



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3003/2017*, **, ***

<i>Communication submitted by:</i>	Allan Brewer-Carías (represented by Pedro Nikken, Claudio Grossman, Douglas Cassel, Héctor Faúndez, Juan Méndez and Carlos Ayala)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Bolivarian Republic of Venezuela
<i>Date of communication:</i>	21 December 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 7 July 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	18 October 2021
<i>Subject matter:</i>	Violation of due process guarantees and discrimination on political grounds
<i>Procedural issues:</i>	Res judicata and exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair trial; right to legal assistance; right to a defence; right to be heard; equality before the courts and tribunals; freedom of expression; unlawful attacks on honour or reputation; deprivation of liberty
<i>Articles of the Covenant:</i>	2 (3), 9, 12, 14 (1), (2) and (3) (b) and (e), 17, 19 and 26
<i>Article of the Optional Protocol:</i>	5 (2) (a) and (b)

1.1 The author of the communication is Allan Brewer-Carías, a national of the Bolivarian Republic of Venezuela born on 13 November 1939. He claims that the State party has

* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** A joint opinion by Committee members Arif Bulkan and Hélène Tigroudja (partially dissenting) and individual opinions by Committee members Vasilka Sancin (partially dissenting) and José Manuel Santos Pais (partially dissenting) are annexed to the present Views.



violated his rights under articles 2 (3), 9, 12, 14 (1), (2) and (3) (b) and (e), 17, 19 and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 10 August 1978. The author is represented by counsel.

1.2 On 24 April 2018, the Special Rapporteurs on new communications and interim measures decided, on behalf of the Committee, not to accede to the State party's request to examine the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 In the early hours of 12 April 2002, the State party's military leaders announced on television that they had asked the then President, Hugo Chávez, to resign and that he had agreed. That same afternoon, Pedro Carmona Estanga, an opposition leader, announced the dissolution of the existing Government and the establishment, by decree, of a "democratic transitional government". The author claims that, in the early hours of that morning, he received a telephone call from Mr. Carmona urgently requesting his presence to give his legal opinion as a lawyer. He adds that he was taken to the military complex known as Fort Tiuna, where Mr. Carmona was in meetings that the author did not attend. At the complex, the author was shown the text of a draft decree, which later became known as the Carmona Decree, that was due to be announced that afternoon. He did not know who had drafted the text, and he disagreed with its content. The author claims that he was unable to meet with Mr. Carmona at Fort Tiuna. Consequently, at midday that same day, he went to Miraflores Palace, where he spent only a few minutes and was again unable to meet with Mr. Carmona. The author claims that he did not speak to Mr. Carmona until that afternoon, by telephone, at which time he gave him his legal opinion, namely his outright rejection of the decree in question. That conversation took place before the televised announcement of the decree, which the author watched at home. The author explains that, in his capacity as a lawyer specializing in public law and a recognized expert on the Constitution, he was asked to give his legal opinion on a text that had already been drafted. The fact that he was consulted on the document and rejected its content demonstrates that he had not drafted it. In the days that followed, the media speculated about the author's presence at Fort Tiuna and claimed that he had been the mastermind behind the Carmona Decree and had drafted it himself. The author immediately and publicly denied those claims.¹

2.2 In July 2002, a Special Parliamentary Commission set up by the National Assembly to investigate the events of April 2002 issued a report without having summoned or heard the author. According to the report, the Commission found that it was "proven" that the author had participated in the "planning and execution of the coup d'état"² and that he had "jointly drafted the decree of self-proclamation and dissolution of the Government".³

2.3 On 27 January 2005, Provisional Prosecutor No. 6 from the Public Prosecutor's Office, Luisa Ortega Díaz, who had full national jurisdiction, charged the author with the offence of "conspiracy to alter the Constitution through violent means" for his role in the "discussion, preparation, drafting and presentation" of the Carmona Decree. The starting point and basis for the charge was a private complaint filed on 22 May 2002 by Ángel Bellorín, a lawyer and army colonel, who stated that it was a "well-known and repeatedly stated fact" that the author had participated in the drafting of the decree "as demonstrated by the newspaper articles". The author explains that the newspaper articles presented as evidence are based on nothing more than interpretations, rumours and journalists' opinions and that he immediately denied them.

2.4 The author explains that, as part of the proceedings relating to the events under investigation, Josefina Gómez Sosa, a temporary provisional judge at Supervisory Court of First Instance No. 25 of the Caracas Criminal Circuit, issued an order banning several individuals who were under investigation for their alleged involvement in the events of April 2002 from leaving the country. The Court of Appeal overturned the order on the ground that it was not accompanied by a reasoned argument. On 3 February 2005, the Judicial

¹ The author cites a series of newspaper articles dated 17 April 2002 and two books written by him.

² Report of the Special Parliamentary Commission set up to investigate the events of April 2002, Caracas, July 2002, p. 276.

³ Ibid.

Commission of the Supreme Court suspended the two judges who voted to overturn the order, as well as Ms. Gómez Sosa, the provisional judge who had issued the order allegedly without a reasoned argument. The author explains that Judge Gómez Sosa was replaced by another temporary judge, Manuel Bognanno. On one occasion, Judge Bognanno ordered Provisional Prosecutor No. 6 to provide the author's lawyers with the copies of the case file they had requested, and on another occasion, to provide them with the case file itself. The Prosecutor denied the request, and Judge Bognanno sent a letter to the Senior Prosecutor informing him of the Prosecutor's irregular conduct. Two days later, Judge Bognanno was suspended from his post.

2.5 The author states that on 29 September 2005, he lawfully left the State party to fulfil academic commitments at Columbia University in New York. He adds that since then, he has remained outside the country as an exile to protect his freedom and his physical and moral integrity. On 4 October 2005, the author's lawyers filed a petition for annulment with the relevant court following the publication, the previous month, of a book by the Attorney General, who was already in office. In the book, the Attorney General claimed that the author, together with other individuals, had drafted the Carmona Decree.⁴ In the petition for annulment, the author alleged that "the investigation in the present case has been conducted by a body whose highest authority is completely biased," in violation of his rights to a defence, the presumption of innocence and due process. On 21 October 2005, Provisional Prosecutor No. 6 filed criminal charges against the author and ordered him to be placed in pretrial detention.⁵ On 26 October 2005, the author's lawyers filed an early motion requesting that the order to place him in pretrial detention be declared inadmissible. On 8 November 2005, the author's lawyers filed another petition for annulment of the entire proceedings. The author alleges that, to date, the petitions for annulment and the request for a declaration of inadmissibility remain unresolved.

2.6 The author explains that on 10 May 2006, he informed Supervisory Court No. 25 that he had accepted the position of Adjunct Professor at Columbia University. He claims that he shared the information to avoid disrupting the proceedings for the other defendants. However, on 15 June 2006, the Provisional Supervisory Judge issued an indictment against the author and ordered him to be placed in pretrial detention. As he was outside the territory of the State party, the author could not be deprived of his liberty. The author adds that, on 29 August 2006, the State party's Ambassador to Costa Rica sent identical letters to the Inter-American Institute of Human Rights and to the Government of Costa Rica regarding an invitation the author had received to give a lecture in the country. In the letter, the Ambassador expressed her bewilderment at the invitation and requested that the author be arrested, asserting that he "was the material and intellectual author of the [Carmona] Decree and gave instructions on revisions to the drafting thereof", and that he "was and is aware of all the offences he was committing and that is why he fled the country".

2.7 The author explains that on 1 February 2007, Decree No. 5790 was published. The Decree, which was described as having "the rank, value and force of a Special Amnesty Act", extinguished all criminal proceedings relating to the events surrounding the drafting and signing of the Carmona Decree. On 11 January 2008, the author's lawyer requested the Supervisory Judge to dismiss the case on the basis of the Special Amnesty Act. On 25 January 2008, the judge rejected that request, but did dismiss the case against the author's co-defendants, who, according to the author, were in the same procedural situation as him. His appeal was rejected on 3 April 2008 by Chamber No. 5 of the Court of Appeal of the Criminal Judicial Circuit of Caracas Metropolitan Area.

⁴ Isaías Rodríguez, *Abril comienza en Octubre*, Caracas, Grabados Nacionales, 2005, p. 195.

⁵ The Venezuelan criminal process has three well-defined phases: preparatory, intermediate and trial. The indictment brings the preparatory phase to an end and signals the beginning of the intermediate phase, in which the Supervisory Judge reviews whether the indictment complies with the minimum requirements of form and substance, and triggers the preliminary hearing, at which the judge decides whether to acquit the accused or begin the trial phase.

The complaint

3.1 The author claims to be a victim of violations of his rights under articles 2 (3), 9, 12, 14 (1), (2) and (3) (b) and (e), 17, 19 and 26 of the Covenant. He stresses that the above-mentioned violations have taken place in the context of a political crackdown on the judiciary and the Public Prosecutor's Office that has been widely documented by various international human rights protection bodies.⁶

3.2 With regard to the requirement of non-duplication of proceedings, the author explains that the Inter-American Court of Human Rights ruled on his case on 26 May 2014, declaring it inadmissible without considering the merits.⁷ He claims that, as the case is not being examined by any other international procedure, the communication is admissible under article 5 (2) (a) of the Optional Protocol.

3.3 As to the requirement of exhaustion of domestic remedies, the author explains that the only suitable remedy available was ineffective and that the other available remedies were neither suitable nor effective. He asserts that his communication is therefore admissible under article 5 (2) (b) of the Optional Protocol. The author explains that he appealed against each of the violations of his right to due process in a timely manner, but the result was unfavourable on each occasion. He stresses that despite the lack of judicial independence, he made a reasonable effort to exhaust all available remedies, including filing a petition for the outright annulment of all proceedings, on which the courts never ruled.⁸ The author explains that, without responding to his petition for annulment, the Supervisory Judge ordered his detention. Since then, the State party has made the exercise of any procedural activity or remedy conditional on his placement in pretrial detention. He explains that appeals and cassation remedies are not only unavailable in the absence of judicial acts against which such appeals would be filed, but that they are not suitable for the outcome sought, namely the cessation of the violations committed in the investigation phase that affect the subsequent phases of the proceedings. He adds that the State party cannot force him, as a politically persecuted individual, to exhaust any available remedies, since that would entail him submitting to the persecution to which he is subjected, including arbitrary detention and further aggravation at the hands of those against whom he is making the complaint. The author emphasizes that any remedy that forces the victim to submit to unlawful and arbitrary detention is not an effective remedy and is not an obligation that can be reasonably placed on the victim.

3.4 With regard to the right to be heard by an independent and impartial tribunal, as enshrined in article 14 (1) of the Covenant, the author claims that in 1999, the Government began to interfere in the judiciary to such an extent that it has been able to appoint judges of any rank. He adds that between 60 and 80 per cent of judges are provisional, an issue that also affects prosecutors. He stresses that since 2005, the Constitutional Chamber of the Supreme Court has not found admissible any constitutional *amparo* case brought against the President, nor has it annulled any act of government. The author adds that the Inter-American Court of Human Rights has condemned the State party on three occasions for failing to guarantee the stability of the judiciary.⁹ He emphasizes that the Supreme Court itself has said that provisional judges are appointed in a discretionary manner and can be removed from office in the same manner.¹⁰

⁶ The author cites documents issued by the Committee, the Inter-American Commission on Human Rights, the Special Rapporteur on the independence of judges and lawyers, the Human Rights Council, the Committee against Torture and the United Nations High Commissioner for Human Rights.

⁷ Inter-American Court of Human Rights, *Case of Brewer Carías v. Venezuela*, Judgment of 26 May 2014 (preliminary objections).

⁸ The author lists the eight remedies that he has pursued throughout the process and claims that none of them were effective in remedying the violations.

⁹ The author cites, inter alia, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of 5 August 2008 (preliminary objections, merits, reparations and costs), para. 253.

¹⁰ The author cites, inter alia, Judgment No. 2414 of the Constitutional Chamber of the Supreme Court, 20 December 2007.

3.5 The author explains that the lack of independence of the State party's judiciary has had a concrete impact on his case, since all the judges and prosecutors involved in the criminal proceedings relating to him are temporary or provisional officials who have been appointed or replaced in a discretionary manner for political reasons. This is demonstrated even more clearly by the case of the two judges who were suspended for ruling against the prosecutors (see para. 2.4 above). The author explains that the provisional judges' lack of stability, coupled with the manifestly political bias of Provisional Public Prosecutor No. 6 at the time, has deprived him of any possibility of being tried by an independent and impartial judge.

3.6 With regard to the violation of his right to be presumed innocent under article 14 (2) of the Covenant, the author explains that the Committee itself has warned that public authorities should abstain from making public statements affirming the guilt of the accused.¹¹ He emphasizes that in *Cedeño v. Bolivarian Republic of Venezuela*, the Committee concluded that the direct reference to the victim's case made by the President of the State party at the time, and before a judgment had been handed down, violated the principle of the presumption of innocence.¹² Similarly, in another case, the Committee concluded that public statements made by high-ranking law enforcement officials portraying the author as guilty and which received extensive media coverage demonstrated that the authorities failed to exercise the restraint that article 14 (2) required of them.¹³ The author explains that, in his case, the actions of, inter alia, the President,¹⁴ the Special Parliamentary Commission (see para. 2.2 above), the Attorney General (see para. 2.5 above) and certain Ambassadors of the State party (see para. 2.6 above) not only constituted a violation of his right of defence, but also contributed to the construction of a politically motivated presumption of his guilt.

3.7 The author also claims that his right to adequate time and facilities for the preparation of his defence, which is protected by article 14 (3) (b) of the Covenant, was violated.¹⁵ In his case, he claims that throughout the proceedings he was unable to obtain a copy of any of the related documentation. His lawyers were allowed only to transcribe by hand the various elements of the file, which amounted to thousands of pages in 27 sections. The author further explains that video statements by journalists were used for his indictment; he claims that he repeatedly requested access to the videos but was shown the content of only two of them. In some instances, he was told that the recordings could not be found, or that because of the large number of defendants it was difficult to find a suitable opportunity, or that the office was busy with other matters. The author explains that, based on the videos he did view, it was clear that the texts transcribed in the indictment were incorrect and did not correspond to what was said. In view of this, the author requested a full transcript of all the videos in the case file that were to be considered as evidence in support of the charges; that request was also rejected. The author explains that there was no reasonable justification for obstructing his access to copies of the files and evidence, and that the obstacles he had faced had made it impossible for him to prepare his defence.

3.8 The author explains that he was never permitted to be present for the examination of any of the prosecution witnesses or to cross-examine them, in violation of article 14 (3) (e) of the Covenant. In certain cases only, he was allowed to submit examination questions, which had to be passed on to Provisional Prosecutor No. 6, who handled the questions alone

¹¹ The author cites the Committee's general comment No. 32 (2007), para. 30.

¹² *Cedeño v. Bolivarian Republic of Venezuela* (CCPR/C/106/D/1940/2010).

¹³ *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997 and CCPR/C/69/D/770/1997/Corr.1), para. 8.3.

¹⁴ The author quotes the President at the time, Hugo Chávez, who, on 2 June 2002, in his television programme "Aló Presidente", said: "This gives us all an idea of the degree of responsibility the coup plotters harbour in their souls; they manipulated a large number of people and now some have left the country. Justice must reach them wherever they are. We saw Dr. Olavarría's explanation, that on the 10th Brewer Carías went looking for him, with Daniel Romero, and who is this Daniel Romero whom we saw reading the decree of the coup? They already had the decree ready beforehand. They already knew what was coming the next day, a coup put together in a laboratory, the march, with the support of the media." Available at <http://www.todochavez.gob.ve/todochavez/4100-alo-presidente-n-106>.

¹⁵ The author cites the Committee's general comment No. 32 (2007), para. 33.

without any oversight whatsoever. The author explains that requests made by his lawyers to call witnesses or introduce relevant evidence were arbitrarily rejected.

3.9 With regard to his right to an effective remedy under article 2 (3) of the Covenant, read in conjunction with article 14 (1), the author explains that he repeatedly applied to the Provisional Supervisory Judge and the Court of Appeal for the restoration of his rights. However, on each occasion his requests were rejected on the grounds that he must not interfere with the work of the Provisional Prosecutor, who conducts the investigation in an “autonomous” manner, or that it was not the right time to make such requests, or he simply received no response, as in the case of his petitions for annulment. The author explains that this conduct left him in a situation of defencelessness against the arbitrary actions of the Provisional Public Prosecutor, in violation of his right to an effective remedy.

3.10 The author claims that the political persecution of him, together with the order to place him in pretrial detention, amounts to a violation of his right to freedom of expression and to freely exercise his profession as a lawyer, which is protected by article 19 of the Covenant, as well as his freedom and freedom of movement, under articles 9 and 12 of the Covenant. The author asserts that the real motivation for his persecution is his anti-Government political dissent, as demonstrated by the fact that the State party ignored the author’s immediate public statements, which were corroborated by witnesses, in which he asserted that he had been asked for his legal opinion as a lawyer and that he had opposed the content of the Carmona Decree. He adds that the International Criminal Police Organization (INTERPOL) itself considered *prima facie* that the offence with which the author was charged fell into the category of “purely political offences” and, after requesting additional information from the State party and receiving no reply, decided to remove the author’s details from its databases.

3.11 As to the violation of his right to equality and non-discrimination, as enshrined in article 26 of the Covenant, the author explains that only civilians are being prosecuted over the events of April 2002; not a single member of the military has faced trial owing to a constitutional privilege granting generals and admirals the right to a “preliminary hearing” before the Supreme Court, which ruled that there was insufficient grounds to try them. The author adds that another element that led to the violation of that right was the refusal to apply the Special Amnesty Act to him, despite the fact that he was in the same legal and *de facto* situation as other individuals who did benefit from the Act.

3.12 The author adds that the statements made by State officials in violation of his right to be presumed innocent also violated his right to honour and reputation, as enshrined in article 17 of the Covenant.¹⁶

3.13 The author requests the Committee to find that the State party has violated the above-mentioned rights and to order full reparation in the form of: (a) a declaration of outright annulment and the immediate dismissal of the proceedings against him, rendering null and void the order for his placement in pretrial detention; (b) the provision of an effective remedy before independent and impartial judges; (c) compensation and legal costs; (d) a guarantee of the independence and impartiality of the judiciary in order to avoid similar violations; (e) the publication of the Views adopted by the Committee; and (f) the submission, within 90 days, of information on the measures taken to give effect to the Committee’s Views.

State party’s observations on admissibility

4.1 On 7 September 2017, the State party submitted its observations on the admissibility of the communication and requested that it be found inadmissible under articles 5 (2) (a) and (b) of the Optional Protocol.

4.2 The State party explains that, in accordance with article 5 (2) (a) of the Optional Protocol, the Committee shall not consider any communication if the same matter has been submitted to another international procedure of international investigation or settlement. It claims that the present case has been submitted to the Inter-American Commission on Human Rights and to the Inter-American Court of Human Rights, which has ruled on it. The State

¹⁶ The author cites the Human Rights Committee, *Birindwa and Tshisekedi v. Zaire*, communications No. 241/1987 and No. 242/1987, para. 12.7

party explains that, in violation of the Optional Protocol, the petitioners are asking the Committee to act as a mechanism for the appeal or review of the Judgment issued by the Court.

4.3 With regard to article 5 (2) (b) of the Optional Protocol, the State party explains that after the judicial proceedings were initiated, the author left the territory of the State party and has not returned to face trial. As a result, the judicial proceedings have been suspended, and the author has not taken the steps set out in the Code of Criminal Procedure to remedy the alleged violations of his human rights. It adds that the Inter-American Court of Human Rights has already found, in its Judgment of 26 May 2014, that the author had failed to exhaust suitable and effective remedies and that the exceptions to the requirement of exhaustion of such remedies did not apply.¹⁷

Author's comments on the State party's observations on admissibility

5.1 In his comments of 15 February 2018, the author explains that the Committee has asserted that the phrase "no ha sido sometido" ("has not been submitted"), in article 5 (2) (a) of the Spanish version of the Optional Protocol, should be understood to mean "is not being examined" by another procedure of international investigation or settlement.¹⁸ He adds that the State party did not make any express reservation to the provision contained in article 5 (2) (a) and that the Committee is therefore competent to examine and decide on the present communication, as it has done in a number of cases in which States parties have not made reservations and the same matter has already been considered by other procedures of international investigation or settlement.¹⁹

5.2 With regard to the exhaustion of domestic remedies, the author explains that an exception to this requirement is made when there has been an unwarranted delay in the proceedings that is attributable to the State party, as set out in article 5 (2) (b) of the Optional Protocol. The author emphasizes that, despite his active participation in the proceedings, more than 12 years have passed without the necessary conditions having been guaranteed to continue with the proceedings, making it impossible for him to continue with his defence without undermining his rights. The author again lists the various remedies he has pursued throughout the proceedings and explains that the last of these, the petition for annulment or criminal *amparo*, should have been resolved within three days of its submission,²⁰ but that he never received a ruling from the court on the matter.

State party's observations on the merits

6.1 On 17 June 2020, the State party submitted its observations on the merits of the communication. With regard to all the alleged violations, the State party reiterates that the criminal proceedings in question have been suspended because the author is outside the State party and has therefore not taken the steps provided for in the Code of Criminal Procedure to remedy the alleged violations of his rights, depriving the justice system of the possibility of resolving the issues raised by his lawyers.

6.2 With regard to the right to be heard by an independent and impartial judge or tribunal, the State party argues that the author does not specify the manner, place and time in which his right was violated, but merely describes events that occurred in the course of the judicial proceedings.²¹

6.3 With regard to the right to the presumption of innocence, the State party argues that the author does not identify the judicial body which, in his view, violated his right, nor does he describe how this violation occurred. It adds that the author reproduces communications

¹⁷ The State party transcribes almost in their entirety paragraphs 88–89 and 96–98 of the Judgment in the case concerning *Brewer Carías v. Venezuela*.

¹⁸ The author cites, inter alia, *Semey v. Spain* (CCPR/C/78/D/986/2001) and *Rodríguez Castañeda v. Mexico* (CCPR/C/108/D/2202/2012).

¹⁹ *Ibid.*

²⁰ As set out in article 177 of the Code of Criminal Procedure.

²¹ The State party transcribes almost in their entirety paragraphs 109–111 of the Judgment of the Inter-American Court of Human Rights in the case concerning *Brewer Carías v. Venezuela*.

signed by diplomatic officials who were not parties to the judicial proceedings against him and which relate to activities unconnected to the criminal proceedings, and that the content of those communications was not presented as evidence to support the charges brought by the Public Prosecutor's Office. It stresses that there is no court ruling establishing his responsibility for the acts attributed to him.

6.4 With regard to the right to present witnesses and cross-examine prosecution witnesses, the State party explains that the violations of this right are alleged in the context of the investigation conducted by the Public Prosecutor's Office, not in court proceedings. It explains that the appropriate procedural stage for presenting and examining evidence in criminal proceedings, and for contesting the admissibility of that evidence, is the trial phase.

6.5 With regard to the right to adequate time and facilities to prepare a defence, the State party argues that the failure to provide copies of documents does not constitute a violation of that right. It explains that the lawyers were allowed to review the file for as long as they wished and were permitted to manually transcribe the documents contained within it. With regard to access to one of the items of evidence used by the Public Prosecutor's Office for the indictment, the State party explains that the preliminary hearing and the trial phase are the appropriate procedural stages for examining and contesting evidence.

6.6 With regard to the right to an effective remedy, the State party explains that the author recounts all the occasions on which he had recourse to the competent courts to exercise his defence and describes the decisions subsequently handed down by those courts. This demonstrates that the author had full access to the court hearing his case in order to mount a defence and to the appeals against the decisions. It emphasizes that the motions filed have not exhausted the remedies established by law, since they were filed only at the early stage of the proceedings, with the preliminary phase and the eventual trial phase still pending.

6.7 With regard to the right to freedom of expression and the free exercise of his profession as a lawyer and the alleged restriction of his right to freedom of movement, the State party explains that the criminal investigation against the author was based on elements that led to the presumption that an offence had been committed.

6.8 The State party argues that being the subject of a criminal investigation or indictment cannot be considered a violation of the right to equality and non-discrimination. The State party adds that the Special Amnesty Act was adopted for the benefit of all persons who, as of the date of its adoption, had appeared in court and had been subject to criminal proceedings. It explains that the court refused to apply the amnesty to the author because he did not meet the legal conditions set out in the Act since, at the time the Act was adopted, there were no criminal proceedings against him and he had not appeared in court. The State party claims that the other defendants were not in the same legal situation as him, as they had appeared in court in the territory of the State party.

6.9 With regard to the right to honour and reputation, the State party argues that because the author's claims are so thin, it can merely reiterate that the criminal proceedings have been suspended because of the author's absence, as a result of which he has not taken legal action to report or remedy the alleged violations.

6.10 The State party requests the Committee to find the communication inadmissible or to find that the author's rights have not been violated in the way that he claims.

Author's comments on the State party's observations on the merits

7.1 On 25 September 2020, the author submitted his comments on the State party's observations on the merits. The author argues that the State party merely repeats its argument that the communication is inadmissible since it has not been possible to remedy the arbitrary acts committed against him because he is outside the State party's territory. He claims that there is no domestic legislative provision that requires an accused person to be present in order for a judge to rule on a valid application, appeal or action brought by that person. Therefore, the judges can and must resolve his petition for annulment or criminal *amparo*. However, the State party has de facto suspended the judicial process and made the exercise of any procedural activity conditional on his placement in pretrial detention.

7.2 With regard to the right to be heard by an independent and impartial judge or tribunal, the author argues that, in his initial communication, he did in fact document in detail all the violations to which he refers. He explains that the fact that his criminal proceedings are being, and may continue to be, presided over by judges who are subject to discretionary removal at any time is evidence of a violation of the right to be tried by independent judges, highlighting the need for the Committee to intervene to protect the victim.

7.3 With regard to the right to the presumption of innocence, the author claims that, in his initial communication, he did in fact document in detail all the violations to which he refers. He adds that by freezing the criminal proceedings against him and keeping in place the orders for his arrest and detention without resolving any of the motions filed by him, the State party is denying him the effects of the right to be presumed innocent. The author argues that the presumption of innocence is incompatible with the judge's hostile attitude, which is obstructing his right to a defence, and that, in practice, he has been condemned to living in exile, experiencing scorn and a disrupted family life without having been convicted.

7.4 With regard to the right to adequate time and facilities for the preparation of a defence, the author explains that it is unreasonable, arbitrary and disproportionate to expect the author to copy many thousands of pages of criminal case files by hand. He recalls that he was also denied access to materials and items in the file, such as videos and interviews that were in the possession of the Prosecutor's Office and that were used against him. The author reiterates that these obstructions made it impossible to mount a defence.

7.5 With regard to the right to present witnesses and cross-examine prosecution witnesses, the author explains that in denying him this right, the State party has, in practice, prevented the clarification of the facts in order to proceed to a predetermined conviction. He adds that the State party intends to limit the right in question only in the final phase of the proceedings, namely the trial. However, that would imply that the Prosecutor's Office has absolute, unlimited, arbitrary and total power. The author argues that it was precisely to prevent this that the State party adopted the adversarial system, introducing the post of supervisory judge from the earliest stages of the proceedings in order to verify the legality of prosecutors' investigations and protect the rights of defendants. He explains that it is precisely from the early stages of criminal proceedings that serious consequences, such as criminal charges and pretrial detention, can arise; for this reason, this right is essential and must be guaranteed from the beginning of the process.

7.6 With regard to his right to an effective remedy, the author explains that despite repeated recourse to the Provisional Supervisory Judge and the Court of Appeal to request the restoration of his violated rights, on no occasion did the judges, who lacked any independence and impartiality, provide effective protection. He alleges that these were mere pro forma appeals without any possible effective result, while the criminal *amparo* petition he filed was never decided.

7.7 With regard to his right to equality and non-discrimination, the author adds that making the application of the amnesty conditional on a person's presence in the country does not seem to be a legitimate measure and is certainly not in good faith. He explains that the State party arbitrarily excluded him from the application of the Special Amnesty Act, which was applied to his co-defendants. The author adds that the arbitrary criminal prosecution brought against him was motivated by political persecution, which amounts to politically motivated discrimination.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 In connection with the submission of the matter to another procedure of international investigation or settlement, the Committee notes the State party's contention that the case should be declared inadmissible because the same matter "has been submitted" to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

8.3 The Committee recalls its jurisprudence, according to which, under article 5 (2) (a) of the Optional Protocol, a communication shall be declared inadmissible if it is being examined under another procedure of international investigation or settlement. It further recalls its jurisprudence, according to which, while the Spanish version of article 5 (2) (a) of the Optional Protocol can result in this paragraph being interpreted differently from the other language versions, this difference must be resolved in accordance with article 33 (4) of the 1969 Vienna Convention on the Law of Treaties by adopting the meaning which best reconciles the authentic texts, having regard to the object and purpose of the treaty. The phrase “ha sido sometido” (“has been submitted”) in the Spanish version should therefore be interpreted, in the light of the other versions, as meaning “is being examined” under another procedure of international investigation or settlement. The Committee considers that this interpretation reconciles the meaning of article 5 (2) (a) of the authentic texts referred to in article 14 (1) of the Optional Protocol.²² Bearing in mind that the same matter is no longer pending before the above-mentioned regional bodies and that the State party has not entered a reservation to article 5 (2) (a) of the Optional Protocol, the Committee considers that, under that article, there is no obstacle to declaring the communication admissible. The Committee notes that fully reasoned decisions of the organs of the inter-American system on an essentially similar complaint by the author against the State party deserve due consideration.²³ This does not imply, however, that the Committee cannot reach a different conclusion, in particular on issues relating to the standards of law applicable in the light of the Covenant.

8.4 The Committee notes the State party’s claims that the proceedings against the author have been suspended because he left the State party’s territory and has not returned to face trial. The Committee also notes the author’s allegations that the only available remedy, namely the petition for annulment or criminal *amparo*, which he pursued, was ineffective; that other available remedies were neither suitable nor effective; and that the appeals and cassation remedies available were unsuitable for ending the violations committed during the investigation phase and would have exacerbated the violations of his rights by requiring him to submit to illegal and arbitrary detention. The Committee notes that, in connection with the claims concerning the alleged violations of his right to honour and reputation, as protected under article 17 of the Covenant, the author does not submit any information to demonstrate that they were brought before the domestic courts. Accordingly, the Committee declares the author’s claims under article 17 of the Covenant inadmissible under article 5 (2) (b) of the Optional Protocol.

8.5 The Committee observes, however, that in the present case, the issue of exhaustion of domestic remedies in relation to the author’s other allegations is intimately linked to the substantive issues.²⁴ The Committee therefore takes the view that article 5 (2) (b) of the Optional Protocol is not an obstacle to the admissibility of the communication.

8.6 With regard to the author’s claims concerning his rights to liberty and security and to freedom of movement, as protected under articles 9 and 12 of the Covenant respectively, the Committee considers that these claims have not been sufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.7 In relation to the author’s allegations concerning his right to freedom of expression under article 19 of the Covenant, the Committee notes the author’s argument that he is facing criminal prosecution for his political views and for having expressed his professional opinion on the decree in question. The Committee notes that it is not in a position to determine the level of the author’s involvement in the drafting of the decree in question and that the author has not sufficiently substantiated, for the purposes of admissibility, how the criminal proceedings pertaining to him violated his right to freedom of expression. Accordingly, the

²² *Semey v. Spain*, para. 8.3; and *Rodríguez Castañeda v. Mexico*, para. 6.3.

²³ *Moreno de Castillo v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2610/2015 and CCPR/C/121/D/2610/2015/Corr.1), para. 8.3.

²⁴ *Pichardo Salazar v. Bolivarian Republic of Venezuela* (CCPR/C/132/D/2833/2016), para. 6.3; and *Celdeño v. Bolivarian Republic of Venezuela*, para. 6.3.

Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.8 With regard to the author's allegations concerning the right to equality and non-discrimination under article 26 of the Covenant, the Committee considers that, for the purposes of admissibility, the author has failed to sufficiently substantiate how the requirement that individuals must have appeared in court, as set out in the Special Amnesty Act, could amount to discrimination contrary to the Covenant. With regard to the fact that criminal proceedings have been brought only against civilians owing to a constitutional privilege reportedly granting generals and admirals the right to a special hearing before the Supreme Court (see para. 3.11 above), the Committee considers that the author has not sufficiently substantiated, for the purposes of admissibility, the prima facie existence of discriminatory treatment on the basis of his status as a civilian. The Committee therefore declares these claims inadmissible pursuant to article 2 of the Optional Protocol.

8.9 The Committee considers that the remainder of the author's allegations have been sufficiently substantiated for the purposes of admissibility. In view of this, the Committee declares the communication admissible the author's claims under article 14 (1), (2) and (3) (b) and (e), and article 2 (3), read in conjunction with article 14 (1), of the Covenant, and proceeds to a consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, as required by article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's argument that all the judges and prosecutors involved in his criminal proceedings are temporary or provisional officials who have been appointed or replaced on a discretionary basis for political reasons. The Committee takes note of the State party's argument that the author does not specify the manner, place and time in which his right was violated, but merely describes events that occurred in the course of the judicial proceedings. The Committee notes that, according to the State party, there is no specific causal link between the removals of judges referred to by the author, since they were related to decisions in respect of other defendants in the proceedings. The Committee recalls that the procedure for the appointment of judges and guarantees relating to their security of tenure are prerequisites for an independent judiciary, and that any situation in which the executive is able to control or direct the judiciary is incompatible with the Covenant,²⁵ a safeguard which indeed applies to supervisory judges at the preliminary stages of proceedings. In this regard, the temporary appointment of members of the judiciary does not exempt a State party from ensuring that the appropriate guarantees relating to the security of tenure of appointees are in place.²⁶ Regardless of the nature of their appointment, members of the judiciary must be, and must appear to be, independent.²⁷ Furthermore, temporary appointments should be exceptional and limited in time.²⁸ This guarantee also extends to prosecutors, insofar as they are justice officials, since it is a basic condition for the proper performance of their procedural functions.²⁹

9.3 In the present case, the Committee notes that the guarantee of independence cannot require the author to prove a direct causal link between removals of judges or prosecutors and his specific situation. The Committee notes that the author demonstrated that all the prosecutors and judges involved in his case were appointed on a provisional basis and that they could be removed without cause or recourse to appeal procedure, both in law and in fact, according to the jurisprudence of the Constitutional Chamber of the Supreme Court (see para. 3.4 above). The Committee notes that the author demonstrated that in the criminal

²⁵ General comment No. 32 (2007), para. 19.

²⁶ *Osío Zamora v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2203/2012), para. 9.3.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ See the Judgments of the Inter-American Court of Human Rights in the cases of *Martínez Esquivia v. Colombia*, 6 October 2020 (preliminary objections, merits and reparations), paras. 94, 95 and 97; and *Casa Nina v. Peru*, 24 November 2020 (preliminary objections, merits, reparations and costs), paras. 78–79.

proceedings in which he was a party, at least one supervising judge, namely Judge Bognanno, and two appeal judges were indeed removed without cause immediately after taking decisions that could be considered as safeguarding the rights of the author's co-defendants. The Committee considers that this is sufficient to shift to the State party the burden of proving that the judges and prosecutors in the case had security of tenure guarantees that allowed them to perform their duties independently. In the absence of any information from the State party to refute the author's allegations or demonstrate that such guarantees were in place, the Committee considers, on the basis of the information before it, that the judges and prosecutors involved in the criminal proceedings against the author did not enjoy the guarantees of independence required to uphold his right to an independent tribunal, thereby giving rise to a violation of article 14 (1) of the Covenant.

9.4 The Committee notes the author's argument that various public authorities built a presumption of guilt against him by making public statements pronouncing him guilty of the offence for which he was being prosecuted, in violation of article 14 (2) of the Covenant. The Committee takes note of the State party's argument that the author shared communications sent by diplomatic officials, who were not parties to the judicial proceedings against him, in the context of activities unrelated to the criminal proceedings, and that the content of those communications was not presented as an element in the indictment issued by the Public Prosecutor's Office. The Committee recalls that it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.³⁰ The Committee considers that it is not necessary for the authorities to be directly involved in the proceedings in question for their actions to give rise to a rights violation, nor is it necessary for their comments to be presented as elements in the indictment of the defendant.

9.5 In the present case, the Committee notes, in particular, the statements of the then President of the State party, who appeared on television and identified the author as having drafted the decree in question and participated in the coup d'état. The Committee also notes that, in September 2005, one month before the request made by the Provisional Public Prosecutor on 21 October for formal charges to be brought against the author, the then Attorney General, who was responsible for the appointment of the Prosecutor, published a book in which he claimed that the author had drafted the Carmona Decree. The Committee also highlights the assertions made by the State party's Ambassador to Costa Rica that "the author was the material and intellectual author of the Decree and gave instructions on revisions to the drafting thereof" and that the author "was and is aware of all the offences he was committing and that is why he fled the country". In the absence of any information from the State party refuting the author's allegations, and given the fact that, at the time the above-mentioned statements were made by public authorities, no judgment establishing the author's criminal responsibility had been handed down, the Committee considers that, in respect of the author, and on the basis of the information before it, the principle of the presumption of innocence, as enshrined in article 14 (2) of the Covenant, was violated.³¹

9.6 The Committee notes the author's argument that he was not permitted to obtain a copy of the file against him and that he was denied access to certain videos which formed part of the file, some of which were used in his indictment, in violation of his right to adequate time and facilities for the preparation of his defence, as protected by article 14 (3) (b) of the Covenant. The Committee notes the State party's argument that the author was in fact able to view the file and manually transcribe the documents, and that the appropriate procedural phase for reviewing the evidence is the preliminary hearing and the trial. The Committee recalls that the right of a defendant to adequate facilities for the preparation of a defence includes access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory.³² The Committee also considers that the refusal to issue copies of the investigation file may constitute a disproportionate burden on a defendant.³³ However, in the

³⁰ General comment No. 32 (2007), para. 30.

³¹ *Cedeño v. Bolivarian Republic of Venezuela*, para. 7.4.

³² General comment No. 32 (2007), para. 33.

³³ Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, (preliminary objections, merits, reparations and costs), para. 256. See also European Court of Human

present case, the Committee notes that the author and his lawyers were provided with full access to the file and were able to take handwritten notes of any information they considered relevant to the defence. The Committee considers that, based on the information available, it is unable to determine the extent to which the failure to obtain copies of or access to videos that were allegedly in the case file, including their full transcript, would have affected the author's right to adequate time and facilities to prepare a defence. The Committee also notes that, given the early stage of the proceedings, it is unable to conclude that the author's right, under article 14 (3) (e) of the Covenant, to present witnesses and cross-examine prosecution witnesses has been violated. The Committee therefore concludes that the facts as presented to it by the author do not allow it to find a violation of his rights under article 14 (3) (b) and (e) of the Covenant.

9.7 With regard to the right to an effective remedy under article 2 (3), read in conjunction with article 14 (1) of the Covenant, the Committee notes the author's argument that the only suitable remedy, namely the petition for annulment or criminal *amparo*, which he filed twice, was never resolved, leaving him in a state of defencelessness. The Committee also notes the State party's argument that the author exercised remedies only at the early stage of the proceedings, leaving those in the pretrial and trial phases pending, and that he had full access to the Supervisory Court at that early stage. The Committee notes that all the allegedly effective remedies mentioned by the State party require the author to return to the State party and be placed in pretrial detention.

9.8 In the present case, the Committee highlights the particular background to the author's persistence, including the fact that he was heavily involved in the criminal proceedings against him and even personally took notes on his file. He also exercised due diligence during the preliminary phase of the investigation, filing various motions challenging the evidence against him and offering evidence in his defence; he departed the territory of the State party lawfully; he filed a petition for annulment prior to the Prosecution's request for indictment; and he filed a second petition for annulment prior to the Judge's indictment containing the order for him to be placed in pretrial detention. The Committee considers that the author has established a well-founded fear of being subjected to arbitrary criminal proceedings that violate his rights and guarantees, and of the severe aggravation of those violations that would arise should he be placed in pretrial detention, all of which were duly and repeatedly brought to the attention of the judicial authorities responsible for safeguarding his right to due process. The Committee observes that, in the author's circumstances, a remedy that gives effect to the right to due process cannot be predicated on him not receiving due process. This implies that, irrespective of what is determined by domestic law,³⁴ the State party cannot invoke such determinations as a justification for non-compliance with its obligations under the Covenant.³⁵ Accordingly, and on the basis of the information before it, the Committee finds that the author has suffered a violation of his right to an effective remedy in respect of his right to due process, in particular, access to an independent tribunal, as enshrined in article 2 (3), read in conjunction with article 14 (1) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of article 14 (1) and (2) and of article 2 (3), read in conjunction with article 14 (1) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. Accordingly, the State party is under an obligation, *inter alia*, to: (a) declare the proceedings against the author null and void, thereby invalidating the pretrial detention order against him; (b) in the event that new proceedings are instigated against the author, ensure that they comply with all the due process guarantees set out in article 14 of the Covenant and are accompanied by access to effective remedies in

Rights, *Rasmussen v. Poland*, No. 38886/05, 28 April 2009, para. 49; and *Beraru v. Romania*, No. 40107/04, 18 March 2014, paras. 70–71.

³⁴ This includes questions such as whether or not petitions for annulment can be decided in the absence of the author.

³⁵ Article 27 of the Vienna Convention on the Law of Treaties.

accordance with article 2 (3); and (c) to provide the author with adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

Annex I

[Original: English]

Joint opinion by Committee members Arif Bulkan and H el ene Tigroudja (partially dissenting)

1. We regret that the majority did not rigorously address the claims under article 14 (3) (b) and (e) on access to certain evidence in the file and the right to cross-examine witnesses.
2. In our view, the majority’s reasoning on these points (para. 9.6 of the Views) is ambiguous and does not reflect the long-standing international jurisprudence. Both the European Court of Human Rights and the Inter-American Court of Human Rights have clearly affirmed the applicability of defence rights at the investigation stage, stressing that this early-stage protection contributes to avoiding miscarriages of justice and to securing the aims of the right to a fair trial.¹ We think it sufficiently important to have reaffirmed this core principle before distinguishing the time at which the author invoked these rights. It is true that, based on the file, the author did not elaborate on the right to call witnesses and the majority could have rejected this part of the claim for lack of substantiation.
3. With regard to access to evidence as a pillar of the right to prepare one’s defence, in general comment No. 32 (2007), the Committee highlighted the fact that the right “must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused” (para. 33). The Committee found a violation of article 14 (3) (b) in a case where the author was prevented from seeing certain evidence classified as secret, recalling “that ‘adequate facilities’ within the meaning of article 14 (3) (b) must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court”.² This has also been reflected by the Inter-American Court of Human Rights in another case where access to evidence and to the investigation file was at stake.³
4. However, in the present case, the majority’s position (para. 9.6 of the Views) does not follow this well-established jurisprudence. Notably, although the State party did not respond to the author’s claim of being denied access to videos, the majority of the Committee overlooked this failure and instead placed the burden of proof on the author, reasoning that he did not demonstrate to what extent the lack of access to copies or the complete transcription of certain recordings in the file would have affected his right to adequate time and facilities for his defence. This is not only an unreasonable burden of proof; it is actually a form of *probatio diabolica* – the author is expected to prove that the lack of access to copies or videos has affected his defence rights in order to be granted access to the relevant copies and videos.
5. It is our view that, based on the detailed claims of the author regarding access to certain pieces of evidence and in the absence of sufficient explanation provided by the State party, the facts reveal a breach of article 14 (3) (b) of the Covenant.

¹ European Court of Human Rights, *John Murray v. United Kingdom*, Application No. 18731/91, Judgment of 8 February 1996, para. 45; Inter-American Court of Human Rights, *Mohamed v. Argentina*, Judgment of 23 November 2012, para. 91.

² *Esergepov v. Kazakhstan* (CCPR/C/116/D/2129/2012), para. 11.4.

³ Inter-American Court of Human Rights, *Barreto Leiva v. Venezuela*, Judgment of 17 November 2009, para. 56.

Annex II

[Original: English]

Individual opinion by Committee member Vasilka Sancin (partially dissenting)

1. I disagree with the majority's finding that the facts presented by the author do not allow the Committee to find a violation of his right under article 14 (3) (b) of the Covenant. I am of the view that the State party also failed to ensure that the author had adequate facilities for the preparation of his defence, since he was not provided with access to all the documentation, in particular all the videos used for his indictment.

2. The State party never rebutted the author's argument that he was not able to access all the videos used for his indictment (paras. 3.7, 6.5 and 7.4 of the Views). Any documentation gathered and used before the preliminary hearing and trial is equally vital for the preparation of a defence and the State party's conduct constituted an unjustified restriction of the author's ability to prepare a defence.¹ This resulted in inadequate facilities for the preparation of his defence, which negatively impacted the equality of arms.²

3. I disagree with the majority's logic in finding that it is the author who should have further demonstrated to what extent the deprivation of his access to copies, or the complete transcription of certain recordings in the file, would have affected his right to adequate facilities for the preparation of his defence (para. 9.6 of the Views). In my view, this right imposes an obligation on a State party to disclose all material that the prosecution plans to offer in court and when, such as in this case, the author demonstrates that the State party has at any procedural phase substantially limited his access to such material, the Committee should find a violation of his right under article 14 (3) (b) of the Covenant.

¹ Human Rights Committee, general comment No. 13 (1984) on the administration of justice, para. 9.

² Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 32.

Annex III

[Original: English]

Individual opinion by Committee member José Manuel Santos Pais (partially dissenting)

1. I hesitate to conclude, as the majority does, that it is not necessary for the authorities to be directly involved in the proceedings in question for their actions to give rise to a violation of rights, nor is it necessary for their comments to be presented as elements in the indictment of the defendant.

2. In the present case, the criminal procedure is still at a preliminary stage, where the indictment concludes the preparatory phase of the proceedings (see second footnote to para. 2.5 of the Views). Since the author is outside the State party's territory, the proceedings had to be suspended from that moment onwards because of his absence (para 6.1 of the Views). Public statements by relevant public officials, therefore, at least for the time being, could not have significantly impacted such proceedings: the author has yet to present his defence, one does not know whether there will be a trial and much less the outcome of such a trial, since no judgment establishing the author's criminal responsibility has yet been handed down.

3. By concluding, at this stage, that there has been a violation of article 14 (2) of the Covenant, the Committee establishes a presumption of guilt for the State party, which it will never be able to rebut, whatever the future outcome of the pending criminal proceedings against the author, since the public statements by relevant public officials have already been issued. The same conclusion will inevitably have to be drawn if a new criminal procedure, replacing the present one, is instituted against the author, if the current criminal proceedings are considered null and void.

4. On the other hand, by already concluding that there has been a violation of article 14 (2), the Committee prevents the domestic courts from rebutting this presumption of guilt of the State party and from proving that the interference of the executive or other branches of Government was not, in the end, sufficient to hamper judicial independence.

5. Several Views of the Committee, unlike the position adopted in the present case, seem to require that the author provide evidence of the impact a particular public statement had on the outcome of his or her trial, such as *Khudayberdiev v. Kyrgyzstan*,¹ *Kh.B. v. Kyrgyzstan*² and *Orkin v. Russian Federation*.³

6. I would therefore not have concluded that there has been a violation by the State party of article 14 (2) of the Covenant at such a preliminary stage of the criminal proceedings.

¹ CCPR/C/127/D/2522/2015, para 10.2.

² CCPR/C/120/D/2163/2012, para 11.2.

³ CCPR/C/126/D/2410/2014, para 12.6.