testimonies. The defence team has been asking for these witnesses' identities to be formally disclosed since 24 November 2015 but has obtained no response.

8. Since the bill of charges had been issued without an arraignment hearing taking place, on 19 October 2015 Mr. Martinelli's defence team filed a motion of objection. Although a date for the arraignment hearing and resolution of the objection was then set (11 December 2015), Mr. Martinelli was not present at the start of the hearing because he was already based abroad, pending acceptance of an application for political asylum that prevented him from leaving the country. He was therefore declared to be in contempt of court pursuant to article 158 of the Code of Criminal Procedure. The source maintains that there was no valid procedural basis for this declaration as Mr. Martinelli had not been charged with any offence and his whereabouts were known to the court.

9. The source reports that, on 24 May 2016, the Supreme Court issued a warrant for Mr. Martinelli's arrest and a request for his extradition. On 12 June 2017, the United States authorities arrested Mr. Martinelli and initiated extradition proceedings, placing him in the Federal Detention Centre in Miami. On 11 June 2018, Mr. Martinelli was surrendered to Panama after waiving his right to challenge the extradition proceedings.

10. According to the source, on arriving in Panama Mr. Martinelli was not allowed to have one of his lawyers present at the time of his surrender to the authorities even though this was one of his fundamental rights. In addition, he was not read his constitutional and legal rights. He was not taken to a hospital for the comprehensive physical health check that the Government had undertaken to organize pursuant to the surrender agreement. Instead, he was transferred to El Renacer prison as a remand prisoner, even though there was no court order for his arrest and certainly no order for his detention. The source maintains that Mr. Martinelli's arrival in Panama marked the end of the extradition proceedings, that he should not, therefore, have been treated as a detainee but rather as a person under arrest, and that, for this reason, he should not have been admitted to a prison to which persons under the custody of the prison system who have been detained by order of a judge are taken.

11. The source reports that on 11 June 2018, at 5 p.m., having been brought before the due process judge Mr. Martinelli was denied medical treatment even though specialists had recommended that he be admitted to hospital. On arrival at El Renacer prison at around 9 p.m. his medical condition worsened, and he was taken to Santo Tomás Hospital, where he

remained until 14 June 2018. He was then taken back to El Renacer prison, still without his detention status having been formalized. The source further alleges that he was taken to Santo Tomás Hospital by crowd control officers of the national police, who impeded the work of the doctors who should have been attending to Mr. Martinelli.

12. The source recounts that the United States established three conditions for the Panamanian Government before agreeing to Mr. Martinelli's extradition, namely, that: (a) he could be tried only for the offence or incident for which extradition was requested; (b) a comprehensive physical health check should be organized immediately upon his arrival in Panama and the medical treatment he was receiving for various chronic conditions should be continued; and (c) Panama should take account of the period of 364 days during which he was deprived of his liberty in the United States.

13. The source also explains that, according to its constituent treaty, the Central American Parliament may waive the immunity and privileges of its members on the request of the State concerned. According to the source, however, the Government of Panama chose to initiate criminal proceedings under the special system for persons benefiting from parliamentary immunity ("*aforados*") on the grounds that Mr. Martinelli's status as a member of the Central American Parliament was equivalent to that of member of the national parliament. The source explains that criminal proceedings brought against persons benefiting from parliamentary immunity in Panama differ from ordinary proceedings both in the manner in which they are initiated and in terms of the institutions responsible for the investigation and criminal prosecution. The Plenum of the Supreme Court, sitting as a special court, is assigned trial court functions; timelines and due process guarantees differ from those applicable in ordinary criminal proceedings; and, lastly, the sentence handed down by the Plenum constitutes a sole-instance decision and as such cannot be appealed before a higher court.

14. The source recounts that Mr. Martinelli waived the immunity associated with his status as a member of the Central American Parliament in order to be tried as an ordinary citizen with access to the ordinary system of justice. However, the special court that initiated the proceedings dismissed all the objections questioning its competence to hear the case. Accordingly, Mr. Martinelli was investigated under the special procedure until 16 January 2018, when an *amparo* application filed by the defence was successful. In ruling on the *amparo* application, the Supreme Court established that the Plenum could not "continue hearing" the case owing to a violation of due process. However, the Supreme Court declared all interim proceedings to be valid. Thus, the trial continued in the ordinary court system, with the proceedings before the special court being considered valid.

15. On 4 February 2019, Mr. Martinelli's defence team requested the due process judge to release him from provisional detention on bail. When the due process judge refused the request, the defence team requested a hearing to discuss whether the precautionary measure imposed was justified.

16. Prior to the hearing, the defence requested: (a) that the Institute of Legal Medicine and Forensic Sciences be requested to conduct an assessment of the medical documentation issued by specialists working in State and private-sector hospitals that had examined Mr. Martinelli, since the last forensic medical report had been issued on 13 June 2018 and a considerable number of medical assessments and opinions concerning his state of health had been issued since that date, and; (b) that the Director of the National Security Council be given directions to respond to a request for information submitted by the defence and to issue corresponding instructions to the staff under his charge.

17. At the start of the hearing, on 28 February 2019, the defence asked for the proceedings to be conducted in camera, as provided for in articles 8, 9, 14, 361 and 362 (1) of the Code of Criminal Procedure, since the information that would be disclosed concerned the private life and physical integrity of Mr. Martinelli. However, the request was denied on the grounds that, in the judge's opinion, any health issues that Mr. Martinelli might have, or have had, were already known, in addition to the fact that the parties had a right to know the court's decision. The source notes that there was nothing to prevent the parties from attending the in-camera proceedings and that there was therefore no need for an open, public hearing.

18. The source further notes that the authorities of the National Security Council refused to receive communications in which the defence requested the appearance of members of its staff at the oral hearing, scheduled for 12 March 2019, on the grounds that the summonses should be issued by the Public Prosecution Service, thereby disregarding the rights of the defence. In view of this situation, the due process judge ordered that the Director of the National Security Council be informed that he had a duty to receive the communications and to respond.

19. According to the source, the oral hearing was scheduled to begin on 12 March 2019. However, it was suspended at the outset because Mr. Martinelli was required to undergo a medical examination, even though his own doctor had concluded, after an assessment conducted on 9 March 2019, that the best course of action was that he be declared medically unfit until his condition could be stabilized, since the anxiety and depression from which he was suffering were causing severe health issues that had a direct effect on his heart.

20. Despite the foregoing, the source reports that the judge decided to resume the oral hearing on 22 March 2019.

21. The source also reports that, on 18 March 2019, Mr. Martinelli was refused delivery of the medicines prescribed by his doctors. The source maintains that this situation is particularly serious because Mr. Martinelli is 66 years old and has a history of heart problems. His heart condition and family background make careful medical treatment imperative to safeguard his life and physical integrity.

22. According to the information received, on 20 December 2018 the authorities authorized Mr. Martinelli's admission to a private hospital so that tests which required equipment not available in State hospitals could be carried out. However, in the early hours of 21 December 2018, Mr. Martinelli was forcibly removed from this hospital, against the wishes of the attending physician, and taken to a State hospital.

23. According to the source, the use of excessive force against Mr. Martinelli has been noted during his detention, for example, when he was being transferred between hospitals and even including when he was on a stretcher. Mr. Martinelli has been held separately from other prisoners and has contact with them only once a week, for one hour, during the religious service. He has no access to telephone calls, he cannot participate in recreational activities and his isolation from other prisoners has caused him intermittent periods of depression that have an adverse impact on his heart condition.

24. According to the source, Mr. Martinelli does not have access to safe drinking water and must wash in recycled water that he has to collect from tanks in order to wash or use the toilets. The source also reports that Mr. Martinelli has been subjected to constant searches during which he is forced to strip naked, his belongings are destroyed and his food is thrown on the floor.

25. The source further reports that Mr. Martinelli has asked permission to study for a diploma, for which he has received authorization from the prison board, but that he has been prevented from commencing his studies because he has not been allowed to take delivery of the equipment that he needs to do so.

26. The source alleges that his detention is arbitrary under category I as it is not provided for under national law and, even if it was, the provisions in question would be contrary to international law. The source also alleges that his case falls under category III, since there has been a total or partial failure to observe international standards relating to the right to a fair trial.

27. In addition, the source explains that pretrial detention should be exceptional, and must be used in a manner entirely consistent with the legal procedures and requirements established nationally and internationally, in accordance with article 9 of the Covenant and with articles 2 and 12 of the Code of Criminal Procedure.

28. The source maintains that custodial precautionary measures are considered the most severe measure that can be imposed upon a defendant and that their use should always be

limited to exceptional circumstances and by the principles of legality, presumption of innocence, necessity and proportionality.

29. The source affirms that Mr. Martinelli's pretrial detention does not meet any of the legal criteria established in article 237 of the Code of Criminal Procedure, that is, risk of flight, contempt of proceedings, destruction of evidence or attempts on the life or physical integrity of another person or of the defendant him or herself. Mr. Martinelli was living outside Panama because he was seeking asylum, and this was preventing him from leaving the United States. However, he resigned his seat in the Central American Parliament and withdrew his asylum application so that he could stand trial. There could therefore be no risk of his failing to appear in court; rather, he had in fact facilitated his trial. It would also be impossible for Mr. Martinelli to destroy items of evidence, as no such items were in his possession. Furthermore, there were no evidence to suggest that he would make an attempt on the life of another person.

30. The source argues that deprivation of liberty should be used only when necessary, that is, when it is the only means to safeguard the aim and purpose of the proceedings after demonstrating that less intrusive precautionary measures would be ineffective. According to the source, this means that, when two measures would be equally ineffective in safeguarding the aim and purpose of the proceedings, the measure least detrimental to the rights of the accused should be chosen since, in accordance with article 238 of the Code of Criminal Procedure, he or she should still be considered innocent at this stage. The source alleges that this point was not taken into account by the Panamanian courts, since they held that pretrial detention was the best option despite Mr. Martinelli's state of health.

31. The source argues that Mr. Martinelli should not be held in conditions of detention analogous to those of a convicted prisoner subject to a non-appealable judgment as this would make his detention disproportionate. Any analysis of the proportionality of the measure should assess whether the objective sought really demands the sacrifices it entails for the individuals affected and for society. Even when a possible flight risk can be reasonably expected, which is not the case with Mr. Martinelli, exhaustive consideration should first be given to other measures that provide equal assurances that the defendant will not evade justice.

32. The source maintains that it is clear from the facts set out above that there was no need to impose a custodial precautionary measure as Mr. Martinelli's personal state of health and the non-existent risk of obstruction of justice meant that less severe measures that would not have aggravated his situation and state of health could have been used. The source argues that this also constitutes a violation of the principle of presumption of innocence, since Mr. Martinelli's rights were compromised to such a degree that his situation was more analogous to that of a convicted prisoner than a person still presumed to be innocent.

33. The source further maintains that Mr. Martinelli's detention is unlawful because its length has exceeded the maximum period permitted for pretrial detention in the Code of Criminal Procedure, the extradition agreement concluded between Panama and the United States and the agreement concerning the specific conditions for Mr. Martinelli's extradition.

34. The source reports that, pursuant to article 237 of the Code of Criminal Procedure, pretrial detention should not exceed a period of one year, except in the circumstances envisaged in article 502 of the Code, concerning cases complicated by a "plurality of offences" or "high number of defendants or victims" or associated with "organized crime". Mr. Martinelli's trial does not appear to have been considered to meet any of the specific criteria established under article 502, for which reason the maximum permitted period of deprivation of liberty should have been one year.

35. Despite the foregoing, the trial court ruled that the period during which Mr. Martinelli was detained in the United States would not be counted as pretrial detention but that, if he was convicted, the period would be deducted from the overall prison sentence.

36. According to the source, the conditions demanded by the United States in the extradition agreement were not limited to the sentence: they also included recognition of the period of detention for all legal purposes. A contrary interpretation would make no

sense since there is no certainty that the trial will result in a conviction, as the court responsible for this interpretation, which is detrimental to Mr. Martinelli's interests, appears to be implying.

37. The source maintains that, rather than making a *pro persona* interpretation, the Panamanian court made an assumption regarding the result of a trial in order to justify its contention that the diplomatic assurances should take effect only once Mr. Martinelli had been convicted of a criminal offence. As there is no means to foresee whether the accused will be convicted, it is unreasonable to make compliance with a legally binding obligation conditional upon a later event that may or may not happen. However, the court acted as if it were certain that the trial would end with a sentence being imposed. This situation highlights the preconceptions surrounding Mr. Martinelli's responsibility.

38. The source alleges that the court lacked competence and the ordinary trial proceedings are invalid, in that they contravene article 14 of the Covenant. The source explains that the Panamanian legal system establishes a special procedure for persons benefiting from political privilege (i.e. members of parliament) that is regulated in article 487 of the Code of Criminal Procedure. However, as is clear from the facts described, since Mr. Martinelli resigned his seat in the Central American Parliament on 22 July 2018, as of the next working day the special procedure for persons with political privilege was no longer applicable to his situation.

39. Despite this, the court continued hearing the case against Mr. Martinelli as if he were a person benefiting from political privilege from 22 July until 7 December 2018, when the fact that it was no longer competent was recognized. During this period, the special court dismissed the prior allegations of nullity, ruled on the admissibility and inadmissibility of evidence and called a hearing to review his pretrial detention, among other matters.

40. On 7 December 2018, the Supreme Court ruled on the *amparo* application, which it decided to refer to the ordinary courts. According to the source, however, the proceedings carried out in the interim stages of the trial were deemed to be valid, in contravention of the international law standard which stipulates that, since the guarantee of the court's competence constitutes the basis for the exercise of all other guarantees of due process, all proceedings conducted in trials where the court is subsequently declared incompetent are without legal effect.

41. The source also reports that guarantees of impartiality were not upheld during the proceedings in which Mr. Martinelli was tried as a person with parliamentary privilege, either in the review of his precautionary pretrial detention or in the decisions concerning the admissibility and inadmissibility of evidence. Article 9 (4) of the Covenant establishes that all persons are entitled to bring proceedings before a court so that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. The Human Rights Committee has interpreted this to mean that this guarantee is applicable to all persons deprived of their liberty and that the review should be conducted either by a competent court of law or by another court that has the judicial independence to do so.

42. The source notes that, in this specific case, the arrest warrant was issued by the Plenum of the Supreme Court on 21 December 2015. Six of the judges who participated in the warrant application hearing were also responsible for ruling on the application for review of the lawfulness of this precautionary measure on 19 June 2018. In addition, three of the judges had already been involved in other cases initiated against Mr. Martinelli.

43. According to the source, the above facts clearly reveal a lack of objective and subjective impartiality since the review of the custodial measure was heard before the very same judges who had already expressed a position on it. Accordingly, the source concludes that the guarantees of fair trial recognized in articles 14 (1) and 9 (4) of the Covenant have been violated.

44. The source also highlights that Mr. Martinelli's detention is arbitrary in that, in the trial, the judicial authorities omitted one of the key stages, namely, his arraignment. From the time that Mr. Martinelli's extradition was requested up to and including the present date,

Mr. Martinelli has not been formally charged, in contravention of article 546 of the Code of Criminal Procedure, which stipulates that extradition should be authorized only for a person who has been either convicted or charged.

45. According to the source, with the authorities having omitted to call an arraignment hearing and the accused having nonetheless come forward, on 19 October 2015 Mr. Martinelli's defence filed a motion of objection. The source maintains that this objection should have been resolved before the arraignment hearing, as provided for in article 491 of the Code of Criminal Procedure, which states that "if the act or process being challenged has not been initiated, the said act or process will not be carried out until the challenge is resolved".

46. Although 11 December 2015 had been set as the date for the arraignment hearing and resolution of the objection, Mr. Martinelli was not summoned to the arraignment hearing as the law required and was not present at the start of the hearing as he had been based abroad since before the start of the investigation and at the time was awaiting the outcome of an application for political asylum, submitted on 7 January 2015, that prevented him from leaving the country in the meantime. Mr. Martinelli was then also declared in contempt of court, contrary to the provisions of national law, which specifies that this qualifier can be applied only to persons who have been charged.

47. The source underscores that Mr. Martinelli is the only person in the whole of Panama whose trial has reached the intermediate stage prior to the oral proceedings without him having been formally charged in the only case against him, which is being tried before the Supreme Court.

48. The source draws attention to the Inter-American Court of Human Rights finding, as reiterated in its case law on the right to a defence, that preventing a defendant from exercising his or her right to a defence from the outset of the investigation against him or her strengthens the State's investigative powers, to the detriment of the fundamental rights of the person being investigated, giving rise to a procedural imbalance that leaves the individual without protection against punitive action. The right to a defence exists from the investigation stage and defendants must be able to exercise this right from the moment they are identified as the possible perpetrator or a possible participant in a punishable act.

49. The source also highlights that it is established in case law that, in order for an accused person to be able to defend him- or herself, arraignment – or, more precisely, identification of the thing against which the person must defend themselves, that is, the thing the person is alleged to have done or to have failed to do – is imperative. If a defendant is not aware of all the charges of which he or she stands accused, he or she will not be able to mount an effective defence. This is what has happened in the present case, the source maintains.

50. Mr. Martinelli had no opportunity to defend himself because he was excluded from all stages of the arraignment proceedings and prevented from apprising himself of the events for which he was being investigated. Although a date for the hearing was set after the motion of objection was filed, Mr. Martinelli was unable to attend for the reasons set out above which, according to the source, are completely justified.

51. The source maintains that the failure to call an arraignment hearing resulted in a violation of Mr. Martinelli's right to a defence since he was not apprised of and had no opportunity to enter a plea in response to the charges against which he must defend himself. He had limited opportunity to prepare his defence properly and was denied access to information that might serve as exculpatory evidence as he was excluded from the formal investigation stage of the proceedings.

52. The source also maintains that Mr. Martinelli's detention is arbitrary because the conditions of his detention and his state of health justified his release. Mr. Martinelli is 66 years old and suffers from chronic heart diseases that place his health, and even his life, at serious risk. However, the source highlights the following violations: (a) the failure to conduct an initial comprehensive and specialized health assessment, contrary to the provisions of the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), with a view, specifically, to ascertaining Mr. Martinelli's health-care

needs and taking all measures necessary for his treatment; (b) the inadequate conditions in El Renacer prison; and (c) the increase in health emergencies and the ill-treatment he suffered during his detention.

53. The source underlines that the courts are aware of all these issues since the defence team has asked for Mr. Martinelli to be transferred to a specialist hospital to continue his detention. However, the source reports that the judicial authorities have repeatedly denied such requests.

54. The source concludes that, given the combined effects of the health conditions described and the conditions in which he is being held, Mr. Martinelli's detention must be considered unlawful and arbitrary as the State is under an obligation to use less intrusive measures in order to safeguard his health and physical integrity provided that this does not impede the criminal proceedings.

55. The source also maintains that Mr. Martinelli's detention falls under category III, since he is being prosecuted on the basis of the testimony of anonymous witnesses who, it is alleged, had been blackmailed and bribed.

56. The source emphasizes that article 14 (3) (e) of the Covenant provides that the accused must have the opportunity "to examine, or have examined, the witnesses against him". Similarly, article 340 of the Code of Criminal Procedure provides that, to support its evidence, the prosecution must provide a list of witnesses which includes their name, occupation and domicile, and that, if the witnesses are benefiting from protective measures, "their identity may be made known to the defence team". The source also underscores that the Public Prosecution Service is under an obligation to identify witnesses who are key to establishing the facts, as specified in article 273 of the Code, from the start of the investigation.

57. According to the source, these provisions were violated in the proceedings against Mr. Martinelli, since, when reading out the bill of charges, the prosecuting judge cited in evidence anonymous witnesses who were identified solely by numbers, without providing further details of their identity.

58. The source alleges that the absolute anonymity accorded the prosecution witnesses in the proceedings and the action taken by the Government's representatives places the accused in a situation of helplessness and disadvantage relative to the counterparties, and that the inevitable consequence of this situation is a violation of his right to defend himself and his right to equality before the courts. In addition to the foregoing, the source alleges that it has been established that several of the witnesses against Mr. Martinelli subsequently indicated that their testimonies were coerced using threats and bribes, a fact that constitutes an additional violation of due process of law.

59. Lastly, the source alleges that Mr. Martinelli's detention is arbitrary under category II, in that he is being detained as a result of exercising rights and freedoms guaranteed by the Universal Declaration of Human Rights and the Covenant.

60. According to the source, one of the reasons for Mr. Martinelli's arrest was his status as a political figure of some standing in the country, in that he is a former President of Panama, a former member of the Central American Parliament and a future electoral candidate.

61. Since 2012, the current President and Mr. Martinelli have been engaged in a verbal conflict that has been widely covered by the media.

62. According to the source, a number of factors support the conclusion that Mr. Martinelli's deprivation of liberty is politically motivated, intended to eliminate any possibility of contact with his supporters, tarnish his public image and place obstacles in his path to elected office. The source reports that Mr. Martinelli has a high popularity rating and is emerging as a candidate for Vice-President. Furthermore, he has publicly stated that he will stand in the 2024 presidential elections.

63. According to the source, there are sufficient grounds to believe that the authorities might be interfering in Mr. Martinelli's trial and subsequent deprivation of liberty in order to undermine his political freedoms, specifically:

(a) The legal files detailing the charges against Mr. Martinelli were put together by the National Security Council, a body attached to the Office of the President of the Republic that acted as a parallel prosecution service;

(b) The activities overseen by the National Security Council include, notably, the investigation and establishment of criminal cases, coordination of testimonies, protected witnesses, evidence and other documents that might be used in the formal examination of the cases by the Public Prosecution Service. The source emphasizes that, under Panamanian law, the Attorney General's Office forms part of the Public Prosecution Service and is the institution responsible for defending the interests of the State, promoting compliance with and enforcing the law, monitoring the conduct of public officials, prosecuting violations of constitutional and other legal provisions and, lastly, serving as legal advisers to public servants. The source asserts that there is no reason for the investigation to have been carried out by a different institution that lacks independence;

(c) The bill of charges was based on the testimonies of anonymous witnesses, whose identities were disclosed subsequently. It has also been established that the testimonies provided were obtained through bribery and extortion, a fact that not only divests them of all probative value but also attests to the existence of bad-faith proceedings on the part of the prosecution;

(d) The source claims that, according to some reports, those who refused to incriminate Mr. Martinelli, despite having been offered diplomatic positions in exchange, were threatened and forced to flee.

64. The source concludes that the body of evidence described above provides reasonable grounds to conclude that the investigation of Mr. Martinelli and his subsequent arbitrary deprivation of liberty contravene international human rights law. The fact that the investigation was led by State authorities or persons that were openly in conflict with Mr. Martinelli and opposed to his political views, provides sufficient grounds to conclude that the investigation of Mr. Martinelli and his subsequent detention were politically motivated.

Response from the Government

65. The Working Group transmitted the source's allegations to the Government on 22 March 2019. The Working Group requested the Government to provide detailed information by 21 May 2019. The Working Group also requested the Government to clarify the factual and legal grounds for Mr. Martinelli's detention and explain how it was in compliance with the international human rights obligations of Panama. The Working Group also called upon the Government to ensure Mr. Martinelli's physical and mental integrity.

66. The Government requested an extension of the deadline for response, which was granted, setting 22 June 2019 as the new deadline. However, the Government submitted its reply on 22 May 2019. It then submitted additional information after the extension granted had expired, on 1 July 2019.

67. The Government questions the competence of the Working Group to consider a number of the arguments presented by the source, without specifying which ones, and therefore requests that these are not taken into account in the examination of the case. Consequently, the Government refers only to the lawfulness of the detention as part of due process and to the legal arguments presented to justify the pretrial detention.

68. The Government indicates that Mr. Martinelli has been facing criminal proceedings since 2015 for a number of offences allegedly committed during his term as President. Because he was a member of the Central American Parliament, the initial stages of the proceedings were heard before the Supreme Court, in accordance with the Code of Criminal Procedure and the constituent treaty of the Central American Parliament and other political bodies.

69. The Government confirms that, in accordance with the special procedure for members of parliament established by law, an arraignment hearing at the start of Mr. Martinelli's trial was not required. This was confirmed by the due process judge on 27 June 2018, who took the arraignment as given since Mr. Martinelli's lawyers had access to the investigations once the action had been admitted. The Government affirms that Mr.

Martinelli was not left defenceless because he was aware of the investigative proceedings under way before the Supreme Court.

70. The Supreme Court declared Mr. Martinelli to be in contempt of court for having failed to attend the hearing on 19 October 2015, when he was outside Panamanian jurisdiction, and ordered that he be detained pursuant to article 158 of the Code of Criminal Procedure. The reasons put forward by the source to justify Mr. Martinelli's failure to appear were not considered valid grounds to ignore his obligations under the Panamanian justice system.

71. The Government states that extradition proceedings were initiated in view of Mr. Martinelli's failure to appear in court and that the extradition was carried out on 11 June 2018. On this same day, Mr. Martinelli was brought before the due process judge of the Supreme Court, which confirmed that he should remain in pretrial detention from this point in time. The 364 days of precautionary detention served by Mr. Martinelli in the United States were not taken into consideration since he was not under the orders of the Panamanian authorities at the time. The Government recognizes that Panamanian law establishes a limit of one year for pretrial detention and explains that the Supreme Court judge took the view that this one-year period should be calculated from the moment that Mr. Martinelli was transferred to the custody of the Panamanian authorities.

72. The Government further explains that the due process judge ordered Mr. Martinelli's detention because of the risk of flight and contempt of proceedings, as provided for in article 237 of the Code of Criminal Procedure. In this connection, it highlights that Mr. Martinelli has shown a reluctance to face Panamanian justice, for which reason it was necessary to seek his extradition, and that he has even demonstrated a certain contempt and a desire to find obstacles to his court attendance. This, together with the fact that Mr. Martinelli has the financial means to find ways to escape justice, attests to a high risk of flight in the event of an alternative non-custodial measure being agreed. The Government affirms that this determination is consistent with article 9 (3) of the Covenant since the measure was necessary to guarantee the defendant's appearance for the judgment and trial proceedings.

73. The Government submitted additional information, after the deadline had past, in which it detailed the steps taken to safeguard Mr. Martinelli's physical and mental integrity and reported that his precautionary pretrial detention had been replaced by house arrest and a ban on leaving the country as of 11 June 2019.

Additional comments from the source

74. The source submitted final observations and comments on the Government's response on 15 July 2019. In response, the source highlights the arguments on which the Government failed to comment and provides detailed information on those that were addressed by the Government.

75. The source indicates that the fact that the Code of Criminal Procedure contains certain provisions and that these provisions are respected is not a guarantee of compliance with due process under international standards. It highlights that the Supreme Court has acknowledged that it is not competent to hear Mr. Martinelli's case. It also refers to the fact that the Government acknowledges that the defendant was not formally arraigned, a fact which the source considers a violation of guarantees of due process, and that it is impossible to declare the defendant to be in contempt of court without first having arraigned him.

76. With regard to the period during which Mr. Martinelli remained in detention in the United States, the source alleges that the Panamanian State effectively ordered this deprivation of liberty by requesting his arrest and extradition. It claims that the interpretation made by the Government in order to exclude this period of detention was contrary to the rights of the detainee. The source adds that Panama was required to take the period of custody served in the United States into account pursuant to the provisions of the Convention on Private International Law (Bustamante Code).

77. The source asserts that the pretrial detention was ordered not by a due process judge but by the Plenum of the Supreme Court, which prevented the detainee from being able to appeal the decision before a higher court. It states that the financial resources at Mr. Martinelli's command cannot be considered a justification for pretrial detention.

78. The source asserts it is not true that, pursuant to article 237 of the Code of Criminal Procedure, at least one of the circumstances established thereunder must be met in order for pretrial detention to be ordered. It claims that the text of the Code requires several of these circumstances to be met at the same time.

79. With regard to the additional information provided by the Government, the source stresses that this document shows that it was only as of 22 March 2019 that the necessary steps were taken to guarantee medical care for Mr. Martinelli's health condition. According to the source, this confirms that, until this date, he had to take part in the criminal proceedings in a fragile state of health.

80. Lastly, with regard to the report that the precautionary pretrial detention has been replaced by house arrest, the source notes that house arrest is also a form of deprivation of liberty albeit at a site other than a prison.

Discussion

81. The Working Group thanks the parties for their initial communication and subsequent contributions to the resolution of the present case.

82. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and the relevant international legal instruments, in accordance with its methods of work.

83. 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. Mere assertions that lawful procedures have been followed will not be sufficient to rebut the source's allegations.¹

84. On the basis of the information provided by the parties, the Working Group notes that Mr. Martinelli was born on 11 March 1952, that he was the President of Panama from 2009 to 2014, is a candidate for a seat in the national parliament and a possible contender for the office of President in the 2024 elections.

85. The Working Group has received information indicating that Mr. Martinelli was acquitted by the trial judge and released on 9 August 2019, days before the consideration of the case and the adoption of the present decision. In accordance with rule 17 (a) of its methods of work, however, the Working Group has decided to continue the consideration of the case through its regular procedure and to render the present opinion.

Category III

Remedies before a court (habeas corpus)

86. Article 9 (3) of the Covenant establishes that detention in custody of persons awaiting trial should be the exception rather than the general rule, but that release may be subject to guarantees to appear for trial or at any other stage of the judicial proceedings. As noted by the Working Group in its jurisprudence, the court's decision to order pretrial detention must be based on an individual determination that such action is reasonable and necessary taking into account all the circumstances and in order to prevent flight, or interference with the evidence or a repeat of the offence. The courts must consider whether

¹ See A/HRC/19/57, para. 68.

alternatives to detention could be granted, such as, for example, bail, that would render detention in a particular case unnecessary.²

87. The Government recognizes the exceptional nature of pretrial detention and that:

“it may be ordered by a due process judge only when applied in respect of an offence that carries a minimum sentence of at least four years’ imprisonment and there is evidence to prove the offence and the defendant’s involvement, the risk of flight and the risk of destruction of evidence or attempts on the life or health of other persons or of the defendant him or herself”.³

When criminal proceedings are brought against members of the National Assembly, the Plenum of the Supreme Court is the body responsible for authorizing the use of any precautionary measure that restricts the liberty of a member of parliament.⁴ The Working Group is convinced that the procedures applicable to members of the National Assembly are likewise applicable to members of the Central American Parliament.

88. From the information received from the parties, the Working Group has learned that it was the Plenum of the Supreme Court that issued the order for the pretrial detention of Mr. Martinelli on 21 December 2015 because he was a member of the Central American Parliament. The Working Group noted that Mr. Martinelli remained a member of this Parliament until 22 June 2018.

89. In this context, the Working Group wishes to recall that article 9 (4) of the Covenant establishes that all persons deprived of their liberty are entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. The right is a judicial remedy intended to protect liberty of person and physical integrity from detention, including pretrial detention, and the risk of torture and other cruel, inhuman or degrading treatment or punishment.⁵

90. The Working Group wishes to recall that the courts of justice are the bodies responsible for reviewing the arbitrariness and lawfulness of the deprivation of liberty.⁶ In this context, the Working Group also wishes to recall that both the Universal Declaration of Human Rights and the Covenant recognize the right of all persons charged with an offence to a fair and public hearing, with every guarantee, by a competent, independent and impartial tribunal.⁷ The Working Group considers that this right is fundamental to the protection of human rights, in that it is aimed at ensuring the proper administration of justice and guaranteeing a number of specific rights.⁸

91. The Human Rights Committee has highlighted that the requirement of competence, independence and impartiality of judicial bodies is an absolute right that is not subject to any exception.⁹ Impartiality should be understood, first, as a way of preventing judges from allowing their decisions to be influenced by personal bias or prejudice, or harbouring preconceptions about the particular case before them, or acting in ways that promote the interests of one of the parties to the detriment of another. Second, the judicial body must also appear to a reasonable observer to be impartial.¹⁰

92. While noting that the order for Mr. Martinelli’s pretrial detention was issued by the Plenum of the Supreme Court, the Working Group is convinced by the information submitted by the source, which was not rebutted by the Government, according to which

² Opinion No. 27/2017, para. 43.

³ See CCPR/C/PAN/4, para. 44. See also art. 273 of the Code of Criminal Procedure.

⁴ Art. 490 of the Code of Criminal Procedure.

⁵ See A/HRC/30/37, para. 2.

⁶ Ibid., principle 6.

⁷ Art. 10 of the Universal Declaration of Human Rights and art. 14 of the Covenant

⁸ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 2.

⁹ Ibid., para. 20.

¹⁰ Ibid., para. 21.

some of the judges who took part in the detention hearing and decision had participated in other cases opened against Mr. Martinelli, and that they also subsequently ruled on the review of the lawfulness of the precautionary measure. The Working Group considers that, since the judicial authority that issued the pretrial detention order was the Supreme Court, Mr. Martinelli did not have access to an impartial – to a reasonable observer – judicial review through which to challenge the lawfulness of his detention, as the same court would have been responsible for the review proceedings, in contravention of the provisions of article 9 (4) of the Covenant.

Right to examine, or have examined, the witnesses against him

93. The Working Group wishes to recall that:

“paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.”¹¹

94. For the Working Group, the anonymity of the witnesses, whose identities are unknown to the defence team, restricts the accused’s right to verify whether the testimonies are reliable. In this regard, the Working Group agrees with the Inter-American Commission on Human Rights that:

“the anonymity of the prosecutors, judges and witnesses deprives the defendant of basic guarantees of justice. A defendant in such circumstances does not know who is accusing him or her and therefore cannot know whether that person is qualified to do so. The defendant is also prevented from carrying out any effective examination of the opposing witnesses, as he or she does not possess any information regarding the witness’ background or motivations and does not know how the witness obtained information about the facts in question. For these reasons, the use of systems of secret justice, including the use of witnesses whose identity is not revealed, has been deemed by the Inter-American Court and the Commission to constitute, in principle, a violation of the due process guarantee of being able to question witnesses and the guarantee regarding publicity for criminal trials.”¹²

95. The Working Group wishes to recall that, when it has occasion to verify the conditions of the judiciary’s application of domestic law, it refrains from taking the place of the judicial authorities or acting as a kind of supranational tribunal. When it examines a communication, it prefers not to query the facts and evidence of the case. It seeks only the observance of the relevant rules of international law and investigates whether the way domestic law has been applied has given rise to a violation of such gravity as to make the detention arbitrary.¹³

96. The Working Group considers that the evaluation of evidence is a matter that falls under the responsibility of the national authorities and that its role is to verify whether, in

¹¹ Ibid., para. 39.

¹² Report No. 176/10, Cases Nos. 12576, 12611 and 12612, Aniceto Norin Catrیمان, Juan Patricio Marileo Saravia, Victor Ancalaf Llaupé et al., Merits, Chile, 5 November 2010, para. 237.

¹³ Opinion No. 40/2005, para. 43.

the national proceedings, this evidence has been presented fairly, guaranteeing equality before the court for the parties to the proceedings.

97. The Working Group received information, which was not rebutted by the Government, indicating that the bill of charges against Mr. Martinelli cited as evidence the testimonies of protected witnesses whose identities were not disclosed to the defence team, thereby preventing the lawyers from effectively refuting the need for pretrial detention, in violation of article 14 (3) (e) of the Covenant.¹⁴

98. In the light of the partial non-observance of international norms on the right to a fair trial, as enshrined in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, the Working Group considers that Mr. Martinelli's detention is arbitrary in accordance with category III.

99. In the light of the information received about Mr. Martinelli's health, the supply of medicines and the care he needs to treat his heart conditions, the Working Group, in accordance with paragraph 33 (a) of its methods of work, refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Decision

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

The deprivation of liberty of Ricardo Martinelli, being in contravention of articles 9, 10, 11, 19 and 21 of the Universal Declaration of Human Rights and of articles 9, 14, 19 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III.

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

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

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

104. In accordance with paragraph 33 (a) of its methods of work, 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 for appropriate action.

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

Follow-up procedure

106. 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 compensation or other reparations have been made to Mr. Martinelli;
- (b) Whether an investigation has been conducted into the violation of Mr. Martinelli's rights and, if so, the outcome of the investigation;

¹⁴ Opinions No. 78/2018, para. 79; No. 18/2018, para. 53; No. 89/2017, para. 56; No. 50/2014, para. 77; and No. 19/2005, para. 28 (b).

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Panama with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

107. 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.

108. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

109. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹⁵

[Adopted on 15 August 2019]

¹⁵ Human Rights Council resolution 33/30, paras. 3 and 7.