



General Assembly

Distr.: General
14 August 2019
English
Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

Opinion No. 14/2019 concerning Rafael Méndez Valenzuela (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 most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 7 November 2018, the Working Group transmitted to the Government of Mexico a communication concerning Rafael Méndez Valenzuela. The Government replied to the communication on 7 January 2019. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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



Submissions

Communication from the source

4. Mr. Méndez Valenzuela is a 30-year-old Mexican construction equipment operator. He is currently detained in Federal Social Rehabilitation Centre No. 8 in Guasave, Sinaloa.

Arrest, interrogation and indictment

5. According to the information received, Mr. Méndez Valenzuela was deprived of his liberty by police officers of the Valle de Bravo municipality on 22 January 2008 at 2.20 p.m., when the utility vehicle in which he and his companions were travelling was stopped at a checkpoint on the road to Toluca. During the inspection, the police officers claimed that the licence plates on the vehicle belonged to a vehicle that had been reported stolen and handed the passengers over to state police officers, who said that they would go to their offices to investigate the situation and forced the arrested persons into a vehicle. Later, the authorities claimed that they had been arrested in flagrante delicto, as they had allegedly been transporting drugs and weapons intended solely for military use.

6. According to the source, during the journey, the vehicle was driven off the road and towards some woods, where the arrested persons waited for the police chiefs to arrive. They were joined by more state police officers, who asked them what they did, who their bosses were and where they could be found. When they were unable to answer some of the questions, the police officers started beating them and bound their hands. They were told that, when the soldiers and the Federal Investigation Agency officers arrived, they would have to confess to being part of the organized crime group known as La Familia Michoacana or be prepared to suffer.

7. The source reports that, after approximately two hours, the arrested persons were taken into the woods by soldiers and Federal Investigation Agency officers. They were transported in utility vehicles to a military base, where they were taken to a basement. There, the officers told Mr. Méndez Valenzuela that they knew where his family members lived and were going to kill them but that first they were going to torture him. He was beaten, had water poured over his nose and was suffocated with a plastic bag. During this time, he was repeatedly asked where his bosses were, while being threatened with death.

8. Mr. Méndez Valenzuela, according to the source, was then transferred by helicopter to the Office of the Assistant Attorney General for the Investigation of Organized Crime, where he was told that he must sign a confession stating that he was a member of a criminal group. As he was getting out of the helicopter, he was pushed backwards while blindfolded and handcuffed, causing him to fall over and dislocate his left shoulder. Ever since, he has had shoulder problems. He was detained in a room where he was tortured again for two or three hours. The torturers wrapped his body in a blanket so that the blows would not leave marks and suffocated him with a plastic bag. They told him that if he did not sign the confession, they would continue torturing him all night; they also told him that his companions had already confessed, so he ended up signing the papers that he was given, without reading them. Once he had signed, he was introduced to his defence lawyer, almost seven hours after his arrest. The lawyer told him that, if he had already signed a confession, nothing could be done to defend him.

9. According to the source, a photograph of Mr. Méndez Valenzuela's face was disseminated via the media by the Office of the Attorney General of the Republic and was shown on television as though he were a member of La Familia Michoacana. He was given the alias "El Chester" as part of a strategy of announcing daily arrests of suspected members of organized crime groups.

10. In March 2008, a complaint was filed with the Mexico State Human Rights Commission. On 18 March 2008, the Commission replied that it could not handle the complaint because the case fell under the jurisdiction of the Autonomous Agency for Prevention and Social Rehabilitation of the Ministry of Public Security. The authorities referred the complaint to the National Human Rights Commission, which stated on 30 March 2008 that Mr. Méndez Valenzuela was being brought to trial and that further details could be obtained by contacting the regional office of the Federal Public Defender Service in Toluca.

Conviction, serving of sentence and amparo application

11. The source reports that Mr. Méndez Valenzuela was held in pretrial detention in Federal Social Rehabilitation Centre No. 1 in Almoloya de Juárez, Mexico State, for four years, until he was sentenced on 30 April 2012 to 17 years' imprisonment for organized crime and carrying a firearm. The allegation of torture, the relevant medical and psychological evaluations and the contradictory statements of the police officers involved in the arrest were not taken into account in the judgment. The defence lodged an appeal, which was resolved after 20 months, on 11 December 2013, and led to the prison sentence being reduced by one year.

12. On 15 August 2014, Mr. Méndez Valenzuela was transferred to Federal Social Rehabilitation Centre No. 8 in Guasave, Sinaloa.

13. On 9 September 2014, the Fourth District Court for Federal Criminal Proceedings in Mexico State granted Mr. Méndez Valenzuela's request to be allowed to serve his sentences concurrently. He had served 5 years, 10 months and 19 days, from 22 January 2008 (the date of his arrest) to 11 December 2013 (the date on which he was sentenced). His total concurrent sentence was therefore reduced to 10 years, 2 months and 19 days. The new sentence completion date was set as 2 March 2018.

14. The case was passed on to a federal public defender, who filed a direct *amparo* application, alleging torture and other irregularities. The application was received on 10 June 2015 by the Fourth Collegiate Circuit Court of Mexico State, which decided on 31 March 2016, after almost 10 months, not to grant *amparo* to Mr. Méndez Valenzuela. An application for a review of the decision was filed and the case was referred to the Supreme Court. One month later, on 29 April 2016, the First Chamber of the Supreme Court declared the application admissible as direct *amparo* appeal No. 2524/2016.

15. The source notes that, on 5 October 2016, the Supreme Court found that the Collegiate Circuit Court had "violated due process" and had not "followed the set criteria" when ruling on Mr. Méndez Valenzuela's allegations that he was a victim of torture, since it had not taken into account the medical evaluations regarding his injuries and post-traumatic stress disorder. The Supreme Court also found that: (a) a false evaluation of his physical integrity had been issued; (b) the statement to the public prosecutor was unlawful because it had been made as a result of torture; and (c) in his extended statement to the public prosecutor, Mr. Méndez Valenzuela declared that he had been tortured in order to extract a confession.

16. The Supreme Court noted that, despite being aware of the allegation of torture, the judicial authority did not investigate it and thus failed to comply with fundamental procedural requirements, leaving the accused without a defence. For that reason, it decided to review the proceedings conducted in the initial criminal case, up to the phase immediately preceding the order to conclude the investigation, with a view to investigating the alleged torture, and instructed the competent judicial authority to immediately order that the relevant examinations be carried out, in order to properly clarify what had happened, taking into account the nature of the alleged ill-treatment and applying the provisions of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). Not to do so, the Court stated, would constitute a failure to comply with fundamental procedural requirements that would be detrimental to the defendant.

17. According to the source, the Fourth Collegiate Circuit Court received the Supreme Court's decision four months later, on 7 February 2017, and granted the remedy of *amparo* and federal court protection two months later, on 6 April 2017. At that point, the public defender told members of Mr. Méndez Valenzuela's family that experts would need to be appointed, which could take up to a year, so they hired independent experts, who carried out the necessary medical and psychological examinations on 8 December 2017.

18. Mr. Méndez Valenzuela completed his prison sentence on 2 March 2018 but was not released. When he raised the issue with the prison director, the prison director said that he was waiting for judicial notification that he could be released; Mr. Méndez Valenzuela therefore sent another letter to the Fourth Court of Toluca requesting that a decision be handed down as soon as possible, since the expert evaluations required by the Supreme Court had already been carried out. On 21 March 2018, the judge replied that Mr. Méndez

Valenzuela could not be released because the Council of the Federal Judiciary had appointed experts to evaluate him. However, in her letter, she gave only the names of the experts, without indicating the date or time of the examinations; she also declared void the independent expert evaluations that had already been carried out.

19. On 27 March 2018, the judge sent a letter to the courts in Sinaloa, declaring that the case was outside her jurisdiction and requesting that it be handled in Sinaloa. The source notes that months have passed, yet it remains unclear how the courts in Sinaloa responded.

20. After the public defender had been pressed to request that the proceedings be expedited, an expert appointed by the Council of the Federal Judiciary carried out a medical examination of Mr. Méndez Valenzuela in accordance with the Istanbul Protocol, on 22 May 2018. A psychological examination was carried out later, in October 2018.

21. Mr. Méndez Valenzuela is still deprived of his liberty and is being held in mandatory pretrial detention, as he is still awaiting trial; he has no alternative but to wait in pretrial detention for the final judgment to be handed down, even though, if he is found guilty, he will have already served the full sentence. According to the source, all the procedures and excuses of the authorities responsible for the delayed release are clearly intended to harm Mr. Méndez Valenzuela.

Category I

22. The source argues that there is no legal justification for keeping Mr. Méndez Valenzuela in detention, since he has already served his sentence in full. He has been kept in pretrial detention because he has lodged appeals claiming that his detention is unlawful and denouncing the use of torture to obtain evidence. As a result of these appeals, the case has been reopened and he has been kept in pretrial detention, even though, if he is convicted, he will have already served the sentence that is imposed on him.

23. Moreover, although the Constitution provides for detention in cases of flagrante delicto, the source argues that this provision is not actually applicable in the present case, since the authorities did not catch Mr. Méndez Valenzuela in the act of committing an offence. Furthermore, in violation of his procedural rights, he was detained unlawfully for approximately seven hours, he was tortured and he was not assigned a public defender in a timely manner.

Category III

24. The source notes that mandatory pretrial detention for certain offences is applied as a rule, not an exception, in violation of article 9 (3) of the Covenant. Mr. Méndez Valenzuela was charged with the offences of organized crime and carrying weapons intended solely for use by the army, navy and air force and was therefore forced to spend more than 10 years in pretrial detention waiting for a judgment to be handed down. By law, he was placed in pretrial detention automatically; no determination of whether the detention was appropriate and reasonable was ever made.

Category V

25. Lastly, the source maintains that under the Constitution, there is a distinction, contrary to articles 3 and 26 of the Covenant, between those who have access to alternatives to mandatory pretrial detention and those who do not. The distinction is based on a list of offences established by law; Mr. Méndez Valenzuela therefore has not enjoyed equal protection under the law.

Response from the Government

26. On 7 November 2018, the Working Group transmitted the allegations from the source to the Government. The Working Group requested the Government to provide detailed information about the case involving Mr. Méndez Valenzuela by 7 January 2019. It requested the Government to clarify the legal and factual grounds for his detention and explain how his detention was compatible with the international human rights obligations of Mexico. The Working Group also called upon the Government to ensure Mr. Méndez Valenzuela's physical and mental integrity.

Procedural background

27. The Government replied to the communication on 7 January 2019,¹ setting out the procedural background as follows.

28. On 22 January 2008, members of the Mexico State security forces placed Mr. Méndez Valenzuela and others at the disposal of the Office of the Attorney General of the Republic after confiscating firearms from them; this led to the opening of a preliminary investigation.

29. On 23 January 2008, an expert from the Office of the Attorney General of the Republic issued a medical evaluation stating that Mr. Méndez Valenzuela's injuries were not life-threatening and would heal within 15 days.

30. On 4 March 2008, Mr. Méndez Valenzuela's statement was recorded and criminal proceedings were brought against him and others for organized crime as an offence against public health and for carrying a firearm intended solely for use by the army, navy and air force.

31. The Government reports that, on 6 March 2008, the Fourth District Court for Federal Criminal Proceedings in Mexico State issued a warrant for the arrest of Mr. Méndez Valenzuela as requested by the Public Prosecution Service based on his suspected involvement in the offences of organized crime and carrying a firearm intended solely for use by the army, navy and air force.²

32. At 4 p.m. on 13 March 2008, a detention order was issued in respect of Mr. Méndez Valenzuela.

33. On 30 May 2013, the judge in the case convicted Mr. Méndez Valenzuela of the offences mentioned above and sentenced him to 17 years' imprisonment and a fine equivalent to 350 days' wages.

34. The convicted persons lodged an appeal (No. 251/2013), which was heard by the court that was first on the rota to hear it, namely the First Single-Judge Court of the Second Circuit. This court reduced the sentence to 16 years' imprisonment and a fine equivalent to 300 days' wages.

35. On 21 April 2016, Mr. Méndez Valenzuela filed an application for *amparo* and federal court protection with the Fourth Collegiate Criminal Court of the Second Circuit (application No. 92/2015). On 31 March 2016, the Collegiate Court decided to reject the application and to notify the Public Prosecution Service of the allegations of torture made by Mr. Méndez Valenzuela to allow for an investigation.

36. According to the Government, Mr. Méndez Valenzuela applied for a review of the decision and his application was considered by the First Chamber of the Supreme Court. It was deemed admissible and, on 5 October 2016, the Supreme Court decided to overturn the contested decision and call upon the Collegiate Court to reconsider the torture allegations in the light of constitutional doctrine.

¹ The Working Group has taken into account a document that was annexed to the Government's response. The annex is a memorandum, dated 12 December 2018, from the Second District Court for Federal Criminal Proceedings in Mexico State, which contains information on the proceedings brought against Mr. Méndez Valenzuela and confirms the Government's summary of the case. It appears that the Council of the Federal Judiciary requested the information for the purpose of responding to the Working Group's communication. The information includes an explanation of the warrants for the arrest and detention of Mr. Méndez Valenzuela, as well as other aspects of the case such as the initial reduction of the sentence by one year, the *amparo* application, the conclusions of the Supreme Court, Mr. Méndez Valenzuela's detention situation and an update on the investigation into his allegations of torture.

² According to the Government, the offence of organized crime and the applicable penalty are established in articles 2 (I) and 4 (I) (b), respectively, of the Federal Act on the Prevention of Organized Crime, read in conjunction with article 13 (III) of the Federal Criminal Code. The offence of carrying a firearm intended solely for use by the army, navy and air force and the applicable penalty are established in article 83 (II) and article 11 (b) and (c) of the Federal Firearms and Explosives Act, read in conjunction with article 13 (III) of the Federal Criminal Code.

37. In compliance with this ruling, the Fourth Collegiate Court granted the remedy of *amparo* in its decision of 6 April 2017 concerning direct *amparo* application No. 92/2015 and called upon the First Single-Judge Court of the Second Circuit based in Mexico City to:

(a) Declare null and void the contested judgment handed down on 11 December 2013 in connection with appeal No. 251/2013;

(b) Hand down another decision, overturning the first instance judgment and ordering the judge in the case to review the proceedings, starting from the phase immediately preceding the order to conclude the investigation;

(c) Order the Public Prosecution Service to open an investigation in order to determine whether the allegations of torture were true;

(d) Order that the relevant psychological and medical examinations be carried out, in accordance with the Istanbul Protocol, and order the gathering of whatever evidence might be needed in order to establish the facts, so that it could be used during the trial to determine whether or not Mr. Méndez Valenzuela's confession should be considered to have probative value, when the final judgment was handed down;

(e) Ensure that any penalties imposed in the final judgment that was to be handed down once the above steps had been taken were no more severe than the penalties initially imposed, since, in line with the principle of the prohibition of *reformatio in pejus*, neither *amparo* proceedings nor the granting of *amparo* can ever have an effect contrary to that intended by the complainant.

38. The Government reports that, in accordance with the decision granting *amparo*, the First Single-Judge Court of the Second Circuit handed down a decision on 31 May 2017 in which it ordered that the sentence of 30 May 2013 be revoked, solely in respect of Mr. Méndez Valenzuela, and that the proceedings be reviewed up to the phase immediately preceding the order to conclude the investigation.

39. The Government notes that these measures were taken so that the examination of Mr. Méndez Valenzuela's allegations of torture and the significance of those allegations could be evaluated. Mr. Méndez Valenzuela is currently awaiting trial because there has been no final judgment in which he has been sentenced to a specific penalty, since the judgments that were handed down were challenged and then overturned. He is waiting for the relevant expert evaluation based on the Istanbul Protocol to be submitted, to allow for a new decision to be handed down.

Alleged acts of torture

40. According to the Government, when the arrest warrant was executed and Mr. Méndez Valenzuela was taken to Federal Social Rehabilitation Centre No. 1, his health was not found to have changed, as confirmed by the initial physical and psychological evaluation that was carried out on 10 March 2008. The Government reiterates that the criminal courts are waiting for the submission of an expert evaluation based on the Istanbul Protocol in order to be able to determine whether Mr. Méndez Valenzuela was a victim of torture.

41. Independently of the aforementioned process, the Office of the Special Prosecutor for the Investigation of Torture of the Office of the Assistant Attorney General for the Investigation of Federal Crimes is conducting a preliminary investigation into the alleged torture of Mr. Méndez Valenzuela; this investigation is still under way.

42. In addition, an investigation was opened when Mr. Méndez Valenzuela filed a complaint alleging acts of torture. When the Mexico State Office of the Special Prosecutor for the Investigation of Torture was set up, it was given the responsibility for conducting this investigation.

43. The Government adds that, as part of the investigation, information was requested from the Directorate General of Prevention and Social Reintegration of Mexico State. In addition, the investigative police were instructed by official letter to conduct an interview with Mr. Méndez Valenzuela, as the complainant; the resulting report, which was submitted on 13 December 2013, is also being examined.

Detention of Mr. Méndez Valenzuela

44. According to the Government, the detention of Mr. Méndez Valenzuela is lawful and his rights have been respected at all times. His detention has been reviewed by independent and impartial courts of first and second instance and even by the Supreme Court, which is the highest court in the country.

45. Mr. Méndez Valenzuela has had access to a proper defence, as demonstrated by the effectiveness of his appeals, which were duly considered, and it is because they have been effective that his case remains pending.

46. Given the seriousness of the offences with which he has been charged, Mr. Méndez Valenzuela must be detained throughout the trial, under article 19 of the Constitution.³

47. Lastly, the Government notes that the detention of Mr. Méndez Valenzuela cannot be considered arbitrary on the grounds of discrimination, since it cannot be concluded that he was subject to any distinction, exclusion, restriction or preference. There was therefore no nullification or impairment of the recognition, enjoyment or exercise of rights on an equal basis with others.

Additional comments from the source

48. In additional comments, the source refers to the Government's claim that the physical and psychological evaluation carried out on 10 March 2008 upon Mr. Méndez Valenzuela's arrival at the federal prison showed that his health had not changed. This evaluation, according to the source, contradicts an earlier medical report, also mentioned by the Government, which was drawn up on 23 January 2008, immediately after Mr. Méndez Valenzuela had been deprived of his liberty, and in which it had been noted that he did have injuries. Moreover, other expert evaluations have corroborated the allegations of torture.

49. The source reiterates that the possibility that torture may have occurred has a direct bearing on the right of all persons not to be compelled to testify against themselves or to confess guilt, under international standards on the right to a fair trial. Mr. Méndez Valenzuela was allegedly forced, by means of torture, to sign a confession of guilt. The alleged acts of torture are directly linked to the arbitrary detention.

50. According to the source, the investigations into the torture allegations have not yet led to the prosecution of any officers; this lack of action is a failing on the part of the State, as there are clear indications that acts of torture were committed. The Supreme Court ordered a review of the criminal proceedings on the grounds that torture may have occurred and that the evidence may therefore be unlawful. The source reiterates that, since the review began, examinations have already been carried out and have shown that the evidence substantiates the complaint. However, the judge has not yet ruled on the case and Mr. Méndez Valenzuela remains on trial and deprived of his liberty.

51. The source refers to the decision to reduce the sentence from 16 years' imprisonment to slightly more than 10 years' imprisonment. The sentence completion date was set as 2 March 2018. Mr. Méndez Valenzuela is still being detained in a federal prison. Deprivation of liberty after the completion of a sentence is clearly arbitrary, as it has no legal basis. It is not possible for a longer prison sentence to be imposed in any new judgment that is handed down as a result of the review of the criminal proceedings, given the prohibition of *reformatio in pejus*, which has already been mentioned by the Government.

52. Furthermore, Mr. Méndez Valenzuela is being held in pretrial detention, even though he need not be detained for the criminal proceedings to be conducted. It would have been appropriate for him to have been released once he had served his sentence and, in any event, not to have been detained while the proceedings were conducted. Mr. Méndez Valenzuela is being detained on the basis of a decision in which he was found to have been a victim of violations of the rules of due process and his rights were asserted. Had it not

³ The relevant part of article 19 reads as follows: "Judges shall order mandatory pretrial detention in cases of organized crime, intentional homicide, rape, kidnapping, trafficking in persons, violent crimes involving the use of weapons or explosives, and serious offences against national security, the free development of the person and public health, as determined by law."

been for the order to review the proceedings, Mr. Méndez Valenzuela would have been released.

53. The source recalls that, under article 19 of the Constitution, Mr. Méndez Valenzuela must remain in mandatory pretrial detention until a final judgment is handed down. Mandatory pretrial detention is a violation of numerous human rights standards. Since none of the judgments handed down in respect of Mr. Méndez Valenzuela have been final, he is still in mandatory pretrial detention. As a result, Mr. Méndez Valenzuela has spent over 10 years in prison without having been found criminally responsible. This system, in which persons subject to mandatory pretrial detention are treated differently from others, is discriminatory.

54. Lastly, the source notes that it is questionable whether Mr. Méndez Valenzuela was arrested in flagrante delicto, given the irregularities relating to his detention, such as the torture inflicted in the hours after he was deprived of his liberty. Those irregularities reveal a degree of arbitrariness in the actions of the authorities and cast doubt on the claim that he was arrested in flagrante delicto. It can therefore be concluded that there was no legal basis for his detention, since it was based on a case of flagrante delicto that was not actually any such thing.

Discussion

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

56. In determining whether the deprivation of liberty is arbitrary, the Working Group has regard to the principles of dealing with evidentiary issues that are established in its jurisprudence. If the source has made a *prima facie* case for violations of international standards on personal liberty and arbitrary detention, the burden of disproving the allegations should be understood to rest upon the State. Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

57. According to the source, on 22 January 2008, Mr. Méndez Valenzuela was not caught committing an offence and no legal basis for his arrest was invoked. However, the authorities later claimed that the arrest was made in flagrante delicto, because drugs and weapons were allegedly being transported in the vehicle in which he was travelling. In its response, the Government did not counter this allegation; it merely noted that the Fourth District Court issued a warrant on 6 March 2008 for the arrest that had taken place on 22 January 2008.

58. Given that the Government has not provided information on the question of whether the arrest was made in flagrante delicto, and since it has confirmed that the arrest warrant was issued over a month after Mr. Méndez Valenzuela was placed in detention, the Working Group considers that there was no legal basis for his detention. Article 9 (1) of the Covenant stipulates that no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, in order for deprivation of liberty to be considered lawful and not arbitrary, previously established procedures and guarantees must be observed. In this case, Mr. Méndez Valenzuela was arrested without a warrant or any other legal basis, in violation of article 9 (1) of the Covenant. Deprivation of liberty cannot be considered to have a legal basis simply because it is permitted by law; the authorities must invoke the law in question and apply it to the case by means of an arrest warrant, at the time when the arrest is made.⁴

59. An argument that there is no legal basis for keeping Mr. Méndez Valenzuela in detention has also been made, since he completed his prison term on 2 March 2018. Nonetheless, he is currently in pretrial detention and has spent over 11 years in custody. Mr. Méndez Valenzuela is still in detention because he lodged appeals claiming that his detention was unlawful and that the evidence against him had been obtained through torture. As a result, the proceedings against Mr. Méndez Valenzuela are being reviewed and the initial judgment has been overturned to allow for his case to be reconsidered. Had the Supreme Court not requested a review of the proceedings, Mr. Méndez Valenzuela would

⁴ Opinions No. 53/2018 and No. 36/2018.

have been released already.⁵ The source emphasizes that whatever sentence is imposed on Mr. Méndez Valenzuela following the reconsideration of his case will have already been served, given that he has been in prison since 2008.

60. In its response, the Government states that Mr. Méndez Valenzuela is currently in detention because a final judgment sentencing him to a specific penalty has not yet been handed down, since the earlier judgment was overturned as a result of his successful appeals. He is therefore waiting for his allegations of torture to be examined by an expert, in accordance with the Istanbul Protocol, and for a judgment to be handed down, based on the results of that examination. In the document attached to the Government's response, the Second District Court for Federal Criminal Proceedings in Mexico State explains the steps that must be taken in order to obtain expert reports that are in line with the Istanbul Protocol and notes that the entire process must be completed before Mr. Méndez Valenzuela can be examined.

61. The Working Group recognizes that the courts, particularly the Supreme Court, have considered Mr. Méndez Valenzuela's case carefully and have given him a major opportunity by agreeing to reconsider his allegations of torture. This is a significant step towards ensuring that officers responsible for detention in the criminal justice system are held accountable. The Working Group also agrees that it is necessary to gather all the relevant information, including by following the procedures and obtaining the reports required under the Istanbul Protocol, before a full and accurate assessment of the torture allegations can be made. However, the Government has not provided a satisfactory explanation as to why Mr. Méndez Valenzuela must remain in detention while this information is gathered, as he has completed his initial sentence, and any new sentence should take into account the substantial amount of time already served.⁶ The Working Group considers this case to be a clear example of detention without a legal basis, as expressly mentioned in category I of its categories of arbitrary detention, which covers cases where 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".⁷

62. The Working Group considers that the detention of Mr. Méndez Valenzuela has no legal basis and is therefore arbitrary under category I.

63. The source also maintains that the detention of Mr. Méndez Valenzuela is arbitrary under category III because his right to a fair trial has been violated.

64. The source claims that, after Mr. Méndez Valenzuela was arrested, a photograph of him was disseminated via the media by the Office of the Attorney General of the Republic and was shown on television as though he were a member of the criminal group La Familia Michoacana. According to the source, the authorities invented the alias El Chester for him as part of their strategy of publicly announcing daily arrests of suspected members of organized crime groups. The Government did not specifically address this allegation in its response; it merely stated generally that the detention of Mr. Méndez Valenzuela was lawful and that his rights had been respected at all times. Consequently, based on the available information, which has not been contested by the Government, the Working Group believes that the photograph of Mr. Méndez Valenzuela was disseminated as alleged.

65. The Working Group considers that the way in which the photograph of Mr. Méndez Valenzuela was presented to the public jeopardized his right to be presumed innocent. The accuracy of the allegations made against Mr. Méndez Valenzuela, including the claim that he was an active member of an organized crime group, should have been determined by a

⁵ The Working Group notes that, under article 5 (1) of the Covenant, no State may engage in any activity aimed at the destruction of the rights and freedoms recognized in the Covenant, including the right not to be subjected to arbitrary detention or torture and the right to an effective remedy. The Working Group considers that a person should not be denied the right to liberty for having exercised the right to challenge his or her detention and to seek redress for alleged torture.

⁶ The Government notes in its response that the Fourth Collegiate Circuit Court ruled on 6 April 2017 that the case must be reconsidered in the light of the prohibition of *reformatio in pejus* (an appellant cannot be put in a worse position than if he or she had not appealed). It is therefore likely that any new sentence will not be heavier than the one already imposed, which Mr. Méndez Valenzuela will have already served in full.

⁷ A/HRC/36/38, para. 8 (a).

court; the allegations should not have been relayed by the media as proven facts. The Working Group stands by this principle even though Mr. Méndez Valenzuela signed a confession admitting that he belonged to the criminal group in question. It is for a court to assess the probative value of a confession and to determine whether it was made voluntarily and whether it proves that the accused was involved in an offence, especially as Mr. Méndez Valenzuela claims that the confession was obtained through torture.

66. The Working Group agrees with the Human Rights Committee that public authorities should refrain from prejudging the outcome of a trial, especially by abstaining from making public statements affirming the guilt of the accused. The Committee also stresses that the media should avoid news coverage undermining the presumption of innocence.⁸ The Working Group therefore considers that Mr. Méndez Valenzuela was deprived of his right to be presumed innocent, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

67. The source claims that Mr. Méndez Valenzuela signed a confession after being tortured and told that members of his family would be killed. The torture reportedly included blindfolding him, hitting him in the ribs and kidneys, pouring water over his nose and suffocating him with a plastic bag, while threatening to kill him. At the Office of the Assistant Attorney General for the Investigation of Organized Crime, he was allegedly subjected again, for two or three hours, to similar forms of torture. He was also told that his companions, who had been arrested at the same time as he had been, had confessed. As a result, Mr. Méndez Valenzuela signed the papers containing a confession without reading them. The Government did not refer to the confession in its response; however, it mentioned various ongoing investigations into the alleged torture.

68. As emphasized by the Human Rights Committee, the burden is on the State to prove, beyond reasonable doubt, that statements made by the accused have been given of their own free will and without any direct or indirect physical or psychological pressure from the investigating authorities.⁹ In the present case, the Supreme Court has acknowledged that the burden of proof rests upon the authorities. The Working Group considers that there are serious doubts as to whether Mr. Méndez Valenzuela's confession was made voluntarily.

69. The Working Group considers that Mr. Méndez Valenzuela has been detained for over 11 years without the Government having proven that his confession was made voluntarily and that the proceedings against him have therefore been fundamentally unfair. Mr. Méndez Valenzuela's right not to be compelled to testify against himself or to confess guilt, under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (g) of the Covenant, has been violated. Safeguarding the right not to be compelled to testify against oneself or to confess guilt protects not only the individual but also the interests of society in general, as it ensures that the judicial process remains trusted and effective and preserves the credibility of evidence. In view of the seriousness of the allegations of torture and forced confession, the Working Group has decided to refer this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

70. The source also claims that Mr. Méndez Valenzuela did not have access to legal assistance until almost seven hours after he was arrested, and only after he had signed the confession. The Government did not specifically address this allegation in its response; it merely stated generally that Mr. Méndez Valenzuela exercised his right to a proper defence during the proceedings, as demonstrated by the many appeals that he lodged. In the absence of specific information from the Government, the Working Group considers that Mr. Méndez Valenzuela did not have access to a lawyer when he was initially questioned by the authorities and that he made a confession without prior legal assistance. The lack of access to a lawyer is particularly serious in this case, as Mr. Méndez Valenzuela was initially sentenced to 17 years' imprisonment, which is a significant prison term.

71. All persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their

⁸ General comment No. 32 (2007) of the Human Rights Committee on the right to equality before courts and tribunals and to a fair trial, para. 30.

⁹ Ibid., para. 41. See also, for example, opinions No. 53/2018, para. 77, No. 52/2018, para. 79, No. 17/2017, para. 42, No. 10/2016, para. 48, and No. 1/2016, para. 40, and A/56/156, para. 39 (j).

apprehension, and such access should be provided without delay.¹⁰ In this case, the delay in providing access to legal assistance violated Mr. Méndez Valenzuela's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant. The Working Group also considers that confessions made in the absence of legal counsel are not admissible as evidence in criminal proceedings.¹¹

72. The Working Group is alarmed by the source's assertion that, when Mr. Méndez Valenzuela was allowed to speak to his lawyer, the lawyer told him that nothing could be done to defend him because he had already signed a confession. Although Mr. Méndez Valenzuela appears to have had access to other lawyers during the proceedings, the Working Group considers that there are serious doubts as to whether he received effective legal assistance from his first lawyer. As the Working Group stipulated 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, effective legal aid should be provided promptly at all stages of the deprivation of liberty.¹²

73. The Government has acknowledged that Mr. Méndez Valenzuela remains in pretrial detention because the offences of which he is accused are offences for which detention is automatic, under article 19 of the Constitution. Mr. Méndez Valenzuela is being kept in pretrial detention while he waits for the outcome of an investigation into his allegations of torture and a final judgment in his case.

74. The Working Group considers it important to reiterate that automatic pretrial detention is incompatible with the Government's obligations under international human rights law. The Working Group examined this issue carefully in its opinion No. 1/2018 and concluded that mandatory pretrial detention violates article 9 (3) of the Covenant.¹³ This article states that pretrial detention should be the exception rather than the rule and that it should be based on an individualized determination that it is reasonable and necessary in the case concerned.¹⁴

75. The Working Group considers that automatic pretrial detention deprives the detainee of the right to seek alternatives to detention, such as bail, in violation of the right to be presumed innocent, which is enshrined in article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. Imposing pretrial detention for specific offences is contrary to the principle of the presumption of innocence, as the persons facing criminal charges are detained automatically, without balanced consideration of non-custodial alternatives. It also deprives judges of one of their core responsibilities as members of independent and impartial tribunals, namely, the task of assessing the necessity and proportionality of detention in each case. The Working Group respectfully invites the Government to take steps to amend the constitutional and other provisions relating to automatic pretrial detention in order to bring them into line with the State's obligations under the Covenant.

76. Lastly, the information provided by the source shows that Mr. Méndez Valenzuela was kept in pretrial detention from his arrest on 22 January 2008 to his initial sentencing to 17 years' imprisonment on 30 April 2012, that is to say, for more than four years.¹⁵ It is hard to understand why it was necessary to keep him in pretrial detention for so long, given that – according to the source, whose statement is not contested by the Government – the

¹⁰ 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, principle 9 and guideline 8 (A/HRC/30/37). See also general comment No. 35 (2014) of the Human Rights Committee on liberty and security of person, para. 35.

¹¹ Opinions No. 1/2014, para. 22, and No. 40/2012, para. 48. See also E/CN.4/2003/68, para. 26 (e).

¹² A/HRC/30/37, principle 9 and guideline 8.

¹³ See opinions No. 53/2018, No. 16/2018, No. 24/2015 and No. 57/2014; see also A/HRC/19/57, paras. 48–58, and OL MEX 18/2018.

¹⁴ General comment No. 35, para. 38.

¹⁵ According to the Government's response, this period was even longer. The Government stated that Mr. Méndez Valenzuela was arrested on 22 January 2008 and was not sentenced until 30 May 2013, more than five years after his arrest.

authorities claimed that he was arrested in flagrante delicto. The Working Group considers that this period of pretrial detention, prior to his initial sentencing, was unacceptably long. Furthermore, as a result of the *amparo* proceedings brought before the Supreme Court, Mr. Méndez Valenzuela's sentence was revoked and his legal status has yet to be determined, even though he has already spent over 11 years in detention. Once again, the Working Group considers that the judicial proceedings in this case have taken an unacceptably long time. As the Human Rights Committee has stated, the right to be tried without undue delay is designed to avoid keeping persons in a state of uncertainty about their fate for too long. All stages of criminal proceedings, whether in first instance or on appeal, must take place without undue delay.¹⁶ The Working Group therefore considers that Mr. Méndez Valenzuela's right to be tried within a reasonable time and without undue delay, under articles 9 (3) and 14 (3) (c) of the Covenant, was violated during his first four years of pretrial detention and later, during his detention pending a final judgment.

77. For these reasons, the Working Group concludes that the violations of the right to a fair trial are of such gravity as to give Mr. Méndez Valenzuela's deprivation of liberty an arbitrary character under category III.

78. The source also claims that under the Constitution, there is a distinction, based on a list of offences for which pretrial detention is automatic, between accused persons who have access to alternatives to pretrial detention and those who do not. As a result, Mr. Méndez Valenzuela, who was charged with offences for which pretrial detention was automatic, did not enjoy equal protection under the law. In its reply, the Government contends that, according to the criteria applied by the Human Rights Committee, Mr. Méndez Valenzuela was not subject to any distinction, exclusion, restriction or preference that had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of his rights.

79. In its opinion No. 1/2018, the Working Group found that the constitutional provisions allowing for automatic pretrial detention create two categories of accused person: those charged with offences that do not automatically require detention, who can benefit from alternatives such as bail, and those who, like Mr. Méndez Valenzuela, are charged with criminal offences that preclude the use of such alternatives. The Working Group reiterates that this distinction discriminates against some accused persons in a manner that ignores the equality of human beings and is based on their "status" (that is, as persons accused of an offence that precludes the use of non-custodial alternatives), a basis for discrimination prohibited under articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.¹⁷ The Working Group is therefore of the view that the facts of the present case disclose a violation that falls within category V.

80. The Working Group wishes to make some final observations on the detention of Mr. Méndez Valenzuela. The source has provided information showing that Mr. Méndez Valenzuela suffered injuries after his arrest. These injuries included the dislocation of his left shoulder when he was allegedly pushed as he was getting out of a helicopter while handcuffed and blindfolded. According to the source, Mr. Méndez Valenzuela continues to have problems with his left shoulder and suffer from the effects of other forms of physical and psychological trauma. He was examined by independent experts in 2017 and 2018 in accordance with the Istanbul Protocol. The Government notes in its response that, on 23 January 2008, a forensic physician from the Office of the Attorney General of the Republic concluded that Mr. Méndez Valenzuela's injuries were not life-threatening and would heal within 15 days. The Government also refers to an examination carried out on 10 March 2008, when Mr. Méndez Valenzuela was transferred to Federal Social Rehabilitation Centre No. 1, which showed that his health had not changed. Although Mr. Méndez Valenzuela's allegations of torture are still being investigated, the Working Group reiterates that he has already spent more than 11 years in detention and that he has served his initial sentence in full. The Working Group urges the Government to release Mr. Méndez Valenzuela immediately and unconditionally and to ensure that he receives appropriate physical and psychological care.

¹⁶ General comment No. 32, para. 35.

¹⁷ See also opinion No. 75/2018.

81. The Working Group notes the delays allegedly encountered by Mr. Méndez Valenzuela when challenging the lawfulness of his detention and submitting allegations of torture. In particular, as mentioned above, Mr. Méndez Valenzuela has been in detention for more than 11 years and his legal status, including the applicable sentence, has yet to be determined. According to the source, the authorities imposed various procedures and created obstacles in order to delay Mr. Méndez Valenzuela's release and clearly intended to harm him by doing so.

82. The Working Group acknowledges that some of the delays were probably a consequence of the fact that Mr. Méndez Valenzuela submitted various *amparo* applications. However, some of the delays are inexplicable, and there seem to have been greater bureaucratic obstacles than would normally be expected in a busy criminal justice system, including: (a) the failure of the Mexico State Human Rights Commission and the National Human Rights Commission to provide meaningful assistance when a complaint was filed in relation to Mr. Méndez Valenzuela's case; (b) the refusal of the Fourth Court of Toluca to use the independent expert evaluation obtained by Mr. Méndez Valenzuela's family on 8 December 2017, which meant that additional examinations had to be carried out in May and October 2018; (c) the judge's sudden announcement on 27 March 2018 that the case was outside her jurisdiction and her request that it be heard in Sinaloa; and (d) the fact that, at the time the complaint was submitted to the Working Group, more than five months had passed without the courts in Sinaloa having provided updated information on Mr. Méndez Valenzuela's case.

83. It seems to the Working Group that some of the authorities responsible for detention have not treated the situation of Mr. Méndez Valenzuela – a young man kept in detention after the completion of his initial sentence – with the urgency that it deserves or in a manner that would guarantee his right to an effective remedy in accordance with article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. In view of the circumstances, the Working Group has decided to refer this case to the Special Rapporteur on the independence of judges and lawyers.

84. This case is one of many submitted to the Working Group in the last five years in connection with arbitrary deprivation of liberty in Mexico.¹⁸ The Working Group is concerned that this may be indicative of a systemic problem of arbitrary detention in Mexico which, if it continues, 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.¹⁹

85. Lastly, the Working Group would welcome the opportunity to visit Mexico in order to help the Government to address the issue of arbitrary deprivation of liberty. Given that a significant length of time has elapsed since its last visit to Mexico, in November 2002, the Working Group deems it an appropriate time to conduct another visit to the country. Since Mexico is currently a member of the Human Rights Council and recently (in November 2018) underwent a review of its human rights record as part of the third cycle of the universal periodic review, it would be appropriate for the Government to extend an invitation. The Working Group notes that the Government issued a standing invitation to all special procedure mandate holders in March 2001 and looks forward to receiving a positive response to its country visit requests of 15 April 2015, 10 August 2016 and 9 February and 18 December 2018.²⁰

Disposition

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

The deprivation of liberty of Rafael Méndez Valenzuela, being in contravention of articles 2, 7, 9, 10 and 11 (1) of the Universal Declaration of

¹⁸ Opinions No. 75/2018, No. 53/2018, No. 16/2018, No. 1/2018, No. 66/2017, No. 65/2017, No. 24/2017, No. 23/2017, No. 58/2016, No. 17/2016, No. 56/2015, No. 55/2015, No. 19/2015, No. 18/2015, No. 23/2014, No. 58/2013 and No. 21/2013.

¹⁹ Opinion No. 47/2012, para. 22.

²⁰ The Government stated that it was unable to schedule a visit for 2018 on account of its other international commitments.

Human Rights and articles 2 (1), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

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

88. The Working Group considers that, taking into account all the circumstances of the case, including the risk of further damage to Mr. Méndez Valenzuela's physical and mental health, the appropriate remedy would be to release Mr. Méndez Valenzuela immediately and accord him an enforceable right to compensation and other reparation, in accordance with international law.

89. In this regard, the Working Group notes the interpretative declaration 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.²¹

The Working Group notes that the State's domestic law establishes additional grounds for compensation.

90. The Working Group urges the Government to conduct a full and independent investigation into the circumstances surrounding the arbitrary detention of Mr. Méndez Valenzuela, including the allegations of torture, and to take appropriate measures against those responsible for the violation of his rights.

91. The Working Group requests the Government to harmonize its laws, especially article 19 of the Constitution, with the commitments made by Mexico under international human rights law, taking into account the conclusions set forth in the present opinion.

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

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

Follow-up procedure

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

95. 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

²¹ Multilateral Treaties Deposited with the Secretary-General, chap. IV (4).

whether further technical assistance is required, for example through a visit by the Working Group.

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

97. The Working Group notes that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²²

[Adopted on 26 April 2019]

²² Human Rights Council resolution 33/30, paras. 3 and 7.