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Human Rights Council Working Group on Arbitrary Detention

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No. 61/2011 (Mexico)

Communication addressed to the Government on 5 September 2011

Concerning: Tomintat Marx Yu and Zhu Wei Yi

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. The mandate of the Working Group was clarified and extended by Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period in Council 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 or her sentence or despite an amnesty law applicable to him or her) (category I);

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

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

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

(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 which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Mr. Zhu Wei Yi, a naturalized Mexican and businessman, was arrested on 15 March 2007 without a warrant by federal investigators who claimed to have caught him in flagrante delicto after he appeared at the home of a relative which was being searched in the course of a police raid. He was kept in detention for 72 hours on the premises of the Attorney-General's Office. From 18 March 2007, he was held in detention in a preventive custody (*arraigo*) centre of the Attorney-General's Office in the Federal District. On 15 June 2007, he was transferred to Federal Social Rehabilitation Centre No. 1 (Altiplano), where he remains deprived of his liberty.

4. Mr. Tomintat Marx Yu, a businessman with dual Mexican and United States nationality, was arrested on 19 April 2007 by Federal Prosecution Service officers of the Special Unit for the Investigation of Health-related Offences after they had completed a search of his home. He was held in detention for two days on the premises of the Special Unit for the Investigation of Health-related Offences and, from 21 April 2007, in a preventive custody centre of the Attorney-General's Office in the Federal District. On 15 June 2007, he was transferred to Federal Social Rehabilitation Centre No. 1 (Altiplano), where he remains deprived of his liberty.

5. On 15 March 2007, Mr. Zhu Wei Yi and Mr. Tomintat Marx Yu, were working at their respective businesses, H.K. Comercializadora and Comercial Tams, respectively located at No. 22 and No. 25 (that is, across the road from one another) Calle Dolores, in Colonia Centro, Mexico City. On that day, Mr. Erick Raymundo Campos, an employee of the husband of Ms. Tomoiyi Marx Yu, the sister of Mr. Tomintat Marx Yu and sister-in-law of Mr. Zhu Wei Yi, came to tell them that the police were at that moment raiding the home of Ms. Tomoiyi Marx Yu.

6. Mr. Zhu Wei Yi and Mr. Tomintat Marx Yu, concerned about the safety of Ms. Tomoiyi Marx Yu and her son, 7-year-old Ziming Ronald Ye Marx, who were in the raided house, went with Mr. Erick Raymundo Campos to the house, located at No. 515 Calle Sierra Madre, in Colonia Lomas de Chapultepec, Mexico City. The source stated that the search had been triggered by an investigation into the activities of Mr. Zhenli Ye Gon, Ms. Tomoiyi Marx Yu's husband, in connection with crimes against health and organized crime. Mr. Tomintat Marx Yu is Mr. Zhenli Ye Gon's brother-in-law.

7. After Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi arrived at the raided house, Mr. Tomintat Marx Yu was allowed to leave it accompanied by his nephew, the child Ziming Ronald Ye Marx. However, Mr. Zhu Wei Yi and Mr. Erick Raymundo Campos were forced to remain in the house. At 9 p.m. on 15 March 2007, they were informed that they were under arrest.

8. Mr. Zhu Wei Yi was arrested by federal investigators, who transferred him to the federal prosecutor attached to the Office of the Assistant Attorney-General for Organized Crime Investigations. The reason given for the arrest was that the detainee had been caught in the act of participating in organized crime and operations conducted with funds of illicit origin. Mr. Zhu Wei Yi was charged with possession of foreign currency found in his sister-in-law's house. Mr. Zhu Wei Yi is the brother-in-law of Mr. Zhenli Ye Gon's wife.

9. Mr. Zhu Wei Yi was informed that he would be kept in custody for 48 hours, from 9 p.m. on 15 March to 9 p.m. on 17 March 2007. However, the source states that Mr. Zhu Wei Yi was not released after 48 hours, but instead held for a further 24 hours in the facilities of the Attorney-General's Office in the Federal District in order to give a judge time to examine a request by the Federal Prosecution Service to authorize his placement in preventive custody. At around 9 p.m. on 18 March 2007, the federal prosecutor ordered Mr. Zhu Wei Yi's release, only to proceed with his immediate rearrest in line with the decision by the Fifth District Criminal Court of the Federal District to grant the request for preventive custody.

10. The sum of US\$ 207 million was confiscated from Mr. Zhenli Ye Gon. Having spent 72 hours held in detention by the Special Unit for the Investigation of Crimes against Health of the Office of the Assistant Attorney-General for Organized Crime Investigations, Mr. Zhu Wei Yi was transferred, on 18 March, to the preventive custody centre of the Attorney-General's Office in Colonia Doctores, Cuauhtémoc Municipality, in the Federal District, where he remained until 15 June 2007. In other words, he was kept in preventive custody for 88 days by court order, in addition to 2 days of arrest under a warrant issued against him.

11. On 20 March 2007, Ms. Tomoiling Marx Yu, Mr. Zhu Wei Yi's sister-in-law, filed an application for *amparo* against the preventive custody order, which was granted by the Fourteenth District Criminal Amparo Court of the Federal District. The Federal Prosecution Service, however, managed to have the decision overturned, rendering the remedy ineffective. The court was of the view that article 12 of the Federal Act on Combating Organized Crime violated articles 14, 16, 19 and 21 of the Constitution, because none of those articles allowed for the restriction of liberty for more than 96 hours for the purpose of carrying out a preliminary inquiry, and because there was no provision for preventive custody in the Constitution. Consequently, the court that had issued the original order granting preventive custody had to issue a new ruling rescinding it.

12. The federal prosecutor of the Special Unit for the Investigation of Crimes against Health and the Federal Prosecution Service of the Fourteenth District Criminal Amparo Court to appeal for judicial review in the light of the *amparo* thus granted. In the source's view, the sole aim of the application for judicial review was to delay the execution of the *amparo* earlier granted and ensure that Mr. Zhu Wei Yi remained in preventive custody.

13. On 22 August 2007, four months after Mr. Zhu Wei Yi had been moved from preventive custody to prison as a trial defendant, the First Division of the Supreme Court ruled on the appeal against his *amparo*, quashing the appeal by the two representatives of the Federal Prosecution Service and upholding the decision to grant *amparo*. Although the original *amparo* ruling was upheld owing to the unconstitutionality of his preventive custody, the decision was set aside because of Mr. Zhu Wei Yi's changed legal status.

14. Mr. Tomintat Marx Yu was arrested on 19 April 2007 by federal prosecutors of the Special Unit for the Investigation of Health-related Offences after a police raid on his home in Apartment 6, No. 26 Calle José Marroquí, Colonia Centro, in the Federal District. An initial application by the Federal Prosecution Service for a search warrant had been turned down by the courts and it had appealed against the ruling. While the decision on the appeal was pending, it filed a second application for a warrant before another court and without mentioning the appeal. That application was granted.

15. Mr. Tomintat Marx Yu was arrested on the basis of charges by the Federal Prosecution Service that he had been caught in the act of participating in organized crime and operations conducted with funds of illicit origin, on the ground that he had been guarding the foreign currency found on 15 March 2007 in his sister's home. He is believed to be a member of Mr. Zhenli Ye Gon's criminal group.

16. The placement in preventive custody of Mr. Tomintat Marx Yu was allegedly authorized for a maximum of 90 days, provided that the Federal Prosecution Service informed the court, within 30 days of receipt of the authorization, of the results of inquiries and progress made in its investigation at that point, and on the understanding that the failure to comply with the conditions established for granting the preventive custody order would result in the detainee's release. On 21 April 2007, Mr. Tomintat Marx Yu was transferred to the preventive custody centre of the Attorney-General's Office at No. 43 Calle Doctor Ignacio Morones Prieto, Colonia Doctores, Cuauhtémoc Municipality, in the Federal District.

17. Given the failure to comply with the conditions established by the court for the placement in preventive custody of Mr. Tomintat Marx Yu, his defence counsel submitted an application on 6 June 2007 to have the order set aside, which was granted on 11 June 2007. The court ruling ordering an end to the detention was, however, ignored. Far from being released, Mr. Tomintat Marx Yu was kept in detention in the above-mentioned preventive custody centre for a further two days with no legal basis, until 15 June 2007. In other words, Mr. Tomintat Marx Yu was deprived of liberty for 51 days by court order, a further 2 days in preventive custody without any court order, and 2 days when the arrest warrant was issued against him, making a total of 55 days held in a preventive custody centre.

18. On 10 May 2007, Mr. Tomintat Marx Yu filed an application for *amparo* against his detention in preventive custody. No ruling, however, was made on that application, given that he was transferred to the Social Rehabilitation Centre. In that way his deprivation of liberty was prolonged through an arrest warrant issued for his arraignment. The application for *amparo* was set aside, as a result of the change in his legal status. Mr. Tomintat Marx Yu was charged with health-related offences, in the form of incitement, organized crime and money-laundering.

19. On 12 June 2007, the federal prosecutor of the Special Unit for the Investigation of Health-related Offences of the Assistant Attorney-General for Organized Crime Investigations (Office of the Attorney-General), launched criminal proceedings against Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi. On 13 June 2007, the Fourth District Criminal Court issued warrants for the arrest of Mr. Zhu Wei Yi and Mr. Tomintat Marx Yu in relation to case No. 25/2007-I. Two days later, on 15 June 2007, they were both transferred to the Federal Social Rehabilitation Centre No. 1 (El Altiplano), in Almoloya de Juárez, where they remain deprived of their liberty. Six days later, on 21 June, the Fourth District Criminal Court issued a formal writ of imprisonment for Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi on charges of organized crime and operations carried out with funds of illicit origin.

20. It should be noted that Mr. Zhenli Ye Gon is no longer in Mexican territory and that his extradition from the United States of America has been requested. His ties to Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi are demonstrated by the fact that his wife is the sister of the former and sister-in-law of the latter.

21. According to the source, those family ties were crucial in convincing the court of the existence of a criminal organization. It would appear that those family ties were in themselves considered evidence of probable criminal liability. The source is also of the view that the burden of proof has been reversed in the criminal proceedings against Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi, since the Federal Prosecution Service has not been asked to prove that a crime was committed. Rather, the defendants have been required to demonstrate their innocence.

22. On 14 March 2008, defence counsel for Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi made an application for *amparo* against the writ of imprisonment, which was granted on 5

January 2009 by the Second Circuit Court No. 2. The *amparo* was granted with a view to establishing what proof there was that offences had been committed and the liability of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi.

23. Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi also filed an administrative complaint against the judge of Second Circuit Court No. 1, which is being examined by the Council of the Federal Judiciary. They also filed applications for *amparo* against the sixth writ of imprisonment.

24. Citing articles 7.5, 8.1, 2 and 29 of the American Convention on Human Rights and the principles of the presumption of innocence, reasonable delay and *pro homine*, and, considering that so far, after four years, no definitive prison sentence has as yet been handed down in criminal case No. 25/2007-I, explaining the factual and legal reasons for the deprivation of liberty of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi, the defence counsel applied to the Fourth District Criminal Court for the cessation of their pretrial detention. Counsel requested an alternative measure that would prevent them from evading justice and ensure that they remained under the court's authority for the duration of the trial proceedings, without depriving them of their liberty. The application was rejected. The detainees subsequently filed an application for *amparo*, which is still before the Fifth District Amparo and Federal Civil Proceedings Court.

25. Another application for release from prison, for the same reasons as mentioned above, was filed before the Fifth District Criminal Court and rejected. The detainees then filed a second application for *amparo*, which is currently before the Fifth District Amparo and Federal Civil Proceedings Court.

26. All the appeals, especially for *amparo*, made by the defence on behalf of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi have thus proven ineffective. In that context, the source refers to observations made by the Working Group on Arbitrary Detention in the report on its visit to Mexico in 2002, when it noted shortcomings in the *amparo* proceedings with regard to combating arbitrary detention.¹ The Working Group went on to observe that, in most cases, proceedings were shelved, thereby ruling out any effective control by the courts over those practising arbitrary detention without reference to judicial procedure. In the source's view, that is precisely what has occurred in the case under consideration.

27. The source concludes that the detention of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi contravenes national and international law and is therefore arbitrary. Firstly, the source casts doubt over whether they were caught in flagrante delicto, which was the reason given for their arrest. Secondly, it maintains that the preventive custody to which they were subjected was unconstitutional and violated their basic rights. Thirdly, it points to the lack of a rapid and effective legal remedy enabling them to contest their arbitrary detention; and lastly, it considers that the above-mentioned points amount to a failure to uphold the guarantees that must be implicit in all legal proceedings.

28. The source, pointing out that the reason given for the arrest of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi was that they were allegedly caught in flagrante delicto, to the scope of flagrante delicto as set forth in article 193 of the Federal Code of Criminal Procedure, which was in force in 2007:

Flagrante delicto exists when:

I. The accused is caught in the act of committing an offence;

¹ E/CN.4/2003/8/Add.3, para. 51.

II. The accused is pursued and caught immediately after having committed an offence; or

III. The accused is identified as the culprit by the victim, another witness at the scene or a fellow perpetrator; the object, instrument or proceeds of a crime are found in his possession; or clues or evidence are found that give reason to suppose that he was involved in the commission of the crime, provided that the crime is one defined as serious by law, that no more than 48 hours have elapsed since the crime was committed, that a preliminary investigation has been launched and that the crime is still under investigation.

29. The legal concept of *flagrante delicto* was employed in this case in the wake of a police search or raid in a house that belonged to neither of the detainees. Mr. Zhu Wei Yi and Mr. Tomintat Marx Yu were not present when the raid took place, but rather came of their own volition once the search had begun in order to give support to two relatives, one of them a minor, who were in the house at the time of the search. In the source's view, the situations outlined in sections I and II of the law cited above could not possibly have occurred, since there was no element of surprise or pursuit in either case. On the contrary, both detainees presented themselves of their own free will, without any official request, at the place that was the subject of a criminal investigation.

30. In the case of Mr. Zhu Wei Yi, arrested on 15 March 2007, and that of Mr. Tomintat Marx Yu, arrested 35 days later, the concept of *flagrante delicto* was applied to possession of a large sum of foreign currency (United States dollars) found in the above-mentioned house. The claim that they were caught in *flagrante delicto* in possession of the money is difficult to accept, given that the money was found in one location while those who were allegedly in possession of it were in another.

31. The source recalls the view expressed by the Working Group in the report on its 2002 visit to Mexico with regard to the broad interpretation of the concept of catching an offender in *flagrante delicto*, which is not limited to allowing a person to be arrested while he or she is actually committing an offence and when the perpetrator is identified.² The Working Group has noted that the broad interpretation of the concept of *flagrante delicto* means that arrests can be made without a court order, solely on the basis of complaints or witness statements, and that such an assumption of flagrancy is incompatible with the principle of the presumption of innocence and creates risks of arbitrary detention. Mr. Tomintat Marx Yu was arrested 35 days after he had been allegedly caught in the act of committing the offences of which he was accused. Both persons were allegedly caught in the possession of money found in a place in which neither was physically present at the time it was discovered, and which was neither their place of residence nor their workplace. It was simply money found in the house of someone with whom both had only family ties.

32. Moreover, the source insists that the legal procedure known as *arraigo* is unconstitutional and violates human rights. The source considers that the deprivation of liberty to which Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi have been subjected under the *arraigo* regime is arbitrary and unconstitutional. At the time of their arrest, there was no provision whatsoever in the Constitution for *arraigo*, which is not the case at present. Its legality was recognized solely and exclusively under federal law, in article 12 of the Federal Act on Combating Organized Crime, in the following terms:

² Ibid., para. 39.

Article 12: A court may, upon request by the Federal Prosecution Service and taking into consideration the nature of the alleged offence and the personal circumstances of the accused, order that he or she be held in preventive custody in the facilities and manner set forth in the request and under the surveillance of the Federal Prosecution Service and its ancillary officers, provided that such custody, which shall not exceed 90 days, lasts only as long as strictly necessary for the conduct of the investigations, with the aim of obtaining the cooperation of the person concerned in ascertaining the veracity of the alleged facts and shortening the period of custody.

33. The source is surprised that a preventive custody request should have been filed after the arrest of these two persons, given that in 2006, one year before Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi were arrested, an important legal precedent was set when the Supreme Court of Justice had ruled that preventive custody was unconstitutional.

34. The source further underlines the unconstitutional and arbitrary nature of the placement in preventive custody in both cases, citing the ruling of the Fourteenth District Criminal Amparo Court of the Federal District in criminal case No. 254/07-II.A, in which it is stated: "... article 12 of the Federal Act on Combating Organized Crime violated articles 14, 16, 19 and 21 of the Constitution in that none of those articles allowed for the restriction of liberty for more than 96 hours for the purpose of carrying out a preliminary inquiry, and that there was no provision for preventive custody in the Constitution".

35. In its report on its mission to Mexico, the Working Group addressed the arbitrary nature of preventive custody, stating that it had become a form of pretrial detention, often enforced in *casas de arraigo* (or "curfew houses").³ The Working Group stated that the practical consequence of the use of this kind of curfew is that it gives the Federal Prosecution Service longer to carry out the relevant investigations and collect the evidence it needs to submit to the district judge before the person can be formally charged. There is thus a sort of de facto pretrial that takes place not before a judge, but before officials from the Attorney-General's Office, who are thus empowered to perform judicial acts and evaluate evidence and present the means of proof before the person is charged. It noted that preventive custody centres were in fact similar to prisons in terms of security, with numerous armed guards, electronic surveillance, and the like.

36. Lastly, the source recalls that, despite the Working Group's recommendation in 2002 that Mexico should, inter alia, amend its domestic laws on preventive custody in order to bring them into line with international norms on the presumption of innocence, flagrante delicto and the conditions for early release, and that it work on effective remedies for arbitrary detention and class such detention as a crime, the State decided to elevate preventive custody to constitutional status amending article 16 of the Constitution. The intention was to endow this sort of deprivation of liberty with constitutional legality under the constitutional reform published in the State's Official Gazette on 18 June 2008, exactly one year after Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi had been placed in preventive custody.

37. The Working Group noted in its report on its 2002 mission to Mexico that one of the salient features of *amparo* is that it does not apply *erga omnes* and that proceedings are stayed or set aside if a person's legal situation changes, which prevents it from effectively protecting personal freedom.⁴ Those two features of *amparo*, prior to the reform of the Constitution, rendered it ineffective.

³ Ibid., paras. 45–50.

⁴ Ibid., para. 18.

38. In spite of the various appeals submitted by Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi with the aim of proving their innocence, they have now been caught up in trial proceedings for four years and two months during which no definitive prison sentence has been handed down. This fact, the source asserts, has made a mockery of their right to be tried within one year, as set forth in article 20 of the Constitution, which is currently in force:

VIII. [The accused] shall be tried within four months in the case of offences for which the maximum sentence does not exceed two years, and within one year where the sentence exceeds that period, unless he requests an extension for his defence.

39. The source recalls the opinion expressed by the Human Rights Committee that a person may not be held in detention beyond a period of time that can be properly justified by the State. There has therefore been a breach of Principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁵ which establishes: "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."

40. Apart from the fact that they have been held in pretrial detention for an excessive period of more than four years, Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi are held in prison together with convicts and in the same conditions of detention, in violation of Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establishes: "Persons in detention shall be subject to treatment appropriate to their non-convicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons." This situation clearly places the detainees in a situation of vulnerability, since they are not assured of receiving treatment in any way different from that reserved for persons serving prison sentences after having been found guilty of a crime.

41. Lastly, the source underlines the failure to apply precautionary measures that would make it possible to release Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi, all the while obliging them to attend trial proceedings and ensuring that they do not abscond from justice, but in conditions of freedom. Such measures have been requested on more than one occasion.

42. The source therefore concludes that the detention of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi is arbitrary.

Response from the Government

43. The Government failed to comply with the Working Group's request for a report on the allegations received within the period stipulated by its methods of work. Therefore, pursuant to paragraph 15 of the methods of work, it is in a position to render an opinion. The Working Group was unable to grant the extension of 20 days requested by the Government, because the request was submitted after the deadline stipulated in the methods of work. Any information furnished by the Government at a later date will be welcomed and summarized in a report by the Working Group to the Human Rights Council.

Considerations of the Working Group

44. Judging by the source's account, which the Government has not contested, the persons on whose behalf the appeal is lodged have been deprived of their liberty for almost five years. Indeed, Mr. Zhu Wei Yi was apprehended on 15 March 2007, without a warrant

⁵ Resolution No. 43/173 of the General Assembly, annex.

from any appropriate authority, when he presented himself at the house of a relative in which a search was being conducted by officials of the Attorney-General's Office, and was subsequently detained on the premises of the Office for 72 hours. The Office was of the view that Mr. Zhu Wei Yi's presence was tantamount to having been caught in flagrante delicto while committing acts of organized crime and operations conducted with funds of illicit origin. When this period had elapsed, he was transferred to one of the Office's own preventive custody centres, where he was kept in preventive custody for 88 days without an arrest warrant. On 15 June of the same year, he was transferred to the Federal Social Rehabilitation Centre, where he still remains as this opinion is being issued, making for a total of 4 years and 8 months' deprivation of liberty. Even the order of imprisonment for the offences in question was handed down by the Fourth District Criminal Court only on 21 June, when he had already been in administrative detention for almost three months.

45. Mr. Tomintat Marx Yu, for his part, was deprived of his liberty on the same charges on 19 April 2007, and was also considered to have been caught in flagrante delicto. Having been held for two days on the premises of the Special Unit for the Investigation of Health-related Offences, he was transferred without a warrant to the preventive custody centre of the Attorney-General's Office, where he was kept for 56 days without a court order but under a provision for preventive custody that will be discussed in greater detail below. On 15 June he was transferred with Mr. Zhu Wei Yi to the same Social Rehabilitation Centre, where he remains deprived of his liberty, having spent a total of four years and seven months in detention, including his time spent at the Attorney-General's Office, his time in preventive custody, and the duration of investigations, which have dragged on inconclusively for more than four years.

46. In order to adopt an opinion, the Group will examine the situation of the persons concerned from the source's viewpoint, looking separately at the time of arrest for being caught in flagrante delicto in commission of the aforementioned offences, the period of preventive custody and the time spent in detention in the course of the judicial investigation. Mention will also be made of the court appeals submitted by defence counsel.

Arrest for alleged flagrante delicto

47. Pursuant to article 193 of the Federal Code of Criminal Procedure, flagrante delicto exists in three situations: (a) when the detainee is caught "in the act of committing an offence"; (b) when he or she is pursued "immediately after having committed an offence"; and (c) if the arrest takes place within 48 hours of the offence having been committed, an investigation has already been launched, the alleged perpetrator has been identified and the offence is of a serious nature.

48. Judging from the source's account, which is not contested by the Government, it appears clear that the detainees were not caught in flagrante delicto in the process of committing any crime. Mr. Zhu Wei Yi and Mr. Tomintat Marx Yu were told on 15 March 2007 that the house of a relative, Mr. Zhenli Ye Gon, was being searched and went there freely and with nothing to fear, desirous only of protecting family members, including a 7-year-old boy. Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi are, respectively, the brother-in-law of Mr. Zhenli Ye Gon and brother-in-law of the wife of Mr. Zhenli Ye Gon, who was under investigation. Even during the house search, Attorney-General's Office officials allowed Mr. Tomintat Marx Yu to leave the location with the boy and he was arrested only more than one month later at his home, during another raid by the Office. He was not found to be in possession of anything irregular and the aforementioned money was discovered not in his possession but in that of his brother-in-law, Mr. Zhenli Ye Gon. All of the above is incompatible with the concept of flagrante delicto. Strangest of all is that 35 days elapsed between one arrest and the other, a fact irreconcilable with claims of flagrante delicto.

49. It should be noted that, in its report on its visit to Mexico in 2002, the Working Group pointed out that “‘equipollent flagrancy’ is based on a broad interpretation of the concept of catching an offender ‘in flagrante delicto’” ... which means that “arrests can be made without a court order and, as the Working Group discovered in its conversations with numerous detainees, simply on the basis of complaints or statements by witnesses. This assumption of flagrancy is incompatible with the principle of presumption of innocence and creates risks of both arbitrary detention and extortion”.⁶

The institution of preventive custody (arraigo)

50. Mr. Zhu Wei Yi was the subject of a preventive custody order issued by the Fifth District Criminal Court between 18 March and 15 June 2007 (88 days), while Mr. Tomintat Marx Yu was the subject of a similar order between 19 April and 15 June 2007, making a total of 52 days of preventive custody ordered by a criminal court. Although the court orders were issued for the maximum period permissible under the law, they were made conditional on considerable progress by the Attorney-General’s Office in its inquiries.

51. The source maintains that preventive custody is an administrative measure, although in the cases at hand it was imposed by court order. The Working Group does not share this position: organized crime legislation and the 2008 Constitution stipulate that only a court may order preventive custody in response to a request by the Federal Prosecution Service and on grounds of evidence provided.

52. At the time these two persons were arrested, the institution of preventive custody had no constitutional foundation. It had been provided for only in federal law, under article 12 of the Federal Act on Combating Organized Crime (para. 32 above), and had thus been the subject of fierce criticism, prompting the Supreme Court to rule that it was unconstitutional. The legal grounds for the deprivation of liberty of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi were therefore unconstitutional. That alone would have sufficed to conclude that their detention was arbitrary, given that it flies in the face of all the norms laid down in international human rights law in the past 70 years. It constitutes a clear case of arbitrary detention as set forth under category III of the Working Group’s methods of work.

53. The amendment of article 16 of the Constitution clearly does not legitimate actions taken prior to its adoption; on the contrary, what it does is underscore the arbitrary nature of earlier detentions. The new norm in the Constitution provides that: “When dealing with organized crime, the judicial authority, at the request of the prosecutor, may order that a person be held in preventive custody in a facility and for a period of time as provided for by law, up to a maximum of 40 days, if such detention is necessary for the success of the investigation or for the protection of persons or property, or if there is a well-founded concern that the suspect will abscond from justice.” (art. 16, para. 7). Moreover, it was established that the Federal Prosecution Service could prolong preventive custody for a further 40 days.

54. In the view of the Working Group, preventive custody, as it was set forth under the Federal Act on Combating Organized Crime and in the current Constitution, constitutes an infringement of the rights to personal freedom, a fair trial and the presumption of innocence; of the right not to be deprived of liberty while on trial; of the human right to security; and of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

⁶ E/CN.4/2003/8/Add.3, para. 39.

55. During its sixty-first session, the Working Group received the text of Recommendation No. 02/2011 of the Human Rights Commission of the Federal District, which sets out the serious human rights problems ensuing from preventive custody. It recommends to the Attorney-General of the Federal District and the President of the Federal District High Court that they should, in their respective jurisdictions, encourage the appropriate authorities to carry out reforms designed to remove preventive custody as a form of detention from legislation and to implement other recommendations deemed by the Working Group to be of key importance.

56. In its report on its 2002 mission, the Working Group found that preventive custody “in fact amounts to a form of preventive detention of an arbitrary nature, given the lack of oversight by the courts and the implementation of the measure in places that, while not actually secret, are ‘discreet’”.⁷ The Working Group established that inquiries about their precise location were “more or less a taboo subject, including for administration officials”.⁸

57. Similarly, the Special Rapporteur on the independence of judges and lawyers, in her report on her visit to Mexico in 2010, studied in depth the use of preventive custody and pointed out that it permitted persons to “be detained for the purpose of an investigation, whereas the appropriate and correct course of action would be to swiftly undertake an effective investigation and then proceed to make an arrest. The use of preventive custody is the outgrowth of a poorly functioning system for investigation and the administration of justice.” The Special Rapporteur concluded that: “Preventive custody (*arraigo*) is an arbitrary measure that is incompatible with the principle of the presumption of innocence and the right to personal freedom” and that it “should be expunged from Mexico’s criminal justice system”.⁹

Human right to access to judicial remedies

58. Rights enshrined in the International Covenant on Civil and Political Rights in article 2, paragraph 3 (all rights), and in article 9, paragraph 3 (the right to personal freedom, universally known as habeas corpus) have also been ignored. In each provision, the basic principle is the effectiveness of the remedy. According to the complaint, in no way contested by the Government, at least the following remedies were sought:

(a) An application for *amparo* on behalf of Mr. Zhu Wei Yi against the preventive custody order was granted on 14 May 2007 by the Fourteenth District Criminal Amparo Court in the Federal District. The Federal Prosecution Service, however, asked for the measure to be reviewed, which prevented implementation of the *amparo* and, in the end, resulted in continued preventive custody. The remedy thus proved ineffective;

(b) The competent court refused to grant a search warrant. The Federal Prosecution Service, however, appealed and at the same time applied to another judge for a warrant, which was granted, thereby overturning a ruling in favour of the person concerned;

(c) Tomintat Marx Yu applied for *amparo* against his detention, but no ruling was made, making the remedy ineffective. The reason given was that he was on trial (10 May 2007);

(d) Various appeals, remedies and complaints submitted with the aim of obtaining their release from prison while trial proceedings were ongoing have been denied, while some are still being considered.

⁷ Ibid., para. 50.

⁸ Ibid., para. 50.

⁹ A/HRC/17/30/Add.3, paras. 64, 92 and 94 (bb).

59. The above reveals a serious disregard for the human rights referred to and reflects how poorly the justice system in the Federal District works. This opinion is shared by the Human Rights Commission of the Federal District, which, in its Recommendation No. 02/2011, maintains that “in cases documented by this Commission, Federal District High Court judges have failed to guarantee the rights of suspects”; adding that frequently preventive custody orders were granted without sufficient reasons or the application of a clear standard regarding evidence. The same recommendation tersely states that “in the light of the above information and reasoning, this Commission has come to the conclusion that the model of preventive custody provided for in the Constitution and the law of the Federal District was tantamount to a legal or procedural act, in that it requires a court order, and a unilateral act carried out by the Federal Prosecution Service, with serious consequences for the rights of persons under criminal investigation”.

60. It is worthy of note that the opinion of the Working Group coincides entirely with that expressed by other United Nations mechanisms:

(a) During consideration of Mexico’s report under the universal periodic review, some States called for the abolition of the practice of preventive custody;¹⁰

(b) In its report on its visit to Mexico, the Subcommittee on Prevention “recommends that the State party abolish *arraigo*”;¹¹

(c) The Human Rights Committee underscored “that persons detained under *arraigo* are exposed to ill-treatment” and proposed that “the State party should take all necessary measures to remove *arraigo* detention from legislation and practice at both federal and state levels”.¹²

Undue delays

61. More than four years of deprivation of personal freedom without conviction constitute, in the view of the Working Group, a denial of the right to be tried without undue delay, enshrined in article 14, paragraph 2 (c), of the International Covenant on Civil and Political Rights.

Opinion of the Working Group

62. In the light of the above, the Working Group renders the following opinion: The deprivation of liberty of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi is arbitrary, in that it violates human rights enshrined in articles 3, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights; article 2, paragraph 3 (a), (b) and (c), and articles 9, 10, 12 and 14 of the International Covenant on Civil and Political Rights, pursuant to category III of the Working Group’s methods of work.

63. The Working Group therefore requests that Mexico order the release of Mr. Tomintat Marx Yu and Mr. Zhu Wei Yi, without prejudice to the use of measures needed to ensure that they appear in court when required and serve any sentence that might be imposed.

64. The Working Group also requests the Government to order compensation to be made for the loss and damages caused by the arbitrary acts addressed in this opinion.

¹⁰ A/HRC/11/27, para. 49: recommendation by New Zealand and Switzerland, in which the former added the words “as soon as possible”.

¹¹ CAT/OP/MEX/1, para. 334.

¹² CCPR/C/MEX/CO/5, para. 15.

65. Lastly, the Working Group requests that the Government adopt the measures proposed by the United Nations special mechanisms, especially those of the Special Rapporteur on the independence of judges and lawyers following her visit to Mexico in 2010; by this Working Group after its official visit to Mexico in 2002, and by the Inter-American Commission on Human Rights, in relation to the improper interpretation of flagrante delicto and the abolition of preventive custody (*arraigo*).

[Adopted on 22 November 2011]
