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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021

Opinion No. 74/2021 concerning Emirlendris Benítez (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work,¹ on 10 August 2021 the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Emirlendris Benítez. The Government replied to the communication on 10 November 2021. 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).

¹ [A/HRC/36/38](#).



Submissions

Communication from the source

4. Emirlendris Benítez is a Venezuelan national who works as a housewife and has her home in Barquisimeto in the state of Lara.

5. According to the source, Ms. Benítez was arrested at around 2.30 a.m. on 5 August 2018 by agents of the Directorate General of Military Counter-Intelligence of Boleíta. Ms. Benítez was travelling by road from the city of Barquisimeto to the city of Barinas in the company of a family member and two other people to whom they were providing a transportation service. When they were passing through Acarigua, they were stopped at a police checkpoint and searched, after which Ms. Benítez was taken to the Directorate General of Military Counter-Intelligence in Acarigua. At the time of her arrest, Ms. Benítez was around three weeks pregnant.

6. When the officers of the Directorate General arrested Ms. Benítez, they did not show her a valid warrant as no such document had been issued by a procedural court. The legal basis for the arrest is not known since there was no warrant and she was not committing an offence at the time of her arrest. The source states that there are no substantiated grounds for the arrest. The day after her arrest, she was taken to the headquarters of the Directorate General in Boleíta, Caracas.

7. From the moment the officers of the Directorate General took Ms. Benítez into custody, she was subjected to constant torture, kept in isolation and prevented from communicating with her family. The officers brutally tortured her: they used bags and water to suffocate her and repeatedly beat her and kicked her in the stomach after she had implored them not to because she was pregnant. They also verbally humiliated her. Ms. Benítez slept on the floor, relieved herself in bags and had her food thrown on the floor.

8. Prosecutors No. 67 and No. 83, who represented the Public Prosecution Service and have national jurisdiction, ordered that Ms. Benítez be placed in detention. On 7 August 2018, she was brought before Special Procedural Court of First Instance No. 1, which has national jurisdiction over cases involving terrorism. The court ordered that she be held in pretrial detention. Following a 45-day investigation by the Public Prosecution Service, an indictment was filed against her, charging her with the offences of terrorism (Act on Organized Crime and the Financing of Terrorism, art. 52), criminal association (Act on Organized Crime and the Financing of Terrorism, art. 37), attempted murder of the President of the Republic (Criminal Code, arts. 405 and 406 (b)), attempted murder with malicious intent against the military command (Criminal Code, art. 407 (2)), damage to public property (Criminal Code, arts. 473–474), treason (Criminal Code, art. 128) and launching explosives in public places (Criminal Code, art. 474). The source states that these accusations are groundless.

9. The source gives the reasons for the detention provided by the authorities. On 4 August 2018, during an event held to commemorate the eighty-first anniversary of the Bolivarian National Guard in Caracas, a loud detonation was heard about two hundred metres from the spot where the President of the Republic was making a speech. A drone allegedly carrying explosives was seen. Ms. Benítez was arrested because a member of her family had been hired to drive some people from the city of Barquisimeto to the city of Barinas and, owing to the time of day, she decided to accompany him. Apparently, the persons being driven were involved in the events.

10. After she had been brought before the court, Ms. Benítez was held completely incommunicado until 1 December 2018, in violation of all her constitutional rights. In October 2018, she was rushed to a military hospital where she miscarried as a result of the torture she had suffered.

11. The preliminary hearing began in February 2019 and ended on 1 July 2019, after which she was tried for the offences of terrorism, criminal association, attempted murder of the President, attempted murder with malicious intent of the high military command, damage to public property, treason and the unlawful possession of explosives.

12. Ms. Benítez was held at the headquarters of the Directorate General of Military Counter-Intelligence until July 2019 and was then transferred to the National Women's Correctional Institute in Miranda state, where she continues to be deprived of her liberty.

13. In November 2019, the case file was transferred to Special Procedural Court of First Instance No. 1 with jurisdiction over cases involving terrorism. The hearings began in December of that year and continued until March 2020, when they were suspended for reasons related to the coronavirus disease (COVID-19) pandemic.

14. Ms. Benítez is being unjustly held in pretrial detention without having been convicted. The judicial proceedings involving Ms. Benítez have been significantly delayed: more than three years have passed since 5 August 2018, the date on which she was arrested. The source notes that, under Venezuelan law, pretrial detention should not exceed two years.

15. Ms. Benítez is currently in poor health owing to her detention conditions and the torture to which she was subjected. The court, the public prosecutor's office and the Ombudsman's Office have all ignored the formal complaints submitted in connection with her torture and the miscarriage she suffered while in custody. Ms. Benítez has recently been humiliated and abused in the detention centre, where she and four other persons are crammed into a cell designed for two.

16. The source states that there is no basis for Ms. Benítez' deprivation of liberty under the Constitution or national law. It stresses that, at the time of her arrest, Ms. Benítez was not caught in the act of committing an offence and was not the subject of a legitimate arrest warrant drawn up in advance. Ms. Benítez was arrested only in order to justify the investigative measures undertaken in connection with an alleged assassination attempt that could not be linked to her and that has not been proven.

17. The source also affirms that the international norms related to the right to a fair and impartial trial, specifically articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, have been violated. It claims that the proceedings have not been fair or impartial. There were no valid legal grounds or evidence to justify the arrest of Ms. Benítez and she has been charged with very serious offences. In addition, she has been tortured, ill-treated and held incommunicado to the point where she suffered a miscarriage. Her right to a defence has also been severely restricted.

18. The source concludes that Ms. Benítez was unjustly deprived of her liberty simply because she accompanied a family member when he was transporting two strangers.

19. The source also notes that a complaint has been submitted to the Directorate for the Protection of Human Rights of the Public Prosecution Service. In addition, medical transfers and a review of the deprivation of liberty were requested at all the hearings at which the right to speak was granted. No response had been received at the date on which the source's allegations were received.

Response from the Government

20. On 10 August 2021, the Working Group transmitted the source's allegations to the Government and requested the Government to provide detailed information on the current situation of Ms. Benítez by 11 October 2021. In addition, the Working Group requested the Government to ensure Ms. Benítez' physical and mental integrity.

21. On 11 October 2021, the Government requested an extension of this deadline and was given until 10 November 2021 to reply. It submitted its response on 10 November 2021.

22. The Government states that Ms. Benítez is deprived of her liberty in connection with criminal proceedings under way before Special Procedural Court of First Instance No. 1 with national jurisdiction over cases involving terrorism. The proceedings in question concern her alleged criminal responsibility for committing serious offences duly defined in the national legal order.

23. The criminal proceedings against her are related to her alleged participation in the attempted assassination that occurred on 4 August 2018 in the vicinity of Avenida Bolívar in Caracas during an event held to commemorate the anniversary of the Bolivarian National Guard. The event was attended by the most senior State authorities and representatives of the

diplomatic corps accredited in the country. When the President of the Republic was making a speech, he was interrupted by the detonation of two explosive devices being carried by two remotely operated drones. Several military personnel were wounded in the attack.

24. Ms. Benítez was arrested by the National Police in the early hours of the morning on 5 August 2018 at a road checkpoint on the General en Jefe José Antonio Páez highway in the municipality of Araure, in the state of Portuguesa, when she was travelling from Caracas to Colombia with three other people who are also believed to have been involved in the attempted assassination of 4 August 2018.

25. She was arrested in the act of committing an offence, in accordance with article 44 of the Constitution and article 234 of the Code of Criminal Procedure.

26. The Government adds that, in accordance with article 234 of the Code of Criminal Procedure, a flagrant offence is one that leads to the pursuit of the suspect by the police or the victim or an immediate public outcry, or one committed just before the suspect is caught at the scene of the crime or in the vicinity thereof while in possession of weapons, instruments or other items providing grounds to believe that he or she is the perpetrator.

27. At the time of the arrest, the officers informed Ms. Benítez and the other individuals arrested of the reasons for their arrest and their rights under the Constitution and the Covenant. On 6 August 2018, Ms. Benítez was transferred to the headquarters of the Directorate General of Military Counter-Intelligence in Caracas, where she was held in detention. Once there, she was informed of her rights again, as recorded in the report of notification of the rights of suspects, which Ms. Benítez signed. She was also allowed to telephone her family.

28. The investigation in this case was conducted by officers of the National Police and not, as the source erroneously claims, by the Directorate General of Military Counter-Intelligence. The Government therefore takes the view that the claims made by the source are false.

29. On 8 August 2018, in accordance with article 236 of the Code of Criminal Procedure, an oral arraignment hearing was held before Special Procedural Court of First Instance No. 1 with national jurisdiction over cases involving terrorism. At the hearing, Ms. Benítez benefited from all the guarantees of due process and the legitimate right to a defence.

30. On this occasion, the Public Prosecution Service provisionally charged Ms. Benítez with the offences of treason (Criminal Code, art. 128); attempted murder of the President of the Republic (Criminal Code, art. 405, read in conjunction with art. 406 (3) (a) and in the context of article 80); attempted murder with malicious intent and out of futile motives (Criminal Code, art. 405, read in conjunction with art. 406 (2) and in the context of article 80); terrorism (Act on Organized Crime and the Financing of Terrorism, art. 52); and criminal association (Act on Organized Crime and the Financing of Terrorism, art. 37). The public prosecutor called for Ms. Benítez to be held in pretrial detention in accordance with article 236 (1), (2) and 3, article 237 (2) and (3), and article 238 (1) and (2) of the Code of Criminal Procedure.

31. Although Ms. Benítez and her defence were free to make whatever statements they considered necessary for her defence, they did not raise before the judge the arguments they have put before the Working Group.

32. Once the arraignment hearing was concluded, the judge confirmed the preliminary charges against Ms. Benítez and ordered her pretrial detention at the Directorate General of Military Counter-Intelligence and a prohibition on the sale or encumbering of her movable and immovable property.

33. On 21 September 2018, the Public Prosecution Service formally submitted the indictment against Ms. Benítez for alleged committing the aforementioned offences to the court hearing the case. The indictment is supported by 74 pieces of evidence, including witness and expert statements, documentary evidence, reports and investigations carried out by legal experts.

34. The investigations conducted by the Public Prosecution Service show that Ms. Benítez and her partner were allegedly fully aware of the acts that the actual perpetrators of the

assassination attempt were going to carry out and travelled to Caracas prior to the attempt in order to acquire the explosives used in the commission of the offence. They were also supposed to transport the would-be assassins out of the country after the attempt.

35. On 22 February 2019, the preliminary hearing before Special Procedural Court of First Instance No. 1 began. Owing to the large number of defendants, the hearing lasted until 29 July 2019. On this occasion, the court, acting in accordance with articles 236, 237 and 238 of the Code of Criminal Procedure, decided to uphold Ms. Benítez' pretrial detention and ruled that she should be detained at the National Women's Correctional Institute.

36. The oral proceedings began on 2 December 2019 and continued on 4, 9, 12, 16 and 19 December 2019; 8, 14, 21 and 29 January 2020; 5, 19 and 26 February 2020; and 2, 6 and 11 March 2020. On 16 March 2020, court activities were suspended throughout the country owing to the COVID-19 pandemic. The proceedings are currently at the trial stage.

37. On 5 August 2020, the Public Prosecution Service requested an extension of Ms. Benítez's pretrial detention in view of the complexity of the case and reasons of force majeure (in particular, the COVID-19 pandemic) that prevented the oral proceedings from continuing. The extension was granted on 15 October 2020, pursuant to article 230 of the Code of Criminal Procedure (which, under the law, is applicable *ratione temporis*).

38. Ms. Benítez is being held at the National Women's Correctional Institute in conditions that meet the relevant international standards, including with regard to access to sanitary facilities. Accredited officials of the Office of the United Nations High Commissioner for Human Rights have paid several visits to both establishments and have met with Ms. Benítez.

39. The Government lists the times that the prisoner has received medical attention. Furthermore, it categorically denies that she was subjected to torture of any kind or arbitrary detention under any of the categories established by the Working Group. The Government asserts that no action has been taken against Ms. Benítez that could be considered in any way discriminatory and that her lawyer has had access to the case files and has been able to pursue the judicial remedies that he and Ms. Benítez have deemed appropriate.

40. On 29 September 2021, prosecutor No. 32 of the Public Prosecution Service interviewed Ms. Benítez at the National Women's Correctional Institute. In this interview, she asked to be transferred to the headquarters of the Bolivarian National Intelligence Service because she had no access to running water and her family had difficulty getting to her current place of detention. On this occasion, as on other occasions, she made no mention of the alleged humiliation or abuse.

41. Ms. Benítez' defence requested the court hearing the case to transfer her to the headquarters of the Directorate General of Military Counter-Intelligence. Ms. Benítez confirmed this request at a hearing before the court. The transfer request was denied by the court, given that Ms. Benítez had previously reported being ill-treated by this agency.

42. The Government wishes to highlight the inconsistency of the source's claims: Ms. Benítez has alleged that she was tortured and kept in solitary confinement when deprived of her liberty at the headquarters of the Directorate General of Military Counter-Intelligence or the Bolivarian Intelligence Service. The Working Group should bear this in mind when it assesses the credibility of the source's allegations.

43. Having analysed the different legal categories one by one, the Government affirms that national law was not violated at any time and that the criminal proceedings have at all times been conducted in strict compliance with the guarantees of due process, the right to a defence, the right to a fair trial and the right to impartiality established in articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant; there has been no total or partial breach of the applicable international norms of such gravity as to give the deprivation of liberty an arbitrary character.

Additional comments from the source

44. The source has submitted comments on the Government's response, in which it compares that response to the source's initial statements and points out that the response confirms the source's allegations. Thus, it states that the petitioner and the Government agree

that the arrest was carried out by police officers in the early hours of 5 August 2018 and that it took place at a police checkpoint on the highway near the city of Acarigua. This information fully coincides with that put forward by Ms. Benítez, who gave the same version of events at the initial plea hearing on 16 December 2019. Thus, the information provided by the Government in its response does not contradict the source's allegations in any way. Rather, it confirms them.

45. The source has considered the legal elements required under Venezuelan law in the light of the Government's claim that Ms. Benítez was arrested in flagrante delicto. It has also pondered the question of pretrial detention and its application in national law; in this respect, the facts presented by the source show that Ms. Benítez' rights have been violated. In this connection, the source draws attention to the principle of in *dubio pro reo*.²

46. The source notes that, at the hearing on 8 August 2018, Ms. Benítez refused to be represented by lawyers who were not of her choosing. It also states that the Government has tacitly accepted the fact that Ms. Benítez informed the judge hearing the case that she had been subjected to ill-treatment at the Directorate General of Military Counter-Intelligence. It points out that Ms. Benítez asked to be held at the Directorate General only because her spouse, who had been arrested with her, was being held there.

47. The source states once again that Ms. Benítez was continuously tortured and adds that the Inter-American Commission on Human Rights confirmed that this was the case when it extended the relevant precautionary measure on the grounds that Ms. Benítez had been suffering from pains in her knee, lower back and belly since 2018 after having a miscarriage that year while deprived of her liberty. This information is set out in the resolution concerning the extension of the Commission's precautionary measure, issued on 17 June 2020.³

48. The source calls for consideration to be given to the violation of Ms. Benítez' sexual and reproductive rights as a result of torture and reiterates all the claims contained in its submission to the Working Group.

49. The source concludes by requesting that Working Group declare the detention of Ms. Benítez to be arbitrary under categories I, III and V.

Discussion

50. The Working Group thanks both parties for their cooperation.

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.⁴ In the present case, the Government replied to the Working Group within the established period.

Category I

52. According to the communication from the source, Ms. Benítez was arrested at a police checkpoint in Acarigua in the early hours of 5 August 2018 while travelling on the highway with a family member and two other persons to whom they were providing a transportation service. When she was arrested, she was not shown a valid warrant or given an explanation of any kind. She was transferred to the Directorate General of Military Counter-Intelligence in Acarigua and, the following day, to the Directorate General's headquarters in Caracas. At the time of her arrest, she was around three weeks pregnant.

53. The Government contests the claim that Ms. Benítez was arrested by members of the Directorate General of Military Counter-Intelligence and states that she was arrested in flagrante delicto by the police. An examination of the case file shows that the source and the Government agree on the time and place of Ms. Benítez' arrest. The source submits, however, that although the law provides that the authorities may deprive persons of their liberty if they

² A universal legal principle that establishes that, in case of doubt, the benefit of the doubt should always be given to the accused.

³ See http://www.oas.org/es/cidh/decisiones/pdf/2020/26-20MC751-19-VE_ampliacion.pdf.

⁴ A/HRC/19/57, para. 68.

are discovered in flagrante delicto, Ms. Benítez was not committing an unlawful act at the time of her arrest.

54. The Government maintains that Ms. Benítez was arrested in flagrante delicto, in accordance with article 44 of the Constitution and article 234 of the Code of Criminal Procedure.

55. The Working Group notes that, in the present case, the Government has failed to demonstrate that Ms. Benítez was arrested in flagrante delicto (a legal concept that the authorities can use to justify an arrest that is not conducted in compliance with international instruments), especially since, according to universal legal principles and the provision cited by the Government, a person is considered to have been arrested in flagrante delicto if he or she is caught in the act of committing an offence. The Working Group notes that a person may also be considered to have been discovered in flagrante delicto if he or she is pursued and arrested immediately after the offence has been committed or if, failing that, he or she is identified as responsible by the victim or an eyewitness to the offence.⁵ None of these conditions applies to the case of Ms. Benítez, as the Government itself has stated that she was arrested in the early hours of the morning, some time after the assassination attempt cited as the offence.

56. The Working Group notes that the Inter-American Court of Human Rights has ruled on several occasions that requirements for in flagrante arrest cannot simply be assumed to be met but must be proven by the authorities,⁶ which they were not in the case of Ms. Benítez. The Government has also failed to demonstrate that the legal concept of in flagrante delicto is applicable to the present case.

57. The source claims that Ms. Benítez did not have the opportunity to communicate with her family and that the reasons for her arrest were not specified either when it took place or when she was transferred to Caracas. In response to this claim, the Government states that, in accordance with the Constitution and the relevant international instruments, Ms. Benítez was informed of her rights both at the time of her arrest and when she was transferred to the headquarters of the Directorate General of Military Counter-Intelligence. As proof of its claims, the Government attaches a copy of the report of notification of the rights of suspects, which Ms. Benítez has signed. The Government also states that she was allowed to telephone her relatives.

58. The above-mentioned report, which the Working Group has examined, appears to consist of a list of the rights afforded to accused persons under different laws and the national legal instrument that provides for the safeguarding of these rights. The report does not contain Ms. Benítez' signature. Rather, it contains what appear to be fingerprints, which, in contrast to the written information on Ms. Benítez, are unclear. The source has also reported that, after Ms. Benítez was brought before the court, she was held completely incommunicado until 1 December 2018. These circumstances, which have not been refuted by the Government, lead the Working Group to doubt that the Government's documents and claims actually constitute proof that Ms. Benítez was informed of her rights or allowed to communicate with her family, since no convincing proof has been provided that this was the case.

59. Therefore, the Working Group concludes that Ms. Benítez was subjected to enforced disappearance, in breach of article 9 (1) of the Covenant. The Working Group stresses that enforced disappearances are prohibited under international law and constitute a particularly aggravated form of arbitrary detention. It has therefore decided to refer this case to the Working Group on Enforced or Involuntary Disappearances for further action.

60. Furthermore, holding persons incommunicado violates their right to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant.⁷ Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential to ensuring that detention has a legal basis. Given that Ms. Benítez was unable to challenge her

⁵ Opinion No. 9/2018, para. 38.

⁶ See Inter-American Court of Human Rights, *Gutiérrez Soler v. Colombia*, judgment of 12 September 2005, Series C No. 132; and *García Asto and Ramírez Rojas v. Peru*, judgment of 25 November 2005, Series C No. 137.

⁷ See, for example, opinions No. 79/2017 and No. 28/2016.

detention, her right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated.

61. The Working Group also notes that article 14 (3) (a) of the Covenant, which requires arrested persons to be promptly informed of the nature and cause of the charges against them, was violated during Ms. Benítez' arrest and detention. The Government's response to the Working Group cites various national legal provisions to explain how this requirement was fulfilled. However, the Working Group respectfully reminds the Government that mere assertions that national legal procedures have been followed are not sufficient to rebut the source's allegations,⁸ which, in the Working Group's view, the Government has failed to do.

62. The Working Group recalls that arrests must be conducted in compliance with article 9 (2) of the Covenant, which requires that any persons who are arrested must be informed, at the time of arrest, of the reasons for their arrest and promptly informed of any charges against them. The information provided to the arrested person should include not only the general legal basis for the arrest but also sufficient factual details concerning the substance of the complaint, such as the nature of the wrongful act. The Government has failed to demonstrate that it complied with this obligation.

63. The Working Group has established that Ms. Benítez has been held in pretrial detention for more than three years. The Government claims that this has been necessary because of the number of people involved in the events, among other reasons. However, the Working Group recalls that deprivation of liberty is not only a question of legal definition, but also of fact and, as the Human Rights Committee has established, must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁹ It must not be punitive in nature and should be based on an individual assessment of each person. In objective terms, the Government has not complied with this requirement in the case of Ms. Benítez.

64. Furthermore, the Working Group is of the view that Ms. Benítez' pretrial detention constitutes a violation of the rule of international law providing that such detention should be a precautionary *ultima ratio* measure, which means that it should be the exception rather than the rule and should be adopted only as a last resort and only exceptionally. Moreover, it should be imposed for a short duration, that is, for the shortest possible time. The Working Group notes that the Bolivarian Republic of Venezuela has set a two-year limit on pretrial detention, which seems excessive. Furthermore, article 9 (3) of the Covenant requires that the justification for pretrial detention be analysed in a reasoned judicial decision in every case, which, according to the documents examined, was not done in the case of Ms. Benítez, as she was arrested, transferred and held incommunicado before her pretrial detention was declared to be lawful. She has been held in pretrial detention for more than three years. The Government has not provided the Working Group with any plausible explanation for this situation.

65. The Working Group recalls that legal safeguards against arbitrary deprivation of liberty, as encapsulated in article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant, require anyone arrested or detained on a criminal charge to be brought promptly before a judge. As the Working Group has reiterated in its jurisprudence, and the Human Rights Committee has specified, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following his or her arrest; any delay longer than this must remain absolutely exceptional and be justified by the circumstances.

66. Furthermore, article 9 (3) of the Covenant provides that release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgment. In any case, pretrial detention must be an exceptional measure taken in the interest of justice, and accused persons must be released when there are means of guaranteeing that they will appear for trial and serve their sentence. When pretrial detention is prolonged, as in the case of Ms. Benítez, the presumption in favour of bail should preferably be applied. All the more so when, as the Government points out, the

⁸ A/HRC/19/57, para. 68.

⁹ Human Rights Committee, general comment No. 35 (2014), para. 18.

trial has been delayed by a year because of the COVID-19 pandemic. This measure has not been applied to Ms. Benítez despite her very delicate state of health. The circumstances impel the Working Group to refer the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

67. Both the source and the Government state that the warrant for Ms. Benítez' arrest was issued by the public prosecutor's office. The Working Group recalls that, according to its established jurisprudence and practice, the public prosecutor's office is not an independent judicial authority and does not meet the criteria established in article 9 of the Covenant.¹⁰ In addition, the legal system should provide for a separation between the authority conducting the investigation and the authorities responsible for detention and for ruling on questions related to pretrial detention. This separation is necessary to prevent detention from being used as a form of advance punishment or as a way of undermining the right to a defence or encouraging self-incrimination. Consequently, the Working Group concludes that Ms. Benítez' pretrial detention violates article 9 (3) of the Covenant.

68. Furthermore, Ms. Benítez did not have access to lawyers of her choosing since, according to the source, she was prevented from exercising this right until the proceedings, hearings and other judicial activities were far advanced. The source has claimed, and the Government has not denied, that lawyers whom she had not chosen were assigned to her. This situation violates the guarantees established in article 14 (3) (b) of the Covenant.

69. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. The State must guarantee the effective exercise of this fundamental guarantee of personal liberty in all situations of deprivation of liberty, without delay and without exception, since it is essential to preserve legality in a democratic society. This right is a peremptory norm of international law and applies to all forms of deprivation of liberty, including not only to detention for the purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, detention on security grounds and detention under counter-terrorism measures. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.

70. The facts as described by the source and the Government show that these rights were denied to Ms. Benítez on several occasions. By contrast, the public prosecutor's office filed charges and ordered her pretrial detention very quickly, as the Government has stated. The description of this situation leads the Working Group to conclude that the case should be referred to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

71. In the light of the above, the Working Group concludes that: Ms. Benítez was arrested without a warrant issued by a competent authority, not caught in flagrante delicto and not informed of the reasons for her arrest; she was held incommunicado, a warrant of commitment having been issued after the fact by the Public Prosecution Service; she was denied the right to choose her own lawyer; and she has been held in pretrial detention for more than three years, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (3) of the Covenant. Her deprivation of liberty therefore constitutes an act of such gravity that it may be declared arbitrary under category I.

Category III

72. The Working Group notes that, in the present case, several of the requirements of the fundamental rules of due process have not been observed. Thus, on 7 August 2018, Ms. Benítez was brought before Special Procedural Court No. 1 with national jurisdiction over

¹⁰ Ibid., para. 32; opinions No. 41/2020, para. 60; No. 5/2020, para. 72; and No. 14/2015, para. 28; and [A/HRC/45/16/Add.1](#), para. 35.

cases involving terrorism in the absence of any proof that she had committed this offence and without her having access to a lawyer or being informed of the reasons for her detention.

73. As a result, Ms. Benítez was placed in pretrial detention. After a 45-day investigation by the Public Prosecution Service, an indictment was filed against her, charging her with the aforementioned offences. The source affirms that these accusations are completely unfounded and that the Government has merely expressed suspicions for which there is no legal basis.

74. The Working Group recalls that, even if an individual's arrest has been carried out in accordance with article 9 of the Covenant, this does not automatically mean that the decision to continue holding him or her in detention (as Ms. Benítez has continued to be held) also complies with that article. Ms. Benítez' detention has been excessively prolonged by the continual delays in regularizing her legal situation, to the extent that the trial is still under way. This means that Ms. Benítez has effectively been deprived of her legitimate right to defend herself properly by contesting the charges against her; all of this, in the view of the Working Group, constitutes a violation of her rights under article 9 (4) of the Covenant.

75. While the Working Group notes the Government's claims that all national laws and procedures were respected in the proceedings in this case, the Working Group must assess whether the authorities acted in compliance with international law.

76. The Working Group notes that, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case by issuing an arrest warrant based on a reasoned and substantiated decision. In the present case, the Government has not been able to disprove the source's claim that Ms. Benítez was simply accompanying a family member who was fulfilling a contract for transportation services and that she had no prior knowledge of the circumstances surrounding the attack on the President before she made the journey and had nothing to do with any terrorist activity.

77. The Working Group notes that, in the preliminary hearing before Special Procedural Court of First Instance No. 1, which, owing to the large number of defendants, lasted until 29 July 2019, the Court decided to authorize the measure of pretrial detention in accordance with articles 236, 237 and 238 of the Code of Criminal Procedure, designating the National Women's Correctional Institute as Ms. Benítez' place of detention.

78. The Working Group also notes that the oral proceedings began on 2 December 2019 and continued on 4, 9, 12, 16 and 19 December 2019; 8, 14, 21 and 29 January 2020; 5, 19 and 26 February 2020; and 2, 6 and 11 March 2020. The Working Group is concerned to note that, on 16 March 2020, judicial activities were suspended across the country because of the COVID-19 pandemic and that the proceedings against Ms. Benítez are currently in the trial stage.

79. Moreover, the prosecutor in the case requested an extension of Ms. Benítez' pretrial detention on the grounds that the case was complex and the oral proceedings had been interrupted for reasons of force majeure. The judge presiding over the case granted the request without carrying out any analysis or citing the legal grounds that were considered in taking this decision, which is contrary to the national law stipulating that only in exceptional situations, justified by the public prosecutor's office, may pretrial detention be extended by one additional year, up to a maximum of three years. According to the information received by the Working Group, Ms. Benítez has remained in detention, without justification, for even longer than the period specified in this decision, as the Government has not put forward any legal justification for the extension.

80. The Working Group therefore reaffirms its view that this delay has prevented Ms. Benítez from benefiting from due process guarantees and has undoubtedly prevented the court from deciding without delay on the lawfulness of her detention, as provided for in articles 3 and 9 of the Universal Declaration of Human Rights and principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

81. The Working Group wishes to highlight that the source refutes the Government's claim that Ms. Benítez had access to a lawyer and notes that an attempt was made to assign her a lawyer who was not of her choosing. This made it impossible for Ms. Benítez to prepare

an adequate defence, in clear violation of article 14 (3) (b) of the Covenant, her right to a defence and due process, and principle 12 on equality before the courts of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

82. The Working Group points out that article 14 (3) (c) of the Covenant guarantees the right of everyone charged with a criminal offence to be tried without undue delay. In addition, article 9 (1) of the Covenant provides that everyone has the right to liberty and security of person, as does article 3 of the Universal Declaration of Human Rights. Article 7 (5) of the American Convention on Human Rights further establishes that all detained persons are entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings, and recognizes that their release may be subject to guarantees to assure their appearance for trial. In the case of Ms. Benítez, the Working Group is persuaded that, although she may have been assisted by a lawyer, as the Government claims, this lawyer failed to ensure that she received a fair trial in which due process was respected.

83. The Working Group is not convinced that Ms. Benítez was given sufficient advice or time to prepare a defence. Consequently, the trial did not meet the standard of a fair hearing established in article 10 of the Universal Declaration of Human Rights, article 14 (1) of the Covenant and principles 12 and 14 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court. All these reasons impel the Working Group, in accordance with paragraph 33 (a) of its methods of work, to refer the present case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

84. The purpose of article 14 (1) of the Covenant is to ensure the proper administration of justice. To this end, it guarantees a number of specific rights and, more generally, the principles of equal access and equality of arms with a view to ensuring that the parties to proceedings are treated without discrimination.

85. Furthermore, the Working Group wishes to evoke the presumption of innocence, which is guaranteed by article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant and is declared to be *jus cogens* in the Human Rights Committee's general comment No. 24 (1994), that is, a human right that may not be suspended and a principle of international law. In the case of Ms. Benítez, the presumption of innocence has been seriously violated by a pretrial detention measure that has lasted more than three years to date.

86. The Working Group notes the Government's claim that national laws and international human rights standards were respected. However, the Government has not put forward sufficient evidence to justify the extensive delay in processing the case. The Working Group reminds the Government that the right to due process is intended to confirm the lawfulness and correct application of laws within a framework of minimum respect for human dignity and that due process should be understood as a complex, progressive and methodical activity carried out in accordance with pre-established rules, resulting in the issuance of a decision on the conduct concerned (i.e., a judgment) for the purpose of identifying the substantive law applicable to the particular case. As Ms. Benítez' case file contains no indication that these procedures were carried out, her case may be said to involve serious violations of due process and the rights guaranteed in the relevant articles of the Covenant and the Universal Declaration of Human Rights.

87. The source goes on to describe the acts of torture to which Ms. Benítez was subjected despite her pleas that she was pregnant. Ms. Benítez' claims were confirmed by the issuance of a precautionary measure by the Inter-American Commission on Human Rights. The Government, however, claims that Ms. Benítez was not tortured and submits a list of the many occasions on which she received a medical examination.

88. The source notes that formal complaints concerning torture and a miscarriage brought on by ill-treatment in custody have been filed, but the court, the public prosecutor's office and the Ombudsman's Office have all ignored them. In addition, Ms. Benítez has recently been humiliated and abused in the detention centre, where she and four other persons are crammed into a cell designed for two.

89. The Working Group considers that the source has presented a credible *prima facie* case that the detained person was subjected to torture and ill-treatment. This conduct violates the absolute prohibition of torture as a peremptory norm of international law, as well as article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

90. The Working Group puts it to the Government that the admission into evidence of a statement allegedly obtained through torture or ill-treatment causes the entirety of the proceedings to fall into the category of an unfair trial. The burden of proving that the signatures and all the statements were freely and voluntarily given by Ms. Benítez falls on the Government, but it has refrained from commenting on the matter. The Working Group wishes to emphasize that the intentional application of pressure to obtain a confession violates articles 2, 13, 15 and 16 of the Convention against Torture.

91. The Working Group stresses to the Government that torture is a serious violation of the fundamental principles of human rights and that it has an obligation to ensure that a prompt and effective investigation is carried out and that the torturer is prosecuted for his or her acts. The Government's failure to mention that any such investigation has been initiated is of concern to the Working Group since the absolute prohibition of torture is established in the Convention against Torture, to which the Bolivarian Republic of Venezuela is a State party. Furthermore, the Bolivarian Republic of Venezuela has signed the Optional Protocol to the Convention and has expressed its willingness to ratify it.

92. The circumstances of Ms. Benítez's detention, as described, constitute a serious violation of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

93. The Working Group concludes that, in the case of Ms. Benítez, the non-observance of international standards relating to the right to a fair and impartial trial, as recognized in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, is of such gravity as to render the deprivation of liberty arbitrary under category III.

94. The present case is one of a number of cases brought before the Working Group in recent years concerning arbitrary detention in the Bolivarian Republic of Venezuela.¹¹ In the Working Group's view, this amounts to a systematic practice of depriving people of their liberty without respecting the rights enshrined in international law. Widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.

Category V

95. The Government has categorically stated that the present case is not linked to any act of discrimination. However, the source mentions that, when Ms. Benítez was being tortured, she was continuously subjected to insults related to her gender. The torture to which she was subjected, which has been confirmed by the Inter-American Commission on Human Rights, led to her miscarriage, as she was beaten and kicked in the belly even though she was known to be pregnant. The manner in which the gynaecological examinations were performed on Ms. Benítez, together with the damage caused to her reproductive organs by a miscarriage triggered by blows, violated her reproductive rights and constitute a serious act of violence against Ms. Benítez that is contrary to the Convention on the Elimination of All Forms of Discrimination against Women, to which the Bolivarian Republic of Venezuela is a party and to which it has entered no reservations of any kind.

¹¹ Opinions No. 73/2020, No. 57/2020, No. 44/2020, No. 20/2020, No. 18/2020, No. 81/2019, No. 80/2019, No. 75/2019, No. 40/2019, No. 39/2019, No. 13/2019, No. 86/2018, No. 72/2018, No. 49/2018, No. 41/2018, No. 32/2018, No. 24/2018, No. 87/2017, No. 84/2017, No. 52/2017, No. 37/2017 and No. 18/2017.

96. Moreover, the Working Group, in its deliberation No. 12, on women deprived of their liberty,¹² reminds States that women experience multiple and intersectional forms of discrimination¹³ and may therefore be particularly vulnerable to being detained on the basis of discriminatory grounds.¹⁴ Therefore, in its deliberation No. 12, the Working Group has requested States to take into account the situation of women who face particular discrimination that may lead to their arbitrary detention, including, but not limited to, women who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism¹⁵ with a view to granting them an alternative measure to imprisonment. The authorities refused to grant Ms. Benítez an alternative measure to detention, despite the fact that she was pregnant and miscarried as a result of torture.

97. The source has stated that Ms. Benítez is a housewife who was not directly engaged in political activism but was arrested for allegedly collaborating in a so-called terrorist attack. In the present case, the Working Group is persuaded that Ms. Benítez' detention forms part of a State practice of depriving citizens of their liberty for contributing to the expression of political dissent,¹⁶ which constitutes a violation of international law in that it stems from discrimination on the ground of political opinion, in contravention of articles 2 and 26 of the Covenant and 2 and 7 of the Universal Declaration of Human Rights, and thus constitutes arbitrary detention under category V.

98. In view of the circumstances described by the source, which the Government has denied without substantiating its denial, the Working Group is persuaded that Ms. Benítez has been discriminated against because she is a woman, which means that her case falls into category V established by the Working Group. On the basis of its analysis, the Working Group has decided to refer the case to the Special Rapporteur on violence against women, its causes and consequences, the Working Group on discrimination against women and girls and the Special Rapporteur on the right to privacy, for appropriate action.

99. The Working Group would welcome an opportunity to work constructively with the Government to tackle the problems related to arbitrary detention. Furthermore, in the light of the recurrent pattern of arbitrary detention identified by the Working Group in recent years, the Government of the Bolivarian Republic of Venezuela is urged to consider inviting the Working Group to make an official country visit. Such visits are an opportunity for the Working Group to engage in direct constructive dialogue with the Government and representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

Disposition

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

The deprivation of liberty of Emirlendris Benítez, being in contravention of articles 3, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 (1), (3) and (4) and 14 (1), (2), (3) (a), (b) and (c) of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

101. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Ms. Benítez 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.

102. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Benítez immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the COVID-19 pandemic and the threat that it poses in places

¹² A/HRC/48/55, annex, para. 14.

¹³ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women migrant workers, para. 8.

¹⁴ Opinion No. 1/2016, para. 38.

¹⁵ A/HRC/48/55, annex, para. 14.

¹⁶ Opinion No. 41/2018, para. 30.

of detention, the Working Group calls upon the Government to take urgent action to ensure her immediate release.

103. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Benítez and to take appropriate measures against those responsible for the violation of her rights.

104. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the right to privacy; the Special Rapporteur on violence against women, its causes and consequences; and the Working Group on discrimination against women and girls.

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

Follow-up procedure

106. 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 Ms. Benítez has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Benítez;
- (c) Whether an investigation has been conducted into the violation of Ms. Benítez' rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Bolivarian Republic of Venezuela with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

107. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

108. The Working Group requests the source and the Government to provide the above-mentioned 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.

109. 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.¹⁷

[Adopted on 18 November 2021]

¹⁷ Human Rights Council resolution 42/22, paras. 3 and 7.