

No. 27/2011 (Bolivarian Republic of Venezuela)

Communication addressed to the Government on 14 June 2011

Concerning Mr. Marcos Michel Siervo Sabarsky

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which clarified and extended the Working Group's mandate by resolution 1997/50. The Human Rights Council approved the Working Group's mandate in its decision 2006/102 and extended it for a further three-year period in resolution 15/18 of 30 September 2010. In accordance with its methods of work, the Working Group transmitted the above communication to the Government.

2. The Working Group considers that deprivation of liberty is 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 the detainee) (category I);

(b) When the deprivation of liberty results from a judgement or sentence resulting 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 International Covenant on Civil and Political Rights (category II);

(c) When 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 (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of an administrative or judicial remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

3. The Working Group regrets the Government's failure to reply to the communication addressed to it. For this reason, the Working Group will adopt its Opinion on the basis of the source's submissions.

Submissions

Communication from the source

4. The source states that Mr. Marcos Michel Siervo Sabarsky, a married Venezuelan national who works as a manager, was the chairman of the *Venevalores* brokerage firm in Caracas. Mr. Sabarsky was arrested on 19 May 2010, without a prior court order, by police officers of the Organized Crime

Division of the Scientific, Criminal and Forensic Investigation Unit (CICPC) attached to the Ministry of People's Power for the Interior and Justice. The arrest took place during a raid on the head office of *Venevalores*.

5. The information received indicated that Mr. Sabarsky's arrest infringed the provisions of article 44 of the Venezuelan Constitution. Mr. Sabarsky was detained for 3 days without a court order. On 22 May 2010, he was brought before a provisional judge of the sixteenth court of first instance responsible for the criminal court circuit of the Caracas Metropolitan Area, in order that an oral hearing of the detainee might be held. At this hearing, the judge cancelled the warrant for Mr. Sabarsky's arrest on the grounds that it did not comply with the requirements set forth in the above-mentioned article 44 of the Constitution. The judge did not, however, order his immediate release, as he should have done, but remanded Mr. Sabarsky in custody.

6. The source claims that, in ordering pretrial detention, the judge apparently accepted the initial classification of the offences by the provisional prosecutors of the national Public Prosecution Service's Offices Nos. 23 and 71, who had full competence, with regard to the following offences: illegal procurement of foreign currency; fictitious stock market transactions, and criminal association. When they filed charges against Mr. Sabarsky, the provisional prosecutors dropped the charge of fictitious stock market transactions and replaced the charge of illegal procurement of foreign currency with one of illegal foreign currency transactions, an offence for which provision was made in the 2010 amendment of the Act on illegal foreign exchange transactions.

7. Mr. Sabarsky was therefore accused of two offences, namely illegal foreign currency transactions and criminal association, because, through *Venevalores*, he had engaged in stock market transactions that were perfectly legal when they were performed, because they were covered by an exception expressly laid down in the Act on illegal foreign exchange transactions (published in the *Gaceta Oficial* on 28 December 2007) which was in force at the time of the alleged acts. According to this Act, irrespective of its amount and even if it did not pass through the Central Bank of Venezuela, a bond transaction was not deemed to be an illegal exchange transaction.

8. The source draws attention to the fact that the new Act on illegal foreign exchange transactions, which is now in force, was published on 17 May 2010, two days before Mr. Sabarsky's arrest. It was only as from that date that the Central Bank of Venezuela was given exclusive competence to buy and sell foreign currency of any amount, including bond transactions. The source therefore makes it clear that a criminal law was applied to Mr. Sabarsky *ex post facto*.

9. The source contends that if there is no offence there can be no "criminal association", an offence defined in the Act on organized crime, published in the *Gaceta Oficial* on 27 September 2005. In order for there to be criminal association, at least three persons must have participated in an act or omission classified as an offence with a view to committing the offences defined in the above-mentioned Act. Mr. Sabarsky was not accused of offences under the latter Act, but of offences under the Act on illegal foreign exchange transactions. There was no criminal association.

10. The source holds that, at all times Mr. Sabarsky, as chairman of *Venevalores*, complied with the regulations governing the activities of brokerage firms. In accordance with the criminal law principle *nullum crimen nulla poena sine lege praevia* his arrest was not justified because there was no prior legislation to warrant it. None of this person's alleged conduct corresponds to the constitutive elements of an offence defined in Venezuelan legislation prior to the acts with which he is charged.

11. Mr. Sabarsky has been deprived of liberty and is being put on trial for an act which did not constitute an offence when it was committed. His pretrial detention is therefore devoid of any legal basis. The Public Prosecution Service has acted arbitrarily by retroactively applying the provisions of the new law to Mr. Sabarsky, that is to say it is charging him under a criminal law adopted after the acts of which he stands accused. His detention is manifestly arbitrary, in that it does not rest on any legal provision.

12. The source adds that Mr. Sabarsky's detention has damaged his health. He suffers from a heart complaint which cannot be treated properly in prison. For this reason, the supervising judge decided to transfer his place of imprisonment to his home, which was to be duly guarded by police officers of the Bolivarian National Intelligence Service (SEBIN) "for enforcement purposes and with a view to

ensuring the medical progress of the accused". This decision was, however, set aside without valid legal grounds by the Appeal Court at the request of the Public Prosecution Service.

13. On the day the supervising judge ordered Mr. Sabarsky's house arrest, instead of being driven home, he was taken to the premises of the Special Action Squad (*Grupo BAE*) of CICPC, where he has remained until now.

14. The transactions carried out by Mr. Sabarsky were perfectly legal when they were performed, since a legal text expressly exempted transactions of that nature from classification as illegal foreign exchange transactions. In this connection, the source refers to article 9 of the Act on illegal foreign exchange transactions, which was published in the *Gaceta Oficial* (Special Issue) No. 5867, on 28 December 2007 and which remained in force until 17 May 2010. This Act stipulates:

"The Central Bank of Venezuela shall have exclusive competence to buy and sell foreign currency of any amount through authorized foreign exchange dealers. Any person who contravenes this provision commits an illegal foreign exchange transaction and shall be fined twice the amount of the transactions, or its equivalent in bolivares. Any person who, in one or more transactions in the same calendar year and bypassing the Central Bank of Venezuela, buys, sells or in any way offers, disposes of, transfers or receives foreign currency in an amount of between 10,000 and 20,000 United States dollars, or its equivalent in another currency, shall be fined twice the amount of the transaction, or its equivalent in bolivares.

When, in the above circumstances, the transaction amounts to more than 20,000 United States dollars, or its equivalent in another currency, the penalty shall be imprisonment from 2 to 6 years and a fine equivalent in bolivares to twice the amount of the transaction.

This shall be without prejudice to the obligation to surrender or sell the foreign currency to the Central Bank of Venezuela, in accordance with the applicable legal rules.

Bond transactions shall be exempt from these provisions."

15. The transactions listed in the Public Prosecution Service's charges against Mr. Sabarsky, in his capacity as chairman of *Venevalores*, relate to bond transactions between 2009 and April 2010, a period when the above-mentioned legislation was fully in force. The source explains that the Act was subsequently amended to become the text published in the *Gaceta Oficial* (Special Issue) No. 5975, on 17 May 2010. This amendment stipulates:

"Article 9 shall be amended as follows:

Article 9

The Central Bank of Venezuela shall have exclusive competence to buy and sell foreign currency of any amount in cash or in bonds with the aim of obtaining foreign currency balances for itself or for its customers through the disposal thereof prior to the maturity date. Any person who contravenes this Act commits an illegal foreign exchange transaction and shall be fined twice the amount of the transaction, or its equivalent in bolivares.

Any person who, in one or more transactions in the same calendar year, and bypassing the Central Bank of Venezuela, buys, sells or in any way offers, disposes of, transfers or receives foreign currency in an amount of between 10,000 and 20,000 United States dollars, or its equivalent in another currency, shall be fined twice the amount of the operation, or its equivalent in bolivares.

When, in the above circumstances, the transaction amounts to more than 20,000 United States dollars, or its equivalent in another currency, the penalty shall be imprisonment from 2 to 6 years and a fine equivalent in bolivares to twice the amount of the transaction.

This shall be without prejudice to the obligation to surrender or sell the foreign currency to the Central Bank of Venezuela, in accordance with the applicable legal rules."

16. The source adds that Mr. Sabarsky's detention is consistent with a plan allegedly devised and executed by the government authorities and directed against brokerage firms, and which is prompted by the political aim of tightening its control over foreign exchange transactions and not by legal considerations.

17. Mr. Sabarsky was arrested without a previous court order. An attempt was subsequently made to validate his arrest by accusing him of committing acts which, when they took place, were not legally classified as offences.

18. The source points out that deprivation of liberty is exceptional and constitutes a measure of last resort in criminal proceedings. For this reason, if the purposes of criminal proceedings can be safeguarded by a less detrimental measure, the judge must order that measure. In this connection, the source cites article 250 of the Venezuelan Code of Criminal Procedure, which reads:

"Article 250. The supervising judge, at the request of the Public Prosecution Service, may order the pretrial detention of the accused, provided that the existence of the following has been proven:

1. A punishable act warranting a custodial sentence in respect of which criminal proceedings are not plainly time barred.

2. Substantiated evidence that the accused has been the perpetrator of, or participated in, the commission of a punishable act.

3. A reasonable presumption, having regard to the specific circumstances of the case, that the accused might abscond or obstruct efforts to establish the truth in respect of a specific measure of investigation.

[...]

In exceptional cases requiring immediate action, provided that the conditions laid down in this article are met, the supervising judge, at the request of the Public Prosecution Service, shall authorize the suspect's arrest by any suitable means."

19. In Mr. Sabarsky's case there is nothing to show that there is any danger of his absconding or perverting the course of justice. However, in breach of the principle that pretrial detention must not be considered the general rule, but an exceptional measure, the house arrest ordered by the supervisory judge for health reasons, was cancelled.

20. The source adds that all the criminal judges and prosecutors who have participated in these proceedings are provisional. In other words they can be appointed and removed at will and they enjoy no security of tenure whatsoever. This situation violates the right to a hearing by an independent and impartial tribunal established in article 14, paragraph 1, of the International Covenant on Civil and Political Rights and in the Basic Principles on the Independence of the Judiciary.

21. A further serious breach of due process lies in the fact that, in the case at hand, the principle of estoppel has not been respected. The Public Prosecution Service is still investigating Mr. Sabarsky's case, in other words the investigatory or preparatory phase is continuing after formal charges have been laid.

22. The source considers that Mr. Sabarsky's detention is contrary to domestic and international legislation and hence arbitrary. His arrest was not based on a prior court order. In this connection, the source draws attention to the fact that under article 49 and article 44, paragraph 1, of the Venezuelan Constitution, no person may be detained unless their detention has been previously ordered by a competent and impartial court. Mr. Sabarsky's detention is therefore illegal and arbitrary and contrary to the basic principles set forth in article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

23. However, although the court declared that his arrest warrant was invalid, since it did not comply with the requirements set out in article 44 of the Venezuelan Constitution, instead of ordering the detainee's release, it ordered his pretrial detention on the basis of acts which did not constitute an offence when they were performed.

24. The arbitrary nature of this person's detention was aggravated by the retroactive application of criminal law.

25. The source explains that it is impossible to find any legal basis for Mr. Sabarsky's detention. He is being held in pretrial detention for acts which, when they were committed, did not constitute an offence. The Act on illegal foreign exchange transactions is being applied to him retroactively in clear breach of his right of due process and of the recognized criminal law principle of *nulla poena sine lege praevia*.

26. The source further refers to the fact that Mr. Sabarsky has been charged with the offence of criminal association under the Act on organized crime. In this respect, it considers that the offence as charged does not correspond to the acts for which he is supposedly being prosecuted, inasmuch as the Act stipulates that the offence occurs when an act or omission is committed by three or more

persons associated for a period of time, with the intention of committing the offences defined in the Act. In Mr. Sabarsky's case, the acts of which he stands accused were defined in another piece of legislation, namely the Act on illegal foreign exchange transactions.

27. The source contends that the following constitute breaches of due process: the violation of the right to an independent and impartial tribunal, the violation of the principle of estoppel and failure to regard pretrial detention as an exceptional measure rather than a general rule.

28. The source concludes that Mr. Sabarsky's detention is arbitrary in that it is contrary to articles 7, 9, 10 and 11 of the Universal Declaration of Human Rights and to article 9, article 14, paragraphs 1 to 3 and article 26 of the International Covenant on Civil and Political Rights to which the Bolivarian Republic of Venezuela has been a party since 1977.

Government reply

29. In the absence of a government reply and since the time limit laid down in the revised methods of work (A/HRC/16/47, annex IV, para. 15) has expired, the Working Group considers that it may adopt an opinion.

Considerations of the Working Group

30. Mr. Marcos Michel Siervo Sabarsky, chairman of the brokerage firm *Venevalores*, located in Caracas, was deprived of his liberty on 19 May 2010, without a prior court order, by police officers of the Organized Crime Division of CICPC, which is attached to the Ministry of People's Power for the Interior and Justice. The arrest took place during a search of the firm. After he had been held in custody without a court order, on 22 May 2010 Mr. Sabarsky appeared for questioning before a provisional judge of the sixteenth court of first instance with investigative powers in the criminal court circuit of the Caracas Metropolitan Area. At the hearing, the judge cancelled the warrant for Mr. Sabarsky's arrest because it did not meet legal requirements (art. 44 of the Constitution), but instead of ordering his release, he remanded the accused in custody.

31. The failure to inform Mr. Sabarsky of the reasons for his detention at the time of his arrest or to inform him promptly of the charges against him constitute a violation of the rights under article 9, paragraph 2, of the International Covenant on Civil and Political Rights and of the requirements that an arrest warrant must be issued prior to an arrest and must be presented at the time of arrest and that the arrested person must be brought promptly before a judge or other officer authorized by law to exercise judicial power.

32. The judge before whom Mr. Sabarsky appeared considered that his detention infringed article 44 of the 1999 Venezuelan Constitution which stipulates, inter alia, that "No one may be arrested or detained except by virtue of a court order, unless he is caught in flagrante delicto." The Government's failure to reply makes it impossible to know whether the judge did not consider that Mr. Sabarsky had been caught in flagrante delicto. Nevertheless, the fact that he considered that article 44 had been flouted suggests that this was not a case where the accused had been caught in flagrante delicto.

33. Article 9, paragraph 1, of the Covenant, which stipulates that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law", was thus ignored. Since it was not until the third day of his detention, 22 May 2010, that Mr. Sabarsky was brought before a judge, the right of anyone arrested on a criminal charge to be "brought promptly before a judge or other person authorized to exercise judicial power" was violated at the same time. This right is also established in article 9 of the Covenant to which the Bolivarian Republic of Venezuela is a party.

34. Mr. Sabarsky has spent over a year in pretrial detention and he has still not been released. Article 9, paragraph 3, of the Covenant states that "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". There is no record of any previous behaviour to suggest that Mr. Sabarsky is likely to abscond or pervert the course of justice, dangers which, under Venezuelan legislation, might justify an exception to the right to pretrial release in accordance with article 250, paragraph 3, of the Code of Criminal Procedure. In addition, his lengthy pretrial detention, lasting for more than a year, infringes the principle and fundamental right of the presumption of innocence, established in article

11, paragraph 1, of the Universal Declaration of Human Rights and in article 9, paragraph 3 of the Covenant.

35. The source contends that "all the criminal judges and prosecutors who have participated in proceedings are provisional. In other words they can be appointed and removed at will and they enjoy no security of tenure whatsoever. This situation violates the right to a hearing by an independent and impartial tribunal established in article 14, paragraph 1, of the International Covenant on Civil and Political Rights and in the Basic Principles on the Independence of the Judiciary." The Working Group expressed a similar view in its report on its mission to Peru in 1998 (E/CN.4/1999/63/Add.2). In that report the Working Group considered that the situation of "provisional" judges and prosecutors was "serious" and it concurred with the Special Rapporteur on the independence of judges and lawyers that "the trial of persons ... by judges without security of tenure constitutes prima facie a violation of the right to be tried by an independent tribunal" (E/CN.4/1998/39/Add.1, para. 106).

36. The Working Group draws attention to the fact that the Basic Principles on the Independence of the Judiciary, which the General Assembly endorsed in resolutions 40/32 and 40/146, requires that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists". In this connection, the Working Group's above-mentioned report recommended that the Government should "re-establish tenure for judges and prosecutors, without discrimination for political or other reasons" and it added that "the powers of the National Council of the Judiciary should be restored immediately" (E/CN.4/1999/63/Add.2, para. 175).

37. With reference to the criminal nature of the acts ascribed to Mr. Sabarsky, the Working Group notes that until 17 May 2010, in other words until two days before his arrest, the buying and selling of foreign currency in an amount of less than 20,000 United States dollars, or its equivalent in other currencies, without the authorization of the Central Bank, was punishable only by a fine, or in the case of larger amounts by 2 to 6 years' imprisonment. Since 17 May 2010, the date of publication of the Act prohibiting various foreign exchange transactions, other previously lawful activities have become punishable. All the acts of which Mr. Sabarsky is accused took place before 17 May 2010.

38. The Government has not adduced any evidence showing that Mr. Sabarsky's transactions before 17 May 2010, which form the subject of the charges, exceeded the amount of 20,000 dollars or their equivalent in other currencies, or that he engaged in foreign currency transactions between 17 and 19 May 2010. In these circumstances, the principle of *nullum crimen sine lege, nulla poena sine lege* has been infringed. This is a cardinal principle of modern criminal law and is enshrined in both the Universal Declaration of Human Rights (art. 11, para. 1) and the International Covenant on Civil and Political Rights (art. 15).

Opinion of the Working Group

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

(a) The deprivation of liberty of Marcos Michel Siervo Sabarsky is arbitrary, in that it falls into Category III as set forth in the methods of work of the Working Group, inasmuch as it violates the human rights established in articles 3, 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and article 2, paragraph 3 and articles 9, 10, 14, 15 and 26 of the International Covenant of Civil and Political Rights;

(b) In accordance with the opinion rendered, the Working Group requests the relevant authorities of the Bolivarian Republic of Venezuela to order the immediate release of the accused, who may be asked to provide guarantees that he will appear for trial, or at any other stage of judicial proceedings, and, should the occasion arise, for execution of the judgement.

[Adopted on 30 August 2011]