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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. 2833/2016*, **

Communication submitted by:	José Luis Pichardo Salazar (represented by counsel, Oswaldo José Domínguez Florido)
Alleged victim:	The author
State party:	Bolivarian Republic of Venezuela
Date of communication:	30 March 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 19 October 2016 (not issued in document form)
Date of adoption of Views:	14 July 2021
Subject matter:	Criminal proceedings and arrest warrant against a businessman
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to a fair trial; right to legal assistance; right to a defence; right to be heard
Articles of the Covenant:	2, 9 and 14 (1), (2) and (3) (a), (b), (c) and (d)
Article of the Optional Protocol:	5 (2) (b)

1. The author of the communication is José Luis Pichardo Salazar, a national of the Bolivarian Republic of Venezuela born on 25 August 1958. He claims that the State party has violated his rights under articles 2, 9 and 14 (1), (2) and (3) (a), (b), (c) and (d) of the Covenant. The Optional Protocol entered into force for the State party on 10 August 1978. The author is represented by counsel.

Facts as submitted by the author

2.1 The author was a 45 per cent shareholder in the brokerage firm Uno Valores Casa de Bolsa and became the owner, through purchase, of the bank Banco del Sol. He claims that

* Adopted by the Committee at its 132nd session (28 June–23 July 2021).

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

the events took place in a context of persecution of banks and brokerage firms by the Government of the State party in 2009 and 2010.

2.2 On 5 January 2010, the author filed a complaint with the Attorney General's Office against Leonor Sarmiento, the Vice-President of Uno Valores Casa de Bolsa, for embezzlement of funds. However, the statement that Ms. Sarmiento gave to the Venezuelan authorities led to the opening of investigations against the author for alleged offences of criminal association and misappropriation of public funds in connection with his activities in the aforementioned companies. This, together with a complaint against the author filed by Marianela Araujo Hurtado, the Acting Legal Counsel of Banco del Sol, prompted a State takeover of the bank and the brokerage firm and a request from the Public Prosecution Service for precautionary measures including the freezing of the author's bank accounts, which was granted by Court of First Instance No. 19 acting as the criminal procedural court for Caracas on 18 January 2010.

2.3 On 12 January 2010, the author had left the territory of the State party for Miami, United States of America, as he feared that he would be subjected to pretrial detention without investigation, a measure commonly applied against bankers and owners of brokerage firms in the country.[1] On 25 March 2010, the author appointed his defence lawyers,[2] following the procedures set forth in Venezuelan law, at the Consulate of the Bolivarian Republic of Venezuela in Miami.

2.4 On 7 April 2010, Mr. Domínguez Florido submitted a request to the registration and document distribution unit asking the competent procedural court to swear him in as the author's counsel. On the same day, the request was forwarded to Court of First Instance No. 5 acting as the criminal procedural court for Caracas, which two months later declined jurisdiction in favour of the aforementioned Court of First Instance No. 19.

2.5 On 12 May 2010, the Public Prosecution Service applied to Court of First Instance No. 19 for a warrant for the author's arrest. The Court issued the warrant on 14 May 2010.[3] On 3 June 2010, the author's counsel submitted a brief, supplementing the one dated 7 April 2010, in which he insisted on the author's right to legal assistance and to participate and be heard in the proceedings. However, on 16 June 2010, the Court denied the request to swear in Mr. Domínguez Florido as counsel on the grounds that the author was not in the country and had to be present in order to formally appoint counsel. On 22 June 2010, Mr. Domínguez Florido filed an appeal against this decision, which was rejected in a judgment of 6 September 2010 by the Eighth Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas metropolitan area. On 7 October 2010, the author filed an application for *amparo* with the Constitutional Chamber of the Supreme Court, which was rejected in a judgment of 6 June 2011. All of the courts that heard the case insisted in their rulings and decisions that the author must appear in person in order for him to be in good standing and consequently be able to appoint and swear in defence counsel.[4]

2.6 On 16 September 2010, the Court of First Instance hearing the case decided to initiate extradition proceedings against the author and others for the offences of misappropriation of public funds and criminal association. On 18 October 2010, the author's counsel filed a brief with the Supreme Court, again requesting that he be allowed to exercise the author's right to a defence. In a judgment dated 8 November 2010, the Supreme Court found that the submission of a request to the United States for the author's extradition was justified. In its judgment, the Supreme Court affirmed that the author needed to be present in order to appoint counsel, explaining that the investigation was at the preparatory stage and that once the author appeared in person the facts, grounds and evidence justifying his prosecution would be laid

[1] However, in his comments of 2 April 2018, the author claimed to have left the Bolivarian Republic of Venezuela to fulfil family commitments, as several of his children were studying in Miami at that time.

[2] Oswaldo José Domínguez Florido, Oswaldo Domínguez Hernández and Gustavo Gimón Lorenzo.

[3] The warrant was initially issued with a request for the International Criminal Police Organization (INTERPOL) to publish a Red Notice. However, on 8 August 2012 INTERPOL notified the author of its decision to cancel the Red Notice, considering that the case against him was mainly political.

[4] See Judgment No. 812 of the Constitutional Chamber of the Supreme Court, 6 June 2011.

before him and, together with other procedural acts, would determine whether or not a trial would be held, which was why it was necessary for him to appear.[5]

2.7 The author adds that, on 5 October 2010, officers of the Bolivarian National Intelligence Service went to the author's home and searched his property without a warrant. The officers then left a summons handwritten on plain paper and signed by a chief inspector Charles Carmona, calling the author as a witness in the investigation.[6] The following day, a formal summons was sent, signed by the Director of the Bolivarian National Intelligence Service, Jesús Arellano, also calling the author to appear as a witness,[7] despite the outstanding warrant for the author's arrest.

Complaint

3.1 The author claims to be a victim of violations of his rights under articles 2, 9 and 14 (1), (2) and (3) (a), (b), (c) and (d) of the Covenant.

3.2 Regarding the right to due process under article 14, the author alleges various violations. Firstly, he claims that the failure to allow his duly appointed defence counsel to be sworn in before the relevant judicial authorities violated his right to a defence. Secondly, he claims that the request from the Public Prosecution Service and the decision of Court of First Instance No. 19 regarding the precautionary measures of restraint of assets and arrest, without first hearing the author or his lawyers or informing them in a clear, precise and detailed manner of the facts relating to the criminal investigation, violated his right to a defence and his right to be heard. Thirdly, he argues that the refusal to accept the briefs submitted by his counsel and provide access to information related to the case also impedes his right to a defence, as it prevents him from familiarizing himself with the evidence that the Public Prosecution Service has against him. Fourthly, the author alleges a lack of independence within the judiciary, especially in the context of the criminal prosecution of the owners of banks and brokerage firms, and asserts that several judicial decisions have been inadequately reasoned, since the various courts limit themselves to transcribing the case law of the Supreme Court.

3.3 The author requests the Committee to find the State party in breach of the aforementioned rights, to call on it to restore all violated rights and to order the rescindment of the arrest warrant and the annulment of the flawed criminal proceedings. He also requests, on the basis of article 2 (3) of the Covenant, that the State party provide him with an effective remedy for the moral and pecuniary damage suffered as a result of the arbitrary proceedings that led to his exile.

State party's observations on admissibility and the merits

4.1 On 10 July 2017, the State party submitted observations on the admissibility and the merits of the communication, arguing that it should be declared inadmissible for failure to exhaust domestic remedies under article 5 (2) (b) of the Optional Protocol.

4.2 The State party explains that in two official letters dated 17 December 2009,[8] the National Securities Commission – the body in charge of promoting, regulating, overseeing and monitoring the capital market – ordered inspections of Uno Valores Casa de Bolsa for the purpose of conducting financial and system audits. In the course of these investigations, irregularities were detected and were reported to the Public Prosecution Service.[9] In the light of the irregularities, on 26 February 2010 the National Securities Commission authorized the State takeover of the company and ordered it to cease market trading,[10] a decision of which the Public Prosecution Service was duly notified. As for Banco del Sol, on 18 January 2010 the Office of the Superintendent of Banks and Other Financial Institutions decided to take it

[5] Judgment No. 477 of the Criminal Appellate Chamber of the Supreme Court, 8 November 2010.

[6] The author attaches an uncertified copy of this document.

[7] Idem.

[8] Nos. PRE-2088 and PRE-2099.

[9] The institution responsible for bringing criminal prosecutions on behalf of the State under article 285 of the Constitution.

[10] In accordance with the decision published in *Gaceta Oficial* No. 39.375.

into public ownership after detecting irregularities and infringements. At that time, the author was the bank's Senior Director.

4.3 On the basis of information submitted by the aforementioned supervisory authorities, the Public Prosecution Service conducted the investigations necessary to determine criminal responsibility, and, as a result, a warrant for the author's arrest was issued on 14 May 2010. However, the warrant could not be enforced because the author was not in the country. The State party explains that the author has himself created the main legal obstacle to the defence of his interests by failing to appear in the criminal proceedings brought against him. The State party adds that the author's absence during the investigation stage gives rise to a presumption that he is responsible for the irregularities.

4.4 The State party asserts that the author has refused to appear in Venezuelan territory to be tried with guarantees of due process in accordance with the constitutional and legal system in force. It adds that the author cannot request to be tried in absentia, as this would undermine the premises of due process established under article 49 of the Constitution of 1999. The State party explains that, while the previous Constitution allowed for trial in absentia, albeit only in cases of offences against the public interest,[11] the current Constitution does not allow the author's prosecution to proceed unless he is present in the country.[12] Consequently, all criminal proceedings are suspended when the person charged or accused fails to appear, particularly when it has not been possible to enforce an arrest warrant issued against him or her. For the accused to benefit from all the rights and guarantees afforded by the Venezuelan criminal justice system, it is necessary for him to appear for the criminal proceedings, in order to exercise his right to a defence.[13] The State party argues that the impossibility of trial in absentia is an unquestioned criterion and a principle that is adequately and consistently explained in the case law of the Supreme Court.[14]

4.5 The State party adds that the author cannot petition the Committee on the grounds of unequal treatment, let alone alleged political persecution, without any basis or evidence. It notes that the author has in no way proved that he is in exile for political reasons.

4.6 The State party argues that the author must appear in court to appoint counsel and be able to put forward all the formal and material defences that he considers pertinent, since otherwise the criminal proceedings cannot advance. An inevitable consequence of the author's evading or being a fugitive from the criminal proceedings against him is that he cannot appoint private defence counsel, which means that no one is able to inspect the contents of the case file on his behalf. The State party explains that, during the investigation stage of criminal proceedings, the principle of disclosure to the parties is applied only on the basis of article 286 of the Code of Criminal Procedure. Moreover, the Supreme Court itself has stated that:

> In criminal proceedings there is a series of acts that necessarily require the presence of the accused, and cannot be delegated to representatives, since it is the presence of the accused which effectively guarantees the right to be heard and the right to a defence. The appointment of defence counsel or of a lawyer of one's choosing is one such act, in that it must be done on the record, by the accused, in person, given that

[11] Under article 60 (5) of the Constitution of 16 January 1961.

[12] The State party cites the case law of the Constitutional Chamber of the Supreme Court, which has stated that: "in the current criminal proceedings … it is necessary for the person charged or accused to appear in court since, under the 1999 Constitution of the Bolivarian Republic of Venezuela, trial in absentia is not permitted as it was under the repealed 1961 Constitution" (*Eduardo Manuitt* case, Judgment No. 710 of 9 July 2010).

[13] The State party cites: "in the current criminal proceedings, it is essential that the accused should appear so that the court may adjudicate, in a public hearing and in the presence of all the parties, on any request made by the accused in which he seeks to benefit by claiming his rights; to accept otherwise would be to disregard the Constitution … thus validating, in this case, the evasive and contumacious conduct of the accused … who has refused to submit to Venezuelan justice and yet then seeks to claim rights and guarantees in his favour, which derive – or so he asserts – from acquittals" (*Fernando Pérez Amado* case, Judgment No. 365 of the Constitutional Chamber of the Supreme Court, 10 May 2010).

[14] The State party cites six other Supreme Court judgments, including the 6 June 2011 judgment in which the Court rejected the author's application regarding the appointment of his counsel.

> legal assistance is provided from the moment the investigation is initiated or, peremptorily, before the accused gives evidence.[15]

4.7 The State party adds that the Inter-American Court of Human Rights has stated that it is necessary for accused persons to appear in criminal proceedings. The Court considers that:

> under many procedural systems, the presence of the accused is an essential requirement for the regular and legal implementation of the proceedings. The [American] Convention [on Human Rights] itself reflects this requirement. In this regard, Article 7 (5) of the Convention establishes that "release may be subject to guarantees to assure his appearance for trial", so that States are authorized to establish domestic laws to ensure the appearance of the accused. As can be seen, one of the most important objectives of preventive detention, which is only admissible on an exceptional basis, is to ensure the appearance of the accused at his trial, in order to guarantee the criminal jurisdiction and help combat impunity. It also constitutes a guarantee for the implementation of the proceedings. Furthermore, Venezuela has established the prohibition of a trial *in absentia* by law.[16]

4.8 The State party submits that, under its domestic law, the author, a fugitive from justice, cannot be tried in absentia and thus has not effectively exhausted all domestic remedies to conduct his defence. This is because all criminal proceedings are suspended when the person charged or accused fails to appear in court, particularly when it has not been possible to enforce an arrest warrant issued against him or her.

4.9 The State party concludes by adding that there has been no violation of the author's fundamental rights, inasmuch as he is a fugitive from justice and it is this that is preventing him from putting forward a formal and material defence in the criminal proceedings against him. Moreover, there is no truth to the allegation of unequal treatment for political reasons, since the author has not proved that he has been granted political asylum, and the laws and principles that have been applied were in force before the author claimed to be unable to exercise a defence. The State party draws attention to the fact that the author is making a case in which his financial interests take precedence and is attempting to flout the Venezuelan justice system in order to continue to receive the financial benefits that he enjoyed as a corporate executive. It adds that the communication is intended to secure impunity for the author, a banker, through arguments that have no evidentiary value and duplicitous claims of persecution of the private sector on the part of the State party. Lastly, the State party calls on international bodies to review the practices that they apply when considering complaints involving mere speculation about hypothetical and unproven events, based solely on press, television and social media reports that are subjective, untruthful and one-sided in all matters related to the Government of the State party and which represent no more than the self-interested and biased opinions of small groups of people opposed to the sovereign and democratic will of the majority.

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

5.1 In his comments of 2 April 2018, the author claims that it is not true that he has fled justice, let alone that he is endeavouring to evade the criminal proceedings. The author claims that, prior to the issuance of the arrest warrant on 14 May 2010, he had not been summoned and had received no notification of the opening of investigations against him. The author claims that the Public Prosecution Service requested the precautionary measure prohibiting the disposal of his property on the same day that it received the complaint from Ms. Araujo. The author emphasizes that, when he left for the United States on 12 January 2010, neither a precautionary measure prohibiting his departure nor a warrant for his arrest had been issued. He explains that he left the State party's territory from Maiquetía International Airport, passing through immigration without difficulty, so the State party is wrong to speak of absconding or evading justice.

[15] *Enrique Antonio Medina Gómez* case, Judgment No. 3654 of 6 December 2005. The State party cites two other Supreme Court judgments in support of this point.

[16] *Brewer Carías v. Venezuela*, judgment of 26 May 2014 (preliminary objections), Series C, No. 278, para. 134.

5.2 The author reiterates that the arrest warrant against him was issued unlawfully, as he had not been summoned previously, was not charged, and was not allowed to appoint defence counsel so that he could gain access to the evidence against him.[17] He argues that the two summonses calling him as a witness, issued at a time when there was an outstanding warrant for his arrest, constituted an abuse of process as they were designed to persuade him, under false pretences, to come forward as a witness, whereupon he would have been unlawfully detained. The author claims that there is no evidence implicating him in the commission of any offence.

5.3 The author adds that he submitted a formal request to the International Criminal Police Organization (INTERPOL) for a review of the international wanted persons notice that was issued in February 2011 on the basis of the illegal arrest warrant. His submission included a brief, evidence and oral statements to prove that the State party had brought several arbitrary and illegal prosecutions against various businesspersons with the aim of taking control, through expropriation, of the country's entire economic and financial apparatus. The author explains that, after he had submitted the request and visited the organization, the Commission for the Control of INTERPOL's Files unanimously decided that he had been subjected to political persecution by the State party. At its eighty-third session, in May 2012, the Commission cancelled the international wanted persons notice against the author, notifying him of its decision on 8 August 2012 in a document that the author enclosed with his initial communication to the Committee.[18]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the State party's claims that, under its domestic law, the author, as a fugitive from justice, cannot conduct his defence or appoint counsel and has therefore not exhausted all available domestic remedies. The Committee notes that, with regard to the appointment of his defence counsel, the author has exhausted all available domestic remedies, since the Supreme Court has had the opportunity to rule on the matter,

[17] The author cites, inter alia, the *Aholeab Eduardo Toledano Abadi* case, Judgment No. 186 of the Criminal Appellate Chamber of the Supreme Court, 8 April 2008: "The act of laying formal charges is of fundamental importance for the proceedings, and especially for the accused, and sets out details that cannot be overlooked. In other words … 'the laying of formal charges is an activity inherent to the Public Prosecution Service, which, having summoned the person under investigation, who is assisted by counsel, formally informs him or her of the constitutional provision exempting him or her from making a statement and, where he or she agrees to make a statement, to be exempted from making it under oath; *it also informs him or her of the facts under investigation and the circumstances of time, manner and place, the offence committed, the evidence that ties him or her to the investigation and access to the file in accordance with articles 8, 125, 126, 130 and 131 of the Code of Criminal Procedure…*'. … Consequently, this Chamber observes that the failure to lay formal charges … resulted in a violation of article 49 (1) of the Constitution of the Bolivarian Republic of Venezuela and article 125 (1) of the Code of Criminal Procedure in respect of the right of defence of the accused."

[18] In its letter to the author, the secretariat of the Commission explained that: "In light of the information available to it, the Commission considered that the information about you in INTERPOL's files raised doubts as to compliance with the applicable rules. Following the Commission's recommendation, INTERPOL initially removed from INTERPOL's website the extract from the red notice published for you and blocked access by INTERPOL's member countries to the information concerned. After re-examining all the information available to it at its 83rd session (May 2012), the Commission finally considered that the case against you was predominantly political in nature, and consequently fell within the scope of Article 3 of Interpol's Constitution. Following the Commission's recommendation, the information challenged concerning you was deleted from INTERPOL's files."

both in the extradition procedure that culminated in the judgment of 8 November 2010 and in its rejection of the application for *amparo* on 6 June 2011. The Committee observes that in the present case the issue of exhaustion of domestic remedies, in relation to the author's other allegations of due process violations, is intimately linked to the substantive issues.[19] 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.

6.4 Regarding the author's claim of a violation of article 14 (1) due to the lack of independence of the courts hearing his case, and his generic invocation of articles 2, 9 and 14 (2) and (3) (b) and (c) of the Covenant, the Committee finds that these allegations have not been sufficiently substantiated and declares them inadmissible under article 2 of the Optional Protocol.

6.5 However, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claims concerning his right to due process under article 14 (3) (a) and (d) of the Covenant, namely that he was not informed in a clear, precise and detailed manner of the charges against him, was not summoned before the decision was taken to issue a warrant for his arrest, and was not permitted to appoint counsel. The Committee therefore declares these claims admissible and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee takes note of the author's argument that the fact that his duly appointed defence counsel was not allowed to be sworn in before the relevant judicial authorities violated his right to a defence under article 14 (3) (d) of the Covenant. The Committee also takes note of the State party's argument that the author is a fugitive from justice and it is this that is preventing him from putting forward a formal and material defence in the criminal proceedings against him. The Committee observes, however, that the author had been outside the territory of the State party for four months when the pretrial detention order against him was issued on 14 May 2010 and that he had therefore left the territory lawfully. The Committee further observes that the author, in view of the precautionary measures under which his bank accounts were frozen and the investigations related to the State party's takeover of the companies of which he was a shareholder, sought to appoint counsel on 7 April 2010, one month before the pretrial detention order against him was issued.

7.3 The Committee also takes note of the State party's argument that the author cannot request to be tried in absentia, as domestic law does not allow for his criminal prosecution unless he is present in the country, and any criminal proceedings are suspended when the person charged or accused fails to appear, particularly when it has not been possible to enforce an arrest warrant issued against him or her. Nevertheless, the Committee notes that the author is not requesting that he be tried in absentia but that the courts accept the appointment of his counsel so that he can access the case file containing the evidence against him that gave rise to both the arrest warrant and the extradition request addressed to the United States. The Committee does not see how the appointment of counsel and the possible filing of defence submissions, such as motions or appeals against the precautionary measures or the extradition request, prior to the preliminary hearing would amount to a violation of the constitutional prohibition of trial in absentia. In view of these facts, the Committee concludes that, in the present case, the State party violated the author's right to a defence under article 14 (3) (d) of the Covenant.

7.4 In the light of this conclusion, the Committee decides not to examine separately the author's remaining claims under article 14 (3) (a) of the Covenant, concerning his right to be informed in a clear, precise and detailed manner of the charges against him and to receive a summons prior to the imposition of precautionary measures.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation of article 14 (3) (d) of the Covenant.

[19] *Cedeño v. Bolivarian Republic of Venezuela* (CCPR/C/106/D/1940/2010), para. 6.3.

9. 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 it to make full reparation to the author for the violation of his Covenant rights, including by allowing him to: (a) appoint counsel and consequently access his case file; and (b) put forward, through counsel, the available defences during the preliminary investigation prior to the preliminary hearing. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. 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 present Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated.