Opinion No. 10/2009 (Bolivarian Republic of Venezuela)

Communication addressed to the Government on 28 May 2009

Concerning Mr. Eligio Cedeño

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group regrets that the Government did not provide the information solicited, although it was requested by a letter dated 28 May 2009 and a note verbale dated 8 August 2009.

3. (Same text as paragraph 1 of Opinion No. 17/2008.)

4. According to the source, Mr. Eligio Cedeño, born on 1 December 1964 in the State of Miranda, Venezuelan citizen, resident of Urbanización Ávila, Florida, Caracas, banker by occupation, former vice-president for finance of Banco Canarias of Venezuela, president of Bolívar Banco, was arrested on 8 February 2007 at the headquarters of the Intelligence and Prevención Services (DISIP) Directorate by officials of that organization, who showed no arrest warrant.

5. It is stated that Mr. Cedeño appeared voluntarily in that agency, after being informed that agents of the police directorate in question planned to arrest him. On the following day, the Caracas Metropolitan Area Criminal Judicial Circuit Court of the First Instance with Control Functions No. 3, headed by Judge Veneci Blanco García, issued the detention order (File No. 8845-06).

6. Mr. Cedeño has been detained in the El Helicoide facilities of DISIP since 8 February 2007.

7. It is reported that Mr. Cedeño is regarded by the authorities as a political figure opposing the regime. Of very humble origin, to the point that, according to the source, he

shared clothes and books with its brother, Mr. Cedeño managed to complete his studies successfully and to make a career as a financial expert. In 1997, he created the CEDEL Foundation with a view to combating the poverty endemic in Venezuela's disadvantaged districts, emphasizing hard work and personal effort. It is stated that the Foundation has assisted 27 schools and 40 health centres, provided monthly financial support to more than 1,000 families and made substantial contributions to "TeleCorazón", the main fund-raising television programme.

8. Mr. Cedeño was arrested without any previous formal accusation for the offence on which the arrest was based, namely misappropriation of funds, an infraction provided for and punishable under article 432 of the General Act on Banks and Other Financial Institutions. According to the source, that measure violated Mr. Cedeño's right to defence and therefore affected the proceedings as a whole, particularly the right to due process of law.

9. As a result, in violation of 8 of article 125 (8) of the Code of Criminal Procedure (COPP), Mr. Cedeño was prevented from requesting in advance the court to declare the arrest inadmissible.

10. Moreover, according to the source, the two years and three months during which Mr. Cedeño has been deprived of liberty constitute a violation of his right to presumption of innocence. In that long period, no criminal liability was established. Moreover, the detention of this person is not based on any procedural risk because there is sufficient evidence that there is no danger that he might flee. The Constitution and the Code of Criminal Procedure of the Bolivarian Republic of Venezuela require public prosecutors and judges who establish such specific dangers to demand or to order detention. In the case under consideration, however, Mr. Cedeño has repeatedly shown his intention not to flee but to face the judicial proceedings concerned. Although he had sufficient funds and means to leave the country or go into hiding, he decided to appear voluntarily at the police offices in order to clarify his situation and appear in court. In so doing, he was detained without a previously issued arrest warrant.

11. The preceding assertion has been corroborated by the Prosecutor General of the Republic, Dr. Luisa Ortega Díaz, who stated that, in her opinion, deprivation of liberty is inappropriate where the accused has voluntarily submitted to the proceedings.

12. It has also been impossible to show specifically that Mr. Cedeño may resort to action intended to obstruct the establishment of the truth during the proceedings.

13. What should have therefore been ordered is not this person's detention but merely his appearance in court. Police custody in this case is thus arbitrary and presumably indicates the political will to mete out a criminal punishment not preceded by a trial. Mr. Cedeño should not have been placed in detention because the risk that he might flee or his intention to obstruct the establishment of the truth have never been demonstrated. His detention for more than two years and three months compounds the abusive character of the measure. Moreover, the source reports that Mr. Cedeño's property was illegally confiscated after his arrest.

14. It is reported that, in February 2003, in the face of a serious foreign currency shortage, the Government imposed a strict exchange control system. The Central Bank of Venezuela established the official exchange rate at Venezuelan Bolivar (VEB) 1,600 to US$1. Dollars were exclusively sold by the Foreign Exchange Administration Commission (CADIVI), an official organization created to that purpose. In June 2003, the Microstar Consortium, C.A., Venezuela's main distribution enterprise for computers, requested dollars from CADIVI through the Banco Canarias in order to clear a substantial lot of imported computers through customs. Hundreds of millions of dollars worth of computers have been sold by Microstar in the country. Banco Canarias accepted and managed

Microstar's request for the provision of foreign currency by CADIVI, which approved the request. Subsequently, the Customs Administration of Venezuela stated that the computers were not in its warehouses.

15. The Public Prosecutor's Office accused Mr. Cedeño of having provided Microstar with VEF 43,368,496 in order to acquire from CADIVI US$27,105,310 at a preferential rate, on the basis of earlier operations considered to be fictitious. Mr. Cedeño was accused of having taken advantage of his status as Banco Canarias manager and having caused damage to the institution to which he offered his services. CADIVI was never investigated.

16. Mr. Cedeño's trial was characterized by misconduct on the part of the Public Prosecutor's Office and by judicial abuses. The Public Prosecutor's Office was unable to prove its accusations during the oral hearing. On the contrary, it was demonstrated that the financial operations had not been fictitious but actual; that Mr. Cedeño did not have any relation with the companies with which the financial operations investigated were conducted; and that Banco Canarias suffered no prejudice. Mr. Cedeño was also accused of complicity in the offences of smuggling through simulated import and exchange fraud. The Public Prosecutor's Office was unable to present any evidence substantiating these offences.

17. Under article 244 of COPP, coercive measures in criminal matters may not exceed two years. An extension may be granted only where the excessive duration of the proceedings is attributable to the accused or the defence counsel. In the present case, the delay has always stemmed from the State, in particular the public prosecutors and the Supreme Court.

18. Once the evidence was adduced, the defence discredited the public prosecutor's accusations. Once the date for expression of opinions, a stage preceding the formulation of the judgement, had been set, the public prosecutor's office challenged, after the time limit and in an illegal manner, the judge hearing the case. The motion was appealed and the challenge was declared inadmissible. Immediately afterwards, the Criminal Appellate Division of the Supreme Court demanded the file, invoking a forgotten request, transmitted eight months earlier, for cognizance by a superior court of a matter pending before an inferior court. The formulation of a judgement was thereby brought to a standstill.

19. Although, under article 244 of COPP, detention may not be ordered where it seems disproportionate to the offence, the circumstances of its commission and the likely penalty, public prosecutor Lisette Rodríguez Peñaranda requested the Criminal Appellate Division on 17 December 2008 the extension of the trial with the defendant in jail. This was the latest of a series of manoeuvres used by the public prosecutor's office to delay the course of legal proceedings and the formulation of a judgement with a view to keeping Mr. Cedeño in a condition of criminal punishment without his having been found guilty. As some of such stalling tactics, the source mentions the following moves:

(a) Halting of the proceedings as a result of vacation taken by members of the Prosecutor General's Office in August and December 2007 and 2008;

(b) Slowing down of the proceedings through days of screening of the members of the jury;

(c) Failure of members of the Prosecutor General's Office to participate in four consecutive crucial court hearings, obviously and solely in order to slow down the proceedings;

(d) Challenging of five judges in the trial stage;

(e) Absence of the public prosecutors from the concluding stage.

20. The source points out that, although article 335 of COPP stipulates a ten-day time limit for the suspension of the oral hearing, the proceedings have been halted for ten months, while the Criminal Appellate Division failed to hand down a ruling that it was obliged to give within 30 days.

21. Moreover, in bringing charges for misappropriation of funds the Public Prosecutor's Office committed serious irregularities which compelled the Criminal Appellate Division of the Supreme Court to invalidate, on 4 May 2009 (record No. 73), the accusation for such misappropriation and for later acts stemming from or dependent on that alleged embezzlement. Accordingly, that body upheld the removal to a superior court but ordered keeping Mr. Cedeño in judicial preventive detention, without taking into account the two years and three months that he has spent in the jail of the police headquarters without having been found guilty.

22. According to that procedural decision, the oral hearing is back to square one and the Public Prosecutor's Office must formulate against Mr. Cedeño, within 45 days, new charges which this time should comply with the law.

23. The charges for misappropriation of funds, brought against Mr. Cedeño, were based on a preliminary investigation, in which his right to substantive defence was restricted. On 16 March 2007, the Court with Control Functions No. 3 issued a procedural decision prohibiting Mr. Cedeño from going to the Public Prosecutor's Office in order to find out in person the content of documents used in the proceedings, in blatant violation of article 49 (1) of the Constitution and articles 12 and 125 (7) of COPP. The accused was thereby prevented from learning the content of the investigation to which he was subjected and of the related judicial documents; and, therefore, from fully exercising his right to substantive defence. The preliminary investigation, on which criminal charges are based, was therefore tainted by serious constitutional violations.

24. The Public Prosecutor's Office also infringed Mr. Cedeño's right to defence by not indicating in the accusation the grounds on which the nature of the alleged offences had been established. At no time did the public prosecutor's office proceed with matching, as required, the acts described with the legal provisions whose implementation it requested. The defence was faced with mere riddles and suppositions.

25. The prosecution does not specify what irregular conduct Mr. Cedeño is blamed for; does not establish what operations benefited Microstar illegally; and does not explain why there was an illegal gain. Not a single question, whether serious or superficial, is asked regarding these operations. The Public Prosecutor's Office is content with generalities and with a tacit, not explicit, accusation, thereby seriously preventing any effective defence.

26. During the proceedings, the public prosecutors have limited themselves to stating that the operations referred to were irregular, without ever specifying in what the supposed irregularity consisted.

27. Furthermore, in providing various pieces of evidence, the Public Prosecutor's Office failed to show, as was its functional role to do, what fact it tried to establish through them or what their usefulness was with respect to the proceedings. In clear violation of article 326 (5) of COPP, the right of the defence to counter such evidence was restricted.

28. Not only Mr. Cedeño was refused access to the file and his substantive defence was thereby prevented, but also the right to defence was violated by:

(a) Essential procedural defects of the accusation in relation to the offence;

(b) The lack of a clear, precise and detailed statement of the factual basis of the offence;

(c) The lack of a reasoned and accurate statement of the relevance of the alleged acts to the offence;

(d) Illegal presentation of evidence used in the trial by the public prosecutor's office.

29. In these cases, the defence raised the objections provided for in article 28, paragraphs 4 (e) and 4 (i) of COPP. These objections were immediately overruled by the Court with Control Functions in the intermediate stage of the proceedings.

30. According to the source, the judge called upon on three occasions to rule on the measure of deprivation of liberty has been the same judge who:

(a) Ruled on the admissibility of the evidence provided by the defence;

(b) Issued a procedural decision rejecting almost all of that evidence.

As a result, the accused lacked proper defence during the trial.

31. Contrary to the provisions of the international instruments, in Venezuela the judge who rules on the deprivation of liberty during the pre-trial stage conducts also the intermediate stage, rules on the admissibility of the charges and issues the binding decision to proceed with a trial. The same judge who orders the detention passes judgement, later, on the probability of a sentence. That judge is therefore biased. In the case at hand, the Judge of the Court with Control Functions No. 3:

(a) Ordered the detention;

(b) Against the objections raised, decided that the detention order was legal;

(c) In the intermediate stage, overruled various applications by the defence for a step in the proceedings to be struck out on grounds of nullity;

(d) Rejected pleadings to the effect that acts ascribed to the defendant did not constitute an offence;

(e) Ordered the commencement of the trial;

(f) Assessed for a third time the probability of a sentence as high;

(g) Confirmed the legality of all of her previous decisions.

32. Accordingly, in the case under consideration, the right of the accused to be judged by an impartial judge was violated.

33. The source adds that, out of political considerations, Mr. Cedeño was later charged with further offences which, however, had not been mentioned as grounds for his detention. Thus, he was accused of complicity in the commission of the offence of smuggling through simulated import. This accusation, formulated by the public prosecutor's office, fails to establish what action, ascribed to Mr. Cedeño, allows that office to bring such a charge against him. It is only said that "he supported the representative of Microstar and provided him with the resources to commit the offence". But the manner of supporting or the means provided are not specified. The public prosecutor's office, therefore, also violated article 326 (2) of COPP, stipulating a prerequisite and *sine qua non* condition for the proper exercise of the right to defence. There is not even any distinct and specific statement of the elements supposed to establish the individual offences.

34. This serious confusion on the part of the public prosecutor's office left the accused completely defenceless by preventing the presentation of evidence to invalidate or weaken the charges, thereby gravely impairing the conduct of his defence and substantially undermining due process of law.

35. In the accusation, the Public Prosecutor's Office did not indicate the grounds on which the nature of the alleged offences had been established. Not having previously established the facts, the Public Prosecutor's Office failed to match them with the legal provisions whose implementation it requested. In providing various pieces of evidence, the Public Prosecutor's Office failed to show what fact it tried to establish through them or what their usefulness was with respect to the proceedings.

36. In the course of more than two years and three months, the Public Prosecutor's Office not only gravely violated Mr. Cedeño's right to defence, but also serious infringed the law by presenting search reports as documentary evidence.

37. A further serious issue denounced by the source is that the Public Prosecutor's Office has sought to initiate baseless criminal proceedings with a view to an arbitrary sentence by maintaining that the offence of exchange fraud was perpetrated between August and October 2003, without taking into account that, under article 108 (5) of the Criminal Code, this offence is subject to a three-year prescription period. Consequently, criminal proceedings were precluded by ordinary prescription as early as August-October 2006. In April 2007, the Public Prosecutor's Office sought the reversal of a prescription already in effect according to explicit provisions of the law.

38. In sum, the proceedings against Mr. Cedeño present a series of serious irregularities and violations of the Constitution, the Criminal Code and the Code of Criminal Procedure and multiple precedents set by the Supreme Court of the Bolivarian Republic of Venezuela and of the international and Venezuelan rules of law.

39. Mr. Cedeño has also been the victim of a campaign of insults, slander and defamation by the media close to the Government authorities. Thus, on 23 March 2009, in a broadcast of the Venezuelan Television Corporation (Venezolana de Televisión) programme "Los papeles de Mandinga" ("The devil's papers"), Mr. Cedeño was described as "a thief, a crook who sponsored, brought about and carried out a swindle with an enterprise called Microstar, which obtained plenty of dollars from CADIVI to import electronic equipment that never entered Venezuela. These guys are used to squandering, living as they wish and getting and doing what they want. His lawyer is a traitor to the country, a criminal, a miserable character, a traitor who hates Venezuela and who, taking advantage of the fears and desperation of the scrounger Cedeño, is getting from him money, lots of dough, a heap".

40. The source concludes that Mr. Eligio Cedeño has been detained for more than two years and three months without a conclusive trial or judgement, for supposed offences of tax fraud and diversion of resources that the public prosecutors have so far, in the various stages of drawn-out proceedings, been unable to prove. According to the source, despite all of the constitutional and legal violations and procedural irregularities committed, there are no elements establishing Mr. Cedeño's guilt.

41. The jurist Yuri Lopez, who ruled in favour of Mr. Cedeño, was obliged to leave the country and request political asylum in the United States, after receiving serious threats by her superiors in the judiciary, to the effect that "her life would be destroyed", and after an attempted kidnapping of one of her children. In November 2008, former public prosecutor Hernando Contreras stated that the Public Prosecutor's Office had bribed witnesses to testify against Mr. Cedeño.

42. The source expresses concern that, in view of the impossibility of obtaining a judgement against Mr. Cedeño, he may fall victim to acts against his physical or mental integrity.

43. The source concludes that Mr. Eligio Cedeño has been arbitrarily deprived of his liberty for more than two years and three months through criminal proceedings vitiated by

grave irregularities and violations of the right to defence and to due process of law. His detention without a sentence since 8 February 2007 is contrary to the rules enshrined in the Universal Declaration of Human rights, the International Covenant on Civil and Political Rights, the Constitution (article 49 (1)), the Criminal Code (articles 37 and 108) and the Code of Criminal Procedure (articles 12, 28 (4) (e) and (i), 31, 250, 326 and 335).

44. The Working Group has on two occasions requested the Government for prompt and detailed information regarding these allegations but has not received any reply.

45. As stated in paragraph 3 above, according to the Working Group's methods of work, adopted in 1991 and approved by the former Commission on Human Rights and the current Human Rights Council, the Working Group may consider deprivation of liberty to be arbitrary in cases falling into one of three categories specified therein.

46. Category I must certainly be rejected because Mr. Cedeño's deprivation of liberty is based on a court order solicited by the public prosecutor's office, where that person appeared voluntarily on 8 February 2007, having been informed of the office's decision. The delay in the issue of the detention order is discussed below.

47. Category II must also be rejected, since the detention is based on the alleged commission of ordinary offences, not on the legitimate exercise of human rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or another related instrument. The source's communication, which has prompted this Opinion, suggests what right(s) exercised by Mr. Cedeño led to his detention. However, although stating that "Mr. Cedeño is regarded by the authorities as a political figure opposing the regime", the source does not claim that the deprivation of liberty has been motivated by that view. Moreover, although it is reported that the accused and his lawyer were insulted with offensive epithets, the insults and disparaging characterizations were expressed only in March 2009, namely more than two years after Mr. Cedeño was deprived of his liberty.

48. It remains to examine whether Category III applies, namely whether in this case "the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out 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". As the Working Group has maintained in earlier Opinions, "the Working Group has not been designed as a court of last resort and is not expected, in its Opinions, to evaluate the evidence presented in any legal action taken against a detainee in the investigation stage or, subsequently, in view of the final judgement. Such is not the Group's mandate and, moreover, that task would be impossible without a thorough examination of the file. An exception is called for where the judgement is based on a confession obtained by torture". The Group has added that "thus, in proceedings for an ordinary offence (not for an offence in which the act denounced consists in the exercise of one of the rights belonging to Category II of the rights considered by the Working Group), the Working Group is not competent to assess whether the indictment or the unappealable judgement fit the evidence in the file. The Working Group, however, would have such competence, if the Court had refused to admit evidence provided by the accused and the case involved a possible serious violation specified in Category III. In that event, the detention could be arbitrary".

49. Most of the allegations contained in the communication of the source refer to the nature of the acts considered as offences, to weaknesses of the evidence, and to the failure to admit an absolute defence. Consequently, the Working Group may not rule on the merits of the allegations.

50. According to the communication, the first irregularity in the proceedings has been the enforcement of the detention before the relevant order was issued by the competent

judicial authority. The beneficiary of the communication claims to have been arrested on 7 February 2007, while reportedly the order was issued on the following day. However, according to the Working Group, the International Covenant on Civil and Political Rights requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power" (art. 9 (3)). Accordingly, despite the infringement of the provision for an arrest warrant, required by the Venezuelan and all legislations, the placement of the detainee at the disposal of the court or competent judicial authority on the very day of the arrest may be considered as a violation of the rules of due process of law but not of "such gravity as to give the deprivation of liberty an arbitrary character".

51. Moreover, the communication alleges a violation of any person's right to be tried within a reasonable time or to be released. Under the afore-mentioned article 9 (3) of the Covenant, "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

52. The Working Group considers that infringements of these rules of due process of law constitute violations that do give to Mr. Cedeño's deprivation of liberty an arbitrary character because:

(a) The proceedings stalled for a long time as a result of inaction on the part of the Prosecutor General's Office, and the Government has failed to justify such delay, in violation of the provisions of article 14 of the International Covenant on Civil and Political Rights.

(b) The preventive custody has been extremely long, exceeding two years and six months, while the Venezuelan legislation (article 244 of the Code of Criminal Procedure) stipulates granting provisional release two years after the arrest. The denial of this right has been all the more unwarranted since Mr. Cedeño, upon being informed of the existence of a detention order (which had actually not yet been issued), went voluntarily to the competent Court and, finding it closed, appeared at the Directorate of the Intelligence and Prevention Services (DISIP). He was therefore not seeking to escape justice.

53. In light of the foregoing, the Working Group renders the following Opinion:

> The deprivation of liberty of Mr. Eligio Cedeño is arbitrary, violating articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, and falls into Category III of the criteria used in considering cases submitted to the Working Group.

54. Consequent upon the Opinion rendered, the Working Group requests the Government of the Bolivarian Republic of Venezuela to remedy the situation of Mr. Eligio Cedeño, in conformity with the provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, by granting provisional release up to the end of the trial and by moreover taking measures to ensure that subsequent proceedings against him should not suffer further undue delays.

Adopted on 1 September 2009