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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

Opinion No. 53/2018 concerning Raudel Gómez Olivas (Mexico)*

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 recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 12 April 2018, the Working Group transmitted to the Government of Mexico a communication concerning Raudel Gómez Olivas. The Government replied to the communication on 11 June 2018 and provided follow-up information on 13 June 2018. 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,

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



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. Gómez Olivas, a Mexican national born in 1969, is a lawyer and businessman who is allegedly being held in a state prison in the city of Chihuahua.
- (a) Arrest, police custody and appearance before a judge
5. Mr. Gómez Olivas was arrested on 11 January 2008, when he was stopped while driving a pickup truck on a public road in Chihuahua by Baja California state police officers, who pointed guns at him and forcibly removed him from his vehicle. It is reported that the officers did not produce an arrest warrant issued by a judicial authority or inform Mr. Gómez Olivas of the reasons why he was being deprived of his liberty.
 6. According to the source, Mr. Gómez Olivas was taken by bus from Chihuahua to the cities of Tecate and, subsequently, Ensenada, in Baja California, with the journey lasting some 26 hours. The source reports that, on the way, Mr. Gómez Olivas was subjected to psychological torture in that he received constant death threats, remained handcuffed throughout, was not provided with food and was repeatedly addressed in colloquial terms using phrases like “*ya te chingaste*” (“you are so fucked”), without being given any reasons for what was happening or an indication of where he was being taken.
 7. On arrival in Ensenada, Mr. Gómez Olivas was held in the offices of the State’s Assistant Attorney General, where he was allegedly physically tortured. The source reports that the officers pulled a padded mask over the detainee’s head, preventing him from breathing, and beat him repeatedly in that area. At the same time, they put pressure on him to confess to the crime of which they were accusing him. He was then made to sit in a chair, handcuffed behind his back and barefoot, with pincers on his fingers that were connected by cables to a machine that administered electric shocks. Following the alleged acts of torture, a supposed lawyer arrived and an identity parade was held. Subsequently, public prosecutors took a statement from Mr. Gómez Olivas.
 8. According to the information received, after his arrest, Mr. Gómez Olivas remained in the custody of the police and the Prosecution Service for around 80 hours before being brought before a judge. Given the circumstances, on 13 January 2008, relatives of Mr. Gómez Olivas lodged a complaint of disappearance with the competent authorities.
 9. The source reports that an attempt was made to justify Mr. Gómez Olivas’ arrest on the basis of a summons to appear issued by the Prosecution Service on 11 June 2007, in which Mr. Gómez Olivas was requested to present himself in order to submit a statement concerning events that occurred on 14 May 2007 and resulted in a person losing their life. The source argues, however, that a summons to appear is no substitute for an arrest warrant within the local legal framework, as compliance with the former is voluntary. It is therefore claimed that the arrest and subsequent detention of Mr. Gómez Olivas were carried out in the absence of a legal basis. To support this argument, the source makes reference to decisions of the federal judiciary.
 10. According to the source, in the opinion in book 31, volume I, of June 2016 of the *Gaceta del Semanario Judicial de la Federación* (Judicial Weekly Gazette of the Federation) (register No. 2011881), it is stated that:

The Prosecution Service may not force suspects to appear through so-called “orders to search for, locate and hand over” or compel them to remain against their will in the place where they are being interrogated, as to do so would amount to detaining them. Thus, when police officers are in possession of such an order issued against a suspect by the Prosecution Service, they are empowered only to notify the person of the existence of an investigation against him or her and of his or her right to appear before the prosecuting authority to give a statement accordingly, which the suspect may express a desire not to do; in other words, the officers may not detain the person

and force him or her to appear against his or her will, as such an act would amount to arbitrary detention.

11. In another opinion highlighted by the source, contained in book 22, volume III, of September 2015, it is indicated that:

If a person is detained in circumstances that do not meet the aforementioned conditions of flagrante delicto and/or urgency, but for the purpose of complying with an order to locate and hand over issued by the investigating prosecutor to make the person appear and give a statement in the context of a preliminary inquiry, and if, as a result of being handed over, the accused gives a statement and is subsequently remanded in judicial custody, that detention is illegal. The reason for this is that the suspect's appearance before the public prosecutor, brought about through the enforcement of the order to search for, locate and hand over, aside from temporarily affecting the suspect's freedom of movement, is not designed to trigger his or her detention; rather, the idea is that the suspect should appear before the prosecutor to give a statement and, upon completion of the proceedings that require his or her presence, leave [...] If the person is detained in circumstances that do not meet the conditions of flagrante delicto and/or urgency, but pursuant to an order to locate and hand over, and, on the basis of the order, gives a statement and is subsequently remanded in judicial custody, his or her detention is illegal.

12. On 14 January 2008, the Public Prosecutor's Office in Ensenada filed criminal charges against Mr. Gómez Olivas (official communication No. 2945/07/311/AP).

13. The source reports that Mr. Gómez Olivas was first brought before a judge to give a preliminary statement on 15 January 2008, which was when the criminal proceedings began. The source underlines that, during the hearing before the Third Criminal Court of Ensenada, the detainee stated that he was being detained arbitrarily, that he had been held incommunicado and that he had been subjected to both physical and psychological torture. However, the Court did not order an investigation into the alleged violations, and the public defence lawyer assigned to the case did not follow up on the complaint.

(b) Place and conditions of detention

14. According to the information received, Mr. Gómez Olivas was moved to the Social Rehabilitation Centre in Ensenada on 14 January 2008. Between 17 January 2008 and 25 May 2010, he was confined to the Centre's psychiatric unit without justification, despite not requiring specialized care. The source also maintains that while Mr. Gómez Olivas was in the psychiatric unit, he was given medication against his will. One of the drugs he was given allegedly prevented him from moving his legs and affected his ability to walk. Mr. Gómez Olivas was subsequently returned to the Social Rehabilitation Centre in Tecate on 25 May 2010. On 30 March 2017, he was transferred to the Social Rehabilitation Centre in Chihuahua, where he remains.

(c) Criminal trial, evidence, legal assistance and presumption of innocence

15. On 20 January 2008, the Third Criminal Court of Ensenada issued a formal detention order for Mr. Gómez Olivas.

16. According to the information received, Mr. Gómez Olivas was investigated and prosecuted on the basis of testimony reportedly given on 15 May 2007 by a witness who implicated him. On 13 January 2008, following his arrest, he was identified by the witness in an identity parade.

17. However, it is alleged that on 14 April 2008, when the witness gave his extended statement and was brought face-to-face with the accused, he retracted his identification of Mr. Gómez Olivas, saying that he was not the person he had seen on the day of the events. In addition, the witness allegedly admitted that, prior to the identity parade on 13 January, he had been shown photographs of Mr. Gómez Olivas and seen him in person and had been told that he was the person he should identify. Lastly, the witness reportedly said that he recognized Mr. Gómez Olivas easily during the identity parade because he was the only participant wearing handcuffs.

18. The source maintains that these events violate articles 200 to 205 of the Baja California State Code of Criminal Procedure of 1989, as well as the judgment of the Supreme Court, the latter having established in its jurisprudence that a witness statement is void if it is later retracted in court.

19. The source also claims that Mr. Gómez Olivas did not receive adequate legal assistance and did not have a lawyer present when he gave his statement. Mr. Gómez Olivas was assigned a public defender who failed to identify and contest the irregularities in the witness's evidence. Furthermore, the public defender did not take proper action regarding Mr. Gómez Olivas' physical injuries, his poor health and signs of torture. The public defender was dismissed from the State Attorney General's Office in December 2009 for poor performance.

20. The source also argues that during the trial, the principle of the presumption of innocence was violated because the burden of proof was shifted to the accused. The source claims that on the day the offences of which Mr. Gómez Olivas was accused took place, he was not in the location where they occurred, nor was he in Mexico at all. During the trial, the defence explained that the defendant was in El Paso, Texas, United States of America, from 12 to 14 May 2007. The source claims that the defence was nevertheless requested to prove that Mr. Gómez Olivas had been outside the country before he could be afforded the presumption of innocence. The source indicates that although evidence to that effect was provided, it was not examined during the trial. The source alleges that the investigative bodies never examined this alibi; rather, they concentrated on gathering false evidence to prove that Mr. Gómez Olivas was guilty.

(d) Conviction, appeal and *amparo*

21. On 25 November 2008, the Third Criminal Court of First Instance of Ensenada sentenced Mr. Gómez Olivas to 23 years and 9 months in prison. In this regard, the source asserts that the conviction was based on flawed and unlawful evidence, that it was the outcome of a trial in which the presumption of innocence was not respected and the right to adequate legal assistance was violated, and that such flaws amount to arbitrary detention.

22. In view of the foregoing, Mr. Gómez Olivas appealed his conviction. On 10 July 2009, the Third Chamber of the High Court of the State of Baja California upheld his conviction.

23. On 10 February 2011, the Fourth Collegiate Court of the Fifteenth Circuit in Mexicali denied a motion for constitutional *amparo* filed against the judgments of the court of second instance: the Third Criminal Chamber of the High Court of the State of Baja California. The *amparo* motion sought constitutional protection of the right to personal liberty, considering that the arrest of Mr. Gómez Olivas on the basis of a summons to appear and without a court-issued warrant violated his fundamental rights. The motion also sought the annulment of the flawed evidence described above.

(e) Categories of the Working Group

24. The source alleges that the events as described amount to arbitrary detention owing to the lack of any legal basis and the violation of judicial guarantees of a fair trial and due process. The source therefore maintains that the arrest of Mr. Gómez Olivas without a warrant and the subsequent failure to present him promptly before a judge constitute a case of absence of any legal basis under category I.

25. In addition, the alleged lack of adequate and effective legal assistance, the flaws and irregularities in the gathering of evidence that affected the principle of equality of arms and the transfer of the burden of proof that affected the presumption of innocence constitute a case of non-observance of international norms relating to the right to a fair trial under category III.

Response from the Government

26. On 12 April 2018, the Working Group transmitted to the Government the allegations made by the source and requested that it provide detailed information on Mr. Gómez

Olivas' case and clarify the factual and legal basis justifying his detention, as well as its compatibility with the international human rights obligations of Mexico.

27. The Government responded to the communication on 11 June 2018 and provided additional information on 13 June 2018. In its response, the Government reports that on 14 May 2007 a preliminary inquiry was launched to investigate a suspected homicide on that date in the municipality of Ensenada, Baja California. After examining the case, the Prosecution Service determined that the offences committed amounted to aggravated homicide.

28. On the same day, the murder victim's wife gave a statement in which she described how she had learned of the death of her husband and asserted that beforehand, she had seen a person outside looking intently at her house, which she had found frightening. She gave a physical description of the person and noted that he looked very much like Mr. Gómez Olivas, with whom she alleged that she and her husband had had difficulties in January of that year.

29. On 15 May 2007, the murdered man's widow gave an extended statement and provided additional information about their disagreement with Mr. Gómez Olivas. She filed a complaint against Mr. Gómez Olivas, alleging he was responsible for the death of her husband.

30. On 11 January 2008, the Prosecution Service issued a summons for Mr. Gómez Olivas to appear and testify at its offices.

31. In a report dated 12 January 2008, the Ministerial Police reported that, using the summons to appear issued for Mr. Gómez Olivas on 11 June 2007 and with assistance from the authorities in Chihuahua, it obtained Mr. Gómez Olivas' address. On 12 January 2008, officers of the Ministerial Police served the summons, which they showed and read aloud to Mr. Gómez Olivas. They requested him to accompany them to Ensenada to give a statement as a suspect. Mr. Gómez Olivas did not object to accompanying the officers.

32. On 12 January 2008, Mr. Gómez Olivas was handed over to the Prosecution Service under the terms of article 254 of the Code of Criminal Procedure and on the basis of the summons. The Criminal Court of First Instance in Ensenada was notified accordingly. At 1.49 p.m. on the same day, Mr. Gómez Olivas gave a statement in the presence of his court-appointed defence counsel, in which he denied the allegations made against him and explained that he had been out of the country on the date of the offence.

33. The Government reports that on the same date, Mr. Gómez Olivas underwent a physical examination conducted by a doctor attached to the Department of Forensic Services of the Baja California State Attorney General's Office. The doctor certified that Mr. Gómez Olivas did not have any visible signs of physical violence.

34. Subsequently, on the basis of the evidence indicating that Mr. Gómez Olivas might be responsible for the offences committed, the authorities issued a detention order on grounds of administrative exigency under article 107 of the Code of Criminal Procedure.¹

35. On 14 January 2008, the Prosecution Service launched prosecution proceedings against Mr. Gómez Olivas for the offence of aggravated homicide. The criminal case began the same day. The Government notes that, in his preliminary statement, Mr. Gómez Olivas denied the offences and claimed that he had been tortured by the Ministerial Police.

36. On 20 January 2008, a formal detention order was issued for Mr. Gómez Olivas as the likely perpetrator of the offence of aggravated homicide. On 21 January 2008, his public defender lodged an appeal against the formal detention order. On 25 November 2008, the Third Criminal Court of Ensenada sentenced Mr. Gómez Olivas to 23 years and 9 months in prison for the offence of aggravated homicide, which is punishable under articles 123, 126, 147, 148, 149 and 150 of the Baja California State Criminal Code.

¹ Article 107 states that only in cases of administrative exigency where there is a well-founded risk that the accused intends to evade justice the Public Prosecutor's Office may order in writing the arrest of a person, provided that the case relates to one of the serious crimes listed in article 123 of the Code.

37. The Government describes the evidence analysed by the Court to establish Mr. Gómez Olivas' guilt, which included: (a) the statement he gave to the Prosecution Service, which he retracted at the end of his trial; (b) witness statements; (c) the identity parade, in which the eyewitness recognized Mr. Gómez Olivas as the person he saw standing next to the vehicle in which the victim was killed; and (d) expert opinions on, inter alia, chemical analysis, crime scene examination and ballistics.

38. The evidence presented by Mr. Gómez Olivas in his defence consisted in: (a) statements from his partner and sister-in-law seeking to prove that at the time of the murder he was in El Paso, Texas, United States; (b) a bill in his name from a hotel in El Paso; (c) a bank statement in his name to prove that on the day of the murder he was not in Ensenada; and (d) proof that he had crossed the border in his car.

39. The Court considered that even though the payment made to the hotel in El Paso showed that Mr. Gómez Olivas' card had been used there, there was no way to prove that he had made the purchase himself. With regard to the evidence showing that his car had crossed the border between Mexico and the United States, the authorities in the United States record the details of vehicles entering the country but not the identity of the driver, making it impossible for the Court to assign probative value to the evidence. Lastly, the statements had no probative value because they were made by close relatives and there was no convincing evidence to support them. The evidence presented was not admitted pursuant to article 221 of the Code of Criminal Procedure.

40. The Government reports that Mr. Gómez Olivas filed an *amparo* motion against the judgment of the Third Criminal Court of Ensenada. The proceedings concluded on 15 February 2011: the *amparo* motion and federal court protection were denied on the grounds that during the trial it had been proven, in a proper and legal manner, that a crime had taken place and that the accused had committed it. However, Mr. Gómez Olivas filed an *amparo* motion before the Second District Court of Baja California against the failure to respond to the transfer request. The appeal was discontinued on 9 September 2016.

41. Mr. Gómez Olivas filed three complaints with the Baja California State Human Rights Commission in connection with the alleged acts of torture committed against him. An investigation was conducted and the case was closed on the basis that Mr. Gómez Olivas' requirements had been met.

42. With regard to category I and the absence of a legal basis for detaining Mr. Gómez Olivas, the Government notes that he was not held at gunpoint on the day the authorities escorted him to the Prosecution Service in Ensenada. This information is corroborated in the report of the Ministerial Police officers. Mr. Gómez Olivas was informed of the reason why he had been requested to appear and of the offences being investigated. He was shown the summons, with which he complied.

43. The Government stresses that Mr. Gómez Olivas was not tortured, as proven by the medical certificate regarding his physical state and the records presented during the criminal proceedings showing that Mr. Gómez Olivas had no injuries. In his preliminary statement to the Prosecution Service, Mr. Gómez Olivas denied the charges against him, stating only that he had been in dispute with the murder victim. He could not therefore claim to have been tortured, let alone that he had been tortured into confessing to a crime he did not commit.

44. With regard to the alleged 26 hours of travel to Ensenada, the journey from Chihuahua to Baja California usually takes between 16 and 20 hours by car. Mr. Gómez Olivas was transferred to the Prosecution Service and the Criminal Court of First Instance in Ensenada in accordance with articles 110, 115 (2), 234 and 259 of the Code of Criminal Procedure. With regard to the actions of authorities other than the Prosecution Service, the Ministerial Police officers also acted on the basis of articles 234 and 259 of the Code.²

² Article 234 states that when an authority other than the Prosecution Service conducts proceedings in connection with behaviour or actions that might constitute an offence, all actions taken must

45. The Government states that when Mr. Gómez Olivas was transferred to the Prosecution Service, he willingly gave a statement as a suspect on 12 January 2008, in the presence of his court-appointed defence counsel. After he had given his statement, the Prosecution Service found that the evidence indicated that Mr. Gómez Olivas might have committed a serious crime, as envisaged under article 123 of the Code of Criminal Procedure. Therefore, under article 107 of the Code, the Prosecution Service ordered his detention on grounds of administrative exigency.

46. The Government reports that Mr. Gómez Olivas accompanied the police officers willingly and that the Criminal Court of First Instance was notified accordingly. It was not until he gave his statement that the Prosecution Service ordered his detention on grounds of administrative exigency, formally placing him at the disposal of the Criminal Court.

47. In view of the foregoing, the Government considers that in this case the detention was lawful, since the police officers acted on the basis of the legal provisions in force at the time Mr. Gómez Olivas was detained. Mr. Gómez Olivas was referred to the Prosecution Service immediately after giving his statement as a person of interest, when his detention was ordered on grounds of administrative exigency. His detention was formalized and the Criminal Court of First Instance in Ensenada was notified in accordance with article 254 of the Code of Criminal Procedure.

48. Regarding the conditions in which Mr. Gómez Olivas was held in the detention facility, the Government submits that there is no evidence to substantiate the source's claims. Mr. Gómez Olivas was transferred to the State Rehabilitation Centre in Chihuahua so that he would be closer to his family.

49. With regard to category III, the Government reiterates that the evidence provided by Mr. Gómez Olivas to prove that he was in the United States on the day of the offence was evaluated by the judicial authorities. All the evidence provided by his defence was analysed by the various courts.

50. The Government concludes that Mr. Gómez Olivas was brought before a judge and the prosecutor in a legally designated detention centre in Ensenada. Mr. Gómez Olivas had an adequate defence and was able to appeal any aspect of the proceedings that he considered to have been conducted improperly. Through his court-appointed defence counsel, he appealed against the formal detention order, initiated various proceedings and presented evidence. He also appealed against his conviction and filed an *amparo* motion against the decision of the Third Chamber of the High Court of the State of Baja California.

Additional comments from the source

51. On 12 June 2018, the Working Group transmitted the Government's response to the source for further comments, which were received on 16 June 2018.

52. According to the source, the Government is attempting to justify action taken by the Mexican authorities outside the framework of the law. The source maintains that the Government is incorrect in stating that the summons was issued on 11 January 2008. According to the source, it was issued on 11 June 2007. The summons was served on 11 January 2008, eight months after the offence had been committed in May 2007. The source alleges that the summons was unlawful because it was not issued in accordance with articles 115 and 259, inter alia, of the Baja California State Code of Criminal Procedure. One of the Ministerial Police officers showed the summons to Mr. Gómez Olivas but handcuffed him as he was reading it. The source reports that Mr. Gómez Olivas tried to resist arrest but was overpowered by the arresting officers: four armed agents of the Ministerial Police. Contrary to the Government's claims, Mr. Gómez Olivas did not accompany the officers willingly. He was forcibly arrested and taken to Ensenada by bus.

53. The source indicates that Mr. Gómez Olivas gave his statement to officials from the Prosecution Service under torture. The agents who gathered the evidence against Mr.

immediately be referred to the Service. If any arrests are made, any persons to be detained shall be referred to the Prosecution Service without delay.

Gómez Olivas were allegedly the same agents who tortured him. The source considers that the doctor could not certify that Mr. Gómez Olivas had been electrocuted and suffocated because those forms of torture leave no trace. The certificate regarding his physical state issued by the doctor on 13 January 2008 was superficial and was provided purely in order to comply with a legal requirement.

54. Mr. Gómez Olivas was not brought before the authorities immediately. He was arrested at 10 a.m. on 11 January 2008. The authorities transferred him to the Prosecution Service at 11.49 p.m. on 12 January 2008, and he was brought before a judge at 10.15 p.m. on 14 January 2008. The source adds that there was no administrative exigency in ordering the arrest of Mr. Gómez Olivas for offences that had occurred eight months earlier.

55. The source alleges that Mr. Gómez Olivas asked to be allowed to call a private lawyer to accompany him during the identity parade, but that the authorities assigned him a public defender whose role was simply to show that Mr. Gómez Olivas' right to a lawyer had been respected. Mr. Gómez Olivas was treated unfairly and his right to defend himself was not respected, since the torture and incommunicado detention he was subjected to meant that his ability to do so was compromised by his state of health.

56. With regard to the complaint lodged with the Baja California State Human Rights Commission, the source explains that, since Mr. Gómez Olivas was of the opinion that due process was not being respected, he decided to submit complaints of torture and incommunicado detention to the Inter-American Commission on Human Rights.

57. Finally, the source reiterates that the judge did not assess the evidence provided by Mr. Gómez Olivas and that the burden of proof was therefore shifted, in violation of the principles contained in articles 212 to 223 of the Code of Criminal Procedure. For example, the Government of the United States of America surely records the passport details of persons entering the country; such electronic records ought to be taken into account. Furthermore, under Mexican criminal law there is no impediment to relatives or acquaintances testifying in regard of information they possess which is relevant to establishing the facts surrounding the offences a person is charged with.

Discussion

58. The Working Group thanks the source and the Government for their submissions.

59. In determining whether Mr. Gómez Olivas' deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence concerning evidentiary issues. If the source has presented a credible *prima facie* case for breach of the international standards in place to protect personal liberty and avoid arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.³

Deprivation of liberty under category I

60. The first question raised is whether there was a legal basis for the arrest and detention of Mr. Gómez Olivas. The source and the Government agree that, on 11 January 2008, Mr. Gómez Olivas was transferred by the Ministerial Police from Chihuahua City to Ensenada, Baja California, on the basis of a summons. The summons, which was issued by the Prosecution Service on 11 June 2007, requested Mr. Gómez Olivas to appear and give a statement regarding the circumstances surrounding the death of an individual on 14 May 2007.

61. According to the source, compliance with such a summons is voluntary and, as such, is not a substitute for an arrest warrant. The source alleges that Mr. Gómez Olivas did not

³ See A/HRC/19/57, para. 68. The Government submitted evidence in support of this claim, namely: (a) the arrest warrant issued by the Prosecution Service, claiming administrative exigency; (b) a report dated 12 January 2008 from the Baja California Police regarding Mr. Gómez Olivas' transfer from Chihuahua; and (c) the medical certificate regarding his physical state.

accompany the police officers to Ensenada voluntarily but was forcibly transported by armed agents who showed him the summons and handcuffed him while he was reading it. The source alleges that, as a result, Mr. Gómez Olivas was deprived of his liberty without an arrest warrant or a court order and without being informed of the reasons; therefore, his detention has no legal basis.

62. The Government claims that when the police officers served the summons, they showed it to Mr. Gómez Olivas and read it aloud to him. The Government provided a report from the Ministerial Police dated 12 January 2008 which indicates that Mr. Gómez Olivas was shown the summons and that he was allowed to read it, after which he was taken to Ensenada to give his statement. This report does not directly contradict the source's version of events. According to the Government, the police asked Mr. Gómez Olivas to accompany them to Ensenada without using force or firearms, and he agreed to do so having been informed of the alleged criminal acts they were investigating. The Government invokes article 107 of the Baja California State Code of Criminal Procedure as the legal basis for the arrest and detention of Mr. Gómez Olivas. Under that article, prosecutors can order the arrest of a person alleged to have committed certain serious offences in cases of "administrative exigency", namely where there is good reason to believe that the accused intends to evade justice. In such cases, prosecutors are required to demonstrate they were unable to obtain an arrest warrant from a judicial authority.

63. In its consideration of the two versions of events, the Working Group has taken into account all the information available. The Working Group considers that the source has established a credible case that Mr. Gómez Olivas was taken into custody and forcibly transferred to Ensenada on 11 January 2008. The report from the Ministerial Police was drafted on 12 January 2008, the day after Mr. Gómez Olivas was taken to Ensenada. As such, it does not constitute an actual record of the transfer. Furthermore, it was not signed or accepted by Mr. Gómez Olivas at the time. The Working Group takes note of the complaint filed by Mr. Gómez Olivas' family on 13 January 2008 regarding his disappearance.⁴ It is very unlikely that such a complaint would have been filed had Mr. Gómez Olivas accompanied the police officers voluntarily and had he been able to inform his family of where he was going. The Working Group considers that Mr. Gómez Olivas was not free to leave the custody of the police and the Prosecution Service from 11 January 2008 and that as such, he was deprived of his liberty.⁵ The Working Group also considers that a summons is not a substitute for an arrest warrant or other decision duly issued by the judicial authority.

64. While the Working Group does not act as a court or a national authority, it must consider whether the Government has invoked a legal basis for detention, particularly in connection with the information given regarding article 107 of the Code of Criminal Procedure. After examining the information and evidence provided by both parties, the Working Group considers that the provisions of article 107 appear not to have been implemented by the authorities. Almost eight months had elapsed between the date of the offence under investigation – 14 May 2007 – and the arrest of Mr. Gómez Olivas on 11 January 2008. During that time, there was no apparent urgency to serve the summons.⁶ If Mr. Gómez Olivas cooperated with the police and accompanied them voluntarily, as the Government claims, and even provided a statement, it is unclear how and why within the space of only a few days it was considered that there was a well-founded risk of him evading justice. Lastly, it is unclear why the authorities could not first obtain an arrest warrant from a judicial authority.

⁴ The source provided the Working Group with copies of the missing persons report and relevant correspondence.

⁵ A/HRC/36/37, paras. 50–53 and 56.

⁶ According to the arrest warrant issued by the Prosecution Service on grounds of administrative exigency, after Mr. Gómez Olivas had given his statement there was a well-founded risk that he would evade justice because he lived in Chihuahua and did not have a fixed address in Ensenada, he had left the jurisdiction after the alleged offence and admitted that he did not intend to return, and his subsequent actions indicated that he intended to evade justice.

65. As the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group, as an international protection mechanism, must ensure that the detention is also consistent with the relevant provisions of international law.⁷ Although the requirements of article 107 of the Code of Criminal Procedure were met, that provision cannot be used in the present case to justify the arrest of Mr. Gómez Olivas on 11 January 2008. Pursuant to article 9 (1) of the International Covenant on Civil and Political Rights, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. In the opinion of the Working Group, this provision requires that the legal basis for detention must exist at the time of deprivation of liberty. When Mr. Gómez Olivas was arrested on 11 January 2008, the police did not present an arrest warrant issued by a judicial authority. There was therefore no legal basis for his arrest.⁸

66. The parties have provided conflicting information on how long Mr. Gómez Olivas spent in custody prior to being brought before a court. The source states that Mr. Gómez Olivas was in the custody of the Ministerial Police and the Prosecution Service for approximately 80 hours prior to being brought before a judge, having been arrested at 10 a.m. on 11 January 2008 and brought before a judge at 10.15 p.m. on 14 January 2008. Mr. Gómez Olivas made his preliminary statement before a judge on 15 January 2008. According to the Government, Mr. Gómez Olivas went with police officers to Ensenada voluntarily, and the Court of First Instance was notified of his transfer. After Mr. Gómez Olivas gave his statement to the Prosecution Service, he was detained under article 107 of the Code of Criminal Procedure, and the Criminal Court of First Instance was again notified. By way of this process, Mr. Gómez Olivas was formally placed before a criminal judge.

67. The Working Group determined that Mr. Gómez Olivas was arrested on 11 January 2008, when he was transferred to Ensenada against his will. It is clear that he was not brought before a court until 14 January 2008, three days after his arrest. Article 9 (3) of the Covenant requires that anyone arrested or detained on a criminal charge shall be brought promptly before a judge. The Human Rights Committee has stated that, while the meaning of “promptly” may vary, 48 hours are usually sufficient to transfer an individual and prepare a court hearing. A delay of more than 48 hours must be absolutely exceptional and be justified by specific circumstances.⁹ The Working Group considers that a judicial review of detention is essential for establishing a legal basis. Simply notifying the Court that Mr. Gómez Olivas had been transferred to Ensenada and placing him under the jurisdiction of the Court once he had been taken into the custody of the Prosecution Service is not sufficient. Article 9 (3) of the Covenant requires physical presence before a judicial authority.¹⁰ In this case, the requirements of article 9 (3) were not met, which strengthens the Working Group’s conclusion that there was no legal basis for the arrest of Mr. Gómez Olivas.

68. The Working Group has also considered the source’s allegations that Mr. Gómez Olivas was held incommunicado at the time of his arrest and transfer to Ensenada, with a view to determining whether he was able to request a judicial review and challenge the legal basis for his detention. As the Working Group has consistently argued, holding persons incommunicado is not permitted under international human rights law because it violates the right to challenge the lawfulness of detention before a judge.¹¹ However, in this case, the Working Group cannot reach a conclusion based on the evidence presented by the parties. In a statement to the Inter-American Commission on Human Rights on 7 July 2012, a relative of Mr. Gómez Olivas stated that he was held incommunicado for five days following his arrest. However, in the report of the Ministerial Police dated 12 January 2008 it is noted that a public defender was present when Mr. Gómez Olivas made a statement to

⁷ See, for example, opinions Nos. 1/2018, 79/2017 and 42/2012.

⁸ The Working Group considers that for deprivation of liberty to have a legal basis, the authorities must present an arrest warrant. See opinion No. 66/2017, para. 63.

⁹ General comment No. 35 on article 9 (Right to liberty and security of persons), para. 33.

¹⁰ *Ibid.*, para. 34.

¹¹ For example, opinions Nos. 45/2017, 56/2016 and 53/2016.

the Prosecution Service. In fact, the source admits in the additional comments submitted that a public defender was present at the time. The Working Group cannot therefore conclude that Mr. Gómez Olivas was held incommunicado.

69. In the present case, an arrest warrant issued by a judicial authority was not presented at the time of Mr. Gómez Olivas' arrest, and he was not brought promptly before a judge. Accordingly, the Working Group considers that there was no legal basis for Mr. Gómez Olivas' detention and that it constitutes arbitrary deprivation of his liberty under category I.

Deprivation of liberty under category III

70. The source alleges that international standards relating to a fair trial were not observed in this case due to lack of effective legal assistance, the commission of acts of torture and other ill-treatment and a number of evidentiary irregularities that affected the principle of equality of arms and shifted the burden of proof, thereby violating the principle of the presumption of innocence. In considering these allegations, the Working Group stresses that its mandate does not extend to determining whether Mr. Gómez Olivas committed the offence for which he has been in prison for more than 10 years. The Working Group's attention is focused on whether the judicial process against Mr. Gómez Olivas conformed to international human rights standards.

71. The source alleges that Mr. Gómez Olivas did not receive effective legal assistance during the proceedings against him. The source indicates that Mr. Gómez Olivas requested the presence of a private lawyer when he made his statement to the Prosecution Service on 12 January 2008, but that the authorities provided only a public defender who did not assist Mr. Gómez Olivas in mounting a proper defence. In addition, the source argues that at the hearing on 15 January 2008, Mr. Gómez Olivas stated that he was being subjected to arbitrary and incommunicado detention and had suffered physical and psychological torture. The public defender assigned to Mr. Gómez Olivas did not take follow-up action regarding either those complaints or the evidentiary irregularities relating to the statements of some of the witnesses who testified against Mr. Gómez Olivas. The source states that the public defender was subsequently dismissed from the Attorney General's Office in December 2009 for poor performance.

72. The Government asserts that Mr. Gómez Olivas was provided with an adequate defence and notes the many remedies, appeals and *amparo* motions filed on his behalf. It asserts that all legal remedies were available to Mr. Gómez Olivas from the time of his arrest, that he had adequate time and means to prepare his defence and communicate with a lawyer of his choice, that he presented evidence in his defence, and that he was able to examine prosecution witnesses and call defence witnesses.

73. The Working Group notes that there is no indication, in the materials submitted by the parties, that the public defender took thorough follow-up action in relation to the serious allegations of incommunicado and arbitrary detention and torture made by Mr. Gómez Olivas at his hearing on 15 January 2008. While it is possible that such allegations would not ultimately have been resolved in favour of Mr. Gómez Olivas, his defence counsel ought to have instituted legal proceedings in relation to such serious complaints at the time they were raised. The lawyer's failure to do so gives rise to the strong presumption, which was not rebutted by the Government, that Mr. Gómez Olivas did not receive effective legal assistance, in violation of article 14 (3) (d) of the Covenant. This shortcoming may be the result of several factors, including the lack of resources and personnel in the public defence system or, as the Government acknowledges, the fact that different public defenders were assigned to Mr. Gómez Olivas' case when he made his statement on 12 January 2008 and at subsequent stages of the proceedings. During its visit to Mexico in 2002, the Working Group observed that both factors were major obstacles to the provision of an adequate defence.¹² As the Working Group has stated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, free legal assistance should be provided from the

¹² E/CN.4/2003/8/Add.3, paras. 52–56.

outset of detention and at all stages of deprivation of liberty.¹³ This did not happen in the case of Mr. Gómez Olivas.

74. The source further alleges that Mr. Gómez Olivas was subjected to physical and psychological torture and ill-treatment at three separate points during his arrest and detention. Firstly, during the 26-hour journey to Ensenada, he was allegedly subjected to death threats, remained handcuffed throughout and was not given any food. Secondly, when he arrived in Ensenada, a padded mask was allegedly placed over his face, preventing him from breathing, and he was repeatedly hit on the head and pressured to confess. In addition, clips were allegedly placed on his fingers and connected to a machine that gave him electric shocks. Thirdly, Mr. Gómez Olivas was reportedly detained in the psychiatric unit at the Social Rehabilitation Centre in Ensenada from 17 January 2008 to 25 May 2010, where he was obliged to take medication which prevented him from moving his legs and affected his ability to walk.

75. In its reply, the Government denies that Mr. Gómez Olivas was tortured. It refers to the certificate regarding his physical state issued by the doctor who examined him which indicates that Mr. Gómez Olivas did not show any signs of physical harm. The Government also notes that in his statement, Mr. Gómez Olivas denied involvement in the offence of which he was accused and that he therefore could not have been tortured or put under pressure to confess to an offence that he claimed not to have committed. Lastly, the Government argues that there is no evidence to corroborate the allegations regarding his conditions of detention in Ensenada.

76. After taking into account all the information submitted by the parties, the Working Group considers that the source's allegations that Mr. Gómez Olivas was subjected to torture and ill-treatment are credible and that the Government has failed to rebut these allegations. It is unsurprising that the doctor who examined Mr. Gómez Olivas found no physical traces of harm, since the forms of ill-treatment he was subjected to would not have left any obvious signs of torture. The certificate regarding his physical state did not meet the requirements set forth in the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). For example, the examination report appears to be very superficial and was not signed by Mr. Gómez Olivas' legal counsel and another health official as required under paragraph 165 of the Istanbul Protocol. The certificate regarding his physical state shows that the examination took place before Mr. Gómez Olivas was detained in the psychiatric unit and therefore could not have taken into account the torture he allegedly suffered there. The Government recognizes that Mr. Gómez Olivas used every opportunity to complain about the alleged torture, having informed the judge at his hearing on 15 January 2008 and filed three complaints to the Baja California State Human Rights Commission. His family filed similar complaints with the Inter-American Commission on Human Rights.

77. The Working Group considers that the alleged torture significantly decreased the likelihood of Mr. Gómez Olivas receiving a fair trial:

(a) Responsibility for proving that the statement Mr. Gómez Olivas gave after arriving in Ensenada was not made under duress lies with the Government,¹⁴ which has not provided such proof. Although the Government claims that when Mr. Gómez Olivas made his statement he denied the allegations against him, it also asserts that his statement was the basis of the decision to detain him on the grounds of alleged administrative exigency. Accordingly, the source has established a *prima facie* violation of Mr. Gómez Olivas' right not to be pressured to plead guilty, as guaranteed in article 14 (3) (g) of the Covenant;

(b) The judge who presided over the hearing on 15 January 2008 should have ordered an investigation into the allegations of torture made at that hearing but did not do so. The Working Group has previously determined that the failure of a judge to take action when torture is evident amounts to a violation of the right to be tried by an independent and

¹³ Principle 9 and Guideline 8.

¹⁴ General comment No. 32 on the right to equality before courts and tribunals and to a fair trial, para. 41.

impartial tribunal under article 14 (1) of the Covenant.¹⁵ Accordingly, the Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers;

(c) The Government has not rebutted the claims that Mr. Gómez Olivas was detained in a psychiatric unit from 17 January 2008 to 25 May 2010 and that while he was there he was forced to take medication that adversely affected his health. The Working Group notes that during that time several judicial proceedings relating to his case were conducted, including his initial sentencing in November 2008 and his appeal in July 2009. It is extremely unlikely that Mr. Gómez Olivas would have been able to assist with and participate effectively in his own defence before and during those proceedings, from which it follows that the alleged torture violated his right to a fair trial.¹⁶

78. The Working Group considers that the source has established a *prima facie* presumption that Mr. Gómez Olivas was subjected to torture and ill-treatment in violation of the absolute prohibition of torture as a peremptory norm of international law, article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant. The acts of torture to which Mr. Gómez Olivas was subjected also represent *prima facie* violations of articles 1, 2, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Mexico is a party. The Working Group therefore refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

79. Lastly, the Working Group has considered the source's allegations of a number of evidentiary irregularities during Mr. Gómez Olivas' trial, which affected the principle of equality of arms, shifted the burden of proof and interfered with the presumption of innocence. The Working Group emphasizes that it has not examined the substance of the evidence; it has considered only whether international human rights standards have been respected in this case. The evidentiary irregularities allegedly included the use of a witness statement that was later retracted and that had been obtained in an improper manner, the witness having been told to identify Mr. Gómez Olivas as the perpetrator of the alleged offence. The irregularities also included the alleged failure of the courts to require the prosecution to prove that Mr. Gómez Olivas' alibi was false and to conduct a thorough evaluation of the evidence. The Working Group does not act as a national court or appellate body and does not assess the sufficiency of the evidence presented at trial.¹⁷ The Working Group considers that the alleged evidentiary irregularities raised by the source were a matter for the domestic courts and that they appear to have been raised and fully considered in the trial and appeal. On the basis of all the information submitted by the parties, the Working Group cannot conclude that there were any irregularities in the evidentiary evaluation procedure that amount to a violation of international human rights law.

80. Lastly, although the matter was not raised by the parties, the Working Group notes that pretrial detention is mandatory for the offence being tried in this case. The Working Group has previously stated that mandatory pretrial detention amounts to a violation of article 9 (3) of the Covenant and is arbitrary under category III.¹⁸

81. In the present case, Mr. Gómez Olivas did not have access to effective legal assistance, and the proceedings against him are considered to have been unfair owing to the torture and ill-treatment he suffered. He was also subjected to mandatory pretrial detention. The Working Group therefore concludes that the violations of the right to a fair trial were of such gravity as to give the deprivation of liberty of Mr. Gómez Olivas an arbitrary character under category III.

¹⁵ Opinion No. 63/2017, paras. 64–72. While the torture Mr. Gómez Olivas experienced may not have left visible marks, his allegations of torture were clearly formulated and required further investigation. See also opinion No. 46/2017, para. 25.

¹⁶ In opinion No. 47/2017, the Working Group stated that although its mandate does not cover conditions of detention or the treatment of prisoners, it must consider to what extent detention conditions can negatively affect the ability of detainees to prepare their defence and their chances of a fair trial (para. 28). See also E/CN.4/2004/3/Add.3, para. 33.

¹⁷ Opinions Nos. 57/2016, para. 115, and 10/2000, para. 9.

¹⁸ Opinion No. 1/2018.

82. The source has indicated that a petition related to this matter has been filed with the Inter-American Commission on Human Rights and a decision on its admissibility is pending. From the information provided by the source, it appears that the petition relates primarily to the allegations of torture and incommunicado detention in the case of Mr. Gómez Olivas. The Working Group has indicated that its working methods do not prevent it from considering a complaint that is pending before the Inter-American Commission.¹⁹

83. This case is one of many submitted to the Working Group in recent years in connection with arbitrary deprivation of liberty in Mexico.²⁰ The Working Group is concerned that this may reflect a systemic problem of arbitrary detention in Mexico which may constitute a serious violation of international law. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.²¹

84. Lastly, the Working Group would welcome the opportunity to conduct a visit to Mexico to work constructively with the Government in order to address its concerns relating to arbitrary deprivation of liberty. Given that a considerable time period has elapsed since its last visit to Mexico in November 2002, the Working Group deems it an opportune moment to continue its dialogue with the Government by way of another country visit. The Working Group recalls that in March 2001 the Government issued a standing invitation to all thematic special procedure mandate holders, and looks forward to a positive response from the Government to its most recent request for a country visit, which it made in February 2018.²²

Disposition

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

The deprivation of liberty of Raudel Gómez Olivas, being in contravention of articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary within the meaning of categories I and III.

86. The Working Group requests the Government of Mexico to take the necessary measures to remedy Mr. Gómez Olivas' situation without delay and bring it into conformity with applicable international norms, including those set out in the Covenant and the Universal Declaration of Human Rights.

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

88. The Working Group takes note of the interpretive statement made by Mexico regarding article 9 (5) of the Covenant, which states that: "Under the Political Constitution of the United Mexican States and the relevant implementing legislation, every individual enjoys the guarantees relating to criminal matters embodied therein, and consequently no person may be unlawfully arrested or detained. However, if by reason of false accusation or complaint any individual suffers an infringement of this right, he or she has, *inter alia*, under the provisions of the appropriate laws, an enforceable right to just compensation".²³ The Working Group considers that this statement provides additional grounds for compensation under the State's national legislation.

¹⁹ Opinion No. 16/2016, para. 20.

²⁰ Opinions Nos. 16/2018, 1/2018, 66/2017, 65/2017, 24/2017, 23/2017, 58/2016, 17/2016, 56/2015, 55/2015, 19/2015, 18/2015, 23/2014, 58/2013 and 21/2013.

²¹ Opinion No. 47/2012, para. 22.

²² In March 2018, the Government of Mexico indicated that it was not possible to arrange a visit for that year owing to its schedule of international commitments.

²³ Multilateral Treaties Deposited with the Secretary General, chap. IV (4).

89. The Working Group urges the Government to conduct a full and independent investigation into the circumstances surrounding Mr. Gómez Olivas' arbitrary detention, including the allegations of cruel and inhuman treatment, and to take appropriate measures against those responsible for the violation of his rights.

90. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

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

Follow-up procedure

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

93. 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.

94. 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.

95. 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.²⁴

[Adopted on 23 August 2018]

²⁴ Human Rights Council resolution 33/30, paras. 3 and 7.