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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 81/2019 concerning Carlos Miguel Aristimuño de Gamas (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 21 August 2019, the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Carlos Miguel Aristimuño de Gamas. The Government requested an extension of the deadline for submitting a response, which was granted, and responded to the communication on 4 November 2019. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, 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. Aristimuño is a Venezuelan national domiciled in Chacao, Miranda State. By profession, he is a safety instructor, helicopter pilot and former police officer. He was 60 years old when he was deprived of his liberty.

5. According to the information received, Mr. Aristimuño was arrested at his home, at 10.30 p.m. on Sunday, 15 April 2018, when a group of between 25 and 28 heavily armed officers dressed in black hooded uniforms called at his building. The officers were allowed to enter the building even though they did not produce a search warrant. They claimed to be looking for a terrorist and asked the neighbours where Mr. Aristimuño's apartment was. When they arrived at the door of his apartment, Mr. Aristimuño identified himself by giving his name.

6. The source indicates that the officers then bound Mr. Aristimuño's wrists together with black plastic tape, immobilizing him as if he were handcuffed, and took him to an adjacent room. Meanwhile, a member of Mr. Aristimuño's family who was present at the scene was forced to remain in a chair in the first room, handcuffed with a cable plastic tape and unable to move. When she tried to move, the officers threatened to arrest her. The officers were later identified as members of the Directorate General of Military Counter-Intelligence.

7. According to the source, the officers ransacked the apartment, removing all belongings from the chests of drawers and off the shelves and stealing many of the items, notably the content of a storage trunk. After the search, which was conducted without a warrant, the officers claimed to have found weapons in the trunk. Mr. Aristimuño was brought back into the first room and subjected to hostile questioning about persons he supposedly knew.

8. According to the information received, before leaving, the purported officers of the Directorate General of Military Counter-Intelligence placed a black bag over Mr. Aristimuño's head and told the family member present that she had to accompany them, without explaining why and without presenting an arrest warrant. The officers also demanded that the video tapes from the security cameras be handed over to them before they left. Mr. Aristimuño and his relative were taken to the headquarters of the Directorate General of Military Counter-Intelligence in the Boleíta district, in the municipality of Sucre, where they were separated. Mr. Aristimuño's relative was taken to the investigations unit, where she was held for two and a half days without food or water before eventually being freed on Tuesday, 17 April 2018.

9. The source stresses that, under Venezuelan law, arrest without a warrant issued by a judge is legal only in cases of flagrante delicto. According to article 234 of the Code of Criminal Procedure, a flagrant offence is an offence that is being or has just been committed. An offence leading to the pursuit of the suspect by the police or the victim or to an immediate public outcry, or an offence committed just before the suspect is caught at the scene of the crime or in the vicinity thereof while in possession of weapons, tools or other items providing grounds to believe that he or she is the perpetrator, is also considered a flagrant offence.

10. The source reports that Mr. Aristimuño was held incommunicado and tortured on the premises of the Directorate General of Military Counter-Intelligence, not only at its headquarters in Boleíta but also in other facilities. A plastic bag was placed over his head and water was poured over his face, causing him to suffocate. For the duration of his detention on the premises of the Directorate General of Military Counter-Intelligence, he was kept in isolation in a small cell without food or water, where round-the-clock electric lighting made it impossible for him to distinguish between night and day. He was subjected to severe ill-treatment; for example, he was frequently beaten with a steel baton and forced to drink dirty water; his food was thrown on the floor, and he was forced to eat it quickly, off the floor, otherwise they would clean it up and take it away; and officers threatened to mutilate parts of his body. He was severely beaten and saw persons he did not know being executed. As a result of this treatment, he now suffers from severe abdominal pain and his whole body is weak. He is unable to stand, much less walk, has high fevers, suffers from

severe malnutrition, weighs 30 kilograms, has broken teeth and suffers from various other serious health conditions.

11. On 18 April 2018, the Minister of the Interior stated on national public television that “members of a terrorist cell planning operations intended to destabilize the public order and undermine peace in the Republic” had been detained. These statements were made in tandem with various posts on the Minister’s account on the social media platform Twitter, which included a photo of Mr. Aristimuño, next to which it was stated that he had been “hired by the terrorist cell as an instructor of various courses for this militant group of insurgents”.

12. On 20 April 2018, Mr. Aristimuño was brought before Caracas Military Court of Due Process No. 3 for a detention hearing. According to the source, in accordance with the Constitution, detainees must be brought before the judicial authority that issued the warrant for their arrest within 48 hours of apprehension, but this did not occur in the present case, since Mr. Aristimuño was not brought before a judicial authority until 96 hours after his arrest.

13. The source indicates that, when brought before the military judge, Mr. Aristimuño showed signs of the cruel, inhuman and degrading treatment to which he had been subjected while being held on the Directorate General of Military Counter-Intelligence’s premises. At the hearing, the military judge ordered Mr. Aristimuño’s transfer to Santa Ana National Centre for Military Detainees in Táchira State, which is 812 kilometres from Caracas. This made it difficult and expensive for relatives to bring him food, clothing and other items, and scuppered any possibility of his relatives and defence counsel visiting him on a regular basis.

14. According to the information received, in the written submission presented to the military judge, the Military Prosecutor stated that Mr. Aristimuño had been detained on account of his alleged links to destabilizing, destructive acts against units of the National Bolivarian Armed Forces in Caracas. The Prosecutor claimed that Mr. Aristimuño had been planning to carry out destabilizing attacks, involving, for example, planting large quantities of explosives in the vicinity of the National Electoral Council, in the national headquarters of the Bolivarian National Guard, in La Carlota “Generalísimo Francisco Miranda” Air Force Base and in various military facilities in Fuerte Tiuna, with the aim of incapacitating their personnel so that the militants could steal the military supplies they needed to carry out alleged plans to prevent the elections due to take place in May 2018. The source stresses that the Military Prosecutor provided no evidence to support the claims made in the written submission incriminating Mr. Aristimuño.

15. According to the source, the Military Prosecutor accused Mr. Aristimuño of committing the offences of treason, as provided for in article 464 (25) of the Code of Military Justice and punishable under article 465 read in conjunction with article 467; instigating a military rebellion, as provided for in articles 481 and 487 of the Code; and affronting the Armed Forces, also provided for in the Code of Military Justice. The source highlights that Mr. Aristimuño is a civilian being tried in a military court.

16. The pretrial hearing in Mr. Aristimuño’s case was held on 19 October 2018. At the hearing, the Prosecutor reiterated the charges of treason, affronting the Armed Forces, theft of military supplies and instigating a rebellion laid against the accused. The source indicates that Mr. Aristimuño’s defence counsel succeeded in having the first three charges dismissed. Nonetheless, the military court ordered that Mr. Aristimuño be tried for the offence of instigating a rebellion. The source reports, however, that the trial phase is yet to begin, despite the fact that more than 10 months have passed since the order was given to move to trial upon conclusion of the preliminary phase.

17. The source alleges that there is no legal basis justifying Mr. Aristimuño’s detention, since article 44 of the Constitution provides that the right to personal liberty is inviolable and that detention is permissible only when ordered by a court warrant or in cases of flagrante delicto.

18. The source points to a violation of Mr. Aristimuño’s fundamental rights, including his right to a defence and to due process, his right to be presumed innocent, his right to remain at liberty during proceedings and his right to be heard before the natural judge.

Article 49 of the Constitution enshrines the fundamental safeguards of due process, which, according to the source, have been violated in Mr. Aristimuño's case.

19. The source stresses that, in accordance with the legislation governing Venezuelan criminal procedure, police authorities must respect certain obligations when arresting suspects as part of a criminal investigation. These obligations are enshrined in article 119 of the Code of Criminal Procedure and include the following: to use force only when strictly necessary and, in such cases, only to the extent required to make the arrest; not to use arms, except in the event of resistance that endangers a person's life or physical integrity and, in such cases, subject to the aforementioned restrictions on the use of force; not to commit, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment; not to reveal detainees' identity to the media when doing so could affect ongoing investigations; to identify oneself as a law enforcement officer at the time of arrest; and to inform detainees of their rights.

20. The source also claims that, pursuant to article 229 of the Code of Criminal Procedure, Mr. Aristimuño had the right to remain at liberty during proceedings. According to article 220, deprivation of liberty is a precautionary measure admissible only when other precautionary measures provide insufficient guarantee for the purposes of the proceedings.

21. The source reports that Mr. Aristimuño's defence counsel has requested a hearing before the Attorney General for the purpose of establishing whether Mr. Aristimuño's detention is lawful and formally recording the ill-treatment to which he has been subjected and the damage done to his health and physical integrity. Such a hearing would also be an opportunity to report the cruel and inhuman treatment, torture, verbal abuse and insults to which Mr. Aristimuño has been subjected from the moment the purported officers of the Directorate General of Military Counter-Intelligence broke into his home on 15 April 2018 until the present day. Military Court No. 3 has not agreed to the hearing, in breach of due process.

22. Mr. Aristimuño's defence lawyers allegedly informed the office of the special prosecutor responsible for upholding fundamental rights that officers of the Directorate General of Military Counter-Intelligence, the Special Action Forces and the Bolivarian National Police Force, acting together, made frequent visits to Santa Ana National Centre for Military Detainees in the early hours of the morning and engaged in dehumanizing attacks on prisoners, including Mr. Aristimuño, whom they subjected to physical and psychological torture; they even stole personal belongings from his cell and threatened to kill him. The defence lawyers reported that the officers involved had violated Mr. Aristimuño's fundamental rights. However, the Public Prosecution Service failed to act on these reports.

23. Mr. Aristimuño's defence lawyers also requested the support of the Attorney General's Office in ensuring that its criminal forensics department and its forensic medicine experts provided due assistance in respect of the fundamental rights violations suffered by Mr. Aristimuño. Specifically, they requested that the Office's experts be sent with the utmost urgency to Santa Ana National Centre for Military Detainees to check on Mr. Aristimuño's state of health and thus protect his right to health and physical integrity and his right to life. However, to date, no check-up has been conducted.

24. The source stresses that Mr. Aristimuño's health has rapidly and seriously deteriorated as a consequence of the torture and cruel, inhuman and degrading treatment to which he has been subjected. Mr. Aristimuño currently weighs 30 kilograms. His defence counsel has repeatedly requested that he receive adequate and timely medical assistance as a matter of utmost urgency; however, such assistance has been denied to him time and time again.

25. The source reports that Mr. Aristimuño, who is a civilian, was transferred to and is currently being detained in Ramo Verde National Centre for Military Detainees in Los Teques, Miranda State.

Response from the Government

26. On 21 August 2019, the Working Group transmitted the source's allegations to the Government, requesting a response by 22 October 2019. The Government requested an

extension of this deadline and was given until 5 November 2019 to reply. The Government submitted its response on 4 November 2019.

27. The Government states that Mr. Aristimuño has been deprived of liberty since 18 April 2018 in the context of criminal proceedings brought against him as the alleged perpetrator of offences under Venezuelan law related to politically destabilizing plans and activities specifically intended to prevent the presidential elections of 20 May 2018 from taking place.

28. On 13 April 2018, the Directorate General of Military Counter-Intelligence sent an official letter to the Military Prosecutor's Office, informing it of the results of an investigation that allegedly linked Mr. Aristimuño and other individuals to plans to carry out attacks, including a plan to plant explosives in the vicinity of the National Electoral Council, in the national headquarters of the Bolivarian National Guard, in La Carlota "Generalísimo Francisco Miranda" Air Force Base and in various military facilities, with the aim of incapacitating military personnel so that they could steal military supplies belonging to the Armed Forces for use in a planned attempt to prevent the May 2018 elections.

29. This information was incorporated into an investigation being conducted by the Military Prosecutor's Office, leading it to request, on 13 April 2018, that Military Court of Due Process No. 3 issue a warrant for Mr. Aristimuño's arrest. This request was received on 16 April 2018. By way of an official letter dated 13 April 2018, the Military Prosecutor's Office also requested Military Court of Due Process No. 3 to grant it a warrant to search and seize property from Mr. Aristimuño's home.

30. In response to the requests submitted by the Military Prosecutor's Office, Military Court of Due Process No. 3 granted an arrest warrant on 16 April 2018, in accordance with article 236 of the Code of Criminal Procedure. The Court also granted a search warrant on 16 April 2018, thereby authorizing officers of the Directorate of Military Counter-Intelligence to search Mr. Aristimuño's home.

31. On 18 April 2018, officers of the Directorate General of Military Counter-Intelligence searched Mr. Aristimuño's home, in implementation of the search warrant. This process was carried out in the presence of witnesses who are identified in records attached to the case file, in accordance with article 196 of the Code of Criminal Procedure.

32. During the search, the officers arrested Mr. Aristimuño. At the time of arrest, the officers informed Mr. Aristimuño of the reasons for his arrest and of his rights as a suspect. The proceedings in this case were carried out in accordance with article 113 of the Code of Criminal Procedure and article 3 (4) and (5) of the general regulations of the Directorate General of Military Counter-Intelligence.

33. Following his arrest, Mr. Aristimuño was taken to the headquarters of the Directorate General of Military Counter-Intelligence, where he was held in detention while waiting to be brought before the court hearing the case.

34. On 20 April 2018, within 48 hours of his arrest, Mr. Aristimuño was brought before Military Court of Due Process No. 3 for an oral hearing on his detention, in accordance with article 236 of the Code of Criminal Procedure.

35. At the hearing, the Military Prosecutor formally charged Mr. Aristimuño with the offences of treason, instigating a military rebellion, affronting the Armed Forces and theft of items belonging to the Armed Forces (Code of Military Justice, arts. 464 (25), 465, 467, 481, 487, 505 and 570).

36. During the hearing, Mr. Aristimuño's private defence lawyers were allowed to make their arguments before the court. They rejected the charges brought by the Military Prosecutor, requesting that they be dropped and that Mr. Aristimuño be released. At no point did the defence counsel call into question the jurisdiction of Military Court of Due Process No. 3 over the defendant or report any human rights violations or acts of torture.

37. Mr. Aristimuño was also permitted to address the court and set out the points he considered central to his defence. However, he did not more than offer explanations of the facts presented and profess his innocence. At no point did he complain to the judge in the case that he had been subjected to acts of torture or that the search of his home and his arrest had been conducted without a warrant.

38. According to the Government, the fact that his defence counsel did not report these alleged violations of Mr. Aristimuño's right to integrity of the person and to due process contradicts the statements made by third parties in the same case. This proves that the allegations made are not grounded in reality.

39. Military Court of Due Process No. 3 decided to authorize Mr. Aristimuño's detention and to order that he be placed in pretrial detention in Santa Ana National Centre for Military Detainees.

40. A pretrial hearing was held before Military Court of Due Process No. 3 on 19 October 2018. The judge in the case dismissed the charges of affronting the Armed Forces, treason and theft of items belonging to the Armed Forces but ordered that Mr. Aristimuño stand trial for the offence of instigating a military rebellion, as provided for in articles 481 and 487 of the Code of Military Justice.

41. On 25 February 2019, Military Court of Due Process No. 3 referred Mr. Aristimuño's case to Military Trial Court No. 1. The proceedings are currently on hold pending a hearing for the opening of the public trial phase.

42. It was not possible to hold such a hearing in 2019, owing to various circumstances preventing the Trial Court from being able to sit with the three professional judges required.

43. Mr. Aristimuño is currently deprived of his liberty in Ramo Verde National Centre for Military Detainees, Miranda State. His detention conditions meet international standards. Mr. Aristimuño's state of health is not as described by the source.

44. Mr. Aristimuño has been deprived of his liberty by way of a court decision within the context of criminal proceedings. The State has respected all of Mr. Aristimuño's rights under the Universal Declaration of Human Rights and other applicable instruments.

45. In the light of the above, the detention of Mr. Aristimuño cannot be considered arbitrary under categories I and III. The arrest was made pursuant to an arrest warrant issued by a judicial authority, in accordance with article 44 of the Constitution and article 236 of the Code of Criminal Procedure. In other words, there is a legal basis justifying the detention. Furthermore, the criminal proceedings against Mr. Aristimuño have at all times been conducted in strict compliance with the safeguards of due process and the right to a defence, as recognized in articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

46. The Government further notes that there has been no violation of Mr. Aristimuño's right to remain at liberty during proceedings, as this right is not absolute and is subject to certain limitations, as provided for by law.

47. The Government concludes that the detention of Mr. Aristimuño is fully compliant with the provisions of the Constitution and domestic law and with the Universal Declaration of Human Rights and the Covenant.

Further comments from the source

48. The Working Group transmitted the Government's response to the source on 4 November 2019. The source submitted final comments and observations on the Government's response on 11 November 2019.

49. In these final observations, the source stresses that the Government recognizes that Mr. Aristimuño, who is and has always been a civilian, has been investigated, prosecuted, detained and tried by various military courts from the outset of proceedings. The Government thereby accepts and confirms that his detention is arbitrary.

50. The source claims that since 2014, at least 848 civilians, including Mr. Aristimuño, have been investigated, detained, prosecuted and even sentenced by military courts. This practice, which is systematic and the result of a State policy, as recognized by the Government in its communication, is a clear violation of these civilians' rights to be heard by the natural judge and to due process, as enshrined in article 49 (4) of the Constitution and in multiple international human rights treaties, by virtue of the fact that they are not members of the military.

51. The source also stresses that, at the moment of Mr. Aristimuño's arrest, no arrest or search warrant that would provide a legal basis for his illegitimate detention had been

issued, since at that time no judicial order whatsoever had been issued against him. These orders were issued by the judicial authority after the arrest.

52. The source indicates that Mr. Aristimuño was not brought before the judicial authorities within 48 hours of his arrest, as required by the Constitution and the law. Instead, he was held incommunicado for 96 hours before being arbitrarily brought before the military courts. The source notes that the Government recognizes this to be the case when it highlights that the hearing on Mr. Aristimuño's detention, when he was finally allowed to communicate with his defence counsel, was not held until 20 April 2018.

53. The source notes that in several paragraphs of the communication sent by the Government to the Working Group, the Government claims that Mr. Aristimuño's defence counsel failed to report the ill-treatment, torture and serious injuries suffered by Mr. Aristimuño throughout the investigation. The source claims that these statements are false.

54. The acts to which Mr. Aristimuño was subjected were reported to the military court and to the office of the special prosecutor responsible for upholding fundamental rights, now known as the office of the special prosecutor responsible for upholding human rights, which is attached to the Public Prosecution Service. In both cases, it was reported that several persons arbitrarily detained in Ramo Verde military prison, including Mr. Aristimuño, had serious health problems, most of which were the result of ill-treatment suffered at the time of arrest and in the days immediately after. However, to date, no investigation into these events has been opened.

Discussion

55. The Working Group thanks the parties for their contributions to the resolution of the present case.

56. The Working Group is mandated to investigate all claims 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 other relevant international legal instruments, in accordance with its methods of work.

57. 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, then the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions, proffered in isolation and without substantiation, that lawful procedures have been followed are not sufficient to rebut the source's allegations.¹

58. Mr. Aristimuño is a safety instructor, helicopter pilot and former police officer. He was 60 years old when he was deprived of his liberty.

Category I

59. The Working Group has indicated that anyone who is arrested must be informed, at the time of their arrest, not only of the reasons for the arrest² but also of the judicial avenues available for challenging the lawfulness of the arrest.³ The reasons for the arrest must include not only the general legal basis but also factual specifics to indicate the substance of the complaint and the wrongful act committed. These reasons concern the official basis for the arrest, not the subjective motivations of the arresting officer.⁴

60. In its jurisprudence, the Working Group has consistently held that a person is considered to have been arrested in *flagrante delicto* when the accused is deprived of liberty

¹ A/HRC/19/57, para. 68.

² Covenant, art. 9 (2).

³ A/HRC/30/37, principle 7. Right to be informed.

⁴ General comment No. 35 (2014) on liberty and security of person, para. 25.

during or immediately after the commission of an offence or is arrested in hot pursuit moments after the offence has been committed.⁵

61. The Working Group received credible information to the effect that Mr. Aristimuño was arrested at his home at 10.30 p.m. on Sunday, 15 April 2018, without having been shown a warrant or having been caught in flagrante delicto, by a group of between 25 and 28 officers of the Directorate General of Military Counter-Intelligence, who were dressed in black and heavily armed. The Working Group also received credible information to the effect that Mr. Aristimuño was detained on the premises of the Directorate General of Military Counter-Intelligence.

62. The Working Group received alarming information to the effect that the authorities placed a plastic bag over Mr. Aristimuño's head and poured water over his face, causing him to suffocate, and that for the duration of his detention on the premises of the Directorate General of Military Counter-Intelligence he was kept in isolation in a small cell and was subjected to cruel, inhuman and degrading treatment. In the light of these allegations, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

63. By virtue of the fact that Mr. Aristimuño was arrested without a warrant and was not caught committing or having just committed an offence, the Working Group considers that the Government was unable to invoke any legal basis to justify depriving him of his liberty and that his detention is arbitrary under category I.

Category III

Presumption of innocence

64. Article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant recognize the right of all persons charged with a criminal offence to be presumed innocent. This right imposes a number of obligations on all State institutions to treat persons accused of a criminal offence as innocent until they have been found guilty beyond any reasonable doubt. In the view of the Working Group, as well as that of the Human Rights Committee, this right carries an obligation for all public authorities, including the executive branch, to avoid prejudging the outcome of a trial, which means refraining from making public statements affirming the guilt of the accused.⁶

65. The Working Group has determined that statements publicly condemning the accused person before a judgment has been made violate the presumption of innocence and constitute undue interference that undermines the independence and impartiality of the court.⁷

66. The Inter-American Court of Human Rights has stated that:

The right to be presumed innocent requires that the State refrain from informally convicting a person or making public declarations regarding his or her guilt, thereby shaping public opinion, so long as the person's guilt has not been proven according to law. This right can be violated by the judges in charge of the proceedings or indeed by other public authorities, who therefore have a duty to exercise discretion and caution when making public statements regarding criminal proceedings before the person has been tried and a judgment has been made.⁸

67. The Working Group has reiterated that the public statements of high-ranking officials violate the right to be presumed innocent if such statements declare persons guilty of an offence for which they have not yet been tried, thereby leading the public to believe

⁵ See opinions Nos. 13/2019, para. 53; 9/2018, para. 38; 36/2017, para. 85; 53/2014, para. 42; 46/2012, para. 30; 67/2011, para. 30; and 61/2011, paras. 48–49. See also E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

⁶ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30. See also *Kozulina v. Belarus* (CCPR/C/112/D/1773/2008), para. 9.8.

⁷ Opinions Nos. 90/2017, 76/2018, 89/2018 and 40/2019.

⁸ *Pollo Rivera et al. v. Peru*, Judgment of 21 October 2016, Merits, Reparations and Costs, Series C, No. 319, para. 177.

them guilty and influencing or prejudging the assessment of the facts by the competent judicial authority.⁹

68. The Working Group received credible information to the effect that, on 18 April 2018, the Minister of the Interior stated on national public television that “members of a terrorist cell planning operations intended to destabilize the public order and undermine peace in the Republic” had been detained and published images of Mr. Aristimuño on social media indicating that he had been “hired by the terrorist cell as an instructor of various courses for this militant group of insurgents”.

Right to a hearing before a competent tribunal

69. The Working Group recalls that the detention of civilians by the Venezuelan military authorities is an issue that it has already dealt with in previous opinions.¹⁰ As stated previously, the trial of civilians by judges who are under military command is an irregularity.¹¹ In the Working Group’s view, one of the main benefits of civilian judges is their impartiality and independence, which military judges generally lack because they are required to follow orders given by superior officers and because they are appointed by the executive branch. Thus, the separation of powers is not guaranteed in the exercise of this judicial function, which must be independent and impartial.

70. The Working Group has noted in its jurisprudence that placing civilians under the jurisdiction of military prosecutors and courts breaches obligations contained in both the Universal Declaration of Human Rights and the Covenant. The military courts cannot be considered to be “competent, independent and impartial” within the meaning of article 14 (1) of the Covenant.¹² In addition, the Working Group believes that military courts should only be competent to try military personnel for military offences and are precluded from trying cases in which the accused or the victims are civilians. Additionally, the Working Group has noted that the offences of rebellion, sedition and attacks against democratic institutions, when committed by civilians, cannot be tried by military courts.¹³

71. In the light of the information received from the parties, the Working Group is convinced that Mr. Aristimuño, who is a civilian, is being prosecuted and tried by the military courts. The Working Group is of the view that the military authorities are not competent to order the detention of civilians. Therefore, the detention of Mr. Aristimuño, which was ordered by a military court, violates the human right to a fair trial as established in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

72. In recent years, the Working Group has repeatedly expressed views on multiple arbitrary arrests of political opponents of the Government or people who have exercised their rights to freedom of opinion, expression, association, assembly or political participation. Such persecution, in the Working Group’s view, is an attack or systematic practice engaged in by the Government to deprive political opponents, particularly those who are seen as opponents of the regime, of their physical freedom, in violation of fundamental rules of international law, including the Universal Declaration of Human Rights and the Covenant. The Working Group recalls that, in some circumstances, imprisonment and other severe forms of deprivation of physical liberty that violate internationally recognized norms may constitute crimes against humanity.¹⁴

73. In the light of the recurrent pattern of arbitrary detention identified by this international human rights mechanism in recent years, the Government is urged to consider inviting the Working Group to make an official visit to the country. Such visits are an opportunity for the Working Group to engage in direct constructive dialogue with the

⁹ See opinions Nos. 6/2019 and 12/2019.

¹⁰ See opinion No. 84/2017.

¹¹ See A/HRC/27/48, paras. 66 and 70. See also opinions Nos. 30/2017 and 44/2016.

¹² See A/HRC/27/48, paras. 69.

¹³ Ibid.

¹⁴ See opinions Nos. 37/2011, para. 15; 38/2011, para. 16; 39/2011, para. 17; 4/2012, para. 26; 47/2012, paras. 19 and 22; 34/2013, paras. 31, 33 and 35; 35/2013, paras. 33, 35 and 37; 36/2013, paras. 32, 34 and 36; 38/2012, para. 33; 48/2013, para. 14; 22/2014, para. 25; 27/2014, para. 32; 34/2014, para. 34; 35/2014, para. 19; 44/2016, para. 37; 32/2017, para. 40; 33/2017, para. 102; and 36/2017, para. 110.

Government and with representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

74. In view of the information received regarding allegations of acts of torture and Mr. Aristimuño's state of health, in accordance with paragraph 33 (a) of its methods of work, the Working Group 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 and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Disposition

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

The deprivation of liberty of Carlos Miguel Aristimuño de Gamas, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

76. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Mr. Aristimuño 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.

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

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

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group 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 and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

81. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

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

82. 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.

83. 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.

84. 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 22 November 2019]

¹⁵ See Human Rights Council resolution 42/22, para. 3.