



General Assembly

Distr.: General
4 February 2019
English
Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 88/2018 concerning Eduardo Valencia Castellanos (Mexico)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 28 February 2018, the Working Group transmitted to the Government of Mexico a communication concerning Eduardo Valencia Castellanos. The Government replied to the communication in two separate complementary documents that were received on 3 and 31 May 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,

* 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.



religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Valencia Castellanos, a Mexican citizen born in 1970, is a property developer and businessman. Since 1992, Mr. Valencia Castellanos has overseen the construction of more than 25 tourist resorts, including Acqua Flamingos in Nuevo Vallarta, Nayarit.

First arrest

5. The source reports that Mr. Valencia Castellanos was arrested for the first time on 6 September 2010 at around 2.30 p.m., while driving his private vehicle along Patria Avenue in Jalisco. Two white vans blocked his way and a group of people wearing civilian clothes and armed with long guns immediately got out. Without identifying themselves, informing him of the reason for his arrest or showing an arrest warrant, they forced Mr. Valencia Castellanos to get into one of the vans, telling him that he was under arrest and that they were taking him to the offices of Jalisco State prosecution service. On arrival at the Office of the Attorney General of Jalisco State, he was told only that he had been arrested at the request of the Nayarit State authorities. Mr. Valencia Castellanos reportedly asked to see a copy of the authorities' supposed request, but to no avail. He was detained at the Attorney General's Office until 11 p.m., when he was taken by Jalisco State detectives to the Office of the Attorney General of Nayarit State. Once there, he was not informed of the reasons for his arrest and he was denied the right to contact his family and his lawyer.

6. It is reported that, at midday on 7 September 2010, Mr. Valencia Castellanos was transferred to the Bahía de Banderas public prison in Nayarit. At no point during that day was he brought before a judge or informed by any authority of his rights and the reasons for his arrest. He was not shown any legal document justifying his arrest and he received no legal assistance. He was unable to contact his family.

7. According to the source, on 8 September 2010, Mr. Valencia Castellanos was brought before the registrar of the competent court to make a statement and be informed orally of the supposed arrest warrant. At this point, the detainee asked to see the judge in person, but he was told that the judge was absent and unable to attend. Mr. Valencia Castellanos also requested to see the file of charges before making his statement, but his request was refused. The court registrar told him verbally and informally that a foreign national had apparently accused him of theft and showed him a document that he had supposedly signed, from which he could see that his signature had been forged.

8. The source reports that Mr. Valencia Castellanos was accused of stealing equipment from an apartment in Acqua Flamingos which he owned and had physical possession of, making the alleged theft impossible. During his imprisonment, on 11 September 2010, he received a death threat from a lawyer whose name is known to the Working Group, who told him: "If you do not give me complete control over your assets, I will have you killed tonight; I control everything here." Around six days later, Mr. Valencia Castellanos was released on bail.

Threats and expropriation

9. It is reported that, between January 2011 and May 2013, Mr. Valencia Castellanos repeatedly received threats from a foreign national who was allegedly associated with the lawyer mentioned above. More specifically, he received emails containing death threats. In these emails, the person claimed to be linked to the Los Zetas cartel and the then Attorney General of Nayarit State. One of the emails contained the following message: "When you come to Puerto Vallarta, I'll be waiting for you at the airport with Los Zetas and that will be the end of the Valencias."

10. On 18 April 2011, 604 properties owned by Mr. Valencia Castellanos in the Acqua Flamingos development were frozen. The source reports that this was achieved by means of

a precautionary measure that was subsequently ruled to be illegal in eight judicial decisions handed down in *amparo* proceedings. The asset freeze was reportedly illegal because it was carried out without due regard for basic procedural requirements: it was imposed without witnesses present and without reference to the document that described the properties concerned. Moreover, the measure was considered to be disproportionate, since it concerned 604 units valued at US\$ 80 million, whereas, according to the petition, only US\$ 40 million needed to be secured. It is reported that the adoption of this precautionary measure was requested by the same group of people that had threatened Mr. Valencia Castellanos. These individuals were apparently seeking to have Mr. Valencia Castellanos hand the asset portfolio that he had built up during his career in property over to them. The connections between the complainants and the persons who threatened Mr. Valencia Castellanos and the then Attorney General and the Governor of Nayarit State had supposedly been exploited to this end.

11. Faced with this situation, Mr. Valencia Castellanos requested a meeting with a representative of the Office of the State Governor in March 2012. The meeting was attended by his lawyer, the then State Attorney General and the Secretary General of the Government, who allegedly stated: “In Nayarit I am the law, and I see you as a criminal. Either you hand over Acqua Flamingos or I will expropriate it, put you in prison and finish you off.” Later, Mr. Valencia Castellanos was reportedly pressured to sign a document that would have granted a lawyer – the one who had previously threatened him – the power to conclude irrevocable transfers of property ownership, without any accountability. When Mr. Valencia Castellanos refused to do so, his interlocutor reached for a gun and threatened him, saying that he would pay for his action.

12. In the days following this meeting, the persons who had previously threatened Mr. Valencia Castellanos allegedly forged his signature on a series of documents, including promissory notes, contracts, acknowledgements of debt and legal claims. They also used his forged signature to take legal action without his knowledge and to leave him without a proper defence in legal proceedings and at risk of imprisonment as a result of the final decisions handed down. The source alleges that these methods were used to illegally appropriate a large proportion of Mr. Valencia Castellanos’ assets.

13. The source reports that, at the end of May 2012, Mr. Valencia Castellanos’ lawyers received death threats in connection with their legal defence work.

14. According to the information received, Mr. Valencia Castellanos and his defence counsel publicly disclosed details of the threats, harassment and persecution described above via the media. The case featured, for example, on the *Todo Personal* programme aired on Mexican broadcast television channel 40 in August 2012 and March 2013 and in the *Reforma* newspaper in May 2013. In addition, in May 2017, the *Proceso* weekly newspaper published an article on the case on its front page and several inside pages. In August 2017, relatives of Mr. Valencia Castellanos spoke about his case at a plenary session of the local Congress, which received extensive media coverage.

Second arrest

15. In November 2013, Mr. Valencia Castellanos sought legal assistance in the Federal District. To this end, on 28 November 2013, he went to the private office of the legal director of the Office of the President of the Republic, on Mazatlán Avenue in the Condesa neighbourhood.

16. According to the source, upon leaving the meeting on 28 November 2013, Mr. Valencia Castellanos was arrested by supposed police officers of the Federal District, who did not identify themselves or show a warrant for his arrest. The officers allegedly told Mr. Valencia Castellanos that his car had been reported stolen; however, they did not specify which vehicle they were referring to, where the theft report had been filed or how it was linked to the alleged offence. He was then forced into a private vehicle and held captive overnight in an unknown location, without the possibility of contacting a lawyer. The next morning, on 29 November, he was taken to the Office of the Attorney General of Nayarit State in the city of Tepic, where he met with the State Attorney General, who told him that he would not get out of the situation alive.

17. On 30 November 2013, Mr. Valencia Castellanos was transferred to Venustiano Carranza prison, where he was detained in the section for persons with mental health problems, known as Section Seven One. It is alleged that he was brutally beaten and held in subhuman conditions there.

18. On 30 November 2013 at 5 p.m., staff from the court of Bahía de Banderas came to Venustiano Carranza prison in Tepic to lay charges, without identifying themselves. Mr. Valencia Castellanos requested the presence of the competent judge, in accordance with article 82 of the Nayarit Code of Criminal Procedure, but was told that they were simply following orders and that the judge would not be coming. (The source notes that the first time the detainee saw the judge who was keeping him in detention in person was in mid-June 2016.) Mr. Valencia Castellanos was reportedly charged with criminal association, fraudulent administration, threats, dispossession of property, general fraud and two counts of specific fraud. It is noted that the preliminary investigations into these accusations were carried out between 2009 and 2011, without the defendant's knowledge, which allegedly left him defenceless, in violation of his right to a proper and adequate defence.

19. It is also noted that Mr. Valencia Castellanos was not allowed to exercise his right to effective legal assistance during the first 48 hours of detention or before he was formally charged. His lawyer was denied the right to be heard and submitted a defence statement in writing that was ignored when the detention order was handed down. Furthermore, his lawyer was not allowed to assist him in the first 48 hours following his arrest as he was being held incommunicado. Subsequently he was unable to meet with his lawyer in private, as they were always being watched closely by State police detectives who assumed a threatening attitude.

20. The source reports that Mr. Valencia Castellanos was acquitted of six of the seven charges. As regards the remaining charge, it is reported that proceedings are currently under way and the judge has dismissed the evidence on which the charge was based.

Conditions of detention and treatment suffered

21. Mr. Valencia Castellanos remained in Section Seven One of Venustiano Carranza prison until 15 December 2013. He was then sent to the infirmary, where he received medical treatment for the injuries that he had sustained when he was beaten up, as well as for bronchial diseases and dermatitis.

22. On 13 January 2014, the prisoner who was the main agent of the prison authorities told Mr. Valencia Castellanos that the State Attorney General had instructed him to torture Mr. Valencia Castellanos that night, but that he would do his best to make sure that the torture was not too severe. That same day, however, Mr. Valencia Castellanos was transferred to Bucerías prison, where documents that were essential for his defence were stolen from him. In this prison he was told that he would have 10 minutes each day to consult his lawyers, who had to travel from Mexico City and Guadalajara to prepare his defence in connection with over 100 individual criminal complaints that had been maliciously filed against him by supposed foreign buyers.

23. On 24 June 2014, Mr. Valencia Castellanos was beaten up in a cell by eight hooded men who told him afterwards that he had been beaten up for speaking badly of the then State Attorney General and the Deputy Director of Public Security of Bahía de Banderas.

24. On 11 November 2015, Mr. Valencia Castellanos was beaten up by hooded men armed with long guns, who then dragged him to a cell known as the wolf. This cell was located in the space under a staircase with a maximum ceiling height of 1.2 metres and had no bathroom. It was very hot in the cell, which was full of the excrement and urine of people who had previously been confined there and crawling with insects. He was held there virtually incommunicado, with such limited access to food and water that he lost approximately 14 kg in one month. This lasted until a district judge ordered that he be released from this cell and placed in better conditions of detention.

25. On 9 December 2015, Mr. Valencia Castellanos received a visit from the Nayarit State Commission for the Defence of Human Rights and recounted what had happened during his detention. In its recommendation 7/2016, the Commission noted that the

detainee's human rights had been violated as a result of the abuse of public authority, incommunicado detention and cruel, inhuman and degrading treatment to which he had been subjected. After the visit and the filing of an *amparo* application that was declared admissible, Mr. Valencia Castellanos was transferred to the cell that was used for prisoners with mental health problems, where he was stripped of his belongings and cash in the early hours of the morning.

26. On 16 December 2015, Mr. Valencia Castellanos was taken to a room where a prison supervisor shouted at him, threatened him and banged on the walls in order to make him sign a statement admitting that he had tried to smuggle drugs into the country. Mr. Valencia Castellanos refused to sign the document and suffered further threats.

27. On 1 November 2016, by means of an *amparo* application Mr. Valencia Castellanos requested a transfer to another detention centre outside Nayarit because various prisoners and guards had told him that his life was at risk in that prison and because he wanted to avoid further torture and cruel and inhuman treatment. His *amparo* application was rejected, however.

28. In February and March 2017, Mr. Valencia Castellanos was involved in two confrontations during which he recognized the foreign national who had threatened him between 2011 and 2013. At that time, the person in question once again threatened him with death.

29. On 27 March 2017, two inmates who had arrived at the detention centre approximately 36 hours earlier entered Mr. Valencia Castellanos' cell and beat him repeatedly, stopping only when they thought he was dead. Mr. Valencia Castellanos was taken to the central courtyard where he remained unconscious for around 30 minutes. When he regained consciousness, he asked to be taken to the hospital. Only then did a police patrol take him to the San Javier hospital in Nuevo Vallarta. The source reports that the two inmates who beat up Mr. Valencia Castellanos supposedly "escaped" from the prison 10 days later.

30. After being admitted to hospital, Mr. Valencia Castellanos was diagnosed with fractures to his hip bones, nose, left cheekbone, upper jawbone and the second and third ribs on his right side, as well as a sprained knee, a pulmonary aneurysm, a cerebral contusion and bruises on his face, neck and body. He needed four operations, a hip replacement and several rehabilitation treatments; he is reportedly limited in many ways and will need lifelong care. As for his mental state, Mr. Valencia Castellanos reportedly suffers from post-traumatic stress, persecutory delusions, uncontrollable anxiety and sleeplessness. The source provided a medical report that was drawn up in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The report states that Mr. Valencia Castellanos was subjected to torture and cruel, inhuman and degrading treatment.

Hospitalization, harassment and conditional release

31. After Mr. Valencia Castellanos had been hospitalized, unidentified State officials came to the hospital asking to transfer him elsewhere, without specifying where he would be taken or who had ordered the transfer. The medical staff and his family prevented this from happening.

32. On 25 August 2017, eight heavily armed persons who did not identify themselves and had no court order or certificate of discharge forcibly removed Mr. Valencia Castellanos from the hospital and took him to Bucerías prison in a police vehicle. He was returned to the hospital the next day, after his family and lawyers put pressure on the local government.

33. It is reported that some of the people who had constantly threatened Mr. Valencia Castellanos in the past visited the San Javier hospital frequently; they asked after him, took photographs and were sometimes carrying weapons.

34. On 27 November 2017, the Inter-American Commission on Human Rights adopted Precautionary Measure No. 519-17 in favour of Mr. Valencia Castellanos on the grounds

that he was in a serious and urgent situation presenting a risk of irreparable harm. It requested the State to adopt the measures necessary to preserve the life and personal integrity of Eduardo Valencia Castellanos.

35. On 17 January 2018, the judge of Bahía de Banderas criminal court of first instance ordered the conditional release of Mr. Valencia Castellanos, after he had been detained for 50 months. According to the source, the bond required by the judge – 13,800,000 pesos (Mex\$) – was excessive and unjustified, for the 26 complainants in the proceedings that had given rise to the detention order were each seeking damages of between Mex\$ 18,000 and Mex\$ 26,000.

Alleged violations of due process

36. The source claims that Mr. Valencia Castellanos' detention was arbitrary under category III, owing to the repeated violations of national and international norms relating to judicial guarantees and due process, which are essential for a fair trial. It is alleged that no arrest warrant or judicial document providing a legal basis for his detention was shown during either of the two arrests. The competent judges were not present at the arraignment hearings. It is alleged that Mr. Valencia Castellanos was not notified of the preliminary investigations concerning him and was thus unable to fully exercise his right of defence at that stage. In addition, the individual complainants allegedly did not exhaust the alternative dispute resolution methods or the available civil and administrative remedies before proceeding with their criminal complaints. It is argued that release on bail was denied arbitrarily, given that this is a civil case involving minor offences for which there is no incontrovertible evidence and that the detainee has no criminal record and does not pose a risk to society.

37. Mr. Valencia Castellanos was also denied timely and effective access to the relevant court files, which prevented him from preparing his defence. He was not informed of his right to free legal aid. According to the source, Mr. Valencia Castellanos was unable to consult his lawyers in private and their independence was affected by the death threats received in May 2012 and by the bribes that they were allegedly offered. The source also claims that the judicial remedies invoked by the defence were ineffective, as they were denied without any reason or explanation being given and without the arguments and evidence submitted being considered. There were unjustified delays in the proceedings while Mr. Valencia Castellanos continued to be deprived of his liberty. Furthermore, he was subjected to an excessively long period of pretrial detention, which lasted 50 months, even though decisions stating that he was not responsible and that his rights had been violated during the trial had been handed down. The source also claims that the torture, threats and extortion suffered by Mr. Valencia Castellanos prevented him from exercising his right to a proper defence. Lastly, it is alleged that the judges who were involved in the various criminal proceedings against Mr. Valencia Castellanos lacked independence and impartiality, for they acknowledged, separately and on several occasions, that they were merely acting on the instructions of the Attorney General of Nayarit State.

38. In addition, the source claims that the detention of Mr. Valencia Castellanos for the second time was arbitrary under category II, since it resulted from the exercise of his right to freedom of expression. The source considers that both the detention of Mr. Valencia Castellanos and the subsequent violations of his rights constituted reprisals for his repeated public statements to the media, in which he revealed that the authorities had breached local legislation in order to harm him and pressure him into surrendering his assets.

Response from the Government

39. On 28 February 2018, the Working Group transmitted the allegations from the source to the Government, requesting that it submit a response before 5 April 2018. The Government requested an extension of the time limit for its reply, which was granted. The deadline was set back to 31 May 2018. The Government provided its response in two separate documents that were submitted on 3 and 31 May 2018.

40. The Government states that, starting in 2008, a series of complaints against Mr. Valencia Castellanos were filed with the Public Prosecution Service that gave rise to a

number of investigations. The complaints contained allegations of theft, dispossession of property, fraud, criminal association and serious threats affecting approximately 96 victims.

41. The Government recounts that, after evidence had been gathered, on 14 February 2013 the judge in the case issued arrest warrants at the request of the Public Prosecution Service. On 28 November 2013, staff of the Office of the Attorney General of the Federal District executed these arrest warrants, in cooperation with the Office of the Attorney General of Nayarit State. Mr. Valencia Castellanos was taken to Nayarit, where he was brought before the competent judicial authority the same day for a review of his detention. Once all stages of the proceedings had been completed, Mr. Valencia Castellanos was convicted. He subsequently appealed against the conviction and his appeal remains pending.

42. The Government indicates the current status of various cases involving Mr. Valencia Castellanos. One case has resulted in a conviction (195/2010), while another four remain pending (211/2011, 34/2014, 371/2011 and 307/2011).

43. The Government asserts that Mr. Valencia Castellanos had access to a proper defence, because he appointed his own private lawyers and through them he was able to seek remedies before the judicial authorities, state human rights bodies and even the Inter-American Commission on Human Rights.

44. Regarding the conditions of detention, the Government states that Mr. Valencia Castellanos filed a complaint with the Nayarit State Commission for the Defence of Human Rights concerning the use of incommunicado detention and cruel, inhuman and degrading treatment. The Commission issued recommendation No. 07/2016, confirming that there was evidence of the alleged violations; that recommendation was therefore fully complied with.

45. With respect to the events that took place on 23 March 2017, the Government reports that an investigation into the persons responsible for the threats and torture was launched on 30 September 2017 and security measures to protect the life and personal integrity of Mr. Valencia Castellanos were implemented at the same time.

46. On 1 December 2017, the Inter-American Commission on Human Rights ordered the adoption of precautionary measures in favour of Mr. Valencia Castellanos. These measures were implemented immediately and with his full consent. Thus, on 17 January 2018, he was released on bail.

47. Regarding the legal basis for the detention of Mr. Valencia Castellanos, the Government states that he was detained on the basis of the complaints submitted and the supporting evidence gathered during the various investigations, which was sufficient to establish that he was the likely perpetrator of the offences in question.

48. Under article 21 of the Constitution, the Public Prosecution Service and the police have the power and the obligation to investigate all offences that are reported. Since Mr. Valencia Castellanos had been accused of offences that are punishable by deprivation of liberty and the various arrest warrants against him had been executed, he had to remain in detention while he faced the criminal proceedings brought against him. The Government claims that he was kept informed at all times of the charges against him. Furthermore, he exercised his right to a proper defence, for he was a party to approximately 151 legal actions and was released on bail on 17 January 2018.

49. The Government explains that, under article 20 of the Constitution, pretrial detention cannot exceed the maximum term of imprisonment established by law for the alleged offence and cannot, under any circumstances, exceed two years, unless it is extended as a result of the accused exercising his or her right of defence.

50. The Government claims that the pretrial detention of Mr. Valencia Castellanos was necessary and lawful. It did not exceed the maximum terms of imprisonment for the offences of dispossession of property (5 years), theft (10 years) and fraud (12 years). Moreover, it was extended as a result of the number of criminal actions brought against Mr. Valencia Castellanos and the number of appeals that he lodged.

51. Regarding the second period of detention, when he was allegedly held on a pretrial basis for 50 months, the Government explains that its length reflected the sum of all the criminal actions brought against him, rather than a single criminal action.

52. With regard to judicial review of the detention, the Government indicates that all the steps taken were reviewed by the competent judicial authority without delay. Mr. Valencia Castellanos was therefore detained in accordance with the applicable legislation and the requirements of necessity and proportionality, and the State's actions were in keeping with article 9 (3) of the Covenant.

53. With respect to category III, the Government states that Mr. Valencia Castellanos had access to a fair trial in which he could submit any evidence that he considered relevant and lodge the appropriate appeals at each stage of the proceedings. Furthermore, both the prosecutor and the judge in the case acted promptly and with due diligence throughout the proceedings. For all these reasons, the detention of Mr Valencia Castellanos does not fall under category III.

54. Finally, with respect to category V, the Government asserts that the detention cannot be considered discriminatory, for there is no evidence of any distinction, exclusion, restriction or preference in favour of or against Mr. Valencia Castellanos.

55. In the light of the foregoing and by way of conclusion, the Government requests the Working Group to consider it to have responded to the request for information and to determine that the deprivation of liberty of Mr. Valencia Castellanos does not constitute arbitrary detention.

Additional comments from the source

56. The source responded to the Government's arguments on 18 May and 12 June 2018. The source denies the claim that a series of complaints were filed in 2008 and states that the preliminary investigations were initiated in 2011. The source also states that case No. 111/2012 was brought to the attention of the Public Prosecution Service in Nayarit in 2012 and that only criminal case No. 195/2010 was filed with the Office of the Attorney General of Nayarit State at the end of 2009.

57. The source notes that, during both arrests, Mr. Valencia Castellanos was immobilized by unidentified persons and given no legal justification for his arrest at any time: he was not shown an arrest warrant or any other legal document. The source specifies that, when Mr. Valencia Castellanos was arrested on 6 September 2010, he did not know that he was under arrest until he arrived at the Office of the Attorney General of Jalisco State. When he was arrested on 28 November 2013, he was forced into a private car by persons in civilian clothes who did not identify themselves.

58. The source denies the claim that Mr. Valencia Castellanos was brought before the judge of the competent court without delay. On the first occasion, four days elapsed before he was contacted by supposed court officials. On both occasions, he was expressly denied the opportunity to appear before the judge in person.

59. The source insists that it is not true that, when Mr. Valencia Castellanos made his initial statement, he was informed by the judge of his right to appoint a lawyer or to have one assigned to him. The source rejects the claim that Mr Valencia Castellanos was able to exercise his right to an adequate defence. Between 2013 and 2016, Mr. Valencia Castellanos was denied proper contact with his lawyers; at best, he was able to meet with them for 10 minutes while they were threatened and pressured to drop the case. The complaints filed with the Nayarit State Commission for the Defence of Human Rights and the Inter-American Commission on Human Rights were submitted by members of his family.

60. According to the source, it is not true that Mr. Valencia Castellanos was released in compliance with the precautionary measures requested by the Inter-American Commission on Human Rights. In fact, the judge ordered his provisional release in July 2017, on the basis of *amparo* application No. 1073/2013, before the petition was filed with the Commission.

61. The source claims that it is not true that the State has taken appropriate security measures to protect Mr. Valencia Castellanos, for in the past few months he has repeatedly requested an escort to accompany him on journeys within the city, but the Office of the Secretary General of the Government has not responded to his request.

62. According to the source, the claim that Mr. Valencia Castellanos was not subjected to torture or cruel and inhuman treatment during his detention is contradicted by indirect *amparo* decision No. 2611/2016, which offers proof to the contrary, as well as by recommendation No. 007/2015 of the Nayarit State Commission for the Defence of Human Rights. The source adds that both decisions were ignored by the competent authorities. It is not true that the allegations of torture, inhuman treatment and attempted murder are being investigated. The Public Prosecution Service knew about the investigation but refused to ask the judge of the criminal court for a certified copy of the file and suspended the investigation because the attackers had supposedly escaped.

63. It is not true that justice was administered promptly and expeditiously in respect of Mr. Valencia Castellanos. The source gives the example of case No. 195/2019, in which no appeals were admitted and the proceedings lasted for seven years.

64. According to the source, it is impossible to maintain that the authorities were justified in keeping Mr. Valencia Castellanos in pretrial detention for 50 months. In all of the relevant cases, he was charged with offences such as fraud and dispossession of property, which are not classified as serious offences in the applicable legislation. In several *amparo* decisions (Nos. 1073/2013, 1968/2017 and 262/2016), it was established that none of the competent authorities had specified how the appropriateness and length of detention had been determined.

65. The source contradicts the Government's claim that the judge of Nayarit criminal court acted with due diligence, noting that the High Court ruled in favour of Mr. Valencia Castellanos and acknowledged major irregularities in the criminal court proceedings.

66. The source states that Mr. Valencia Castellanos has been cleared of all charges; his innocence is confirmed by the fact that he was granted *amparo* more than 12 times. The source claims that the State officials and their accomplices were trying to pressure Mr. Valencia Castellanos into surrendering his assets in exchange for his physical freedom.

67. The source reports that Mr. Valencia Castellanos is preparing to submit an asylum application because he faces persecution by State officials that causes severe physical and psychological harm and prevents him from taking legal action that would allow him to be properly and effectively protected by his country's legal system.

Second response from the Government

68. The Government provided additional information to supplement its initial defence statement. In this submission, it reiterates that, in 2008, dozens of criminal actions were brought against Mr. Valencia Castellanos. It provides information on five of these cases, indicating that one led to a conviction, while four others remain pending.

69. The Government confirms that, according to the results of a medical examination carried out on 14 December 2017 in accordance with the Istanbul Protocol, Mr. Valencia Castellanos was suffering from post-traumatic stress disorder and showed signs of having been subjected to torture. The Government states that, in response to Mr. Valencia Castellanos' allegations of human rights violations, criminal investigations have been launched and arrest warrants have been issued, as appropriate.

70. The Government insists that the detention of Mr. Valencia Castellanos was not arbitrary, for he was informed of the charges against him, he was brought before a competent authority without delay, he had access to legal assistance and was able to submit statements and evidence in his defence, and he was able to challenge the judicial decisions that were handed down. Furthermore, all the authorities concerned acted promptly and diligently, without engaging in improper conduct during the proceedings.

71. In view of the above, the Government requests the Working Group to find that the detention of Mr. Valencia Castellanos was not arbitrary, on the grounds that it does not fall within the applicable categories.

Additional comments from the source on the Government's second response

72. The source submitted an additional document containing comments and observations on the Government's second response. In this document, it counters the Government's arguments and reaffirms the initial allegations.

73. The source insists that, when Mr. Valencia Castellanos was arrested, he was not, on either occasion, shown any legal document justifying his arrest, nor was he brought promptly before a judge. According to the source, the fact that Mr. Valencia Castellanos has been granted *amparo* against detention orders more than 30 times, for lack of grounds and failure to state reasons, shows that there was no legal basis for these arrests. However, the competent authorities have continued to hand down detention orders in connection with the same charges. The source gives the example of criminal case No. 34/2014, in which the latest detention order is the sixth to be handed down in the same case.

74. Similarly, in case No. 111/2012, the Public Prosecution Service found that the responsibility of the accused had not been established and that the case was civil in nature. In spite of this finding, Mr. Valencia Castellanos was sentenced. After the sentence was handed down, the judge apologized to Mr. Valencia Castellanos and said that he was simply following the instructions of the Attorney General.

75. According to the source, it is not true that security measures were taken to protect Mr. Valencia Castellanos during his hospitalization, for those measures were in place for only a few days at the start of 2018, when the Inter-American Commission on Human Rights requested precautionary measures.

76. The source notes that the medical examination carried out in line with the Istanbul Protocol was organized and paid for by Mr. Valencia Castellanos' family. The State had nothing to do with this medical examination. In addition, it is not known whether the authorities have ordered a further examination of this nature or opened investigations into the offences committed by public servants.

77. The source notes that the pretrial detention of Mr. Valencia Castellanos was illegal, as shown by *amparo* decision No. 1073/2013 in case No. 371/2011, for the pretrial detention decision did not take into account whether the accused had committed the alleged offence repeatedly or whether there was any evidence that he posed a risk to the alleged victims. On this basis, Mr. Valencia Castellano should have been released on bail on 28 November 2013, rather than 50 months later, on 17 January 2018.

78. The source also rejects the argument that the pretrial detention period was extended on account of the number of criminal actions brought against Mr. Valencia Castellano. A request to consolidate proceedings was made with a view to speeding up and simplifying the process, but was denied by the competent authorities for no apparent reason.

79. The source points out that the single sentence handed down against Mr. Valencia Castellanos has been at the appeal stage for 16 months so far, showing that the conviction was not reviewed promptly, contrary to the Government's claims.

Discussion

80. The Working Group is grateful to both parties for the cooperation in providing the information that it needs in order to render an opinion on the present case.

81. The Working Group notes that Mr. Valencia Castellanos was released on bail on 17 January 2018, after 50 months of detention. Although Mr. Valencia Castellanos is no longer required to remain in a particular place of detention, while the judicial proceedings continue there are still certain restrictions on his rights and his personal freedom may be at risk. Given these circumstances, the Working Group is of the view that the case still merits consideration.

82. 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 a breach of the international standards that are in place to protect personal liberty and prevent arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68).

83. The parties agree that numerous legal actions have been brought against Mr. Valencia Castellanos over the last 8 to 10 years. However, the parties offer different versions of what happened during certain stages of the judicial proceedings. In its response, the Government merely stated that the law had not been breached; this argument is not sufficient for the case to be dismissed. The Government simply described the charges and the various stages of the proceedings, without specifically addressing or countering the source's allegations. The source, on the other hand, provided a coherent account of the proceedings that is backed up by documentary evidence and is highly credible and reliable. The Working Group will discuss its reasoning step by step, before reaching a conclusion.

84. Mr. Valencia Castellanos is a businessman in the property and tourism sectors. His success and resulting wealth have attracted the attention of several people, including various State officials, who have reportedly taken coordinated action with a view to appropriating some of this wealth. The source claims that this is the real reason behind the false charges that Mr. Valencia Castellanos has had to face before the criminal courts of his own country. While he was in prison, Mr. Valencia Castellanos received a death threat from a lawyer who wanted him to sign a document authorizing the transfer of property. Between 2011 and 2013, Mr. Valencia Castellanos received many death threats from a foreign national associated with this lawyer. The foreign national said that he was connected to the Attorney General of Nayarit State and a criminal organization, the Los Zetas cartel. With the support of these people, on 18 April 2011, 604 properties in Acqua Flamings that were owned by Mr. Valencia Castellanos and worth US\$ 80 million were temporarily seized. Mr. Valencia Castellanos took successful legal action to reverse the illegal seizure. Later, he met with the legal counsel of Nayarit State, who also made threats relating to his property. From then on, his signature was forged on a variety of documents for the purpose of taking out loans and participating in litigation. As a result of these events, which the Government has not contested, Mr. Valencia Castellanos was deprived of his liberty.

Category I

85. The source claims that Mr. Valencia Castellanos was arrested on 6 September 2010, while he was driving in the city, by a group of heavily armed men dressed in civilian clothes. He was brought before the Attorney General of Jalisco State and informed that the Attorney General of Nayarit State had ordered his arrest, but he was not shown any arrest warrant or legal document to that effect. A few hours later, he was taken to Nayarit and handed over to the Attorney General. After spending the night in the Office of the Attorney General, he was taken to Bahía de Banderas prison. It was not until 8 September 2010 that he was taken to the office of the judge; even then, however, he did not meet the judge in person and was simply notified verbally of an arrest warrant relating to alleged theft of property. He was released, subject to a bail payment of Mex\$ 40,000, on 11 September 2010.

86. The source states that, on 28 November 2013, when Mr. Valencia Castellanos left the office of the legal director of the Office of the President of the Republic in Mexico City, he was arrested by police officers and taken in a private vehicle to an unknown location, where he spent the night in detention. The following day, he was brought before the Attorney General of Nayarit State, in Tepic, then transferred to Venustiano Carranza prison, where he was held in the section for persons with psychosocial disabilities. On 30 November 2013, he was brought before court officials who had come to the place of detention, but he did not see the judge in person. He then spent time in several prisons before his release on bail in January 2018.

87. In both cases, given that the Government has not effectively challenged or contradicted the allegations made by the source, the Working Group concludes that Mr. Valencia Castellanos was arrested without any State official presenting an arrest warrant or any form of legal justification, in violation of article 9 (1) of the Covenant.

88. Furthermore, in both cases, Mr. Valencia Castellanos was not brought before a judge immediately (Covenant, art. 9 (3)) and therefore did not have the opportunity to contest the lawfulness of his arrest and detention. Interaction with court officials does not constitute enjoyment of the right to be brought before a judge in person. The Government has not provided any evidence showing that he was given a proper hearing.

89. For these reasons, the Working Group considers that the arrest and detention of Mr. Valencia Castellanos were arbitrary under category I.

Category III

90. The source claims that both the physical abuse of Mr. Valencia Castellanos and the violation of his right to a fair trial in general were so serious as to render the detention arbitrary. The Working Group is deeply troubled by the extent and the gravity of the violence to which Mr. Valencia Castellanos was subjected while he was in the custody of the authorities.

91. In Venustiano Carranza prison, a prisoner who was moved to Mr. Valencia Castellanos' cell claimed to have been instructed, by the State Attorney General, to torture him. He was later transferred to Bucerías prison where, on 24 June 2014, he was beaten up by several hooded men, who said that the beating was due to his misconduct with respect to the State Attorney General. On 11 November 2015, he was beaten up again by another group of prisoners and locked in a dark, dirty cell under some stairs, where he was held for several days in conditions that appear to have been utterly inhuman, cruel and degrading. On 16 December 2015, a State official verbally abused him and tried to coerce him into signing a confession to drug trafficking. On 27 March 2017, Mr. Valencia Castellanos was beaten up again, by two newly admitted detainees, to the point where he was believed to be dead; these inmates escaped from prison 10 days later. Mr. Valencia Castellanos will suffer from physical disabilities for the rest of his life as a result of these acts of ill-treatment.

92. The Working Group has no doubt that Mr. Valencia Castellanos was subjected to extreme violence. The Nayarit State Commission for the Defence of Human Rights found that he had suffered violations of his rights, including torture. The Inter-American Commission on Human Rights, meanwhile, concluded that Mr. Valencia Castellanos was in a serious and urgent situation presenting a risk of irreparable harm. The Government stated that the matter remained under investigation, while the two persons who had escaped from prison were subject to arrest warrants that could not be executed. This response is far from satisfactory.

93. When a State has custody of an individual, it has a duty to ensure the safety and integrity of that person. In this case, the Government failed in that duty and Mr. Valencia Castellanos will suffer the consequences for the rest of his life. The source has demonstrated and the Working Group concludes that the detention conditions and the treatment received during detention prevented Mr. Valencia Castellanos from effectively preparing his defence with respect to the charges filed against him, in accordance with article 14 (3) (b) of the Covenant.

94. Furthermore, the Working Group considers that Mr. Valencia Castellanos' right to effective legal assistance from his lawyer, under article 14 (3) (d) of the Covenant, was violated extensively, especially as the lawyer's visits were limited to a maximum of 10 minutes per day while Mr. Valencia Castellanos was detained in Bucerías prison and faced over 100 criminal actions.

95. The source also claimed that Mr. Valencia Castellanos' right to have access to his case files, pursuant to article 14 (3) (b) of the Covenant, was severely restricted. The Government, meanwhile, did not contest these allegations, nor did it provide any evidence showing that access to case files was granted in a timely manner.

96. Lastly, the Working Group notes that both Mr. Valencia Castellanos and his lawyers and relatives were subjected to considerable pressure of various kinds in connection with the criminal proceedings. This constitutes a further violation of his right to a fair trial.

97. For all these reasons, the Working Group considers that the detention of Mr. Valencia Castellanos was arbitrary under category III.

Category V

98. The Working Group considers that the facts of the case show that discrimination took place. Mr. Valencia Castellanos was persecuted and detained because of his property and wealth. These acts were carried out through the prosecution service, the police and the

prison system and led to Mr. Valencia Castellanos being deprived of his liberty on the basis of his economic status. The Working Group considers this to be a violation of article 26 of the Covenant and therefore concludes that the detention was arbitrary under category V.

Disposition

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

The deprivation of liberty of Eduardo Valencia Castellanos, being in contravention of articles 9, 14 and 26 of the Covenant, is arbitrary and falls within categories I, III and V.

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

101. The Working Group considers that, taking into account the circumstances of the case, the appropriate remedy would be to terminate all criminal proceedings against Mr. Valencia Castellanos and to accord him an enforceable right to compensation and other reparations, in accordance with international law, including assistance and support in coping with the difficulties that he may face for the rest of his life as a consequence of the abuse suffered in custody.

102. The Working Group takes note of the interpretative 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 penal 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 basic right, he has, *inter alia*, under the provisions of the appropriate laws, an enforceable right to just compensation.”¹ The Working Group considers that this statement provides additional grounds for compensation under the State party’s legislation.

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

104. In view of the number of cases decided by the Working Group in respect of Mexico in recent years,² the Working Group reiterates its request that the Government consider inviting it to conduct an official visit to the country. An official visit would be an appropriate means of helping the Government, through constructive dialogue, to improve legislation and practice with a view to preventing arbitrary deprivation of liberty. It would be particularly appropriate given the standing invitation extended by Mexico to all special procedures mechanisms in 2001 and the messages sent by the Working Group to the Permanent Mission of Mexico in Geneva on 15 April 2015 and 10 August 2016.

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

Follow-up procedure

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

(a) Whether compensation or other reparations have been made to Mr. Valencia Castellanos;

¹ *Multilateral Treaties Deposited with the Secretary-General*, chap. IV (4).

² Opinions Nos. 23/2014, 18/2015, 19/2015, 55/2015, 56/2015, 17/2016, 58/2016, 23/2017, 24/2017, 66/2017, 1/2018, 16/2018 and 53/2018.

(b) Whether an investigation has been conducted into the violation of Mr. Valencia Castellanos' rights and, if so, the outcome of the investigation;

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

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

107. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

108. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

109. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³

[Adopted on 23 November 2018]

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