



# General Assembly

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

#### Opinion No. 32/2023 concerning Mario Almanza Cerriteño, Jorge Hernández Mora and Sergio Rodríguez Rosas (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,<sup>1</sup> on 29 November 2022 the Working Group transmitted to the Government of Mexico a communication concerning Mario Almanza Cerriteño, Jorge Hernández Mora and Sergio Rodríguez Rosas. The Government replied to the communication on 27 January 2023. 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).

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<sup>1</sup> [A/HRC/36/38](#).



## Submissions

### *Communication from the source*

4. Mario Almanza Cerriteño is a Mexican national, born on 9 January 1977. He is a resident of Mexico City. He was 25 years old at the time of his arrest.
5. Jorge Hernández Mora is a Mexican national, born on 15 January 1981. He is a resident of Mexico State. He was 21 years old at the time of his arrest.
6. Sergio Rodríguez Rosas is a Mexican national, born on 1 April 1959. He is a resident of Mexico State. He was 43 years old at the time of his arrest.
7. According to the information received, between January and August 2001, two kidnappings were perpetrated in the State of Tlaxcala, and the Office of the State Attorney General opened an investigation. As it was unable to find the perpetrators, the state government opted to arrest, charge and punish innocent people in order to show that it was capable of maintaining public safety and protecting citizens.

### *Arrest of Mr. Rodríguez*

8. According to the source, on 13 August 2002, Mr. Rodríguez received a call informing him that his son had been arrested. He went to his home and then, accompanied by another son, to the San Agustín police station, where he asked for information about his detained son. He was told that his son was not there, but that he might be at the Ecatepec justice centre.
9. On their way to the justice centre, at around 11 a.m., Mr. Rodríguez and his other son were driving along the Vía Morelos road in Ecatepec when they were intercepted by a van without registration plates. Three armed individuals got out of the van, overpowered Mr. Rodríguez and his son and covered their faces. They were forced into the van and, once inside, their hands were tied behind their backs and they were beaten.
10. The source reports that, after being in transit for more than two hours, they were taken to a building of the Office of the State Attorney General, where Mr. Rodríguez's son who had already been arrested was being tortured. Mr. Rodríguez, who could hear that this son was in the building, called out for him not to be beaten, but was insulted and assaulted so that he would be quiet.
11. Mr. Rodríguez was separated from his other son and taken to a room. There he was forced to take his clothes off and was thrown to the ground and suffocated. A police officer pressed his boot down on his head for about 20 minutes. The assailants kicked Mr. Rodríguez in the ribs, but stopped when they saw that he had a scar from an operation. He was punched in the face, making him bleed from the nose and breaking a tooth.
12. Subsequently, Mr. Rodríguez was taken to the premises of the Office of the State Attorney General, where he was made to attend a press conference at which the State Attorney General exhibited him and his co-accused as kidnappers. He was placed in a block of cells with glass walls, in which he could see his sons. He was beaten and made to read out a document in which he confessed to being a kidnapper, while being recorded. He was then presented at an identification parade at which a man apparently claimed to recognize him.
13. The source reports that Mr. Rodríguez was taken to a cell where a police officer handed him some papers and told him to sign them, threatening that his sons would be killed if he did not do so. He signed the papers without reading them. He was then taken to another identification parade, at which he was presented before a woman who did not recognize him. When the woman was asked to identify her kidnapper, she pointed out the police officers and they ended the procedure.
14. The source claims that, back in the glass cells, Mr. Rodríguez watched as one of his sons repeatedly had carbonated water spiced with chili pepper forced up his nose. Later, he was handed papers that had already been signed by his sons and was again threatened so that he would sign them, which he did. When Mr. Rodríguez asked the police officers for water, they responded by beating him. When he asked why he was being tortured, the police officers beat him and told him to be quiet. In the early hours of the morning they took him out to a garden and staged a mock execution. He was then taken to a cell where he spent the rest of

the night of 13 August 2002, before being transferred to the federal Attorney General's Office the following day.

#### Arrest of Mr. Hernández

15. According to the source, Mr. Hernández was arrested on 13 August 2002 at approximately 10 a.m. upon arriving home. Three individuals got out of a car, approached him and took him by the arms while telling him to be quiet. Mr. Hernández asked them what they were doing, shouted for help and resisted as they dragged and forced him into the vehicle without informing him of what was happening.

16. Hearing his shouts for help, neighbours and family members came onto the street (Mr. Almanza among them). During the exchange which then took place, another vehicle arrived and more people got out of it. The police officers hastily showed what were apparently a badge and a summons issued by the state prosecution service, without allowing him to read the summons. Mr. Hernández was forced to get into the officers' car, without being told the reason for his arrest.

17. The source indicates that Mr. Almanza and a relative of Mr. Hernández requested the officers to accompany them. The officers indicated that they would go to the premises of the Office of the State Attorney General in Tlaxcala. Upon arriving in the car park of this facility, a police officer got out of the car and asked the passengers to separate. Mr. Hernández was left in the car in which he had travelled for about 25 minutes.

18. According to the information received, at approximately 2 p.m., a police commander from the Office of the State Attorney General approached the car, took Mr. Hernández out of it and, in an aggressive manner, took him to an office. The police officer placed a tape recorder in front of Mr. Hernández, struck him and forced him record a statement in which he admitted to being a kidnapper. Once he had finished the recording, the commander handed Mr. Hernández some papers and demanded that he sign them, which he refused to do. The commander grabbed Mr. Hernández by the neck and took him to an individual cell. Minutes later, three police officers entered the cell and bound Mr. Hernández by the hands and feet while one police officer sat on him. Another officer punched him in the sternum, knocking the wind out of him. The police officers placed a plastic bag over his head so that he could not breathe, while laughing at him. This was repeated at least five times. They injected doses of carbonated water spiced with chili pepper into his nose, while mocking him.

19. The source reports that the commander subsequently entered the cell and asked Mr. Hernández if he was going to cooperate. Mr. Hernández refused. The commander then ordered that Mr. Hernández be taken to an identification parade, at which Mr. Hernández was ordered to remain standing and not move. Four men dressed in suits then entered the room, two of whom were told to stand on his left and two on his right. These individuals could be distinguished from Mr. Hernández by the type of clothing they wore.

20. After the identification parade, Mr. Hernández was taken to a different office, where he was locked up with 15 police officers whose faces were covered and who told him he had "reached the end of the road". They made him lie face down on the floor while they walked on his back. One officer took his arm and pulled it back until it "cracked". Another stepped on his hand, causing injuries. This torture allegedly went on for about 20 minutes.

21. Mr. Hernández was then taken to the aforementioned press conference to be presented as a kidnapper by the State Attorney General. Once the press conference had finished, at 6.30 p.m., the commander took Mr. Hernández to a building near the Office of the State Attorney General. There he was placed in a bathroom where he was forced to take off his clothes and do 250 squats and 250 press-ups while police officers made fun of him. He was laid face up on a board and tied to it so that he could not move, and a dirty rag was placed in his mouth. Water was then poured over his face to prevent him from breathing. The bindings covered him up to his neck, leaving him "mummified", while still tied to the board. The commander asked him how he wanted to die and said that they would rape the women in his family. The commander also said "I know how you are going to die" and ordered the police officers to take Mr. Hernández to a water tank, where they twice forced his head under the water. They dropped the (heavy metal) lid of the tank on his head and slammed his head against the side of the tank.

22. Subsequently, Mr. Hernández was taken to an infirmary of the Office of the State Attorney General, the police officers having previously threatened him so that he would not accuse them of the treatment they had meted out. After he had been examined at the infirmary, police officers took him back to the office, where the commander forced him to record statements. Two hours later, police officers told him: “that’s what you get for refusing to sign the papers”. While in the office, the commander placed a gun to Mr. Hernández’s head and forced him to sign documents without his being able to read them. He was then taken to a cell where he spent the night of 13 August 2002, before being transferred to the federal Attorney General’s Office the following day.

#### Arrest of Mr. Almanza

23. The source states that Mr. Almanza was arrested at around 10.30 a.m. on 13 August 2002 while at the house of a friend, after neighbours informed him that Mr. Hernández, a relative of his friend, was being taken into custody. One of the arresting officers asked Mr. Almanza if he went by the name of Alejandro, as they had a summons in that name, to which he answered that he did not and that the person in question was an acquaintance, a minor, who at the time would have been 10 or 11 years old.

24. Concerned about excessive use of force and arbitrariness, Mr. Almanza and his friend asked to accompany the police officers, who told them they could accompany them and put them in different cars. In the car with Mr. Almanza were four people who did not have any identification as police officers. The vehicle in which Mr. Almanza was travelling entered a car park, where he tried to get out of the car, but the police officers stopped him from doing so and asked that he remain in silence. Two people waited outside the car watching him. After an hour, another vehicle arrived, in which he was placed for about 30 minutes. He was asked to show his voting card, and his personal information was taken.

25. The source reports that Mr. Almanza was subsequently taken out of the car and led to a canteen. Three people then arrived who observed him and talked among themselves. It later became known that these were the persons who had reported the kidnapping of which Mr. Almanza and others stood accused. He was then taken to a hallway and asked to stand with his hands behind his back and against the wall.

26. According to the source, a police officer grabbed Mr. Almanza by the neck, forcing him to bend down, while shouting at him to walk. Mr. Almanza said that he was only there to ask for information, but he was insulted, told “no way, you’re screwed for being an asshole”, and told that he was going to take the place of Alejandro, for whom a summons had been issued. They took him to another building, similar to a hospital, and made him stand against a wall to be searched. He was then taken to another building, with glass cells.

27. The source states that, some minutes later, an officer entered and took Mr. Almanza out of the glass cell and into another room. A masked police officer asked him who he was working for, while slapping him repeatedly. The commander entered the room and also began to slap him. The masked police officer then pushed him onto some blankets and made him cover himself with one. Once he was wrapped in the blanket and had got to his feet, the police officers began to punch him in the stomach, ribs and legs, causing him to fall again. The police officers continued to kick him on the floor, and one of them kneed him in the ribs. They picked him up again and continued to beat him. This lasted for about 20 minutes.

28. Mr. Almanza was subsequently returned to the glass cell, where he saw other detainees, also in a bad state. A police officer took Mr. Almanza to a room with a metal chair. Three people were waiting for him: a masked police officer, the commander and another police officer. They sat Mr. Almanza in the chair and the commander poured a bucket of water over him. The police officers took out some wires; one had a copper ring that they made him place on his hand and another was connected to a metal sheet that they made him place in his mouth. They then applied electric shocks. Mr. Almanza spat the metal sheet out and the police officers struck him. The intensity of the assault made him cry, for which the police officers mocked him. They tore Mr. Almanza’s trousers, stripped him and threatened to apply electric shocks to his genitals. They asked him about several people and tried to make him confess to being “the one in charge”. They told him that all the others had already said that he was “the boss”. The source alleges that this torture lasted for about one hour.

29. Mr. Almanza was taken back to the glass cells where he waited for a little over an hour, until 6 p.m., when was taken to the press conference at which the State Attorney General presented him, Mr. Hernández and Mr. Rodríguez as members of the “Los Kempes” kidnapping gang. During the press conference, Mr. Almanza shouted that he was not involved. To shut him up, a police officer struck him in the face and stomach.

30. At the end of the press conference, a police officer took Mr. Almanza to an office in the facility of the Office of the State Attorney General. In the room was a desk, a telephone and a police officer holding a tape recorder. The source alleges that Mr. Almanza was forced to answer the telephone and pretend to be a kidnapper, while being recorded. He was then forced to sign several blank sheets of paper. He was taken to the Gesell chamber of the Office of the State Attorney General, where he was placed in an identification parade. One of the people he had seen previously in the canteen identified him as a kidnapper.

31. The source reports that, after the identification parade, the police officers returned Mr. Almanza to the room where he had been given electric shocks. There he was again subjected to blows to his ribs, stomach, legs and arms, threats against his family and further electric shocks. Police officers then handed Mr. Almanza a document and threatened him so that he would read it out while being recorded. They then forced him to sign some 30 sheets of paper without allowing him to read them. He was held at the premises of the Office of the State Attorney General until his transfer to the federal Attorney General’s Office the following day.

#### Summons and flagrante delicto

32. The source indicates that Mr. Hernández and Mr. Rodríguez were arrested under a summons and not an arrest warrant, which requires judicial authorization. Mexican law provides that a person may only be arrested only in three circumstances: pursuant to an arrest warrant, in cases of flagrante delicto and in emergency cases. A summons is insufficient to make an arrest. The State subsequently fabricated an account of flagrante delicto in order to justify the arrests. Mr. Almanza was detained at the Office of the State Attorney General, without an arrest warrant, as a result of having gone there to request information.

33. The source states that the authorities fabricated a false account of the arrest, according to which Mr. Almanza was arrested with Mr. Hernández in the vicinity of his home. According to this account, the police officers who made the arrest identified themselves and showed the summons ordering them to give testimony regarding possible criminal offences, and therefore asked them to get into the patrol car.

34. According to this account, agents of the Office of the State Attorney General decided to conduct a “security check”, in the course of which they found packets of white powder. As a result, what should have been an appearance in the context of a police investigation turned into an arrest for the alleged flagrant offence of drug possession. The source claims that this account is false and that the drugs supposedly found never in fact existed. The discovery was feigned so that a flagrant offence could be alleged. Summonses do not permit the arrest of an individual, and no flagrant offence was ever committed.

#### Automatic pretrial detention

35. After the arrests, mandatory or automatic pretrial detention was imposed for the offences of drug possession with intent to sell, kidnapping and organized crime. The pretrial detention order was revoked for the drug possession charge but upheld for the charges of kidnapping and organized crime.

36. Article 399 of the Federal Code of Criminal Procedure, then in force, prohibited bail for serious offences, including kidnapping as defined under article 194. The kidnapping and organized crime charges prevented the judge from ordering the release of the accused pending trial. In other words, pretrial detention was imposed automatically, without being based on any legal or factual reasoning and without any analysis of its proportionality and necessity.

### Places of detention

37. According to the source, on 14 August 2002, one day after their arrest, Messrs. Almanza, Hernández and Rodríguez were transferred to the federal Attorney General's Office because the Office of the State Attorney General consolidated the respective investigations into drug possession and kidnapping. The Office of the State Attorney General considered, too, that an offence of organized crime had been committed. Since these were federal offences, the Office of the State Attorney General declared that the case should be referred to the federal Attorney General's Office.

38. On 17 August 2002, Messrs. Almanza, Hernández and Rodríguez were transferred to the Reclusorio Sur prison in Mexico City, where they remained after they were remanded in custody. In the following years they were transferred to different facilities: Federal Social Rehabilitation Centre No. 5, in Veracruz; Federal Social Rehabilitation Centre No. 6, in Tabasco; Federal Social Rehabilitation Centre No. 8, in Sinaloa; Federal Social Rehabilitation Centre No. 14, in Durango; and Santa Martha Acatitla Social Rehabilitation Centre for Men, in Mexico City.

### Conviction

39. Messrs. Almanza, Hernández and Rodríguez are serving 30-year sentences. There have been multiple judgments in their case, most of which have been overturned by higher courts in rulings that also found human rights violations. The Fourth Unitary Criminal Court of the First Circuit handed down convictions on 26 September 2008, 30 April 2012 and 30 September 2019. The Ninth District Court for Federal Criminal Proceedings of the then Federal District passed judgment on three occasions: 31 July 2005, 26 March 2008 and 28 March 2019.

40. The sources reports that, in *amparo* proceedings brought against the judgment of 30 April 2012, the court ordered a review of the proceedings, having established that human rights violations had been committed during the investigation and detention stages. This implies recognition that the detentions were arbitrary.

41. In view of the above, the Sixth Collegiate Criminal Court declared null and void the reports prepared by officers of the Office of the State Attorney General and the federal Attorney General's Office that had been considered by the courts when delivering judgment. It also ordered an analysis of the evidence connected to the violation of human rights during transfer of custody and declared it null and void. As a result, judgments were handed down on 15 December 2016 by the Fourth Unitary Criminal Court of the First Circuit and on 28 March 2019 by the Ninth District Court for Federal Criminal Proceedings of Mexico City.

42. According to the source, the Ninth District Court found that there was no credible evidence of a violation of the Federal Act on the Prevention of Organized Crime and that Messrs. Almanza, Hernández and Rodríguez were guilty only of one of the kidnappings. That conviction was based on the remaining evidence, especially the identification of Messrs. Almanza, Hernández and Rodríguez. The source contends that the federal Attorney General's Office filed the charges based on evidence that had been declared unlawful by the federal courts, claiming that the exclusion of evidence was binding only on the courts and not the prosecution service.

43. Furthermore, the judge of the Ninth Court stated that, given the existence of signs of torture and other cruel, inhuman or degrading treatment, it was not incumbent upon him to evaluate the conduct of the authorities, as an investigation had already been ordered pursuant to the judgment in the aforementioned *amparo* case, which also ordered a review of the proceedings. An appeal was filed against this decision, and the contested judgment was upheld.

### Category I

44. The source alleges that the detention of Messrs. Almanza, Hernández and Rodríguez is arbitrary for lack of a legal basis, as no arrest warrant existed at the time of their arrests. Such detention must therefore be considered arbitrary under category I and contrary to articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant.

45. Rather than arrest warrants, the authorities presented summonses, which did not authorize them to make an arrest. In addition, since Mr. Hernández and Mr. Rodríguez did not reside in the State of Tlaxcala, the Office of the State Attorney General was required to issue a request for cooperation in order to operate outside its jurisdiction. That request should have been addressed to the Office of the Attorney General of Mexico State, where the three men resided. However, it was actually sent to the federal Attorney General's Office, with the result that the officers of the Office of the Attorney General of the State of Tlaxcala were accompanied by federal officers. In addition, the deadline set by the request for cooperation had expired.

46. The source states that neither arrest warrant nor summons was issued in respect of Mr. Almanza, who was arrested at the facility of the Office of the State Attorney General, having gone there voluntarily. In this case, it is impossible to justify the legality of the detention, not only because there was no warrant and because the arrest was made under false pretences, but because Mr. Almanza was detained in place of another individual sought by the Office of the State Attorney General. This occurred following the issuance of a summons in the name of a 10-year-old boy.

47. The sources also states that the Office of the State Attorney General never acknowledged that Messrs. Almanza, Hernández and Rodríguez were arrested in different places and under different circumstances. On the contrary, the police reports indicate that they were arrested in flagrante delicto. This account has been consistently denied and was dismissed in a judgment of 15 April 2003, when the Fourth Unitary Criminal Court of the First Circuit dismissed the charge, considering that there was no evidence of either the corpus delicti or the likely responsibility of the defendants.

48. The source also highlights the practices of torture, incommunicado detention and ill-treatment that were used to produce the evidence, and the lack of action by the judge hearing the case when informed of this situation.

49. Finally, the source considers that the imposition of pretrial detention as a general rule in cases that are legally classified as serious is particularly grave, not only because it violates article 9 (3) of the Covenant, but also because there exists a policy of coercing defendants into pleading guilty. The imposition of pretrial detention as a general rule in certain cases results in the mandatory deprivation of liberty of a large number of innocent people, who are detained simply because the authorities accuse them of an offence that features on the list of offences warranting automatic pretrial detention.

### *Category II*

50. The source also alleges that Mr. Almanza's detention is arbitrary under category II, as it arose from the exercise of his right under article 19 of the Covenant, namely the right to freedom of expression and to seek and receive information, either orally, in writing or through any other media of his choice. The source argues that Mr. Almanza was detained for exercising his right to seek and receive information from a public body about the fate or whereabouts of Mr. Hernández, and that his detention is therefore arbitrary under category II.

### *Category III*

51. The source asserts that Messrs. Almanza, Hernández and Rodríguez have been unable to benefit from international fair trial standards, as set forth in article 14 of the Covenant, because they were presented at a press conference as part of a kidnapping gang in violation of the presumption of innocence.

52. In addition, fair trial guarantees were not observed, since the defendants were not informed promptly and in detail of the nature and cause of the charges against them. They were arrested for an offence other than the one they were actually charged with in criminal proceedings.

53. It is alleged that there have been undue delays in the trial. The source highlights that the detainees still have legal recourse to challenge the most recent decision, handed down by a higher court on 30 September 2019, when they were acquitted of organized crime. This

allegedly demonstrates the delay in the proceedings, as it has taken almost 20 years for the courts to recognize that the detainees could not be convicted of an offence that they were accused of in 2002.

54. The source also states that the three men were forced to testify against themselves and to confess their guilt under torture.

55. The source further alleges a violation of the right to have the conviction and sentence reviewed by a higher tribunal according to law, since none of the judgments handed down at second instance, following various appeals, has provided the detainees with effective relief.

56. The source claims that, in addition to the aforementioned irregularities, the detainees were tried on the basis of evidence obtained through illegal acts. Torture and humiliating, cruel and inhuman treatment have allegedly been confirmed in reports by medical and psychological experts, which have been dismissed by the authorities.

#### *Category V*

57. According to the source, the fact that Messrs. Almanza, Hernández and Rodríguez have been accused of kidnapping and organized crime means that they are subject to a special regime under which they are prohibited from having access to procedural benefits or rights available to other accused persons. Merely being accused of a serious offence is enough to frustrate a person's rights to due process and to be tried at liberty.

58. Finally, Mr. Hernández has not been able to serve his sentence in a prison near his home, owing to the special regime that is in force for organized crime. This, too, constitutes a ground for discrimination and, therefore, for considering that his detention is arbitrary under category V.

#### *Response from the Government*

59. On 29 November 2022, the Working Group transmitted the source's allegations to the Government, requesting detailed information on the case of Messrs. Almanza, Hernández and Rodríguez, including information on the legal and factual grounds for their detention and an explanation of how this detention is compatible with the international obligations of Mexico. The Government replied on 27 January 2023.

60. In its response, the Government states that the detention of Messrs. Almanza, Hernández and Rodríguez was ordered in accordance with the applicable law, was necessary and proportionate to the aims pursued, and was reviewed by a judge in a timely manner.

61. Article 21 of the Constitution grants the Federal Prosecution Service the power and the obligation to investigate any offence. In this sense, the detention has a legal basis, because on 17 August 2002 the Federal Prosecution Service instituted criminal proceedings against the complainants.

62. On that date, the Ninth District Court for Federal Criminal Proceedings of the Federal District (now Mexico City) registered the case and approved the detention on the grounds that the accused had been arrested in flagrante delicto for drug possession. On 20 August 2002, at the request of the Federal Prosecution Service, the judge hearing the case issued an arrest warrant for unlawful deprivation of liberty in the form of kidnapping and organized crime.

63. On 23 August 2002, the judge bound the complainants over for trial and remanded them in custody in view of their likely responsibility for drug possession with intent to sell.

64. Messrs. Almanza, Hernández and Rodríguez appealed against the decision. The appeal was heard by the Fourth Unitary Criminal Court of the First Circuit, which in its decision of 15 April 2003 amended the detention order and ordered their release for lack of evidence to proceed, without the prosecution service instituting new criminal proceedings for drug possession. The judge deemed that the arrest warrant of 20 August 2002 had been complied with and declared the arrest legal.

65. On 30 August 2002, the judge in the case bound the complainants over for trial for kidnapping and organized crime and ordered the opening of ordinary proceedings.



Dissatisfied with the decision, the complainants appealed against the detention order. On 4 April 2003, the detention order was upheld.

66. The defendants filed an indirect *amparo* application against this decision, which was heard by the Third Unitary Criminal Court of the First Circuit. On 14 January 2004, the Court annulled the decision of 4 April 2003, issued another decision responding to the grievances raised in the appeal, and upheld the detention order.

67. The torture that Messrs. Almanza, Hernández and Rodríguez reportedly experienced on the premises of the Office of the Attorney General of the State of Tlaxcala was also alleged during the criminal proceedings, insofar as it was described by the defence. In this regard, it must be considered that the exclusion of evidence meant that the courts recognized that it would have been improper to retain it; as a result, none of the evidence gathered during the complainants' stay at the headquarters of the Office of the State Attorney General was used against them.

68. As a review of the proceedings was ordered pursuant to the decision of 15 December 2016, the defence had the opportunity to submit medical and psychological opinions on the alleged torture. However, these had no bearing on the criminal proceedings, in that they did not reveal any illegal acts, and nor did any incriminating evidence emerge. For that reason, it would not have been appropriate to annul the entire proceedings.

69. In this regard, the Government points out that the case file contains several medical opinions which established that the accused did not exhibit any traces of physical injury.

70. However, these medical certificates were superseded by other opinions evaluated by the Court, which established the existence of signs of torture. In addition, the final judgment on the *amparo* application led to the exclusion of all evidence originating during the stay of the accused at the headquarters of the Office of the State Attorney General, where they claimed to have been tortured. Based on an interpretation of article 107, section IX of the Constitution, the State determined that this aspect could not be re-examined, as doing so would be contrary to the principle of *res judicata*.

71. According to the Government, the Collegiate Court conducted a study which found that the press conference was inconsequential because the identification parade had been carried out immediately afterwards, while the only victims who made accusations against the complainants stated that they had not been present at said press conference.

72. The Government emphasizes that the evidence gathered during the complainants' stay at the headquarters of the Office of the State Attorney General was excluded and that therefore their conviction was based solely on lawful evidence.

73. In respect of the argument that the detention was reasonable, necessary and proportionate, the Government stresses that, since the present case relates to a serious offence (kidnapping), the accused cannot be treated in a manner that would allow them to avoid deprivation of liberty.

74. On 20 August 2002, an arrest warrant was issued for illegal deprivation of liberty and organized crime. At the request of the federal prosecutor, the judge issued an arrest warrant against Messrs. Almanza, Hernández and Rodríguez as the likely perpetrators of kidnapping and organized crime – a warrant that in due course was declared legal in view of the fact that the requirements set forth in article 18 of the Constitution were met.

75. As for the delay attributed to the courts regarding the opening of an investigation into complaints of torture, the Government indicates that the procedural developments described above, which included various opportunities for the defence to present evidence, should be taken into consideration.

76. From 31 December 2002 to 17 August 2004, from 4 December 2005 to 7 November 2006 and from 15 December 2016 to 9 July 2018, evidence periods were granted on an exceptional basis, allowing the defence to produce and present various pieces of evidence, although the evidentiary phase had already concluded.

77. In addition, in the first appeal judgment, handed down on 28 May 2005, the court ordered a review of the proceedings so that various pieces of evidence in favour of the

defence could be admitted and presented. The Government asserts that this is inconsistent with the argument that equality of arms was not respected and that the complainants were not granted all appropriate means for an adequate defence.

78. In the Government's view, the individual communication sets out human rights violations in two areas, namely the lack of a criminal investigation to establish the facts concerning the acts of torture, and the impact that the torture had on the criminal proceedings.

79. The criminal proceedings have concluded, and the legal situation of the complainants was resolved on the basis of evidence unrelated to the acts of degrading treatment.

80. From this perspective, the Government is of the view that the allegations made in the individual communication cannot be examined in full because, even if they were based on the same events (the purported unlawful arrest and acts of torture), unrelated legal consequences were alleged during the criminal proceedings.

81. According to the Government, this view is supported by the fact that the complainants have alleged that the State acted in an arbitrary and biased manner by failing to assess evidence related to torture, unlawful arrest and lack of an adequate defence.

82. Regarding the allegation that the detention resulted from the exercise of rights or freedoms, the Government states that it was carried out pursuant to the arrest warrant, which in turn led to the bringing of criminal proceedings against the accused on the basis of their likely responsibility for kidnapping. Therefore, the detention did not result from the exercise of rights or freedoms.

83. The Government also states that the right of Messrs. Almanza, Hernández and Rodríguez to be heard by an independent and impartial tribunal was respected at all times, as were their rights to an adequate defence and to challenge decisions. Thus, during the proceedings described above, the complainants have availed themselves of the defence mechanisms provided by the Mexican legal system in order to assert their rights.

84. Finally, the Government points out that the detention does not constitute a violation of international law because it is not based on discrimination. The detention was carried out in accordance with the findings of the preliminary investigation and, according to a court decision, was based on the likely responsibility of the accused for the offence of aggravated kidnapping.

85. No distinction, exclusion, restriction or preference whatsoever has been applied in the case of Messrs. Almanza, Hernández and Rodríguez and therefore the recognition, enjoyment and exercise of their human rights and fundamental freedoms, on an equal footing, have in no way been nullified or impaired.

*Additional comments from the source*

86. The Working Group transmitted the Government's response to the source on 31 January 2023. The source submitted final observations and comments on 15 February 2023.

87. The source states that the Government, in its response, failed to provide details of what occurred between the date of the arrests, 13 August 2002, and 17 August 2002. This amounts to an admission that the arrests lacked a legal basis and were not subject to initial judicial review. The source also points out that the Government, in its response, recounts some of the steps taken by the detainees to challenge the legality of their deprivation of liberty, which supposedly reveals that the judiciary failed to ensure an effective remedy.

88. The source adds that, although two decades have passed since the arrests, the case is still unresolved. The fact that judicial proceedings to challenge the legality of detention have been prolonged for more than 20 years, without the judiciary being able to ensure an effective remedy, points to a violation of the right of access to justice.

89. The source also highlights that the Government mentions several medical reports that found no injuries consistent with torture, while it acknowledges that there are signs that torture did indeed occur. For the source, it is particularly troubling that the State affirms that the allegations of torture and arbitrary detention, if true, are unimportant, since they had no

bearing on the domestic criminal proceedings. It is unacceptable for claims of torture and arbitrary detention to be lightly dismissed by a domestic judge simply because the victims did not confess to the false account that the authorities attempted to force upon them. According to the source, the courts have not expressly ruled on the existence or non-existence of torture or of elements of arbitrary detention; as a result, Messrs. Almanza, Hernández and Rodríguez have been arbitrarily deprived of their liberty for more than two decades.

90. In the source's view, it is not enough for the Government to have provided information on the exercise of domestic remedies, as this does not reveal anything about their effectiveness or adequacy. Access to some judicial remedies has not been an effective guarantee for challenging the arbitrariness of detention.

## Discussion

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

92. In determining whether the deprivation of liberty of the three detainees 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 law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>2</sup> Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.

### *Category I*

93. The source maintains that the arrests of Messrs. Almanza, Hernández and Rodríguez, on 13 August 2002, were arbitrary due to lack of legal basis since there was no outstanding warrant for their arrest. The Government claims that the detention of Messrs. Almanza, Hernández and Rodríguez has a legal basis, since on 17 August 2002, a criminal complaint was filed against them for kidnapping, drug possession and organized crime, and on the same day the Ninth Chamber of the District Court for Federal Criminal Proceedings of the Federal District (now Mexico City) approved the detention on the grounds that the accused had been arrested in *flagrante delicto*, albeit only for drug possession, while ordering their release in respect of the other offences. On 20 August 2002, the judge hearing the case issued an arrest warrant for kidnapping and organized crime. Finally, on 23 August 2002, the judge opened criminal proceedings against Messrs. Almanza, Hernández and Rodríguez and remanded them in custody.

94. According to article 9 (2) of the Covenant, anyone who is arrested must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him. The Working Group has previously stated that in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case.<sup>3</sup> This is typically<sup>4</sup> done through an arrest warrant or arrest order (or equivalent document).<sup>5</sup> The reasons for the arrest must be provided immediately upon arrest and must include not only the general legal basis for the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.<sup>6</sup>

95. The Working Group notes the source's assertion that there was no arrest warrant on 13 August 2002, when the three individuals were arrested. The Government has not referred to the existence of arrest warrants on 13 August 2002, but has pointed to subsequent proceedings that began on 17 August 2002. Since the Government has not shown that there

<sup>2</sup> [A/HRC/19/57](#), para. 68.

<sup>3</sup> In cases of arrests made in *flagrante delicto*, the opportunity to obtain a warrant will typically not be available.

<sup>4</sup> Human Rights Committee, general comment No. 35 (2014), para. 23. See also opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39.

<sup>5</sup> Human Rights Committee, general comment No. 35 (2014), para. 27. See also opinion No. 30/2017, paras. 58 and 59.

<sup>6</sup> Opinion No. 85/2021, para. 69.

were arrest warrants on 13 August 2002, the Working Group takes it that no arrest warrants or equivalent documents were issued on or before that date, and that the earliest that any warrant was issued was four days later, on 17 August 2002, although in reality this seems to have occurred on 20 August 2002. The Working Group notes that this period of detention, without any apparent legal basis, is not addressed by the Government's arguments regarding the legality, necessity and reasonableness of the detention as of 20 August 2002.

96. The Government appears to argue that the arrests were made in flagrante delicto in connection with drug possession charges. However, this information is unclear and does not explain why no arrest warrant on charges of kidnapping and organized crime was issued or shown to Messrs. Almanza, Hernández and Rodríguez on 13 August 2002. Furthermore, the source maintains that claims of an arrest in flagrante delicto were fabricated and subsequently rejected by judicial authorities. The Government does not address this allegation in its response. The Working Group does not consider that sufficient justification has been given for the failure to produce an arrest warrant on 13 August 2002.

97. The source refers to the summonses that were shown to Mr. Hernández and Mr. Rodríguez and argues that these do not allow for arrest. In the absence of a response from the Government on this issue, the Working Group considers that the source has sufficiently established that the use of these summonses was improper. A summons to appear must not be used as a pretext when the intention of the authorities is actually to arrest the person.

98. Furthermore, according to the source, Mr. Almanza was arrested without a warrant or summons when he went to a police station to seek information about the arrest of Mr. Hernández. The Government also failed to respond to the allegation concerning the lack of an arrest warrant or summons for Mr. Almanza. The Working Group cannot but accept the information provided by the source in this regard, which was not contested by the Government.

99. Therefore, the Working Group considers that Messrs. Almanza, Hernández and Rodríguez were detained without arrest warrants and without being informed of the reasons for their arrest. This was a violation of article 9 (2) of the Covenant.

100. The source argues that the Government imposes pretrial detention as a general rule for serious cases and that this violates the rights of detainees. The Government does not directly address this argument, other than to point out that pretrial detention was ordered on 23 August 2002.

101. The Working Group observes that it is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible. Indeed, article 9 (3) of the Covenant recognizes liberty as the primary consideration, with detention being an exception. Detention pending trial must therefore be based on an individualized determination that it is reasonable and necessary to prevent flight, interference with evidence or the recurrence of the offence.

102. Noting the lack of a response from the Government in this regard, the Working Group considers that the source's allegation is substantiated and concludes that the automatic preventive detention imposed in this case violated the detainees' rights under article 9 (3) of the Covenant.

103. On the basis of the foregoing, the Working Group considers that the violations of article 9 of the Covenant render the detention arbitrary under category I.

#### *Category II*

104. With regard to Mr. Almanza, the source claims that the detention was arbitrary under category II, since it arose from the exercise of his right to seek and receive information, as enshrined in article 19 of the Covenant. The source alleges that Mr. Almanza was detained for requesting information from a public body about the fate or whereabouts of Mr. Hernández. The Government claims that Mr. Almanza was not detained for exercising rights or freedoms, but based on his likely responsibility for committing the offence of kidnapping.

105. To assess whether category II is applicable, the Working Group must determine whether Mr. Almanza was detained simply for seeking information, rather than for being suspected of involvement in the offences of which he and the other detainees were accused. The Working Group notes that the three detainees were charged with offences such as kidnapping, drug possession and criminal association. All three, including Mr. Almanza, have been convicted of kidnapping in proceedings which have included numerous appeals. This suggests that he was arrested by the police in connection with criminal acts.

106. The specific facts of Mr. Almanza's arrest indicate a connection with the charges. On the day of his arrest, he was taken in a police vehicle to the police station, whereupon he was prevented from leaving the vehicle. He was then taken inside and questioned, and was apparently identified by the people who had reported the kidnapping, before finally being subjected to interrogation. Consequently, the source has not demonstrated that Mr. Almanza was detained merely for asking questions about Mr. Hernández.

107. In light of the above, the Working Group does not find a violation under category II.

### *Category III*

108. The source alleges several violations under category III. The Government refutes these allegations and argues that Messrs. Almanza, Hernández and Rodríguez were tried by an independent and impartial tribunal, with adequate opportunity for them to receive legal representation and to present their defence.

109. Firstly, the source argues that the right to the presumption of innocence was violated by the presentation of the three detainees at a press conference. The Government argues that the press conference was inconsequential, as the identification parade carried out immediately afterwards.

110. Under article 14 (2) of the Covenant, everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. Article 11 of the Universal Declaration of Human Rights also enshrines this right. The Human Rights Committee has explained that article 14 (2) of the Covenant 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.<sup>7</sup>

111. Despite the Government's argument that the press conference was inconsequential, the Working Group considers that the source has sufficiently established that the presumption of innocence was compromised by this public event. The detainees were presented to the public as the perpetrators of serious offences. The Government has failed to demonstrate that the existence of other procedures, such as the identification parade, remedied the harm that this caused. This was a violation of article 14 (2) of the Covenant.

112. Secondly, the source argues that Messrs. Almanza, Hernández and Rodríguez were not informed of the nature and causes of the charges against them. The source maintains that they were arrested for a different offence to the one that they were charged with. As before, the Government makes a general statement that the detainees enjoyed a fair trial.

113. The Working Group has already found a violation in relation to the lack of a legal basis for the detention under category I. Noting that the charges were confirmed in the proceeding of 20 August 2002, and noting, too, the lack of detail in the source's submissions regarding possible other failures to notify the accused of the charges, the Working Group does not find an additional violation of article 14 in respect of this allegation.

114. Thirdly, the source argues that there have been undue delays, as Messrs. Almanza, Hernández and Rodríguez were acquitted of the organized crime charge in 2019, 17 years after their arrest. Once again, the Government asserts that the detainees enjoyed a fair trial.

115. The Working Group notes that the right to be tried without undue delay under article 14 (3) (c) of the Covenant covers the entirety of the proceedings, including appeals.

<sup>7</sup> General comment No. 32 (2007), para. 30.

As the Human Rights Committee has stated, this guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages must take place “without undue delay”.<sup>8</sup>

116. In the absence of an adequate explanation from the Government as to why the proceedings have continued for 19 years without the courts reaching a final decision on the appeals, the Working Group considers that there has been an undue delay, in violation of article 14 (3) (c) of the Covenant.

117. Fourthly, the source alleges that Messrs. Almanza, Hernández and Rodríguez were forced to confess under torture. The Government appears to concede that the detainees were subjected to torture but argues that the evidence gathered was dismissed pursuant to a court decision. It also states that none of the detainees admitted to the offences at trial, so no prejudice was incurred.

118. The prohibition of torture is a peremptory norm of international law, recognized in article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture is non-derogable, because of its status as a *jus cogens* norm, and encompasses the obligation to investigate alleged violations without delay and bring perpetrators to justice, and the prohibition of the use of evidence obtained under torture in legal proceedings.<sup>9</sup>

119. The Working Group considers that the Government has effectively admitted that the detainees were subjected to torture and ill-treatment. However, the Government has not shown that they received adequate reparation for this violation of their rights, nor has it shown that the evidence upon which their convictions were upheld – after some evidence was excluded – was free from any risk of prejudice arising from the initial extraction of confessions under torture. The Government’s argument that Messrs. Almanza, Hernández and Rodríguez did not confess during the trial misunderstands the point of the absolute prohibition of torture and use of evidence obtained under torture. It is not only a matter of preventing such evidence from being brought before the courts but, more generally, of preventing torture from taking place, providing reparations to victims and investigating and punishing those responsible when it does occur. On this basis, the Working Group considers that the right to a fair trial of Messrs. Almanza, Hernández and Rodríguez was violated by the extraction of confessions under torture, in violation of article 14 of the Covenant.

120. Fifthly, the source alleges a violation of the right of the detainees to have their convictions and sentences reviewed, as the appeal court judgments that overturned their convictions did not provide them with effective relief. The Government denies this, listing the various cases in which their convictions have been overturned.

121. The Working Group considers that an adequate remedy has not been provided, as the proceedings have continued for more than 19 years without a final decision, which is extremely serious and unacceptable under international human rights law. This is a separate and additional violation of the detainees’ rights under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant, in conjunction with article 14. These violations are in addition to the violation of article 14 created by the undue delay.

122. In the light of these violations, the Working Group considers that the non-observance of the right to a fair trial of Messrs. Almanza, Hernández and Rodríguez is of such gravity as to render their detention arbitrary under category III.

#### *Category V*

123. The source argues that the detention was discriminatory, since pretrial detention was imposed because the detainees were charged with the offences of kidnapping and organized crime, whereas if they had been charged with less serious offences, they would have faced trial at liberty. The Government challenges this assessment, reiterating its previous arguments

<sup>8</sup> Ibid., para. 35.

<sup>9</sup> Opinion No. 89/2017, paras. 41–45.

that the pretrial detention was based on the arrest warrants and indications that Messrs. Almanza, Hernández and Rodríguez were the likely perpetrators of serious offences.

124. The Working Group recalls that detention is arbitrary under category V when it 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.

125. The Working Group does not consider that the source has demonstrated that discrimination under category V has occurred in the present case. In particular, the source has failed to demonstrate that Messrs. Almanza, Hernández and Rodríguez were accused of kidnapping and organized crime owing to a particular characteristic or status. Nor has the source provided sufficient evidence of any particular social group being discriminated against through the imposition of mandatory pretrial detention.

126. On that basis, the Working Group does not find a violation under category V.

### **Disposition**

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

The deprivation of liberty of Mario Almanza Cerriteño, Jorge Hernández Mora and Sergio Rodríguez Rosas, being in contravention of articles 5, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 2, 7, 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

128. The Working Group requests the Government of Mexico to take the steps necessary to remedy the situation of Messrs. Almanza, Hernández and Rodríguez 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.

129. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Almanza, Hernández and Rodríguez immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. 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 Messrs. Almanza, Hernández and Rodríguez.

130. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Almanza, Hernández and Rodríguez and to take appropriate measures against those responsible for the violation of their rights.

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

### **Follow-up procedure**

132. 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 Messrs. Almanza, Hernández and Rodríguez have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. Almanza, Hernández and Rodríguez;

(c) Whether an investigation has been conducted into the violation of the rights of Messrs. Almanza, Hernández and Rodríguez 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.

133. 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.

134. 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 of any failure to take action.

135. 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.<sup>10</sup>

*[Adopted on 5 April 2023]*

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<sup>10</sup> Human Rights Council resolution 51/8, paras. 6 and 9.