



## 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. 2652/2015\*, \*\*

<i>Communication submitted by:</i>	Carlos José Correa Barros et al.
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Bolivarian Republic of Venezuela
<i>Date of communication:</i>	2 March 2015 (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 1 October 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	18 March 2021
<i>Subject matter:</i>	Access to public information about alleged irregularities in the procurement, storage and distribution of medicines on the part of the State party
<i>Substantive issues:</i>	Right to seek, receive and impart information; right to take part in the conduct of public affairs; right to an effective remedy
<i>Procedural issues:</i>	Exhaustion of domestic remedies; lack of substantiation
<i>Articles of the Covenant:</i>	2 (2 and 3), 14, 19 and 25
<i>Articles of the Optional Protocol:</i>	2 and 5

1. The authors of the communication, submitted on 2 March 2015, are Carlos José Correa Barros, born 2 October 1964, Executive Director of the non-governmental organization (NGO) Asociación Civil Espacio Público (Public Civil Space Association);<sup>1</sup> Feliciano Reyna, born 2 December 1955, President of the NGO Asociación Civil Acción Solidaria (Civil Action Solidarity Association);<sup>2</sup> María de las Mercedes de Freitas, born 11

\* Adopted by the Committee at its 131st session (1–26 March 2021).

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

<sup>1</sup> Dedicated to promoting and defending freedom of expression, the right to information and social responsibility in the communication media.

<sup>2</sup> Dedicated to helping to reduce the impact of HIV and AIDS in the State party.



April 1961, Executive Director of the NGO Asociación Civil Transparencia Venezuela (Venezuela Civil Transparency Association);<sup>3</sup> Rafael Leonardo Uzcategui Montes, General Coordinator of the NGO Programa Venezolano de Educación-Acción en Derechos Humanos (Venezuelan Programme for Human Rights Education and Action);<sup>4</sup> and Marino Alvarado Betancourt, born 10 January 1958, a lawyer by profession. All the authors are Venezuelan nationals and claim that the State party has violated their rights under articles 2 (2), 19, read in conjunction with article 2 (1), 25, read in conjunction with articles 2 (1) and 19, and 14, read in conjunction with article 2 (3), of the Covenant. The Optional Protocol entered into force for the State party on 10 August 1978. The authors are not represented by counsel.

### **Factual background**

2.1 In 2010, the Office of the Comptroller General of the Bolivarian Republic of Venezuela published its annual management report, in which it detailed a number of irregularities in the procurement, storage and distribution of medicines. The report referred to 30 contracts for the procurement of medicines concluded with pharmaceutical companies in the Republic of Cuba during the period 2005–2010. The State bodies in charge of these contracts were the Ministry of People’s Power for Health (MPPS) and the Independent Pharmaceutical Preparations Service (SEFAR), attached to the MPPS. The report indicated that several irregularities had been found, including: (a) the supply and receipt of medicines with characteristics that did not meet the needs of the public; (b) delays of up to two years in the delivery of medicines purchased; (c) medicines with expiration dates of less than nine months, in violation of the legal minimum; (d) a lack of storage facilities that met the conditions necessary for the correct storage of medicines; (e) defective medical products, including medicines damaged as a result of a broken cold chain; (f) medicines stored in SEFAR facilities for two years on average without being distributed; and (g) medicines received without being covered in the contracts.

2.2 The report concluded that medicines were purchased without planning or effective oversight of contract fulfilment. It also concluded that storage was inadequate and distribution inefficient, necessitating the incineration of considerable volumes of medicines. The report made various recommendations to the MPPS, including that it should: (1) plan the procurement of medicines in order to ensure that purchases meet public needs, so preventing the expiration of medicines and consequent detriment to public assets; (2) exercise effective oversight over all activities associated with the fulfilment of international contracts for the purchase of medicines; (3) establish a working group on which all relevant stakeholders are represented to take charge of planning the international procurement of medicines with a view to ensuring that appropriate products are selected, warehouses are equipped to provide appropriate conditions for their storage, and research into the needs of the public is carried out; (4) establish and implement the mechanisms necessary to ensure that transaction-related documentation is kept and thus guarantee transparency in medicine procurement processes; and (5) encourage the SEFAR authorities to compile handbooks of procedural guidelines for the storage of medicines and to formulate quality control protocols.

2.3 On 29 August 2011, the authors and the above-mentioned NGOs, in exercise of their right of petition, submitted an application to the MPPS in which they requested information about the measures taken to implement each of the five recommendations contained in the Comptroller General’s report as well as information on any administrative investigations ordered by the MPPS, in accordance with the Civil Service Statute.<sup>5</sup> The authors stated that, as human rights activists and individuals interested in transparency in public administration who are also part of NGOs pursuing the same goals, they considered it important to know the scope of the measures adopted to prevent a recurrence of the irregularities identified by the Comptroller General’s Office, which were affecting the public’s right to health and were detrimental to public assets. The authors also stated that the information to be disclosed to them by virtue of the “right of petition” request would be included in the respective annual reports drawn up by the organizations of which they formed part and would be posted on

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<sup>3</sup> Dedicated to action to reduce corruption.

<sup>4</sup> Dedicated to the provision of free legal assistance in relation to human rights violations.

<sup>5</sup> Reference is made, *inter alia*, to article 79 of the Statute, concerning the responsibility of civil servants.

their websites, the aim being to provide follow-up on the implementation of the report's recommendations.

2.4 The authors received no reply to their petition, even after the 20-day deadline established in the Organic Administrative Procedure Act had expired.<sup>6</sup> Consequently, on 19 March 2012, they filed an application for *amparo* before the Constitutional Chamber of the Supreme Court against the Minister of People's Power for Health, in view of her refusal to respond to their petition. The authors allege violations of their right of access to public information, their right of petition and their right to obtain a timely and appropriate response from the public administration, as well as of their freedom of expression.<sup>7</sup> They maintain that these rights entail an obligation for the State party to guarantee not only the right to express one's thoughts, but also the right to seek, receive and impart ideas of all kinds, including the right to obtain State-held information.<sup>8</sup> The authors also indicate that their reasons for requesting information from the MPPS included exercising social oversight over State bodies, protecting the right to health and promoting the proper functioning of the public administration, all of which are rights enshrined in the Constitution. The authors described how they would use the information requested,<sup>9</sup> and indicated that, although they had complied with this requirement as established by the Supreme Court, they did not deem it necessary to demonstrate a particular interest in the information requested, as the Inter-American Court of Human Rights had found,<sup>10</sup> in ruling that information requested from public authorities should be provided without the requesting party having to prove a direct interest or personal involvement, except in cases where a legitimate restriction applied.

2.5 The authors maintain that an application for *amparo* was the only effective and expeditious means of obtaining timely restitution of the rights infringed, given the urgency with which the information on implementation of the recommendations contained in the report of the Comptroller General's Office was required from the MPPS.<sup>11</sup> They likewise affirmed administrative litigation on grounds of omission or inaction would not constitute an effective remedy, given the risk of having to wait a long, indeterminate period of time, which would be at odds with the urgency with which the requested information was needed, given its close correlation with citizens' right to health and life. This urgency was apparently attributable to the fact that the recommendations of the Comptroller General's Office were intended to prevent a recurrence of situations such as medicine shortages, short expiration dates, inadequate storage and inefficient distribution that placed public health at risk.

2.6 On 18 June 2012, the Constitutional Chamber of the Supreme Court ruled on the authors' *amparo* application. The Court declared the application inadmissible, on the grounds that the remedy of *amparo* was not the only effective and expeditious means of obtaining timely restitution of the rights allegedly infringed. The Court indicated that, according to its case law, the remedy of administrative litigation for omission or inaction was the procedure that should ordinarily be used to appeal against omissions on the part of the public administration, including so-called "generic omissions" resulting from a failure to provide an adequate and timely response to administrative requests. The Court also stated that, although in other cases related to administrative failings it had determined that the remedy for omission or inaction did not of itself exclude an *amparo* application, the omissions in question must violate fundamental rights and it must be shown that the remedy for omission or inaction

<sup>6</sup> Article 5 provides that: "In the absence of any express provision otherwise, any petition (...) addressed by individuals to bodies of the public administration (...) should be satisfied within 20 days of its submission (...). The administration shall notify the interested party (...) of any omission or failure to comply with any requirement within five days of the date of submission of the petition."

<sup>7</sup> Constitution, arts. 51, 57 and 143; and Organic Administrative Procedure Act, arts. 2 and 5.

<sup>8</sup> They refer to article 13 of the Inter-American Convention on Human Rights and the judgment of the Inter-American Court of Human Rights in *Claude Reyes et al. v. Chile*, 19 September 2006.

<sup>9</sup> See para. 2.3.

<sup>10</sup> *Claude Reyes et al. v. Chile*, para. 77.

<sup>11</sup> They refer to the judgment in *Claude Reyes et al. v. Chile* (para. 137), in which the Inter-American Court of Human Rights found that "the State must guarantee that, in the event that the disclosure of State-held information is refused, there is a simple, prompt and effective judicial remedy (...)". They also refer to national jurisprudence and case law, especially decisions of the former Political and Administrative Chamber of the Supreme Court (prior to the 1999 Constitution).

could not guarantee effective satisfaction of the claim.<sup>12</sup> In the case in point, there was no evidence of a de facto situation which would provide a basis to assert that the authors might suffer unavoidable and irreparable harm if they were to use the remedy for omission or inaction or that this remedy would be insufficient to restore the rights allegedly infringed. The Court recalled its case law concerning the requirements for an *amparo* application to be declared admissible, which were that: (a) ordinary judicial avenues of redress have been exhausted and yet the constitutional rights have still not been restored; and (b) it is evident that ordinary judicial avenues will not give satisfaction for the claim invoked. The Court found that these requirements had not been met by the authors in their *amparo* application.

2.7 The authors recount that, as the decision of 18 June 2012 could not be appealed, they submitted a second “right of petition” request to the MPPS on 22 October 2012, in which they reiterated the request for information made in their first petition. On 26 December 2012, when the 20-day deadline for responding to a “right of petition” request had elapsed without a reply having been received, the authors sent a further communication to the Minister, in which they reiterated their request for information and stated that their request of 22 October 2012 had not been answered. On 6 February 2013, in the absence of a reply, the authors sent another letter to the MPPS, in which they insisted that their requests for information, including those of 22 October and 26 December 2012, be answered.

2.8 In the absence of a response, on 23 May 2013 the authors petitioned for a remedy against omission or inaction before the Political and Administrative Chamber of the Supreme Court. They reiterated the arguments set out in their *amparo* application, citing the constitutional status of the rights violated in their case, namely, the right of access to public information, the right of petition and the right to obtain timely and adequate responses from the public administration, and freedom of expression. In addition, the authors maintained that the chamber in question was the competent authority, since the remedy for omission or inaction should be used whenever senior administrative authorities, including ministers, refused to carry out acts that they are legally bound to perform. This included omissions to act, as was the case here, since it had been demonstrated that the Minister never replied to their “right of petition” request submitted on 22 October 2012 even though the request was resubmitted on two occasions. The authors also asked the Court to apply the time limits established for *amparo* proceedings when ruling on the remedy, in view of the constitutional status of the rights violated and the need to put an end to such violations in an expeditious manner, in accordance with the Organic Act on the Protection of Constitutional Rights and Guarantees (*Amparo*)<sup>13</sup> and the case law of the Constitutional Chamber of the Supreme Court.<sup>14</sup>

2.9 The authors also reiterated that the information requested would be included in the reports prepared by the organizations of which they form part with a view to providing follow-up on the recommendations made by the Office of the Comptroller General in respect of irregularities in the procurement, storage and distribution of medicines, even though international human rights law does not require a specific interest in the information requested in exercise of the right of petition to be demonstrated.<sup>15</sup> The authors also attached as evidence various newspaper articles reporting on the shortage of medicines in the State party.<sup>16</sup> Lastly, as an interim measure, the authors requested that the Minister of People’s Power for Health be ordered to respond immediately to their “right of petition” request, given the urgency of the matter evidenced by the shortage of medicines to treat serious diseases

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<sup>12</sup> The Court refers to Constitutional Chamber judgment No. 547/04, *A.B.M.* case.

<sup>13</sup> The authors refer to various articles according to which, in the event that a violation of a constitutional right is alleged in the context of an ordinary remedy, the judge must adhere to the procedure and time limits established for *amparo* proceedings.

<sup>14</sup> The authors state that, when it comes to protecting fundamental rights, this jurisprudence has extended the application of the time limits for *amparo* proceedings to ordinary remedies.

<sup>15</sup> See para. 24.

<sup>16</sup> They refer, among others, to *El Nacional*, “Reportan fallas de suministro de antiretrovirales y antibióticos” (reports of irregularities in the supply of antiretroviral drugs and antibiotics), 2 May 2013; *La Prensa de Monagas*, “Registran escasez de medicina contra el Sida en Humnt” (Shortages of drugs to treat AIDS reported in Humnt), 7 June 2012; Agencia Carabobeña de Noticias, “Escasez de reactivos para VIH en Venezuela” (Shortage of HIV reagents in Venezuela), 9 April 2013.

such as AIDS, hypertension, Alzheimer's and diabetes. They provided several press articles on this subject.<sup>17</sup>

2.10 On several occasions, the authors requested the Political and Administrative Chamber of the Supreme Court to admit their claim and issue a prompt ruling,<sup>18</sup> but the Supreme Court dismissed the remedy on 6 August 2014. The Court referred to the case law of the Constitutional Chamber according to which the right to information is subject to certain restrictions, particularly: (a) persons requesting information from the public administration must expressly state the reasons or purposes for which they are seeking the information requested; and (b) the "magnitude" of the information requested must be proportionate to its intended use.<sup>19</sup>

2.11 The Supreme Court found that the authors had not duly explained the reasons for which they were requesting information from the MPPS, since from the evidence they submitted it was impossible to discern the existence of any irregularities in the procurement, distribution and storage of medicines. In the Court's view, the reference to the 2010 report of the Office of the Comptroller General of the Republic did not constitute proof of the alleged irregularities. The Court also stated that the authors failed to make clear the extent to which publication of the requested information in their annual reports and on their websites could be of use to them, or how publication might serve to improve medicine procurement processes, a failure indicative of a mismatch between "the magnitude of the information requested and its intended use". Accordingly, the Court found that the authors' remedy request did not meet the requirements established in the aforementioned case law. The Court further stated that, although everyone has the right to request information from the public authorities and to receive an adequate and timely response, the exercise of this right must not impede the normal functioning of administrative activity; responding to generic requests such as the one in question entails the use of financial and human resources, overburdening the public administration unjustifiably. Lastly, the Court stated that information of the type requested by the authors can be found in the annual reports submitted by the various ministries to the National Assembly, which are in the public domain.

### **The complaint**

3.1 The authors claim that the State party violated their freedom of expression, in particular with regard to access to information, which is a right enshrined in article 19 (2) of the Covenant, read in conjunction with article 2 (1). The authors also allege a violation of article 25, which enshrines the right to take part in the conduct of public affairs, read in conjunction with articles 2 (1) and 19. They further allege a violation of the right to an effective judicial remedy and to the guarantees of due process enshrined in article 14, read in conjunction with article 2 (3). Lastly, the authors claim that the State party has violated article 2 (2), which establishes an obligation for States parties to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

3.2 The authors refer to the Committee's general comment No. 34 (2011), according to which article 19 (2) of the Covenant enshrines the right of access to information held by public bodies, and that this right must be protected by States parties, who must ensure easy, prompt and effective access by means of procedures that provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.<sup>20</sup> The authors also indicate that the Committee has recognized the freedom to seek, receive and impart information, including, inter alia, in respect of public affairs, in accordance with article 25 of the Covenant. In this connection they refer to the decision adopted in *Toktakunov v. Kyrgyzstan*, in which the Committee found that article 19 (2) of the Covenant includes the right of individuals to receive State-held information, with the exceptions permitted by the

<sup>17</sup> Ibid.

<sup>18</sup> They submitted repeat requests on 2 July, 6 August, 18 September and 19 November 2013 and on 6 February and 1 July 2014.

<sup>19</sup> The Supreme Court refers to Constitutional Chamber judgment No. 745 of 15 July 2010, which is apparently binding in nature.

<sup>20</sup> Human Rights Committee, general comment No. 24 (2011), paras. 18 and 19.

restrictions established in the Covenant.<sup>21</sup> The authors also point out that, in the aforementioned decision, the Committee determined that “information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied” and that the right of access to public information is not limited to the media, but can also be exercised by public associations or private individuals.<sup>22</sup>

3.3 The authors further state that the right of access to information has two dimensions – a social one and an individual one – that must be guaranteed by States parties.<sup>23</sup> The individual dimension is determined by the right of all persons to seek information held in public records and the duty of the State to release it, while the social dimension refers to the right of all persons to have access to State-held information. The authors also maintain that, although the right of access to public information is not absolute, restrictions on this right must be in line with the Covenant, which provides that restrictions must meet certain requirements, namely, respect for the rights and reputation of others and the protection of national security, public order, public health or public morals.<sup>24</sup>

3.4 The authors refer to various instruments and the jurisprudence of regional bodies for the protection of human rights related to freedom of expression. Among others, they indicate that, according to the Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights in 2000, access to State-held information is a fundamental right of individuals that States are under an obligation to guarantee.<sup>25</sup> They also refer to the decision of the European Court of Human Rights in the case of *Társaság A Szabadságjogokért v. Hungary*, in which the Court found that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as public watchdogs and their ability to provide accurate and reliable information may be adversely affected.<sup>26</sup> The authors also list the national legislation violated by the State party, which includes articles 51 (right of petition), 57 and 58 (freedom of expression) and 143 (access to public information) of the Constitution, articles 2 and 5 (right of petition) of the Organic Administrative Procedure Act and article 9 (obligation to respond to citizens’ petitions) of the Organic Act on Public Administration.

3.5 With regard to their specific case, the authors point out that, as the Committee has stated, civic associations have the right to disseminate information that is relevant to the development and protection of human rights, provided that their actions do not undermine public order or national security and are not compatible with any of the other restrictions established by the Covenant. The associations that submitted the petition to the MPPS were exercising this right, acting as a “social watchdog” of the acts of the public administration. The authors reiterate that neither they themselves nor the civic associations mentioned above were required to demonstrate that they had a particular or specific interest in accessing the public information in question,<sup>27</sup> especially since the information related to public health. Furthermore, the authors claim that information about irregularities in the procurement of medicines cannot be subject to restrictions because there is no law that so provides, restriction would not serve to satisfy some superior interest protected under the Covenant and such restrictions are unnecessary in a democratic society. In addition, such information is not of a personal nature, so no violation of the right to privacy or the reputation of the persons concerned may be invoked, nor is it information that might affect national security, public order, public health or morals. On the contrary, it is information that should be in the public domain, given the need for awareness of the situation regarding medicine procurement, distribution and storage processes, and of the measures taken to correct the problems affecting these processes, in order to foster public debate that might serve to improve the

<sup>21</sup> *Toktakunov v. Kyrgyzstan* (CCPR/C/101/D/1470/2006 and Corr.1), para. 6.3.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, para. 7.4.

<sup>24</sup> They refer to *Gauthier v. Canada* (CCPR/C/65/D/633/1995), para. 13.4.

<sup>25</sup> Available for consultation at [www.cidh.oas.org/Basicos/declaracion.htm](http://www.cidh.oas.org/Basicos/declaracion.htm)

<sup>26</sup> European Court of Human Rights, *Társaság A Szabadságjogokért v. Hungary*, application No. 37374/05, judgment of 14 April 2009, para. 38.

<sup>27</sup> They refer to *Toktakunov v. Kyrgyzstan*, para. 6.3.

situation and so that citizens can participate in an informed manner in future election processes.

3.6 Likewise, the authors consider that, in order to justify the failure to release information to the public, the competent authority must indicate what legitimate purpose it is pursuing in restricting access to the requested information and explain its motives for doing so, which it has not done in the present case.

3.7 The authors also mention the connection between access to public information and the right to health, and maintain that both may be adversely affected in cases such as the present one. They refer to article 12 of the International Covenant on Economic, Social and Cultural Rights, which enshrines the right to health, pointing out that this right includes an obligation for the State to ensure that citizens have access to sufficient medicines in good condition. In this connection, they attach a report entitled “Venezuelan context: access to public information and availability of medicines”, which identifies various legal and practical obstacles that impede access to public information.<sup>28</sup> The legal obstacles include the impossibility of invoking *amparo* as a means to obtain enforcement of this right. As for the practical obstacles, the report states that a study of requests for information submitted to various public authorities in 2013 found that 87 per cent of such requests went unanswered. Regarding problems affecting the availability of medicines, the report states that the Comptroller General’s Office described irregularities in their procurement, storage and distribution in its 2010, 2011 and 2013 reports. For example, the most recent of these reports states that, in September 2013, only 0.84 per cent of medicines purchased had been received, although 74 per cent should have been received. In August 2014, the Venezuelan Association of Distributors of Medical, Dental, Pharmaceutical, Laboratory and Related Equipment issued a press release in which it expressed its concern over the total or partial lack of certain medical supplies. The press release stated that the shortage of these supplies had been increasing exponentially, generating a “humanitarian health crisis”, attributable, among other factors, to negligence on the part of the MPPS, which had failed to update hundreds of medical records necessary for the import of medical supplies, and to delays in State payments to foreign pharmaceutical companies equivalent to a cumulative debt in an approximate amount of \$350 million.

3.8 With regard to article 25 of the International Covenant on Civil and Political Rights, the authors points out that, as recognized by the Committee in its general comment No. 25 (1996), the free communication of information and ideas about public and political issues between citizens is essential, and this requires the existence of free press and communication media able to comment on public issues without censorship or restraint and thus to inform public opinion.<sup>29</sup> Accordingly, States parties have an obligation to provide the public with the maximum amount of information through informal channels, particularly when the information in question concerns public policies, in this case related to the right to health, which is recognized in the Constitution and in international treaties to which the State is a party.<sup>30</sup> As a consequence, the authors consider that, by failing to respond to the petitions that are the subject of the present communication, the State party violated article 25 of the Covenant, read in conjunction with articles 19 and 2 (1).

3.9 With regard to the claims under articles 14 and 2 (3) of the Covenant, the authors maintain that these articles require States parties to ensure to all individuals whose rights have been violated, and who are within its territory or subject to its jurisdiction, an effective remedy through which a competent authority may re-establish their rights.<sup>31</sup> The authors consider that, in the present case, they were denied access to a simple, prompt and effective judicial remedy on two occasions: first, when their application for *amparo*, filed on 19 March 2012, was dismissed, and, second, when the remedy for omission or inaction filed on 23 May 2013 was declared inadmissible.

<sup>28</sup> Prepared by the NGO Espacio Público (Public Space) in 2014.

<sup>29</sup> Human Rights Committee, general comment No. 25 (1996), para. 25.

<sup>30</sup> Constitution, art. 83.

<sup>31</sup> They refer to the Committee’s general comment No. 33 (2008), para. 14, and to its Views in *Gauthier v. Canada*, para. 13.7.

3.10 The authors maintain that the Supreme Court dismissed their *amparo* application on grounds that were not duly substantiated and ran counter to both domestic legislation and international law. With regard to domestic legislation, the authors argue that the Constitutional Chamber of the Supreme Court has established that *amparo* is the most appropriate remedy for claiming restitution of the right to public information, and refer to a dissenting opinion (individual opinion) issued by a judge in another similar case,<sup>32</sup> as well as to academic articles and decisions of the Political and Administrative Chamber of the Supreme Court issued prior to the adoption of the 1999 Constitution.<sup>33</sup> With regard to international law, the authors reiterate that articles 2 (3) and 14 of the Covenant were violated by the decision to dismiss their application for *amparo*, which was the only effective remedy available given the delays affecting the processing of the remedy for omission or inaction, and by the Court's failure to provide a reasoned explanation.<sup>34</sup>

3.11 The authors point out that the Court took a very long time – one year and two months – to reach a decision on the remedy for omission or inaction despite their request that it be processed in accordance with the time frames established for *amparo* applications. They also maintain that it was not necessary to provide supporting documentation to substantiate the irregularities identified by the Comptroller General's Office, since proving such irregularities was not a requirement for requesting information, especially bearing in mind that the reports of the Comptroller General's Office are publicly available. Similarly, the authors argue that it was not necessary for them to set out the reasons for which they required the requested information, or to specify how the petitioners might help to resolve the irregularities. The authors reiterate that information should be provided without there being any need to prove a direct interest or personal involvement, unless a legitimate restriction applies.<sup>35</sup> They also point out that requests for public information cannot be considered to impede the functioning of the public administration, as the Political and Administrative Chamber found in its decision of 6 August 2014. Such an assertion is contrary to the right to access public information, given States' obligation to ensure the transparency of their actions and to respond promptly and appropriately to requests submitted by any individual. The authors also affirm that, contrary to the Supreme Court's contention, the information requested cannot be found in any of the annual management reports published by the MPPS, which is not proactive in disseminating information about its activities, as evidenced by the fact that, at the time of the communication's submission, only the reports for the years from 2002 to 2008 were available on its website. Furthermore, based on an analysis of publicly available information, it is impossible to find information that might provide responses to the questions raised in their requests for information about the procurement and distribution of medicines.

3.12 With regard to the violation of article 2 (2) of the Covenant, the authors state that, although the right to public information is enshrined in the State party's Constitution and various legislative texts, there is no specific, clear and comprehensive legal provision that facilitates the exercise of this right by regulating the grey areas existing in legislation and case law. The authors refer to a model law on access to public information adopted by the Organization of American States,<sup>36</sup> and assert that the State party should adopt a law based on this model in order to resolve the current lacunae, including the lack of an adequate special judicial procedure for processing requests for public information and absence of sanctions for public officials who refuse to provide the requested information. The authors consider that the lacunae in national legislation on the right of access to public information resulted in a violation of article 2 (2) of the Covenant.

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<sup>32</sup> Supreme Court of Justice, Constitutional Chamber, judgment No. 697/2010, dissenting opinion of Carmen Zuleta de Merchán. The judge indicated that *amparo* is the effective remedy in certain cases (e.g. requests for information on epidemiological bulletins) due to the lengthy period of time required to process remedies for omission or inaction.

<sup>33</sup> See, among others, *Navio J. Salas Grado* case, judgment of 13 August 1992.

<sup>34</sup> They cite several decisions of the Inter-American Court of Human Rights, including *López Mendoza v. Venezuela*, judgment of 1 September 2011, para. 141.

<sup>35</sup> They refer to *Toktakunov v. Kyrgyzstan*, para. 6.3.

<sup>36</sup> Adopted by resolution AG/RES. 2607 (XL-O/10), on 8 June 2010. See [www.oas.org/es/sla/ddi/docs/AG-RES\\_2607\\_XL-O-10.pdf](http://www.oas.org/es/sla/ddi/docs/AG-RES_2607_XL-O-10.pdf).



### State party's observations

4.1 On 23 August 2016, the State party submitted its observations on the communication. First, it refers to the facts as presented by the authors. The State party claims it is untrue that it is refusing to provide public information on the health system. As evidence, it cites its response to the urgent request sent to the State party in July 2015 by the Special Rapporteur on the right to health and the Special Rapporteur on the situation of human rights defenders in relation to the shortage of medical supplies and medicines. The State party asserts that, in this response, it informed the Office of the High Commissioner for Human Rights of the measures it had taken to improve planning within the public health system and provided information on public policies for promoting, monitoring and effective restitution of comprehensive health.

4.2 The State party also reports a number of actions taken to improve the regulation of the procurement, storage and distribution of medicines. These include the Office of the Vice-President's plan to guarantee the delivery of medicines purchased abroad; agreements with the Pan American Health Organization to guarantee free access to HIV and cancer drugs, among others; the establishment of supply monitoring brigades, composed of doctors who analyse the needs of the population and correct distribution deficiencies; and the development of a software application, referred to as the Integrated System for Access to Medicines (SIAMED), that registers requests for medicines for chronic diseases and allows users to check the availability of medicines by text message; and the production of statistics on consumption and real demand for medicines.

4.3 The State party maintains that the authors' allegations concerning the case law of the Constitutional Chamber of the Supreme Court are inaccurate, and that, as indicated in the decision of 18 June 2012, the authors were aware of the Supreme Court's case law according to which the remedy to be used in cases of omission on the part of the public administration was the remedy for omission or inaction. The authors decided to file an application for *amparo* nonetheless, which shows they were acting in bad faith. The State party also refers to the case law of the Political and Administrative Chamber according to which the right to request public information is not absolute and may be subject to restrictions.

4.4 The State party submits that the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol to the Covenant, for failure to exhaust domestic remedies. It refers to the Committee's jurisprudence which holds that, in addition to judicial administrative remedies, the authors should pursue other judicial remedies to the extent that they appear effective and available.<sup>37</sup> In the present case, the authors used an inappropriate remedy – the remedy of *amparo* – to address a situation for which a specific and effective remedy – the remedy for omission or inaction – was available. This is contrary to the Committee's case law, since they failed to demonstrate that the latter remedy was ineffective or unavailable.<sup>38</sup>

4.5 In addition, the State party asserts that the authors failed to submit sufficient evidence to substantiate their allegations and do no more than simply state that the administration's failure to respond constitutes a violation of their rights. They also fail to demonstrate how the information they requested could serve to uphold the right they were seeking to protect, as they do not explain how this right would have been protected in the event that the administration had responded to their request.

4.6 With regard to the merits of the communication, the State party refers to general comment No. 34 (2011)<sup>39</sup> and submits that it can be inferred from the general comment and from the text of article 19 of the Covenant that the State party has certain obligations: (a) to establish mechanisms for incorporating information of public interest into the "public domain"; (b) to establish clear rules for the exercise of the right of access to public information; and (c) to establish remedies to challenge denials of this right, as well as

<sup>37</sup> The State party refers to *P. A. v. Panama* (CCPR/C/50/D/433/1990), para. 6.2; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; and *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.2.

<sup>38</sup> The State party refers to *Perera v. Australia* (CCPR/C/53/D/536/1993), para. 6.5.

<sup>39</sup> Human Rights Committee, general comment No. 34 (2011), paras. 18 and 19.

situations in which requests for information go unanswered. With regard to the first of these obligations, the State party refers to the planning measures taken within the framework of the Independent Pharmaceutical Preparations Service and SIAMED. Regarding the second, it indicates that it has established rules to regulate the exercise of the right to access public information. These include article 143 of the Constitution and the case law of the Constitutional Chamber of the Supreme Court, which determines the limits on exercise. It reiterates that these limits are that the petitioner must state the reasons for which the information is being requested and that the magnitude of the information requested must be proportionate to its intended use. None of these conditions were met by the authors, as indicated by the Political and Administrative Chamber of the Supreme Court in its judgment of 5 August 2014. With regard to the third obligation, the State party indicates that the remedy for omission or inaction was available to the authors. Accordingly, the State party considers that it has complied with the conditions established in the Covenant in respect of the right of access to public information.

4.7 The State party also asserts that the authors have interpreted the Covenant erroneously in claiming that the information about irregularities that was the subject of the request for information is not information that can be restricted, because there is no law so providing and any restriction would not be intended to satisfy a superior interest protected in the Covenant. This interpretation ignores the fact that the Covenant itself authorizes restrictions on the right to access public information, and that what the State party has done is to establish minimum control parameters which do not impede exercise of the right.

4.8 With regard to the allegations related to article 25, the State party submits that the authors have failed to explain the manner in which their right to participate in public affairs has been impeded, since they have made no claim of difficulties in gaining access to executive and elected office, or in exercising their right to vote or their right to participate in popular assemblies, as provided in this article.

4.9 With regard to the allegations related to the violation of the right to an effective remedy, the State party refers to general comment No. 34 (2011), which indicates that States parties are required to establish remedies for requests for information that have gone unanswered.<sup>40</sup> The State party reiterates that the remedy for omission or inaction is the ordinary judicial procedure that meets this requirement.

#### **Authors' comments on the State party's observations**

5.1 On 5 February 2019, the authors submitted their comments. They affirm that they have exhausted all domestic remedies available in the State party, since they first filed an application for *amparo*, which was declared inadmissible, and then instituted a remedy for omission or inaction, which was also declared inadmissible.

5.2 As to the State party's observations on the merits of the communication, the authors refer to the information provided by the State party about measures taken in relation to the procurement and distribution of medicines. The authors consider that this information should have been provided to them at the time they submitted their requests for information to the MPPS, and not now, in response to a communication submitted to the Committee. They also consider that the information in question does not alter the fact that the State party violated their rights as stated in the communication, since the violation occurred when the MPPS refused to respond to their requests. The authors also indicate that the information provided by the State is incomplete and does not provide specific responses to the issues raised in their requests for information, as it omits any reference to the recommendations of the Comptroller General's Office.

5.3 With regard to the arguments relating to article 19 of the Covenant, they maintain that, contrary to the State party's assertion, the only restrictions on the right of access to information that the Covenant permits are those that satisfy a three-fold requirement, namely, that they are legal, pursue a legitimate aim, and are necessary and proportionate. The authors consider that the case law of the Political and Administrative Chamber imposes restrictions

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<sup>40</sup> Ibid, paras. 19.

that ignore the conditions imposed by this three-fold requirement.<sup>41</sup> The authors reiterate that information about the procurement and distribution of medicines was not subject to any legal restriction, that any restriction imposed on information of this kind would not be intended to satisfy a legitimate aim of the Covenant and would not constitute a necessary, let alone proportionate, restriction in a democratic society. The authors also reiterate that it was not necessary to explain the reason for requesting the information, since, according to the Committee's jurisprudence, it was not necessary to prove a direct interest or personal involvement in order to obtain such information.<sup>42</sup> They also reiterate that, in a democratic society, human rights defenders and civic associations have the right to disseminate information that is important for the protection of human rights such as, as in this case, the right to health, thereby performing a social oversight or watchdog-type function.

5.4 They consider the State party's interpretation of article 25 of the Covenant to be very restrictive, because the right to participate in public affairs encompasses the close relationship between access to public information and participation in public affairs. Requests for public information are a direct means of citizen participation and free access fosters involvement in political life and decision-making in that it allows for the exercise of social oversight of the State administration. Without public information, it is impossible to participate in public affairs and/or propose improvements to public policies, and this has a negative impact on democratic debate.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

6.2 The Committee takes note of the State party's argument that the authors have not exhausted domestic remedies since they used an inappropriate remedy, namely, an application for *amparo*, to address a situation for which a specific and effective remedy, namely, the remedy for omission or inaction, was available. This was contrary to the Committee's jurisprudence because they did not demonstrate that the latter remedy was ineffective or unavailable. The Committee notes that, after their request for information dated 29 August 2011 went unanswered by the MPPS, the authors filed an application for *amparo* with the Constitutional Chamber of the Supreme Court on 19 March 2012, which was declared inadmissible on 18 June 2012. The Committee notes that the Constitutional Chamber considered that the remedy for omission or inaction was the remedy that the authors should have used. It also notes that the authors submitted a second request to the MPPS in application of their right of petition, on 22 October 2012; that they reiterated this request on two further occasions; and that, in the absence of a reply, they initiated a remedy for omission or inaction with the Political and Administrative Chamber of the Supreme Court on 23 May 2013. The Committee notes that the remedy was declared inadmissible on 6 August 2014 because, in the Chamber's view, the authors did not meet the requirements for requests for public information established in its case law. The Committee observes that, after their *amparo* application was dismissed, the authors availed themselves of the remedy identified by the Constitutional Chamber as the correct remedy to use in cases where the public administration fails to respond to requests for information, but that this remedy was also declared inadmissible. Furthermore, the Committee notes that the State party does not identify any other effective remedy that the authors should have exhausted. Accordingly, the Committee considers that the authors have met the requirements established in articles 2 and 5 (2) (b) of the Optional Protocol.

6.3 The Committee takes note of the authors' allegations concerning the violation of their rights under article 2 (2) of the Covenant, since, although the State party has enshrined the right to public information in the Constitution and in various legislative provisions, there are no specific, comprehensive and clear regulations to facilitate its exercise. The Committee

<sup>41</sup> See para. 2.11.

<sup>42</sup> They refer to *Toktakunov v. Kyrgyzstan*, para. 6.3.

recalls that the provisions of article 2 (2) of the Covenant lay down general obligations for States parties which cannot give rise, when invoked separately, to a claim in a communication.<sup>43</sup> Accordingly, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.4 The Committee also takes note of the authors' allegations under articles 14 and 2 (3), according to which States parties must guarantee to all individuals whose rights have been violated, and who are in their territory or under their jurisdiction, an effective remedy by which their rights can be re-established by a competent authority and that this did not occur in the present case, because they were not given access to a simple, prompt and effective judicial remedy. In this connection, the Committee notes that the authors consider that the dismissal of their application for *amparo* violated the above-mentioned provisions of the Covenant because this remedy was the only effective remedy. Furthermore, the Committee notes that the authors consider that the inadmissibility of the remedy for omission or inaction also violated their rights under articles 14 and 2 (3) of the Covenant, because the Supreme Court took a long time to reach a decision and the Court referred to certain requirements that they consider contrary to the right of access to public information. The Committee also takes note of the State party's argument that it complied with its obligation under the Covenant to provide remedies for requests for public information that have gone unanswered, and that the remedy for omission or inaction is the legal remedy that meets this requirement.

6.5 The Committee notes that the authors do not allege a lack of independence or impartiality on the part of the Supreme Court when considering the aforementioned remedies and that they had the opportunity to exercise the remedies available within the legal system to seek protection of the rights alleged to have been violated. Furthermore, the Committee notes that the authors do not indicate the basis for their argument that the Supreme Court took a long time to reach a decision on the remedy for omission or inaction, nor do they indicate that this delay had any impact on their rights. The Committee also notes that the authors limit themselves to expressing their disagreement with the arguments used by the domestic courts when deciding on the remedies pursued. The Committee recalls that the mere fact that court decisions do not favour the author does not demonstrate that they are unfounded or arbitrary.<sup>44</sup> Accordingly, in view of the above, and the authors' failure to explain the manner in which the dismissal of their remedies constituted of itself a violation of the Covenant, the Committee considers that the authors have failed to substantiate their claims sufficiently for purposes of admissibility, and that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the authors have sufficiently substantiated their claims under articles 19 (2) and 25 of the Covenant for the purposes of admissibility. Accordingly, it declares this claim admissible and proceeds to its consideration on 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 notes the authors' argument that the rights they enjoy under article 19 (2) of the Covenant have been violated, as the State party failed to ensure easy, prompt and effective access, by means of procedures that provide for the timely processing of requests for information held by public bodies according to rules that are compatible with the Covenant. The Committee also takes note of the State party's arguments that it has complied with its obligations under the Covenant by establishing mechanisms for putting information of public interest in the public domain; that it has established clear rules for the exercise of the right of access to public information, in particular through article 143 of the Constitution and the case law of the Supreme Court in connection with this right, which indicates that petitioners must demonstrate an interest in the information requested, and must show that the magnitude of the information requested is proportionate to its intended use; that it has

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<sup>43</sup> See *Millis v. Algeria* (CCPR/C/122/D/2398/2014), para. 6.5; *Rodríguez Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; and *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5.

<sup>44</sup> See *Jusinskas v. Lithuania* (CCPR/C/109/D/2014/2010), para. 7.4.

established remedies for refusals of access to public information, including cases where requests for information have been left unanswered; and that the remedy for omission or inaction is the correct remedy to use in such cases, and a remedy that was available to the authors.

7.3 The Committee recalls that the right of access to information includes the right of the communication media, public associations and private individuals, when they meet certain conditions, to obtain access to information on public affairs, as well as the right of the general public to be informed of the results of the work of these media and associations.<sup>45</sup> The Committee also recalls that it is not necessary to prove a direct interest or personal involvement in order to obtain the public information in question, except in cases where a legitimate restriction applies.<sup>46</sup> In the present case, the Committee notes that the authors are members of associations that perform watchdog-style functions in relation to matters of legitimate public concern, and that, as a consequence, their requests for information deserve to be protected under the Covenant.<sup>47</sup> The Committee also recalls that the right of access to information has two dimensions that must be guaranteed by States parties: an individual one, established by the right of every person to seek information held in public record systems, and a social one, established by the right of all persons to obtain State-held information.<sup>48</sup> Consequently, the Committee concludes that the authors' request for information was protected under article 19 of the Covenant and that the State party's refusal to provide the requested information constituted a restriction of this right.

7.4 The Committee must now determine whether, in the present case, the restrictions imposed by the State party are justified under article 19 (3) of the Covenant. The Committee observes that such restrictions are permitted only as provided by law and where necessary: (a) to guarantee respect for the rights and reputation of others; and (b) to protect national security, public order, or public health or morals. In this respect, the Committee notes the authors' allegations that the State party did not comply with these requirements, since information on irregularities in the procurement and distribution of medicines cannot be restricted because there is no law so providing; is not of a personal nature that might compromise the reputation of others; and is not information that could affect national security, public order, public health or morals. On the contrary, it is information that should be made public, given society's need to know what measures have been taken to address irregularities in the procurement and distribution of medicines, in view of their close connection with the right to health and taking account of the shortages in the supply of medicines in the State party.

7.5 The Committee recalls that, as indicated in its general comment No. 34 (2011), when a State party asserts that it has a legitimate ground for restricting freedom of expression, it must demonstrate in a specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>49</sup> The Committee takes note of the State party's argument that it has complied with the conditions set out in article 19 (3) of the Covenant since it has established minimum control parameters which, however, do not impede the exercise of the right of access to public information. However, the Committee notes that the State party has not given any concrete indication as to the reason for imposing restrictions on the authors' rights under article 19 (2) of the Covenant, nor has it explained the need to impose such restrictions. Consequently, the Committee considers that, in the circumstances of the case, the State party has failed to demonstrate that its failure to respond to the authors' requests for information on the procurement, storage and distribution of medicines was justified under the criteria set out in article 19 (3) of the Covenant.<sup>50</sup> Accordingly, the Committee concludes that the authors' rights under article 19 (2) of the Covenant have been violated.

<sup>45</sup> *Ibid.*, para. 7.4; and Human Rights Committee, general comment No. 34 (2011), paras. 18 and 19.

<sup>46</sup> *Toktakunov v. Kyrgyzstan*, para. 6.3.

<sup>47</sup> *Ibid.*, para. 7.4

<sup>48</sup> *Ibid.*, para. 6.3

<sup>49</sup> Human Rights Committee, general comment No. 34 (2011), para. 35.

<sup>50</sup> See *Pivonos v. Belarus* (CCPR/C/106/D/1830/2008), para. 9.3.

7.6 Taking the conclusions set out above into account, the Committee does not consider it necessary to examine the authors' allegations regarding a possible violation of article 25 of the Covenant.

8. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under article 19 (2) of the International Covenant on Civil and Political Rights.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which includes ensuring that the authors obtain a prompt and reasoned response to their requests for information about the procurement and distribution of medicines, including updated information thereon, as well as the reimbursement of costs incurred, both at the national level and before the Committee. The State party is also under an obligation to adopt measures to prevent similar violations 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 or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or 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 this decision. The State party is also requested to publish this decision, and to have it widely disseminated in the State party.

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