



General Assembly

Distr.: General
3 April 2023
English
Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fifth session, 14–18 November 2022

Opinion No. 81/2022 concerning Jorge Alberto Burelo Gómez (Mexico)

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 51/8.
2. In accordance with its methods of work,¹ on 3 June 2022 the Working Group transmitted to the Government of Mexico a communication concerning Jorge Alberto Burelo Gómez. The Government replied to the communication on 19 August 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, 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. Jorge Alberto Burelo Gómez is a Mexican national, born on 20 July 1994, who is employed in a family business and who normally lives in Mexico City. He suffers from paranoid schizophrenia.
5. According to the submissions, Mr. Burelo Gómez was arrested on 17 May 2019, at approximately 11.33 a.m., just after he left his home and was at the door to his family's business. He was the victim of a beating, threats and psychological torture, and was subdued and beaten inside a van and driven through the streets of Mexico City.
6. The authorities have not offered a single, consistent official version of how or why the arrest was made. For example, neither Mr. Burelo Gómez nor his family members were told which authorities carried out the arrest nor the motives for it. The source indicates that there have been different versions in that regard.
7. An initial version comprises the information supposedly provided subsequently by the Office of the Public Prosecutor to Mr. Burelo Gómez's defence counsel: on 17 May 2019, at 12.25 a.m., an investigation was initiated against Mr. Burelo Gómez for crimes against health, namely small-scale drug trafficking and, specifically, possession.
8. That investigation refers to the detention of Mr. Burelo Gómez, which was carried out by police officers of the Office of the Attorney General of Mexico City, who placed him at the disposal of the corresponding authority, charging him for his alleged responsibility in small-scale drug trafficking (possession), in flagrante delicto.
9. The source underlines the fact that the police indicate that the detention was made at 20 Amatista Street, in the Gustavo A. Madero district of Mexico City. In addition, the police state that they informed him of his rights and the reason for his detention. However, the source alleges that this is false.
10. According to the information received, a second version allegedly indicates that agents of the Office of the Public Prosecutor subsequently provided defence counsel with an uncertified copy of a request for an arrest warrant. The Criminal Judicial Management System of the judiciary of the State of Mexico alleges that, on 17 May 2019, at 9.10 a.m., the Online Procedural Court Specialized in Searches and Arrest Warrants was asked to issue a warrant for the arrest of Mr. Burelo Gómez. This was supposed to take place at 14 Amatista Street, a different place from where the arrest actually took place, which was 20 Amatista Street.
11. According to the source, system records show that the request was approved at 5.20 p.m. on 17 May 2019. The request for an arrest warrant is made so that it can be executed by the Office of the Public Prosecutor. However, at the time of the response to the request, Mr. Burelo Gómez had already been detained, so there was no warrant to justify his detention.
12. According to a third version, at the initial hearing before the Procedural Court on 19 May 2019, the agent of the Office of the Public Prosecutor of Tlalnepantla de Baz allegedly said that the hearing was being held as a consequence of the arrest warrant of 18 May 2019. Despite the statements made by defence counsel, the judicial authority refused to examine how the detention had been conducted, further violating Mr. Burelo Gómez's rights.
13. A fourth version is based on the video recordings of the security cameras installed in the place where the arrest was made. Those videos corroborate that the arrest took place at the entrance to the family business, which is located at 20 Amatista Street. The source indicates that the video recordings show the presence of Mr. Burelo Gómez at the entrance to the business, where about nine people arrived, without prior notice, using excessive force, without police uniforms or police identification. The video also shows that they do not give him any documents, such as an arrest warrant, nor do they address him to inform him of his rights or the supposed reason for the detention. Immediately thereafter, they subdued him and put him in a grey van (not an official patrol car), which was accompanied by two other vans, without any identifying marks, which were used to block the street to traffic.

14. According to the source, the images in the security video led Mr. Burelo Gómez's family to believe that he had been kidnapped. Also, they received no information about his whereabouts or fate. The source alleges that the failure of the authorities to recognize Mr. Burelo Gómez's schizophrenia and to provide him with treatment appropriate in the light of his condition is extraordinary.

15. The source alleges that Mr. Burelo Gómez was not shown a warrant or other order from a competent authority at the time of his arrest. Documents provided to defence counsel by the Office of the Attorney General show that there was no response to the request for an arrest warrant until 5.20 p.m. on 17 May 2019. In other words, at the time of Mr. Burelo Gómez's arrest, there was no arrest warrant. Much less was there any evidence of the alleged possession of drugs, the grounds for the investigation that was initiated in Mexico City (which is not the same jurisdiction as the State of Mexico), where the arrest warrant was issued, despite the lack of an official document requesting inter-agency cooperation.

16. In addition, the source reports that article 145 of the National Code of Criminal Procedure establishes that, upon execution of an arrest warrant issued by a procedural court, agents must immediately thereafter present the detainee to the authority that issued the warrant, in order to hold the initial hearing.

17. However, upon being deprived of his liberty on 17 May 2019, at approximately 11.33 a.m., Mr. Burelo Gómez was taken to the offices of the Gustavo A. Madero district, where he was detained until 11 p.m. on 17 May. It was there that he was told that he had been arrested for possession of marijuana and small-scale drug trafficking. The officers reportedly told him that after some formalities he would be released, but when he left, police officers were waiting for him and this time they were wearing uniforms and had an arrest warrant for homicide.

18. Mr. Burelo Gómez was then taken to an unknown location, a very small place where he was locked up without light or ventilation and forced to confess to the offence for which the arrest warrant had been issued. The location was later identified as the Tlalnepantla Office of the Public Prosecutor. It is alleged that the police officers, who were heavily armed, said that he was there for processing, and that he had to record a video stating his responsibility for the offence of homicide, for which they gave him a piece of paper containing what he had to say while he was being recorded. He was also photographed on several occasions.

19. Without telling him where he was being taken, he was transferred to the "Lic. Juan Fernández Albarrán" Penitentiary and Social Reinsertion Centre in San Pedro Barrientos (in the municipality of Tlalnepantla de Baz, State of Mexico), at 5.10 a.m. on 18 May 2019. Once there, the authorities did not take Mr. Burelo Gómez's condition into account. As a result, he remained in a state of nervous crisis, emotionally traumatized, without contact with family members or people he trusted, and at no time was he given the medical attention he required.

20. According to the little information that has been provided to the family and defence counsel, there are two versions concerning the authority that supposedly ordered the arrest or issued the arrest warrant.

21. The agents of the investigative police said that they were detaining Mr. Burelo Gómez and putting him at the disposal of the investigation unit of the investigating agency of the Office of the Public Prosecutor in the Gustavo A. Madero district, under the jurisdiction of the Office of the Attorney General of Mexico City, because of his alleged suspicious behaviour and because they had seen him with a transparent bag containing marijuana. However, the source indicates that the video of the arrest contradicts this account.

22. The due process judge of the Online Procedural Court Specialized in Searches and Arrest Warrants of the State of Mexico granted the request for a warrant on 17 May 2019, at 5.20 p.m. The judge argued that the information sent by the agent of the Office of the Public Prosecutor contained elements allowing for a presumption of Mr. Burelo Gómez's responsibility for attempted murder. However, the accusation is unfounded and based on false testimony.

23. Regarding the legal grounds for the arrest, the source states that the police officers did not indicate the legal basis for their action. Instead, they only said that they suspected

Mr. Burelo Gómez of having in his hand a transparent plastic bag containing dried green plant matter that resembled marijuana. Mr. Burelo Gómez was allegedly asked to submit to a search and it was falsely stated that he resisted and grasped a post, shouting to his neighbours and insulting the officers. The officers state that, at 11.35 a.m. on 17 May 2019, they applied the use of force protocol, read the accused his rights and informed him that he would be taken to a doctor. This is based on interviews given by police officers, but contradicts what can be seen in the video of the arrest.

24. For her part, the due process judge of the Online Procedural Court Specialized in Searches and Arrest Warrants based her decision on articles 14 and 16 (3) of the Constitution; articles 1, 2, 20, section I, 133, section I, 141, section III, 142, 143 and 145 of the National Code of Criminal Procedure; and articles 187, section I, and 191 bis of the Act on the Judiciary of the State of Mexico.

25. The source indicates that, as a result of the initial hearing held on 19 May 2019, at which the judge refused to permit an analysis of the arrest of Mr. Burelo Gómez, an *amparo* remedy was filed, which was also denied.

26. On 17 February 2020, a psychologist issued an expert opinion on her functional analysis of Mr. Burelo Gómez's behaviour at the 2019 hearings, at which it was clear that his mind was profoundly troubled, showing positive symptoms of the schizophrenia spectrum. That report contained the conclusion that he demonstrated symptoms of torture and ill-treatment. Defence counsel expressed its concern at the severity of psychotic symptoms that had been developing more rapidly since the arrest, which meant that there was evidence of torture at the moment of detention. Consequently, corresponding complaints were filed with the Office of the Attorney General of Mexico City and the Office of the Attorney General of the State of Mexico.

27. As a result, in Mexico City, a case file was opened by the Office of the Public Prosecutor in charge of investigation unit "A-2" of the Office of the Attorney General for the Investigation of Crimes Committed by Public Servants. In 2021, hearings began in cases brought against two agents. However, to date, no progress has been made. The police officers are being prosecuted for deficiencies in the arrest, and the case file includes an analysis of the treatment of which Mr. Burelo Gómez was a victim at the moment of the arrest and in the following hours.

28. In addition, in the State of Mexico, a case file was opened by the Office of the Public Prosecutor assigned to the Office of the Special Prosecutor for the Investigation of Torture of the Office of the Attorney General of the State of Mexico. As part of that investigation, in January 2022, an expert opinion on victimological psychology was submitted, signed by a psychological expert, who concluded that there was psychological damage and trauma resulting from the way in which the arrest and deprivation of liberty of Mr. Burelo Gómez had occurred, as he was a victim of torture and cruel, inhuman or degrading treatment. That expert opinion coincides with the previous one, dated 17 February 2020.

29. The aforementioned expert opinion also coincides with the medical report prepared by another expert, based on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), submitted on 13 November 2020 in her capacity as a specialist in forensic medicine attached to the Directorate of Medical and Psychological Services of the Human Rights Commission of Mexico City.

30. Those reports and opinions coincided with another psychological expert opinion, carried out on the basis of the Istanbul Protocol, issued on 7 December 2020 and signed by a qualified psychologist assigned to the Directorate of Medical and Psychological Services of the Human Rights Commission of Mexico City, who concluded that:

- The psychological findings are in line with the description of the ill-treatment and/or torture.
- The psychological findings are to be expected considering the level of stress to which the subject indicates he was subjected, taking into account his cultural and social background.

- It can be established that Mr. Burelo Gómez presented symptoms of post-traumatic stress disorder.
- Prolonged institutionalization was identified as a stressor, because it prevented him from having direct contact with his support network, aggravating his condition.
- Mr. Burelo Gómez faced various forms of ill-treatment, which increased in intensity as time passed, to the point of him fearing for his life, causing him severe psychological trauma.
- The psychological findings, such as his re-experiencing trauma and avoiding thoughts related to the circumstances of his detention, are consistent with the ill-treatment and/or torture described when considered against the background of blunt force trauma, verbal abuse, electric shocks, threats of harm to family members and prolonged restraint. Taking into account the subject's cultural and social background, the ill-treatment and/or torture he suffered harmed his normal vital functions, causing symptoms of post-traumatic stress disorder and a fear of reprisals as a result of the legal proceeding in which he is involved.

31. The interim hearing was held on 22 September 2020. At the hearing, the judge decided what evidence would be presented at the trial hearing after considering the evidence offered and ruling on what would be admitted or excluded. Owing to the existence of an *amparo* trial pending judgment, the order to open an oral trial was suspended.

32. The criminal proceeding is at the intermediate stage. The hearing for the examination of evidence has been held. The source notes that there is no clear evidence allowing for a conclusion of Mr. Burelo Gómez's involvement in the offence that is the subject of the criminal proceeding against him (homicide) and as a result a hearing is pending owing to a lack of evidence. However, expert opinions have been requested to ascertain his social disability, because his condition has not been acknowledged.

33. The source emphasizes that Mr. Burelo Gómez was lied to when he was told that he was going to be released in the case of drug possession, the reason for his initial arrest; consequently, the violation of his rights continues, without any authority analysing that arrest.

34. The proceeding is currently suspended because the judge decided at the hearing not to consider the evidence that would have proved violations during the arrest or evidence related to his health condition, which is why defence counsel filed an application for *amparo*.

35. Meanwhile, Mr. Burelo Gómez has been held at the North Nezahualcóyotl Penitentiary and Social Reinsertion Centre in the State of Mexico since 16 September 2021, when he was transferred from the Tlalnepantla Penitentiary and Social Reinsertion Centre. In the light of the irregularities in the criminal proceedings against him and in view of his health condition, he was transferred owing to the need to provide him with appropriate medical treatment.

36. The source alleges that the detention of Mr. Burelo Gómez is arbitrary because his arrest did not satisfy the conditions necessary to deprive a person of his or her liberty, which are part of due process. The deprivation of his liberty is based on presumptions made by police officers. As can be seen from the video of the arrest, at the moment when Mr. Burelo Gómez was taken into custody by about nine people, he was not in possession of a bag that would justify the police action. The arrest was carried out without a warrant issued by a judicial authority and was executed taking advantage of Mr. Burelo Gómez's disability.

37. With respect to category I, the source explains that the applicable legislation provides for detention in two cases: (a) when a subject is in flagrante delicto, committing an act legally described as an offence at the time he or she is arrested; and (b) when there is an arrest warrant issued by a judicial authority, which must be delivered to the person to be detained, who shall be informed of the reason for the detention, informed of his or her rights, and informed of the authority before which he or she will be brought. It is alleged that these requirements were not met in this case, because at the time of the arrest, there was no warrant and therefore it was carried out without meeting the legal requirements. Furthermore, given the detainee's psychosocial disability, imprisonment in a penitentiary is prohibited by international human rights treaties.

38. With respect to category II, it is alleged that the individual's deprivation of liberty was the result of the exercise of his rights and freedoms. Mr. Burelo Gómez was arrested when he was at the door to his place of employment, exercising his right to freedom of movement within the national territory.

39. In addition, with respect to category III, the source states that in this case, 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.

40. Finally, with respect to category V, the source claims that Mr. Burelo Gómez has been deprived of his liberty for reasons of discrimination based on his disability.

Response from the Government

41. On 2 June 2022, the Working Group transmitted the allegations from the source to the Government, requesting that it submit a response by 2 August 2022. The Working Group requested the Government to provide detailed information regarding the case of Mr. Burelo Gómez, to clarify the legal and factual grounds for his detention and to comment on its compatibility with the State's international human rights obligations. The Working Group also requested the Government to protect Mr. Burelo Gómez's physical and mental health. In the context of the global pandemic, and in accordance with the World Health Organization recommendations of 15 March 2020 concerning the response to the coronavirus disease (COVID-19) in places of detention, the Working Group urged the Government to prioritize the use of non-custodial measures at all stages of criminal proceedings, including during the pretrial phase, the trial, sentencing and sentence enforcement. The Government requested an extension of the time limit for its reply, which was granted. The Government responded on 19 August 2022.

42. With regard to the different versions of Mr. Burelo Gómez's arrest, the Government indicates that there were two arrests, which took place on the same day, one followed by the other, in which he was accused of two different offences.

43. The first arrest was for the commission of serious crimes against health, in the form of small-scale drug trafficking (simple possession). This arrest was made in flagrante delicto, a situation that, pursuant to national law, is applicable and allows for an arrest to be made without a warrant, in accordance with article 16 of the Constitution.

44. The arrest for crimes against health was conducted by agents of the Office of the Attorney General of Mexico City on 17 May 2019, during which it was noted that, as indicated by the police officers who carried out the arrest, Mr. Burelo Gómez was in possession of two bags.

45. The Government reports that in this first arrest, it was determined that the police officers fabricated evidence. For this reason, Mr. Burelo Gómez was released, in accordance with the provisions of article 140 of the National Code of Criminal Procedure, on 18 May 2019, at 3.30 a.m.

46. According to the Government, the police officers who fabricated the evidence are being held for administration of justice offences, specifically the fabrication of incriminating evidence.

47. Regarding the second arrest of Mr. Burelo Gómez, the Government indicates that it occurred because, on 17 May 2019, the Online Procedural Court Specialized in Searches, Arrest Warrants and Protection Measures of the State of Mexico issued an arrest warrant on the basis of the request made by the Office of the Public Prosecutor. This was in line with the provisions of articles 14, 16, 20 and 21 of the Constitution and article 141, section III, and article 142 of the National Code of Criminal Procedure, for the offence of attempted murder, pursuant to and punishable under articles 241, 242, section II, and 245, sections I, II and III, in relation to articles 6, 7, 8, sections I and III, 10, 11, section II (c) and 58, of the Criminal Code in force in the State of Mexico.

48. The Government states that, on the same date, the due process judge of the Online Procedural Court issued the corresponding warrant, ordering the search for and location and

arrest of Mr. Burelo Gómez, in the light of his probable involvement in the offence referred to by the Office of the Public Prosecutor in its request.

49. The initial arraignment hearing was scheduled to be held on 19 May 2019. At the hearing, in the presence of the defendant and his defence counsel, whom he appointed, it could be seen that the defendant was aware of his rights.

50. At this hearing, Mr. Burelo Gómez was charged with attempted homicide and was informed of the details of the offence and the preliminary legal classification. The judge requested the prosecutor to inform Mr. Burelo Gómez of the evidence against him at that moment in the case file, as the basis for the charges.

51. The Government indicates that the due process judge ordered the arrest on 19 May 2019, backdated to 18 May 2019. Mr. Burelo Gómez was asked if he understood the offence of which he was accused and he answered that he did. On the advice of counsel, he expressed his wish not to give a statement.

52. The judge in the case considered that the delayed appearance of the detainee did not prejudice the proceeding, as argued by defence counsel, because a delay would only be a factor in relation to the offence itself, not to the circumstances of the arrest, and he had taken charge of the case once the defendant had been placed at his disposal. The proceeding included a discussion of the precautionary measure, and it was decided to impose mandatory pretrial detention. If defence counsel considered that the actions of the arresting officers were not in accordance with the law, it should have made the respective complaint. According to the criteria of the due process judge, it was not within his authority to determine the manner or legality of Mr. Bustelo Gómez's arrest.

53. Subsequently, at the hearing to extend the constitutional time limit, held on 23 May 2019, the due process judge said that, in view of the evidence offered by defence counsel, including three psychological and forensic medical reports, an order had been sent to the Tlalnepantla Penitentiary and Social Reinsertion Centre to give defence counsel access to the facility, accompanied by experts, in order to conduct proceedings.

54. At the arraignment hearing, the due process judge indicted Mr. Burelo Gómez for his probable participation in the commission of the statutory offence of attempted homicide, with undue advantage and malicious aforethought.

55. However, an additional four-month investigation period was authorized, which expired on 19 September 2019. Furthermore, on 29 May 2019, defence counsel requested the due process judge to authorize access to the penitentiary so that the forensic psychiatric expert could examine the accused.

56. The expert concluded that Mr. Burelo Gómez has suffered from behavioural disorders since childhood and adolescence. At the age of 17, he was diagnosed by psychiatric specialists with different types of psychosis, illnesses that are disabling for the patient inasmuch as he does not distinguish between hallucination and reality and between what is dreamt and what is experienced, and which have evolved over time. Predisposing and preparatory criminogenic factors were found but triggers of antisocial behaviour were absent. Because of the type of schizophrenia from which he suffers, which has been evolving for seven years, he is not responsible for his actions, given the psychosis he suffers.

57. Mr. Burelo Gómez's defence counsel requested that he be declared incompetent, for which purpose the judiciary of the State of Mexico ordered the appointment of two psychiatric experts. The Government states that the conclusion of the expert report was that the defendant did not present psychotic symptoms and, for this reason, he cannot be declared incompetent. However, defence counsel requested a hearing to discuss the accused's competence, and a provisional guardian was appointed.

58. At that hearing, held on 28 August 2019, as it could not be shown that Mr. Burelo Gómez was the subject of a competence proceeding, taking into account the expert reports, it was established that he retained the capacity of judgment, since he understood the alleged criminal act and, therefore, he was not declared incompetent.

59. The Government indicates that, after several reviews and appeals that were granted, the Eighth District Court of the State of Mexico gave notice of the filing of an amparo

proceeding against the decision not to consider Mr. Burelo Gómez incompetent. The appeal is currently pending a judgment.

60. The Government concludes by stating that the arrest of Mr. Burelo Gómez does not fall into any of the categories identified by the Working Group, and therefore requests that it not be declared arbitrary.

Additional comments from the source

61. The Working Group transmitted the Government's response to the source on 6 September 2022. The source submitted final comments and observations on 20 September. In those comments, the source points out that the Government did not respond to all the allegations in its response. In addition, the source insists on the absence of any judicial authority with the competence, independence and impartiality to analyse the allegations to the effect that the arrest was illegal and to order the corresponding reparations. Furthermore, it has been demonstrated that Mr. Burelo Gómez was not carrying illicit substances at the time of his arrest, so in flagrante delicto does not apply. The source emphasizes that there are official documents that show that the arrest was made before the arrest warrant was issued, in other words, without legal grounds. Despite the above, there has been no progress in the proceeding against the agents responsible for the arbitrary detention, fabrication of evidence and torture.

62. The source emphasizes that, despite the existence of four reports attesting to the torture and ill-treatment to which Mr. Burelo Gómez was subjected, as well as multiple health evaluations that demonstrate his incapacity and incompetence, carried out by private and public doctors from State and federal institutions, the Mexican judicial authorities have insisted on keeping him in detention for an alleged homicide in regard to which there is no evidence of his participation. In this regard, it is also noted that at no time since the moment of his arrest did the authorities take the necessary measures to adapt the conditions of the proceeding, trial and detention to take account of Mr. Burelo Gómez's special needs.

Discussion

63. The Working Group thanks the parties for their submissions. 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.²

64. The Working Group wishes to reaffirm that States have the obligation to respect, protect and uphold all human rights and fundamental freedoms, including liberty of the person. This requires ensuring that any national law allowing deprivation of liberty should be drafted and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights, the Covenant and other relevant international legal instruments. Even if the detention does conform to national law, regulations and practices, the Working Group is mandated to assess the judicial proceedings and the law itself to determine whether such detention is compatible with the relevant provisions of international human rights law.

Category I

65. The source alleges that Mr. Burelo Gómez was arrested on 17 May 2019 by persons who did not identify themselves and who, without presenting him with an arrest warrant or court order for the deprivation of liberty or giving him explanations of any kind, and using excessive force and violence, proceeded to take him into custody.

66. The source maintains that there are several versions of Mr. Burelo Gómez's arrest and that, furthermore, he was arrested more than once. After the first arrest was dismissed, when according to the authorities he had been caught in flagrante delicto, it was proven that it had been made on the basis of evidence fabricated by the law enforcement officers, who had to

² [A/HRC/19/57](#), para. 68.

release him. He was then arrested as he exited the location in question and was charged with a different criminal offence.

67. The Government has not denied these claims. Instead, it has accepted that the officers involved in the first arrest have been investigated and charged with fabricating evidence.

68. Regarding the different versions of the arrest, the Working Group has examined each one, noting that the events were recorded by the security cameras at the site. In the video, it can be seen that Mr. Burelo Gómez is arrested by several people, who are not in uniform and do not give him any documents. On the contrary, it can be observed that the arrest takes place with violence and without prior warning, while Mr. Burelo Gómez is standing with his back to the street, and that he is then dragged from that location towards an unmarked van.

69. Based on the video, Mr. Burelo Gómez's relatives thought that he had been kidnapped because they subsequently received no information on his whereabouts or the conditions in which he was being held.

70. The Working Group emphasizes that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. In this regard, the Working Group emphasizes that the practice of arresting people without a warrant means that the detention can be considered arbitrary.³

71. The Working Group reiterates that in order for there to be a legal basis for a deprivation of liberty, 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 through an arrest warrant.⁴ Article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest. In the present case, the Working Group considers that the source has reported credible allegations that Mr. Burelo Gómez was arrested without being shown an arrest warrant or informed of the grounds for the arrest, in violation of article 9 of the Covenant.

72. Moreover, the Government has acknowledged that that arrest was made on the basis of fabricated evidence, thus constituting a breach by the State of the international commitments under the Universal Declaration of Human Rights and the Covenant.

73. Again, the Working Group reiterates that the information provided to the person detained should include not only the general legal basis for the arrest but also specific information about the act sufficient to establish both the legal elements of the complaint and the description of the wrongful act itself.⁵

74. In addition, the Working Group emphasizes that the present case highlights the relevance of the recommendations of its study on arbitrary detention relating to drug policies, which was mandated by Human Rights Council resolution 42/22.⁶

75. In that study, the Working Group found that people who use drugs are particularly at risk of arbitrary detention, and noted with concern increasing instances of arbitrary detention as a consequence of drug control laws and policies.⁷

76. In that context, the Working Group emphasizes that the absolute prohibition of arbitrary deprivation of liberty and the safeguards to prevent it apply to everyone, including those who are arrested, detained or charged with drug-related offences and those undergoing rehabilitation, in accordance with international human rights obligations.⁸ Imprisonment for drug-related offences should be a measure of last resort and, in principle, should only be used

³ See opinions No. 1/1993, paras. 6 and 7; No. 3/1993, paras. 6 and 7; No. 4/1993, para. 6; and No. 5/1993, paras. 6, 8 and 9. See also the more recent opinions No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; and No. 92/2018, para. 29.

⁴ See [A/HRC/19/57](#), para. 68; and, also, opinions No. 36/2018, para. 40; No. 46/2018, para. 48; No. 44/2019, para. 52; and No. 45/2019, para. 51.

⁵ Human Rights Committee, general comment No. 35 (2014), para. 25. See also opinions No. 10/2015; No. 25/2018, para. 36; and No. 46/2019.

⁶ See [A/HRC/47/40](#).

⁷ [A/HRC/30/36](#), para. 74.

⁸ [A/HRC/42/39/Add.1](#), para. 78.

for serious offences. In the case of less serious infractions, alternatives to criminal punishment or prosecution should be used.

77. Mr. Burelo Gómez was not only arrested because of the implementation of drug control policies but was also a victim of psychological and physical torture, which aggravated a serious precondition of mental disability and violated article 25 of the Universal Declaration of Human Rights; articles 7, 9, 10 and 14 of the Covenant; and article 12 of the International Covenant on Economic, Social and Cultural Rights. The Working Group highlights the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, entitled “Violence and its impact on the right to health”,⁹ and decides to refer this case to the Special Rapporteur.

78. With regard to the second arrest, on a charge of attempted homicide, the Working Group notes that the Government has provided no basis to rebut the credible allegations made by the source.

79. The Government has ignored Mr. Burelo Gómez’s mental disability, his imputability, his inability to distinguish reality from fact and his diminished capacity resulting from his illness. He was detained for several hours in municipal premises and was not immediately brought before a judge or competent legal authority. The investigators made him sign documents and statements that he was not in a position to understand, much less the consequences they would have for him, and without offering him the treatment that a person in his health condition deserves, in violation of his rights under the Universal Declaration of Human Rights and the Covenant.

Enforced disappearance, incommunicado detention and torture

80. The Working Group is concerned by the source’s claims that Mr. Burelo Gómez remained disappeared for approximately 12 hours, when he was tortured for the purpose of self-incrimination. The Working Group recalls that enforced disappearances violate numerous substantive and procedural provisions of the Covenant, especially articles 9 and 14, and constitute a particularly aggravated form of arbitrary detention.¹⁰

81. Mr. Burelo Gómez was secretly taken to an unknown location, where he was locked up in a very small place, without light or ventilation, and forced to confess responsibility for the offence contained in the arrest warrant. This treatment constitutes a *prima facie* breach of the absolute prohibition of torture, which is a peremptory norm of international law, as well as of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

82. The source has submitted an expert report on victimological psychology, which coincides with the first expert report and shows that Mr. Burelo Gómez was a victim of mistreatment and/or torture, with blunt force trauma, verbal abuse, the use of wet and dry methods, electric shocks, threats against the family and prolonged constraint of movement. The mistreatment and torture disrupted his vital functions and caused symptoms of post-traumatic stress disorder and a fear of retaliation in the judicial process.

83. The Working Group recalls that detention based on a confession obtained through torture confers an arbitrary character on the detention, taking into account international standards prohibiting the practice of torture under any circumstances. Specifically, the Working Group highlights the existence of provisions explicitly referring to the inadmissibility of evidence obtained under torture or with a view to preventing torture, implying that no one should be compelled to testify against oneself or to confess guilt, as provided for in article 14, paragraph 3 (g), of the Covenant and article 15 of the Convention against Torture.

⁹ See [A/HRC/50/28](#).

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 17. See also opinions No. 5/2020 and No. 6/2020.

84. The Working Group reiterates the duty of prosecutors outlined in guideline 16 of the Guidelines on the Role of Prosecutors, which states that:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

85. The seriousness of these violations leads the Working Group to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

86. In view of the violations of international human rights law, to the detriment of Mr. Burelo Gómez, the Working Group is convinced that his detention is arbitrary and contrary to articles 8, 9, 10, 11 and 25 of the Universal Declaration of Human Rights and articles 2, 9 and 16 of the Covenant, and falls within category I.

Category III

87. The Working Group will proceed to analyse whether, in the course of the judicial proceedings, the fundamental elements of a fair, independent and impartial trial have been respected.

88. The right to a fair trial was established in the Universal Declaration of Human Rights as one of the fundamental pillars of international law to protect individuals against arbitrary treatment. To that end, everyone has the right to be heard in a public trial at which they have all the guarantees necessary for their defence and where their right to be tried by a competent, independent and impartial court is respected.

89. The Working Group recalls that all detained persons are entitled to challenge the lawfulness of their detention before a court, as provided for in article 9 (4) of the Covenant and articles 6 and 8 of the Universal Declaration of Human Rights. Failure to uphold this right constitutes a violation of principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Furthermore, in accordance with the 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 habeas corpus is a peremptory norm of international law which applies to all forms of deprivation of liberty.

Mandatory or automatic pretrial detention

90. The Working Group is very concerned because, according to the information received from the source, Mr. Burelo Gómez has been held in prison for years, accused of an offence that he insists he did not commit, and without actual evidence of his guilt. The Working Group considers this time to be not only excessive but also a violation of the international norms and guarantees against arbitrary detention contained in the Universal Declaration of Human Rights and the Covenant.¹¹ This violation of Mr. Burelo Gómez's human rights contravenes the standard indicated by the Human Rights Committee, when it stated that "in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification",¹² which has been violated in this case.

¹¹ [A/HRC/19/57](#), paras. 48–58. See opinions No. 5/2019, para. 26; No. 62/2019, paras. 27–29; and [A/HRC/37/6](#), paras. 118.31–118.33.

¹² *Abbassi v. Algeria* (CCPR/C/89/D/1172/2003), para. 7.3.

Absence of flagrancy

91. The Working Group notes with concern that in the case of Mr. Burelo Gómez, due process has been violated, because the authorities ignored the fundamental rules of a fair, independent and impartial trial. He was arrested without a warrant from a competent authority, without being informed of the reasons and in circumstances not involving flagrante delicto, because the agents who arrested him did so without a pursuit following the commission of an offence and without the elements of an urgent case being met.

92. The Working Group notes that the State may not limit the enjoyment of liberty except in cases expressly established by law.¹³ One of those cases is that of flagrant offences, meaning those offences which are evident and unmistakable by any reckoning. Thus, the commission of a flagrant offence is a prerequisite for detention, from which it follows that the authorities do not have the power to arrest persons merely on the suspicion that they may be committing an offence, that they are about to commit an offence, or on the presumption that they may be involved in committing an offence, unless they have an arrest warrant. Nor can they detain persons pending investigation. All of these rights were violated in the case of Mr. Burelo Gómez.

93. The Working Group also emphasizes that, in accordance with article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule and should be ordered for the shortest possible time. In other words, under the Covenant, liberty should be the prime consideration and pretrial detention an exception. Accordingly, pretrial detention must be based strictly on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, tampering with evidence or the recurrence of the offence. This right is especially relevant in the case of Mr. Burelo Gómez, owing to the circumstances of his mental disability and his diminished capacity.

94. In addition, the Working Group highlights the appeal made to the Government of Mexico, on 5 September 2022, to abolish as a matter of urgency mandatory pretrial detention, also called “automatic preventive detention”, in view of the fact that one of its most serious consequences was that many Mexicans spend more than a decade deprived of their liberty awaiting trial, without having been sentenced and in conditions that represent a serious risk to their lives and personal integrity.¹⁴ Such is the case of Mr. Burelo Gómez.

95. According to the Government, the arrest was ordered by the Office of the Public Prosecutor and carried out by its agents, which the Government justifies by stating that such actions are guaranteed by the national legal system. It is important to note that when the Working Group analyses a complaint in this category, it must establish whether or not the actions mentioned by the Government are in line not only with national law, but also with international legal standards.

96. The Working Group reiterates that the Office of the Public Prosecutor cannot be considered to be a judicial authority that meets the criteria of independence and impartiality required by article 9 of the Covenant.¹⁵ The national legal system should provide for a separation between the authority conducting the investigation, authorities responsible for the detention decision and the authority ruling on the conditions of the pretrial detention. This separation is a necessary requirement to prevent detention from being used to impair the effective exercise of the right to defend oneself, favour self-incrimination or allow pretrial detention to amount to a form of advance punishment.

97. The fact that under Mexican law, an intervention of this nature by the prosecutor is permissible, as the Government states, despite its implications for the protection of human rights, is incompatible with international law. In that regard, not everything that is lawful in

¹³ Supreme Court, Direct amparo review No. 1596/2014.

¹⁴ See

www.ohchr.org/en/press-releases/2022/09/mexico-should-overturn-mandatory-pre-trial-detention-un-experts.

¹⁵ Human Rights Committee, general comment No. 35 (2014), para. 32. See also opinions No. 14/2015, para. 28; No. 5/2020, para. 72; and No. 41/2020, para. 60; and [A/HRC/45/16/Add.1](#), para. 35.

the domestic legal order is lawful in the international legal system, and even more so when such values as freedom and justice are at stake.

98. What the source describes in the complaint, which is not contested by the Government, reveals a violation of the rights protected under articles 3, 9, 10 and 11 of the Universal Declaration of Human Rights, article 9 of the Covenant and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

99. Mr. Burelo Gómez's right to be informed, at the time of arrest, of the reasons for the arrest and also of the judicial avenue to challenge the lawfulness of the deprivation of liberty, pursuant to article 9 (2) of the Covenant and principle 7 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, was violated. In its defence, the Government has presented a detailed account of the facts but did not include supporting evidence to back up its assertions.

100. The Working Group cannot consider that the judicial authority in charge of Mr. Burelo Gómez's detention is independent and impartial when it has refused to examine, discuss and answer the allegations of arbitrary detention and the facts involving torture. Therefore, the Working Group decides to refer the case to the Special Rapporteur on the independence of judges and lawyers.

101. In the light of the foregoing, the Working Group concludes that, in the case of Mr. Burelo Gómez, the non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and the Covenant is of such gravity as to give the deprivation of liberty an arbitrary character under category III.

Category V

102. Lastly, the Working Group is convinced that Mr. Burelo Gómez was detained in a discriminatory manner because of the circumstances of his health and mental disability. Attempts were made to make him confess and he has been accused without evidence. Moreover, the provisions of article 14 of the Convention on the Rights of Persons with Disabilities, which establishes that States shall ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty, have been ignored.

103. The Working Group concludes that in the present case, the deprivation of liberty constitutes a violation of international law owing to discrimination based on the disability and psychological condition of Mr. Burelo Gómez. As a result, the right to equality of human beings has been ignored, which makes it arbitrary in accordance with category V.

Concluding remarks

104. The Working Group expresses its concern about the pretrial deprivation of liberty of Mr. Burelo Gómez and reiterates its view that mandatory or automatic pretrial detention violates the Government's obligations under international human rights law.

105. As this is one of many cases of arbitrary detention of persons in Mexico that have been brought before it in recent years, the Working Group is concerned that the situation indicates a systemic problem with respect to arbitrary detention which, if it continues, could constitute a serious violation of international law. The Working Group reiterates that, under certain circumstances, widespread or systematic imprisonment or other severe forms of deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.¹⁶

106. The Working Group notes that the list of offences for which mandatory pretrial detention is required was expanded in 2019 and urges the Government to interpret, review or revoke the provisions of the Mexican Constitution and law that provide for mandatory pretrial

¹⁶ Opinion No. 47/2012, para. 22.

detention, with a view to bringing them into line with the obligations of Mexico under international law.

107. In that context, the Working Group would welcome the opportunity to work constructively with the Government to address its concerns relating to arbitrary detention. Given that a considerable period of time has elapsed since its previous visit to Mexico in November 2002, the Working Group considers that now would be a good moment to continue its dialogue with the country's authorities by means of another visit. The Working Group notes that the Government maintains a standing invitation to all special procedures mandate holders. As a current member of the Human Rights Council, it would also be appropriate for the Government to confirm its standing invitation. Since 2015, the Working Group has made several requests to visit Mexico and has received assurances from the Government that its requests are being considered. The Working Group urges the Government to consider its requests and awaits a positive response.

Decision

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

The deprivation of liberty of Jorge Alberto Burelo Gómez, being in contravention of articles 1, 2, 3, 5, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

109. The Working Group requests the Government of Mexico to take the steps necessary to remedy the situation of Mr. Burelo Gómez 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.

110. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Burelo Gómez immediately and accord him 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 it poses in places of detention, the Working Group urges the Government to take urgent measures to secure the immediate release of Mr. Burelo Gómez.

111. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Burelo Gómez and to take appropriate measures against those responsible for the violation of his rights. In particular, account is taken of the interpretative declaration on article 9 (5) made by Mexico when acceding to the Covenant, which states:

Under the Political Constitution of the United Mexican States and the relevant implementing legislation, every individual enjoys the guarantees relating to penal matters embodied therein, and consequently no person may be unlawfully arrested or detained. However, if by reason of false accusation or complaint any individual suffers an infringement of this basic right, he or she has, *inter alia*, under the provisions of the appropriate laws, an enforceable right to just compensation.

112. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the rights of persons with disabilities, for appropriate action.

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

Follow-up procedure

114. 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. Burelo Gómez has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Burelo Gómez;

(c) Whether an investigation has been conducted into the violation of Mr. Burelo Gómez'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 Mexico with its international obligations, in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

115. 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.

116. 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.

117. 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 17 November 2022]

¹⁷ Human Rights Council resolution 51/8, paras. 6 and 9.