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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 48/2022 concerning Roland Carreño Gutiérrez (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 9 December 2021 the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Roland Carreño Gutiérrez. The Government replied to the communication on 7 March 2022. 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,

¹ [A/HRC/36/38](#).



or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Roland Oswaldo Carreño Gutiérrez, a national of the Bolivarian Republic of Venezuela, was 53 years old and residing in the municipality of Libertador, Distrito Capital, at the time of his arrest.

5. Mr. Carreño Gutiérrez holds a degree in media studies and for over 10 years – from June 2006 to May 2013 – hosted the television programme “Good Evening” (“*Buenas Noches*”) with an editorial viewpoint critical of the Governments of Hugo Chavez and Nicolas Maduro. Mr. Carreño Gutiérrez ran for parliament in the 6 December 2015 elections, representing the political party Voluntad Popular, as part of a coalition of opposition parties. The Voluntad Popular National Committee later appointed him its Operations Coordinator.

6. The source states that Mr. Carreño Gutiérrez was arrested after leaving his home on 26 October 2020 by officers of the Bolivarian National Police who presented no arrest warrant or any other type of order issued by a competent public authority, even though article 44 (1) of the Constitution, along with articles 240 and 241 of the Decree-Law on the Code of Criminal Procedure, provides that persons may be arrested in the country only by order of a criminal procedural court of first instance. The absence of such an order creates a situation of unlawful deprivation of liberty, an offence under article 176 of the Criminal Code.

7. The source stresses that no warrant had yet been issued by a court at the time of Mr. Carreño Gutiérrez’s arrest. The decision to restrict his personal liberty instead rested with a body under the executive branch, the Bolivarian National Police, which the Government had been using to repress political dissent and to persecute and intimidate dissidents and deprive them of their liberty.

8. The source reports that the Bolivarian National Police carried out the arrest and that, later, a pretrial detention order against Mr. Carreño Gutiérrez was issued by Special Procedural Court of First Instance No. 4, which has jurisdiction in cases relating to terrorist offences and is competent to try offences related to corruption and organized crime.

9. On the day of the arrest, Mr. Carreño Gutiérrez was taken by the officers of the Bolivarian National Police to that body’s Directorate of Criminal Investigations, located in Maripérez, in Caracas, and then to Bolivarian National Police premises in El Helicoide, also in Caracas. He is said to now be deprived of liberty at the premises of the Directorate of Criminal Investigations of the Bolivarian National Police.

10. The source states that the officers who carried out the arbitrary detention called Mr. Carreño Gutiérrez a political dissident who promotes ideas that are contrary to the revolutionary process begun by Comandante Chavez and led by President Maduro, thereby demonstrating, in the view of the source, that the grounds for detention were the exercise of civil and political rights and freedoms under the Universal Declaration of Human Rights, the Covenant, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and the Constitution of the Bolivarian Republic of Venezuela. It is noted that, under article 23 of the Constitution, human rights treaties have constitutional rank and therefore form part of Venezuelan domestic law.

11. According to the source, Mr. Carreño Gutiérrez is accused of conspiracy, money-laundering, illicit trafficking in weapons of war and criminal association. He was charged with these offences three days after his arrest – in other words, two days after the expiration of the constitutional and legal time limit for bringing him before a procedural judge. This means that there had been no charges against him at the time of the arrest.

12. Mr. Carreño Gutiérrez was stopped a few kilometres from his home by two unmarked black vehicles. Individuals assumed to be officers of the Bolivarian National Police got out of the vehicles, arrested him and took him to the Directorate of Criminal Investigations in the district of Maripérez, where they kept him for several hours. They then took him to El

Helicoide, where he was made, under duress, to record a video in which he described his role as Operations Coordinator for the Voluntad Popular party.

13. The source notes that the arrest was made in violation of the rules of constitutional and legal procedure, since the officers: (a) were not carrying a warrant duly prepared, signed and sealed by a competent judge; (b) did not identify themselves; (c) did not state the grounds on which Mr. Carreño Gutiérrez was being deprived of his liberty; (d) placed Mr. Carreño Gutiérrez in solitary confinement and did not allow him to communicate with his family or his lawyers; and (e) subjected him to psychological torture, as he was threatened several times with being beaten if he refused to record the video.

14. The source notes that, in the Bolivarian Republic of Venezuela, personal liberty has special constitutional protection, and procedures for restricting that liberty must comply with article 44 of the Constitution:

“Personal liberty is inviolable, and as a consequence: 1. No one may be arrested or detained without a court order, unless he or she is caught in flagrante delicto. In such cases, he or she shall be brought before a judicial authority within 48 hours of the arrest. He or she shall remain free during the trial, except under the circumstances provided for by law and assessed by the judge hearing the case.”

15. Article 44 of the Constitution safeguards personal liberty by providing that, once the requirements for an arrest have been met, a person may not be held incommunicado and the officers carrying out the arrest must identify themselves. Conduct to the contrary, as in the present case, violates paragraphs 2 and 4 of the article, which state the following:

Any person who is detained has the right to immediately contact his or her family members or lawyer or a person of trust. These individuals, in turn, have the right to be informed of the detained person’s whereabouts, to immediately be notified of the reasons for the detention and to have a written record of the detained person’s physical and psychological state, prepared either by themselves or with the assistance of specialists, included in the file. The competent authority shall maintain a public register of all detentions carried out, which shall include the identity of the person detained, the place, time and circumstances of the detention and the officers who carried it out. When a foreign national is detained, the consulate shall be notified in accordance with the relevant international treaties.

Representatives of any authority carrying out measures that deprive persons of their liberty must identify themselves.

16. In addition, arrests must be carried out in accordance with the requirements under articles 240 and 241 of the Decree-Law on the Code of Criminal Procedure.

17. According to the source, after Mr. Carreño Gutiérrez was arrested, the officers did not bring him before the court within the 48-hour time limit provided for under the Constitution and by law. The court in question, Special Procedural Court of First Instance No. 4, which has jurisdiction at the national level, approved the detention, disregarding constitutional rules and upending the basic principles of criminal procedure characteristic of any democratic State, as the judge did not allow defence counsel to enter the courtroom – despite the fact that the detainee had asked that his counsel be present and the lawyer was then on court premises – in violation of article 49 of the Constitution and article 139 of the Decree-Law on the Code of Criminal Procedure.

18. As for the offences with which Mr. Carreño Gutiérrez is charged, they bear no relation to his alleged conduct. This undermines the principle of legality, which can be expressed as *nullum crimen, nulla poena sine lege* and is set out in article 1 of the Criminal Code, in line with article 49 of the Constitution, article 9 of the American Convention on Human Rights and article 15 of the Covenant.

19. According to the source, the reason for restricting Mr. Carreño Gutiérrez’s individual liberty through his arrest and detention reflects an intention to criminalize the exercise of civil and political rights, given his membership in the political party Voluntad Popular, which he had represented as a candidate for parliament and of which he later became the National Operations Coordinator.

20. In addition, Mr. Carreño Gutiérrez hosted *Buenas Noches*, an opposition opinion programme in which he raised questions about the administration of then President Hugo Chavez and later the administration of the current President. Because of their editorial viewpoint and their condemnation of human rights violations, the programme's hosts were threatened several times.

21. It is also claimed that Mr. Carreño Gutiérrez's right to the presumption of innocence has been violated since the day of his arrest because he has been treated as if he were guilty and has not been given due process.

22. Three days after Mr. Carreño Gutiérrez was brought before the procedural court, on 30 October 2020, a former Minister of Communications who was then the parliamentary election campaign manager for the government party, the Partido Socialista Unido of the Bolivarian Republic of Venezuela, and a candidate for a parliamentary seat representing Caracas, prejudged Mr. Carreño Gutiérrez's guilt at a press conference at government campaign headquarters that was broadcast on radio and television, stating that he was guilty and showing a supposed confession that had been obtained under duress.²

23. In this regard, the source points out that public statements of high-ranking officials infringe the presumption of innocence when they identify a person as being responsible for an offence for which he or she has not yet been tried, as such statements can be used to persuade the general public of the person's guilt and can influence or prejudice the assessment of the facts by the competent judicial authority.³

24. The source claims that the infringements that occurred are a clear sign of the political nature of the case. Indeed, a former Minister of Communications who at the time was a candidate for parliament and campaign manager for the government party and who has held positions at the highest levels of the State, including as Vice-President of the Republic, President of the National Electoral Council, mayor of Caracas and President of the National Assembly, made it his business to expose Mr. Carreño Gutiérrez before the media and prejudged his alleged involvement in events intended to destabilize the country, before a competent, autonomous, independent judicial authority had been able to establish any such involvement on the basis of public oral proceedings. In the source's view, the violations of Mr. Carreño Gutiérrez's human rights occurred because of his exercise of his civil liberties and the fact that he was active in one of the main opposition parties.

25. According to the source, evidence of the political nature of the arbitrary detention of Mr. Carreño Gutiérrez is to be found in the court and judge trying his case. The Constitution establishes a right to be tried by an impartial court, and that necessarily entails a guarantee that the trial judge will be duly appointed.

26. However, the source claims that these guarantees have not been observed, since the court hearing the case – Special Procedural Court of First Instance No. 4, which has jurisdiction at the national level in cases relating to terrorist offences and is competent to try offences related to corruption and organized crime – is a special court that was not established in accordance with article 49 (4) of the Constitution.

27. According to the source, the court was not formed under an instrument having the status of a law. In other words, it was not created by the country's rightful lawmakers but rather by decision of the Supreme Court, in violation of the constitutional principle that certain matters are reserved to the legislature. It can therefore be asserted that the court is not one that was pre-established by law but is more akin to a special commission in that it was created, without no basis in law, for the purpose of trying a series of offences that are often brought against troublesome, dissenting political figures.

28. In addition, the source points out that the judgment referred to earlier mentions article 255 of the Constitution, which safeguards the right to be tried by a duly appointed judge, stating:

² See <https://www.youtube.com/watch?v=fJaHjt0Brxc>.

³ See opinion No. 40/2019.

Admission to a judicial career and the promotion of judges are determined by public competitive examination to ensure the suitability and excellence of candidates, who are selected by panels from circuit courts in the form and under the conditions laid down by law. The appointment and swearing-in of judges is the responsibility of the Supreme Court. The law guarantees the participation of the public in the selection and appointment of judges. Judges may be removed or suspended from their posts only under procedures specifically provided for by law.

The law encourages the professionalization of judges and universities cooperate in this regard by organizing the relevant judicial specialization in university law studies.

Judges are personally responsible, under the terms set by law, for unjustified errors, delays or omissions, any substantial lack of compliance with procedural rules, denial of justice, partiality or any acts of bribery or malfeasance in the performance of their duties.

29. According to the source, this shows that the principles governing the suitability of judges are constitutional in nature. The Constitution provides that citizens may be tried only by persons who have been admitted to the judicial profession and risen within it as a result of competitive examinations that genuinely guarantee public participation and the suitability of judges.

30. It is stated, however, that no such examinations have been held in the Bolivarian Republic of Venezuela for years and that, instead, the Supreme Court has appointed temporary judges who may be removed from their positions at any time and who therefore find themselves in a highly unstable situation. Judges, even career judges, who hand down judgments that are not in the Government's interests, are removed from their posts.⁴

31. The source states that, in the present case, the court's sitting judge is a temporary official who was admitted to the judiciary without having passed the necessary competitive examination, which means there is no objective, serious way of knowing whether he meets the requirements of the post. In addition, he is not secure enough in his position to be able to make fair decisions that go against the group that has political power without feeling he is risking his job.

32. The source claims that the Supreme Court has done away with the guarantee regarding the due appointment of judges by failing to hold the competitive examinations that ensure the suitability of judges and by appointing temporary judges whose positions are not secure enough to allow them to exercise their duties impartially. This has become an ongoing, recurrent situation, in contravention of the principles that ensure the impartiality of judges, as stated by the Inter-American Court of Human Rights in its judgment of 5 August 2008,⁵ which held that such temporary status undermines judicial independence when it continues indefinitely, with no indication of when it will cease, when there are no rules setting minimum requirements for temporary judges and when judges are appointed without the transparency and public participation required under the Constitution.

33. In addition, the source claims that, in the course of the proceedings, Mr. Carreño Gutiérrez has suffered from several health problems that have aggravated a pre-existing condition and put his life at risk, as he has a heart condition that causes shortness of breath and his solitary confinement has triggered stomach conditions and other disorders.

34. The source points out that, during the proceedings against Mr. Carreño Gutiérrez, various unlawful measures have been taken that are outside the bounds of the law and the Constitution. One example is the raid on Mr. Carreño Gutiérrez's home, which was carried out without prior notification to the person resident or present there and without the required observers.

⁴ Inter-American Court of Human Rights, *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, judgment of 5 August 2008, Series C No. 182.

⁵ Ibid.

35. In the view of the source, Mr. Carreño Gutiérrez's detention can be seen to fall under categories II, III and V.

36. With respect to category II, the source notes that Mr. Carreño Gutiérrez was subjected to the penalty of deprivation of liberty without regard for his right to be treated equally and not to suffer discrimination because of his political activism. That is to say, his right to equality was violated in that his ability to fully participate in political activities on an equal basis with other members of the public, especially those who support the Government, was not ensured. The conduct is discriminatory in that he was arrested and continues to be deprived of his liberty because he thinks differently from the Government in office. The source therefore claims that the arbitrary detention was carried out for the purposes of depriving Mr. Carreño Gutiérrez of his rights under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.

37. In addition, Mr. Carreño Gutiérrez actively participates in actions whose purpose is to denounce the institutional, economic and social deterioration in the Bolivarian Republic of Venezuela. As a result, he has been subjected, on the basis of what he thinks, to persecution and harassment by the Government, and this has had an effect on his freedom of thought and conscience, a freedom that goes beyond the mere expression of ideas. The scope of the protection of these rights encompasses actions based on thoughts and opinions that differ from those of the Government. This is the main reason for Mr. Carreño Gutiérrez's imprisonment. It is therefore claimed that he was detained because of his exercise of the rights contained in article 18 of the Universal Declaration of Human Rights.

38. Mr. Carreño Gutiérrez is an active member of Voluntad Popular, a political party that has consistently opposed the current Government and, through its leaders in exile, draws international attention to the current situation in the Bolivarian Republic of Venezuela. It is claimed that the party has been persecuted because of its anti-Government position, that it has been labelled a terrorist group, and that its leaders have been subjected to acts of harassment and repression in order to hasten the party's demise by blocking their freedom of association and of assembly.

39. The source argues that Mr. Carreño Gutiérrez was arbitrarily detained for exercising the rights contained in article 20 of the Universal Declaration of Human Rights, in accordance with articles 18 and 21 of the Covenant. Based on the foregoing, the source requests a finding that, in the present case, the criteria for arbitrary detention under category II have been met.

40. With respect to category III, the source notes that the detention violates Mr. Carreño Gutiérrez's right to be tried by an independent and impartial court.

41. According to the source, the court and judge trying the case have specialized exclusively in cases against Venezuelan opposition leaders and human rights activists. Their bias can be seen in the repeated actions of the judge, who consistently grants all the requests and motions made by the Public Prosecution Service while, automatically and without justification, denying those made by the defence, such as requests for a medical transfer.

42. The bias is even more obvious when the motions aim to protect human rights – such as the rights to life, health, physical integrity and freedom – in response to medical complications, when the court has refused to provide proper medical care and ignored a request that Mr. Carreño Gutiérrez be freed on the grounds that his detention is arbitrary and on health-related humanitarian grounds. On the basis of the foregoing, the source concludes that Mr. Carreño Gutiérrez's detention falls within category III.

43. With respect to category V, the source notes that, as a national leader of Voluntad Popular, Mr. Carreño Gutiérrez has organized peaceful protests and street activities, has publicly spoken against the human rights violations by the Government of the Bolivarian Republic of Venezuela and has political ties to Venezuelan opposition leaders. The arresting officers have said as much to Mr. Carreño Gutiérrez, telling him that he would be enjoying his freedom if he did not have such friends and did not spend his time organizing protests.

44. In the light of the foregoing, the source is of the view that, in the present case, the criteria for finding an arbitrary detention under category V have been met.

Response from the Government

45. On 9 December 2021, the Working Group transmitted the source's allegations to the Government. The Working Group requested the Government to provide detailed information about Mr. Carreño Gutiérrez's case by 7 February 2022. In addition, the Working Group requested the Government to safeguard Mr. Carreño Gutiérrez's physical and mental integrity.

46. On 4 February 2022, the Government requested an extension of the deadline and was given until 7 March 2022 to reply. It submitted its response on 7 March 2022.

47. The Government informed the Working Group that Mr. Carreño Gutiérrez has been deprived of his liberty in connection with a criminal trial before trial court of first instance No. 3, which has jurisdiction at the national level and competence to try terrorism-related offences in the criminal court circuit for the Caracas metropolitan area. The applicable legal provisions had previously been set out under Venezuelan law.

48. The Government states that Mr. Carreño Gutiérrez was arrested when patrolling police officers stopped the vehicle in which he was travelling with a companion. The officers carried out a search and found a 5.56 calibre Anderson AM-15 rifle with an obliterated serial number, a case containing 17 unfired rounds of 5.56 calibre ammunition and US\$ 12,000 in cash. This discovery led to Mr. Carreño Gutiérrez and his companion being arrested in flagrante delicto, in accordance with article 44 of the Constitution and article 234 of the Code of Criminal Procedure. Thus the detention was carried out on grounds established by law and in accordance with legal procedure, in conformity with article 9 (1) of the Covenant.

49. In its notification to Mr. Carreño Gutiérrez, the Government included the reasons for his detention and his rights, in accordance with Venezuelan law and in line with the Human Rights Committee's statement that "oral notification of reasons for arrest satisfies the requirement".⁶ The document submitted shows Mr. Carreño Gutiérrez's legible signature and fingerprints.

50. The Government has also provided a statement from Mr. Carreño Gutiérrez's companion that confirms the information given by the State party regarding the conditions, manner, time and place of the arrest in flagrante delicto, and also makes the point that the suspect had stated that his companion had nothing to do with the alleged criminal acts.

51. Regarding the source's assertion that Mr. Carreño Gutiérrez was detained because he had exercised his right to freely express a political opinion critical of the institutions of the Bolivarian Republic of Venezuela and against the Government, the Government states that, as acknowledged by the source, Mr. Carreño Gutiérrez has been doing so publicly and in complete freedom since 2006; that is, for more than 16 years.

52. The Government emphasizes the fact that Mr. Carreño Gutiérrez even openly ran for elected office. Thus, according to the Government, at no time has he been subjected to human rights restrictions motivated by discrimination or by the exercise of his right to freely express his opinion, as the source has claimed.

53. The Government reports that, after the arraignment hearing, Special Procedural Court of First Instance No. 4, which has national jurisdiction over cases involving terrorism, confirmed the preliminary charges against Mr. Carreño Gutiérrez and decided to charge him with the offences of financing terrorism, provided for and punishable under article 53 of the Act on Organized Crime and the Financing of Terrorism; conspiracy against the political system, provided for and punishable under article 132 of the Criminal Code; and illicit trafficking in weapons of war, provided for and punishable under article 38 of the Act on Organized Crime and the Financing of Terrorism.

54. The Government sets out, in a structured and coherent manner, all the procedural steps taken in relation to the detention and trial of Mr. Carreño Gutiérrez and the other proceedings that have taken place in connection with his case.

⁶ Human Rights Committee, general comment No. 35 (2014).

55. The Government notes that the case file contains the detainee's statement accepting the charges against him, made when he was formally charged with terrorism-related offences. There is also a record of his court-ordered pretrial detention, of an order prohibiting him from selling or encumbering any of his property and of the designation of the Criminal Investigations Directorate of the Bolivarian National Police as the place of detention.

56. The Government also demonstrates that, on 30 June 2021, Mr. Carreño Gutiérrez's defence counsel, in full exercise of Mr. Carreño Gutiérrez's constitutional and legal rights, filed a brief with the trial court objecting to the charges filed by the Public Prosecution Service. However, in that brief, defence counsel included no evidence to be considered at trial, despite having the right to do so under article 311 of the Code of Criminal Procedure.

57. The Government explains that the order to freeze Mr. Carreño Gutiérrez's assets was issued because he is accused of being responsible for handling the money of subversive groups in the Bolivarian Republic of Venezuela. Moreover, the Government has determined that the money is sent and managed from abroad and has provided intelligence reports containing this information. The risk of flight is explained and substantiated at length in the supporting decision, which, according to the Government, can be found on pages 154 to 171 of part I of the file.

Additional comments from the source

58. On 10 March 2022, the Working Group transmitted the Government's response to the source with a request for the source's comments and observations.

59. The source denies the existence of the weapons referred to and the money alleged to have been in the vehicle driven by Mr. Carreño Gutiérrez and claims that the search was thus carried out without a lawfully issued warrant. The source alleges that Mr. Carreño Gutiérrez was subjected to an enforced disappearance and a violation of the constitutional and human right of all citizens to due process. Furthermore, the search itself was not carried out in accordance with the procedure established in the Code of Criminal Procedure, which requires that searches of vehicles and persons be carried out in the presence of two witnesses, which was not the case.

60. The source insists that the signature and fingerprints appearing on the document submitted by the Government were obtained under duress, as was Mr. Carreño Gutiérrez's statement. Mr. Carreño Gutiérrez was arrested for being the Operations Coordinator of a political party that the Government considers a terrorist group, having been identified as a financial intermediary for members of the Venezuelan opposition.

61. The source argues that the pretrial detention order violated the principle that judicial decisions must be justified, i.e., duly substantiated in law, as the judge was required to demonstrate that there was a risk of flight or of obstruction of the proceedings, but there is no record of that in the case. On the basis of the foregoing, Mr. Carreño Gutiérrez's detention falls under category I, in addition to being arbitrary under categories II, III and V.

Discussion

62. The Working Group thanks the source and the Government for their submissions.

63. In determining whether the deprivation of liberty of Mr. Carreño Gutiérrez is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international human rights law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.⁷

⁷ A/HRC/19/57, para. 68.

64. The Working Group points out that in such cases it applies a higher standard of review, as they could involve restrictions on the freedom of expression or opinion of persons involved in journalism or the defence of human rights.⁸

Preliminary issues

65. The Working Group notes that the Government has submitted information and a legal analysis with detailed explanations justifying the detention of Mr. Carreño Gutiérrez, while the source has provided an analysis intended to cast doubt on the legitimacy of the judges and cites a number of domestic laws.

66. In this regard, the Working Group recalls that its mandate is not to take the place of the national judicial authorities or act as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary. Reassessing the sufficiency of the evidence or addressing errors of law allegedly committed by the domestic courts is beyond the scope of the Working Group's mandate.⁹

Category I

67. The source asserts that Mr. Carreño Gutiérrez was detained on 26 October 2020 without a warrant, without explanation of the charges against him and without being informed of his rights. The Government has refuted this claim and presented information describing the circumstances of the detention and explaining that it was a case of flagrante delicto.

68. The Working Group points out that the Inter-American Court of Human Rights has established in its case law that flagrancy should not be presumed but must be substantiated by the authority in question.¹⁰

69. In this regard, the Government submitted a document signed by Mr. Carreño Gutiérrez in which he allegedly admits to the offence of which he is accused. Mr. Carreño Gutiérrez is said to have recorded a video in which he freely confesses his guilt and explains his actions.

70. The Government attempts to demonstrate that it has complied with the procedure for carrying out a detention, in accordance with the requirement of article 9 (2) of the Covenant that all persons shall be informed of the reasons for their arrest at the time of arrest, as well as of the judicial avenues for challenging the lawfulness of the deprivation of liberty.¹¹ The Government has submitted documents setting out the reasons for the detention, the legal basis for it, the facts on which the complaint was based and the unlawful act committed.

71. According to the Government, Mr. Carreño Gutiérrez was, within the time limit of 48 hours following detention, brought before Procedural Court of First Instance No. 4, which has national jurisdiction over cases involving terrorism, for an oral arraignment hearing under article 236 of the Code of Criminal Procedure. The source has refuted these statements, insisting that Mr. Carreño Gutiérrez was disappeared.

72. Additionally, the Government has indicated that Mr. Carreño Gutiérrez was detained in flagrante delicto, admitted his guilt and signed a statement to that effect.

73. The Working Group notes that the source and the Government have presented two contradictory versions of the events surrounding the arrest of Mr. Carreño Gutiérrez and of what happened in the hours that followed, until he was brought before a court. On the basis of the information received, it is impossible for the Working Group to determine whether the detention in the present case was arbitrary under category I.

⁸ Opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; No. 39/2012, para. 45; and No. 64/2011, para. 20. See also General Assembly resolution 53/144, annex, art. 9 (3).

⁹ See opinion No. 40/2005.

¹⁰ Inter-American Court of Human Rights, *Case of Gutiérrez-Soler v. Colombia*, judgment of 12 September 2005, and *Case of García-Asto and Ramírez-Rojas v. Peru*, judgment of 25 November 2005. See also opinion No. 9/2018, para. 38.

¹¹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 7.

Category II

74. The source argues that the trial and imprisonment of Mr. Carreño Gutiérrez are arbitrary under category II, as they resulted from his legitimate exercise of rights and freedoms protected under articles 19, 20 and 21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant.

75. In this regard, the United Nations Commission on Human Rights, at its forty-eighth session, adopted resolution 1992/22 on the right to freedom of opinion and expression. The Commission, in paragraph 7 of the resolution, invited the Working Group on Arbitrary Detention and other special procedures to pay particular attention to the situation of persons detained, ill-treated or discriminated against for having exercised the right to freedom of opinion and expression.

76. The Working Group recalls that the right to hold and express opinions, including opinions that are not in accordance with official government policy, is protected by article 19 of the Universal Declaration of Human Rights. Consequently, the Government must respect, protect and uphold the right to freedom of opinion and expression, even where opinions have been expressed which are not to its liking. Restrictions on freedom of expression must not be overbroad, must conform to the principle of proportionality, must be appropriate to achieve their protective function and must be the least intrusive instrument amongst those which might achieve their protective function.¹²

77. Taking note of the legal circumstances surrounding the arrest and imprisonment of Mr. Carreño Gutiérrez, the Working Group is not persuaded that he was deprived of his liberty because he acted in the defence or exercise of human rights. Mr. Carreño Gutiérrez openly exercised his freedom of opinion and expression for approximately 16 years without being detained for doing so. The Government has established that Mr. Carreño Gutiérrez was deprived of his liberty because of the events that occurred at the time of his arrest.

78. However, the Working Group notes that, in the context of the arrest and detention in the present case, Mr. Carreño Gutiérrez's arrest has been linked to his role and activities within a Venezuelan opposition party. That organization has been publicly accused by the Government of theft and terrorism because it opposed, confronted and criticized the current Government. In accordance with the international human rights standards set out in the Covenant and the Universal Declaration of Human Rights, no one may be persecuted or discriminated against on the basis of his or her political beliefs or activities. In view of the foregoing, the Working Group is satisfied that Mr. Carreño Gutiérrez's detention is arbitrary under the criteria set out for category II, since it resulted from his exercise of fundamental rights such as freedom of association and political participation, which are protected under articles 20 and 21 of the Universal Declaration of Human Rights and articles 22 and 25 of the Covenant.

Category III

79. As the Working Group has found that Mr. Carreño Gutiérrez's detention is arbitrary under category II, the proceedings against him for his exercise of his fundamental rights should be halted. However, because Mr. Carreño Gutiérrez has faced criminal proceedings and in view of the claims made by the source, the Working Group will analyse whether, during those proceedings, the fundamental elements of a fair, independent and impartial trial have been respected.

80. According to article 14 (1) of the Covenant, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal in the determination of any criminal charge brought against him or her. The Working Group agrees that judges must not allow their decisions to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties.¹³

¹² General comment No. 34 (2011), para. 34.

¹³ Human Rights Committee, general comment No. 32 (2007), para. 21.

81. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.¹⁴ Furthermore, the aim of article 14 of the Covenant is to ensure the proper administration of justice.

82. Article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant recognize the right of all persons charged with a criminal offence to be presumed innocent. The Working Group has examined the source's claims and the Government's rebuttals regarding the presumption of innocence in the light of the Human Rights Committee's conclusions.¹⁵ The Working Group points out that the "presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".¹⁶ Furthermore, both the Committee and the Working Group have highlighted the duty of all public authorities to refrain from prejudging the outcome of a trial through public statements affirming the guilt of the accused.¹⁷

83. The Government has refuted this accusation, claiming that the statements were made by persons who neither represent nor bind the Bolivarian Republic of Venezuela. The Government explains that, because Mr. Carreño Gutiérrez is a public figure, it is inevitable that comments will be made publicly about any situation involving him; they were, however, not made by officials of the Government of the Bolivarian Republic of Venezuela.

84. However, on the basis of all the information received, the Working Group is satisfied that the person who made the public accusations against Mr. Carreño Gutiérrez is authorized to speak for the Government of the Bolivarian Republic of Venezuela. At the time in question, he was the campaign manager for the government party and a candidate for parliament. He has also been Vice-President of the Republic, Minister of Communications and mayor of Caracas and had earlier been President of the National Electoral Council, and he has enough power to be able to call a meeting at the Teresa Carreño Theatre and have it broadcast on national public television for the purpose of publicizing Mr. Carreño Gutiérrez's alleged confession. The video describes the alleged terrorist activities of the political party to which Mr. Carreño Gutiérrez is said to belong and calls the party's members "thieves who steal from thieves". The speaker gives the public and the press a general description of how public funds are supposedly used in committing various illicit acts against the Government. The official directly singles out Mr. Carreño Gutiérrez as the culprit, ringleader and organizer. In the video, Mr. Carreño Gutiérrez confesses, supposedly voluntarily, to a series of activities. After the confession is shown, the speaker resumes, accusing Mr. Carreño Gutiérrez of theft and terrorist acts. All these statements are made on national public television, over a period of more than an hour.

85. Through these statements, Mr. Carreño Gutiérrez was depicted as destabilizing the Government and as a terrorist. The campaign manager spoke, and spoke on behalf of the Government. Mr. Carreño Gutiérrez was publicly vilified by a representative of the Government even though there was no final judgment against him at that time.¹⁸

86. The Working Group does not accept the argument that the person who publicly accused Mr. Carreño Gutiérrez is not in the Government's confidence and does not represent it. No explanation is given, for example, for how someone who does not represent the Government of the Bolivarian Republic of Venezuela could have been in possession of an official video from a criminal investigation or have been able to broadcast live for more than an hour on national public television from the Teresa Carreño Theatre, one of the largest cultural venues in Latin America.

¹⁴ Ibid., para. 2.

¹⁵ Ibid., para. 30.

¹⁶ Ibid.

¹⁷ See opinion No. 40/2019.

¹⁸ See <https://www.youtube.com/watch?v=fJaHjt0Brxc>.

87. The Working Group finds a violation of Mr. Carreño Gutiérrez's right to the presumption of innocence, which is protected under the Universal Declaration of Human Rights, the Covenant and principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

88. The Working Group's conclusion is supported by the fact that the video of the supposed confession was broadcast on national television even though no final judgment had yet been handed down on the charges. There is consequently a risk that the public and members of the judiciary will be left with the impression that the accused is a criminal, without any prior consideration of the merits of the case in a trial guaranteeing due process.

89. Likewise, the Government has not convinced the Working Group that Mr. Carreño Gutiérrez's statement was given freely and voluntarily.

90. The source further calls into question the competence, independence and impartiality of the courts and presents an analysis of the appointment and removal of judges in the Bolivarian Republic of Venezuela. The Working Group notes that these appointments are part of the judicial structure in the Bolivarian Republic of Venezuela for handling cases involving acts related to terrorism or its financing. However, the Working Group cannot fail to note that the lack of fixed, stable, guaranteed appointments makes judges' positions less secure and, consequently, detracts from the independence required of them.

91. According to the Human Rights Committee, the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is an absolute right that is not subject to any exception.¹⁹ Additionally, a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.²⁰ It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement must be adequately secured by law.²¹

92. The Working Group recalls that its mandate is not to evaluate evidence presented before the national judiciary or to determine whether such evidence is sufficient or has in fact been properly weighed by the national courts. However, the source has presented a credible case regarding the temporary and insecure status of the judges who tried Mr. Carreño Gutiérrez. The Working Group is satisfied that this description reflects a lack of independence under the standards established by the Human Rights Committee in its interpretation of article 14 of the Covenant. This situation in particular has not been refuted by the Government. In the light of the foregoing, the Working Group decides to refer the present case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

93. The Working Group concludes that the detention of Mr. Carreño Gutiérrez is arbitrary because he has been denied fundamental human rights, such as the right to presumption of innocence and the right to be tried by an independent tribunal, which is recognized in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. In the light of the foregoing, Mr. Carreño Gutiérrez's detention is found to be arbitrary under category III.

Category V

94. Non-discrimination, equality before the law and equal protection of the law constitute basic principles of democracy and the protection of human rights. Thus, article 2 (1) of the Covenant sets out an obligation for each State Party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind.

¹⁹ *González del Río v. Peru* (CCPR/C/46/D/263/1987), para. 5.2.

²⁰ *Oló Bahamonde v. Equatorial Guinea* (CCPR/C/49/D/468/1991), para. 9.4.

²¹ Human Rights Committee, general comment No. 32 (2007), para. 19.

95. The source claims that Mr. Carreño Gutiérrez's detention was discriminatory because it resulted from his defence of human rights and his exercise of his right to freedom of opinion and expression in consistently working against the party currently governing the Bolivarian Republic of Venezuela. The Working Group is satisfied that Mr. Carreño Gutiérrez's detention is essentially due to his membership in an opposition party and his leadership role in that party, as stated by the campaign manager for the Government. This fact, along with the public accusations made against Mr. Carreño Gutiérrez, makes it impossible for him to be judged independently and leaves him outside the protection of the law. Because of these circumstances, Mr. Carreño Gutiérrez's detention is arbitrary under category V.

96. This 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.²² In the Working Group's view, this is indicative of a systematic practice of depriving people of their liberty while failing to respect their rights under 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.²³

97. In the light of the recurrent pattern of arbitrary detention identified by this international human rights mechanism in recent years, the Government of the Bolivarian Republic of Venezuela is urged to consider inviting the Working Group to make an official country visit. Such visits are an opportunity for the Working Group to engage in direct constructive dialogue with the Government and with representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country.

Disposition

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

The deprivation of liberty of Roland Oswaldo Carreño Gutiérrez, being in contravention of articles 20 and 21 of the Universal Declaration of Human Rights and articles 9, 14, 22 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, III and V.

99. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Mr. Carreño Gutiérrez 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.

100. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Carreño Gutiérrez immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.²⁴ In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Carreño Gutiérrez.

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

102. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

²² 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.

²³ Opinion No. 47/2012, para. 22.

²⁴ A/HRC/45/16, annex I.

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

Follow-up procedure

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

- (a) Whether Mr. Carreño Gutiérrez has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Carreño Gutiérrez;
- (c) Whether an investigation has been conducted into the violation of Mr. Carreño Gutiérrez's 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.

105. 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.

106. 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.

107. 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.²⁵

[Adopted on 30 August 2022]

²⁵ Human Rights Council resolution 42/22, paras. 3 and 7.