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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 18/2020 concerning Rubén Darío González Rojas (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 28 October 2020, the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Rubén Darío González Rojas. The Government requested an extension of the deadline for its response. The request was granted, and the response was submitted on 27 January 2020. 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. Rubén Darío González Rojas is a Venezuelan citizen born on 17 March 1959 and residing in Ciudad Piar, in the Bolivarian municipality of Angostura, State of Bolívar. Mr. González Rojas is the general secretary of the Ferrominera del Orinoco workers' union and has worked for the Corporación Venezolana de Guayana Ferrominera del Orinoco for 34 years.

5. According to the source, Mr. González Rojas has been subject to persistent persecution for more than seven years because of his ongoing work in defence of labour rights. The source reports that, in August 2009, the workers organized a peaceful strike to protest against the company's failure to comply with the collective agreement. On 24 September of that year, one month after, Mr. González Rojas was arrested for offences allegedly committed during the strike. He was charged with inciting criminal activity, obstructing freedom to work and violating security zones, among other offences. He was imprisoned for 15 months, tried over a period of five years, which, according to the source, was marked by countless procedural irregularities and incidents that led the Criminal Chamber of the Supreme Court to overturn the conviction, which had sentenced him to 7 years' imprisonment. The Criminal Chamber ordered the case to be referred back to the State and a new public hearing to be organized.

6. The trial recommenced before another court, the case being heard in Caracas by order of the Criminal Chamber, and, eventually, on 23 April 2014, First Instance Court No. 24 of the Criminal Judicial Circuit of the Metropolitan Area of Caracas ordered Mr. González Rojas' unconditional release, having found him innocent of all charges brought against him owing to his leadership of the workers' strike at the mining company.

7. According to the submissions, more recently, Mr. González Rojas was arrested in the early morning of 29 November 2018, in Anaco, in the State of Anzoátegui, when he was travelling with a group of 60 workers from the mining company who had taken part in a protest in Caracas on 28 November 2018. The vehicles being used to take the workers back to Ciudad Guayana were intercepted by approximately 20 officers of the Bolivarian National Guard and 10 officers of the Directorate General of Military Counter-Intelligence. The rest of the workers were released after a few hours, but Mr. González Rojas was kept in detention because a warrant for his arrest had supposedly been requested by Military Prosecutor's Office No. 43, in Ciudad Bolívar, on 20 August 2018, in relation to alleged offences of attacking the military guard, affronting the military guard and affronting the armed forces.

8. The source explains that, on 12 August 2018, an assembly was being held at one of the entrances to the mining company and that, while Mr. González Rojas was talking with a group of workers, officers of the Bolivarian National Guard attempted to apprehend him. However, the workers who had gathered for the assembly prevented the guards from apprehending him. The source maintains that, in retaliation for the workers' conduct, the authorities proceeded to instigate military justice proceedings through Military Prosecutor's Office No. 43, which has jurisdiction in the State of Bolívar. The source notes that there was no violent conduct on the part of either the workers or Mr. González Rojas, yet, according to the source, the authorities claim that, in the aforementioned circumstances, Mr. González Rojas committed offences involving attacks on the military guard and affronts to the armed forces.

9. According to the source, on the instructions of the presiding judge of the Criminal Judicial Circuit, Mr. González Rojas was brought before a court located in another city in order to prevent any disruption of public order in the State of Bolívar. Thus, on 30 November 2018, in the course of the afternoon, Mr. González Rojas was brought before Military Court of Due Process No. 15, in Maturín, in the State of Monagas, and was indicted under case No. FM 43053-2018. He was charged with the offences of affronting the military guard, the

national flag and the armed forces and attacking the military guard, as established in articles 501, 502, 504 and 505 of the Code of Military Justice.

10. The source claims that the authorities violated Mr. González Rojas' right to natural judgment and an independent judge. According to the source, the trial, this time in military courts, was a continuation of the relentless persecution of Mr. González Rojas and forms part of a State policy that has been enforced with greater intensity since April 2015, when, in response to the massive, ongoing protests that were taking place in the Bolivarian Republic of Venezuela, the authorities implemented the so-called Zamora Plan, which involved, among other things, trying civilians in military courts.

11. The source states that the parties did not at any time make a formal request to have the case heard before the Supreme Court, which constitutes another irregularity, since the Supreme Court did not decline jurisdiction on territorial grounds, as established in article 62 of the Organic Code of Criminal Procedure, a situation that again demonstrates the lack of independence within the judiciary.

12. According to the source, on 3 December 2018, Mr. González Rojas' lawyer filed a brief with Military Court of Due Process No. 15 challenging the fact that his client was being tried by military courts. It would be up to the Criminal Chamber of the Supreme Court to decide whether to continue the proceedings within the military justice system or to refer the case to the ordinary courts.

13. On the same day, Mr. González Rojas' legal representatives filed a brief with the State of Monagas branch of the Office of the Ombudsperson, requesting the Office, which is mandated under the Constitution to defend the human rights of the people, to also petition the military court for a change of jurisdiction.

14. However, even though the defence team had requested a review of jurisdiction before Military Court of Due Process No. 15, and thus that the case be referred to the ordinary courts, arguing a violation of the fundamental human right to be tried by a natural judge, who is also competent, independent and impartial, as established in article 49 (3) and (4) of the Constitution, it received no response from the Criminal Chamber of the Supreme Court. The State of Monagas branch of the Office of the Ombudsperson also failed to respond to his lawyers' request for corresponding action to address the fact that a civilian was being tried before military courts.

15. The source recounts that Mr. González Rojas was charged with committing the above-mentioned offences before the corresponding legal deadline had passed and the preliminary hearing was held on 20 February 2019. At this hearing, the prosecution's case was admitted in its entirety, despite the defence's claim that there was insufficient evidence to support this outcome, and without the lawyers' petitions being taken into account by the military court concerned, which rejected all challenges brought. The source maintains that Mr. González Rojas' right to a defence, as enshrined in article 49 of the Constitution, was seriously violated. In addition, throughout the proceedings, his lawyers came up against numerous obstacles in their attempts to gain access to the case file.

16. According to the submissions, the hearing began before Military Trial Court No. 5 on 3 July 2019, that is, four months after the preliminary hearing, because no judge had been available previously, and it had not therefore been possible to continue the criminal proceedings without interruption.

17. In addition to the violation of the right to be heard before a natural judge, none of the items of evidence submitted by Mr. González Rojas' defence team were taken into account during the trial. All items were thrown out by the judge, who also dismissed evidence proffered by the military prosecutor that was crucial to establishing the facts of the case, and, to an extent, exonerated the detainee. According to the source, all these factors prove the bias and lack of impartiality of the judge assigned to the case.

18. The source reports that, on 13 August 2019, Military Trial Court No. 5 convicted Mr. González Rojas by oral judgement and sentenced him to 5 years and 9 months' imprisonment. Mr. González Rojas was acquitted of the offence of attacking the military guard (art. 501.1), but convicted of affronting the military guard (art. 502.1) and affronting the armed forces (art. 505). The sentence has not yet been published, even though the period of 10 working

days allowed for publication and notification of decisions has elapsed. Because of this delay, no appeal against the conviction has been possible.

19. According to the source, Mr. González Rojas is being held in the wing of Monagas prison used to house military officers facing trial known as “La Pica” wing, and is the only civilian being detained in this military detention facility. According to the source, this prison is a highly dangerous one, in which acts of violence are a frequent occurrence.

20. The source reports that Mr. González Rojas does not have access to drinking water, that his relatives have to provide him with food, and that, although his lawyers have repeatedly petitioned the court to authorize medical treatment, it has never been possible, even though he has been suffering from kidney disease for more than 10 years. It was not until he began to experience severe pain and symptoms of ill health that the authorities allowed him to be provided with medicines. The source maintains that the State is in breach of its obligation to ensure the health of persons deprived of liberty who are in its custody, in accordance with article 83 of the Constitution and the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules).

21. In addition, the source recounts that, although Mr. González Rojas receives regular visits from members of his family, these relatives report that they have repeatedly been subjected to abusive searches, especially the women, who have been subjected to humiliating and degrading treatment.

22. The source highlights the provisions of articles 44 and 49 (4) of the Constitution, which establish the rights to personal liberty and due process, and articles 9 (1) and (3) and 14 (1) of the Covenant, which enshrine the right to liberty and security of person and to equality before courts and tribunals.

23. The source maintains that Mr. González Rojas’ detention is illegal and is part of a systematic pattern of arbitrary detentions. According to the source, trial by a military court entails a violation of the fundamental safeguard of the right to natural judgement and to independence and impartiality in the administration of justice. Mr. González Rojas is not a military officer and therefore cannot commit crimes of a military nature. He cannot be charged with offences under the Code of Military Justice. The offences with which he is charged may only be committed by active military personnel in the exercise of their duties, never by a civilian.

24. In this context, the source also maintains that Mr. González Rojas has not even committed acts that could be considered offences under ordinary jurisdiction, since carrying out his trade union duties within the framework of the Constitution and the conventions of the International Labour Organization (ILO) does not constitute a crime.

25. According to the source, there is no evidence against Mr. González Rojas in the case file, and the military officers who were allegedly attacked and beaten by Mr. González Rojas have not identified him directly as a perpetrator of violence of any form, nor have they singled him out individually, nor have they stated that he beat them. Another detail in the case file to which the source draws attention is that the Prosecutor’s Office in charge of the investigation (Office No. 43 in Ciudad Bolívar, in the State of Bolívar) made not even the slightest attempt to hear the alleged aggressors’ version of events, nor did it interview any of the civilians who took part in the events in question.

26. The source maintains that Mr. González Rojas’ detention is a result of his having exercised the rights set out in the Constitution, the Universal Declaration of Human Rights and the Covenant. As a trade union leader, Mr. González Rojas asserts his right to freedom of expression, association, peaceful demonstration and assembly. For exercising these rights he has been persecuted for a number of years and on this occasion he was arrested. According to the source, Mr. González Rojas is one of the best-known trade union leaders in the Bolivarian Republic of Venezuela and is the general secretary of the union of one of the largest metallurgical companies.

27. The source also highlights that Mr. González Rojas’ detention is part of a campaign of persecution against the company’s workers, who have been calling for compliance with the collective agreement since March 2018. On 27 November 2018, nine workers from Ferrominera del Orinoco were arrested at the gates to company premises when they were

carrying out a peaceful protest action and waving banners with slogans denouncing the failure to comply with the collective agreement. The arrest was carried out by officials of the Directorate General of Military Counter-Intelligence, which is an intelligence agency forming part of the armed forces. The workers were brought before an ordinary court, which ordered that they be deprived of their liberty and decreed that they should be placed in detention in El Dorado prison. The source reports that this is a highly dangerous prison where violence often occurs. The charges laid against them were treason, obstructing the freedom to work and causing injury to the nation, among others.

28. The source maintains that the use of military justice against Mr. González Rojas is part of a State policy by which civilians who are critical of the Government or who demand the fulfilment of rights under the Constitution are prosecuted. According to the source, it is a policy that has been in effect since the implementation, in 2017, of the so-called Zamora Plan in the context of the protests that were taking place throughout the country.

29. The source concludes that, through his arbitrary detention, the Government has violated Mr. González Rojas' rights under articles 2, 9 and 14 of the Covenant and articles 1, 8, 9, 10, 11, 20 and 23 of the Universal Declaration of Human Rights.

Response from the Government

30. The Working Group transmitted the source's allegations to the Government on 28 October 2019 and requested that it submit a response by 27 December 2019. The Government requested an extension of this deadline and was given until 27 January 2020 to reply. The Government submitted its response on 27 January 2020.

31. The Government indicates that Mr. González Rojas was arrested in the context of criminal proceedings related to his alleged responsibility, as the principal offender, for the commission of the offences of attacking the military guard, affronting the military guard and affronting the national armed forces. The criminal proceedings against him are related to violent acts committed against military officers who were on guard duty at the Ferrominera del Orinoco facility in August 2018.

32. The Government reports that Mr. González Rojas' detention occurred during routine operations in the State of Anzoátegui when, while carrying out checks on persons and vehicles, the military officers found that Mr. González Rojas was the subject of arrest warrant No. 205-18 issued by Military Court of Due Process No. 17, in Ciudad Bolívar, dated 20 August 2018.

33. Mr. González Rojas' arrest was sought pursuant to a letter dated 17 August 2018 by Military Prosecution Service Office of Due Process No. 17. This request was made as a result of investigations initiated following the events at Ferrominera.

34. The evidence gathered during the investigation included a letter requesting that the military initiate criminal investigations, witness statements taken from those involved, a notice of commission, photographs of the victim, the vehicle and the place where the events took place, a forensic examination report and certified copies of internal correspondence, all of which attested to the circumstances linking Mr. González Rojas with the alleged commission of the above-mentioned offences.

35. In response to the requests received from the Military Prosecutor's Office, on 20 August 2018 Military Court of Due Process No. 17 granted the arrest warrant requested, in accordance with article 236 of the Organic Code of Criminal Procedure. Thus, the Court issued arrest warrant No. 205-18 on 20 August 2018.

36. On 29 November 2018, in compliance with this arrest warrant, the officers proceeded to arrest Mr. González Rojas. This action is recorded in the police report of the same date. At the time of his apprehension, the officers informed Mr. González Rojas of the reasons for his arrest and of his rights as a suspect. This action was recorded in the report of notification of the rights of suspects. There is also an official record of fair treatment, attesting to the fact that Mr. González Rojas was not subjected to physical, mental or verbal abuse during his detention.

37. On 30 November 2018, Mr. González Rojas was brought before Military Court of Due Process No. 15 for an initial oral hearing, in accordance with article 236 of the Organic Code of Criminal Procedure. At the hearing, the Military Prosecutor's Office formally charged Mr. González Rojas as the principal offender in the offences of attacking the military guard pursuant to article 501.1, affronting the military guard pursuant to article 502, and affronting the national armed forces pursuant to articles 389.1 and 390.1, with the aggravating circumstances set out in articles 402.1 and 402.12 of the Organic Code of Military Justice.

38. During the hearing, the private defence lawyers of the accused were allowed freely to carry out their duties before the court. Mr. González Rojas was also permitted to address the court and to set out the points he considered important for his defence.

39. The Court decided to confirm Mr. González Rojas' detention and agreed that he should be placed in pretrial detention in the East Wing for Military Prisoners known as "La Pica".

40. On 20 February 2019, a preliminary hearing was held before Military Court of Due Process No. 15. With regard to the offences attributed to Mr. González Rojas at the arraignment hearing, the judge admitted the charges brought by the Military Prosecutor's Office in their entirety. Likewise, the Court assigned to the case confirmed the custodial measure and it was agreed that he would stand trial, in accordance with article 314 of the Organic Code of Criminal Procedure.

41. On 13 August 2019, the trial took place in public before Military Trial Court No. 5. The judge found him not guilty of the military offence of attacking the military guard but convicted him of the military offences of affronting the armed forces and affronting the military guard, for which he was sentenced to 5 years and 9 months' imprisonment.

42. At present, Mr. González Rojas remains deprived of his liberty in the "La Pica" Wing for Military Prisoners. The conditions in which he is being held are in line with the applicable standards, including with regard to access to sanitation facilities.

43. The Government recounts that the criminal proceedings against Mr. González Rojas 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. The detention of Mr. González Rojas is not the result of, nor related to, the exercise of rights or freedoms protected by articles 1, 8, 9, 10, 20 and 23 of the Universal Declaration of Human Rights and articles 2, 9 and 14 of the Covenant. The actions of Mr. González Rojas were not committed in the legitimate exercise of his trade union rights. His detention was the result of an arrest warrant issued in the context of criminal proceedings in which he was charged with involvement in the commission of very serious offences.

44. The Government also notes that article 14 (1) of the Covenant does not expressly prohibit persons who are not part of the military from being tried before courts with special competence in military criminal matters, that is, when they are competent *ratione materiae*.

45. The Government reiterates that the offences in question are offences of a strictly military nature that, in the Bolivarian Republic of Venezuela, must be heard and judged before courts with jurisdiction over military criminal matters. Thus, Mr. González Rojas has been charged with offences of a strictly military nature that are treated as such within the national legal system.

46. The Government points out that jurisdictional competence is determined not by the persons being prosecuted but by the nature of the offence committed. The courts with competence in military criminal matters are an integral part of the justice system, as established in article 261 of the Constitution. They therefore operate under the guidance of the Supreme Court and, consequently, its Criminal Cassation Chamber acts as the highest judicial authority in all criminal proceedings before such courts.

47. The prosecutors who act before the military courts are part of the Public Prosecution Service and report and are subordinate to the Attorney General of the Republic, who enjoys full autonomy and independence, in accordance with article 285 of the Constitution. The

Government asserts that the right to be heard by a natural or independent judge has not been violated in the present case.

48. The Government reports that State institutions are committed to respecting, protecting and strengthening the independence and impartiality of the country's justice system.

49. Furthermore, there has been no violation of Mr. González Rojas' right to remain at liberty during proceedings, especially since this right is not absolute and is subject to certain limitations, as provided for by law. The custodial measure of pretrial deprivation of liberty was approved by a court. Mr. González Rojas' arrest was the result of a court order and, consequently, his deprivation of liberty was fully compatible with article 44 of the Constitution and article 9 of the Covenant.

50. The Government concludes that Mr. González Rojas' detention is fully compliant with the provisions of the Constitution, the Universal Declaration of Human Rights, the Covenant and other applicable instruments.

Further comments from the source

51. In their final comments, the source maintains that, under international human rights law, military criminal jurisdiction is considered a highly specialized system of justice in which the court must have jurisdiction both *ratione materiae* and *ratione personae* and where only offences of a military nature committed by military personnel should be tried. It is therefore a system of justice that should be used in a restrictive manner.

52. The source notes that the Human Rights Committee has recognized the exclusive nature of military criminal jurisdiction, in establishing that the scope of the military courts' competence should be limited to strictly military offences committed by military personnel and cannot be extended to the trial of civilians.¹ Accordingly, this is the manner in which article 14 (1) of the Covenant, which provides that all persons are equal before the courts and have the right to be heard with all due guarantees by a competent, independent and impartial tribunal should be interpreted.

53. The source also notes that the Inter-American Court of Human Rights has also specified that the trial of civilians should be excluded from the scope of military jurisdiction.²

54. The source further notes that the Constitution is compatible with international standards in this area, as it provides, in article 261, that the jurisdiction of the military courts is limited to offences of a military nature, and that ordinary offences, human rights violations and crimes against humanity are subject to ordinary jurisdiction. This provision should be read in conjunction with article 49.4, which provides that "all persons have the right to be tried by their natural judges in ordinary or special jurisdictions, with the guarantees established in this Constitution and in the law".

55. The source asserts, however, that, contrary to widely established contemporary international criteria, the Government has stated that offences of a military nature and the question of jurisdiction over them are defined according to their subject matter. The Government's position is based on article 123.2 of the Organic Code of Military Justice,³ which stipulates that military jurisdiction encompasses "military offences committed by military personnel or civilians, whether jointly or separately".

56. The source argues that the aforementioned Organic Code of Military Justice of 1998 predates the Constitution and has been aligned neither with human rights principles and standards, nor with the international standards that guarantee the independence and autonomy of judges, despite the many calls for attention to be given to this area made by various international bodies. Further compounding this situation, this law represents only a partial reform of the Organic Code of Military Justice of 1938.

¹ See CCPR/C/79/Add.104 and CCPR/C/79/Add.13.

² See *Rochela Massacre v. Colombia*, judgment of 11 May 2007, merits, reparations and costs, Series C No. 163.

³ *Gaceta Oficial No. 5263, extraordinary issue*, 17 September 1998.

57. The source asserts that, in the Bolivarian Republic of Venezuela, military justice is improperly used to try civilians. The principle of natural judgment is also undermined as a result, since the military judge does not act under the supervision of a competent and impartial court, and the judicial function is thus devoid of all legitimacy because it lacks the authority to uphold the basic guarantees of a fair trial, as required under article 10 of the Universal Declaration of Human Rights.

58. With regard to the violation of the right to a defence and the principle of liberty, the source maintains that the detainee's version of events was never taken into account, either by the prosecutor or by the judge, and that although the defence team repeatedly petitioned the Military Prosecutor's Office, the Office never carried out the procedures that would have cleared Mr. González Rojas. In addition, the evidence presented by the lawyers was declared irrelevant. Thus, in the case in hand, all constitutional guarantees of due process, the right to liberty of person, the right to a defence and the principle of presumption of innocence, as set out in article 49 of the Constitution and article 12 of the Organic Code of Criminal Procedure, were undermined; all the prerequisites for equality between the parties in the proceedings were breached; and article 14 (2) and (3) of the Covenant, as well as articles 10 and 11 of the Universal Declaration of Human Rights, were violated. The source also states that it was evident that the initial actions of the police in the proceedings were subject to none of the required checks and balances.

59. The source argues that deprivation of liberty is an exceptional precautionary measure and that the legal prerequisites that authorize custodial measures should be interpreted in a restrictive manner. Furthermore, although the right to freedom is not absolute, deprivation of the right is permissible only when the Public Prosecutor's Office is able to prove before the judge that all required criteria under article 236 of the Organic Code of Criminal Procedure have been met. Although an arrest warrant was issued for Mr. González Rojas, it was not justified because it deprived him of his fundamental right to freedom, in violation of article 9 of the Covenant.

60. The source maintains that there is no basis to assert, as stated in the Government's report on the case, that Mr. González Rojas' detention is in line with the provisions of the Constitution and national laws, and with those of the Universal Declaration of Human Rights, the Covenant, and other applicable instruments signed and ratified by the Bolivarian Republic of Venezuela.

61. The source recounts certain procedural irregularities, which compounded the unjustified procedural delay in the proceedings. Because the conviction served on 13 August 2019 was not published until 29 October 2019, after the legally established deadline for publication of 10 working days, Mr. Gonzalez Rojas' lawyers were not informed of the sentence until 4 November 2019.

62. The source also asserts that the summing-up that served as the basis for the conviction did not specify the punishable acts of which the defendant was convicted and contained none of the usual details of manner, time and place, but simply referred to the events in a generic fashion, citing police records that lacked precision. This added to the implausibility of the alleged events: Mr. González Rojas supposedly attempted to disarm two military officers, but no mention was made of any of the other individuals who were involved or present at the time.

63. The source also argues that the indictment is inconsistent with the statements made by officers of the Military Prosecutor's Office and the evidence in the case file, from which it can be gleaned that the testimonies presented in court were a "copy and paste" of the version drafted by the prosecutor, and that the judge failed to apply the restrictive interpretation that should be adopted when an individual's conduct is deemed to constitute a criminal act. This reflects a failure to comply with the formal requirements that an indictment should satisfy pursuant to Article 308 of the Organic Code of Criminal Procedure.

64. The source concludes that there were irregularities in both the initial detention and the pretrial proceedings, and yet, even so, both were approved by the judicial authorities.

65. With regard to the obstruction of the exercise of the right to demonstrate, the source notes that the case provides an example of the criminalization of the legitimate exercise of

fundamental rights and freedoms, including the right of peaceful assembly and association and freedom of opinion and expression, as provided for in articles 19 and 20 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.

66. The source states that military jurisdiction continues to be used as an instrument of political retaliation, and that Mr. González Rojas' detention is strictly related to his leadership in the exercise of rights and freedoms protected by articles 1, 20 and 21 of the Universal Declaration of Human Rights.

67. Lastly, the source reports that Mr. González Rojas suffered a further hypertensive crisis between 15 and 20 January 2020, from which he is still not fully recovered. His lawyers are making all necessary arrangements to have him transferred to the nearby health centre, since the pills he is taking are having less and less effect and his medical history of kidney disease means that he needs ongoing medical care, but as at 8 February 2020 he had yet to receive treatment for these recurring health problems. The authorities remain reluctant to provide members of his family with a copy of an updated report on the union leader's medical situation, and continue to refuse to allow him to be treated by his own trusted doctor.

68. With regard to the Government's claim that his conditions of detention are in line with applicable international standards, the source notes that it has not been possible to establish whether there exists any independent monitoring body that might verify this information in the present case.

Discussion

69. The Working Group thanks the parties for the initial submission and subsequent contributions to the resolution of the present case.

70. 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.⁴

Category I

71. The Working Group received convincing information that, on 12 August 2018, a group of workers assembled with Mr. González Rojas at one of the entrances to the premises of Ferrominera del Orinoco, and that, on this same day, military officers who were providing on-site security attempted to detain him, but were prevented from doing so by workers participating in the assembly.

72. As a result of these events, on 29 November of the same year, when Mr. González Rojas was travelling home with 60 workers after they had taken part in a protest, their vehicle was intercepted by members of the Bolivarian National Guard and the Directorate General of Military Counter-Intelligence, who arrested them. The Working Group is aware that the rest of the workers were released and that the only person who remained in detention was Mr. González Rojas.

73. According to the information provided to the Working Group, Mr. González Rojas was detained in execution of an arrest warrant requested by the Military Prosecutor's Office and granted by a military court on the grounds that Mr. González Rojas had committed the offences of attacking the military guard and affronting the military guard and the armed forces. The Government asserts that the acts attributed to Mr. González Rojas are related to alleged acts of violence committed against the military officers who worked as guards on the premises of the Ferrominera del Orinoco mining company.

74. The Working Group notes that, in the afternoon of 30 November 2018, Mr. González Rojas was brought before Military Court of Due Process No. 15 in Maturín, State of Monagas, and prosecuted in criminal proceedings for offences under military criminal law.

⁴ A/HRC/19/57, para. 68.

According to the source, Mr. González Rojas is being held in the wing used to house military officers facing or undergoing trial at the Monagas detention facility, known as the “La Pica” wing, and is the only civilian being detained in this military complex.

75. The Government alleges that, under domestic law, the military courts have jurisdiction to try civilians when the offences with which they are charged are offences under the Organic Code of Military Justice. It further argues that, under domestic law, the military courts form part of the judiciary and proceedings before these courts are subject to the cassation procedures of all other courts hearing criminal cases, and that military prosecutors are attached to the Office of the Attorney General of the Republic and under the authority of the Attorney General.

76. The Working Group is aware that article 23 of the Constitution of 1999 recognizes that:

Treaties, covenants and conventions relating to human rights that have been signed and ratified by Venezuela have constitutional rank and take precedence over domestic law insofar as they contain provisions on the enjoyment and exercise of human rights that are more favourable than those established in this Constitution and the laws of the Republic, and are immediately and directly applicable by the courts and other organs of the State.

Consequently, both the Covenant and the American Convention on Human Rights have the same status as the Constitution and take precedence over all other national legal norms.

77. The Working Group has repeatedly stated that military courts usually have an adverse effect on the enjoyment of human rights, including the right to liberty of person, the right to due process of law, the right to be presumed innocent, the right to equality of arms, the right to an adequate defence and the right to be tried by a competent, independent and impartial tribunal.⁵

78. In addition, the Working Group wishes to recall that the Human Rights Committee has also stated that military courts affect the enjoyment of human rights, including the right to procedural equality and to a fair trial. The trial of civilians by military courts also presents serious problems for the administration of justice, which must be equitable, impartial and independent.

79. The Working Group recognizes that one of the most valuable attributes of civilian judges is their independence – an attribute that military judges generally lack, as they are required to obey orders issued by their superiors, and therefore cannot be considered a “competent, independent and impartial tribunal” within the meaning of article 14 (1) of the Covenant.⁶ The fact that military justice officials have to obey superior orders is also a violation of the right to security of person, as enshrined in article 9 of the Covenant.⁷

80. The Working Group is aware that the Inter-American Court of Human Rights has repeatedly recalled that military criminal jurisdiction must be limited and exceptional, and reserved exclusively for offences of a strictly military nature committed by military personnel, and that it cannot be extended to civilians. In other words, military courts can try only military personnel in active service for offences involving legal interests inherent to military order, which excludes civilians.⁸

⁵ A/HRC/13/30, para. 66 and A/HRC/27/48, para. 66 to 71.

⁶ E/CN.4/2006/58, principle 8; A/HRC/27/48, para. 69.

⁷ A/HRC/13/30, para. 67.

⁸ See *Usón Ramírez v. Venezuela*, judgment of 20 November 2009, preliminary objection, merits, reparations and costs, Series C, No. 207, paras. 108 to 111; *Ortiz Hernández et al. v. Venezuela*, judgment of 22 August 2017, merits, reparations and costs, Series C No. 338, paras. 148 and 149; *Castillo Petruzzi et al. v. Peru*, judgment of 30 May 1999, merits, reparations and costs, Series C No. 52, para. 128; and *La Cantuta v. Peru*, judgment of 29 November 2006, merits, reparations and costs, Series C No. 162, para. 142. See also *Radilla Pacheco, Fernández Ortega et al. and Rosendo Cantú et al. v. Mexico*, supervision of compliance with judgment, resolution of 17 April 2015, para. 13, and

81. Accordingly, the Working Group wishes to recall that the principles connected with the administration of justice by military courts establish that such courts should, in principle, have no jurisdiction to try civilians and that in all circumstances States should ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.⁹ Similarly, these principles state that military courts should have limited subject-matter jurisdiction over offences of a strictly military nature committed by military personnel.¹⁰ On this point, the Working Group has been emphatic in asserting that military courts should have no jurisdiction to try civilians, *inter alia*.¹¹

82. The Working Group also wishes to recall that military courts do not have the competence to examine the arbitrariness and legality of the detention of civilians. Military judges and prosecutors do not meet the fundamental requirements of independence and impartiality.¹² The Working Group notes that Mr. González Rojas was brought before Military Court of Due Process No. 15 and not before a civilian judicial authority. The Working Group therefore concludes that there has been a breach of article 9 (3) of the Covenant.

83. Because the military courts lack competence, either *ratione materiae* or *ratione personae*, to order and execute an arrest warrant, and such an arrest would have a legal basis only in the case of serving military officers, Mr. González Rojas' arrest was carried out without there being any legal basis and is therefore arbitrary under category I.

Category II

84. The Working Group is aware that Mr. González Rojas has been an employee of a mining company for decades and, as a trade union leader, works to defend labour rights.

85. In order to establish whether the deprivation of liberty of Mr. González Rojas resulted from the exercise of the rights and freedoms guaranteed in the Universal Declaration of Human Rights, the Working Group recalls that, according to its established practice, all persons have the right to freedom of expression, which includes the right to impart information and ideas of all kinds, either orally or through any other media of their choice. In addition, the Working Group reiterates that the exercise of this right may be subject to restrictions that are expressly provided for by law and are necessary to ensure respect for the rights or reputation of others, or for the protection of national security or of public order, health or morals.¹³

86. The Working Group shares the view of the Human Rights Committee that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.¹⁴ Both freedoms, reflected in the Universal Declaration of Human Rights and the Covenant, form the basis for the full enjoyment of a wide range of other human rights, such as the enjoyment of the rights to freedom of assembly and association, including the defence of labour rights by trade unions.¹⁵

87. The Working Group recognizes the importance of the right to freedom of opinion, and that no Government may violate other human rights on the basis of a person's actual or perceived opinions, whether they be of a political, scientific, historic, moral or religious nature. For the Working Group, it is incompatible with the Universal Declaration of Human Rights and the Covenant to criminalize the holding of an opinion, which means that, for the Human Rights Committee, it is impermissible for a person to be harassed, intimidated, stigmatized, arrested, or subjected to detention, trial or imprisonment, for reasons of the

Palamara Iribarne v. Chile, supervision of compliance with judgment, resolution of 1 September 2016, para. 27.

⁹ E/CN.4/2006/58, principle 5.

¹⁰ A/HRC/13/30, para. 71.

¹¹ *Ibid.*, para. 68 (a).

¹² A/HRC/30/37, para. 55.

¹³ Opinion No. 58/2017, para. 42.

¹⁴ General comment No. 34 on freedoms of opinion and expression, para. 2.

¹⁵ *Ibid.*, para. 4.

opinions they may hold. Any attempt, of any form, to coerce persons into holding or not holding certain opinions is prohibited.¹⁶

88. In the present case, the Working Group was convinced that Mr. González Rojas' detention was prompted by the exercise of the rights established in the Constitution, the Universal Declaration of Human Rights, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and the Covenant. The Working Group is aware that Mr. González Rojas has asserted his right to freedom of expression, association, peaceful demonstration and assembly in such a way that he has become one of the best known trade union leaders in the Bolivarian Republic of Venezuela and the general secretary of one of the largest metallurgical companies. In this context, the Working Group was convinced that Mr. González Rojas has been deprived of his liberty as a result of the exercise of rights and freedoms protected under articles 7, 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 16 of the Covenant.

Category III

89. In the light of the findings made in relation to category II, in which it concluded that the detention results from the exercise of the rights to freedom of thought, expression, assembly and association, the Working Group considers the detention and, by extension, the trial to be disproportionate and unjustified. However, since a trial has taken place, and in view of the claims made by the source and the Government's response, the Working Group will proceed to analyse whether, in the course of the judicial proceedings, the fundamental components of a fair, independent and impartial trial were respected.

Right to be heard before an independent and impartial tribunal

90. The Working Group wishes to recall that, under customary international law, all persons have the right not to be arbitrarily deprived of their liberty,¹⁷ and persons accused of a criminal offence are entitled in full equality to a fair hearing by an independent and impartial tribunal for the examination of any charges against them.¹⁸

91. Since Mr. González Rojas, as a civilian, was charged with an offence that can only be committed by military personnel and is established in a criminal code that applies to the armed forces, was arrested in execution of an arrest warrant issued by a military court, has been charged by a military prosecutor and tried by a military court, the Working Group considers that the Venezuelan authorities violated Mr. González Rojas' right to natural judgment and an independent judge, as recognized in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

Right to be tried without undue delay

92. The Covenant recognizes the right of everyone charged with a criminal offence to be tried without undue delay.¹⁹ The Working Group, like the Human Rights Committee, considers that delays in criminal proceedings can be justified only by the complexity of the case or the behaviour of the parties. Otherwise, such delays are incompatible with the Covenant and undermine the impartiality of a trial.²⁰ In addition, the Human Rights Committee has stated that, when such delays are caused by a lack of resources, to the extent possible States should allocate supplementary budgetary resources.²¹

93. The Working Group has previously stated that defendants have the right to be brought before a judge for trial without delay, and to have the legality of their detention reviewed.²²

¹⁶ Ibid., paras. 9–10.

¹⁷ Article 29 of the Universal Declaration of Human Rights; A/HRC/22/44, paras. 27–75.

¹⁸ Article 10 of the Universal Declaration of Human Rights.

¹⁹ Article 54, para. 3 (c) of the Covenant.

²⁰ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 27.

²¹ Ibid., para. 27.

²² Opinion No. 78/2018, paras. 75 and 76.

The Working Group recognizes, as the Human Rights Committee has stated, that it is important for detainees to be physically present at this review. The physical presence of detainees also serves as a safeguard for their right to physical safety and security of person.²³

94. In the present case, because, since his arrest in November 2018, Mr. González Rojas has been brought not before a natural judge but before a court that does not have jurisdiction to try civilians, the Working Group considers that the detention has been arbitrary because he was not tried without undue delay, as provided for in articles 9, 10 and 11 of the Universal Declaration of Human Rights, and article 14 of the Covenant.

Equality of arms

95. The Working Group also recalls that persons charged with a criminal offence have the right to be presumed innocent and to have a public trial with all due process guarantees.²⁴ One aspect of this right is that national judicial authorities must ensure that the parties to the proceedings in question have “the right to equal access to present their full case, and equality of arms”.²⁵ Similarly, persons deprived of their liberty have the right to be accorded adequate time and facilities to prepare their case and to communicate with legal counsel of their choice.²⁶

96. The Working Group has further noted that, in order to preserve this equality of arms:

Every individual deprived of liberty shall be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities [...]. The requirement that the same procedural rights be provided to all parties is subject only to those distinctions that are based on law and can be justified on objective, reasonable grounds and do not entail actual disadvantage or other unfairness to the detained person.²⁷

In this regard, both the prosecution and the judiciary are under an obligation to ensure that lawyers have access to relevant information in their possession, such as the testimonies of witnesses for the prosecution, in sufficient time to enable them to provide effective legal assistance.²⁸

97. The foregoing implies that accused persons have the right to present relevant evidence and testimony for their defence and that evidence and witnesses alike shall be examined by all parties to the trial. Once the evidence has been thoroughly examined, the court shall assess it in an objective and reasoned manner and shall rule in accordance with the legislative provisions of the State.²⁹

98. In the present case, the Working Group received information from the source, which was not refuted by the Government, that, in the trial of Mr. Gonzalez Rojas, all evidence put forward by his defence team was dismissed by the judge. Similarly, the Government failed to present any information to demonstrate that the criminal case file contained evidence against Mr. González Rojas gathered from the military officers who were allegedly attacked by him, evidence to demonstrate that the procedures that would have been required in order to hear the alleged attackers’ version of events took place, or interviews with civilians who might have been involved in the events in question. On this basis, the Working Group acknowledges that Mr. González Rojas’ right to have equal access to present his full case, to have the evidence put forward thoroughly examined and analysed, and consequently to equality of arms in the criminal proceedings, was violated.

²³ General comment No. 35 (2014) on liberty and security of person, paras. 34 and 42.

²⁴ Article 11 of the Universal Declaration of Human Rights.

²⁵ A/HRC/30/37, principle 12, para. 19.

²⁶ Ibid., principle 9 and guideline 8.

²⁷ Ibid., principle 12, para. 20.

²⁸ See principle 21 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990.

²⁹ See opinions No. 1/2015, No. 14/2017 and No. 15/2017.

99. Since the right to be tried by a competent, impartial and independent tribunal, the right to be tried without undue delay and the right to equality of arms have been violated to the detriment of Mr. González Rojas, in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and 9 and 14 of the Covenant, the Working Group considers that the detention is arbitrary under category III.

Category V

100. The Working Group received information to the effect that Mr. González Rojas' detention is part of a campaign of persecution against workers of Ferrominera, who have been fighting tirelessly to have the company comply with the relevant collective agreement since March 2018. Mr. González Rojas has himself suffered constant persecution owing to his unstinting work in defence of labour rights, and in 2009 he was imprisoned for 15 months.

101. In the Working Group's view, Mr. González Rojas' deprivation of liberty constituted a violation of international law in that it was a detention based on his political opinion and his status as the general secretary of a trade union that works to uphold labour rights in the Bolivarian Republic of Venezuela, in breach of articles 2 and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights. His detention therefore falls within category V of the Working Group's categories of arbitrary detention.

102. The Working Group is of the opinion that the detention described in this case is part of a series of arbitrary detentions ordered by the authorities in the Bolivarian Republic of Venezuela against members of opposition political parties, human rights defenders and persons who criticize the actions of the authorities.³⁰

103. 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 and those who defend human rights, 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.³¹

104. In the light of the information received about Mr. González Rojas' health and the conditions in which he is deprived of his liberty, the Working Group, in accordance with paragraph 33 (a) of its methods of work, refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

105. 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 Government and 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.

³⁰ See opinions No. 86/2018; 49/2018; 41/2018; 32/2018; 52/2017; 37/2017; 18/2017; 27/2015; 26/2015; 7/2015; 1/2015; 51/2014; 26/2014; 29/2014; 30/2014; 47/2013; 56/2012; 28/2012; 62/2011; 65/2011; 27/2011; 28/2011; 31/2010; and 10/2009.

³¹ See opinions No. 86/2018; 49/2018; 41/2018; 32/2018; 52/2017; 37/2017; 18/2017; 27/2015; 26/2015; 7/2015; 1/2015; 51/2014; 26/2014; 29/2014; 30/2014; 47/2013; 56/2012; 28/2012; 62/2011; 65/2011; 27/2011; 28/2011; 31/2010; and 10/2009.

Disposition

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

The deprivation of liberty of Rubén Darío González Rojas, being in contravention of articles 2, 7, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

107. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Mr. González Rojas 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 International Covenant on Civil and Political Rights.

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

109. In the context of the current global pandemic caused by the coronavirus disease (COVID-19) and the threat that the disease poses in places of detention, the Working Group calls on the Government to take urgent action to ensure the immediate release of Mr. González Rojas.

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

111. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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

Follow-up procedure

113. 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. González Rojas has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. González Rojas;
- (c) Whether an investigation has been conducted into the violation of Mr. González Rojas' 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.

114. 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.

115. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the

opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

116. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³²

[Adopted on 1 May 2020]

³² See Human Rights Council resolution 42/22, paras. 3 and 7.