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Human Rights Council Working Group on Arbitrary Detention

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No. 65/2011 (Bolivarian Republic of Venezuela)

Communication addressed to the Government on 31 August 2011

Concerning: Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas

The State has been a Party to the International Covenant on Civil and Political Rights since 10 May 1978.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010. The Working Group, in accordance with its methods of work, forwarded the aforementioned communication to the Government.
2. 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 persons are kept in detention after the completion of their sentence or despite an amnesty law applicable to them) (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 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, 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 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 background information provided by the source.

Submissions

Communication by the source

4. The source indicates that Hernán José Sifontes Tovar, a married Venezuelan national, who is an administrator by profession and was the Executive President of the brokerage firm Econoinvest Casa de Bolsa, C.A. (hereinafter Econoinvest); Ernesto Enrique Rangel Aguilera, a married Venezuelan national, who is also an administrator by profession and was the Deputy Director of Econoinvest; and Juan Carlos Carvallo Villegas, a married Venezuelan national, who was the Sales Director of Econoinvest, were arrested on 24 May 2010, without a warrant, by police officers of the National Organized Crime Division of the Scientific, Criminal and Forensic Investigation Unit (CICPC) attached to the Ministry of People's Power for Internal Relations and Justice. The police officers acted on the instructions of the prosecutors of the Public Prosecution Service who were present when the firm's premises were being searched by the police. The three aforementioned persons are currently deprived of their liberty and are being held in the facilities of the Military Intelligence Directorate.

5. According to information received, the police raided Econoinvest's premises on 24 May 2010 for the purpose of searching its offices and any annexes and seizing foreign exchange (dollars or other currencies) and documents that might provide evidence of illegal securities trading, as well as data stored on electronic media, electronic and physical (documentary) records of any potentially illegal foreign exchange transactions and any other forensic evidence relevant to criminal investigation No. F20NN-017-2010 conducted by National Public Prosecution Service Office No. 20, which had full competence.

6. Search warrant No. 015/10 was issued on 21 May 2010 by Santos Montero Tovar, the provisional judge in charge of the sixteenth court of first instance responsible for the criminal court circuit of the Metropolitan Area of Caracas and was valid for seven days.

7. The source reports that the public prosecutors of National Public Prosecution Service Offices Nos. 23 and 61, who had full competence, asked Judge Montero Tovar to issue a warrant to search Econoinvest's offices as a matter of the utmost urgency. Their request was prompted by a complaint filed by Mr. Tomás Sánchez, President of the National Securities Commission, on 14 May 2010. The Commission had been monitoring a number of brokerage firms that were thought to have been carrying out foreign currency transactions without having securities to back them. According to the information provided by the source, the written request establishing the grounds for the investigation was submitted on 22 May 2010, i.e. after the date on which the search warrant was issued (21 May).

8. The raid in question took place on 24 May 2010 at Econoinvest's head office and was carried out by officers of the National Organized Crime Division of CICPC in the

presence of provisional public prosecutors from National Public Prosecution Service Offices Nos. 20, 23 and 74, the Deputy Director of the Anti-Corruption Directorate of the Public Prosecution Service and the Director of Court Proceedings of the Public Prosecution Service, Alejandro Castillo. The report on the raid states that, on the instructions of the public prosecutors present, it was decided that the directors of Econoinvest should appear before the court of summary jurisdiction on the following day.

9. The three persons were arrested at Econoinvest's offices on 24 May 2010, after the raid had been carried out. Five days later, on 29 May 2010, their detention was sanctioned by the provisional judge, Mr. Montero Tovar.

10. The source highlights that the public prosecutors and police officers who took part in the raid neither had nor presented an arrest warrant, written order or court decision authorizing the arrest of these three persons. Nonetheless, the public prosecutors instructed the police officers to arrest them and to take them to the police station on suspicion of having committed two offences — illegal currency trading and criminal association — by trading in bonds through Econoinvest, allegedly without the Central Bank of Venezuela's involvement or supervision.

11. The three arrested persons were taken to the premises of the National Organized Crime Division of CICPC. The judicial authorities subsequently ordered that they be detained at the premises of the CICPC Special Operations Brigade (BAE), now known as the Rapid Response Brigade (BRI). Finally, they were taken to the facilities of the Military Intelligence Directorate, which is where they are currently being held.

12. The trading operations at the root of the deprivation of liberty and the criminal charges subsequently brought against these three persons involved securities known as TICC bonds (*Títulos de Interés y Capital Cubiertos*), which are issued by the Bolivarian Republic of Venezuela and denominated in United States dollars. All the transactions on which the criminal charges are based involved TICC bonds. The transactions in question were made at the end of 2007 by Econoinvest and other brokerage firms and were carried out with the authorization of the Central Bank of Venezuela and the National Securities Commission. Econoinvest had been audited by the National Securities Commission on numerous occasions in the past and the latter had never queried the legitimacy of its TICC bond transactions.

13. These transactions were fully protected by law at the time of their execution due to an express legal provision that explicitly excluded this type of transaction from being considered illegal foreign exchange transaction. The source refers to article 9 of the Act on Illegal Foreign Exchange Transactions published in *Gaceta Oficial* (Special Issue) No. 5867 of 28 December 2007. This legal text, which was in effect until 17 May 2010, establishes that:

“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 shall have committed an illegal foreign exchange transaction and shall be fined twice the amount of the transaction or its equivalent in bolívares. 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 bolívares.

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 bolívares 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 applicable legal rules.

Bond transactions shall be excluded from these provisions.”

14. The transactions at the origin of the charges brought by the Public Prosecution Service against the three aforementioned persons refer to bond transactions carried out on 23 January 2010 and 10 May 2010. On these dates, the legal provisions cited above were fully in force. The source explains that the law in question was subsequently amended to become the text published in *Gaceta Oficial* (Special Issue) No. 5975 of 17 May 2010, which reads as follows:

“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 provision shall have committed an illegal foreign exchange transaction and shall be fined twice the amount of the transaction or its equivalent in bolívares.

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 bolívares.

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 bolívares 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 applicable legal rules.”

15. In the source’s view, in addition to this legal basis, the legality of the transactions is confirmed by a memorandum sent by the Director-General of the Ministry of the Economy and Finance’s Legal Office to the National Office of Public Credit on 15 July 2010. In this memorandum it is expressly stated that TICC bonds may be traded on the secondary market both in United States dollars and in bolívares. The source adds that the Public Prosecution Service twisted the law so that it could deprive these three persons — and others — of their liberty and bring charges against them, by asserting that, although the TICC bonds were denominated in United States dollars, they could be purchased in bolívares only. The source emphasizes in this regard that neither the Central Bank of Venezuela nor the National Securities Commission made this qualification prior to the amendment of the Act on Illegal Foreign Exchange Transactions, that they did not at any time prohibit trading in TICC bonds in dollars and that they never stated that the bonds should be traded in bolívares only. Furthermore, month after month, all such transactions were reported to the National Securities Commission before the 15th of the following month, with a general balance sheet statement and indices attached.

16. The source recalls that the authorities started to intervene and initiate criminal proceedings against the directors of various financial institutions in 2009. The ambit of their interventions was subsequently extended to include any firm directly or indirectly associated with such financial institutions or their shareholders, and thus henceforth also included securities houses and brokerage firms. The source believes that in 2010 a situation of generalized persecution of directors of brokerage firms took hold, culminating in the State securities regulator taking action against many of these institutions and preventing them from fulfilling their institutional duties and responsibilities. The source believes that these actions were politically motivated and reports that the Government has presented the accused as criminals as if they had already been tried and convicted, with no regard whatsoever for the presumption of innocence principle.

17. Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas were arrested and held in police custody for five days, from 24 to 29 May, without a warrant. Only on their sixth day in custody was their detention as a precautionary measure sanctioned.

18. The source recalls that, in criminal proceedings, deprivation of liberty should be an exceptional measure of last resort only. For this reason, the courts should always favour other less detrimental measures provided that the aims of the legal process can still be safeguarded. In this connection, the source cites article 250 of the Code of Criminal Procedure of the Bolivarian Republic of Venezuela, which stipulates that:

“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 can be proven:

1. A punishable act warranting a custodial sentence in respect of which criminal proceedings are not clearly 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, upon examination of 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, and 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. It was never demonstrated in the case of Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas that they were a flight risk or that they might obstruct the course of justice.

20. On 11 April 2011, a preliminary hearing was held in the thirteenth court of first instance responsible for the criminal court circuit of the Metropolitan Area of Caracas before the temporary judge, Robinson Vásquez. The judge ordered the public oral proceedings to be initiated in the case of the three accused, after dismissing applications for annulment, exceptions and revocation of the detention order. The source explains that the judge substituted the charge of criminal association, which is an offence established in the Organized Crime Act, with one of conspiracy, which is an offence established in the Criminal Code. The charge of illegal foreign currency trading, as defined in the revised Act on Illegal Foreign Exchange Transactions, was maintained.

21. Furthermore, quoting from the court record of the oral proceedings of the defendants' case that took place in the sixteenth court of first instance on 29 May 2010, the source notes that:

“The defendants’ arrest was occasioned by the raid on Econoinvest’s offices. However, there is no record of a court order for their arrest having been issued by any of the methods established in the Code of Criminal Procedure nor, moreover, anything to suggest that they were caught in flagrante delicto since, as both the Public Prosecution Service and the defence counsel have noted, the acts under investigation are not acts that have only just been committed. This court is therefore of the opinion that the actions of the criminal investigation police breached constitutional limits and that this arrest should be declared null and void for failing to satisfy the requirements established in article 44 of the Constitution.”

22. Although the court was of the view that, in this case, the defendants had not been caught in flagrante delicto and that the police had overstepped constitutional limits, instead of ordering the detainees’ release, the court ordered that they be held in pretrial detention on the basis of actions that did not constitute offences at the time they were performed.

23. Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas are being held in pretrial detention for actions that, at the time of their execution, did not constitute offences. The Act on Illegal Foreign Exchange Transactions is being applied to these persons retroactively, in clear violation of their right to due process of law and the recognized principle of criminal law of *nulla poena sine lege*.

24. The source also makes reference to the charge of criminal association brought against these three persons, which is an offence defined in the Organized Crime Act. The source believes that this charge is inconsistent with the actions for which prosecution is sought since this offence is defined under the Organized Crime Act as an act or omission committed by three or more persons, associated for a period of time with the intention of committing the offences defined in the Act. The offences with which Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas are charged are apparently defined in another law, the Act on Illegal Foreign Exchange Transactions. In this connection, the thirteenth judge of the criminal court of first instance responsible for the judicial district of the Metropolitan Area of Caracas changed the offence from “criminal association” to “conspiracy”, an offence which is defined and punished under articles 286 et seq. of the Criminal Code and entails the association of two or more persons for the purpose of committing criminal acts.

25. According to the source, a number of defendants are being tried for different acts. This creates undue complications that could affect their right to be tried without undue delay. The source concludes that these factors have repercussions for the level of expeditiousness, attention to detail and investigation that the court can apply to the different cases.

26. The source concludes that the detention of Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas is arbitrary.

Response of the Government

27. There being no response from the Government of the Bolivarian Republic of Venezuela, the Working Group must render its Opinion on the alleged deprivation of freedom in the absence thereof. The Working Group points out that the Government did not request, within the deadline established for responding, an extension of that deadline.

Considerations of the Working Group

28. The essential information of the communication is that Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas were detained on 24 May 2010 by police officers attached to the Ministry of People’s Power for Internal Relations and Justice, upon the instructions of the Public Prosecution Service which was

conducting a search of the premises of the firm Econoinvest, where Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas held executive positions. The purpose of the raid was to seize foreign exchange holdings and documents that might provide evidence of involvement in supposedly illegal foreign currency trading. The raid was part of a nationwide investigation. The search warrant had been issued by a competent judge on 21 May 2010 as part of the investigation of a complaint made by the National Securities Commission against heads of brokerage firms for carrying out transactions without having the securities to back them. The source objects that the complaint that provided the grounds for the investigation was submitted on 22 May 2010, i.e. one day after the date on which the search warrant was issued (21 May). The prosecutors present in the raid said that the detainees were caught in flagrante delicto and they were thus brought before the competent judge the next day. In the view of the Working Group, it is clear that in this case the requirements of criminal doctrine and Venezuelan law for determining flagrancy were not satisfied.

29. Since the Government has not contradicted the information provided by the source, the Working Group considers it to have been established that the prosecutors and police officers present neither had nor presented an arrest warrant. It was the prosecutors present who gave oral instructions for the three persons to be detained.

30. The detainees were charged with illegal currency trading and criminal association, offences allegedly committed by trading in bonds without the Central Bank of Venezuela's involvement or supervision. The second charge was subsequently changed, however, to conspiracy. The difference between the two offences is that conspiracy is a type of illicit association that does not require there to be an intention to break a specific law; it is therefore easier to build a case against someone for conspiracy.

31. The Working Group understands that the operations that were the subject of complaint involved TICC bonds, which Econoinvest, like nearly all authorized brokerage firms, had been trading since 2007 and that those operations were in compliance with the law. The activities of brokerage firms were always closely supervised by the authorities of the Bolivarian Republic of Venezuela. The Act on Illegal Foreign Exchange Transactions of 2007 clearly states that "Bond transactions shall be excluded [from the aforementioned restrictions]".

32. The alleged offences consist of bond transactions carried out between 23 January 2010 and 10 May 2010, in other words, prior to the amendment to the Act published in the *Gaceta Oficial* of 17 May 2010; i.e. at a time when those transactions were legal. From the moment the amendment was introduced, Econoinvest ceased to carry out the transactions that had become illegal.

33. Moreover, the legality of the transactions carried out prior to the amendment of the law was expressly acknowledged in a memorandum sent by the Director-General of the Legal Office of the Ministry of the Economy and Finance on 15 July 2010, which recognized the legality of trading carried out on the secondary market both in United States dollars and in bolívares.

34. It is the view of the Working Group that the deprivation of the liberty of the persons referred to in this Opinion violates the right that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed", set forth in article 11, paragraph 2, of the Universal Declaration of Human Rights and article 15 of the International Covenant on Civil and Political Rights.

35. Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas were arrested and held in police custody for five days without a warrant. Only on their sixth day in custody was their detention as a precautionary measure sanctioned. Moreover, the

violations of the right to be presumed innocent and the right to be tried without undue delay and in a reasonable time (Universal Declaration of Human Rights, article 11, paragraph 1, and International Covenant on Civil and Political Rights, article 14, paragraph 2) are grounds for determining that their detention was arbitrary under category III of the criteria used in the Working Group's methods of work.

36. The fact that the detention of the three aforementioned persons on 24 May 2010 was made without a warrant from an authority with the competence to issue one and that the charges refer to acts committed before they were considered offences by law shows that there was no legal basis for the detention, which was therefore arbitrary under category I of the aforementioned criteria.

37. In this Opinion, the Working Group complements and reiterates what it stated in its Opinion No. 27/2011 and its Opinion No. 28/2011, on the detention in the Bolivarian Republic of Venezuela of Mr. Marcos Michel Siervo Sabarsky and Mr. Miguel Eduardo Osío Zamora (A/HRC/WGAD/2011/27 and A/HRC/WGAD/2011/28, respectively), which were declared arbitrary for reasons similar to those set forth in this Opinion.

Opinion of the Working Group

38. In light of the foregoing, the Working Group, considering that the violations of the international norms relating to the right to a fair trial are of sufficient gravity as to give the deprivation of liberty an arbitrary character, renders the following Opinion:

(a) The deprivation of liberty of **Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera** and **Juan Carlos Carvallo Villegas** violates the human rights set forth 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, 12, 14, 15 and 26 of the International Covenant on Civil and Political Rights, and is consequently arbitrary according to the category I and category III criteria used in the Working Group's methods of work;

(b) Consequent upon the Opinion rendered, the Working Group requests that the Government of the Bolivarian Republic of Venezuela grant Mr. Sifontes Tovar, Mr. Rangel Aguilera and Mr. Carvallo Villegas immediate release, although they may remain subject to guarantees to appear for trial and, should the occasion arise, for execution of judgement; and that it award them compensation for the damage caused by the arbitrariness to which this Opinion refers;

(c) The Government of the Bolivarian Republic of Venezuela is invited to cooperate with the Working Group by providing timely information on the allegations presented.

[Adopted on 23 November 2011]