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Opinion No. 66/2017 concerning Daniel García Rodríguez and Reyes Alpízar Ortiz (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 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 5 May 2017 the Working Group transmitted to the Government of Mexico a communication concerning Daniel García Rodríguez and Reyes Alpízar Ortiz. The Government replied to the communication on 3 July 2017. 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 International Covenant on Civil and Political Rights (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);

* In accordance with paragraph 5 of the methods of work, José Antonio Guevara Bermúdez did not participate in the adoption of this opinion.

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Daniel García Rodríguez, a Mexican national, was born in January 1965. Formerly a public official, he is currently in the business of fattening livestock. Mr. García, according to the source, was arrested by the judicial police in the vicinity of his home at around 8 o'clock on 25 February 2002. He was intercepted by two men in an unmarked vehicle (a blue Chevrolet), who informed him, without presenting a warrant issued by a judicial authority, that he was being sought by the Office of the Assistant Attorney General of Tlalnepantla (Mexico State).

5. Mr. García was reportedly transferred to the Tlalnepantla Office of the Assistant Attorney General, where he was asked by a public prosecutor to submit to questioning with regard to the murder of María de los Ángeles Tamés Pérez. Mr. García had previously been summoned by the Public Prosecution Service as a witness in the case on 10, 11, 12, 22 and 29 October 2011. After several hours in incommunicado detention, he was informed that the Fifth Criminal Court of the Tlalnepantla Judicial District had ordered him taken into preventive custody for 30 days at a hotel in Tlalnepantla (Mexico State).

6. On the same day, 25 February 2002, Mr. García was placed in preventive custody at the Hotel San Isidro, located in downtown Tlalnepantla. The justification given for the custody measure was to investigate him in connection with the murder, on 5 September 2001, of Ms. Tamés Pérez, a town councillor in Atizapán de Zaragoza. The then-Assistant Attorney General of Tlalnepantla, accompanied by three investigative police officers attached to the prosecution service, appeared at the hotel. The Assistant Attorney General told him that he had nothing against him but that he needed his help with a prepared statement on alleged acts of corruption committed by a former mayor of Atizapán de Zaragoza and the mayor elected for the term 2000–2003, both of whom were former bosses of Mr. García.

7. The source states that, after refusing to make incriminating statements about matters with which he was unfamiliar, Mr. García was warned that if he did not cooperate his family and friends would suffer the consequences. For no apparent reason, and after Mr. García's refusal to incriminate the two politicians, two of his cousins, followed by his father, were taken into preventive custody. Finally, orders were issued for the arrest of siblings and other cousins of Mr. García, who were accused of various offences.

8. Although the preventive detention had been ordered to investigate the murder of Ms. Tamés Pérez, the source reports that the public stance taken in the media by Office of the Attorney General of Mexico State was that Mr. García and his family were part of a political spy ring working for the municipality of Atizapán de Zaragoza. This accusation, widely reported in the media, did not lead to a successful investigation, as no criminal proceedings were ever instituted.

9. During Mr. García's time in preventive custody, he was apparently kept in isolation and shown press clippings or televised reports in which the then-Attorney General referred to the murder of Ms. Tamés Pérez and the alleged spy ring. In addition, the source reports, Mr. García was shown news stories showing his father put on display as a murderer, his children leaving school at the end of the day and other situations that caused him serious fear, anguish and suffering. During Mr. García's time in preventive custody, he was repeatedly threatened by officials from the State Attorney General's Office in their attempts to coerce him into making statements incriminating himself and others.

10. The source reports that during the 45 days Mr. García was held in preventive custody, unlawful evidence was manufactured against him. Initially, Mr. García had been implicated in the murder of Ms. Tamés Pérez as a result of the statements made by three

persons. On 25 September 2002, however, one of the three, alleging that it had been obtained through torture, retracted his statement before a judge.

11. The source indicates that the statements of the two other persons mentioned dates of events that were incompatible with the dates on which the events were recorded. The statements made on 27 March 2002 presumably refer to events and conversations that took place between 14 and 18 March 2002, which are themselves referred to in a police report of 14 March 2002 — in other words, on the same day or even before the events referred to by the informants had taken place — that is included in the investigative case file.

12. On 7 April 2002, the Public Prosecution Service submitted the records of its completed preliminary investigation (ATI/I/3632/02) to a criminal court. On 9 April 2002, the Fifth Criminal Court of the Tlalnepantla Judicial District issued a warrant for the arrest of Mr. García and another person (Mr. Z) on the grounds of their probable commission of four crimes: aggravated homicide, extortion, fraud and organized crime (criminal case No. 88/2002). On 10 April 2002, judicial police officers acted on the arrest warrant and transferred Mr. García and Mr. Z from the Hotel San Isidro to the Juan Fernández Albarrán Pretrial Detention and Social Rehabilitation Centre in Tlalnepantla, as ordered by the Criminal Court judge.

13. The source indicates that on 11 April 2002, during the preliminary statement, Mr. García pleaded not guilty to having committed a crime and complained to the judge that he had been detained arbitrarily and that while he had been in preventive custody he had been subjected to psychological torture. He requested a psychological examination to corroborate his statements. The judge of the Fifth Criminal Court rejected the request on the grounds that the accusation of torture was levelled at a "trusted" official. A pretrial detention order was issued on 16 April 2002.

14. The source reports that on 19 April 2002, Mr. García's defence lawyer lodged an appeal with the Second Collegiate Criminal Division, which was rejected. His lawyer also initiated *amparo* proceedings before the Eighth District Court of Mexico State (326/2003-E). The case was resolved nearly three years later, on 13 June 2005. The court argued that Mr. García's signature had been forged, so, without considering the merits, it held that the petition for *amparo* had never been lodged.

15. A new petition for *amparo* (1192/2005-E) was therefore lodged, again with the Eighth District Court. On 31 May 2006, the Court held that the petition was allowable but did not grant *amparo*. For that reason, an appeal for a review of the proceedings (198/2006) was lodged with the Second Collegiate Criminal Court of the Second Circuit, which ruled in favour of the appellant in April 2007. On 25 May 2007, in accordance with the Collegiate Court's judgment, the duly appointed judge ordered the release of the complainant for want of evidence to try him for the offences of extortion, fraud and organized crime. The detention order issued for the crime of homicide for gain and with malice aforethought or premeditation, was amended to refer only to premeditation. As from that date, this is the only charge keeping the case open.

16. On 25 September 2002, according to the source, as one of the appeals was being considered, one of the three witnesses mentioned above disavowed his statement before a judge, and although he acknowledged his signature and fingerprints, he claimed that he had been forced to affix them to the statement under torture committed by investigative police officers. At that point, the authorities implicated a person, Reyes Alpízar Ortiz, who had until then not been mentioned in the evidence or the investigative data, but only in a statement, as having been present at a party.

17. Reyes Alpízar Ortiz is a Mexican citizen, born in January 1967, who had previously been in prison on charges of robbery and had worked as a trade union adviser and artist. On 25 October 2002, in Tlalnepantla, he was allegedly arrested without a summons or arrest warrant by investigative police officers, while he was waiting for the bus that was to take him to his home in the State of Hidalgo.

18. The source reports that Mr. Alpízar was taken to the Office of the Assistant Attorney General of Tlalnepantla and detained for some 12 hours. He was then transferred to a hotel to be placed in preventive custody. At the Assistant Attorney General's Office and in the

hotel room where he was in custody, he was reportedly subjected to multiple forms of torture, including beatings, electric shocks, burns, asphyxiation and injections, to force him to sign papers without knowing what was in them. A Red Cross ambulance had to be called to take him to a trauma centre for treatment of his wounds. The Public Prosecution Service stated that it was only to take his blood pressure.

19. Mr. Alpízar, according to the source, later learned that the papers he had signed under torture were a prefabricated statement to the prosecution. The statement indicated that he had supposedly gone with another person to assassinate Ms. Tamés Pérez, the town councillor. In the records of the investigation, he had been mentioned only as a guest at a party, but in the statement he had been coerced into signing he supposedly confessed to his involvement in the murder. A warrant for his arrest, based on the statement in which he had incriminated himself, was issued by the Fifth Criminal Court of the Tlalnepantla Judicial District on 27 November 2002. The acts of torture and the forced signing of the confession were reported to the judge in the preliminary statement of 28 November 2002.

20. The source states that during an evidentiary hearing on 22 April 2003, Mr. Alpízar indicated that the alleged perpetrator of the homicide had been in detention under a different name in the prison of Pachuca (Hidalgo State) on the day the homicide was committed. For a year and a half thereafter, Mr. Alpízar's lawyer repeatedly asked the judge of the Fifth Criminal Court to summon that detainee to determine in person whether or not he was the suspect. The judge refused to grant that request every time it was made.

21. According to the source, the newspaper *Reforma* published an interview with the suspect, who was in the prison of Tula (Hidalgo State), on 25 April 2002. He told the journalist that he was the person who was being sought and that on the day of the murder — 5 September 2001 — he had been in the prison of Pachuca, serving a sentence for robbery. In addition, he cleared up the confusion about the second name under which he was sought, which he had taken from a friend of his who had died in Mexico City in 1985. On 8 May 2003, he sent a signed letter to the judge of the Fifth Criminal Court in which he stated that he was being held in the prison of Tula under the alias that had caused the misunderstanding and that he had been in Pachuca under the same alias on the day of the murder. He thereby confirmed that he had been in the Pachuca prison on 5 September 2001 and could not have committed the murder.

22. According to the source, the defence lawyer put forward a variety of evidence to show why the two names referred to the same person. On 20 February 2010, there was a meeting of fingerprint experts, two of whom concluded that there was a clear similarity between the fingerprints provided by the Federal Electoral Institute and those on the card from the Pachuca Prison and Social Rehabilitation System. The defence experts and the third expert acting as an umpire, who was from the High Court of Justice of Mexico State, found that the fingerprints had 28 characteristic similarities.

23. The source claims that even though Messrs. García and Alpízar had maintained since making their preliminary statements that they had been tortured and coerced into incriminating themselves and others, their allegations did not have any procedural consequences or lead to an investigation. Therefore, a complaint was filed with the Office of the Attorney General of the Republic on 29 November 2006. The Office assigned the preliminary investigation to the competent authority; however, the investigation is still under way.

24. The defence submitted an expert psychological opinion in April 2007. That opinion was supplemented in September 2007 by a report from an expert in forensic medicine. The purpose of producing the evidence, which was gathered by qualified experts and assessed in line with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), was to shed light on the torture inflicted on Mr. Alpízar. The source reports that objections to the experts' reports were raised by the Public Prosecution Service, which offered to produce expert forensic medicine and psychological reports of its own, on 24 January 2008. To that end, it appointed the same experts who had assessed Mr. Alpízar while he was in preventive custody in October 2002 and had failed to verify his injuries or find that he had been subjected to torture. This situation — including the experts' partiality and their dependence

on the Service whose personnel were accused of torture — was brought to the attention of the Criminal Court judge on 18 and 26 February 2008.

25. Despite the complaint about their lack of impartiality, the official experts submitted their findings. As they contradicted those produced by the defence, the judge agreed to a third round of expert reports and thus summoned experts in various fields from the High Court of Justice of Mexico State, who, after assessing Mr. Alpízar, spoke at the meeting of the psychological experts on 20 November 2009 and at the meeting of forensic medicine experts on 17 February 2010. The third expert, who was acting as an umpire and had a university degree in psychology, attested to the signs of torture borne by Mr. Alpízar.

26. The source notes that although complaints of torture and cruel, inhuman and degrading treatment were submitted to the trial judge, those complaints were ignored for several years. Only because of the criminal complaint and the evidence produced by both complainants were any efforts made to demonstrate that torture had been committed and to strike the unlawful evidence that had been gathered under torture from the record. The Criminal Court judge was asked on 30 June 2014 to initiate proceedings by making the complaint of torture available to the Public Prosecution Service; however, the request was denied. As a result, a petition for a remedy of *amparo* (597/2012-E) was filed with the Eighth District Court. On 20 April 2015, the remedy was granted, and the judge was ordered to inform the Public Prosecution Service of the complaints of torture.

27. The Second District Court of Mexico State ruled on 20 April 2015 (remedy of *amparo* No. 945/2014-I) that it was the duty of the judge hearing the criminal case to follow up on the proceedings that the judge had set in motion by forwarding the case file to the Public Prosecution Service. The Court noted in its ruling that the burden of proof rested on the State and that it was not the torture victims, the persons accused in the case, who were required to prove that they had not been tortured.

28. The source reports that as a result of the criminal complaint filed by the defence in November 2006 and the petitions for remedies of *amparo* submitted by the victims, the investigation and elucidation of the acts of torture were assigned to the Office of the special prosecutor for offences committed by public servants in Tlalnepantla (preliminary investigation TLA/MR/III/1973/2006), although no active or diligent investigation was carried out. Only in August 2012 were statements taken from Messrs. García and Alpízar, who requested that the expert opinions be provided not by public officials but by independent experts, in accordance with the Istanbul Protocol.

29. According to the source, the specialized examinations were carried out in August 2015 by experts in various fields. The experts, hired specifically to carry out the examinations by the Office of the Attorney General of Mexico State, completed their work over the course of several visits. On 13 October 2015 — 13 years after the events — the experts found that there was evidence that Mr. Alpízar had been tortured. Finally, on 25 January 2016, the Public Prosecution Service acknowledged, as demanded by the complainants, that Messrs. García and Alpízar were victims of torture.

30. In 2011, with the transition of the criminal justice system to an adversarial, oral system, the traditional courts began being replaced. As a result, the criminal case is currently before the First Criminal Court of First Instance, to which the cases from the Tlalnepantla Judicial District have been assigned.

31. The source indicates that on 6 June 2013, in response to a request for information from the Inter-American Commission on Human Rights, the Mexican State gathered information of various sorts. It included in particular a note from the judge hearing the case in the court of first instance, who apparently indicated that the crime for which the accused were being tried was the aggravated homicide of a person who, as they knew, worked as a town councillor at the town hall of Atizapán de Zaragoza and whose life they had decided to take. The accused, who had known she would arrive home alone, waited for her to exit her vehicle before firing the shots that killed her.

32. The source claims that that note did not convey clearly that Mr. García is being prosecuted only for homicide, for allegedly instigating the killings, not as the perpetrator or as a direct participant in the homicide itself. In addition, without seeing the criminal

proceedings through to completion, the judge expressed an opinion on the guilt of the accused and misrepresented the form of participation for which one of the accused was being tried.

33. According to the source, a motion to have the pretrial detention of the accused replaced by an alternative less restrictive of their personal liberty was filed on 21 June 2016, as it had been 14 years, 4 months and 15 days and 13 years, 8 months and 26 days since the respective arrests of Messrs. García and Alpízar. The motion argued that because of the way it had been used and the length of time it had lasted, which meant it was no longer precautionary or reasonable, the detention of the accused without a judgment of a court of first instance was arbitrary. It was also an advance prison sentence. Their detention was thus a violation of their rights to be tried without undue delay or released, to regular judicial review of restrictions on personal freedom, to effective judicial protection, not to be subjected to restrictions on freedom that constitute advance punishment, to the presumption of innocence and to prompt and expeditious administration of justice. The motion was rejected on 8 July 2016. An appeal is currently being heard before the Second Collegiate Criminal Court of the Second Circuit (25/2016).

34. On 9 September 2016, on the basis of a transitional article of a constitutional amendment relating to the justice system (which states that in proceedings conducted in the traditional system, restrictions on personal freedom may be reviewed and amended in accordance with the rules of the adversarial system), a petition for review and amendment of the pretrial detention order was filed. On the date of filing of this petition, Mr. García had been in pretrial detention for 14 years, 4 months and 16 days and Mr. Alpízar for 13 years, 8 months and 27 days. The petition was found inadmissible on 13 September 2016.

35. In view of the facts of the case, including the arrest of the two men without a warrant, and the legal arguments made by the source, the detention of Messrs. García and Alpízar should fall within category I of the categories of arbitrary detention defined in the Working Group's methods of work. As a result of the irregularities that arose during the judicial proceedings and possible violations of the laws guaranteeing a fair trial and due process, it should also fall within category III.

Response from the Government

36. The Working Group transmitted the communication to the Government of Mexico on 5 May 2017 and requested that it submit a response by 4 July 2017. The Government responded to the communication on 3 July 2017.

37. In its response, the Government did not question the dates on which Messrs. García and Alpízar had been arrested or the source's claims that they were arrested without being shown a warrant.

38. The Government indicates that on 25 February 2002, the Public Prosecution Service requested an order for the placement of Mr. García in preventive custody and that the request was granted by a judge on the same day, in accordance with articles 14, 16 and 21 of the Constitution. According to the Government, Mr. García was served with the warrant on that very day, 25 February. His detention under the warrant was extended on 26 March 2002.

39. On 5 April 2002, the Public Prosecution Service instituted criminal proceedings and requested a warrant for Mr. García's arrest. The warrant was issued on 8 April 2002 and the detention order on 16 April.

40. In its response, the Government indicates that on 25 March 2003, Mr. García waived his right to proceedings in which cases such as his, involving offences punishable by prison sentences longer than two years, are heard within a year.

41. The Government states that on 25 May 2007, pursuant to a judgment handed down in connection with an appeal for review filed by Mr. García, another ruling, ordering his release for lack of evidence to try him for the crimes of extortion, fraud and organized crime, was issued. An order to detain him for aggravated homicide was issued, however.

42. The Government notes that on 28 October 2002, the Public Prosecution Service requested an order to take Mr. Alpízar into preventive custody for 30 days in order to conduct the preliminary investigation and that the judge, relying on articles 14, 16 and 21 of the Constitution, granted the request on the same day. Mr. Alpízar was presumably given notice of this order on 28 October 2002.

43. The Public Prosecution Service instituted criminal proceedings against Mr. Alpízar on 25 November 2002. An order for his detention was issued on 30 November 2002.

44. The Government points out that during the hearing of 9 March 2004, Messrs. García and Alpízar waived their right to the guarantee set out in article 20, subparagraph VIII, of the Constitution, as they indicated that they intended to continue submitting evidence. The judge held that only counsel for the defence, not the Public Prosecution Service, could continue producing evidence, as more than a year had elapsed.

45. The Government notes that, after several years during which evidence was produced and examined, the criminal case is still in the investigation phase.

46. The Government emphasizes that once Messrs. García and Alpízar reported to the judicial authorities that they had been tortured, the Office of the special prosecutor for offences committed by government officials began a preliminary investigation into their allegations. It is also noted in the Government's response that the investigation is still under way and that the evidence required to institute criminal proceedings against the person or persons responsible is being collected.

47. In response to the arguments that there was no legal basis for their detention, the Government points out that Messrs. García and Alpízar were kept in detention on the strength of the evidence collected during the preliminary investigation, which was sufficient to find that they were likely to be criminally liable. The Government also notes that in view of the seriousness of the offence and the possibility that they might abscond, the Public Prosecution Service requested that Messrs. García and Alpízar be held in preventive custody for the purpose of completing the necessary investigation.

48. Messrs. García and Alpízar, according to the Government, were informed at all times of the charges against them. The Government notes that they were allowed access to an adequate defence, as reflected in the number of appeals and petitions for remedies of *amparo* they have submitted in a bid to quash first the orders for their arrest and then the orders for their placement in pretrial detention. In addition, Messrs. García and Alpízar have asked the judge conducting the proceedings not to bring the investigation phase to a close, as they intend to continue producing evidence to strengthen their case.

49. The Government states that the detention was ordered by the competent authority, in accordance with a judicial order and on the basis of a specific criminal offence, thereby making it compatible with Mexican law.

50. In addition, the Government notes that the pretrial detention of the defendants was necessary, as they will be answering in court to charges of aggravated homicide, a situation that, in accordance with the Constitution, automatically requires that the accused be detained pending trial. In addition, Mr. Alpízar had a criminal record.

51. In its reply, the Government points out that as the pretrial detention of the accused was proportionate to the crime with which they had been charged, it was in no way excessive; on the contrary, placing them in pretrial detention was a form of attending to their request to continue submitting evidence and does thus not amount to a de facto penalty.

52. The Government also indicates that all the orders issued by the Public Prosecution Service and other authorities in this case were submitted to the competent judicial authority during the appropriate stage of the proceedings and that the accused, whose appeals were handled in accordance with the law, were even given the opportunity to challenge those orders. The Government is therefore of the view that the detention was subject to prompt judicial review and that, as a result, the State's actions were in accordance with the provisions of the Covenant.

53. Lastly, the Government states that Messrs. García and Alpízar have been able to exercise their right to a fair hearing, as they have submitted all the evidence they have deemed relevant during the criminal proceedings brought against them. In addition, both the Public Prosecution Service and the judge responsible for the case have acted with due diligence and dispatch throughout the proceedings. The Government also states that the accused have submitted a considerable number of applications challenging the orders issued against them, so that the decision to keep them in pretrial detention is a consequence of the complexity of the case and their own conduct.

Further comments from the source

54. On 7 July 2017, the Working Group transmitted the Government's response to the source for the source's comments, which were received on 21 July 2017.

55. According to the source, it was not true that Messrs. García and Alpízar were detained after a warrant had been issued for their arrest. The source reports that the events occurred the other way around — that is, first they were detained, and then a warrant was issued for their arrest.

56. The source likewise states that it is untrue that the Public Prosecution Service applied to the trial judge for an order to take Mr. Alpízar into preventive custody. The judge who issued the order was not the one responsible for conducting the main criminal case.

57. The source emphasizes that Messrs. García and Alpízar are being held together with, rather than apart from, convicted prisoners.

58. The source notes that Mr. García appeared as a witness before the Public Prosecution Service on five occasions before he was taken into preventive custody, appearances that belie the argument that he was taken into custody because he posed a flight risk. In the source's view, this situation and the lack of direct or circumstantial evidence of some degree of liability show that there was no legal basis for the order to take him into preventive custody.

59. The source reports that the investigation into the acts of torture was set in motion not once Messrs. García and Alpízar had alleged that they had been tortured but only after family members of theirs had applied repeatedly to federal jurisdictions and submitted a petition for a remedy of *amparo*. The source emphasizes that the preliminary phase of the investigation into the torture allegedly committed by judicial officials has lasted more than ten and a half years and is still under way.

Discussion

60. The Working Group acknowledges the Government's cooperation, which took the form of providing detailed information on the case.

61. 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 (see A/HRC/19/57, para. 68). In the present case, the Government has responded, corroborating basic facts of the case, but without countering the criticisms made by the source.

62. The undisputed facts are the following: Messrs. García and Alpízar are accused of murder in the same case. Mr. García was the first to be arrested, on 25 February 2002, whereas Mr. Alpízar was arrested on 25 October 2002; in neither case was a warrant shown. To date, the trial has not concluded, and both individuals remain in detention. The Working Group cannot but conclude that 15 years in pretrial detention is out of the ordinary.

63. The source reports that Messrs. García and Alpízar were arrested by investigative police officers without being shown a warrant, taken to the offices of the Assistant Attorney General, questioned, held incommunicado and later, on the order of a judge, placed in preventive custody in a local hotel. The Government had the opportunity to dispute these allegations but did not do so. The Working Group concludes that neither Mr. García nor

Mr. Alpízar was arrested under a warrant. The Working Group has consistently held that for deprivation of liberty to have a legal basis, it is not sufficient for arrests to be allowed under the law; the authorities must also invoke the legal basis by presenting an arrest warrant (see, for example, opinions No. 1/2017 and No. 6/2017). The Working Group notes that this condition has not been met in the present case.

64. In addition, neither of the two individuals was brought promptly before a judge. They were instead held incommunicado, outside the protection of the law; the actions of the police officers were not subject to judicial review. The Working Group has in its practice consistently held that holding a person incommunicado is a violation of his or her right to challenge the legality of his or her detention before a judge (see, for example, opinions No. 56/2016, No. 53/2016, No. 6/2017 and No. 10/2017). The Working Group is of the view that judicial review of deprivation of liberty is essential to ensuring that such deprivation has a real legal basis. In this case, the Working Group, noting that the two arrests were made without warrants and that Messrs. García and Alpízar were not brought promptly before a judge, concludes that their detention was effected without a legal basis, in violation of article 9 of the Covenant. The Working Group is therefore of the view that the detention of Messrs. García and Alpízar is arbitrary under category I of its categories of arbitrary detention.

65. The source makes serious allegations that both individuals were subjected to torture and that Mr. García was held incommunicado for around forty days. The Working Group notes that the confession signed under duress by Mr. Alpízar was self-incriminating and that it also implicated Mr. García. In addition, neither of the two men was assisted by a lawyer from the time that Mr. García was taken into incommunicado detention to the time that they were both subjected to torture. These claims were neither contested nor refuted by the Government. The Working Group notes the judicial decision in which it was ruled that both Mr. García and Mr. Alpízar were tortured. Accordingly, the Working Group has no doubt that these allegations are undisputed facts.

66. The Working Group is troubled by the allegations of torture, the incommunicado detention and the delays in the judicial proceedings in both the main case involving the accused and the torture case initiated by Messrs. García and Alpízar.

67. The prohibition of torture is a peremptory norm (*jus cogens*), and any evidence obtained under torture must be excluded from criminal proceedings. The Working Group calls attention to guideline 12 of 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 (A/HRC/30/37), which states as follows:

> Any statement established to have been made or any other evidence obtained as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in any proceedings, except against a person accused of torture or other prohibited treatment as evidence that the statement was made or that other such acts took place.

68. That guideline is a reiteration of the obligation set out in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is one of the binding instruments to which Mexico is a party. It also reaffirms articles 7 and 14 of the Covenant and the determinations made by the Human Rights Committee in general comment No. 32 on the right to equality before courts and tribunals and to a fair trial:

> To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g), prohibiting compulsion to testify against oneself or confess guilt.

69. The Working Group also notes the release of information that portrayed Mr. García and his family as members of a network of criminals and a political spy ring. Such public releases of information, outside the framework of legal proceedings, are a violation of the presumption of innocence.

70. These circumstances constitute a serious violation of the right to a fair trial, including, in this case, the right to be presumed innocent (art. 14 (2) of the Covenant), and this violation means that the detention of Messrs. García and Alpízar falls within category III of the Working Group's categories of arbitrary detention.

71. In accordance with its practice and paragraph 33 (a) of its methods of work, the Working Group will refer serious allegations of torture 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.

72. In view of the number of cases decided by the Working Group in respect of Mexico in recent years (opinions Nos. 23/2014, 18/2015, 19/2015, 55/2015, 56/2015, 17/2016, 58/2016, 23/2017 and 24/2017), the Working Group reiterates its suggestion 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 on 15 April 2015 and 10 August 2016.

Disposition

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

> The deprivation of liberty of Daniel García Rodríguez and Reyes Alpízar Ortiz, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III of the Working Group's categories of arbitrary detention.

74. In the light of the opinion rendered, the Working Group requests the Government of Mexico to take the steps necessary to remedy the situation of Daniel García Rodríguez and Reyes Alpízar Ortiz 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.

75. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Daniel García Rodríguez and Reyes Alpízar Ortiz immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

76. In this regard, the Working Group acknowledges the interpretative declaration made by Mexico in respect of 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 or she has, inter alia, under the provisions of the appropriate laws, an enforceable right to just compensation. The Working Group is of the view that additional grounds for compensation under the State party's legal system are thus provided.

Follow-up procedure

77. 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 Messrs. García and Alpízar have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. García and Alpízar;

(c) Whether an investigation has been conducted into the violation of the rights of Messrs. García and Alpízar 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.

78. 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.

79. 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.

80. 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.[1]

[*Adopted on 25 August 2017*]

[1] See Human Rights Council resolution 33/30, paras. 3 and 7.