



# General Assembly

Distr.: General  
17 July 2018  
English  
Original: Spanish

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

#### Opinion No. 24/2018 concerning Lorent Gómez Saleh and Gabriel Vallés Sguerzi (Colombia and the Bolivarian Republic of Venezuela)

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 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 24 January 2018, the Working Group transmitted to the Governments of Colombia and the Bolivarian Republic of Venezuela a communication concerning Lorent Gómez Saleh and Gabriel Vallés Sguerzi. The Government of Colombia requested additional time in order to respond to the communication and submitted its response on 6 April 2018. The Government of the Bolivarian Republic of Venezuela has not replied to the communication. Both States are parties 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).

### **Submissions**

#### *Communication from the source*

4. Lorent Gómez Saleh is a Venezuelan citizen, born in 1988. He is a student and human rights activist, and a founder and member of several non-governmental organizations in the Bolivarian Republic of Venezuela. He is usually resident in Valencia (Carabobo State).

5. Gabriel Vallés Sguerzi is a Venezuelan citizen, born in 1987. He is a systems engineer and human rights activist and a member of several non-governmental organizations in the Bolivarian Republic of Venezuela. He is usually resident in Valencia (Carabobo State).

6. Mr. Gómez Saleh was arrested by national police officers on 4 September 2014, while travelling in a taxi in Bogotá. On the same day, he was transferred by the Colombian authorities by air from El Dorado airport to the border town of Cúcuta. He was handed over to the authorities of the Bolivarian National Intelligence Service of Venezuela on the Simón Bolívar border bridge, which links the city of Cúcuta with San Antonio del Táchira.

7. Mr. Vallés Sguerzi was arrested on 5 September 2014 in Cúcuta (Colombia), also by the national police, after taking part in a radio programme in which he condemned Mr. Gómez Saleh's detention as arbitrary. Mr. Vallés Sguerzi was also handed over to the Bolivarian National Intelligence Service by the Colombian authorities on the Simón Bolívar border bridge.

8. The source reports that the Colombian police did not show an arrest warrant when arresting either individual. Furthermore, at the time of their arrest, they were not informed of the reasons for it or where they were being taken. They were not allowed to contact their relatives. They were also denied their rights to be assisted by a lawyer and to challenge the legal grounds for their arrest in Colombia.

9. The day after Mr. Gómez Saleh's arrest and deportation, the Ministry of Foreign Affairs of Colombia issued a statement indicating that he had been deported under article 105 of Decree No. 4000 of 2004. According to the statement, Mr. Gómez Saleh's permit to remain on Colombian territory had expired and, furthermore, he had been engaging in political proselytism, which is prohibited under Colombian migration laws. The statement also noted that several proceedings had been brought against Mr. Gómez Saleh in the Bolivarian Republic of Venezuela and that the Venezuelan Government had issued an arrest warrant for him.

10. The source submits that Mr. Gómez Saleh was lawfully present in Colombia at the time of his arrest, since he was applying for a residence permit, and had been issued with a safe conduct pass by the migration office, which allowed him to remain lawfully in the country until 5 September 2014, when he had an appointment with the migration office to complete all the formalities and continue the process of obtaining a residence permit.

11. In addition, the source states that it is untrue that an arrest warrant had been issued in the Bolivarian Republic of Venezuela at the time of his arrest in Colombia. It further reports that no international request had been made for his arrest and that no arrest warrant had been issued by the International Criminal Police Organization (INTERPOL). It explains that Mr. Gómez Saleh's alleged proselytizing involved calling for the release of political prisoners in Venezuela, which can be regarded as human rights protection work.

12. The source submits that by September 2014 it was already common knowledge that the Venezuelan Government had arbitrarily detained, tortured and ill-treated thousands of persons who had taken part in demonstrations against it across the country. Accordingly, the Government of Colombia knew that Mr. Gómez Saleh and Mr. Vallés Sguerzi had left the Bolivarian Republic of Venezuela because of political persecution and that it was highly likely that their human rights would be violated if they were returned to their country. Mr. Gómez Saleh had fled from the Bolivarian Republic of Venezuela to protect his life and

physical integrity following a series of violent attacks and death threats made against him by supporters of the Government of the Bolivarian Republic of Venezuela.

13. The source indicates that Mr. Gómez Saleh and Mr. Vallés Sguerzi were transferred to Caracas on the day they were deported. They were brought before the Third Procedural Court of Carabobo State on 8 September 2014. The Court ordered the detention of the two men for their alleged failure to meet the reporting obligations that had been imposed on them in 2010 after having been arrested at a demonstration. On this point, the source indicates that Venezuelan legislation (article 230 of the Code of Criminal Procedure) states that such alternatives to detention must not be imposed for longer than the minimum term of imprisonment for each offence or for longer than two years. In 2014, therefore, any reporting obligation had expired. The source also stresses that the Court had not issued a warrant for the arrest or detention of either of the two men, as was made clear by an examination of the case file on 8 September 2014, when they were first heard by the Court. The source adds that on 6 September 2014 – that is, after they had been arrested – the public prosecutor petitioned the judge to revoke the order under which Mr. Gómez Saleh and Mr. Vallés Sguerzi had been granted conditional release in 2010, an initiative that throws the absence of a legal basis for the arrest into even sharper relief.

14. On 11 September 2014, Mr. Gómez Saleh was transferred to San Cristóbal, in the State of Táchira, without his family and lawyers being informed. In San Cristóbal, he was brought before the Seventh Procedural Court of Táchira State, where he was charged with improperly issuing certificates, facilitating the illegal entry of aliens and forgery for allegedly giving identification papers to Colombian nationals – preferably those who, because they had completed their military service, had experience in handling weapons – so that they could demonstrate against the Venezuelan Government. At that time, however, Mr. Gómez Saleh was no longer in the Bolivarian Republic of Venezuela and, since he has never worked for a government agency, he could not have committed the offences that he was charged with.

15. The source notes that the Seventh Procedural Court stated that it had issued a warrant for the arrest of Mr. Gómez Saleh on 13 June 2014. The source adds, however, that, because Venezuelan legislation prohibits initiating legal proceedings against a citizen in his or her absence, it was unlikely that a warrant could have been issued. As his lawyers were unaware of the purported opening of proceedings, the charges and the alleged arrest warrant, the source is of the view that they were a fabrication put together to provide a pretext, after the fact, for his deportation from Colombia and detention in the Bolivarian Republic of Venezuela.

16. The source also states that, if an arrest warrant had existed at the time of Mr. Gómez Saleh's arrest, he would not have been taken to Caracas or the State of Carabobo following his transfer from Cúcuta and handover to officials of the Bolivarian National Intelligence Service in Táchira; instead, he would have been brought before the competent court in San Cristóbal in the border State of Táchira, immediately after entering Venezuela from Colombia.

17. The source reports that Mr. Gómez Saleh and Mr. Vallés Sguerzi were held from September 2014 to late October 2016 at the headquarters of the Bolivarian National Intelligence Service on Plaza Venezuela in Caracas. They were held in a section referred to as "The Tomb" (La Tumba), located in a basement five storeys below ground, which is itself notorious for its extreme isolation. The source indicates that "The Tomb" is approximately 15 metres below ground level, that it has no fresh air or natural light and that the cells are 2 x 3 m<sup>2</sup>, with black floors, white walls, cement beds and bright white lights.

18. During their first eight months in "The Tomb", they were confined 24 hours a day and could not go outside. Only sporadically were they let out to go to a bathroom, although sometimes they were forced to urinate and defecate in a bucket. They had no contact with anyone other than the guards, who concealed their identity. There was also no eye contact with other detainees, as the cells were all in a row. They were not allowed access to books or clocks, so they could not tell whether it was day or night. They were given food at irregular times and intervals, on no set schedule, presumably with a view to disorienting them. There was apparently a white light on in "The Tomb" at all times, and the air

conditioning kept the temperature so low that they could not sleep. On the whole, according to the source, there was a lack of sensory and visual stimulation, movement was hampered and the two men were beset by a feeling of uncertainty about their situation. This treatment reportedly caused them to suffer from severe depression, suicidal thoughts, serious sleep disorders, anxiety disorders, loss of self-esteem, adaptation disorders, psychosomatic disorders, cognitive impairment and weakening of the immune system as result of long-term exposure to negative emotions. The source describes the treatment meted out in “The Tomb” as tantamount to torture.

19. The source notes that the pressure and psychological torture that Mr. Gómez Saleh was subjected to ultimately drove him to two suicide attempts in April 2015, which led to the total suspension of visits from his family and communication with his lawyers. Emergency medical treatment was required after the second attempt. After the suicide attempts, the torture became somewhat less severe: he was allowed to go outside for fresh air and given access to a clock, telephone calls and the visiting area. Otherwise, however, the conditions remained the same.

20. The source also contends that, starting in early 2015, after the first few months of torture, threats and pressure, Mr. Gómez Saleh began to experience chronic pain during urination, causing him to reduce his fluid intake and thus to suffer from dehydration.

21. In addition, the source reports that the prosecutor handling the case visited Mr. Gómez Saleh on several occasions to ask him if, in exchange for improved conditions of detention or even his release, he would sign a statement in which he admitted to the charges against him and accused well-known opposition leaders of crimes.

22. On 2 March 2015, the Inter-American Commission on Human Rights issued resolution No. 6/2015, in which the Commission requested the adoption of precautionary measures (No. 223-13) in favour of Mr. Gómez Saleh. In its decision, the Commission asked the Bolivarian Republic of Venezuela to adopt the necessary measures to protect the life and personal integrity of Mr. Gómez Saleh, provide him with adequate medical treatment and ensure that the conditions in which he was detained were brought into line with international standards, taking into account his state of health. The precautionary measures were adopted by the Commission on 11 May 2016.

23. On 24 May 2016, the Sixth Procedural Court ordered Mr. Gómez Saleh’s transfer to a military hospital for a general medical examination, including urological and ophthalmological tests and a general physical and mental health check-up. The source reports, however, that the Bolivarian National Intelligence Service did not comply with the decision until 44 days after it was issued, following two compliance requests submitted by Mr. Gómez Saleh’s defence counsel to the judge who had ordered the transfer, and after Mr. Gómez Saleh’s family had contacted the public prosecution service and made it clear that the medical check-up was urgent and necessary. Mr. Gómez Saleh was transferred to the military hospital on 6 July 2016, in the early hours of the morning and in total secrecy; he was heavily guarded during the transfer and his lawyers and family were not notified. It is alleged that, following his return to the headquarters of the Bolivarian National Intelligence Service that same morning, he was held in incommunicado detention for two days, during which time it was impossible to verify his condition or ascertain what had occurred at the hospital. When his family and his lawyers were eventually allowed to visit him, Mr. Gómez Saleh told them that the treatment he had received at the hospital had been extremely superficial and that the visit had lasted only 20 minutes. The medical facility’s director, who had called him, among other things, a “terrorist”, was disrespectful towards him; he was not allowed to see a specialist and was examined instead by a resident generalist, who did not conduct the tests expressly requested by the court. He was given only a blood test, a urine test, an abdominal sonogram (all of which had already been done by the medical service of the Bolivarian National Intelligence Service) and a testicular ultrasound scan.

24. The source adds that on 17 August 2016, 42 days after Mr. Gómez Saleh’s medical examination, the hospital sent the results of his tests to the court; he had been diagnosed with “urethritis”, but no treatment had been prescribed. Mr. Gómez Saleh’s defence lawyers presented a written statement to the court claiming that the medical treatment their client had received in the military hospital was not timely or objective and was, therefore,

inadequate in terms of treating his health problems, which continue to this day. Consequently, they requested his transfer to a different health facility, the Dr. José María Vargas Hospital. However, there has been no response to that request from the judge in charge of the case, the Ombudsman's Office or the office of the prosecutor specializing in fundamental rights.

25. The source reports that, on 23 October 2016, Mr. Gómez Saleh and Mr. Vallés Sguerzi were transferred from "The Tomb" in Plaza Venezuela to another of the Bolivarian National Intelligence Service's headquarters, called El Helicoide, where they remain, awaiting trial.

26. According to the source, the detention centre in El Helicoide has no windows, so detainees do not know whether it is night or day, do not see the sunlight and have no idea of what the weather is like. Health and sanitary conditions are poor because of a lack of water and overcrowding. In this facility, Mr. Gómez Saleh has been repeatedly denied visits from his family and his lawyers; sometimes as many as 15 days have gone by without his family being able to contact him to ascertain his state of health, which remains fragile.

27. In addition, the source mentions that, on 27 July 2017, Mr. Gómez Saleh's defence lawyers reported that he had been subjected to physical torture by several officials. The torture was allegedly prompted by an altercation in which one official, who had been insulting and verbally abusing a number of political prisoners, was repeatedly asked by Mr. Gómez Saleh to show respect. In response, Mr. Gómez Saleh was struck in the groin, kicked when he fell to the floor, then manually strangled, until a senior officer arrived at the scene and ordered the other officials to stop. Mr. Gómez Saleh was not examined by a doctor following the incident.

28. Furthermore, it is alleged that, after more than three years of detention, ordered as a precautionary measure and without a criminal charge, the trial of Mr. Gómez Saleh and Mr. Vallés Sguerzi has not yet begun, because the preliminary hearing has been postponed more than 44 times by the Sixth Procedural Court of Caracas. The source explains that, according to Venezuelan law, the preliminary hearing should have been held within 45 days of the detainees' first appearance in court (which was on 8 September 2014).

29. The source submits that access to the judicial case file has been unduly restricted. The file is kept by the judge in his office, under lock and key, which means that several rightful requests to review the file have been denied because the judge was not present in the court. Moreover, when Mr. Gómez Saleh's defence counsel has been permitted to review the case file, access has been granted only to certain sections and never to the file as a whole.

30. The source claims that the present case constitutes a violation of the right to liberty, and arbitrary detention under categories I, III and V.

31. With respect to category I, the source reports that Mr. Gómez Saleh and Mr. Vallés Sguerzi were arrested without legal justification. In that regard, the source points out that no arrest warrant was ever issued against either man in the Bolivarian Republic of Venezuela or in Colombia. Moreover, at the time of arrest, no judicial document ordering their detention by the Colombian authorities was produced. Likewise, they were not informed of the legal justification for their detention when they were arrested. The source therefore considers that the arrest of Mr. Gómez Saleh and Mr. Vallés Sguerzi was arbitrary under category I and was conducted in violation of article 9 of the Covenant.

32. The source also alleges that the arrest was arbitrary under category III because it breached fair trial standards. According to the source, Mr. Gómez Saleh and Mr. Vallés Sguerzi were not permitted to appoint a lawyer as soon as they were detained. Furthermore, the source alleges a violation of the right to be presumed innocent given that, after more than three years of detention, there has been no formal charge, much less a trial and still less a criminal sentence. In that regard, the source states that Mr. Gómez Saleh and Mr. Vallés Sguerzi have been treated as though they were criminals, without ever having been declared as such by a criminal court. The source also states that high-ranking officials and representatives of the Government of the Bolivarian Republic of Venezuela and the official political party have spoken publicly, through State channels, about the supposed criminal

guilt of Mr. Gómez Saleh and Mr. Vallés Sguerzi, which, according to the source, is a further violation of their right to be presumed innocent. In addition, the source alleges that more than three years of detention without a trial constitutes a violation of the right to be tried without undue delay.

33. Lastly, the source claims that their detention is arbitrary under category V because Mr. Gómez Saleh and Mr. Vallés Sguerzi have been discriminated against in the exercise of their right to liberty for obviously political reasons. Both individuals are human rights activists and critics of the Venezuelan Government and they participate actively in public and political affairs. The source alleges that they have been persecuted because of their activities to the point of being deprived of their liberty.

#### *Response from the Government*

34. On 24 January 2018, the Working Group transmitted the source's allegations to the Governments of Colombia and the Bolivarian Republic of Venezuela and requested that they submit their responses by 26 March 2018. The Government of Colombia submitted a request for the Working Group to extend this deadline, which was granted, and 9 April 2018 was established as the new response date. The Government of Colombia submitted its response to the source's allegations on 6 April 2018.

35. In its response, the Government of Colombia stated that, pursuant to Act No. 1444 and Decree-Law No. 4062, both of which were enacted in 2011, the Special Administrative Unit for Migration of Colombia was established with a mandate to act as the oversight agency for matters related to migration and immigration, within the framework of national sovereignty and in accordance with applicable laws and government policies. Decree No. 1067 of 2015, which consolidates rules governing external relations, lays down the powers of the regional directorates of the above-mentioned Unit with respect to administrative procedures applicable to foreign nationals who are in breach of Colombian migration regulations and the imposition of sanctions, as appropriate, on the basis of a duly reasoned administrative act, in compliance with procedural safeguards, the right to a defence and other principles and procedural norms provided for under Act No. 1437 of 2011, which regulates such matters.

36. The Government of Colombia states that Special Administrative Unit for Migration is one of the entities that has taken over the functions of the former Department for National Security, which was abolished under Decree No. 4057 of 2011. The Decree provides that responsibility for monitoring migratory flows of Colombian and foreign nationals and the registration of foreign nationals, as set out in article 2 (10) of Decree No. 643 of 2004 and other relevant provisions, should be transferred to the Unit, which is attached to the Ministry of Foreign Affairs.

37. Similarly, as regards the legal and regulatory framework applicable to migration, the Government states that the Department for National Security was established under Decree No. 4000 of 2004, which was partially repealed by Decree No. 834 of 2013 (in force at the time of the events); all remaining provisions of Decree No. 4000 were repealed under article 3.1.1 of Decree No. 1067 of 2015, which currently governs migration.

38. As regards the situation of Mr. Gómez Saleh, the Government states that the Special Administrative Unit for Migration of Colombia, acting in the discharge of its functions and through the Andean regional directorate and having received confidential information in accordance with Act No. 1621 of 2013, examined the personal record of Mr. Lorent Enrique Gómez Saleh, a foreign national, and found that he had been fined under resolution No. 2014703001534 of 21 August 2014 for having been illegally resident in Colombia since 20 May 2014 and that he had entered the country lawfully on 19 February 2014 with a PIP-6 entry permit valid for 90 days. In accordance with article 21 of Decree No. 834 of 2013, the permit, which was valid until 19 May 2014, allowed him to attend or participate in academic, scientific, artistic, cultural and sporting events, without any remuneration; be interviewed as part of a recruitment process for a public or private entity; take part in business training and corporate meetings or negotiations; and carry out journalistic assignments.

39. The Government notes that, on the basis of intelligence information on Mr. Gómez Saleh's activities gathered by the competent bodies, in accordance with Statutory Act No. 1621 of 2013, a decision was taken to expel him under article 105 of Decree No. 4000 of 2004.

40. On 4 September 2014, at 5 p.m., national police officers detained a Venezuelan citizen at the intersection of Carrera 15 and Calle 100 in Bogotá near the Military University and took him to the premises of the Special Administrative Unit for Migration of Colombia.

41. At 5.10 p.m., migration officials of the above-mentioned Unit, having identified the person concerned as Mr. Lorent Enrique Gómez Saleh, informed him that administrative expulsion proceedings had been opened against him in accordance with article 105 of Decree No. 4000 of 2004. A decision was taken to issue order No. 20147030029475, dated 4 September 2014, expelling him from the country under article 105 of Decree No. 4000 of 2004. He was therefore transferred to Bogotá El Dorado Airport in accordance with the resolution and the powers accorded under article 109 of the Decree.

42. Then, at 5.32 p.m., Mr. Gómez Saleh was personally notified of expulsion order No. 20147030029475, of 4 September 2014, adopted by the director of the Andean regional directorate, in accordance with the powers accorded under article 23 (10) of Decree-Law No. 4062 of 2011. The administrative act was read out in its entirety and signed by Mr. Gómez Saleh, as required under Act No. 1437 of 2011 and as noted in the original document.

43. He was subsequently placed on a plane and flown to Camilo Daza International Airport in Cúcuta, in the department of Norte de Santander. The Government states that all of his human rights and his physical and moral integrity were guaranteed, that he was well treated and allowed to contact his family by telephone at 8 p.m.

44. According to the Government, once he had disembarked at the airport, Mr. Gómez Saleh was driven in an official vehicle to the premises of the Special Administrative Unit for Migration of Colombia. Having completed the necessary emigration procedures, he was taken to the Colombian-Venezuelan border at the Simón Bolívar international bridge, where such official procedures are usually conducted. At 8.10 p.m., in good health and unharmed, he was handed over to the Venezuelan migration authorities, represented by officials from the Identification, Migration and Alien Affairs Service.

45. As regards Mr. Vallés Sguerzi, the report submitted by the Government of Colombia states that, on 4 June 2014, he entered the country from the municipality of San Antonio del Táchira (Bolivarian Republic of Venezuela) via Villa del Rosario (Colombia), with permission to enter and stay in Colombia for 90 days as a tourist. He subsequently left the country on 1 September 2014 and then returned via the same route. He was again granted permission to enter and stay in the country for 90 days under article 21 of Decree No. 834 of 2013, enabling him to engage in leisure and recreational activities in Colombia as a tourist.

46. On 5 September 2014, the eastern regional directorate of the Special Administrative Unit for Migration of Colombia, in coordination with its central office and with the support of the national police, instituted administrative proceedings under which Mr. Vallés Sguerzi was notified that he had been sanctioned for a breach of migration regulations, specifically the decision to expel him that had been taken by the director of the eastern regional directorate, pursuant to article 23 (10) of Decree Law No. 4062 of 2011.

47. Mr. Vallés Sguerzi was detained at the Ventura Plaza shopping centre in Cúcuta by national police and migration officials and informed that an administrative measure had been taken against him and that he was requested to present himself at the office of the Special Administrative Unit for Migration of Colombia.

48. The Government notes that, once he had arrived at the Unit's office, Mr. Vallés Sguerzi was notified of order No. 20147030029445, of 4 September 2014, expelling him from the country in accordance with article 105 of Decree No. 4000 of 2004. He was also informed of the nature and scope of the sanction and signed a certificate of good treatment.

49. Mr. Vallés Sguerzi was then transferred to the migration control post at the Simón Bolívar bridge on the Colombian-Venezuelan border, where, in coordination with the Venezuelan Identification, Migration and Alien Affairs Service, he was handed over to the authorities after the relevant documentation had been signed.

50. The Government states that his rights were respected at all times and that he was treated courteously by the migration officials who accompanied him.

51. The Government points out that, in the area of migration, it is empowered to institute expulsion proceedings against foreign nationals, notably under the provisions of article 105 of Decree No. 4000 of 2004. Under article 105, notwithstanding the provisions of article 104, the Director of the Department for National Security, or his or her representatives, may expel foreign nationals who in the opinion of the migration authorities are engaging in activities that jeopardize national security, public order, public health, public peace or public security, or when there is intelligence information indicating that they represent a threat to national security, public order, public safety or public peace, or when the Colombian State has been informed by a foreign authority that a conviction has been handed down or an arrest warrant for ordinary crimes has been issued for the persons in that country for ordinary offences, or that such persons are listed by INTERPOL. Expulsion decisions cannot be appealed through administrative channels.

52. The foregoing is in accordance with the provisions of article 2 of Decree No. 834 of 2013 and article 33 of Decree-Law No. 4062 of 2011, which indicate, respectively, that the national Government, acting on the basis of the principle of State sovereignty, has the discretionary power to authorize foreign nationals to enter, stay in and leave the country; that, without prejudice to the provisions of international treaties, the provisions of the Decree govern the right of foreigners to enter, stay in and leave the country; and that any references in the provisions in force to the Department for National Security and its Alien Affairs Branch that are related to the functions set out in the Decree should be understood as referring to the Special Administrative Unit for Migration of Colombia.

53. In accordance with the above-mentioned provisions and in the light of the functions of the aforementioned Special Administrative Unit, the Government concludes that the migration authorities were fully competent to institute the administrative proceedings aimed at executing the expulsion order in accordance with the international and national regulatory framework, while ensuring respect for the human rights and the safety of the Venezuelan nationals affected by the measure.

*Further information from the source*

54. In the light of the response of the Government of Colombia to the initial communication, the source notes that the State has the power to deny any foreign national entry to the country and to deport or order the expulsion of such persons. However, as regards the expulsion of foreign nationals, the source notes that there is an initial administrative procedure or first instance administrative procedure, both for imposing sanctions and making other administrative decisions, such as those allegedly issued against Mr. Gómez Saleh and Mr. Vallés Sguerzi.

55. According to the source, the Government essentially asserts that it carried out the administrative procedure on the same day that it was decided to issue an administrative expulsion order – 4 September 2014 in the case of Mr. Gómez Saleh and 5 September 2014 in the case of Mr. Vallés Sguerzi. In the source's view, it can hardly be argued that the regulations cited as in force at the time of the events were applicable, since, under Act No. 1437 of 2011, published in Official Gazette No. 47956 of 18 January 2011, the persons affected by the sanction should be notified that they have an opportunity to state their arguments and objections, present evidence and, unless expressly stipulated otherwise, appeal the actions taken under such procedures through administrative channels.

56. Moreover, under Act No. 1437, judges who are called on to review administrative acts have broad powers to impose precautionary measures; it is sufficient to refer to articles 5 (8), 39, 40, 47, 48, 74, 229 and 230 of Act No. 1437 of 2011, published in Official Gazette No. 47956 of 18 January 2011, promulgating the Code of Administrative Litigation Procedure.



57. In the source's view, it is important to point out that Mr. Gómez Saleh was applying for a special permit as a support worker or volunteer, as provided for in article 44 of Decree No. 834 of 2013, and, while it is true that he was fined, the penalty was lifted and he was issued with a safe conduct pass, as provided for in articles 80.1 and 80.1.1 of Decree No. 4000 of 2004.

58. The source thus notes that the administrative decision to expel Mr. Gómez Saleh and Mr. Vallés Sguerzi from Colombia was taken in violation of procedural rules and therefore constitutes unlawful conduct.

59. The source recalls that article 29 of the Colombian Constitution states that "due process shall apply in all legal and administrative proceedings. ... Every person is presumed innocent until proven guilty according to law. Any person who is accused is entitled to the right of defence and to the assistance of counsel of his or her own choosing or assigned by the court during the investigation and trial; to a fair and public hearing without undue delay; to submit evidence and to examine witnesses for the prosecution; to challenge a conviction; and not to be tried twice for the same act."

60. In the source's view, this provision defines the concept of due process in Colombia and establishes that it applies to both judicial and administrative proceedings. Proceedings brought by migration officials are not exempt, nor can they be exempted on constitutional grounds, from ensuring that the affected parties have the opportunity to be informed of the charges against them in order to contest the charges, submit evidence and have legal assistance in proceedings that may result in their expulsion from the country.

61. The source notes that the decisions to expel Mr. Gómez Saleh and Mr. Vallés Sguerzi were taken following what the Government describes as a "procedure" that was initiated and completed on the same day. However, there was no procedure: Mr. Gómez Saleh and Mr. Vallés Sguerzi were simply notified of a special administrative act ordering their expulsion, without being duly informed of the facts that served as the basis of the "procedure" or being given the opportunity to obtain legal assistance or to present their case and evidence in connection with the serious acts referred to in article 105 of Decree No. 4000 of 2004.

62. In the source's view, it is not the case that, as asserted by the Government, Mr. Gómez Saleh's and Mr. Vallés Sguerzi's transfer was coordinated with the Identification, Migration and Alien Affairs Service. According to a record attached to the communication, the two were handed over to officers of the Bolivarian National Intelligence Service – in other words the political police of the Bolivarian Republic of Venezuela – which operates under the Office of the Executive Vice President of the Republic. Furthermore, an arrest warrant for Mr. Gómez Saleh and Mr. Vallés Sguerzi was issued by a judge at the request of the Venezuelan Public Prosecution Service on 6 September 2014 and communicated to them on 8 September 2014. Accordingly, on the date that they were handed over to the Bolivarian Republic of Venezuela by the Colombian authorities, no arrest warrant had been issued that would have justified their detention and nor had they been caught in flagrante delicto.

63. In the source's view, it is important to note that both young men are well-known activists and human rights defenders, who are subject to political persecution by the Venezuelan Government; under international law, they should never have been deported to a country where they are persecuted. As the Colombian Government could not have been unaware of the serious human rights violations occurring in the Bolivarian Republic of Venezuela at the time – including thousands of cases of arbitrary detention, hundreds of cases of detainees being subjected to torture and cruel treatment and the killings of protestors – a democratic Government and guarantor of human rights should not have handed over to the political police of an undemocratic Government two individuals who were being persecuted by that regime for denouncing what was happening in their country. The source concludes by stating that Mr. Gómez Saleh and Mr. Vallés Sguerzi were denied the rights to presumption of innocence, defence and due process.

## Discussion

64. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights and the Covenant and to other relevant international legal standards, in accordance with its methods of work.

65. The Working Group has established in its jurisprudence 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.<sup>1</sup>

66. The Working Group is satisfied that Mr. Gómez Saleh and Mr. Vallés Sguerzi, both of Venezuelan nationality, are recognized activists and human rights defenders in their country of origin and that both fled from the Bolivarian Republic of Venezuela to Colombia to protect their physical integrity and their lives, after having been attacked and threatened.

67. In the present case, the Working Group is of the view that the authorities of two countries – Colombia and the Bolivarian Republic of Venezuela – were involved in the detention of Mr. Gómez Saleh and Mr. Vallés Sguerzi.

### *Detention by Colombia*

68. The Working Group welcomes the cooperation of the Government of Colombia, which replied to the communication from the source within the time limit and provided information regarding the detention of Mr. Gómez Saleh and Mr. Vallés Sguerzi, the powers of the institutions involved and the legal framework applicable to the expulsion of foreign nationals.

69. The Working Group notes that, according to the information submitted by the parties, Mr. Gómez Saleh was arrested on 4 September 2014 in Bogotá by the national police and was transported to the border town of Cúcuta that same day, where he was expelled from the country and handed over to Venezuelan officers at the border by the Colombian authorities.

70. It further notes that Mr. Vallés Sguerzi was arrested by the police on 5 September 2014 in Cúcuta (Colombia) and was deported and handed over to the Venezuelan authorities at the border that same day.

71. The Working Group has seen no evidence that either Mr. Gómez Saleh or Mr. Vallés Sguerzi was presented, at the time of the arrest, with an arrest warrant issued by a competent authority. Neither man was allowed to appoint a lawyer of his own choosing to provide him with legal advice during the migration procedure. The Working Group also notes that the expulsions of Mr. Gómez Saleh and Mr. Vallés Sguerzi took place in a matter of hours, which did not allow them enough time to prepare their defence or to appeal to a judge in order to challenge the legality of their detention in court.

72. The Working Group recognizes States' authority to design and apply policies regulating foreign nationals' entry into, exit from and residence in their territories. It also recognizes that, as a means of preventing arbitrary detention, migration policies must comply with the commitments enshrined in the international instruments relating to human rights and refugees.

73. In the present case, the Government of Colombia has been unable to demonstrate how the rights of Mr. Gómez Saleh and Mr. Vallés Sguerzi to be informed of the reasons for their detention, to be assisted by a lawyer of their own choosing, to have enough time to prepare their defence, and to be heard by a competent court to determine the legality of their detention were upheld during the expulsion procedure. Furthermore, the Government of Colombia neglected to determine whether Mr. Gómez Saleh and Mr. Vallés Sguerzi

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<sup>1</sup> See A/HRC/19/57, para. 68.

were at risk of being subjected to torture in their country of origin and thus contravened the principle of non-refoulement.

74. The above contraventions of the rules of due process, as established in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9, 13 and 14 of the Covenant, as well as article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the provisions of the Convention relating to the Status of Refugees, are of such gravity as to give the detention of Mr. Gómez Saleh and Mr. Vallés Sgeurzi an arbitrary character under category III.

*Detention by the Bolivarian Republic of Venezuela*

75. The Working Group wishes to stress that it also sent the information provided by the source to the Government of the Bolivarian Republic of Venezuela on 24 January 2018. The Working Group regrets that it did not receive a reply from the Bolivarian Republic of Venezuela within the 60-day time limit. The Government did not ask for an extension of the deadline for submitting a response in the present case.

76. In the present case, by not responding to the communication, the Government of the Bolivarian Republic of Venezuela has chosen not to challenge the prima facie credible allegations made by the source. In the absence of a response from the Government, the Working Group has decided to render the present opinion in accordance with paragraph 15 of its methods of work.

77. The Working Group is convinced that Mr. Gómez Saleh and Mr. Vallés Sgeurzi were handed over by the Colombian authorities to the Venezuelan authorities at the border between the two countries. They were then detained by officers of the Bolivarian National Intelligence Service and taken to the capital city of the Bolivarian Republic of Venezuela. They remained in detention from September 2014 until late October 2016 in the headquarters of the Bolivarian National Intelligence Service in Plaza Venezuela, Caracas, in a section known as “The Tomb”, located in the basement of a tower five storeys below ground and notorious for its extremely isolated conditions. There is no fresh air and no natural light. Its cells measure 2 by 3 m<sup>2</sup>, have black floors and white walls, and are equipped with cement beds and bright white lights. The Working Group is also aware that Mr. Gómez Saleh and Mr. Vallés Sgeurzi were taken on 23 October 2016 to another of the Bolivarian National Intelligence Service’s headquarters, known as El Helicoide, where they remain at the time of the adoption of the present opinion.

78. The Working Group is convinced that Mr. Gómez Saleh and Mr. Vallés Sgeurzi have been deprived of their liberty on the basis of a precautionary measure that has lasted for more than three years. Their preliminary hearings have been postponed on several occasions and they have not had access to the facilities necessary for the adequate preparation of their defence, owing to the conditions of isolation that prevail in the various detention facilities of the Bolivarian National Intelligence Service and to their inability to access their judicial case files, which are held by judges.

79. The above violations of the right to a fair trial, as enshrined in articles 9 and 10 of the Universal Declaration of Human Rights and in articles 9 and 14 of the Covenant, are, in the opinion of the Working Group, of such gravity as to give the detention of Mr. Gómez Saleh and Mr. Vallés Sgeurzi an arbitrary character under category III.

80. On the basis of the information available to it, the Working Group considers that the detention of Mr. Gómez Saleh and Mr. Vallés Sgeurzi by the authorities of the Bolivarian Republic of Venezuela is based on their political opinion as expressed through their work defending human rights in that country. This is contrary to international law, which prohibits discrimination on such grounds, and therefore contravenes the principle of the equality of human beings. The Working Group considers that the deprivation of liberty of Mr. Gómez Saleh and Mr. Vallés Sgeurzi constitutes arbitrary detention under categories II and V, because the deprivation of their right to liberty on the part of the Venezuelan authorities was motivated by the activities carried out by them in the defence of human rights, while exercising their rights to freedom of opinion, expression, assembly, association and participation, which are protected under articles 19, 22 and 25 of the

Covenant. The Working Group therefore considers that their detention was carried out on discriminatory grounds, in violation of articles 2 and 26 of the Covenant.

81. The Working Group wishes to recall that, under certain circumstances, imprisonment and other forms of severe deprivation of liberty in violation of internationally recognized standards may constitute crimes against humanity.<sup>2</sup>

82. In recent years, the Working Group has repeatedly expressed its views concerning numerous instances of arbitrary detention carried out by the authorities of the Bolivarian Republic of Venezuela against human rights defenders, members of the political opposition and persons who exercise, or have exercised, their rights to freedom of opinion, expression, association, assembly and political participation.<sup>3</sup> In the Working Group's view, this amounts to an attack or a systematic practice on the part of the Government of the Bolivarian Republic of Venezuela intended to deprive these persons of their liberty and security of person, in violation of fundamental rules of international law, including those enshrined in the Universal Declaration of Human Rights and the Covenant.

83. In the light of the recurrent pattern of arbitrary detention identified by international human rights mechanisms in recent years, the Government of the Bolivarian Republic of Venezuela is urged to consider inviting the Working Group to make an official country visit. Such visits are an opportunity for the Working Group to engage in a direct, constructive dialogue with the Government and with representatives of civil society, for the purposes of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention. The Working Group wishes to recall that on 15 September 2014, 15 August 2017 and 14 February 2018, it asked the Government of the Bolivarian Republic of Venezuela to favourably consider inviting it to make an official country visit.

84. The Working Group is convinced that Mr. Gómez Saleh and Mr. Vallés Sguerzi were expelled from Colombia to the Bolivarian Republic of Venezuela, where they ran the risk of being tortured. The principle of non-refoulement, as an erga omnes obligation, prohibits all Governments from expelling, extraditing or handing over persons to third countries where they run the risk of being tortured. Doing so would constitute a breach of the rules relating to the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

85. In view of the allegations of torture and other cruel, inhuman, degrading treatment and punishment committed against human rights defenders, which also refer to breaches of the right to health and a violation of the principle of non-refoulement, the Working Group has decided to refer this case to the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for their information and with a view to possible action.

<sup>2</sup> See opinions No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 47/2012, paras. 19 and 22; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 38/2012, para. 33; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 34/2014, para. 34; No. 35/2014, para. 19; No. 44/2016, para. 37; No. 32/2017, para. 40; No. 33/2017, para. 102; and No. 36/2017, para. 110.

<sup>3</sup> Opinions No. 52/2017 (Gilbert Alexander Caro Alfonzo); No. 37/2017 (Braulio Jatar); No. 18/2017 (Yon Alexander Goicoechea Lara); No. 27/2015 (Antonio José Ledezma Díaz); No. 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonzo Leal Toro, Carlos Pérez and Renzo David Prieto Ramírez); No. 7/2015 (Rosmit Mantilla); No. 1/2015 (Vincenzo Scarano Spisso); No. 51/2014 (Maikel Giovanni Rondón Romero and 316 others); No. 26/2014 (Leopoldo López); No. 29/2014 (Juan Carlos Nieto Quintero); No. 30/2014 (Daniel Omar Ceballos Morales); No. 47/2013 (Antonio José Rivero González); No. 56/2012 (César Daniel Camejo Blanco); No. 28/2012 (Raúl Leonardo Linares); No. 62/2011 (Sabino Romero Izarra); No. 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas); No. 27/2011 (Marcos Michel Siervo Sabarsky); No. 28/2011 (Miguel Eduardo Osío Zamora); No. 31/2010 (Santiago Giraldo Florez, Luis Carlos Cossio, Cruz Elba Giraldo Florez, Isabel Giraldo Celedón, Secundino Andrés Cadavid, Dimas Oreyanos Lizcano and Omar Alexander Rey Pérez); and No. 10/2009 (Eligio Cedeño).

## Disposition

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

The deprivation of liberty of Lorent Gómez Saleh and Gabriel Vallés Sguerzi, in that it denies their right to due process, as enshrined in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9, 13 and 14 of the Covenant, in that it constitutes detention resulting from the exercise of other fundamental rights protected under articles 9, 22 and 25 of the Covenant, and in that it constitutes detention on discriminatory grounds, which is prohibited by international law under articles 2 and 26 of the Covenant, is arbitrary and falls within category III (with respect to Colombia and the Bolivarian Republic of Venezuela) and within categories II and V (with respect to the Bolivarian Republic of Venezuela).

87. The Working Group makes the following recommendations to the Governments of the Bolivarian Republic of Venezuela and Colombia.

88. The Government of the Bolivarian Republic of Venezuela is requested to take the steps necessary to remedy the situation of Mr. Gómez Saleh and Mr. Vallés Sguerzi without delay and to 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, to which both countries are party.

89. With regard to the Government of the Bolivarian Republic of Venezuela, the Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Gómez Saleh and Mr. Vallés Sguerzi immediately.

90. Moreover, the Working Group considers that the Governments of Colombia and the Bolivarian Republic of Venezuela have a duty to accord Mr. Gómez Saleh and Mr. Vallés Sguerzi an enforceable right to compensation and other reparations, in accordance with international law.

91. The Working Group also requests that the two Governments amend their legislation in such a way as to harmonize their laws and policies with their international obligations, in line with the present opinion.

92. The Working Group urges both Governments to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Gómez Saleh and Mr. Vallés Sguerzi and to take appropriate measures against those responsible for the violation of their rights.

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

## Follow-up procedure

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

(a) Whether the Bolivarian Republic of Venezuela has released Lorent Gómez Saleh and Gabriel Vallés Sguerzi and, if so, on what date;

(b) Whether Colombia or the Bolivarian Republic of Venezuela have accorded compensation or other reparations to Lorent Gómez Saleh and Gabriel Vallés Sguerzi;

(c) Whether the Bolivarian Republic of Venezuela has investigated the violations of the rights of Lorent Gómez Saleh and Gabriel Vallés Sguerzi and, if so, the outcome of the investigation;

(d) Whether Colombia or the Bolivarian Republic of Venezuela have adopted any legislative amendments or changes to harmonize their laws and practices with their international obligations, in line with the present opinion;

(e) Whether Colombia or the Bolivarian Republic of Venezuela have taken any other action to implement the present opinion.

95. The Governments of Colombia and the Bolivarian Republic of Venezuela are invited to inform the Working Group of any difficulties they may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through visits by the Working Group.

96. The Working Group requests the source and the Governments of Colombia and the Bolivarian Republic of Venezuela 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 and of any failure to take action.

97. The Governments should disseminate the present opinion among all stakeholders through all available means.

98. 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.<sup>4</sup>

*[Adopted on 23 April 2018]*

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<sup>4</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.