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Opinion No. 55/2024 concerning Juan Carlos Tovar Moreno (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 6 June 2023 the Working Group transmitted to the Government of Mexico a communication concerning Juan Carlos Tovar Moreno. The Government replied to the communication on 6 September 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).

* Mumba Malila did not participate in the discussion of the case.

¹ [A/HRC/36/38](#).



1. Submissions

(a) Communication from the source

4. Juan Carlos Tovar Moreno is a national of Mexico, born 7 December 1970. He is currently being held at the northern remand centre for men, located at 155 Jaime Nuno Street, Colonia Zona Escolar (Cuautepec Barrio Bajo, Mexico City).

5. Mr. Tovar Moreno was deprived of his liberty on 21 September 2011, at approximately 11 a.m., at his workplace, the Tlalpan police station in Mexico City, without a warrant and even though he was not committing a crime at the time. The police officers making the arrest did not inform him of the reason for his deprivation of his liberty. He was then forcibly taken to the Office of the Special Prosecutor for Kidnappings in the borough of Azcapotzalco. Upon arrival, he was locked in a cell and held incommunicado; he was interrogated for hours by experts, police officers and doctors, without being told the grounds or reason for his deprivation of liberty.

6. On 22 September 2011, Mr. Tovar Moreno was removed from his cell and taken to an air-conditioned location, which he was told was the premises of the Public Prosecutor's Office. There, he was interrogated by a federal prosecutor and informed that he was accused of having kidnapped two people in order to rob them. He was threatened so that he would confess to having committed the crime. He was subsequently introduced to a public defender and, immediately afterwards, gave his statement to the public prosecutor, in which he indicated where he had been and what he had been doing on the day of the events being investigated, as well as the witnesses who could corroborate his statement.² Responding to the questions put by the Public Prosecutor's Office, Mr. Tovar Moreno stated that patrol car 03218 had been in his custody for almost a year, but that for some time the General Headquarters of the Investigative Police had been using it. Mr. Tovar Moreno indicated who was responsible for the patrol car, and stated that he could not use it, as he was in the process of completing a course for a promotion. Once he had finished giving his statement, he was returned to the cell where he had been held since his arrival, to await the resolution of his legal situation.

7. Initially, Mr. Tovar Moreno's family was unaware of the reason for the arrest and did not know where he had been taken; they therefore travelled from their residence in Hidalgo to the capital, Mexico City, to look for him. After enquiring in several places, they found out where he was being held; however, upon arriving at the Office of the Special Prosecutor for Kidnappings, they were informed that they were not permitted to see or talk to him. They were told only that he was accused of kidnapping. Some time after giving his statement, Mr. Tovar Moreno was allowed to see and speak with a relative for approximately five minutes; this relative gave him food, and a police officer was present at all times.

8. A few hours later, Mr. Tovar Moreno was transferred to the northern remand centre for men in the then Federal District, because the Public Prosecutor argued that the case qualified as an "emergency" and because he allegedly stated that there was sufficient evidence to prove Mr. Tovar Moreno's material participation in the crime of "express kidnapping" with a view to committing robbery. To this end, the Public Prosecutor's Office provided as "direct" evidence Mr. Tovar Moreno's status as a police officer, his custody of patrol car 03218 and the accusation of the victims, who had allegedly recognized him a few days earlier in a photographic album and that day in the Gesell chamber.

9. On 22 September 2011, Criminal Court No. 39 of the Federal District formally registered the case. During the constitutional hearing, Mr. Tovar Moreno told the judge in detail how his arrest had occurred, namely, without a warrant and not in circumstances of flagrante delicto, but rather solely on the basis of a summons issued by the Public Prosecutor's Office to bring him in for questioning, a summons that was never shown to him. He also recounted how he had been held incommunicado in a cell, without being able to prepare his defence, and had not been given the opportunity to gather evidence and provide it to the Public Prosecutor's Office. Mr. Tovar Moreno explained, once again, where and with

² The source alleges that, on 20 June 2011, Mr. Tovar Moreno was at the training institute of the Office of the Attorney General of the Federal District before leaving to go work at the Tlalpan police station.

whom he had been on the day and at the time of the alleged events. He requested additional time to secure evidence to corroborate his statement and prove his innocence and, with the help of his family and a private attorney, gathered all the evidence that supported his statement, including public documentary evidence and statements from people who confirmed his claims. However, the judge ignored all the violations committed by the police and the Public Prosecutor's Office, as well as the evidence provided by the defence, and, on 28 September 2011, he issued an order for Mr. Tovar Moreno's mandatory pretrial detention. In other words, the deprivation of liberty was ordered solely based on the fact that the case involved a crime of a serious nature punishable by more than 5 years' imprisonment.

10. The defence subsequently learned that, as of 21 September 2011, news had been circulating on the Internet that the Office of the Attorney General of the Federal District had captured the leader of a kidnapping gang, and had featured Mr. Tovar Moreno's photograph and personal data. As a result of this, his family was forced to move.

11. In view of the violation of Mr. Tovar Moreno's human rights by the Public Prosecutor's Office and the judge in the case, the defence filed an appeal, which was heard by Criminal Chamber No. 7 of the High Court of Justice of the then Federal District. This court, far from respecting and redressing Mr. Tovar Moreno's human rights, on 5 December 2011 upheld the order of mandatory pretrial detention issued by Criminal Court No. 39 and completely disregarded the complaint of arbitrary detention and serious violations of due process related to the collection of evidence.

12. On 5 December 2011, Mr. Tovar Moreno, despite being in pretrial detention, joined the general population of the northern remand centre for men, where he lived alongside prisoners whom he had arrested while serving as a police officer; he spent over 10 years in such conditions.

13. It is indicated that Mr. Tovar Moreno had to forgo the services of private counsel owing to lack of resources and instead requested the assignment of a public defender to his case. A public defender was appointed, but died a few months later, and no new public defender was appointed.

14. In 2013, Mr. Tovar Moreno filed an indirect *amparo* application against the pretrial detention order, which he himself wrote by hand, as he did not have private counsel and the State was unwilling to appoint a public defender for him. The application denounced violations by the police officers, the Public Prosecutor's Office, the trial judge and the court of appeal, as well as the failure to observe due process in obtaining evidence against the accused and the violation of the presumption of innocence.³

15. The *amparo* judge who heard the complaints found them to be well founded, but only with respect to the serious violations of due process and the judge's bias in evaluating the evidence. However, he did not rule on the grievances relating to the detention, arguing that Mr. Tovar Moreno had undergone a change in his legal status: the impediment consisted in the fact that he went from being "a suspect" to "an accused person". Furthermore, the judge did not order his release, despite there being no evidence of his probable responsibility.

16. The plaintiffs, prompted by the actions of the Public Prosecutor's Office, filed an appeal for the review of this decision, which was heard by the Third Collegiate Criminal Court of the First Circuit of the Federal District. The Court unanimously ruled that the claims of the plaintiffs and alleged victims were unfounded and upheld the sentence of the Second Court, leaving pending the examination of the claims related to the arrest, which the Public Prosecutor's Office substantiated on grounds of emergency circumstances.

17. Under these conditions, the criminal proceedings continued, and evidence was collected, presented and formally admitted in order to demonstrate Mr. Tovar Moreno's innocence in the crime of express kidnapping for the purpose of committing robbery. However, months later, Mr. Tovar Moreno learned that the judge in the case had, on his own initiative, changed the charges laid by the Public Prosecutor's Office. According to the source, upon seeing that there was no evidence of the *corpus delicti* or probable responsibility, he had decided, without notifying Mr. Tovar Moreno, that he would try him

³ Indirect *amparo* application No. 63/2013-III.

for the crime of express kidnapping for the purpose of committing extortion. Under these circumstances, the investigation was declared closed. In the statement of his innocence, Mr. Tovar Moreno again requested the examination of the fundamental rights violations that had been committed since his arrest and that justified his immediate release.

18. According to the source, in early February 2016, during the hearing period, Mr. Tovar Moreno was summoned by the court, where he was informed that the incumbent judge had been promoted to another court. Days later, he was again summoned to the court, where he was informed that the new presiding judge had arrived that day. He asked to meet with her. However, the judge did not grant the request, as she had a lot of work to do. On 12 April 2016, three working days after her appointment, the judge requested permission to be absent from court; it was therefore a secretary of agreements, acting as judge, who handed down a sentence against Mr. Tovar Moreno, without hearing the case and on the basis of the same evidence that the Public Prosecutor's Office had used to accuse him of the crime of express kidnapping to commit robbery, disregarding all the evidence that proved his innocence.

19. Mr. Tovar Moreno's defence, dissatisfied with this decision, which violated his human rights, filed an appeal, which was heard by Criminal Chamber No. 7.⁴ On 6 June 2016, Criminal Chamber No. 7, without examining the grievances against Mr. Tovar Moreno, seeing that there was no evidence of his guilt, ordered *ex officio* the reinstatement of the proceedings for the formal admission of evidence.

20. In view of the court's acts and omissions, which violated Mr. Tovar Moreno's fundamental rights to the principle of legality, due process and impartiality, his defence appealed the ruling to an *amparo* judge.⁵ On 28 August 2017, the application for *amparo* was granted, since once again it was demonstrated that the presumption of innocence and due process in the production and evaluation of evidence had been violated, to the detriment of Mr. Tovar Moreno. The evidence consisted of videos that were collected, saved, formally admitted and annexed to the criminal case, in violation of due process, for which reason Criminal Chamber No. 7 was ordered to vacate its decision and exclude the unlawful evidence when handing down a new decision.

21. Despite the *amparo* ruling, on 28 September 2017, the Criminal Chamber again handed down a decision based on the evidence that it and the *amparo* judge had declared unlawful, as it did not formally admit the evidence as established in article 140 of the Procedural Code, thus demonstrating its intention to rule against Mr. Tovar Moreno at all costs, in spite of his innocence.

22. On 7 February 2018, Mr. Tovar Moreno again filed a direct *amparo* appeal against that decision, which was heard by the Third Collegiate Criminal Court. That court, on 4 October 2018, ruled in his favour, finding that Criminal Chamber No. 7 had issued a decision that was not well founded or reasoned and that it continued to violate due process in the production of prosecution evidence, the principle of impartiality and judicial independence.

23. However, the source indicates that, on 8 April 2018, Criminal Chamber No. 7 again handed down a conviction based on the same arguments and evidence.

24. Mr. Tovar Moreno's defence therefore filed a direct *amparo* appeal before the constitutional courts against the decision of Criminal Chamber No. 7 (DP 201/2019). On 20 August 2020, by unanimous vote, the *amparo* application was granted, but once again on the grounds of the formal violations rather than the substantive ones. Once again, the grievances presented by Mr. Tovar Moreno's legal counsel were not examined, thus possibly unjustifiably prolonging the consideration of the merits of his grievances.

25. According to the source, on 22 September 2020, Criminal Chamber No. 7 again handed down a conviction against Mr. Tovar Moreno, within the framework of criminal case No. 38/2016. However, the source claims that this was done in contravention of the constitutional and legal order, and also in violation of Mr. Tovar Moreno's human rights.

⁴ Criminal case No. 38/2016.

⁵ Indirect *amparo* application No. 380/2017.

26. As a result of the foregoing, the defence filed a direct *amparo* application, which was once again heard by the Third Collegiate Criminal Court. In the light of the Chamber's inflexibility, the "matter" was presented in two minutes in the constitutional hearing, in an exasperated manner, and the court opted to reject the *amparo* application, without responding to the grievances presented, as is attested by the record of the legal hearing in which the *amparo* proceedings were concluded.

27. In view of the acts and omissions of the ordinary and extraordinary judges, which are contrary to the constitutional and international human rights protection framework, Mr. Tovar Moreno's defence sought to bring his case before the Supreme Court, by means of an appeal for review, reconsideration and re-examination. However, the source indicates that the Supreme Court decided not to examine the case, applying the law retroactively and denying the right to appeal the sentence by the means established in the law in effect at the time of the facts, thus exhausting all the remedies that could be effective in repairing the fundamental rights violations.

28. The source indicates that each time a sentence that violated Mr. Tovar Moreno's rights was handed down, the defence exhausted all the available remedies established in the law applicable to the case – indirect and direct *amparo* applications, appeals, revocation, non-conformity and review, among others – in order to obtain redress for the violations of his human rights. These violations included the violation of his right to liberty of person (in the form of arbitrary detention) and to be informed, at the time of arrest, of the reasons for his arrest and to be promptly informed of any charges against him; the violation of equality of arms owing to unjustified delay; violation of due process, owing to the unlawful gathering of evidence against Mr. Tovar Moreno; and violation of the presumption of innocence, owing to his being considered guilty of a crime solely on the basis of photographic recognition.

29. Therefore, the source alleges that in the present case there has been a violation of the right to equal protection of the law without discrimination, the prohibition of torture and arbitrary detention, the right to dignified and humane treatment of detainees, and the right to an independent and impartial trial with the guarantees of due process and the right to a defence. These rights are protected and enshrined in articles 2, 7, 9, 10 and 14 of the Covenant.

(b) Response from the Government

30. The Working Group, in accordance with its methods of work, transmitted the source's allegations to the Government of Mexico on 6 June 2023 and requested it to submit a response by 7 August 2023. The Government requested, and was granted, an extension of the deadline for providing its response. The Working Group received the Government's response on 6 September 2023, by the agreed deadline.

31. In its response, the Government underlines the fact that article 21 of the Constitution grants the Public Prosecutor's Office the power and obligation to investigate any crime reported.

32. The Government states that Mr. Tovar Moreno was arrested on 21 September 2011, at approximately 11 a.m., by two investigative police officers, pursuant to a summons to bring Mr. Tovar Moreno in for questioning, issued by a public prosecutor, with reference FSP/B/T2/1630/11-07, for the crime of deprivation of liberty with a view to carrying out aggravated "express kidnapping".

33. The arrest was made at Mr. Tovar Moreno's place of work, the Tlalpan police station in the Federal District. The Government states that Mr. Tovar Moreno was arrested without a warrant and that he was not committing a crime at the time of arrest. Mr. Tovar Moreno was immediately transferred to the northern remand centre for men and was placed in the custody of Criminal Court No. 39 of the Federal District.

34. The Government reports that, on 22 September 2011, while Mr. Tovar Moreno was in detention, he gave his statement and he was informed of his rights and of the reason for his detention. According to the Government, these acts took place in the presence of his lawyer. The Government states that Mr. Tovar Moreno signed his statement and was consistently treated with dignity and informed of his rights.

35. According to the Government, Mr. Tovar Moreno's rights were not violated either by the investigative police or by the Public Prosecutor's Office. When Mr. Tovar Moreno was in the custody of the court, all the circumstances of his case were examined, and it was on that basis that Criminal Court No. 39, by an order dated 22 September 2011, found the detention to be lawful, given the situation of emergency. That decision was well founded and reasoned, and Mr. Tovar Moreno did not challenge it. As a result, Mr. Tovar Moreno is being held at the northern remand centre for men, where he is serving his prison sentence.

36. The Government informs the Working Group that Mr. Tovar Moreno has filed a series of briefs and appeals before various authorities at different jurisdictional levels, with the aim of proving what he claims to be his innocence and his arbitrary detention.

37. The Government then lists the various appeals and briefs filed by Mr. Tovar Moreno. The defendant appealed the decision handed down by the court that, on 28 September 2011, ordered Mr. Tovar Moreno's detention; that appeal was rejected by Criminal Chamber No. 7 of the High Court of Justice of the Federal District in case No. 1399/2011, upholding the lower court's order of 5 December 2011. Following the rejected appeal, on 26 November 2011, Mr. Tovar Moreno initiated proceedings before the relevant court for insufficient evidence; a verification hearing was then scheduled for 3 December 2012, in which the parties appeared in order to assert their rights. The case was dismissed and declared unfounded on 6 December 2012 by the same judge of Criminal Court No. 39, who declared the motion for release on grounds of insufficient evidence unfounded.

38. In addition, the Government informed the Working Group that Mr. Tovar Moreno has filed a series of appeals before the Council of the Federal Judiciary, which has registered the following: three direct *amparo* applications, thirty indirect *amparo* applications, five *amparo* appeals, two non-conformities and one complaint, all of which feature Mr. Tovar Moreno as a party.

39. In its response, the Government provides an analysis of the judicial proceedings brought by Mr. Tovar Moreno and the respective authorities before the Council of the Federal Judiciary. A few of the appeals described are highlighted below.

40. Mr. Tovar Moreno filed indirect *amparo* application No. 1328/2012 according to the records of the Second District Court for *Amparo* in Criminal Matters in the Federal District, which was rejected. In view of this rejection, Mr. Tovar Moreno filed an appeal for review (No. 30/2013), in which he pointed out that (a) the district judge had not taken into account various pieces of evidence that would have invalidated the detention order; (b) essential procedural formalities had not been observed; and (c) because his interests had not been supported, the presumption of his innocence had been violated.

41. On 6 March 2013, the Third Collegiate Criminal Court of the First Circuit overturned the appealed decision and granted Mr. Tovar Moreno's *amparo* application, annulling the decision handed down by the judge of Criminal Court No. 39 of the Federal District on 6 December 2012, in criminal case No. 192/2011 and No. 235/11, and ordering the same judge to hand down a new decision effectively taking into account the evidence presented by Mr. Tovar Moreno, a decision which could be different or equivalent to the previous one, but which would remedy the irregularities of the previous one.

42. In this regard, the judge of Criminal Court No. 39 of the Federal District considered Mr. Tovar Moreno's claims to be essentially well founded; however, the responsible judge violated, to Mr. Tovar Moreno's detriment, article 14 of the Constitution with regard to the formalities of the proceedings. Nevertheless, the judge stated that the original and supplementary evidence was not sufficient to justify Mr. Tovar Moreno's release.

43. By a decision of 3 April 2013, the Second District Court for *Amparo* in Criminal Matters in the Federal District held the decision of Criminal Court No. 39 to have been enforced. In this regard, the federal court found that the entire body of evidence presented in criminal case No. 192/2011 and No. 392/2011 had been examined after the issuance of the detention order, without any objections from Mr. Tovar Moreno. On 29 April 2013, the case was definitively closed.

44. In view of the circumstances, the Government states that Mr. Tovar Moreno claimed violations of his human rights before a number of courts that are under the oversight of the

Council of the Federal Judiciary, until 17 January 2013, when he filed an indirect *amparo* application (No. 63/2013). In response, the Second District Court for *Amparo* in Criminal Matters of the Federal District issued a ruling on 8 October 2013, finding that the order that upheld the detention as lawful was to be considered an irreparable act since the detention order was issued and thus changed the legal situation. Consequently, the Third Collegiate Criminal Court of the First Circuit upheld the judgment by its decision of 27 March 2014, handed down in the context of an appeal for review (No. 238/2013). The federal courts likewise found in subsequent cases that these considerations were *res judicata*.

45. The Government states that Mr. Tovar Moreno lodged three extraordinary appeals with the Supreme Court: (a) a request for assumption of jurisdiction; (b) a request for reassumption of jurisdiction; and (c) a *direct* *amparo* review. These appeals were dismissed by the Supreme Court, which found them manifestly inadmissible, as they did not satisfy the relevant requirements.

46. Regarding Mr. Tovar Moreno's bodily integrity and conditions of detention, in a statement written in Mr. Tovar Moreno's own handwriting, he states that he has no problems with the security guards, the authorities or his fellow inmates. Likewise, he indicates, positively, that he has regular medical appointments, in respect of which he does not report any incident. In addition, Mr. Tovar Moreno has been given physical and psychological medical appointments as needed, and none of these have yielded any negative results.

47. The Government, in its response, examines the facts relating to Mr. Tovar Moreno's legal situation, in the light of the different categories of arbitrary detention identified by the Working Group. The Government maintains that it has acted in accordance with the international treaties to which it is bound, in particular the Universal Declaration of Human Rights and the Covenant.

48. The Government submits that the detention took place in accordance with the applicable laws and in consideration of the circumstances applicable to the case (article 21 of the Constitution). It further submits that the detention was subjected to a prompt judicial review, since the summons to bring Mr. Tovar Moreno in for questioning was issued by the public prosecutor on 21 September 2011 on the basis of a preliminary investigation (No. FSP/B/T2/1630/11-07).

49. In addition, the Government states that Mr. Tovar Moreno's right to be heard by an independent and impartial tribunal was respected at all times, as was his right to have an adequate defence and to challenge the decisions taken as he deemed appropriate. The Government states that on the day of his detention, 22 September 2011, he was informed of the reason for the detention and made a statement regarding the facts in the presence of his lawyer, and it was noted that his rights were respected. Mr. Tovar Moreno had access to legal remedies and was treated with dignity; he even signed in the margin on his statement, stating that he had been made aware of his rights.

50. The Government states that the detention of Mr. Tovar Moreno is not arbitrary on discriminatory grounds, since it was the result of a preliminary investigation initiated by the Mexican investigative authorities and a court order, which was based on the probable responsibility of Mr. Tovar Moreno.

(c) Additional comments from the source

51. The Working Group transmitted the Government's response to the source on 8 September 2023 and requested any final comments and observations, which were received on 18 September 2023.

52. In its additional comments, the source stresses the importance of the Working Group's opinion on the present case and rejects the Government's submissions. The source emphasizes the clear contradiction between the Government's statements and the reality that Mr. Tovar Moreno is living. The source insists that all its claims are supported by evidence that has not been refuted by the Government in its response and which has been gathered in order to ensure that justice is served and to end the violations of Mr. Tovar Moreno's basic rights.

53. The source submits that the Government invokes article 21 of the Constitution as the legal basis for its actions, arguing that the Constitution “grants the Public Prosecutor’s Office the power and obligation to investigate any crime reported [...] in accordance with the applicable criminal and criminal procedure codes”. However, article 21 of the Constitution does not empower the Public Prosecutor’s Office to issue arrest warrants, as the Government implies; article 16 (3) of the Constitution grants this power exclusively to the judiciary. Article 16 (5) and (6) establishes the rules of detention, admitting as the sole legal grounds for the deprivation of liberty arrest warrants, flagrante delicto and cases classified as emergencies.

54. The source argues that the law in force at the time, the Code of Criminal Procedure of the Federal District, established that the Public Prosecutor’s Office could issue summons to bring a person in for questioning, so that the probable perpetrators might be brought in to make a statement if they so wished, but it never empowered the Public Prosecutor’s Office to issue arrest warrants as the Government would like to imply.

55. In addition, the source states, the Code of Criminal Procedure established the procedure for lawful detention in situations of emergency. In this regard, article 267 of the Code of Criminal Procedure of the Federal District provided that the detention of a person was justified when he or she was caught in flagrante delicto or in situations of emergency. Article 268 provided that the following criteria must be satisfied to consider a situation as an emergency: (a) an established serious crime must be involved; (b) the suspect must present a well-founded flight risk; and (c) the Public Prosecutor’s Office must be unable to come before the courts to apply for an arrest warrant, owing to the time, place or other circumstance.

56. The source maintains that these three criteria were not satisfied in the present case, and the Government has not proved otherwise; it is thus more than evident that Mr. Tovar Moreno suffered an unlawful, arbitrary detention.

57. The source submits that the Government, in its response, does not provide the legal basis for the arbitrary detention of which Mr. Tovar Moreno was a victim, and it fraudulently claims that Mr. Tovar Moreno was lawfully detained pursuant to a summons issued by the Public Prosecutor’s Office to bring him in for questioning, as part of an investigation (No. FSP/B/T2/1630/11–07).

58. In the source’s opinion, what the Government’s response does prove is that the actions of the Public Prosecutor’s Office and of the investigation police produced legal effects that went beyond the mere summons to bring Mr. Tovar Moreno in for questioning.

59. The source states that the Government claims that Mr. Tovar Moreno’s detention was subjected to a prompt judicial review; however, in its response, the Government neglects to mention that the law establishes a specific time frame for such judicial review – 72 hours or 144 hours at the most. This did not technically happen in Mr. Tovar Moreno’s case, since, although it is true that Mr. Tovar Moreno was brought before the judge of Criminal Court No. 39, the judge failed to take into consideration the unlawfulness of Mr. Tovar Moreno’s detention or he did not truly review it; if he had done so, he would have ordered his release.

60. The source adds that article 268 bis of the Criminal Code for the Federal District in force at the time established the judge’s obligation to proceed immediately in order to determine whether or not the detention was in accordance with the Constitution, without the need for a specific request to that effect. That is to say, the constitutionality of such acts must be reviewed automatically; the Government’s submission that Mr. Tovar Moreno did not challenge his detention therefore cannot be an argument. In any event, it is not true, as Mr. Tovar Moreno filed various appeals in respect of his unlawful and arbitrary detention, which make clear that a constitutional review of the detention, as required by law, was not carried out. Examples of these appeals include the indirect *amparo* appeal against the detention order and various direct *amparo* appeals against his conviction, which were submitted as evidence.

61. The source maintains that, contrary to the Government’s submissions, the facts denounced in the present case constitute discrimination, since the Public Prosecutor’s Office attempted to base the arbitrary detention of Mr. Tovar Moreno solely on his social status – that of a public servant. As is clear from the statement made by the accused during the

preliminary examination, Mr. Tovar Moreno's detention was not carried out in pursuit of a legitimate or reasonable aim.

2. Discussion

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

63. In determining whether Mr. Tovar Moreno's detention 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 requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.⁶

(a) Category I

64. The Working Group will first examine whether the detention of Mr. Tovar Moreno is arbitrary under category I. The source submits that there is no legal basis for his detention and, although it does not mention the specific category in its initial communication, it does identify it in its response to the Government's submission.

65. The source alleges that, on 21 September 2011, Mr. Tovar Moreno was arrested at his place of work and was taken into custody by police officers pursuant to a summons issued by a public prosecutor to bring Mr. Tovar Moreno in for questioning, in the context of an investigation (No. FSP/B/T2/1630/11–07). Mr. Tovar Moreno was not shown the summons or any other decision of the authorities and was not committing a crime at the time of his arrest. According to the source, Mr. Tovar Moreno was also not informed of the reasons for his arrest.

66. The Working Group recalls that an arrest is arbitrary when it is carried out without informing the arrested person of the reasons for the arrest. The authorities must invoke the legal basis for the arrest and apply it by means of a court order.⁷ In the present case, the arresting officers did not present an arrest warrant at the time of arrest,⁸ but rather a summons to bring Mr. Tovar Moreno in for questioning, in violation of articles 3 and 9 of the Universal Declaration of Human Rights⁹ and article 9 (1) of the Covenant.¹⁰ They also failed to inform Mr. Tovar Moreno of the reason for his arrest, which violates the principle that anyone who is arrested shall be promptly informed of any charges against him or her. This substantive right is enshrined in article 9 of the Universal Declaration of Human Rights, as well as in principles 2 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹¹

67. The Working Group notes that the Government invokes article 21 of the Constitution as the legal basis for its actions and argues that the Constitution "grants the Public Prosecutor's Office the power and obligation to investigate any crime reported [...] in accordance with the applicable criminal and criminal procedure codes". However, the source submits that article 21 of the Constitution does not empower the Public Prosecutor's Office to issue arrest warrants, as the Government implies; article 16 (3) of the Constitution grants this power exclusively to the judiciary. Further, this same article establishes the rules of

⁶ A/HRC/19/57, para. 68.

⁷ Opinions No. 10/2015, para. 34; No. 46/2019, para. 51; and No. 57/2021, para. 52.

⁸ Opinions No. 71/2019, para. 70; No. 45/2019, para. 51; and No. 57/2021, para. 52.

⁹ See, for example, opinions No. 3/2018, para. 43; No. 26/2018, para. 54; No. 82/2018, para. 29; No. 37/2020, para. 52; and No. 57/2021, para. 52.

¹⁰ Opinion No. 57/2021, para. 52.

¹¹ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, opinions No. 1/1993, paras. 6 and 7; No. 3/1993, paras. 6 and 7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6 and 7; For more recent examples, see opinions No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46.

detention, admitting as the sole legal grounds for the deprivation of liberty arrest warrants, flagrante delicto and cases classified as emergencies (paras. 5 and 6).

68. The Working Group recalls that article 2 (2) of the Covenant, to which Mexico is a party, establishes that, where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations.¹² In the present case, the Working Group takes note of the Government's submissions that the proceedings against Mr. Tovar Moreno were conducted in compliance with Mexican law. However, even when detention is carried out in conformity with domestic legislation, the Working Group must assess whether it was consistent with international human rights law.¹³

69. In addition, the Working Group has repeatedly stated that the legal system must provide for a separation between the authority conducting the investigation and the authorities responsible for detention and for ruling on questions related to pretrial detention. This separation is a necessary requirement to prevent conditions of 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.¹⁴

70. The Working Group observes that, in responding to the source's submissions, the Government itself proves that the actions of the Public Prosecutor's Office and the investigate police produced legal effects that went beyond the mere summons to bring Mr. Tovar Moreno in for questioning, since neither the law nor the summons authorizes the deprivation of liberty that occurred in the present case. It is therefore clear that the detention order issued on 28 September 2011, on the basis of the alleged responsibility of Mr. Tovar Moreno in the commission of the alleged crime of aggravated express kidnapping (or robbery), is also unlawful and arbitrary.

71. Although both the Government and the source have established that Mr. Tovar Moreno was deprived of his liberty on 21 September 2011 and, according to the Government, Mr. Tovar Moreno was placed in the custody of Criminal Court No. 39 of the Federal District on the following day, 22 September, his family was not informed of the reasons for his arrest or his whereabouts, and considered him to be missing.

72. According to the source, members of Mr. Tovar Moreno's family, who were unaware of his whereabouts and the reasons for his arrest, travelled from their usual residence in Hidalgo to Mexico City to look for him and, after enquiring in several places, found him in custody at the Office of the Special Prosecutor for Kidnappings. They were not permitted to see or talk to him; they were only told that he was accused of kidnapping. Some time after Mr. Tovar Moreno gave his statement, they were allowed to see him.

73. The Working Group stresses the fact that detainees must be allowed to communicate with family members and receive visits, and that any restrictions on such contact must be reasonable. As the Human Rights Committee has observed, giving prompt and regular access to family members is an essential and necessary safeguard for the prevention of torture and for protection against arbitrary detention and infringement of personal security.¹⁵

74. Accordingly, the Working Group finds that the right of Mr. Tovar Moreno to contact with the outside world was denied, in contravention of rules 43 (3) and 58 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)¹⁶ and principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in which it is also acknowledged that an individual must not be arrested or transferred without the chance to notify (or without

¹² [A/HRC/19/57](#), para. 68.

¹³ Opinions No. 10/2018, para. 39; No. 4/2019, para. 46; No. 46/2019, para. 50; and No. 5/2020, para. 71.

¹⁴ [E/CN.4/2005/6](#), para. 79.

¹⁵ General comment No. 35 (2014), para. 58.

¹⁶ Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74 and 75; and No. 45/2019, para. 76.

the authorities being required to notify) family members or other appropriate persons about his or her whereabouts. The Working Group notes the source's submission that Mr. Tovar Moreno's family members were not notified when he was transferred from one detention facility to another, and that this lack of information impeded their ability to provide him with basic assistance.

75. Furthermore, the Working Group recalls that, as stressed by the Working Group on Enforced or Involuntary Disappearances, there is no time, no matter how short, for an enforced disappearance to occur and accurate information on the detention of any person deprived of liberty and their place of detention should be made promptly available to their family members.¹⁷

76. The Working Group recalls that article 9 (3), of the Covenant provides that it should not be the general rule that persons awaiting trial should be detained in custody, that is, pretrial detention should be a measure of last resort. The Human Rights Committee has confirmed that pretrial detention should be an exception, should be as short as possible and must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail or other conditions, would render detention unnecessary in the particular case.¹⁸ In the present case, the Working Group concludes that there was no individualized determination of Mr. Tovar Moreno's circumstances and that, as a result, his detention lacked a legal basis and was ordered in violation of article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

77. Furthermore, as mandatory pretrial detention has been identified as a violation of the right to personal liberty and can potentially undermine other rights, such as the presumption of innocence, personal integrity, judicial independence and equality before the law, it has been considered a human rights violation in the Working Group's jurisprudence, including in the context of Mexico,¹⁹ and it has been declared a violation of the obligations of Mexico by the Inter-American Court of Human Rights. The Court ordered Mexico to bring its laws into line with international standards.²⁰

78. Moreover, the Working Group has previously urged Mexico to bring its approach to pretrial detention into line with international human rights law by repealing the provision on mandatory pretrial detention from the Constitution and establishing that it can only be applied based on an individualized assessment demonstrating risk of flight, interference with evidence or recurrence of the crime.²¹

79. For these reasons, the Working Group finds that Mr. Tovar Moreno's detention has no legal basis and is therefore arbitrary under category I.

(b) Category III

80. The Working Group will next examine whether the alleged violations of the right to a fair trial and due process were of sufficient gravity as to give Mr. Tovar Moreno's detention an arbitrary character, so as to be appropriately identified with category III.

81. The source states that, initially and during the first hours of his arrest (21 September 2011), Mr. Tovar Moreno's right to communicate with a lawyer of his choice was violated. The source notes that Mr. Tovar Moreno was interrogated for hours by experts, police officers and doctors in the absence of a qualified professional and his counsel. The Government, in its response, does not refer to this allegation, but states that on 22 September 2011, Mr. Tovar Moreno, while in detention, gave his statement in the presence of his lawyer, indicating that his rights had been respected. The Working Group recalls that all persons deprived of their

¹⁷ A/HRC/30/38, para. 102.

¹⁸ General comment No. 35 (2014), paras. 37 and 38.

¹⁹ See opinion No. 32/2023.

²⁰ *García Rodríguez et al. v. Mexico*, Judgment, 25 January 2023.

²¹ A/HRC/57/44/Add.1.

liberty have the right to legal assistance by counsel of their choice from the outset of detention and at any time during the proceedings.²²

82. Later, the source states that Mr. Tovar Moreno had to forgo the services of private counsel owing to lack of resources and instead requested the assignment of a public defender to his case. A public defender was appointed, but died a few months later, and no new public defender was appointed. The Government, in its response, makes the general statement that Mr. Tovar Moreno's right to counsel was respected at all times.

83. The Working Group finds that the limited access to legal assistance violated Mr. Tovar Moreno's right to equality of arms and to a fair hearing by an independent and impartial tribunal under article 14 (1) of the Covenant. Moreover, owing to the circumstances and, above all, owing to his status as an acting police officer, Mr. Tovar Moreno was not entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel, a right that is enshrined in article 14 (3) (b) of the Covenant.

84. The Working Group has emphasized in its jurisprudence that international law upholds the importance of independent and impartial investigations and prosecution proceedings as essential to ensuring access to justice.²³ The principle of the presumption of innocence, which is fundamental to the protection of human rights, means that the burden rests on the Government to prove the charge brought against an accused person and that a defendant cannot be presumed guilty until the charge has been proved beyond a reasonable doubt. This safeguard also ensures that an accused person is given the benefit of the doubt and requires that persons accused of an offence be treated in keeping with this principle. All authorities have a duty to refrain from prejudging the outcome of a trial.

85. However, the Working Group has been informed by the source, and the Government has not refuted it, that there was a violation of the presumption of innocence of Mr. Tovar Moreno, since, on the same day, 21 September 2011, the Attorney General of the Federal District presented him to the public in the form of an Internet news item as the leader of a kidnapping gang, and posted his photograph and personal information on the Internet. This decision resulted in his family's having to move.

86. This situation occurred when there were still no proceedings in progress, let alone any judgment against Mr. Tovar Moreno. The impact was such that Mr. Tovar Moreno's family had to change their residence.

87. The Working Group considers that Mr. Tovar Moreno's right to be presumed innocent, contained in article 14 (2) of the Covenant, was thus violated, confirming the arbitrariness of the detention.²⁴

88. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. This right also guarantees the equality of arms. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision,²⁵ as occurred in the case of Mr. Tovar Moreno.

89. The Working Group finds that, in the case of Mr. Tovar Moreno, there has been a violation of article 14 (5), of the Covenant, which establishes the duty substantially to review a conviction as to the sufficiency of the evidence and the law.²⁶ Mr. Tovar Moreno has filed three direct *amparo* applications, thirty indirect *amparo* applications, five *amparo* appeals, two non-conformities and one complaint in an attempt to assert his rights, but the lawfulness of the detention was not examined in any of them. The judges ignored the opinion of the Constitutional Court, which had recommended the examination of Mr. Tovar Moreno's allegations that the detention was arbitrary and unlawful and the review of the detention.

²² Human Rights Committee, general comment No. 35 (2014), para. 35.

²³ Universal Declaration of Human Rights, arts. 10 and 11; Covenant, art. 14; and American Convention on Human Rights, art. 8, among others. See also opinion No. 38/2019.

²⁴ Human Rights Committee, general comment No. 32 (2007), para. 30.

²⁵ *Ibid.*, para. 13.

²⁶ *Bandajevsky v. Belarus* (CCPR/C/86/D/1100/2002), para. 10.13.

90. Notwithstanding the foregoing, all the motions filed by Mr. Tovar Moreno continued to be processed without any of the intervening judges ever mentioning the essential issue, that is, the unlawful use of the summons to bring a suspect in for questioning as if it were an arrest warrant. The source mentions, and the Government confirms this in its response, that, in the indirect *amparo* action brought by Mr. Tovar Moreno against the detention order and against the sentence upheld by the court of appeal, the Second District Court for *Amparo* in Criminal Matters in Mexico City (in its judgment of 8 October 2023) referred only to serious violations of due process and the judge's bias in assessing the evidence, but did not rule on the detention-related grievances, on the grounds that Mr. Tovar Moreno had undergone a change of legal status: the impediment was that he had gone from being "a suspect" to being "an accused person". The Second District Court found that the order that upheld the detention as lawful was an irreparable act, since the detention order had changed the legal situation.

91. In the light of the foregoing, the Working Group is convinced that the authorities failed to comply with international standards relating to the right to a fair, independent and impartial trial, as set forth in articles 9–11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The Working Group concludes that the above-mentioned violations of the right to a fair trial are of such gravity as to give Mr. Tovar Moreno's detention an arbitrary character under category III.

92. The source has shown great negligence on the part of the judges and judicial authorities who handled the case, with regard to the verification of the lawfulness of his arrest, despite the Constitutional Court's statement that the order to bring Mr. Tovar Moreno in for questioning had been used in an "extended" manner as an arrest warrant. In view of this, the Working Group decides to refer the present case to the Special Rapporteur on the independence of judges and lawyers for further action.

(c) Category V

93. The source states that Mr. Tovar Moreno has been discriminated against because he is a public servant. However, the Working Group, after having examined the documentation submitted and described by the source, does not find that it supports a classification of the detention as arbitrary under category V. Rather, it points to a disproportionate use of mandatory pretrial detention, which has been identified as a violation of the right to personal liberty and can potentially undermine other rights, such as the presumption of innocence, personal integrity, judicial independence and equality before the law, as appears to be true in the case of Mr. Tovar Moreno. Therefore, the Working Group cannot conclude that the detention of Mr. Tovar Moreno falls within the scope of category V.

3. Disposition

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

The deprivation of liberty of Juan Carlos Tovar Moreno, being in contravention of articles 3 and 8–11 of the Universal Declaration of Human Rights and of articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

95. The Working Group requests the Government of Mexico to take the steps necessary to remedy the situation of Mr. Tovar Moreno 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.

96. The Working Group considers that, taking into account all the circumstances of the case, including the risk of harm to Mr. Tovar Moreno's health, the appropriate remedy would be to release Mr. Tovar Moreno immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. Such a remedy would be especially appropriate given the interpretative declaration on article 9 (5) of the Covenant entered by Mexico upon acceding thereto, which states that:

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 has, inter alia, under the provisions of the appropriate laws, an enforceable right to just compensation.

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

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

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

4. Follow-up procedure

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

101. 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.

102. 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.

103. 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.²⁷

[Adopted on 12 November 2024]

²⁷ Human Rights Council resolution 51/8, paras. 6 and 9.