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Human Rights Council Working Group on Arbitrary Detention

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No. 67/2011 (Mexico)

Communication addressed to the Government on 9 September 2011

Concerning: Mr. Israel Arzate Meléndez

The State has been a party to the International Covenant on Civil and Political Rights since 23 March 1981.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate in its decision 2006/102 and extended it for a further three-year period in its resolution 15/18 of 30 September 2010. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. 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 sentence or despite an amnesty law applicable to him) (category I);
 - (b) When the deprivation of liberty results from a trial or conviction for the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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

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

3. The Working Group regrets the Government's failure to reply to the communication addressed to it. For this reason, the Working Group will adopt its Opinion on the basis of the source's submissions.

Submissions

Communication from the source

4. Mr. Israel Arzate Meléndez, a Mexican citizen who was born on 8 May 1985, works as a CD vendor and lives in Ciudad Juárez (State of Chihuahua), was arrested by army personnel on 3 February 2010 at 7 p.m. at the intersection of Melón and Centeno Streets in Ciudad Juárez while he was walking home from his place of work located near Plaza Coral. The soldiers asked him if his name was Carlos Madrigal. When he said it was not, he was made to climb into a van, where he was blindfolded.

5. Both during his transfer to the army's 20th Motorized Cavalry Regiment and after his arrival at that facility, Arzate Meléndez was beaten and given electric shocks to his chest and stomach. He was also stripped naked, his hands and feet were bound, his legs were beaten and on several occasions a plastic bag was placed over his head, causing him to suffocate and lose consciousness. The justification given for his detention was that he was accused of possessing a Jeep-type van that had been reported stolen. A soldier threatened him by saying that he could be extrajudicially executed without serious consequences for the army and that his wife could also be detained, raped and executed, and her body dumped on waste ground. Arzate Meléndez's family was not informed of his detention.

6. At 11.45 p.m. on 4 February 2010, in other words, 28 hours after his arrest, military personnel brought Arzate Meléndez before the Public Prosecution Service (*Ministerio Público*). The military personnel reported — falsely and without any evidence according to the source — that he had been arrested in flagrante delicto. He was held illegally in the custody of the armed forces within the military garrison.

7. On 30 January 2010, multiple killings had taken place in Villas de Salvárcar, Ciudad Juárez, in which the 15 victims were mainly young people. On 5 February 2010, after being threatened and tortured, Arzate Meléndez confessed to the multiple killings in a statement to the Public Prosecution Service, which then declared his detention legal.

8. The next day, it was announced to the media that Arzate Meléndez had been one of the perpetrators of the Villas de Salvárcar massacre. It was only then that his family learned that he had been arrested.

9. On 7 February 2010, a precautionary pretrial detention order was issued against Arzate Meléndez. He was charged with the aggravated homicide of 15 persons and the attempted homicide of 10 other persons. On 10 February, he was moved from the Social Rehabilitation Centre back to the military facility. He was then linked to the offence of motor vehicle theft during proceedings carried out in his absence.

10. On 2 June 2010, the Public Prosecution Service informed the judge that it was withdrawing the charge of vehicle theft owing to lack of evidence. The following day,

however, the Public Prosecution Service inexplicably retracted its withdrawal. An *amparo* action (action 97/2011) against the committal order for the offence of vehicle theft was rejected on 11 July 2011 by the Sixth District Judge of the State of Chihuahua. On 2 August 2011, an application for judicial review of the facts was filed before the 17th Collegiate Circuit Court against the decision to refuse *amparo*.

11. On 11 February 2010, the judge responsible for procedural safeguards within the judicial district, Ms. Bravos Anabel Chumacero Corral, issued a committal order against Arzate Meléndez for the homicide and attempted homicide of 15 and 10 persons respectively. She also issued a pretrial detention order against him pending a thorough investigation of his possible involvement in the multiple homicides that took place on 30 January 2010 in Villas de Salvárcar.

12. According to the source, the judge responsible for procedural safeguards conducted an inadequate judicial review of the evidence against Arzate Meléndez, which consisted solely of a false confession extracted under torture. The judge merely listed the information provided by the prosecutor, but failed to evaluate the quality of each element of this information and the arguments advanced during the committal hearing in order to determine whether they proved the likely involvement of Arzate Meléndez in the alleged facts. The summary of evidence for the prosecution was accompanied by a simple statement that the evidence “was provided by public officials”. That is to say, the evidence was considered valid solely on the basis of the authoritative nature of the source, as under the inquisitorial procedure, and not on the basis of a line of argument or assessment of the evidence as called for under criminal procedural law.

13. In response to the specific allegations of torture made by Arzate Meléndez, the judge responsible for procedural safeguards said only that he “should discuss them with his lawyer”, thereby transferring the burden of proof for effective verification of the torture to the person claiming to have been tortured and his defence lawyer. The judge said she found it unlikely that someone would make a false confession and that it was hard to believe that the military personnel had coerced the accused. She thus recognized the false confession without conducting an in-depth analysis of the investigation file. She refused to exercise her powers to nullify evidence that had been obtained using physical and moral violence.

14. In accordance with article 36 of the Code of Criminal Procedure of the State of Chihuahua, when it is claimed that a confession was made under duress, the judge may no longer simply analyse the arguments advanced by the parties but must also review the investigation file, which she failed to do.

15. When Arzate Meléndez asked whether or not it was legal for him to be removed from the Social Rehabilitation Centre at night without judicial authority and taken to the military facility to be tortured, the judge merely responded by saying “You should discuss that with your lawyer” and did not order any specific action to prevent such irregularities. Neither did the judge take any judicial measure to safeguard and protect the human rights of the accused or to nullify the illegal evidence.

16. An *amparo* action (action 94/2011) against the committal order for the multiple homicides in Villas de Salvárcar was rejected on 19 May 2011 by the Ninth District Judge of the State of Chihuahua, Carlos Carmona García. This judge kept to the same formalistic reasoning as the State judge responsible for procedural safeguards, thereby depriving Arzate Meléndez of an effective, simple and appropriate remedy to defend himself against the abuses by the military authorities. The *amparo* action was based on the violation of Arzate Meléndez’s due process guarantees arising from an inadequate judicial review of the evidence.

17. The district judge gave primacy to evidence prepared in advance by the prosecutor, ignoring the fact that in an oral adversarial criminal justice system only evidence submitted

before a judicial authority, especially during an oral procedure, may be taken into account, and that during the oral procedure the confession was clearly called into question as evidence. Similarly, the judge considered that an adequate defence had been guaranteed simply by virtue of the fact that the ex officio counsels had protested the charge. The judge argues that the fact that a confession was made within a military facility does not make it implausible or illegal. An application for judicial review of the facts was filed against the rejection of the *amparo* action on 2 June 2011 before the aforementioned collegiate court.

18. The source alleges various irregularities in the criminal proceedings against Arzate Meléndez:

(a) The committal hearing for the offence of possessing a stolen car was conducted in the absence of the accused;

(b) He was illegally moved from the Social Rehabilitation Centre to the military facility, where he was subjected to torture and ill-treatment;

(c) Both Arzate Meléndez and his co-defendant, José Dolores Arroyo Chavarria, filed complaints of torture before Judge Anabel Chumacero Corral. The judge, however, refused to process the complaints, corroborate the injuries inflicted or refer the matter to the Public Prosecution Service, as required by law;

(d) When Arzate Meléndez had already been in pretrial detention for more than a year, the judicial authority unlawfully issued a preventive custody (*arraigo*) order for an additional three months;

(e) The ex officio counsels assigned to Arzate Meléndez did not interview him, did not speak during the hearings and did not advise him at any point. Moreover, they did not provide evidence to support the complaint of torture that Arzate Meléndez had submitted to the judge. In neither of the two proceedings did the ex officio counsels file any action against unlawful or arbitrary judicial rulings or decisions.

19. On 31 August 2011, the National Human Rights Commission of Mexico issued its recommendation No. 49/2011, confirming the torture allegedly inflicted on Arzate Meléndez, his illegal transfer from the Social Rehabilitation Centre to the facilities of the 20th Motorized Cavalry Regiment when he had already been brought before the judge, and his illegal detention in army facilities. It was confirmed that he had suffered burns caused by electric current covering a large area on his posterior thorax, another large area of burns running from his right infraclavicular region to his right hypochondrium, and 12 burns in the pubic region, as well as a large bruised area on both legs. The Commission did not comment, however, on the arbitrary nature of Arzate Meléndez's arrest.

20. The source considers that the ineffectiveness of the investigations into the multiple homicides in Villas de Salvárcar resulted in the extraction of confessions through arbitrary detention and torture. The source also objects to the participation of military personnel in the arrests of civilians, the incommunicado detention of individuals in military facilities, and the acts of torture. According to the source, while innocent people are illegally arrested and tortured, the real perpetrators of criminal acts go unpunished, which adds insult to the victims' injury and generates impunity.

21. According to the source, the detention of Arzate Meléndez is arbitrary, because his right to due process and equality of arms between the prosecution and the defence has been violated.

22. The source concludes that this case is an example of how the oral adversarial criminal justice system is being violated and manipulated in the State of Chihuahua amidst abuses by the military and the use of torture and arbitrary detention, resulting in widespread impunity.

23. The source has expressed fear for the life and physical and psychological integrity of Arzate Meléndez, who is currently in preventive custody in a former state police academy.

Government reply

24. The Government announced that it would request additional time to reply to the source's allegations forwarded by the Working Group, but no such request was submitted. The Working Group would not have been able to accept the request in any case, given that the deadline for the reply expired on 9 November 2011, in accordance with the Working Group's methods of work. Furthermore, the Government did not offer a reason for extension pursuant to those methods of work. In the absence of a reply from the Government, the Working Group must issue its opinion on the detention of Israel Arzate.

Considerations of the Working Group

25. In its submission the source states that Mr. Israel Arzate Meléndez was arrested on the street by military personnel in his city of residence, after which he was taken to a military regiment. The source further states that he was tortured both en route to and inside the military facility, forcing him to admit his responsibility in a massacre of 15 persons and the attempted killing of a further 10 persons. He was apparently mistaken for a person named Carlos Madrigal. He was also accused of stealing a vehicle. Once his confession had been obtained, he was brought before the Public Prosecution Service, which accepted the confession as evidence, as did the judge who later examined the case. According to the military, the arrest was made without a warrant on the ground that Arzate Meléndez had been caught in flagrante delicto.

26. His family learned of his detention only when they saw in the Ciudad Juárez local press that he had been charged. As a result of his confession, a pretrial detention order was issued against him and he was charged with the aforementioned multiple homicides and theft; he was then moved to a Social Rehabilitation Centre.

27. The judge responsible for procedural safeguards in the case, Bravos Anabel Chumacero Corral, issued a committal order without an in-depth study of the file and rejected the allegations of torture which she was required to investigate, arguing that it was a problem for the defence counsel and not for her. Moreover, in response to the defence's claims that Arzate Meléndez had been taken illegally at night without a court order from the Social Rehabilitation Centre to the military facility where he was tortured, she said that that issue did not fall within her competence.

28. The competent judge dismissed the *amparo* action filed by the defence without further consideration, and that decision was upheld by the higher collegiate court. Arzate Meléndez was therefore denied his right to an effective remedy to regain his freedom and have access to a fair trial, as guaranteed under article 8 of the Universal Declaration of Human Rights and under article 2, paragraph 3, and article 9, paragraph 4, of the International Covenant on Civil and Political Rights.

29. With regard to the charge of vehicle theft, the Public Prosecution Service first submitted it, then dropped it for lack of evidence, and in the end was forced to reinstate it since it was the only explanation that could justify the claim that the accused was caught in flagrante delicto and give the arrest some semblance of legality, all of which indicates a lack of seriousness in the proceedings.

30. According to the military personnel who arrested him, the Public Prosecution Service and the judge, Arzate Meléndez was caught in flagrante delicto. This is implausible, given that he was arrested on the street while on his way home from work on 3 February. He was linked to two mass killings — one effected and the other attempted —

that had occurred on 30 January. According to the definition of *flagrante delicto* set out in the Criminal Code, this arrest cannot be considered as being in *flagrante delicto*.

31. In the absence of any real evidence, and given the flimsy nature of some of the other evidence presented, and after more than a year of pretrial detention, the judicial authority resorted to a procedure that has been deemed arbitrary and contrary to international human rights standards by the Inter-American Commission on Human Rights, the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Human Rights Council during the universal periodic review of Mexico, and many Mexican human rights organizations. This procedure is known as preventive custody and consists of detention in places specially adapted for that purpose. A judge may order such detention at the request of the Public Prosecution Service for the purpose of gathering information and clarifying the facts. The procedure was originally included in purely legal texts on organized crime, and in the face of the well-founded criticism levelled against both its existence and the abuse of it, as regards its unconstitutional character, in 2008 a decision was made to raise it to constitutional status.

32. Whatever doubt there might have been about the truth of Arzate Meléndez's statements, and about his allegations of torture in particular, is dispelled by the convincing recommendation No. 49/2011 issued by the National Human Rights Commission of Mexico. This recommendation endorses Arzate Meléndez's allegations regarding his torture and his illegal night-time transfer to military facilities without court authorization. Most importantly, it corroborates the claims that he suffered burns caused by electric current applied to his posterior thorax, from his right infraclavicular region to his right hypochondrium, and to his pubic area, in addition to bruises on both legs.

33. Moreover, the alleged mass killings of which Israel Arzate Meléndez has been accused remain unpunished.

34. In addition to the aforementioned irregularities in the proceedings, Arzate Meléndez has not enjoyed a fair trial. Neither the judge responsible for procedural safeguards nor the higher collegiate court acted with the independence and impartiality that their responsibility demands when deciding on detention and its renewal. Even the committal hearing for the alleged vehicle theft was conducted in the absence of the accused, who was thus not given a fair and public hearing by an independent and impartial tribunal to determine his rights and obligations or to examine any criminal charges against him, as required under article 10 of the Universal Declaration of Human Rights and article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

35. Mr. Arzate Meléndez was also tortured and, moreover, forced to testify against himself and to confess guilt, in violation of article 7 and article 14, paragraph 3 (g), of the Covenant.

36. Arzate Meléndez was not defended by a lawyer of his own choosing, as required under article 14, paragraph 3 (d), of the Covenant, but rather by *ex officio* counsels who did not report the torture he had suffered, did not speak during the hearings, and did not file actions to challenge the reported irregularities.

Opinion of the Working Group

37. In the light of the foregoing, the Working Group, considering that the violations of international norms relating to the right to due process and to a fair trial are of such gravity as to give the deprivation of liberty an arbitrary character, renders the following Opinion:

(a) The deprivation of liberty of Mr. Israel Arzate Meléndez violates the human rights protected under articles 3, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and article 2, paragraph 3, and articles 3, 7, 9, 10 and 14 of the International

Covenant on Civil and Political Rights, and is therefore arbitrary according to category III of the Working Group's methods of work;

(b) Consequent upon the opinion rendered, the Working Group requests the Government of the United Mexican States to order the immediate release of "Arzate Meléndez";

(c) It also asks the Government to conduct a thorough, independent and impartial investigation of the complaints of torture suffered by Arzate Meléndez;

(d) It further asks the Government to grant Arzate Meléndez full and suitable compensatory reparation for the harm and injury he suffered;

(e) It asks the Government to repeal the constitutional and legal provisions authorizing preventive custody, as already requested by the following institutions, among others: the Working Group, since 2002;¹ the Special Rapporteur on the independence of judges and lawyers;² the Human Rights Council during the universal periodic review of Mexico;³ and the Inter-American Commission on Human Rights. The Working Group also proposes that the Government should clarify the legal rules governing flagrante delicto, in order to prevent such abuses as the Working Group has found in this and other cases;

(f) It also asks the Government to withdraw the authority given to the armed forces to participate in the investigation and prosecution of criminal offences, and to prohibit the armed forces from engaging in the apprehension, arrest and detention of civilians, given that they do not, nor should they, have police functions;

(g) It invites the Government to continue its cooperation with the Working Group, including timely provision of the information that the Working Group requires to fulfil its mandate.

[Adopted on 24 November 2011]

¹ See the report of the Working Group on its visit to Mexico (E/CN.4/2003/8/Add.3).

² See the report of the Special Rapporteur on her visit to Mexico (A/HRC/17/30/Add.3).

³ See A/HRC/11/27.