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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. 16/2019, concerning Carlos Ramón Brenes Sánchez (Nicaragua)

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 resolution 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 Nicaragua a communication concerning Carlos Ramón Brenes Sánchez. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards the deprivation of liberty 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 and 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, spelled out 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); and
 - (e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Carlos Ramón Brenes Sánchez is a Nicaraguan national who was born in 1955. Mr. Brenes is a retired army general and former member of the Sandinista National Liberation Front. He suffers from diabetes, high blood pressure and related ailments and is reportedly currently detained at La Modelo prison.

Arrest, arraignment and detention

5. According to the source, Mr. Brenes was arrested on 28 August 2018 at the Peñas Blancas border crossing when he was on his way to Costa Rica for a medical check-up. The source indicates that the circumstances of the arrest could not be clarified, as Mr. Brenes has not been able to communicate properly with his defence counsel. His family learned of his arrest through social media and government communications, which portrayed him as a convicted criminal, damaging his reputation and undermining the presumption of his innocence.

6. The source reports that five days prior to the arrest, on 23 August 2018, the Public Prosecution Service allegedly brought charges against Mr. Brenes. However, Mr. Brenes was never duly notified of any charges. The source further reports that, at the time of the arrest, Mr. Brenes was not informed of the reasons for his arrest or of the charges against him.

7. The source also indicates that, on the day of the arrest, 28 August 2018, at 11 a.m., the National Police came to Mr. Brenes' home and conducted an extensive search of the building without a warrant or other authorization from a judge. The purported purpose of the raid was to search for weapons, which were not found.

8. At 7 p.m. that same day, Mr. Brenes' family learned that he had been taken to El Chipote prison. According to the source, he was not given a medical examination as required upon admission. The following day, his family took food and medicines to the prison and handed them over to officials posted outside the facility. The officials were given a 15-day supply of medication.

9. On 29 August 2018, Mr. Brenes was brought before a judge in Managua for a preliminary hearing and charged with terrorism, organized crime, obstruction of public services and aggravated criminal damage. His lawyer, appointed at his family's request, was only allowed to communicate with her client in the presence of the judge and prosecutors. The defendant and his counsel were not given the opportunity to meet prior to the hearing to prepare a proper defence. Moreover, Mr. Brenes' family was not allowed to enter the courtroom or attend the arraignment hearing.

10. The source reports that, when the family arrived at the prison to bring Mr. Brenes food on 31 August 2018, they learned that he had been transferred to La Modelo prison. On 1 September, the family went to La Modelo and confirmed that he was being held there, in the prison's maximum-security unit, but were not allowed to visit him.

11. On 3 September 2018, after a wait of more than four hours, two members of Mr. Brenes' family were allowed to visit him in prison for the first time. However, the source reports that they suffered physical and psychological abuse when they were searched on entry, and that they were photographed and videotaped during the visit. The source further notes that, during this visit, Mr. Brenes indicated that some of the medications he needed were not being given to him regularly and that he was being held in total isolation and subjected to intimidation and ill-treatment by the authorities.

12. During the visit, his family members noted a distinct difference in the treatment afforded to prisoners held in the maximum-security unit, political prisoners like Mr. Brenes, and ordinary prisoners. The latter enjoy longer visiting hours and more privacy and are allowed to receive more food and other goods from their relatives.

13. According to the source, Mr. Brenes continues to be held in isolation and is only allowed outside once a week for one hour. He has only been allowed two family visits. Mr.

Brenes has still not been seen by a doctor, although the charging documents claim that he was examined. He has been denied access to his lawyer and has not been given adequate time and facilities to prepare his defence. The intended defence witnesses have withdrawn for fear of reprisals, having declined to give testimony after hearing about threats to other witnesses in similar cases.

14. The source alleges that the detention of Mr. Brenes is arbitrary because it lacks any legal basis (category I); was a result of the exercise of his human rights (category II); and occurred in violation of the international norms relating to the right to a fair trial and due process (category III).

Category I

15. The source argues that there is no legal basis for Mr. Brenes' detention, since the facts of the case – the reading out of a statement in which he called for respect for the law and the application of constitutional norms – do not constitute an offence justifying a person's arrest under the applicable legislation.

16. The source points out that the charges brought by the Public Prosecution Service do not meet the requirements laid down in article 77 (5) of the Code of Criminal Procedure, namely the need for a "clear, precise, specific and detailed account of the offence, the suspect's involvement therein, the possible legal classification of the offence and the supporting evidence available at the time". The source notes that the charge sheet does not list the individual alleged offences, nor does it make clear how Mr. Brenes was involved in each of them, although details of his involvement in each alleged offence should have been presented. According to the source, the judge should not have admitted the charges, but instead should have ordered the victim's immediate release.

Category II

17. The source points out that Mr. Brenes has been detained for maintaining a critical stance vis-à-vis the Government. Since he left the Sandinista National Liberation Front in the 1990s, Mr. Brenes has openly criticized and opposed the Government's policies, corruption and human rights violations.

18. On 16 May 2018, Mr. Brenes read out a statement entitled "Justice, Democracy and Peace" in Monimbó Plaza, in Masaya, on behalf of retired Sandinista People's Army officers, activists and former combatants. In the document, the signatories set forth their position in regard to the profound crisis triggered by the peaceful popular uprising in the country. The source stresses that, although Mr. Brenes has criticized the Government's policies, corruption and human rights violations, he has never participated actively in anti-government protests.

19. The source states that there are reasons for believing that Mr. Brenes' detention may be linked to an arrest warrant issued for one of his relatives, who was a member of the Sandinista Renewal Movement and was present when the statement was read out. On the day of Mr. Brenes' arrest, his daughter was told by a lawyer close to the Government that "it was your uncle they were after".

Category III

20. The source alleges that Mr. Brenes was never formally notified that he had been charged with the crimes of terrorism, organized crime, obstruction of public services and aggravated criminal damage, and that proceedings had been instituted against him for those crimes. Hence, Mr. Brenes was not officially informed of the charges prior to his detention.

21. Furthermore, the source notes that the judiciary and the Ministry of the Interior, through the National Police and the prison system, have failed to respect the right to a presumption of innocence by publicly treating and depicting Mr. Brenes as a convicted criminal before a public oral trial had been concluded, or even started.

22. The source further notes that Mr. Brenes' right to a defence has been violated, since his lawyer has not been granted access to her client to provide legal representation and assistance. According to the source, there has also been a violation of article 26 (4) of the

Constitution of Nicaragua, which stipulates that all persons have the right to be informed of all information that the State authorities have compiled on them and of the reasons why such information has been compiled. From the moment the National Police launched the investigation, and while the investigation was ongoing, Mr. Brenes should have been informed of the specific offences of which he was accused so that he could refute the charges, submit evidence and prepare his defence.

Response from the Government

23. On 7 November 2018, the Working Group transmitted the allegations set out in the preceding paragraphs to the Government. In accordance with paragraph 15 of its methods of work, the Working Group requested the Government to furnish all available information on the case and the allegations within 60 days from the date of the transmittal of the communication. In accordance with paragraph 16, if the Government desires an extension of the time limit, it may be granted a further period of a maximum of one month in which to reply.

24. The deadline to respond expired on 7 January 2019, but the Working Group did not receive a response from the Government of Nicaragua.

Discussion

25. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

26. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present matter, the Government has chosen not to challenge the allegations made by the source.

Category I

27. The Working Group notes that anyone who is arrested should be informed at that time of the reasons for the arrest¹ and of the possible judicial avenues for challenging the unlawfulness of the deprivation of liberty.² Furthermore, all persons deprived of their liberty should, upon apprehension, be promptly informed of their right to legal assistance by counsel of their choice.³ The Working Group also recalls that incommunicado detention violates individuals' rights to have access to counsel of their choice, to be brought before a judge promptly and to challenge the unlawfulness of their detention before a judge. The Working Group therefore considers that incommunicado detention inherently violates article 9 of the Universal Declaration of Human Rights and article 9 (3) of the International Covenant on Civil and Political Rights.⁴

28. The Working Group notes that, according to the information received from the source, which was not refuted by the Government, Mr. Brenes was arrested on 28 August 2018 without being informed of the reasons for his arrest or, subsequently, of the charges against him, although the Public Prosecution Service had reportedly brought charges against Mr. Brenes five days before the arrest. The Working Group has received no information from the Government indicating that Mr. Brenes was apprehended in *flagrante delicto* or pursuant to a duly exhibited arrest warrant. Consequently, the Working Group considers the detention of Mr. Brenes to be arbitrary under category I.

¹ International Covenant on Civil and Political Rights, article 9 (2).

² 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 (A/HRC/30/37, annex), Principle 7 (Right to be informed).

³ *Ibid.*, Principle 9 (Assistance by legal counsel and access to legal aid).

⁴ Opinion No. 53/2016, para. 47.

Category II

29. In order to determine whether the deprivation of liberty of Mr. Brenes resulted from the exercise of the rights and freedoms guaranteed in the Universal Declaration of Human Rights, the Working Group recalls that, in accordance with its established practice, all persons have the right to freedom of expression, which includes the right to impart information and ideas of all kinds, either orally or through any other media of their choice. The Working Group further recalls that the exercise of this right may be subject to restrictions expressly provided by law which are necessary to ensure respect for the rights or reputation of others, or for the protection of national security, public order, or public health or morals.⁵

30. The Working Group shares the view of the Human Rights Committee that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.⁶ These two freedoms, as reflected in articles 18 and 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, provide the basis for the full enjoyment of a wide range of other human rights, such as the right to freedom of assembly and association, and for the exercise of the right to political participation set forth in articles 20 and 21 of the Universal Declaration of Human Rights and articles 21, 22 and 25 of the Covenant.⁷

31. The Working Group recognizes the importance of the right to freedom of opinion. No Government should infringe a person's other human rights as a result of the opinions – political, scientific, historical, moral or religious – expressed by or attributed to that person. In the view of the Working Group, criminalizing the expression of an opinion is incompatible with the Universal Declaration of Human Rights and the Covenant. According to the Human Rights Committee, this means that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of the Covenant. Any form of effort to coerce the holding or not holding of any opinion is prohibited.⁸

32. The Working Group received information from the source, which was not refuted by the Government, according to which, on 16 May 2018, Mr. Brenes read out a declaration entitled "Justice, Democracy and Peace" in Monimbó Plaza, in Masaya, on behalf of retired Sandinista People's Army officers, activists and former combatants. In the document, the signatories set forth their position vis-à-vis the profound crisis triggered by the peaceful popular uprising in the country. Moreover, since the 1990s, Mr. Brenes has openly maintained a critical position towards the Government in the face of allegations of corruption and human rights violations.

33. The Working Group therefore considers that Mr. Brenes was detained by the Government of Nicaragua for exercising his right to freedom of opinion by expressing his views on a situation of public interest and criticizing the Government, for example by reading out a declaration in public. This violates articles 18 and 19 of the Universal Declaration of Human Rights, and article 19 of the Covenant, rendering the deprivation of liberty arbitrary under category II.

*Category III**Presumption of innocence*

34. Both the Universal Declaration of Human Rights and the Covenant recognize the right of everyone charged with a criminal offence to be presumed innocent. This right imposes a number of obligations on State institutions, including prosecution services, to treat persons accused of a criminal offence as innocent until they have been found guilty beyond any reasonable doubt. In the view of the Working Group, this right carries an

⁵ Opinion No. 58/2017, para. 42.

⁶ Human Rights Committee, general comment No. 34, para. 2.

⁷ Ibid., para. 4.

⁸ Ibid., paras. 9 and 10.

obligation for all public authorities of a country to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.⁹

35. The Working Group has received credible information from the source, which was not refuted by the Government, that indicates that the judiciary and the Ministry of the Interior, through the National Police and the prison system, have failed to respect Mr. Brenes' right to be presumed innocent by publicly treating and depicting him as a convicted criminal although no public oral trial has been held. The Working Group considers this to be a violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

Adequate time and facilities for the preparation of a defence

36. The Working Group recalls that all persons charged with a criminal offence have the right to be informed promptly and in detail and in a language which they understand of the nature and cause of the charge against them, as well as to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.¹⁰

37. The Working Group shares the view of the Human Rights Committee that the right to be informed promptly of the nature and cause of the charges brought may be met by stating the charge either orally – if later confirmed in writing – or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.¹¹

38. As regards the right to a defence lawyer and adequate time and facilities to prepare a defence, the Working Group is of the view that the accused must be given adequate time and facilities. This implies prompt access to counsel and the ability to meet with counsel in private and to communicate in conditions that fully respect the confidentiality of their communication,¹² adequate time to prepare the defence¹³ and access to all documents, evidence and other materials that the prosecution plans to offer in court.¹⁴

39. The Working Group also considers that the factual and legal basis for the detention should be disclosed to the detainee and/or his representative without delay so as to provide adequate time to prepare the challenge. Disclosure includes a copy of the detention order, access to and a copy of the case file, in addition to the disclosure of any material in the possession of the authorities, or to which they may gain access, relating to the reasons for the deprivation of liberty.¹⁵

40. In the present case, the Working Group, on the basis of the information provided by the source, which was not refuted by the Government of Nicaragua, notes that, on 29 August 2019, Mr. Brenes was brought before a judge in Managua for a preliminary hearing and charged on counts of terrorism, organized crime, obstruction of public services and aggravated criminal damage, without having been formally informed of the charges against him. The Working Group is convinced that Mr. Brenes' lawyer was only able to communicate with her client in the presence of the judge and prosecutors, and that the defendant and his counsel were not given the opportunity to meet prior to the hearing to prepare a proper defence.

41. In the light of the foregoing, the Working Group finds that the Government of Nicaragua failed to ensure Mr. Brenes' right to adequate time and facilities for the

⁹ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30.

¹⁰ International Covenant on Civil and Political Rights, art. 14 (3) (a) and (b).

¹¹ Human Rights Committee, general comment No. 32, para. 31.

¹² *Ibid.*, para. 34.

¹³ *Ibid.*, para. 32.

¹⁴ *Ibid.*, para. 33.

¹⁵ 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 (A/HRC/30/37, annex), Guideline 5 (Right to be Informed).

preparation of his defence and to communicate with counsel of his choosing, in violation of the Universal Declaration of Human Rights and article 14 (3) (b) of the International Covenant on Civil and Political Rights, as well as rules 41 and 61 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

42. Given that Mr. Brenes was not informed of the reasons for his arrest by the Nicaraguan government authorities at the time of his arrest, was not promptly informed of the charges against him, was unable to communicate with counsel of his choosing from the moment of his detention, was not able to meet with his lawyer in private and was denied timely access to his case file and was not given adequate time to prepare his defence, the Working Group finds that Mr. Brenes' detention contravenes articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, rendering it arbitrary under category III of the Group's methods of work.

43. The Working Group notes that since the start of the protests in April 2018, special procedures mandate holders of the Human Rights Council have sent at least five separate communications to the Government of Nicaragua expressing concern about numerous allegations of human rights violations, including excessive use of force during peaceful public demonstrations, resulting in death, detention and damage to the integrity of persons and violations of the right to freedom of expression and association. One of the communications, for example, cites the collective detention of 40 persons on their way to a peaceful public protest. The communications have also mentioned smear and public stigmatization campaigns conducted by State officials and authorities against human rights defenders and political opponents or critics of the Government.¹⁶

44. In the light of the information received about Mr. Brenes' health status, the supply of medicines and his alleged ill-treatment while in detention, the Working Group, in accordance with paragraph 33 (a) of its methods of work, refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

45. Lastly, in order for the Working Group to establish a direct dialogue with the authorities in the country, including government authorities, and with representatives of civil society and detainees, with the aim of gaining a better understanding of the situation of deprivation of liberty in the country and the reasons why arbitrary detention occurs, the Working Group suggests that the Government should consider inviting the Working Group to conduct a country visit.

Disposition

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

The deprivation of liberty of Carlos Ramón Brenes Sánchez contravenes articles 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights and articles 9, 11, 14 and 19 of the International Covenant on Civil and Political Rights, and is arbitrary under categories I, II and III.

47. The Working Group requests the Government of Nicaragua to take the steps necessary to remedy the situation of Mr. Brenes without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

49. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr.

¹⁶ See communications NIC 1/2018, NIC 3/2018, NIC 4/2018, NIC 5/2018 and NIC 1/2019, available at: <https://spcommreports.ohchr.org/>.

Brenes and to take appropriate measures against those responsible for the violation of his rights.

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

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

Follow-up procedure

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

53. 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.

54. The Working Group requests the source and the Government to provide the above-mentioned 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.

55. 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.

[Adopted on 29 April 2019]
