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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 August 2019

Opinion No. 61/2019, concerning José María Leyes Justiniano (Plurinational State of Bolivia)

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 44/22.
2. In accordance with its methods of work (A/HRC/36/38), on 1 July 2019, the Working Group transmitted to the Government of the Plurinational State of Bolivia a communication concerning José María Leyes Justiniano. The Government has not replied to the communication. 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).



Submissions

Communication from the source

4. Mr. Leyes was born on 17 July 1977 in Cochabamba (Plurinational State of Bolivia) and is a lawyer by trade. Early in his career, he became involved in politics, and until October 2007 he hosted a political analysis programme on television. In 2010, he ran for governor of the department of Cochabamba. In 2013, Mr. Leyes, along with other Bolivian politicians, founded the political party Movimiento Demócrata Social. In December 2015, Mr. Leyes ran for mayor of the city of Cochabamba as a candidate of the party he had co-founded and was elected to a five-year term. He is married and has three children.

Context and background

5. According to the source, Mr. Leyes has been critical of the former national Government and the party Movimiento al Socialismo (MAS). Since becoming mayor, Mr. Leyes has frequently spoken out against the Government's alleged attacks on the members of his party and other leaders, insisting that there is constant political persecution of the opposition. Mr. Leyes's repeated criticism of the Government's actions was also relayed by the media. As a result, Mr. Leyes reportedly became a target of persecution: the Government has lodged more than a dozen criminal complaints against him over the years.

6. The source states that the criminal cases (known as Mochilas I (Backpacks I) and Mochilas II (Backpacks II)) that led to Mr. Leyes's arrest are politically motivated. Two weeks before the criminal complaint that led to his initial arrest was filed, Mr. Leyes was in Europe, where he met with Members of the European Parliament, staff members of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and Spanish officials. In those meetings, Mr. Leyes discussed the state of democracy in the Plurinational State of Bolivia, human rights violations in the country and the Government's refusal to respect the results of the 2016 referendum, in which the President's bid to run for a fourth term was rejected. The Government criticized Mr. Leyes for this international activity. In addition, a few days before he was arrested, an audio recording that allegedly revealed a plot to remove Mr. Leyes through a recall or a judicial procedure was made public. On the recording, a prominent ruling party politician allegedly discusses possible strategies for the removal of Mr. Leyes. One of the men is apparently heard explaining that the former President was bothered by Mr. Leyes's European tour and noting that he was going to be brought down.

7. On 3 April 2018, according to the source, a councilwoman from the party Movimiento al Socialismo party lodged a criminal complaint against Mr. Leyes in the case Mochilas I. In the complaint, it was alleged that, in early 2018, Mr. Leyes had participated in an illegal award of tender for the provision of more than 90,000 backpacks and other school supplies.

8. The criminal complaint in the case Mochilas II, according to the source, was submitted by the Deputy Minister for Transparency and Combating Corruption of the Ministry of Justice on 26 April 2018. In the complaint, Mr. Leyes is accused of organizing, with the same modus operandi, a rigged call for bids for the provision of more than 90,000 backpacks and school supplies in the period 2016–2017.

Arrest, pretrial detention and investigation

9. On the afternoon of 20 April 2018, according to the information submitted, Mr. Leyes, accompanied by his lawyers, went to the Office of the Special Prosecutor for Crimes of Corruption to make a statement regarding the criminal complaint. Mr. Leyes had asked the Special Prosecutor's Office to take his statement once an investigation had begun. A hearing was held on the same day. As the defence had not yet been able to evaluate all the evidence, Mr. Leyes's lawyer advised him to refrain from making a statement at that time.

10. When Mr. Leyes made it clear that he would not make a statement, the prosecutors issued a warrant for his arrest. However, they did not explain to him why he was being arrested. "Sorry, Mr. Mayor, but I'm just following orders", one of them said to him. Crime Squad agents put Mr. Leyes in handcuffs and escorted him out of the office and into a police bus, while tear-gassing a crowd that had gathered to express support for him.

11. The source reports that the special agents took Mr. Leyes to their headquarters, where he was confined to a cell for the next 20 hours. There, Mr. Leyes was informed that, on the strength of the councilwoman's criminal complaint, he had been charged with five counts of corruption. The agents prohibited Mr. Leyes's lawyers from entering his cell and did not allow him to use his phone to communicate with his family. They also failed to inform his family of his arrest. In addition, several agents entered his cell and tried to question him; as Mr. Leyes did not have a lawyer with him, he refused to respond.

12. The next day, the source reports, Mr. Leyes was taken to Station Complex North for a hearing on pretrial supervision arrangements. According to the source, the Anti-Corruption Court should have presided over the hearing, but as it was Saturday, the judge at Station Complex North presided instead. At the hearing, the judge, on the basis of article 234 (10) of the Code of Criminal Procedure, ruled that Mr. Leyes was a flight risk. According to the judge, Mr. Leyes was a genuine menace to society because he was capable of mobilizing unruly crowds of supporters, which created a risk for people in the vicinity.

13. The judge also ruled that there was a risk that Mr. Leyes would obstruct the investigation – specifically, that he could persuade the persons involved, including experts and other witnesses, to give false testimony or not to cooperate with the investigation. The judge argued that, because of his position as mayor, Mr. Leyes could sway the municipal employees involved in the case. On the strength of claims by the Public Prosecution Service that Mr. Leyes had ordered municipal employees to erase the hard drives of municipal computers, the judge held that Mr. Leyes's possible use of intermediaries to destroy or alter evidence constituted an additional risk of obstruction. Mr. Leyes had ordered an internal investigation into the Mochilas case, and the municipal employee in charge of the investigation had backed up the information on the computers handed over to the Public Prosecution Service.

14. The judge ordered him to be placed under house arrest with a police guard and to post bail. The judge also prohibited Mr. Leyes from commenting on the investigation, entering any municipal office or talking to any municipal employee. These latter two prohibitions prevented Mr. Leyes from fulfilling his duties as mayor. On 24 April 2018, MAS members of the Municipal Council asked the Council to appoint an interim mayor, even though Mr. Leyes had not been convicted.

15. On 4 May 2018, according to the source, Mr. Leyes appealed, arguing that the pretrial supervision arrangements violated his right to take part in the conduct of public affairs, since they prevented him from acting as mayor. He suggested that the ban on contacting municipal employees be amended to prohibit him from contacting only the employees involved in the case. The Third Criminal Division overturned the decision according to which Mr. Leyes had been found a flight risk but not that concerning the risk of obstruction or the imposition of supervision arrangements. The Municipal Council appointed an interim mayor.

16. The source notes that, on 7 May 2018, the Vice-President of the Plurinational State of Bolivia stated in a television interview that Mr. Leyes's attitude towards the proceedings demonstrated his relative complicity. He also stated that Mr. Leyes should have resigned when he was arrested and that his party should have told him to resign temporarily and prove his innocence; according to the Vice-President, Mr. Leyes was being prosecuted not for political reasons but for theft. He continued to state that it had been proven that there had been thefts in Cochabamba and that, instead of supporting a transparent investigation, the leaders of Movimiento Demócrata Social had put up a smokescreen to stop the investigation and turn Mr. Leyes into a political martyr. He asserted that a person who had been involved in stealing from children could not be a martyr and that no one should defend a person involved in corruption. The Vice-President also noted that the bidding process of 2016–2017 had involved theft.

17. The former President of the Plurinational State of Bolivia, the source reports, also asserted that Mr. Leyes was guilty. In an interview on 4 September 2018, President Evo Morales was asked to compare the allegations of corruption against Mr. Leyes and those against the mayor of Santa Cruz de la Sierra, a MAS ally. "The Cochabamba mayor's office", said the President, "was the cash box for the Movimiento Demócrata Social. It's a complicated case. If the Movimiento Demócrata Social takes power, all [the Plurinational State of] Bolivia will become a cash box for the right, for the right-wing party. Fortunately, it fell apart." He also said: "Leyes steals, but he doesn't get anything done."

18. According to the source, shortly after Mr. Leyes was placed under house arrest in the Mochilas I case, the Deputy Minister for Transparency and Combating Corruption filed the criminal complaint concerning Mochilas II. The Public Prosecution Service then began an investigation and ordered Mr. Leyes to make a statement on 6 June 2018.

19. On 6 June 2018, Mr. Leyes, accompanied by his lawyers, went to the Office of the Special Prosecutor for Crimes of Corruption. He refused to make a statement, however. The prosecutors then issued a warrant for his arrest and had him arrested without informing him of the reason for the arrest. He was initially told that he could remain at home under house arrest until the hearing on the possible adoption of pretrial supervision arrangements in the case Mochilas II. On leaving the Special Prosecutor's Office, however, he was informed by Crime Squad officers that he would be taken to a cell at Station Complex North.

20. Shortly after his arrival, Mr. Leyes began to experience serious health complications, including a severe headache and alarmingly high blood pressure. Officers from the Crime Squad nonetheless went into his cell and tried, with no lawyer present, to question him. One of these officers even brought another detainee into the cell, which measured 1.5 m², and told Mr. Leyes that the detainee was a dangerous criminal and that if he wanted to be moved to another cell, he would have to answer his questions truthfully. Mr. Leyes remained silent. Approximately six hours later, the officers authorized his transfer to a medical clinic, where he remained until the hearing on pretrial supervision two days later.

Merger of cases and accusation against the judge

21. According to the source, on 8 June 2018, at a hearing on the possible imposition of pretrial supervision arrangements for Mr. Leyes in the case Mochilas II, the Anti-Corruption Court judge, in accordance with article 67 (1) of the Code of Criminal Procedure, combined Mochilas I and Mochilas II into a single case, as the charges in the two cases and most of the persons accused were, in her view, identical.

22. The source points out that, as the proceedings were combined, the judge should have applied the house arrest order and other existing supervision arrangements. The prosecution, which had asked for Mr. Leyes to be held in pretrial detention, had a government physician examine Mr. Leyes, who was still in poor health, and, on the basis of that examination, requested that the hearing be postponed. Although Mr. Leyes was not consulted, the judge granted the request, postponing the hearing to 11 June 2018.

23. In the meantime, the source notes, the Public Prosecution Service and the Ministry of Justice appealed the decision to merge the two cases, and the Attorney General's Office filed a separate motion with the Court, requesting that it reverse its decision. The Public Prosecution Service also began a criminal investigation of the judge for the alleged impropriety of combining the cases. The Public Prosecution Service ordered her to make a statement at exactly the time of the rescheduled hearing. As a result, the hearing was postponed indefinitely.

24. The judge responded to the summons from the Public Prosecution Service and defended the lawfulness of her decision. Two days later, the Public Prosecution Service issued an arrest warrant and had the judge detained. The local Magistrates' Association strongly condemned the Government's actions, calling them an attack on judicial independence. It expressed deep concern that the Government had resorted to prosecuting the judge. On the following day, at the hearing on pretrial supervision, the judge was released, but she was temporarily suspended from her judicial duties. Two weeks later, as she was again presiding over the Mochilas case, she attempted to recuse herself, citing the ongoing criminal investigation of which she was the target, but a higher court rejected her attempt and she continued to preside over the case.

25. On 10 August 2018, the First Criminal Division rejected the Public Prosecution Service's appeal. The Division found the appeal inadmissible because, according to the law, decisions to combine or separate proceedings are not subject to appeal. A month later, on 13 September, the same judge – once again presiding over the case – reversed her earlier decision. The day before she was transferred to another court, she granted the prosecution's request to reverse her decision to combine the proceedings, which, as a result, were separated. In December, the judge was permanently removed from the bench as a result of the criminal proceedings against her.

26. The source notes that Mr. Leyes, arguing that the Government coerced the judge into her decision, appealed the decision to separate the cases. The cases Mochilas I and Mochilas II continue making their separate ways through the Anti-Corruption Court.

Changes to pretrial supervision arrangements

27. According to the source, after the impeached judge separated the proceedings, Mr. Leyes applied to a new judge who took up the case for a change to the supervision arrangements to allow him to resume performing his mayoral duties. On 28 September 2018, this application was rejected. On 22 October, however, the Third Criminal Division ruled, on appeal, that the existence of the risk of obstruction had not been substantiated and ordered that Mr. Leyes's application be reconsidered. On 9 November, a new judge, who had replaced the second judge handling the case, again rejected the application. The judge noted that Mr. Leyes could work while he was under house arrest but refused to lift the pretrial supervision order preventing him from resuming his official duties. The judge insisted that Mr. Leyes was free to work at any job but that of mayor.

28. On 23 November 2018, the Second Criminal Division, on appeal, overturned the preceding ruling and released Mr. Leyes from house arrest. The Division, according to the source, emphasized that the right to work was protected by both domestic and international law. On the basis of evidence submitted by the defence and not previously taken into account, the Division also overturned the decision regarding Mr. Leyes as posing a risk of using intermediaries to obstruct justice. This evidence, according to the source, showed that the municipal computers that Mr. Leyes had allegedly ordered the data wiped from had been handed over to the Public Prosecution Service.

29. The Division confirmed the second risk of obstruction, concerning Mr. Leyes's ability to personally persuade others to give false testimony, but found that less restrictive arrangements could mitigate this risk. In particular, Mr. Leyes would be prohibited from contacting any municipal employees involved in the case, an arrangement that would allow him to return to work as mayor. The Division also imposed further restrictions on Mr. Leyes, prohibiting him from making written or oral statements to the press or to government authorities of all ranks, speaking about the legality of the court proceedings or attending protests.

30. Immediately after the hearing, according to the source, the Deputy Minister for Transparency and Combating Corruption announced that the Ministry of Justice would take legal action against the two judges of the Second Criminal Division who had released Mr. Leyes from house arrest. The Deputy Minister stated that their decision was unjustified, irresponsible and illegal; he also insisted that if Mr. Leyes escaped or destroyed evidence, those judges alone would be responsible. A few days later, the Minister of Justice, claiming that the judges had acted for obscure, petty and sectarian reasons, asked the Council of the Judiciary to take disciplinary action against them. The Council, composed largely of judges chosen by or affiliated with the Government, did as the Minister had asked and suspended both judges.

31. Although the Second Criminal Division's ruling should have been enforced immediately, the police officers who were keeping Mr. Leyes under house arrest refused to let him go. It was not until a petition for habeas corpus was filed with the Court of Guarantees and habeas relief was granted that, on 28 November 2018, Mr. Leyes was released from house arrest. Mr. Leyes resumed his official duties that day; the next day, however, he was sent to prison in connection with the case Mochilas II.

Imposition of pretrial supervision arrangements and revocation of alternatives to detention

32. The source notes that a ruling on Mr. Leyes's appeal of the decision to separate the proceedings against him has not yet been handed down. However, the Anti-Corruption Court judge scheduled a hearing on pretrial supervision arrangements for the case Mochilas II for 16 November 2018. For various reasons, the hearing was rescheduled four times in two weeks. On 26 November, the judge rescheduled the hearing for three days later, while Mr. Leyes was in the hospital. As a result, his defence team filed a complaint with the Council of the Judiciary, pointing out that the judge, because of a supposed backlog of cases, had scheduled for months later hearings requested by the defence while, by contrast, immediately rescheduling hearings on pretrial supervision arrangements.

33. The hearing on those arrangements was finally held on 29 November 2018 – i.e., the day after Mr. Leyes was released from house arrest in the case Mochilas I. Although his lawyers again requested that the judge postpone the hearing until his appeal on the separation of the two Mochilas cases was resolved, this request was denied.

34. The judge, ruling on the basis of article 234 (8) of the Code of Criminal Procedure, which lists prior or repeated criminal activity as a factor to be considered, held that Mr. Leyes was a flight risk. Specifically, the judge held that the pending charges, and other criminal complaints against Mr. Leyes that had not resulted in charges, demonstrated repeated criminal activity. The source contends that the judge's ruling presumed Mr. Leyes guilty. The judge also found that there was a risk that Mr. Leyes could obstruct the investigation by persuading others, through intermediaries, to give false testimony or refuse to cooperate. This finding was based on testimony from a co-defendant, who claimed that he had been intimidated and swayed by other municipal employees. The judge ordered Mr. Leyes to be held in pretrial detention at San Antonio Prison.

35. On 22 March 2019, the Anti-Corruption Court issued a new order in which it stated that pretrial detention was justified by the risk of obstruction of the investigation. In particular, the Court found that there was a risk that Mr. Leyes would influence parties to the proceedings, including experts and other witnesses. The Court assumed that, as mayor, he would induce municipal employees to give false testimony or refuse to cooperate with the investigation.

Conditions of detention

36. The source claims that, while Mr. Leyes was under house arrest, he and his family were verbally and psychologically abused by police officers. One time, officers knocked on the door to Mr. Leyes's house before dawn and made the entire family leave. Another time, they took pictures of his three young children in bathing suits. One of the prosecutors handling the case even asked the officers to report on the activities of Mr. Leyes's children.

37. Mr. Leyes has been named in three other statements of charges, and although pretrial arrangements have not been ordered in those cases, he could be detained in the future.

Category II

38. The source points out that detention is arbitrary under category II of the Working Group's categories of arbitrary detention when it is the result of the exercise of fundamental rights and freedoms protected by international law. The detention of Mr. Leyes, according to the source, is the result of his exercise of his rights to freedom of expression, freedom of association and political participation.

39. Mr. Leyes, the source contends, was placed in detention precisely because of his criticism of the Government. The criminal complaint against him in Mochilas I, which led to his initial arrest, was filed by the councilwoman from the governing party Movimiento al Socialismo on 3 April 2018, less than two weeks after he had met with members of the European Parliament (on 21 March), staff of the Office of the United Nations High Commissioner for Human Rights (on 22 March) and Spanish officials (on 24 March) in Brussels, Geneva and Madrid, respectively. In those meetings, Mr. Leyes discussed the state of democracy in the Plurinational State of Bolivia, human rights violations in the country and the Government's refusal to respect the results of the 2016 referendum. These meetings and the topics that were discussed were given ample media coverage.

40. The source submits Mr. Leyes is a well-known and outspoken critic of the Government and that in the weeks before the first criminal complaint was filed, he repeatedly spoke out against the Government and organized civic strikes in defence of the constitutional referendum. In addition, in the week of Mr. Leyes's arrest, an audio recording was released, and on the recording a MAS official and another man could allegedly be heard stating that the then President was determined to get rid of and destroy Mr. Leyes for his criticism during the meetings in Europe on the 2016 referendum.

41. In the source's view, the connection between the detention of Mr. Leyes and his criticism of the Government is demonstrated by one of the pretrial supervision arrangements imposed on him: namely, between 23 November 2018 and 22 March 2019, he was prohibited from making written or oral statements about government authorities,

attending protests or speaking about the legal proceedings he was a party to. The Government, the source notes, is using false criminal charges in a bid to silence Mr. Leyes. The source alleges that Mr. Leyes's right to freedom of expression under article 19 (2) of the Covenant is being violated.

42. Mr. Leyes was detained, the source also alleges, for being an active member of an opposition party, Movimiento Demócrata Social, which he co-founded and currently helps lead. Since he was elected mayor, several national government officials have attempted to bring more than a dozen unsubstantiated criminal charges against him. In addition, the then President made disparaging and politicized comments about Mr. Leyes and his fellow party members.

43. According to the source, several other factors make it clear that the goal is to prevent Mr. Leyes from taking part in the conduct of public affairs – namely, (a) the Vice-President explicitly stated on a news channel that Mr. Leyes, in view of the charges against him, should have resigned; (b) immediately after Mr. Leyes was arrested, three MAS councillors asked the Municipal Council to replace the mayor, even though he had not been convicted; (c) the pretrial supervision arrangements were intended to remove him from office: in Mochilas I, the Court prohibited him from entering any municipal office or contacting any municipal employee, which prevented him from fulfilling his duties as mayor and led the Municipal Council to replace him with an interim mayor. While these arrangements were in place, the Anti-Corruption Court explicitly stated that Mr. Leyes “may do any job but that of mayor”. The Court held that the alleged risk of obstruction that led it to order those arrangements would persist until a sentence was served, meaning that Mr. Leyes would not be able to carry out his official duties as mayor; and (d) shortly before Mr. Leyes was arrested, an audio recording that apparently revealed a political plot to get rid of him was released.

44. The source alleges that the detention and prosecution of Mr. Leyes are part of a broader pattern of government persecution of critical politicians and opponents. Concern has reportedly been expressed about the increasing number of legal proceedings against members of the political opposition and former public officials. The source notes, for example, that there are 40 cases open against the mayor of La Paz and 30 against the former prefect of El Beni Department. In addition, there are cases against two former Presidents, the governor of Santa Cruz Department, the governor of La Paz Department, the mayor of El Alto, the mayor of Tarija and the leader of the opposition party Unidad Nacional.

45. The detention of Mr. Leyes, according to the source, is a violation of his rights to freedom of association and to take part in the conduct of public affairs under articles 22 (1) and 25 of the Covenant and therefore falls under category II of the Working Group's categories of arbitrary detention.

Category III

46. The source contends that numerous procedural norms established under both domestic and international law have been violated during the trial and that the detention of Mr. Leyes is therefore arbitrary under category III.

Alternatives to detention

47. In the source's view, the requirements for placing Mr. Leyes in pretrial detention have not been met. Under article 233 (1) of the Code of Criminal Procedure, sufficient evidence of guilt is required for pretrial detention. However, the prosecution has not presented any physical or direct evidence linking Mr. Leyes to the crimes that he is accused of. The evidence presented so far is: (a) the authorization of the bidding processes; (b) the signing of the two contracts; and (c) oral statements by the co-defendants. The evidence referred to in both item (a) and item (b) fails to show that any law was broken or that Mr. Leyes was aware of the alleged irregularities in the bidding processes or had ordered any bid rigging. As mayor, he signed more than a thousand contracts a year in connection with calls for bids, relying on municipal employees to carry out due diligence. As for item (c), the source submits that a few oral statements by the co-defendants, who allegedly have a reason to lie and make accusations, are not sufficient evidence of guilt. In addition, some of the statements have been contradictory.

48. Since it was impossible to prove that Mr. Leyes knew about the irregularities in the bidding processes or that he was directly involved, the idea of strict liability was put forward. The Government, the source claims, insists that Mr. Leyes is criminally liable for any irregularity in the bidding process committed by anyone, even if he was unaware of it and wholly uninvolved. This insistence is incompatible with some of the crimes that Mr. Leyes has been accused of, for which an element of intent or awareness is explicitly required. In addition, exclusive responsibility refers to the designation of an authority, not to criminal responsibility. In fact, the Municipal Comptroller's Office began an independent audit of the 2016–2017 bidding process before the Mochilas criminal complaints had been filed; on 19 March 2019, on the strength of this audit, the Municipal Council found that Mr. Leyes was not criminally responsible.

49. The source notes that the reasons advanced for placing Mr. Leyes in pretrial detention are inconsistent with domestic and international law. Under article 233 (2) of the Code of Criminal Procedure, pretrial detention is admissible only if there is sufficient evidence that the accused person will flee or obstruct the investigation; no such evidence was presented at the hearing.

50. According to the source, Mr. Leyes is being held under pretrial detention orders. The original detention order was issued on 21 April 2018. After two appeal decisions reversing parts of that order, the Anti-Corruption Court issued a new detention order on 22 March 2019. This order was issued because it was found that Mr. Leyes could wield direct influence on the persons involved in the proceedings, including experts or other witnesses. That finding was based solely on his position as mayor – that is, the Court assumed that, as mayor, he would convince municipal employees to give false testimony or refuse to cooperate with the investigation. That reasoning, which in no way stemmed from an assessment of a particular situation, would justify placing any mayor, or even any government employee in a position of authority, in pretrial detention.

51. The detention order in the case Mochilas II was issued on 29 November 2018. It was stated in the order that pretrial detention was warranted because Mr. Leyes posed a flight risk and because he could exert control over the conduct of the investigation. The decision that he posed a flight risk was based on previous criminal activity – that is, on the pending charges in the case Mochilas I and other alleged criminal activities, for which charges have not been brought. The courts that have subsequently upheld this decision have also referred to other unsubstantiated charges that were brought after 29 November. According to the source, it is unreasonable and illogical to assume that previous accusations of criminal activity would cause someone to take the risk of absconding. Under international law, the source claims, previous criminal activity or recidivism cannot serve as a primary basis for pretrial detention, and even in situations where it can be taken into account, neither police records nor any documentary evidence other than a final judgment should be taken as proof of recidivism. In any event, the source also claims, none of Mr. Leyes's previous activities has resulted in criminal convictions, and he should therefore not have been designated as a flight risk. On 22 March 2019, in fact, the Anti-Corruption Court itself ruled that the charges pending against Mr. Leyes and the other conduct with which he was not charged did not constitute prior criminal activity and could therefore not be used to justify a pretrial detention order.

52. The source notes that the Court's conclusion that there was a risk of Mr. Leyes's influencing the investigation was based on a co-defendant's statements. The co-defendant allegedly claimed that, after the criminal complaint in Mochilas I was filed, two municipal employees approached him and berated him. The Court did not explain in its detention order how that incident constituted influence or how it related to Mr. Leyes. Moreover, it is not clear that the incident actually occurred, as the Court itself acknowledged. The co-defendant apparently also claimed that, on several occasions, municipal human resources personnel sat down next to him and threatened him; that behaviour, however, was not related to Mr. Leyes. In the source's view, hearsay from a co-defendant who has reasons to lie to protect himself is hardly evidence sufficient to justify pretrial detention.

53. The source therefore contends that Mr. Leyes's right to be released while awaiting trial, subject to guarantees, is being violated, in breach of article 9 (3) of the Covenant.

Presumption of innocence

54. The source notes that, on 7 May 2018, the Vice-President stated in a televised interview that Mr. Leyes was involved in corruption. He asserted that Mr. Leyes's attitude towards the proceedings showed his "relative complicity" and referred to him as a person involved in stealing from children and corruption. Similarly, on 4 September 2018, a leading newspaper published an interview in which the then President claimed that Mr. Leyes was a thief. These statements, the source submits, are a violation of the presumption of innocence.

55. The grounds for pretrial detention listed by the Anti-Corruption Court in the case *Mochilas II* also amount, in the source's view, to a violation of the right to be presumed innocent. As mentioned above, in its detention order of 29 November 2018, the Court found, *inter alia*, that Mr. Leyes, because of previous criminal activity – the charges pending against him and other alleged criminal activity for which charges have not been brought – was a flight risk. The Court thus presumed that Mr. Leyes was guilty of this previous criminal activity, even though he has not yet been tried or convicted. On 22 March 2019, the Court held that the pending charges and the other conduct for which charges had not been brought could not be used to prove previous criminal activity or come to a determination of flight risk.

56. In addition, the source claims that Mr. Leyes has been given a *de facto* suspension from office by the Government. The Municipal Council has appointed an interim mayor, even though the Constitutional Court has held that the temporary suspension of a mayor following a criminal complaint is unconstitutional, as it is a violation of the right to be presumed innocent and punishment without trial.

57. The source therefore contends that Mr. Leyes's right to be presumed innocent, under article 14 (2) of the Covenant, has been violated.

Response from the Government

58. On 1 July 2019, the Working Group transmitted the information contained in the communication sent by the source to the Government and requested it to provide, by 30 August, detailed information on Mr. Leyes's case that would explain the legal and factual grounds for his detention. The Working Group finds it regrettable that the Government neither requested an extension nor responded to the communication by the deadline.

Discussion

59. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

60. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the allegations made by the source.

61. Since its adoption of Deliberation 01 in 1993, the Working Group has stated that it may decide, on a case-by-case basis, whether house arrest has an arbitrary character.¹ Since then, house arrest has been compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave. For the Working Group, house arrest can be a form of deprivation of liberty.²

Category I

62. The Working Group was surprised by the information that, although on 23 November 2018, the Second Criminal Division ordered Mr. Leyes released from house

¹ Deliberation 01 on house arrest (E/CN.4/1993/24, para. 20).

² United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37). See also opinion No. 77/2017.

arrest, the police officers watching over him refused to release him until 28 November, five days after the court order was issued. In addition, on the following day, after having resumed his official duties, Mr. Leyes was again deprived of his liberty.

63. The Working Group is therefore of the view that there was no legal basis for the detention of Mr. Leyes for those five days (23–28 November 2018) and that it was arbitrary under category I.

Category II

64. The Working Group emphasizes that everyone has the right to freedom of expression, which includes the right to impart information and ideas of all kinds, whether orally or in any other form. In addition, the Working Group reiterates that the exercise of this right may be subject to restrictions that are expressly provided for by law and are necessary to ensure respect for the rights or reputation of others, or for the protection of national security or of public order, health or morals.³

65. The Working Group shares the view of the Human Rights Committee that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the cornerstone of a free and democratic society.⁴ Both freedoms are the basis for the effective exercise of a wide range of human rights, such as the freedoms of assembly, association and political participation, as set forth in articles 20 and 21 of the Universal Declaration of Human Rights and articles 21, 22 and 25 of the Covenant.⁵

66. In the view of the Working Group, the importance of freedom of opinion is such that no Government may infringe other human rights on the basis of a person's actual or perceived opinions, whether of a political, scientific, historical, moral, religious or any other nature. Consequently, criminalizing the expression of an opinion is incompatible with the Universal Declaration of Human Rights and the Covenant. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment, for reasons of the opinions he or she may hold, therefore constitutes a violation of the Covenant.⁶

67. The Working Group was informed that Mr. Leyes, a lawyer, was the host of a televised political analysis programme, a candidate for governor of Cochabamba Department, a founder of the political party Movimiento Demócrata Social and mayor of the city of Cochabamba for a five-year term.

68. In addition, Mr. Leyes has clearly been critical of the national Government and the party Movimiento al Socialismo. He has often condemned attacks against fellow members of his party and other leaders, of whom he is one, describing those attacks as a component of the increasing political persecution of the opposition by government or ruling party officials in the country's media and prosecutorial offices.

69. The Working Group received credible information that a councilwoman from the party Movimiento al Socialismo and the Deputy Minister for Transparency and Combating Corruption filed criminal charges against Mr. Leyes, accusing him of having participated in various irregular processes for the procurement of backpacks and other school supplies.

70. The Working Group has been informed that on 23 November 2018, Mr. Leyes went to Station Complex North for a hearing on pretrial supervision arrangements and that the judge presiding over the hearing ruled that he was a flight risk and a menace to society, since he was capable of mobilizing unruly crowds of supporters. The judge also ruled that there was a risk that Mr. Leyes would obstruct the investigation – specifically, that he could persuade the persons involved, including experts and other witnesses, to give false testimony or not to cooperate with the investigation. In addition, he stated that Mr. Leyes, as mayor, could wield influence over the municipal employees involved in the case and that this risk would persist until the sentence was enforced. Mr. Leyes, according to the judge, could also destroy or alter evidence. As a result, the judge ordered him to be placed under

³ Opinion No. 58/2017, para. 42.

⁴ General comment No. 34 (2011) on freedoms of opinion and expression, para. 2.

⁵ Ibid., para. 4.

⁶ Ibid., para. 9.

house arrest with a police guard and to post bail and prohibited him from talking with any municipal employee.

71. For the Working Group, house arrest can be a form of deprivation of liberty. House arrest is a kind of detention when it is a restriction on personal liberty and freedom of movement in which a person is confined to a place from which he or she cannot come and go freely.⁷

72. The Working Group received information from the source in which there are persuasive claims that the detention of Mr. Leyes is a direct result of his frank criticism of the Government and that the first criminal complaint was filed less than two weeks after he met with Members of the European Parliament, OHCHR staff members and officials from the Spanish Government. The discussions at those meetings covered the situation in the Plurinational State of Bolivia, the state of its democracy, human rights violations and the Government's refusal to respect the results of the 2016 referendum, in which the citizens of the country voted against a fourth presidential term for the President at the time.

73. The claim that Mr. Leyes was detained while awaiting trial in order to restrict his rights to freedom of expression and to participation in the conduct of public affairs was bolstered by the Working Group's finding, based on the information submitted to it, which was not contested by the Government, that one of the pretrial supervision orders (on 23 November 2018 and 22 March 2019) involved prohibiting him from making written or oral statements about government authorities, attending protests or speaking about the legality of the ongoing judicial proceedings. Similarly, after these bans were lifted, he was prevented from holding a press conference on his case. The Working Group did not receive information demonstrating that these measures were lawful, legitimate, necessary and proportionate.

74. The Working Group has also confirmed that the pretrial arrangements for the supervision of Mr. Leyes have prevented him from fulfilling his official duties as mayor, thereby leading to the appointment by the Municipal Council of an interim replacement.

75. The Working Group wishes to emphasize that it did not receive any information indicating that Mr. Leyes had been convicted of a crime and given a sentence involving a ban on holding public office – mayor, in this case. Mr. Leyes lodged an appeal against the decision to order the pretrial supervision arrangements, arguing that, since they prevented him from acting as a mayor, they violated his right to take part in the conduct of public affairs.

76. It seems clear to the Working Group that one of the aims of the supervision arrangements was, through various executive and judicial authorities, to interfere with Mr. Leyes's rights to participate in politics and the conduct of public affairs by preventing him from acting as mayor. Under the pretrial supervision arrangements, he was prohibited from entering any municipal office or contacting any municipal employee, a prohibition that prevented him from fulfilling his duties as mayor and led the Municipal Council to replace him with an interim mayor. Similarly, another court explicitly stated that Mr. Leyes "may do any job but that of mayor".⁸

77. The Working Group was convinced that the prosecution of Mr. Leyes is part of a broader pattern of persecution of political leaders and opponents critical of the Government. The Working Group has received alarming reports of the growing number of legal proceedings against members of the political opposition and former public officials.⁹

78. The Working Group is therefore of the view that Mr. Leyes was deprived of his liberty for the purpose of pressuring him to stop freely expressing his opinions and restricting his rights – enshrined in articles 18, 19 and 21 of the Universal Declaration of Human Rights and articles 19, 22 (1) and 25 of the Covenant – to freedom of association and participation in the conduct of public affairs, a purpose that means that the deprivation of liberty to which he has been subjected falls within category II of the Working Group's categories of arbitrary deprivation of liberty.

⁷ E/CN.4/1993/24.

⁸ See opinion No. 33/2015, para. 84.

⁹ See para. 44.

Category III

79. In the light of the findings in relation to category II, under which it was concluded that the detention resulted from the exercise of the rights to freedom of thought, expression, association and participation in governance, the Working Group found that the pretrial detention and judicial proceedings were disproportionate and unjustified. As the proceedings are under way, however, supervision arrangements have been ordered, and as any prison sentence handed down may be for several years or interfere with multiple rights, the Working Group, in view of the seriousness and credibility of the source's allegations and the lack of response from the Government, will consider whether the proceedings have been conducted with respect for the fundamental rules of a fair, independent and impartial trial.

80. Against this backdrop, the Working Group wishes to stress that under customary international law, everyone has the right not to be arbitrarily deprived of his or her liberty¹⁰ and that persons accused of a criminal offence are entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of any criminal charge against them.¹¹ It also points out that in accordance with the applicable international law, persons charged with a penal offence have the right to be presumed innocent and to a public trial at which they have all the guarantees necessary for their defence.¹²

81. The right of all persons charged with a criminal offence to be presumed innocent is recognized in article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. This right imposes a number of obligations on all State institutions to treat persons accused of a criminal offence as innocent until they have been found guilty beyond any reasonable doubt. In the view of the Working Group, as well as that of the Human Rights Committee, this right carries an obligation for all public authorities, including the executive branch, to avoid prejudging the outcome of a trial – to refrain, in other words, from making public statements affirming the guilt of the accused.¹³

82. The Working Group has determined that statements publicly condemning the accused person before a sentence has been passed violate the presumption of innocence and constitute undue interference that undermines the independence and impartiality of the court.¹⁴

83. The Inter-American Court of Human Rights has stated:

The right to the presumption of innocence requires that the State should not informally condemn a person or pass judgment on him or her before society, thereby contributing to the formation of public opinion, as long as he or she has not been proved guilty in accordance with the law. This right can therefore be violated not only by the judges conducting the trial but also by other public authorities, meaning that the latter must be discreet and cautious when making public statements about criminal proceedings before the person has been tried and sentenced.¹⁵

84. The Working Group has often stated that the public statements of high-ranking officials violate the right to presumption of innocence if, in such statements, persons are declared guilty of an offence for which they have not yet been tried, thereby leading the

¹⁰ Universal Declaration of Human Rights, art. 9. See also A/HRC/22/44, paras. 37 to 75 (deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law).

¹¹ Universal Declaration of Human Rights, art. 10.

¹² *Ibid.*, art. 11.

¹³ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30. See also *Kozulina v. Belarus* (CCPR/C/112/D/1773/2008), para. 9.8.

¹⁴ Opinions No. 90/2017, No. 76/2018 and No. 89/2018.

¹⁵ *Pollo Rivera et al. v. Peru*, judgment of 21 October 2016, para. 177. See also *Tibi v. Ecuador*, judgment of 7 September 2004, para. 182, and *J. v. Peru*, judgment of 27 November 2013, paras. 244–47. In similar terms, see European Court of Human Rights, *Allenet de Ribemont v. France*, para. 41, *Daktaras v. Lithuania*, para. 42, *Petkov v. Bulgaria*, para. 91, *Peša v. Croatia*, para. 149, *Gutsanovi v. Bulgaria*, paras. 194–98, *Konstas v. Greece*, paras. 43 and 45, *Butkevičius v. Lithuania*, para. 53, *Khuzhin v. Russia*, para. 96, and *Ismoilov and Others v. Russia*, para. 161.

public to believe them guilty and prejudging the assessment of the facts by the competent judicial authority.¹⁶

85. In this case, the Working Group was made aware of the release, in the week of Mr. Leyes's arrest, of an audio recording in which an official from the governing party and another man could allegedly be heard stating that the then President was determined to get rid of Mr. Leyes for having been critical of the disregard for the results of the 2016 referendum at meetings in Europe. According to one of these men, Mr. Leyes was going to be destroyed.

86. The Working Group also received convincing information, which was not contested by the Government, that the Vice-President had stated in a televised interview that Mr. Leyes's attitude towards the proceedings showed his "relative complicity", that he should have resigned when he was arrested, that his party had protected him by saying that he was a victim of political persecution when he was really guilty of theft and that no one should defend a person involved in corruption.

87. Similarly, the Working Group received information, which the Government decided not to contest, on the allegations made publicly by the then President, who, in a newspaper interview published on 4 September 2018, pronounced Mr. Leyes guilty in the following terms: "The Cochabamba mayor's office was the cash box for the Movimiento Demócrata Social. It's a complicated case. If the Movimiento Demócrata Social takes power, all [the Plurinational State of] Bolivia will become a cash box for the right, for the right-wing party. Fortunately, it fell apart." He also said: "Leyes steals, but he doesn't get anything done."¹⁷

88. In the light of the statements prematurely attributing guilt to Mr. Leyes, which could influence the courts, the Working Group has been persuaded that Mr. Leyes's right to be presumed innocent has been violated, in breach of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

89. The Working Group wishes to emphasize that the right to be heard by a competent, independent and impartial tribunal is a basic condition for the protection of other rights that are not derogable under the Covenant and, therefore, that "deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times".¹⁸ It also points out that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is an absolute right that is not subject to any exception.¹⁹ The Basic Principles on the Independence of the Judiciary state that the term of office of judges should be secured by law,²⁰ that they should have guaranteed tenure for an established period²¹ and that the promotion of judges should be based on objective factors, in particular ability, integrity and experience.²²

90. The Working Group was persuaded that the judicial proceedings were not conducted in an impartial and independent manner and that the executive authorities interfered improperly to ensure that the supervision arrangements imposed on Mr. Leyes remained in place and that he was therefore unable to perform his duties as mayor.

91. The Working Group has noted that, on 8 June 2018, as Mr. Leyes was being heard in connection with the possible imposition of pretrial supervision arrangements, the Anti-Corruption Court combined the cases Mochilas I and Mochilas II into a single case, as the charges in the two cases and most of the persons accused were, in the Court's view, identical. The Public Prosecution Service and the Ministry of Justice appealed the decision to join the two cases, and the Prosecution Service also began a criminal investigation of the judge for alleged misconduct in joining the cases. The Public Prosecution Service ordered her to make a statement at exactly the time of the rescheduled hearing. As a result, the

¹⁶ See opinions No. 6/2019 and No. 12/2019.

¹⁷ Pablo Ortiz, "Evo acusa a Demócratas de usar la Alcaldía de la Lajta como su 'caja'", *El Deber*, 4 September 2018. Available at www.eldeber.com.bo/bolivia/Evo-acusa-a-Democratas-de-usar-la-Alcaldia-de-la-Lajta-como-su-caja--20180904-0003.html.

¹⁸ General comment No. 32 (2007), para. 6.

¹⁹ *Ibid.*, para. 19.

²⁰ Principle 11.

²¹ Principle 12.

²² Principle 13.

hearing was postponed indefinitely. The Working Group is aware that the judge responded to the summons from the Public Prosecution Service and defended the lawfulness of her decision and that two days later the Prosecution Service issued a warrant for her arrest and had it executed.

92. The Working Group received information that the local Magistrates' Association strongly condemned the Government's actions, calling them an attack on judicial independence, and expressed its deep concern about the criminal proceedings begun against the judge for the decision she made. Although the judge was released, she was also temporarily suspended. When the suspension was lifted and she was presiding over the case again, she attempted, to no avail, to recuse herself. In the end, she was impeached.

93. The Working Group is therefore of the view that the detention of Mr. Leyes took place notwithstanding his right to be presumed innocent and to be tried by an independent and impartial tribunal, without undue interference by the executive authorities, in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights and 9 and 14 of the Covenant. It is thus arbitrary under category III of the Working Group's categories of arbitrary deprivation of liberty.

94. In view of the allegations of violations of the right to freedom of expression and attempts to undermine judicial independence, the Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the independence of judges and lawyers.

Disposition

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

The deprivation of liberty of José María Leyes Justiniano, being in contravention of articles 9, 10, 11, 18, 19 and 21 of the Universal Declaration of Human Rights and articles 9, 14, 19, 22 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

96. The Working Group requests the Government of the Plurinational State of Bolivia to take the steps necessary to remedy the situation of Mr. Leyes without delay and bring it into conformity with relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

97. The Working Group is of the view that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Leyes immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

99. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the independence of judges and lawyers.

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

Follow-up procedure

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

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Plurinational State of Bolivia with its international obligations in line with the present opinion;

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

102. 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.

103. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

104. 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.²³

[Adopted on 19 November 2019]

²³ See Human Rights Council resolution 42/22, para. 3.