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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. 25/2019 concerning Ricardo Traad Porras (Panama)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the mandate of the Working Group by 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 by its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 28 November 2018 the Working Group transmitted a communication concerning Ricardo Traad Porras to the Government of Panama. The Government responded on 8 March 2019, requesting an extension of the deadline to reply, which was refused on the grounds that the request was received after the deadline set for 28 January 2019 had expired. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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



## Submissions

### *Communication from the source*

4. Ricardo Traad Porras is a Panamanian citizen who has worked as a pilot of ships and submarines passing through the Panama Canal for 35 years. He has also been Director of the National Port Authority, Chief of Operations of the Panamanian Navy, Manager of the Port of Balboa, Training Director of the Panamanian Navy, a tugboat captain for the Panama Canal Commission, a harbourmaster and the chairperson of a family-owned company.

### Background

5. According to the information received, on 13 January 2006, in international waters near the Netherlands Antilles, the United States Coast Guard intercepted the *Perseus V*, a ship flying a Panamanian flag, and seized 1.6 tons of illicit drugs in its hold. As a result and in accordance with bilateral treaties, a criminal investigation into the transportation of drugs was conducted in the United States of America. The persons involved were investigated, prosecuted and convicted of criminal offences.

6. The source reports that, following the investigation by the United States authorities, some time in either late January or early February 2006, the *Perseus V* was handed over to Panama and received by the National Maritime Service, whose director at the time was Mr. Traad Porras. Acting in that capacity, Mr. Traad Porras referred the case, together with three crew members who arrived with the vessel, to the Public Prosecution Service; however, the latter did not open an investigation. The United States authorities did not request that a secure chain of custody be kept because the case had been resolved and the vessel had no further evidentiary significance. In cases such as these, the National Maritime Service is responsible for ensuring the maintenance of the vessel so that it does not sustain damage or sink. Due to the risk that the *Perseus V* might sink, the competent authorities opted to carry out an exchange transaction under an existing administrative procedure that called for the valuation of the vessel and all its components. In October 2006, the Panamanian authorities received a request for legal assistance from the United States authorities in which they asked for a visual inspection and search of the vessel to be conducted with a view to finding traces of drugs. The outcome of that search was negative.

7. According to the source, on 7 March 2007, pursuant to a note from the Drug Enforcement Administration of the United States, the Public Prosecution Service opened a summary procedure against Mr. Traad Porras (Case No. 149-07). The note from the Drug Enforcement Administration referred to the events of 13 January 2006 and indicated that the vessel was thought to still contain concealed drugs.

8. On 21 May 2007, the First Prosecutor's Office for Drug-Related Offences directed that a statement be taken from the persons accused of crimes against public health and the laundering of the proceeds of drug trafficking, under articles 389 to 393 of the Criminal Code. The scientific evidence obtained during the investigation (the results of an ion scan) showed that there had been no drugs or narcotics in the hold in question. The record of the proceedings indicates that the Prosecutor's Office stated that the use of suitable evidentiary techniques had failed to detect the presence of illicit drugs in the second compartment of the *Perseus V*. The vessel's crew at the time of its capture unanimously stated that there were no drugs in that compartment and that the foreign authorities had seized all the illicit substances that had been on the vessel.

### Arrest and detention

9. The source states that on 27 May 2007, several hooded men conducted a search of Mr. Traad Porras's home, arrested him and took him away, without permitting him to call either his family or his lawyer. They transferred him to the headquarters of the Narcotics Division of what was then the Technical Investigative Police Brigade, where he was kept for between three and four hours without knowing what was happening. He was then told that he had been arrested in connection with the seizure of drugs on the *Perseus V*. They did not show him any evidence, but instead referred to an intelligence report to which they said

that they were unable to give him access. Without the presence of his lawyer and without having been advised of his rights, Mr. Traad Porras was informed that he was being “detained on a preliminary basis”; no warrant was produced to corroborate this.

10. The Prosecutor’s Office is said to have requested the pretrial detention of Mr. Traad Porras on 28 May 2007. It is reported that the prosecution’s submission did not consider less restrictive alternative measures, nor did it present arguments to support or justify the need for detention as the only measure to guarantee that Mr. Traad Porras would appear in court when called to stand trial.

11. The source reports that the first 60 days of Mr. Traad Porras’s detention were spent in the basement of an administrative building (Edificio Avesa) and were not supervised by the prison system. Mr. Traad Porras was kept in a 5 m<sup>2</sup> cell in poor conditions and in total isolation. His cell had no shower, no windows and no ventilation or natural light. Despite this, he was not allowed out to walk or exercise. He was not permitted conjugal visits and he quickly lost all notion of time due to his lack of contact with the outside world. The food that he was given was insufficient and of poor quality.

#### Trial and restrictive precautionary measures

12. According to the source, the preliminary hearing took place on 25 February 2008. Although the Fourth Criminal Circuit Court of the First Judicial Circuit of Panama authorized precautionary measures other than pretrial detention, the First Prosecutor’s Office for Drug-Related Offences appealed against that decision. In the appeal proceedings, the Second High Court of the First Judicial District of Panama decided to revoke the alternative precautionary measures and to order pretrial detention. In what appears to be a contradiction in terms, in its decision the Court stated that there was no evidence that the persons being charged were a flight risk, would attempt to tamper with the evidence already acquired, or planned to take the life of or do harm to another person or themselves. The Court considered that pretrial detention was necessary despite the statements of the persons arrested in international waters, who without exception confirmed that there were no drugs in the other compartments. The scientific evidence provided by the ion scan was not taken into consideration.

13. On 25 February 2008, criminal proceedings were instituted against Mr. Traad Porras at a preliminary hearing before the Fourth Criminal Circuit Court of the First Judicial Circuit of Panama. On 25 June 2009, a plenary hearing was held in the framework of those proceedings. On 29 January 2010, the Court acquitted the defendants at first instance (judgment No. 21), considering that, since it was impossible for the Panamanian authorities to have removed any narcotics from the vessel, the actions in question could not be classified as a drug-related offence. The Court also considered that it could not convict Mr. Traad Porras of the offence of money-laundering, as there was no evidence upon which to base a conviction.

14. However, the source indicates that the First Prosecutor’s Office for Drug-Related Offences lodged an appeal against the lower court ruling. Despite his acquittal, Mr. Traad Porras regained his freedom only partially and conditionally, since he was placed under precautionary measures which prohibited him from leaving the national territory without court authorization and obliged him to report to the Second High Court on the fifteenth and thirtieth day of each month.

15. The source states that in December 2015 and January and February 2016, Mr. Traad Porras requested an exit permit in order to visit his seriously ill father in Colombia. Although that request was granted, the decision was rendered ineffective because the First Prosecutor’s Office for Drug-Related Offences appealed against it. It was not until 16 February 2016 that the appeal was received by the office of the Second High Court of Justice, which then said that it was not in a position to rule on the matter, as it was “impossible to comply with the petition because of the passage of time”.

16. On 15 July 2016, the Second High Court of Justice issued a judgment at second instance (judgment No. 88), whereby the acquittal of 29 January 2010 was reversed and Mr. Traad Porras was sentenced to 84 months’ imprisonment and disqualification from public office. The source states that Mr. Traad Porras has not been formally notified of this

judgment and its enforcement has therefore not yet begun. However, the Panamanian courts are using the judgment as a basis for rejecting petitions that have been submitted on his behalf (for exit permits and habeas corpus).

17. The source highlights the fact that the conviction was handed down together with the dissenting opinion of one of the judges, who reportedly stated that a draft judgment, which had not been agreed upon by the Chamber, had been circulating in the Court since 18 June 2010 and that it was not until 10 May 2016, almost six years later, that a new alternative draft was circulated. The source emphasizes that the dissenting opinion reveals legal and evidentiary problems in the judgment, namely:

(a) The conviction bears no relation to the charges. On examining the statement taken from the accused, it is clear that the defendants were told that they were being investigated for a drug-related offence against public health and a crime against the national economy in the form of the laundering of the proceeds of drug trafficking. Yet the Chamber convicted them of the offence of the corruption of public officials;

(b) The evidence that was submitted does not corroborate the commission of the offence under investigation. The decision was based on circumstantial evidence which was sufficient grounds for opening an investigation, was not sufficient to prove that a drug-related offence against public health had taken place. Similarly, with regard to the crime of laundering the proceeds of drug trafficking, the charge was based on assumptions which do not prove that such an offence took place;

(c) It cannot be assumed that the transactions carried out by Mr. Traad Porras were illicit. The judgment was based on the expert report submitted by the Prosecutor's Office, which did not include all of the necessary information but instead used and gave weight to information submitted by parties who had no access to the written submissions. In reaching its judgment, the Court did not question the fact that no accounting method had been used in drawing up the financial expert report, which also, in determining the casino expenses, added together the cheques covering expenses and the receipts that are used to repay credit and markers, without understanding how credit or tokens are handled. Moreover, the expert report submitted by the accused, which proved that the assets were acquired or purchased at lower prices than those indicated by the expert of the Public Prosecution Service, was not taken into account.

18. The source indicates that, on 7 March 2018, Mr. Traad Porras's defence attorney filed an extraordinary remedy of habeas corpus, claiming that his detention was arbitrary because: (a) the precautionary measures did not meet the requirements of suitability, necessity and proportionality; (b) the authorities disregarded the provisions of article 2126 of the Judicial Code, since they confined themselves to stating – without disclosing detailed reasons – that the measures related to the commission of an alleged crime, basing themselves solely on a note from the Drug Enforcement Administration; (c) the detention was not in conformity with the requirements laid down in article 2128 of the Judicial Code; and (d) the standard of proportionality set forth in article 2129 of the Judicial Code was not met, since Mr. Traad Porras's fundamental guarantees and human rights were undermined beyond reasonable justification. The Supreme Court rejected the remedy of habeas corpus and upheld the precautionary measure.

19. Finally, the source claims that, as a result of this long and arbitrary process, Mr. Traad Porras's physical and psychological capacities have been diminished ever since his release from pretrial detention. This is also reflected in the fact that the port authorities have reduced his working hours owing to his particular condition, which is related to the effects of his detention and the proceedings against him. Consequently, his prospects for promotion have been undermined and his monthly income is significantly lower than in the past.

Allegations of the source concerning the illegality and arbitrary nature of the detention

20. The source argues that the restrictions on Mr. Traad Porras's personal freedom and freedom of movement are in violation of the principle of legality for two reasons: (a) his pretrial detention was not ordered in accordance with the provisions of the Judicial Code, which are in line with international standards; and (b) the subsequent restrictions on his

freedom of movement were contrary to the Code of Criminal Procedure and international law.

21. Concerning the decision to order pretrial detention, having been interviewed by the prosecutor, Mr. Traad Porras was told that he could not return home, despite there being no warrant for his arrest. Article 2126 of the Judicial Code requires that precautionary measures be imposed only when there is substantial *prima facie* evidence against the person in question. Furthermore, article 2128 requires that, once the existence of substantial *prima facie* evidence has been established, pretrial detention may only be ordered: (a) further to the urgent requirements of investigations related to specific situations that might endanger the acquisition or authenticity of evidence; (b) when the accused takes flight or presents a clear risk of doing so and the offence carries a minimum sentence of 2 years' imprisonment; or (c) when, owing to special circumstances or the character of the accused, there is a real danger that he or she will commit serious crimes using weapons or other means of doing personal violence. It is argued that none of these requirements were found to have been met in the case of Mr. Traad Porras.

22. The source states that the decision to order Mr. Traad Porras's detention indicated only that the measure was related to the alleged commission of crimes and was based on the note of the Drug Enforcement Administration. This is mere speculation and is not substantial *prima facie* evidence as required by law. The lack of such evidence is clear, given the evidence showing that no drugs had been kept in the hold where they had allegedly been concealed.

23. It is contended that no consideration was given to the other requirements set forth in article 2128. Mr. Traad Porras did not pose any specific danger in terms of the acquisition of evidence, nor was there any risk of him taking flight, given his strong family and professional ties. Nor was there a real danger that he would commit serious crimes. It is clear from the decision ordering the detention that the authorities did not conduct a detailed analysis of individual circumstances before ordering the measure. This was recognized by the Second High Court of Justice, which, in its ruling on the detention measure, stated that there was no evidence that the accused persons intended to take flight, posed a danger to evidence already acquired, or planned to take the life of or do harm to another person or themselves.

24. Article 429 of the Code of Criminal Procedure states that acquittals shall have the following effects: (a) the accused shall be immediately released, even if the judgment is contested; (b) all precautionary measures shall cease; and (c) other precautionary measures may be established only in respect of foreign nationals or tourists. It is argued that these provisions were not applied in the case of Mr. Traad Porras. Despite his acquittal by the criminal court of first instance, the restrictions on his freedom, notably the ban on his leaving the country and the obligation to sign in with the Court twice a month, have been maintained. The source states that these measures remain in effect and have not been reviewed by the courts. There is no law which authorizes the restriction of Mr. Traad Porras's freedom following his acquittal.

Presumption of innocence, absence of exceptional circumstances, failure to consider other less restrictive measures, due justification of necessity and proportionality

25. It is contended that the Panamanian authorities did not justify the detention as an exceptional measure. The prosecution's submission of 28 May 2007 gives no reasons for pretrial detention; no indication is given that alternative measures were examined or that it was seen as a measure of last resort. Furthermore, the courts did not conduct a review for the purpose of duly justifying the necessity and proportionality of detention. In the event of a present, direct and imperative threat justifying detention, the burden of proof in establishing that risk should fall upon the State. The longer the detention lasts, the greater that burden of proof becomes.

26. On 25 February 2008, the Fourth Criminal Circuit Court of the First Judicial Circuit of Panama granted precautionary measures other than detention, which were the subject of an appeal by the Prosecutor's Office. In response to that appeal, the Second High Court of Justice decided to revoke the less restrictive measures and to order pretrial detention, even

while recognizing that there was no evidence that the accused persons intended to take flight, posed a threat to evidence already acquired, or planned to take the life of or do harm to another person or themselves. The source states that this is unreasonable, considering that Mr. Traad Porras had complied with the obligation to sign in with the Court every 15 days. As a result of that decision, Mr. Traad Porras remained in pretrial detention until his acquittal on 29 January 2010. That period of two years and eight months could be regarded as an anticipatory punishment.

27. The Second High Court justified part of its decision to order pretrial detention on the basis of the charges, which involved two offences that were deemed serious, i.e. a drug-related offence against public health and a crime against the national economy in the form of money-laundering.

28. The source contends that the pretrial detention was disproportionate and unreasonable because it lasted for almost 3 years and because Mr. Traad Porras spent 60 days of that period in isolation. The source also contends that the less restrictive measures are disproportionate and unreasonable because they have been applied for more than 11 years. Mr. Traad Porras has been sentenced to a term of imprisonment of 84 months, or 7 years. How is it possible that he has been subject to measures that restrict his freedom for an even longer period of time? The deprivation of a person's liberty for an excessively prolonged period, when his or her criminal responsibility has not been established, is tantamount to an anticipatory punishment. Furthermore, Panamanian law did not permit such an extended period of detention; the Code of Criminal Procedure in force at the time (Act No. 63 of 2008) – the most favourable law – set a maximum period of one year. Holding a person in pretrial detention for a lengthy period may create a de facto situation in which judges are more likely to hand down convictions.

29. The source points out that, for many years, during the appeal proceedings against his acquittal, Mr. Traad Porras was subjected to restrictions on his personal liberty such as a ban on his leaving the country without court authorization. He has requested exit permits on a number of occasions. However, although the court hearing the case authorized the requested permits on the last seven occasions, the Public Prosecution Service contested their issuance in each instance. This led the Court to find that it was not in a position to rule on the matter because, owing to the passage of time and the lack of a response, it was “impossible to comply with the petition because of the passage of time”. These practices rendered nugatory the right to apply for exit permits, turning the precautionary measure into a permanent circumstance.

Right to challenge the illegality and arbitrary nature of the detention and right to appeal against the conviction: lack of recourse to a higher court

30. The source argues that, in the present case, the pretrial detention order prepared by the prosecuting authority did not allow for any means of appealing the order before a competent court. The Code of Criminal Procedure in force at the time of his arrest did not guarantee Mr. Traad Porras a review of the lawfulness of the pretrial detention order recommended by the prosecution and, therefore, the detention was not subject to judicial review. Consequently, it was not until his acquittal of 29 January 2010, two years and eight months after his arrest, that Mr. Traad Porras partially regained his freedom.

31. According to the source, a decision to remand in custody is arbitrary if the justification for that decision is not periodically re-evaluated. Pretrial detention should not continue if the reasons for it no longer persist. The judge does not have to wait until a judgment of acquittal is handed down and should periodically assess the legality, necessity, proportionality and reasonableness of the detention. Mr. Traad Porras's prolonged detention without judicial review increased the risk of ill-treatment, as judicial review is a safeguard for the right to security of person and the prohibition of torture.

32. The source states that Mr. Traad Porras, having been convicted for the first time by the court of second instance, had no recourse to a higher court. This was the first time in the proceedings that Mr. Traad Porras was given a custodial sentence by a national court. However, as a second instance judgment, this could not be challenged by means of an appeal within the meaning of article 14 (5) of the Covenant. In the source's view, the fact

that it is not possible to lodge an ordinary appeal in this type of criminal case, in which the conviction is decided by a higher court acting in “sole instance”, means that the final custodial sentence is an arbitrary decision, in that it constitutes a restriction of freedom for which no appeal is possible, there being no guarantee of a review by a higher court.

33. It is further contended that not only was Mr. Traad Porras’s right to due process violated, but that he was discriminated against in relation to other defendants who were entitled to appeal when their convictions were handed down by the trial court or court of first instance.

34. On 7 March 2018, Mr. Traad Porras filed a remedy of habeas corpus, which was rejected, the imposed precautionary measure being declared “legal”, despite the fact that the precautionary measures have been in effect for more than 11 years and exceed what anyone might deem to be reasonable for preventive purposes.

35. Mr. Traad Porras was subjected to pretrial detention at the request of the Prosecution Service for two years and eight months (from 28 May 2007 to 29 January 2010), without being able to challenge the legality or arbitrary nature of his detention, since the legal system made no provision for that possibility. Similarly, when he challenged the legality and arbitrary nature of the precautionary measures imposed from 2010 to 2016, arguing that consideration had not been given to their necessity, proportionality or reasonableness, the remedy of habeas corpus proved ineffective.

Unjustified delay by reason of not being brought to trial within a reasonable time and non-compliance with procedural deadlines during the investigation

36. The source argues that the length of the criminal proceedings involving Mr. Traad Porras violated the international standard for being brought to trial within a reasonable time. The prosecution launched its investigations in March 2007, and Mr. Traad Porras was arrested at the end of May 2007. On 29 January 2010, two years and eight months later, he was acquitted at first instance by the Fourth Criminal Circuit Court of the First Judicial Circuit of Panama. On 15 July 2016, six years and six months later, the Second High Court of Justice sentenced him to 84 months’ imprisonment. A final judgment on the case has still not been rendered, so the time that has elapsed since the beginning of the proceedings is 11 years and 6 months.

37. By any measure, this delay is a remarkable one and is without due or valid justification. It has arisen exclusively as a result of situations attributable to the judicial authorities. As can be seen from the dissenting opinion accompanying the decision to convict, a draft judgment had been circulating within the Court since 18 June 2010 but had ultimately not been accepted. Although it was no longer necessary to gather further evidence, and no new proceedings had been instituted that would have created a delay, it was not until 10 May 2016, almost six years later, that an alternative draft judgment was circulated, and that draft was not adopted until July 2016. The case remained unresolved for more than six years and five months after the proceedings had reached the stage where a second instance judgment could be issued. The case is not of sufficient complexity to have merited such an extraordinary delay.

38. According to the source, another reason why the delay was unjustified and attributable to the Panamanian authorities is that the pretrial proceedings were not conducted within the period stipulated by law. Article 2033 of the Judicial Code requires the completion of the pretrial stage within a maximum of four months, with the possibility of requesting an extension before the expiry of that period. Non-compliance with this provision is a violation of due process. In the case at hand, the pretrial investigation was opened on 7 March 2007, but the prosecution’s submission No. 748-07 was not issued until 20 December – 9 months and 13 days later – and the elapsed period was thus longer than that permitted by law. Despite the expiry of the four-month deadline on 7 July, it was not until 25 October that the Prosecutor’s Office requested the extension. No decision was taken in that regard because the prosecution’s submission was issued before the authorities decided on the matter.

39. The source argues that the prolonged nature of the criminal proceedings has harmed Mr. Traad Porras’s reputation. Given that he is a public figure who is recognized for his

work in the National Maritime Service and known for his investments in real estate projects, the damage to his reputation caused by the criminal proceedings – which have taken more than 11 years – is especially serious.

Other guarantees: the rights to have adequate time and facilities for the preparation of a defence, to be brought before a competent authority and to examine, or have examined, the witnesses; “faceless” witnesses and the inconsistency between the charges and the counts of conviction

40. The source argues that Panama violated the detainee’s right to a hearing by an independent and impartial tribunal, which includes the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, the right to have adequate time and facilities for the preparation of a defence and the right to examine, or have examined, the witnesses.

41. After the search of his house and his arrest, Mr. Traad Porras was taken to the basement of the building of the Narcotics Division of the Judicial Investigative Police Brigade. At 11 p.m. that day, he was taken to the Prosecutor’s Office, where he was told that he was being investigated in connection with the loss of 1 ton of drugs. He was not shown evidence to support the allegation and was told that he could not have access to such evidence. Moreover, the entirety of the meeting took place without the presence of his lawyer, and contact with his family was restricted. He was not informed of his constitutional or other legal rights. It was not explained to him that he had the right not to testify against himself and the right to refrain from making a statement. Only later did he have access to a lawyer. The source notes that the Human Rights Committee has indicated that a public prosecutor cannot be considered to be an officer exercising judicial power under article 9 (3) of the Covenant.<sup>1</sup>

42. The source contends that “faceless” witnesses (protected witnesses) were called during the proceedings and that Mr. Traad Porras was prevented from confronting, contradicting or challenging them in the exercise of his right of defence. These witnesses were “Ofelino” (Sheet No. 9079 of the case file) and “Gumersindo” (Sheet No. 9089 of the case file). The source states that the use of such witnesses should be subject to judicial oversight, should be based on the principles of necessity and proportionality, should be exceptional and should be founded on the existence of a risk to the witness. Even in such cases, a conviction cannot be based solely on the testimony of witnesses whose identity is withheld. None of these norms were observed in this case.

43. The source claims that there was undue interference with the witnesses, since, during the hearing at first instance, a witness confessed that the prosecutor had instructed him to point out and testify against Mr. Traad Porras. Similarly, the court of first instance recognized that there were serious irregularities in the reports prepared by the experts used by the Public Prosecution Service, and it ordered that attested copies of those reports be provided for the purposes of investigating possible offences against the administration of justice, namely the simulation of a punishable act. Moreover, in the dissenting opinion that accompanied the appeal court judgment, the judge who wrote that opinion concluded that the evidence was insufficient to prove the existence of the offence being investigated and that it could not be assumed that the transactions in question were illicit.

44. The source argues that the court of first instance not only recognized serious irregularities in respect of the evidence, but that the court was itself responsible for irregularities, including the failure to state the reasons for its decision – a failure that was noticed but dismissed by the appeal court. The proceedings against Mr. Traad Porras should have included a preliminary hearing during which the pretrial proceedings were assessed to determine whether there was sufficient evidence of the existence of the alleged punishable act and the likely involvement of the accused. However, the court of first instance did not undertake such an assessment. This was later recognized by the courts, which observed that the first instance judge had not performed the task of explaining what evidence there was of

<sup>1</sup> Human Rights Committee, general comment No. 35 (2014) on article 9 (Liberty and security of person), para. 32.



the existence of the punishable act and the involvement of the accused, as can be seen from the decision in which the judge ordered the opening of the trial. However, the judges minimized the importance of this infringement of the duty to set out a reasoned assessment and then ignored it (despite the fact that this infringement was deemed sufficient for them to declare the proceedings null and void, or at least to order that the judgment be corrected), thus allowing the proceedings, in violation of Mr. Traad Porras's human rights, to continue.

45. The source also argues that there is an inconsistency between the initial charges and the conviction handed down in 2016. The crimes imputed to the defendant at the outset of the proceedings are different from those he was convicted of at second instance, without possibility of appeal. The statement taken from the accused indicates that Mr. Traad Porras was placed under investigation for a drug-related offence against public health and a crime against the national economy in the form of the laundering of the proceeds of drug trafficking. Yet Mr. Traad Porras was convicted of laundering the proceeds from the corruption of public officials. This was noted in the dissenting opinion that accompanied the appeal court judgment.

46. In the source's view, that procedural action on the part of the appeal court seriously undermined the right to a defence and, in particular, the right to personal liberty, because it subjected Mr. Traad Porras to a custodial sentence in violation of fundamental rules and principles. If the appeal court considered that the judgment handed down at first instance should be overturned, it ought not to have done so directly by exercising its prerogative to reverse the decision, but should have ordered a retrial, which was not done. The source contends that the entire process was plagued by both formal and substantive procedural errors to such an extent that no other conclusion may be reached except that Mr. Traad Porras was presumed guilty from start to finish.

#### *Complaints of cruel, inhuman and degrading treatment*

47. The source claims that, during Mr. Traad Porras's arrest and detention, he was subjected to cruel, inhuman and degrading treatment. The search of his house was carried out late at night by 16 men, with their faces covered, who arrested Mr. Traad Porras and removed him from the house in front of his wife and infant son. He was imprisoned in the basement of a police building that is not part of the prison system and in which he was the only detainee. Mr. Traad Porras was subsequently locked up for 60 days in total isolation, in an office measuring approximately 5 m<sup>2</sup>, without windows, daylight or the possibility to exercise or to go for a walk. He did not see daylight for even one hour a day. It is stated that the hygiene of the place was so poor – there being no access to showers or other sanitation – that he required medical treatment as a result. The food provided to him was of extremely poor quality and did not meet the minimum requirements of the right to health. He was served only two meals a day and, on some weekends, he was not given food at all. He was then transferred to El Renacer prison, in the official prison system, where he was held in pretrial detention for two years and eight months, in the same wing as convicted persons, in violation of international standards. There, the visiting regime was extremely limited, with visits permitted on Saturdays between 10 a.m. and 3 p.m.

48. In short, it is reported that Mr. Traad Porras has suffered physical, psychological and moral harm as a result of his detention; his future prospects were so seriously compromised that his marriage ended in failure. The source contends that the legal proceedings and the deprivation of liberty have brought on illnesses and disorders, symptoms of anxiety, paranoia, phobias and major depressive affective disorder.

#### *Response from the Government*

49. The Government responded to the communication on 8 March 2019 with a request for an extension of the deadline for its reply. That request was rejected on the grounds that it had been submitted after the expiry of the deadline, which had been set for 28 January 2019.

## Discussion

50. In the absence of a response from the Government, the Working Group has decided to render the present opinion on the basis of all the information available to it, in conformity with paragraph 15 of its methods of work.

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

52. In that context, the Working Group is persuaded that Mr. Traad Porras is a Panamanian citizen and a pilot of ships and submarines passing through the Panama Canal.

53. The Working Group has been informed that, on 29 January 2010, Mr. Traad Porras regained his freedom partially and conditionally, since at that point he was placed under precautionary measures which prohibited him from leaving the country without a court's authorization and obliged him to report to a court twice a month. In view of the duration of the proceedings in which a final judgment has still not been handed down or executed, the duration of the restrictive precautionary measures that have been imposed and the characteristics and importance of the case, the Working Group has decided to render the present opinion in conformity with paragraph 17 of its methods of work.

54. The Working Group is persuaded that, following an investigation by the United States authorities, between late January and early February 2006, a vessel was handed over to Panama and received by the National Maritime Service, whose director was Mr. Traad Porras. Some months later, in October 2006, the Panamanian authorities received a request for legal assistance from the United States authorities with a view to conducting an inspection of the vessel to search for traces of drugs. The source has provided information, which the Government has not refuted, indicating that the outcome of that search was negative.

55. The Working Group has also received convincing information about the opening by the Public Prosecution Service of a summary procedure against Mr. Traad Porras in March 2007. Moreover, it has been established that, on 27 May 2007, a number of hooded men conducted a search of Mr. Traad Porras's home, during which they took him into custody and led him away. He was informed that he had been "detained on a preliminary basis"; no warrant was produced to corroborate this.

## *Category III*

56. Before determining whether Mr. Traad Porras's detention was arbitrary, the Working Group recalls that, under article 9 (1) of the Covenant, everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

### Pretrial detention

57. The Working Group is aware that article 9 (3) of the Covenant provides that it shall not be the general rule that persons awaiting trial shall be detained in custody. It also specifies that release from custody may be subject to guarantees of appearance for trial, of appearance at any other stage of the judicial proceedings and, should the occasion arise, of appearance for execution of the judgment.

58. The Working Group has emphasized that pretrial detention constitutes a grave limitation of freedom of movement, which is a fundamental and universal human right.<sup>2</sup> It

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<sup>2</sup> See opinions No. 1/2018, No. 16/2018, No. 24/2015 and No. 57/2014.

follows that, in the interests of justice, liberty should be recognized as a general principle or rule, and detention as an exception.<sup>3</sup>

59. The Human Rights Committee has pointed out that, in order to uphold the right to liberty and security of person, detention pending trial must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The Committee has indicated that courts must examine alternatives to pretrial detention, such as bail, electronic bracelets or other measures.<sup>4</sup>

60. The Committee has also pointed out that, after an initial determination has been made that pretrial detention is necessary, there should be a periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.<sup>5</sup>

61. In the present case, the Working Group has noted that, in the decision to order the pretrial detention of Mr. Traad Porras, no evidence was adduced regarding a risk that he would take flight or commit new crimes. The Working Group is also persuaded that, for the duration of his pretrial detention, from 28 May 2007 to 29 January 2010, Mr. Traad Porras did not have access to effective judicial remedies for the periodic evaluation of the appropriateness of the measure. Consequently, the Working Group considers that the pretrial detention of Mr. Traad Porras was contrary to the obligations of Panama under article 9 (3) of the Covenant and was prejudicial to his rights.

#### Equality of arms and right to a defence

62. The Working Group recalls that article 14 (3) (e) of the Covenant guarantees the right of everyone “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. In this regard, the Working Group is aware of the position of the Human Rights Committee, which recognizes that, “as an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.”<sup>6</sup>

63. As is established in its jurisprudence, the Working Group has decided that, when the prosecution uses the written testimony of witnesses who do not appear before the court to be examined during the trial, the guarantee contained in article 14 (3) (e) of the Covenant is violated.<sup>7</sup> Similarly, the Working Group has found that the use of anonymous witnesses runs counter to this guarantee, since it may be detrimental to the accused person’s right to a defence by making it impossible to question witnesses or challenge their statements if they are thought to be lacking in credibility.<sup>8</sup>

64. In the present case, the Working Group is persuaded that the testimony of “faceless” witnesses (protected witnesses) was used during the proceedings and that Mr. Traad Porras was prevented from confronting, contradicting or challenging them in the exercise of his right of defence. The Working Group recalls that the Government chose not to provide information regarding the legitimacy of that measure and the applicable safeguards involved in its possible implementation. For these reasons, the Working Group finds a violation of the guarantee contained in article 14 (3) of the Covenant.

<sup>3</sup> A/HRC/19/57, paras. 48–58.

<sup>4</sup> Human Rights Committee, general comment No. 35, para. 38.

<sup>5</sup> *Ibid.*

<sup>6</sup> Human Rights Committee, general comment No. 32 (2007) on article 14: right to equality before courts and tribunals and to a fair trial, para. 39.

<sup>7</sup> See, for example, opinions No. 14/2017, No. 40/2014, No. 4/2013 and No. 53/2011.

<sup>8</sup> See opinion No. 91/2017.

## Trial within a reasonable time

65. The Working Group recalls that both the Universal Declaration of Human Rights and the Covenant recognize the right of everyone to be tried within a reasonable time. Specifically, article 9 (3) of the Covenant provides that: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge [...] and shall be entitled to trial within a reasonable time or to release.” Furthermore, article 14 (3) (c) of the Covenant recognizes the right of everyone charged with a criminal offence to be tried without undue delay.

66. The Human Rights Committee has indicated that the right to be tried without undue delay is intended, *inter alia*, “to avoid keeping persons too long in a state of uncertainty about their fate”.<sup>9</sup>

67. The Working Group has received no information on the existence of any obstacles that might have justified the procedural delays owing either to the complexity of the case or to any due diligence undertaken by the Panamanian authorities in the course of court proceedings.

68. On the basis of the information provided by the source, which was not refuted by the Government, it is the understanding of the Working Group that, more than 11 years and 6 months since the Prosecutor’s Office opened investigations, Mr. Traad Porras has not been notified of the issuance and execution of a final judgment.

69. In view of the foregoing and considering the long duration of the criminal proceedings to which Mr. Traad Porras has been subjected, the Working Group concludes that the State has failed to comply with international standards on the right to be tried within a reasonable time and without undue delay, as set forth in articles 10 and 11 (1) of the Universal Declaration of Human Rights and in articles 9 (3) and 14 (3) (c) of the Covenant.

## Right to be informed of the charges

70. The Working Group recalls that, under international law, and specifically article 9 (2) of the Covenant, anyone who is arrested has the right to “be informed ... of the reasons for his arrest and shall be promptly informed of any charges against him”.<sup>10</sup> The Human Rights Committee has indicated that if a person already detained on one criminal charge is also ordered detained to face an unrelated criminal charge, prompt information must be provided regarding the unrelated charge.<sup>11</sup> The purpose of requiring that arrested persons be informed of the charges against them is to facilitate the determination of whether pretrial detention is appropriate or not, which is why article 9 (2) of the Covenant does not require that the arrested person be given as much detail regarding the charges as would be needed later to prepare for trial.<sup>12</sup> Similarly, this requirement will enable arrested persons to seek release if they believe that the reasons given for their detention are invalid or unfounded.<sup>13</sup>

71. The Working Group considers that a person’s right to be informed without delay of the criminal charges being brought against him or her is closely related to the right to be given adequate time and facilities for the preparation of a defence. The Working Group has also determined in certain cases that changing the charges constitutes a violation of equality of arms that is prejudicial to the accused and detrimental to the guarantees contained in articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant.<sup>14</sup>

72. The Working Group notes that, on 29 January 2010, a criminal court issued a judgment of acquittal in Mr. Traad Porras’s favour because it had not been possible to

<sup>9</sup> Human Rights Committee, general comment No. 32, para. 35.

<sup>10</sup> See opinions No. 38/2017 and No. 44/2017.

<sup>11</sup> Human Rights Committee, general comment No. 35, para. 24.

<sup>12</sup> *Ibid.*, para. 30.

<sup>13</sup> *Ibid.*, para. 25.

<sup>14</sup> See, for example, opinions Nos. 50/2017, para. 44; No. 39/2015, para. 25; and No. 49/2014, para. 20.

prove his responsibility for drug-related offences or the laundering of the proceeds of drug trafficking. On 15 July 2016, the Second High Court of Justice handed down a judgment reversing the acquittal of 29 January 2010 and sentencing Mr. Traad Porras to 84 months' imprisonment and disqualification from public office; however, the counts on which he was convicted bear no relation to the charges. The Working Group is persuaded that, according to the statement taken from the accused, the defendants were told that they were being investigated for a drug-related offence against public health and a crime against the national economy in the form of the laundering of the proceeds of drug trafficking, whereas they were convicted of the corruption of public officials.

73. The Working Group is persuaded that Mr. Traad Porras's conviction was based on charges other than those that were initially brought against him; in other words, the judicial authorities changed the charges (offences) without informing Mr. Traad Porras. This indicates that he did not have the opportunity to learn of the charges against him with sufficient time to defend himself, in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant.

74. In conclusion, the Working Group considers that, during both the investigation and the prosecution, the Panamanian authorities did not respect international standards relating to the right to a fair and impartial trial, to the detriment of Traad Porras's rights. Specifically, the guarantees necessary for the proper application of pretrial detention were not respected; the use of "faceless" witnesses violated the right to have adequate facilities for a defence; the trial was not carried out within a reasonable time and without undue delay; and Mr. Traad Porras was not notified effectively and without delay of the change in the charges against him. Accordingly, the Working Group considers that these irregularities, which are contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, were of such gravity as to give the deprivation of liberty an arbitrary character under category III.

75. Having considered all the information available to it, the Working Group is not persuaded by the source's allegations that Mr. Traad Porras has been the subject of arbitrary detention under categories II or V.

76. In respect of the information received concerning the cruel, inhuman and degrading treatment suffered by Mr. Traad Porras during his arrest and detention and the allegations relating to the impact of the conditions of detention on his health, the Working Group decides to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in conformity with paragraph 33 (a) of its methods of work.

### **Disposition**

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

The deprivation of liberty of Ricardo Traad Porras, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, was arbitrary and falls within category III.

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

79. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to grant Mr. Traad Porras full liberty and accord him an enforceable right to compensation and other reparation in accordance with international law.

80. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Traad Porras and to take appropriate measures against those responsible for the violation of his rights.

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

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

#### **Follow-up procedure**

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

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

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

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

86. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they have taken.<sup>15</sup>

*[Adopted on 2 May 2019]*

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<sup>15</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.