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Human Rights Council Working Group on Arbitrary Detention

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

Opinion No. 13/2019 concerning 11 Banesco bank employees (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended by the Council for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 10 August 2018 the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares, requesting the Government to provide relevant information by 9 October 2018. On 2 October 2018, the Government responded by requesting an extension of the deadline for replying to the communication. The request was granted and the deadline was extended to 9 November 2018. The Government of the Bolivarian Republic of Venezuela replied to the communication on 5 November 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group considers that deprivation of liberty is 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. The following persons are all Venezuelan citizens and employees of Banesco, a banking institution in the Bolivarian Republic of Venezuela: Oscar Doval García, Chief Executive, Venezuelan and Spanish citizen; Marco Tulio Ortega Vargas, Legal Counsel, Venezuelan citizen; Jesús Guillermo Irausquín Herrera, Vice-President, Venezuelan citizen; Carlos Martín Lorenzo López, Vice-President, Venezuelan and Spanish citizen; Liz Carolina Sánchez de Rojas, Executive Director, Venezuelan citizen; Teresa María de Prisco Pascale, Compliance Officer, Venezuelan and Italian citizen; Carmen Teresa Lorenzo Lander, Executive Director, Venezuelan citizen; Cosme Eduardo Betancourt Quarto, Manager, Venezuelan and Italian citizen; Pedro Pablo Pernía Madrid, Vice-President, Venezuelan citizen; David Antonio Romero Romero, Executive Manager, Venezuelan citizen; and Belinda Beatriz Omaña Payares, Vice-President, Venezuelan citizen.

(a) Background

5. The source reports that Banesco is a private financial institution that has become one of the leading and most stable banks in the Bolivarian Republic of Venezuela, and that it runs an extensive corporate social responsibility programme. As the financial institution with the largest number of users, bank accounts and daily transactions in the country, it is considered to be one of the foremost private enterprises in the Bolivarian Republic of Venezuela.

6. According to the information received, the Venezuelan Government has introduced numerous controls on banking institutions, monitored primarily by the Superintendency of Banking Sector Institutions. Due to a serious economic crisis, the budget deficit and hyperinflation, the administrative authorities have applied even stricter controls on banking institutions, requiring them to stay in constant contact through meetings, updates and information reporting.

(b) Arrest of the 11 bank executives

7. On 2 May 2018, the Superintendency of Banking Sector Institutions summoned seven Banesco employees to a meeting at its Caracas headquarters in order to go over various risk-control matters relating to the offences of money-laundering and the financing of terrorism, issues that fell within the scope of the ordinary meetings held with the Superintendency.

8. The source reports that, after a wait of approximately 45 minutes for the meeting to begin, officials turned up who were purportedly from the General Directorate of Military Counter-Intelligence – a military component of the Bolivarian National Armed Forces. Armed and with their faces covered, they claimed to be members of the military but did not identify themselves by name or rank. Without presenting any warrants, the alleged military personnel arrested the seven Banesco employees, who were taken by surprise while attending a work meeting in good faith. As a result, Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale and Carmen Teresa Lorenzo Lander were deprived of their liberty.

9. According to the source, on the evening of the same day – 2 May 2018 – alleged military personnel, who were armed, wearing masks and claiming to be agents of the

General Directorate of Military Counter-Intelligence, without identifying themselves as such or giving their names, turned up at the homes of three Banesco employees and proceeded to arrest them, without presenting any arrest warrants. The employees arrested in their homes on that occasion were Cosme Eduardo Betancourt Quarto, David Antonio Romero Romero and Pedro Pablo Pernía Madrid.

10. Lastly, on 3 May 2018, following the same *modus operandi* used in the previous arrests, armed and masked military personnel, who were allegedly from the General Directorate of Military Counter-Intelligence but did not identify themselves by name, went to a residence where they arrested Banesco employee Belinda Beatriz Omaña Payares, who was at a location other than her usual place of residence. It is not known how the General Directorate was able to determine her whereabouts.

11. The source states that, after their arrest, the 11 detainees were transferred to the headquarters of the General Directorate of Military Counter-Intelligence in Boleíta Norte. From that moment on, they were kept in isolation, without sunlight, and held incommunicado, without access to counsel of their own choosing.

(c) Initiation of proceedings

12. According to the source, on 3 May 2018, the Attorney General of the Bolivarian Republic of Venezuela announced in a public address that the Public Prosecution Service had requested an arrest warrant for the 11 aforementioned persons, who, he said, were “under investigation for alleged dereliction of duty”.

13. The source states that, on 4 May 2018, the detainees’ defence lawyers were sworn in just minutes before appearing before First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas – presided over by a provisional judge without security of tenure – without so much as having had any prior contact with, or knowledge of the status of, the defendants or access to the criminal case files. They only gained access to the latter after having been sworn in and for a very short time – less than 45 minutes – before the arraignment hearing with the criminal judge.

14. A single application for the arrest of the 11 employees, which had never been shown to them before, was found in the case file and was apparently dated 1 May 2018. The source reports that the application bore no acknowledgement-of-receipt stamp or any other identifying marks of the court. Moreover, none of its 63 pages had ever been shown to the detainees or their lawyers, who had no opportunity to mount a proper defence during the hearing since they were unaware of the offences and charges with which the detainees were being falsely accused.

15. The source states that the acts allegedly committed by the employees would constitute – in the hypothetical situation that they had indeed been committed – an administrative breach of their contractual obligations, which, if proven, would carry an administrative penalty, at most. At no time would such acts constitute criminal offences under Venezuelan law, much less offences of sufficient gravity to justify pretrial detention or imprisonment.

16. It is further emphasized that, in April 2018, an administrative banking procedure against Banesco was under way, as part of which the administrative breaches allegedly – but not actually – committed were already being investigated. For that reason, the source contends, the criminal prosecution encroaches on the administrative investigation, basing its case on the same facts and the same administrative breaches already investigated by the Superintendency of Banking Sector Institutions, with the aim of making them the subject of a criminal trial. The Prosecutor’s Office imputes to the 11 Banesco employees the offences of illicit deposit-taking (provided for in article 212 of the current Act on Banking Sector Institutions), money-laundering and criminal association (provided for in articles 35 and 37, respectively, of the Organic Act on Combating Organized Crime and the Financing of Terrorism).

17. The source adds that a purported judicial decision, which had never before been shown to the detainees, was also found in the criminal file. Dated 2 May 2018, it fully endorsed and accepted the prosecutor’s application for an arrest warrant and issued a single

warrant for the arrest of the 11 Banesco employees, to be executed by the General Directorate of Military Counter-Intelligence. The restrictive measures requested by the Prosecutor's Office, prohibiting the transfer or encumbrance of assets and blocking or freezing their bank accounts, were also authorized.

18. The source reports that this judicial decision contains the so-called "arrest warrant" for the 11 Banesco employees, identified as "Warrant No. 485-2018". It had not been shown during any of the arrests and neither the detainees nor their lawyers had known of its existence before the arraignment hearing.

19. Also found in the case file were accounts of the military operations of the General Directorate of Military Counter-Intelligence, which neither the detainees nor their lawyers had previously known about. In these accounts, the various arrests of the 11 Banesco employees were documented. The source reports that the documents were inserted in the file on 3 May 2018, although there was no way of verifying whether they had actually been added on that date, since there were no acknowledgement-of-receipt or court stamps. The detainees and their lawyers had not known of these documents before the arraignment hearing. According to the source, among these documents were five "police reports" that supposedly recount the five arrest operations carried out by the agents of the General Directorate of Military Counter-Intelligence but are signed only by military officers.

20. Also found in the case file were documents recounting the alleged provision of information on their rights to the detainees, supposedly by the General Directorate of Military Counter-Intelligence at the time of the arrests, and apparently signed by each of the detainees. However, it is pointed out that the only document signed by the detainees during their detention by the General Directorate was a sheet of paper that they were made to sign, without being duly informed of its contents, on 4 May 2018.

21. It should also be noted that three other documents, relating to the arrest of Ms. Omaña Payares, were added to the file. They indicate that her arrest took place on 2 May 2018, when it actually occurred the following day, on 3 May 2018. As far as the source is concerned, this reveals a clear inconsistency in the already contested accounts of the military's actions in the case.

22. On the evening of Friday, 4 May 2018, the 11 Banesco employees were presented jointly before the provisional judge of First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas. According to the source, that was the first time since their arrest that the status of the detainees could be ascertained and they, in turn, could converse with counsel of their own choosing.

23. The source states that, at the conclusion of the arraignment hearing, the court "fully accepted" the charges that the Public Prosecutor's Office proposed to bring (illicit deposit-taking, money-laundering and criminal association) and ordered the custodial measure of pretrial detention, as well as the restrictive measures prohibiting the transfer or encumbrance of assets and blocking and freezing their bank accounts. A record of the hearing was issued but was signed only by the detainees at a later date and on a separate sheet of paper. It was not signed by the defence lawyers or by the representatives of the Prosecutor's Office.

(d) Subsequent judicial detention

24. The source reports that, after the arraignment hearing and the judge's order for the pretrial detention of the 11 Banesco employees as a precautionary measure, the detainees were immediately taken to detention centres. The men were sent to the Hombre Nuevo Training Centre, a recently refurbished facility for foreign detainees in the former, partially demolished, La Planta prison in Caracas. The detention centre operates a disciplinary regime for inmates that requires them to wear uniforms, take part in military drills and chant slogans to the prison authorities, without a predetermined regime for family visits, without access to sunlight and with just one weekly visit from their lawyers.

25. The women employees were transferred to the Los Teques National Women's Counselling Institute, an ordinary detention centre for women awaiting trial and convicted women prisoners. It has a disciplinary regime that requires the wearing of prison uniforms

and limits visits to once a fortnight. According to the source, the sanitary conditions at the centre are deplorable and there is overcrowding and a shortage of food.

26. The source reports that, after several weeks of detention, the 11 Banesco employees were subjected to an alternative measure to the restriction of their liberty that was less harsh than imprisonment. However, the source indicates that this measure in no way mitigates the additional restrictions on their freedom or assets and that, in any case, it may be revoked. Both the pretrial detention and this new restrictive measure were ordered by a provisional judge, which makes these decisions uncertain and unsafe.

27. On 19 May 2018, after 17 days of imprisonment, the four women employees – Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander and Belinda Beatriz Omaña Payares – were subjected to the new liberty-restricting measure: they were released on condition that they report to the court once a week and they were prohibited from leaving the country. The restrictive measures on their assets and bank accounts were maintained.

28. On 23 May 2018, after 21 days of deprivation of liberty, the seven male employees – Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Cosme Eduardo Betancourt Quarto and David Antonio Romero Romero – were subjected to the new liberty-restricting measure: they were released on condition that they report to the court once a week and they were prohibited from leaving the country. The restrictive measures on their assets and bank accounts were maintained.

29. The source points out that First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas is presided over by a provisional judge, without security of tenure, who ordered the arbitrary deprivation of liberty measure and then ordered the replacement of the custodial measure with an alternative precautionary measure that placed serious restrictions on personal liberty. This liberty-restricting regime has also led to restrictions on the 11 employees' right to work, since they have had to be relieved of their normal duties at Banesco. This discretionary regime may be revoked at any time and escalated once again to pretrial detention. It is claimed that the 11 accused persons are beset by constant and crippling feelings of insecurity and fears that the current restrictive regime could be stepped up and that, at any moment, they could once again be subjected to a custodial measure.

30. The source also contends that the criminal prosecution has serious repercussions for the 11 Banesco employees in terms of the personal data and information available about them at the national and international levels. First, as a result of being arrested, they are registered in the police criminal database, despite being completely innocent. Second, at the international level, background checks on police and criminal records of persons subject to criminal proceedings often result in restrictions on migration-related procedures, such as obtaining visas, travel permits, immigration and residency permits. They may also encounter difficulties when it comes to opening bank accounts or performing other ordinary banking transactions such as opening, holding and closing accounts abroad. Third, the 11 Banesco employees face employment restrictions: they cannot exercise their right to work at Banesco, as can be inferred from correspondence sent by an official of the Superintendency of Banking Sector Institutions to the Human Resources Department of Banesco requesting information on the employment status of the employees who had been detained "in the interests of maintaining the objectivity of the investigation being conducted by the Public Prosecution Service".

(e) Allegations from the source relating to categories I, III and V

31. The source alleges that with the arrest of the 11 Banesco employees by a military unit (the General Directorate of Military Counter-Intelligence), the Venezuelan Government has violated the rights of those persons to personal liberty and due process, and that it has also committed a serious breach of the prohibition of discrimination on political and economic grounds, as provided for in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

(i) Category I

32. The source emphasizes that the 11 Banesco employees arrested by military personnel from the General Directorate of Military Counter-Intelligence were deprived of their liberty without being shown any arrest warrants and without being caught in flagrante delicto, since they were not committing a criminal act. It is pointed out that, in the Bolivarian Republic of Venezuela, an arrest has no legal basis unless a warrant is obtained or the person is caught in flagrante delicto. In this case, the arrests were carried out without meeting these legal requirements. Some time after the arrests, the judicial file was tampered with in order to include a predated prosecutor's application and a supposed court-ordered arrest warrant, as well as so-called "police reports" of the military's arrest operations, which were never presented to, or signed by, the detainees, thus exacerbating the arbitrary nature and severity of the detention.

(ii) Category III

33. According to the source, the fundamental guarantee of the independence and impartiality of the justice system was violated because the detainees' case was heard by a provisional judge without security of tenure and subject to removal on a discretionary basis. This provisional status of Venezuelan judges – which is all the more serious when cases of a political nature or of national interest are involved – has been documented and questioned by international human rights bodies and organizations in their different reports and decisions. The judge in this case is on a provisional appointment and her tenure is clearly insecure and depends entirely on the authority responsible for her appointment, which is related to and controlled by the executive branch. That fact constitutes an aggravating factor in the violation of the fundamental guarantees of the independence and impartiality of the justice system.

34. It is further alleged that the 11 Banesco detainees were denied the right of access to lawyers of their choosing from the outset of their arrest. This issue was not remedied by the fact that they had access to them days later at the arraignment hearing, when they were finally able to be represented by their own lawyers. In addition, the lawyers were unable to have any contact with the detainees before they were appointed. As if that were not enough, the detainees had not had access to legal counsel of their choosing or to their criminal case file before that time, and their lawyers had only a few minutes to review the case file and the offences with which their clients were being charged before the arraignment hearing. After the hearing, when they were finally able to go over the file, the lawyers found their access to basic documents hindered or denied, severely restricting the right to a defence.

(iii) Category V

35. The source alleges that the detention of the 11 Banesco employees, whom the Government has blamed for causing the national economic crisis, constitutes discriminatory treatment against those persons by the State, due to their position and work in an economic agent in the financial sector. These arbitrarily detained persons are individual employees who are committed to economic and social responsibility and who, although not overtly politically active, were detained within the framework of a political strategy of the Government aimed at fighting an alleged, but non-existent, economic war. It is pointed out that this is not an isolated case; rather, it is part of the systematic persecution of economic agents, business owners and their employees and relatives, who continue to carry out their economic activities despite government attacks, as well as many others who have been arbitrarily deprived of their liberty by the Venezuelan Government and whose cases have been identified and evaluated by various rights bodies.

Response from the Government

36. On 10 August 2018, the Working Group transmitted the source's allegations to the Government, requesting a response by 9 October 2018. The Government requested an extension of that deadline; the request was granted and the deadline extended to 9 November 2018. The Government submitted its response on 5 November 2018.

37. The Government states that on 1 May 2018, Assistant Prosecutor No. 73 of the Public Prosecution Service, with national jurisdiction for money-laundering and financial and economic crimes, applied to First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas for an arrest warrant, as well as precautionary measures prohibiting the transfer or encumbrance of real-estate assets and blocking and freezing access to bank accounts, against Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Belinda Beatriz Omaña Payares, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera for allegedly committing the offences of illicit deposit-taking, money-laundering and criminal association – offences provided for and punishable under the Act on Banking Sector Institutions and the Organic Act on Combating Organized Crime and the Financing of Terrorism.

38. According to the Government, on 2 May 2018, First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas issued an order granting the arrest warrant and precautionary measures prohibiting the transfer or encumbrance of real-estate assets and blocking or freezing access to bank accounts in respect of Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Belinda Beatriz Omaña Payares, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera for allegedly committing the offences referred to in the previous paragraph.

39. The Government reports that, on 2 May 2018, Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera were arrested by the Special Criminal and Forensic Investigations Unit, attached to the General Directorate of Military Counter-Intelligence, and subsequently transferred to the headquarters of the General Directorate and detained there, as is recorded in the police report duly signed by the officers on duty and on the notification of rights form signed by each of the detained persons and bearing their fingerprints.

40. The Government asserts that David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto and Pedro Pablo Pernía Madrid were arrested on 2 May 2018, while Belinda Beatriz Omaña Payares was detained on 3 May 2018. The arrests were made by the Special Criminal and Forensic Investigations Unit, attached to the General Directorate of Military Counter-Intelligence, under the arrest warrant issued by First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas. The detainees were transferred to the headquarters of the aforementioned General Directorate and detained there, as is recorded in the respective police reports duly signed by the officers on duty and on the notification of rights form signed by each of the detained persons and bearing their fingerprints.

41. The Government states that, on 4 May 2018, Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Belinda Beatriz Omaña Payares, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera appeared before First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas for the oral hearing. The detainees were duly represented at the hearing by their private defence counsel and each was given the opportunity to put forward any arguments they might have to challenge their detention. However, none of the detainees elected to testify; nor did they make any allegation or complain of any human rights violations in respect of their detention.

42. According to the Government, at the same oral hearing, the detainees' defence counsel made the arguments that they considered appropriate for their defence. It should be noted that at no time did they object to the criminal nature of the acts of which they were accused, nor did they complain of arbitrary detention or human rights violations.

43. The Government reports that, at the conclusion of the oral hearing, the judge ordered the pretrial detention of all the accused persons and instructed that Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera be held in the Simón Bolívar Centre for Foreign Defendants, and that Belinda Beatriz Omaña Payares, Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas and Carmen Teresa Lorenzo Lander be held in the National Women's Counselling Institute. The respective committal orders were issued that same day.

44. The decision of the judge was formalized through an order dated 4 May 2018 by First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas.

45. On 19 May 2018, according to the Government, the court ordered alternative measures to deprivation of liberty for Belinda Beatriz Omaña Payares, Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas and Carmen Teresa Lorenzo Lander. Similarly, on 23 May 2018, the court ordered alternative measures to deprivation of liberty for Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera, pursuant to article 242 of the Code of Criminal Procedure.

46. By virtue of the court-ordered alternative measures, Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Belinda Beatriz Omaña Payares, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera are currently at liberty.

47. It is pointed out that the detention of Teresa María de Prisco Pascale, Liz Carolina Sánchez de Rojas, Carmen Teresa Lorenzo Lander, Carlos Martín Lorenzo López, Pedro Pablo Pernía Madrid, Belinda Beatriz Omaña Payares, David Antonio Romero Romero, Cosme Eduardo Betancourt Quarto, Oscar Doval García, Marco Tulio Ortega Vargas and Jesús Guillermo Irausquín Herrera was in conformity with article 44 of the Constitution of the Bolivarian Republic of Venezuela and article 236 of the Code of Criminal Procedure, since it was carried out in line with an arrest warrant issued by a competent judicial authority following an application by the official body responsible for prosecutions.

Discussion

48. The Working Group thanks the parties for their initial communication and subsequent contributions to the resolution of the present case.

49. 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, the Covenant and the relevant international legal instruments, in accordance with its methods of work.

50. 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). Mere assertions that lawful procedures have been followed will not be sufficient to rebut the source's allegations.

51. The Working Group was informed that Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid and David Antonio Romero Romero, and Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander and Belinda Beatriz Omaña Payares, who all worked for the Banesco banking institution in the Bolivarian Republic of Venezuela, were released from prison and subjected to a new measure requiring them to report to the court once a week, prohibiting them from leaving the country and restricting access to their assets and bank accounts. In

accordance with rule 17 (a) of its methods of work, however, the Working Group decided to use its regular procedure to process the case and render the present opinion.

Category I

52. The Working Group is persuaded by the claim that, on 2 and 3 May 2018, military personnel apprehended the 11 Banesco employees in various locations. It did not, however, receive convincing information from the Venezuelan Government that the workers had been arrested in the act of committing a crime (in flagrante delicto) or that during their arrest they had been presented with a warrant for their arrest.

53. In its jurisprudence, the Working Group has consistently concluded that a person is considered to have been arrested in flagrante delicto when the accused is deprived of liberty during or immediately after the commission of a crime or is arrested in hot pursuit moments after the crime has been committed.¹

54. Similarly, the Working Group received compelling information indicating that the 11 Banesco employees were held incommunicado for at least several hours from the time of their arrest until 4 May 2018, when they were given access to their lawyers only minutes before being brought before a judge to be charged with the offences of illicit deposit-taking, money-laundering and criminal association.

55. The Working Group has indicated that anyone who is arrested must not only be informed, at the time of their arrest, of the reasons for their arrest,² but also of the judicial avenue for challenging the lawfulness of the deprivation of their liberty.³ Moreover, detained persons have the right to be informed by the authority, at the time of arrest, of their right to counsel of their own choosing.⁴ The Working Group has also indicated that incommunicado detention violates the rights to have access to a lawyer of one's own choosing, to be brought promptly before a judicial authority and to challenge before a judge the lawfulness of the detention. For these reasons, the Working Group considers that incommunicado detention constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the International Covenant on Civil and Political Rights.⁵

56. On the basis of the information provided by the parties, the Working Group concludes that the 11 Banesco employees were deprived of their liberty by military personnel, without having been informed of the reasons for their arrest, presented with any arrest warrants or caught in flagrante delicto. The Working Group therefore considers that the detention of these persons, at least from the time of their arrest until 4 May, when they were brought before a criminal judge, was arbitrary in accordance with category I of its methods of work.

Category III

Detention in accordance with the law and the procedures established by law

57. The Working Group is also convinced that the 11 Banesco employees were deprived of their liberty by military personnel of the Special Criminal and Forensic Investigations Unit, which is attached to the General Directorate of Military Counter-Intelligence, and that they were subsequently transferred to the headquarters of the General Directorate, where they were held incommunicado for several hours.

¹ See opinions No. 9/2018, para. 38; No. 36/2017, para. 85; No. 53/2014, para. 42; No. 46/2012, para. 30; No. 67/2011, para. 30; No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

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

³ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 7 (Right to be informed).

⁴ Ibid., Principle 9 (Assistance by legal counsel and access to legal aid).

⁵ Opinion No. 53/2016, para. 47.

58. Under the Covenant, anyone arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power.

59. According to the Human Rights Committee, article 9 of the Covenant requires that the procedures for depriving a person of their liberty must be established by law, which must identify which officials may carry out arrests and the place where individuals may be detained.⁶

60. For the Working Group, the participation of the armed forces in judicial police work may contravene certain principles of the rule of law, such as the separation of powers, the independence and autonomy of the courts and the subordination of the armed forces to the civilian authorities.⁷ It therefore wishes to emphasize, just as the Inter-American Court of Human Rights has done, that the investigative functions of the judicial police, including those relating to the restriction of the personal liberty of civilians, should be carried out by a civilian entity.⁸

61. As noted in paragraph 54 above, the Working Group is convinced by the claim that the 11 Banesco workers were held incommunicado for at least several hours from the time of their arrest until they were brought before the criminal judge. However, the Working Group has not received any compelling information demonstrating the existence of a legal framework that authorizes the armed forces to arrest persons or to use military facilities to deprive civilians of their liberty. For that reason, it considers that the detention of the 11 Banesco employees was contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant.

Adequate time and facilities to prepare a defence

62. The Working Group is convinced that, after their arrest, the 11 Banesco employees were transferred to the headquarters of the General Directorate of Military Counter-Intelligence, where they were kept in isolation, without sunlight, and held incommunicado for several hours, without access to counsel of their own choosing. It also concludes that, on 4 May 2018, the detainees' defence lawyers were sworn in just minutes before appearing in court and without having had any prior contact with, or knowledge of the status of, the defendants or access to the criminal case files. The lawyers had 45 minutes to prepare their defence ahead of the arraignment hearing before the judge.

63. The Working Group recalls that it is the right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of the charges against them, and to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.⁹

64. Like the Human Rights Committee, the Working Group considers that a person's right to be informed promptly of the nature and cause of the charges against him or her may be satisfied orally (verbally) provided that notification is subsequently confirmed in writing, that the applicable law is stated and that the acts on which the allegation is based are described.¹⁰

65. With regard to the right to defence counsel and to adequate time and facilities to mount a defence, the Working Group is of the opinion that accused persons should have adequate time and facilities for that purpose, which implies that they should have prompt access to lawyers, be able to communicate privately with them in conditions that guarantee the confidentiality of their communications,¹¹ have adequate time to prepare their defence¹²

⁶ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 23.

⁷ Inter-American Court of Human Rights, *Alvarado Espinoza and Others v. Mexico*, Judgment of 28 November 2018 (Merits, Reparations and Costs), Series C, No. 370, paras. 179-181.

⁸ Ibid.

⁹ International Covenant on Civil and Political Rights, art. 14 (3) (a) and (b).

¹⁰ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 31.

¹¹ Ibid., para. 34.

and be provided with access to the file containing all documents, evidence and other materials that the prosecution intends to submit to the court.¹³

66. Moreover, for the Working Group, the factual and legal basis for the detention must be disclosed to the detainee and/or his or her representative without delay so that they have sufficient time to prepare a challenge. This disclosure includes supplying a copy of the detention order; providing access to, and a copy of, the case file; and disclosing any material in the authorities' possession, or to which they may have access, with regard to the reasons for the deprivation of liberty.¹⁴

67. In view of the fact that the 11 Banesco employees were not promptly informed of the charges against them, could not contact lawyers of their own choosing at the time of their arrest, were not able to communicate privately with their lawyers, were not allowed to view the criminal file in good time and did not have sufficient time to prepare their defence, the Working Group considers that their detention was contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 14 (3) (a) and (b) of the Covenant.

Independence and impartiality of the judiciary

68. The Working Group received compelling information indicating that First Instance Procedural Court No. 3 of the Criminal Court Circuit of the Metropolitan Area of Caracas is presided over by a provisional judge without security of tenure, who ordered the arbitrary detention measure and then ordered the alternative measures to custody, subject to serious restrictions on the personal liberty of the 11 Banesco employees.

69. In this respect, the Working Group draws attention to the Basic Principles on the Independence of the Judiciary, in which it is stated that the law must guarantee the term of office of judges,¹⁵ their security of tenure¹⁶ and their system of promotions, which should be based on objective criteria such as professional ability, integrity and experience.¹⁷

70. The Working Group recalls that the Human Rights Committee, in its consideration of the fourth periodic report of the Bolivarian Republic of Venezuela, expressed concerns about the situation of the judiciary, with particular regard to its autonomy, independence and impartiality. It noted that only 34 per cent of the judges are tenured, meaning that the remainder have provisional status and that appointments and removals can be made on a discretionary basis.¹⁸

71. In the course of the review of the human rights situation in the Bolivarian Republic of Venezuela during the past two cycles of the universal periodic review, several delegations expressed concern about the lack of independence of the judiciary.¹⁹

72. The Working Group wishes to emphasize that both procedures recommended that the Bolivarian Republic of Venezuela should take immediate measures to ensure and uphold the full autonomy, independence and impartiality of judges; guarantee that they are free to operate without pressure or influence of any kind; and, in particular, remedy the provisional situation of the majority of judges as soon as possible.²⁰

73. Given that the judge in the case of the 11 Banesco employees is on a provisional appointment and that her tenure is clearly insecure and depends entirely on the authority responsible for her appointment, which is related to and controlled by the National

¹² Ibid., para. 32.

¹³ Ibid., para. 33.

¹⁴ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 7 (Right to be informed).

¹⁵ Basic Principles on the Independence of the Judiciary, principle 11.

¹⁶ Ibid., principle 12.

¹⁷ Ibid., principle 13.

¹⁸ CCPR/C/VEN/CO/4, para. 15.

¹⁹ A/HRC/19/12, paras. 30, 88, 96.13, 96.14, 96.16, 96.18, 96.19, 96.20 and 96.21; also A/HRC/34/6, paras. 102, 119, 133.46, 133.79, 133.133, 133.138, 133.154, 133.155, 133.156, 133.157, 133.158, 133.159, 133.160, 133.162, 133.163, 133.164, 133.165, 133.166, 133.167 and 133.218.

²⁰ See A/HRC/WGAD/2015/27.

Executive, the Working Group considers that there has been a violation of the fundamental guarantee of the independence and impartiality of the judiciary, as enshrined in article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant.

74. In the light of the partial non-observance of international norms on the right to a fair trial, as enshrined in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, the Working Group considers that the detention of the 11 Banesco employees was arbitrary in accordance with category III of its methods of work.

Category V

75. The Working Group was not persuaded by the claim that the persons were deprived of their liberty owing to their position and work in an economic agent in the financial sector and, thus, was unable to conclude that this amounted to arbitrary detention in accordance with category V of its methods of work.

76. In the light of the recurrent pattern of arbitrary detention identified by this international human rights mechanism 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 direct constructive dialogue with the Government and representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

Disposition

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

The deprivation of liberty of Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary within the meaning of categories I and III.

78. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares without delay and bring it into conformity with relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

79. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to grant the immediate and full release of Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares and to accord them an enforceable right to compensation and other reparations, in accordance with international law.

80. The Working Group urges the Government to ensure a thorough and independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares and to take appropriate measures against those responsible for violating their rights.

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

Follow-up procedure

82. 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 the right to personal liberty has been fully restored to Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares and, if so, on what date;

(b) Whether compensation has been paid or other reparations made to Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares;

(c) Whether an investigation has been conducted into the violation of the rights of Oscar Doval García, Marco Tulio Ortega Vargas, Jesús Guillermo Irausquín Herrera, Carlos Martín Lorenzo López, Liz Carolina Sánchez de Rojas, Teresa María de Prisco Pascale, Carmen Teresa Lorenzo Lander, Cosme Eduardo Betancourt Quarto, Pedro Pablo Pernía Madrid, David Antonio Romero Romero and Belinda Beatriz Omaña Payares and, if so, what the outcome of the investigation has been;

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

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

83. 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.

84. 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 action of its own 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.

85. 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.²¹

[Adopted on 26 April 2019]

²¹ Human Rights Council resolution 33/30, paras. 3 and 7.