United Nations CCPR/C/134/D/2841/2016 (Final proceedings)*

# 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. 2841/2016**, ***, ****

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| *Communication submitted by:* | Luiz Inácio Lula da Silva (represented by counsel, Valeska Teixeira Zanin Martins, Cristiano Zanin Martins and Geoffrey Robertson) |
| *Alleged victim:* | The author |
| *State party:* | Brazil |
| *Date of communication:* | 28 July 2016 |
| *Document references:* | Decision taken pursuant to rule 92 (6)–(7) of the Committee's rules of procedure, transmitted to the State party on 24 October 2016 (not issued in document form) |
| *Date of adoption of Views:* | 17 March 2022 |
| *Subject matter:* | Fair trial; imprisonment without a final judgment; and prohibition of standing for election |
| *Procedural issues:* | Exhaustion of domestic remedies; compliance with interim measures |
| *Substantive issues:* | Arbitrary arrest and detention; competent, independent and impartial tribunal; presumption of innocence; privacy; unlawful attacks on honour or reputation; voting and elections |
| *Articles of the Covenant:* | 9 (1), 14 (1)–(2), 17 and 25 |
| *Articles of the Optional Protocol:* | 1 and 5 (2) (b) |

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** Adopted by the Committee at its 134th session (28 February–25 March 2022).

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

**** An individual opinion by Committee member Duncan Laki Muhumuza (concurring) and a joint opinion by Committee members José Manuel Santos Pais and Kobauyah Tchamdja Kpatcha (dissenting) are annexed to the present document.

1. The initial proceedings of the present Views, including the author's initial submissions of facts and claims and the State party's initial observations on admissibility and the merits, may be found in document CCPR/C/134/D/2841/2016 (Initial proceedings).

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

*Exhaustion of domestic remedies*

2.1 In his comments on admissibility and the merits of 21 February 2019, the author alleges that the State party has not provided any evidence that the far-fetched remedies it mentions are effective and available within a reasonable time frame. For example, the author's final appeal against his conviction to the Supreme Federal Court, which is suggested by the State party as a remedy, had been delayed by a year at the time of filing of the comments. The author claims that the State party's judicial system is institutionally biased against him, as is shown by the press releases of the Association of Federal Judges of Brazil. He stresses that, in the only instance where a judge had ruled substantively in his favour, that judge was removed and is now the subject of an investigation.

2.2 The author alleges that the State party assumed that the violations of his rights could be remedied by an appeal against his conviction, misunderstanding the nature of his complaint to the Committee, which relates to matters that took place before his trial and before the filing of his communication to the Committee. The damages caused to him could not be rectified by any appeal against his conviction. He explains that none of his complaints, other than the one regarding the partiality of Judge of the Thirteenth Federal Criminal Court of Curitiba, Sérgio Moro, could feature in appeals against his conviction because they were irrelevant to the facts of his case. Furthermore, the partiality complaint had already been decided against him in the motions for bias, and any appeals to the convictions would not have compensated him for being put through the ordeal of a long trial before a biased judge, with the resulting inevitable conviction and imprisonment.

2.3 The author claims that, in the jurisprudence of the Committee and the European Court of Human Rights cited by the State party, those bodies accept that exhaustion of domestic remedies may be considered after the date of the filing of the petition but before the determination of admissibility. However, he affirms that he did exhaust domestic remedies at the time of the filing, as established in his original complaint. He also claims that the question of whether remedies are unreasonably prolonged can be best assessed when examining the admissibility of the communication.

*Bench warrant of 2 March 2016*

2.4 The author claims that he never refused to cooperate with judicial authorities in a way that would trigger the application of article 260 of the Code of Criminal Procedure. He explains that the writ of habeas corpus filed concerning the deposition in São Paulo involved a different investigation and that taking legitimate action in a court in relation to the timing of a deposition cannot be interpreted as a refusal to give it.

2.5 The author alleges that the media presence at 6 a.m. at his home can only be explained by a leak by the State authorities. He claims that the State party's allegations that secrecy of the bench warrant was necessary to the objective of preventing disorder were disingenuous, because that was not the objective of the bench warrant. The fact that the author contemplated "assembling some congressmen to surprise them" did not suggest that they would have been many or would have held a disruptive demonstration. He claims that he was merely contemplating them as potential witnesses. He adds that the fact that Judge Moro instructed that no handcuffs be used was not out of benevolence, but in virtue of a binding Supreme Federal Court rule.

*Disclosure of various intercepts of telephone conversations*

2.6 The author claims that the Committee's general comment No. 32 (2007), cited by the State party, relates specifically to the need to publish reasons for judgments where some trial secrecy has been necessary. He adds that it does not in any way justify the release by an investigating judge of intercepts of private conversations obtained via telephone taps before

a charge has been brought. He adds that the immediate release of such intercepts in order to assist in the demonization of a suspect before he is charged is characteristic of an undemocratic and authoritarian State.

*Taps of the author's lawyers' telephones and disclosure of the intercepts*

2.7 With regard to the tapping of the law firm's telephones, the author alleges that Judge Moro was notified twice by the telephone company that the telephone number in question was actually related to the law firm. He adds that Judge Moro simply stated that that was unnoticed by the court, due to the enormous amount of work, which the author considers an unacceptable excuse considering the very serious circumstances.[1] Equally, the author explains that, although the State party alleges that the calls were never used in the investigations, the court had many transcripts of calls made from the law firm, including calls discussing the author's defence strategy, with several comments made on their margins, showing that they had definitely been analysed by the federal police.[2] The fact that they were later destroyed does not preclude the possibility that the author's defence strategy had been closely monitored by judicial authorities.

2.8 With regard to the mobile phone of the author's lawyer, Roberto Teixeira, the author alleges that Mr. Teixeira was not even being formally investigated at the time that the telephone taps occurred. Although one of the petitions challenging a search warrant was not filed by Mr. Teixeira, he signed all other petitions that were filed, and it was well known that he was the author's lawyer.

*Absence of an impartial tribunal*

2.9 The author claims that the State party has failed to recognize a defect in domestic law. The defect consists of allowing a judge in the investigative phase who determines that a suspect is probably or likely to be found guilty[3] to assume subsequently the role of trial judge. That inevitably imbues the judge with the views produced in those early decisions, making him act with prejudice during the trial. He explains that, according to domestic law, both tapping telephones and search and seizure orders require a high degree of cognizance. He adds that it does not matter whether it is allowed by law, but whether the law or the specific facts of the case conform to the Covenant.

2.10 The author alleges that, although the State party claims that the role of a criminal judge in the preliminary investigations is supposedly passive, Judge Moro's conduct did not convey the idea of a person acting in a passive manner. The author alleges that Judge Moro portrayed himself, and allowed himself to be portrayed by the media, as the leading anti-corruption hero. Furthermore, Judge Moro's widely spread theory of the "attack judge" shows that, had the author been acquitted at his trial, it would have been a major blow to Judge Moro's reputation and ego. The author adds that his complaint does not take issue with a judge's right to give lectures or to attend public events. However, the requirement of judicial impartiality necessitates that judges behave in public in such a way that will not permit reasonable members of the public to perceive them as biased.[4]

2.11 The author explains that two new facts have come to light that show that Judge Moro's bias existed from the time that he was appointed as an investigative judge. On 1 October 2018, six days before the first round of the presidential election, the former judge published the only plea bargain testimony from Operation Car Wash mentioning the author, accusing him of crimes. The testimony was from the former Minister of Finance, Antonio Palocci, and was in fact rejected by the Office of the Federal Attorney, which indicated that the testimony did not give enough evidence or good investigative leads. However, after the release of that document, Judge Moro granted Mr. Palocci a considerable reduction of his prison sentence and the right to house arrest. The author alleges that the confidential testimony was widely

[1] Basic Principles on the Role of Lawyers, principles 16 and 22.

[2] The author filed an affidavit of a lawyer who consulted at the court the material obtained through the telephone tapping.

[3] For example, by ordering searches and seizures and tapping telephones.

[4] Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 21.

publicized before the election. The author also recalls that, in December 2017, Judge Moro informed the media that: "it would not be appropriate for me to think of any kind of political office because that could, let's say, raise questions about the integrity of the work I have done up to today. So I think it would not be appropriate."[5] In November 2018, then President elect, Jair Messias Bolsonaro, announced that he would appoint Judge Moro as Minister of Justice in his Administration, a position which the latter nevertheless accepted.

2.12 The author recalls that Judge Moro, who was not an appellate judge, was on vacation at the time of the decision rendered by the appellate judge of the Federal Regional Court assigned to hear cases in the court's recess period, Rogério Favreto, on 8 July 2018, to release the author from imprisonment,[6] but that he nevertheless gave orders via telephone to countermand them. He adds that it is extraordinary that the State party's authorities are criminally prosecuting Judge Favreto for exercising his jurisdiction, rather than Judge Moro, who intervened to assert his jurisdiction.

2.13 The author also claims that the State party passes off judicial prejudice as merely an exercise of freedom of speech or of association. He affirms that, when exercised in a certain way, it can lead to prejudice against a defendant and a consequent unfair trial. While certain biased speech, such as that of judges' associations, might not be illegal, it may have consequences for the fairness of an appeal.

*Risk of indefinite pretrial detention*

2.14 The author claims that, while Judge Moro did not put the author in pretrial detention, he did order the revocation of the author's release, as dictated by Judge Favreto. The author explains that, at the time the communication was filed, his complaint hinged on his potential to be detained, which existed while he was under the jurisdiction of Thirteenth Federal Criminal Court of Curitiba, the court of Judge Moro, who had already ordered the pretrial detention of 29 Operation Car Wash suspects. He recalls that, according to the Committee's jurisprudence, he is entitled to lodge a complaint as a "victim", because there was a real risk of such a violation of his rights.[7]

*Presumption of innocence*

2.15 The author claims that the State party relied once again on freedom of speech to justify prejudicial and "poisonous" attacks proclaiming the author's guilt before and during his trial. He recalls that the State party is notable for not having a contempt of court law to thwart, or at least postpone, the making of prejudicial comments until after the trial. He adds that the 90-minute press conference held by the prosecutors of Operation Car Wash was not aimed at providing the public with information, but was instead a propagandistic exercise aimed at persuading viewers of the author's guilt. He claims that none of the factors mentioned by Judge Moro in his attempt to justify the press conference[8] excuse the prosecutors' public demonization of the author. With regard to the press, he claims that his complaint was not about reporting facts or news, but about prejudicial comments stoked by being voiced by prosecutors, which created an expectation of guilt. The media are entitled to report the charges and evidence against the author, but they are not entitled to report that a defendant is guilty before his conviction.

*Right to vote and right to be elected*

2.16 The author claims that the right to be elected might be made subject to a reasonable restriction by excluding persons who have been finally convicted, but the restriction would be unreasonable if the conviction were still subject to appeal. He recalled that that is forbidden under article 15 of the State party's Constitution, which provides for a revocation of political rights only after a final judgment of conviction.

[5] OPOVO online, "*Há um ano, Moro disse que postular cargo político 'não seria apropriado'"*, 3 November 2018.

[6] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 2.14.

[7] See *Kindler v. Canada* (CCPR/C/48/D/470/1991).

[8] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 4.24.

*Interim measures*

2.17 The author adds that the State party provided no explanation as to why its authorities refused to comply with the Committee's request for interim measures.

**State party's additional observations**

3.1 On 14 March 2019, the State party submitted additional observations. It reiterated its prior observations on the admissibility of the communication and on the merits of the author's complaints under articles 9 (1), 17 and 25 of the Covenant.

*Absence of an impartial tribunal*

3.2 The State party claims that it could not be assumed that all judges and prosecutors would exercise their official duties under the influence of their professional association's opinions, in disregard of the rule of law. It adds that the investigation into Judge Favreto's conduct was set in motion on the legitimate grounds of indications of use of the judicial office to advance private interests. In response to the author's claim that Judge Moro's acceptance of an appointment as Minister of Justice "permits an inference that he was angling for a political position and using his role" to appeal to political groups that were against the author, the State party claims that an inference on personal intentions is simply not judicial evidence and should not be taken into account by the Committee.

3.3 With regard to Mr. Palocci's plea bargain, the State party affirms that Judge Moro's conduct was regularly ratified by the Federal Regional Court. It adds that only a portion of the plea bargain, which was directly related to the procedure, was attached to another criminal lawsuit involving both Mr. Palocci and the author. Once attached, in accordance with article 7 (3) of Law No. 12,850/2013, the rule of publicity of procedural acts prevailed and no right to secrecy existed as to the content of the plea bargain testimonies. It adds that the author's counsel had requested the attachment of all plea bargain agreements to the criminal procedure and that the decision to attach that portion was not political, but rather aimed at guaranteeing the effectiveness of the plea bargain and the defendants' access to complete information.

*Risk of indefinite pretrial detention*

3.4 The State party reiterates that the author never faced pretrial detention and that both the Covenant and its domestic law allow for arrests when they are necessary and legally carried out. It adds that the author's imprisonment was indeed legally carried out and in accordance with the Covenant.

*Presumption of innocence*

3.5 The State party claims that, in the light of its previous observations, judicial independence, freedom of speech and the general right to information have been balanced in the domestic legal framework, in accordance with international standards. It adds that the case was carried out with the necessary social accountability and constraints posed by equality, impartiality and the high ethical standards for judges and public prosecutors.

**Additional information from the author**

4.1 On 10 October 2021, the author submitted additional information containing new facts and further comments on admissibility and the merits.

*New facts*

4.2 On 7 November 2019, the Supreme Federal Court ruled that article 283 of the State party's Code of Criminal Procedure, which establishes that defendants cannot be imprisoned until their conviction is final, was constitutional. That decision allowed for the invalidation of the execution of the author's conviction after the confirmation on appeal while other extraordinary appeals were pending. By virtue of that decision, the author was freed on 8 November 2019, after 580 days of false imprisonment and of having been deprived of his right to vote and to stand for election.

4.3 On 8 March 2021, the Rapporteur of the Supreme Federal Court granted one of the author's writs of habeas corpus, determining that the decisions of the Thirteenth Federal Criminal Court of Curitiba, including those of both Judge Moro and Gabriela Hardt, a judge of the same Court appointed to temporarily replace Judge Moro, convicting the author,[9] were rendered without jurisdiction. The Court understood that the author's two convictions and the other two investigations related to the Lula Institute were not directly related to Operation Car Wash, but instead involved other bodies of the public administration. The convictions against the author were therefore vacated.[10]

4.4 On 23 March 2021, the Second Panel of the Supreme Federal Court granted the author's second writ of habeas corpus, declaring that Judge Moro was biased.[11] The Court listed the following seven facts in its finding, all of which, according to the author, confirm his complaints:

(a) Bench warrant of 2 March 2016, which was issued prematurely by Judge Moro, without previously having summoned the author to appear in court, as required under article 260 of the Code of Criminal Procedure, and which provided an exposure that undermined the author's dignity and his right to the presumption of innocence;

(b) Tapping of the author's telephones, as well as those of his family and his lawyers (lasting for 30 days and including all the conversations between 25 members of the law firm), in order to monitor and anticipate defence strategies, which constituted a flagrant violation of his constitutional right to a full defence;

(c) Disclosure of the intercepts of conversations with family members and third parties obtained from telephone taps was manipulatively selective, particularly those of 16 March 2016 between the author and the then President of Brazil, Dilma Rousseff, which were released at a time of enormous tension in the State party's society and which Teori Albino Zavascki, Justice of the Supreme Federal Court, declared were obtained illegally, given that they were intercepted after the judicial decision to cease the telephone taps;

(d) Actions, even without jurisdiction over the case and while on vacation, to prevent the implementation of the order of the Federal Regional Court of 6 July 2018 by Judge Favreto, ordering the author's release from prison and enabling him to participate in the elections; Judge Moro went so far as to call then Director General of the Federal Police to tell him not to comply with the order, acting as if he were a member of the Office of the Federal Prosecutor, with the purpose of holding the defendant in prison with regard to cases in which he had already manifested himself as a judge;

(e) Clear expressions, in the judgment of the case relating to construction companies that had allegedly helped the author buy a holiday apartment, of his perceptions of alleged abusive behaviour by the author's defence, including stating that, in Judge Moro's perception, the defence had acted in an aggressive manner, with inappropriate procedural behaviour, aiming to offend him;

(f) Ordering the lifting of the confidentiality of Mr. Palocci's plea bargain and transferring it to those conducting the investigations concerning the Lula Institute, which was done when the evidentiary stage of those investigations had already concluded, which meant that the content of the plea bargain could not serve as grounds for a future judgment; it was also done three months after the judicial decision that ratified the plea bargain, to coincide

[9] On 6 February 2019, Judge Hardt sentenced the author to 12 years and 11 months' imprisonment for corruption and money-laundering in the case concerning the author's property in Atibaia.

[10] The decision by the Rapporteur was confirmed by the full bench of the Supreme Federal Court, 8 votes to 3, on 15 April 2021. On 22 April 2021, the Court issued a clarification determining that the proceedings against the author should be carried out by the Federal Court of the State party's Federal District.

[11] The decision of the Second Panel of the Supreme Federal Court of 23 March 2021 was confirmed by the full bench of the Supreme Federal Court, 7 votes to 4, on 23 June 2021. On 24 June 2021, the Second Panel extended the finding to all other investigations against the author in which Judge Moro had participated.

with the eve of the elections, and done by Judge Moro's own initiative, i.e. without a request from the prosecuting body;[12]

(g) Acceptance of the position of Minister of Justice in the current Administration, i.e. that of the author's main political adversary, whom Judge Moro helped to get elected; therefore, Judge Moro directly benefited from the author's conviction and imprisonment.

*Admissibility*

4.5 The author explains that the Supreme Federal Court decision cannot be viewed as an effective remedy for the wrongs done to him five years earlier. A remedy is only effective in terms of its timeliness and capacity to provide restitution. The wrongs done to the author were such that they called for a speedy remedy, certainly before the presidential election in 2018. The remedy, such as it was, took too long to be considered effective. In addition, although the decision addressed the first three complaints, it was directed at the author's complaint that his right to an impartial tribunal had been violated. It provided no compensation or any form of restitution other than retroactive vindication. Furthermore, the decision was not reached on a motion that was or could have been filed in 2016. The Court acted only on 25 June 2019, a few weeks after the release of transcripts that revealed Judge Moro's close involvement with the prosecution. That was a new fact, which was not linked to the court filings of 2016. The Court decided only in December 2019 to open federal files for the author's lawyers to access, files which provided indisputable evidence of bias. The remedy, such as it was, took too long to be considered effective. He therefore requests the Committee to examine the merits of the communication.

**State party's further observations**

5.1 On 15 November 2021, the State party submitted further observations on the admissibility and the merits of the communication. The State party claims that the author's allegations were upheld by the decisions of the Supreme Federal Court in 2021, and that all decisions rendered on the criminal proceedings were annulled. It alleges that the facts prove that the author had not exhausted the internal remedies when he filed his communication with the Committee and that the measures requested in his communication are no longer necessary and have become moot since the author's claims were accepted by the State party's judiciary.

5.2 With specific regard to the author's imprisonment, the State party explains that the provisional execution of his sentence, after the confirmation of his conviction by the Federal Regional Court, was a measure taken in accordance with the Supreme Federal Court's jurisprudence. In February 2016, the Supreme Federal Court held, in a case unrelated to the author, that the presumption of innocence did not prevent imprisonment resulting from a judgment confirmed on appeal. The State party explains that, in fact, that was the consolidated jurisprudence of the Court prior to 2009. The State party alleges that the changes in the case law of the Court, and the fact that the author was released as soon as it had changed, is a clear demonstration of the independence of its judiciary.

5.3 With specific regard to the author's political rights, the State party claims that any limitations imposed stayed in place only while the criminal conviction was in force. Given that that sentence was annulled by the Supreme Federal Court, there are no longer any limitations on the author's political rights.

**Issues and proceedings before the Committee**

*State party's failure to respect the Committee's request for interim measures*

6.1 The Committee notes that the adoption of interim measures pursuant to rule 94 of its rules of procedure, in accordance with article 1 of the Optional Protocol, is vital to the role

[12] The illegality of both lifting the secrecy of the plea bargain and transferring it to those in charge of the investigations into the Lula Institute was determined by the Second Panel of the Supreme Federal Court on 10 September 2020.

entrusted to the Committee under that article.[13] Failure to respect the interim measures requested by the Committee with a view to preventing irreparable harm undermines the protection of the rights enshrined in the Covenant.

6.2 The Committee recalls that failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol[14] and therefore constitutes a violation of article 1 of the Optional Protocol.[15]

6.3 The Committee takes note of the author's argument that the State party never complied with the requests for interim measures issued by the Committee.[16] The Committee also takes note of the State party's argument that the Superior Electoral Court duly took into account, in good faith, the recommendation of the Committee to grant provisional measures.[17] The Committee is of the view that the State party has failed to substantiate how the request for interim measures was complied with, in the terms requested by the Committee, given that the author was neither allowed to campaign nor allowed to stand in the presidential election in 2018.[18] The Committee therefore considers that the State party failed in its obligations under article 1 of the Optional Protocol.

*Consideration of admissibility*

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

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

7.3 The Committee takes note of the State party's arguments that the author had not exhausted domestic remedies when he filed his communication with the Committee and that the measures requested in his communication are no longer necessary and have become moot, given that the author's claims were accepted by the State party's judiciary (see para. 5.1 above).

7.4 With regard to the timing of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the determination should be conducted with reference to the date on which a communication is submitted, with few exceptions when the last stage is reached shortly after the submission but before the determination of admissibility.[19] However, the Committee recalls its long-standing jurisprudence according to which, when examining complaints, that determination is made with reference to the time a communication is being examined.[20] The Committee recalls that procedural economy is a motivating factor, given that a communication in respect of which domestic remedies have been exhausted after submission could be immediately resubmitted to the Committee if declared inadmissible for that reason.[21] The Committee notes that, in all instances, both parties have had the opportunity to file further information and allegations, which have been

[13] *Valetov v. Kazakhstan* (CCPR/C/110/D/2104/2011), para. 12.3; *Ahani v. Canada* (CCPR/C/80/D/1051/2002), para. 8.2, *Saidova v. Tajikistan* (CCPR/C/81/D/964/2001), para. 4.4; and *Piandong et al. v. Philippines* (CCPR/C/70/D/869/1999), para. 5.4.

[14] Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 19.

[15] *Valetov v. Kazakhstan*, para. 15.

[16] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 3.20.

[17] Ibid., para. 4.30.

[18] Ibid., para. 1.4.

[19] Ibid., para. 4.1.

[20] See, among others, *Al-Gertani v. Bosnia and Herzegovina* (CCPR/C/109/D/1955/2010), para. 9.3; *Singh v. France* (CCPR/C/102/D/1876/2009), para. 7.3; *Lemercier and Lemercier v. France* (CCPR/C/86/D/1228/2003), para. 6.4; *Baroy v. Philippines* (CCPR/C/79/D/1045/2002), para. 8.3; *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002), para. 8.2.

[21] *Bakhtiyari et al. v. Australia*, para. 8.2.

transmitted to the other party for comments, giving both parties the opportunity to challenge each new fact and their corresponding allegations.

7.5 In the present case, the Committee takes note of the State party's argument that the author had been gradually making use of the available domestic remedies since the filing of his communication.[22] However, the Committee notes that the author made all reasonable attempts to remedy the alleged violations at the domestic level.[23] The Committee also notes that, with regard to the author's article 14 (1) claims, the Supreme Federal Court had already rejected, by June 2018, his appeals against the rejection of all four motions for bias against Judge Moro.[24] The Committee takes note of the author's argument that his claims relate to pretrial matters which could not be rectified by any appeals mentioned by the State party against his conviction (see para. 2.2 above). In this regard, the Committee observes that the State party has not identified – nor has the State party invoked – any other effective and reasonably available remedies that the author could have been expected to have exhausted at the time of issuance of the present decision.[25] Furthermore, given the time elapsed and the several attempts by the author to obtain relief at the domestic level, the Committee considers that it would be unreasonable to expect the author to pursue anew any other possible civil or administrative remedy. Therefore, the Committee is not precluded under article 5 (2) (b) of the Optional Protocol from considering the communication.

7.6 With regard to whether the communication has become moot, the Committee takes note of the State party's argument that the author's allegations were upheld by the judicial decisions issued by the Supreme Federal Court in 2021 and that all decisions in the criminal proceedings were annulled (see para. 5.1 above). The Committee also takes note of the author's argument that the Supreme Federal Court decision only addressed his claims based on his right to an impartial tribunal, that the decision took too long for it to be considered an effective remedy and that it did not provide any compensation or any form of restitution (see para. 4.5 above). The Committee observes that, except for the allegations regarding the right to an impartial tribunal, the Supreme Federal Court decisions did not directly pronounce on the alleged violations of the author's rights under the Covenant. The Committee also observes that the State party has failed to demonstrate how the decisions were timely and effective to avoid all the alleged violations invoked before the Committee, including the right to an impartial tribunal,[26] or how they have already provided full reparation to the author commensurate with all the violations alleged[27] in a way that could render the communication devoid of purpose. The Committee therefore considers that the author's communication has not become moot and that it is therefore not precluded from examining it on the merits.

7.7 With regard to the author's claims concerning the alleged risk of indefinite pretrial detention, in violation of article 9 of the Covenant, the Committee considers that those claims have not been sufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

7.8 The Committee considers, however, that the author has sufficiently substantiated for the purpose of admissibility his remaining claims relating to the bench warrant, the tapping of telephones and release of intercepts of conversations, the absence of an impartial tribunal, the presumption of innocence and the right to vote and be elected. The Committee therefore declares the communication admissible, raising issues under articles 9 (1), 14 (1) and (2), 17 and 25 of the Covenant, and proceeds with its consideration of the merits.

[22] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 4.2.

[23] *Lemercier and Lemercier v. France*, para. 6.4.

[24] CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 2.6, 2.11 and 3.17.

[25] *Katashynskyi v. Ukraine* (CCPR/C/123/D/2250/2013), para. 6.3. See also, mutatis mutandis, *Randolph v. Togo* (CCPR/C/79/D/910/2000), para. 8.5; and Human Rights Committee, *C.F. et al. v. Canada*, communication No. 113/1981, para. 6.2; *Muhonen v. Finland*, communication No. 89/1981, para. 6.1; and *Sequeira v. Uruguay*, communication No. 6/1977, para. 9 (b).

[26] Mutatis mutandis, *Brewer-Carías v. Bolivarian Republic of Venezuela* (CCPR/C/133/D/3003/2017), para. 9.8.

[27] Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 16.

*Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

a. Bench warrant of 2 March 2016

8.2 In relation to the author's claim under article 9 (1) of the Covenant, the Committee recalls that article 9 provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law.[28] The Committee must therefore determine whether the author was subject to a deprivation of his liberty and whether such a deprivation was established by law.[29]

8.3 The Committee recalls that examples of deprivation of liberty include police custody, confinement to a restricted area of an airport and being involuntarily transported.[30] The Committee takes note of the author's argument that compulsory transportation for questioning constitutes a deprivation of liberty.[31] The Committee also takes note of the State party's argument that the bench warrant was only to be used in case the author refused to accompany the police.[32] The Committee observes, however, that the State party has not contested that, in the author's specific context, the time in transport and the time held for questioning as a result of the bench warrant constituted a deprivation of liberty in the terms of article 9 (1) of the Covenant. The Committee notes that, although the author technically agreed to accompany the police to the questioning site, the issued bench warrant meant that he could neither refuse nor leave the questioning had he wanted to. The Committee therefore considers that the author was deprived of his liberty as provided by article 9 (1), and it must consequently determine whether the deprivation of liberty was carried out on grounds and in accordance with such procedure as are established by law.

8.4 The Committee recalls that, to be prescribed by law, any substantive grounds for arrest or detention should be defined with sufficient precision so as to avoid overly broad or arbitrary interpretation or application.[33] The Committee takes note of the author's argument that, in the light of article 260 of the State party's Code of Criminal Procedure, a bench warrant can only be ordered after the defendant has been subpoenaed and has either failed or refused to attend to give testimony, preconditions which were not satisfied in his case.[34] The Committee also takes note of the State party's argument that the measure was ordered according to its Code of Criminal Procedure and under the judicial authority's general power to grant precautionary measures, which were at the time of issuance considered regular and constitutional by the Supreme Federal Court.[35] However, the Committee observes that, when deciding on the lack of impartiality of the investigating judge, the Supreme Federal Court considered the issuance of the bench warrant to be premature, because the author had not been previously summoned to appear in court as required under article 260 of the Code of Criminal Procedure (see para. 4.4 above). The Committee therefore considers that the bench warrant was not issued in accordance with the procedure established by the State party's domestic law and declares that it violated the author's right to liberty under article 9 (1) of the Covenant.

b. Disclosure of various intercepts of telephone conversations and tapping of the telephones of the author's lawyers

8.5 The Committee takes note of the author's claims under article 17 of the Covenant, with regard to the disclosure of various telephone intercepts between his family, lawyer and

[28] Committee's general comment No. 35 (2014) on liberty and security of person, para. 22.
[29] Ibid., para. 14.
[30] Ibid., para. 5.
[31] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 3.2.
[32] Ibid., para. 4.7.
[33] Committee's general comment No. 35 (2014), para. 5.
[34] CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 3.1–3.2.
[35] Ibid., para. 4.5.

the President[36] and the tapping of the mobile telephone of one of his lawyers and the telephones at his lawyers' law firm.[37] In relation to the disclosures, the Committee takes note of the author's argument that the release of various telephone intercepts between him, his family, his lawyer and the President was carried out in contravention of articles 8 and 10 of Law No. 9,296/96, without conceivable public interest, to publicly humiliate and intimidate him.[38] The Committee also takes note of the State party's argument that the lifting of confidentiality was motivated and carried out to prevent the obstruction of justice and because of the public interest for a healthy public scrutiny of the performance of the Government and justice.[39]

8.6 The Committee takes note of the author's argument that the tapping of his lawyers' telephone breached attorney-client privilege through the interception of conversations about his legal defence strategy.[40] The Committee also takes note of the State party's arguments that the telephone number of the law firm was registered in the name of a company that belonged to the author, that, once it was known that the number belonged to third parties, the Federal Regional Court decided that the evidence should not be used for any purpose and that there are no records of intercepted conversations of lawyers other than Mr. Teixeira or of conversations with content related to the right of defence.[41] The Committee further takes note of the State party's argument that Mr. Teixeira's telephone was intercepted because he was being investigated for the alleged perpetration of money-laundering crimes and that he was not listed as one of the author's defence attorneys.[42] The Committee takes note of the author's argument that, although the State party alleges that the calls were never used and the records were destroyed later, that does not preclude the possibility that the author's defence strategy was closely followed by judicial authorities (see para. 2.7 above). The Committee also takes note of the author's arguments that Mr. Teixeira was not being formally investigated at the time the telephone tapping occurred and that, although one of the petitions challenging the search warrant against the author was not filed by Mr. Teixeira, he signed all other petitions that were filed, and it was well known that he was the author's lawyer (see para. 2.8 above).

8.7 The Committee observes that both the telephone tapping and the disclosure of the intercepts of telephone conversations constitute interferences with the right to privacy[43] and that this is not disputed by the State party. The Committee recalls that, in order to be permissible under article 17 of the Covenant, any interference with the right to privacy must not be arbitrary or unlawful.[44] It must cumulatively meet several conditions set out in article 17 (1), i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances of the case.[45] The Committee recalls that the relevant legislation authorizing interference with one's communications must specify in detail the precise circumstances in which such interference may be permitted and that the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis.[46] The Committee also recalls that, while acknowledging the importance of protecting the confidentiality of communications, in particular those relating to communications between lawyer and client, it must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences,[47] in particular those related to acts of corruption.[48]

8.8 The Committee considers, in the light of the analysis of the Inter-American Court of Human Rights, that Law No. 9,296/96 complies with the standard of legality required by

[36] Ibid., paras. 3.3 and 3.6.
[37] Ibid., para. 3.6.
[38] Ibid., para. 3.3.
[39] Ibid., para. 4.10.
[40] Ibid., para. 3.6.
[41] Ibid., para. 4.12.
[42] Ibid., para. 4.13.
[43] Committee's general comment No. 16 (1988) on the right to privacy, para. 8.
[44] Ibid., paras. 3–4; and *Van Hulst v. Netherlands* (CCPR/C/82/D/903/1999), para. 7.3.
[45] Ibid.
[46] Committee's general comment No. 16 (1988), para. 8; and *Van Hulst v. Netherlands*, para. 7.7.
[47] *Van Hulst v. Netherlands*, para. 7.6.
[48] *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.7.

article 17 of the Convention.[49] The Committee notes in particular that article 10 of Law No. 9,296/96 prohibits the lifting of judicial secrecy "without judicial authorization or for purposes which are unauthorized by law", including the concept of arbitrariness within the norm. In the author's case, the Committee notes that both the release of the various intercepts and the tapping of Mr. Teixeira's and his law firm's telephones were conducted after a reasoned decision of the intervening judge. However, the Committee also notes that the conversations with the President were illegally intercepted, as repeatedly recognized by the Supreme Federal Court[50] (see also para. 4.4 above). The Committee considers that the illegality of the telephone tap also renders the conversation's disclosure "unlawful", within the meaning of article 17 (1). The Committee notes that the Supreme Federal Court characterized all disclosure of intercepts, including those involving the author's family members and his lawyer, as "manipulatively selective" and considered that the tapping of the law firm's and Mr. Teixeira's telephones was conducted "in order to monitor and anticipate defence strategies" in "flagrant violation of [the author's] constitutional right to a full defence" (see para. 4.4 above). The Committee considers that the timing and manner of both the tapping of Mr. Teixeira's and his law firm's telephones and all disclosures of intercepts obtained therefrom reveal ulterior purposes that are "unauthorized by law" in the terms of article 10 of Law No. 9,296/96 and therefore arbitrary. The Committee considers that the above-mentioned intercepts and their disclosures were unlawful and arbitrary and declares them in violation of article 17 of the Covenant.

c. Absence of an impartial tribunal

8.9 With regard to the author's allegations under article 14 (1), the Committee recalls its long-standing jurisprudence according to which the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.[51] The Committee also recalls that that right is a safeguard that applies equally to supervisory judges at the preliminary stages of proceedings.[52] The Committee further recalls that the requirement of impartiality has a subjective element and an objective element.[53] According to the former, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[54] According to the latter, the tribunal must also appear to a reasonable observer to be impartial,[55] i.e. judges must not only be impartial, they must also be seen to be impartial, and it must be determined whether, quite apart from judges' personal mindsets, there are ascertainable objective facts which may raise doubts as to their impartiality.[56] The Committee recalls that the impartiality of a judge must be presumed until there is evidence to the contrary[57] and that partiality may be evidenced by various article 14 irregularities in the actions of the intervening judge.[58]

8.10 In the author's case, the Committee notes that the Supreme Federal Court found seven facts that showed that Judge Moro was subjectively partial (see para. 4.4 above). The Committee observes that, of the seven facts found by the Supreme Federal Court, the first six occurred before the elections, five of those facts constituted prima facie article 14 irregularities (see para. 4.4 (a)–(e) above) and the first three occurred prior to the author filing his communication before the Committee. The Committee considers that, to a reasonable observer,[59] the facts that occurred even before the author's first conviction in 2017 showed that the objective element of the requirement of impartiality was not met. The Committee

[49] Inter-American Court of Human Rights, *Escher v. Brazil*, judgment of 6 July 2009, paras. 130–132.
[50] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 2.6.
[51] Committee's general comment No. 32 (2007), para. 19; and *González del Río v. Peru* (CCPR/C/46/D/263/1987), para. 5.2.
[52] *Brewer-Carías v. Bolivarian Republic of Venezuela*, para. 9.2.
[53] *Jenny v. Austria* (CCPR/C/93/D/1437/2005), para. 9.3.
[54] Committee's general comment No. 32 (2007), para. 21.
[55] Ibid.
[56] *Lagunas Castedo v. Spain* (CCPR/C/94/D/1122/2002), para. 9.7.
[57] *Jenny v. Austria*, para. 9.4.
[58] See, for example, *Khostikoev v. Tajikistan* (CCPR/C/97/D/1519/2006), paras. 7.2–7.3; and *Saidova v. Tajikistan*, para. 6.7.
[59] Committee's general comment No. 32 (2007), para. 21.

observes that a timely decision on the matter would have avoided the harm caused to the author, which included a conviction, the confirmation of the conviction, being barred from standing for election and 580 days of wrongful imprisonment. The Committee therefore declares that the State party has violated the author's right to an impartial tribunal as provided for in article 14 (1) of the Covenant.

d. Presumption of innocence

8.11 With regard to the author's allegations under article 14 (2) of the Covenant, the Committee recalls its jurisprudence, as reflected in its general comment No. 32 (2007), according to which the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proven beyond reasonable doubt, ensures that the accused has the benefit of the doubt and requires that persons accused of a criminal act must be treated in accordance with this principle.[60] In addition, it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused, and the media should avoid news coverage undermining the presumption of innocence.[61]

8.12 In that regard, the Committee takes note of the author's argument that there was a virulent media campaign against him allegedly fostered by Judge Moro's actions, which created an expectation that he would be found guilty of corruption.[62] The Committee also takes note of the author's argument that the federal prosecutors have repeatedly made public statements asserting his guilt.[63] On the other hand, the Committee further takes note of the State party's argument that informing the public of corruption charges against the author in a technical manner is in accordance with the right to information and the principle of transparency.[64] The Committee takes note of the State party's argument that the regular conduct of the prosecutors in the exercise of their functions was highlighted on different occasions by Judge Moro, by other first and second instance judges and by administrative prosecutorial authorities.[65] The Committee also takes note of the State party's argument that judicial independence, freedom of speech and the general right to information have been balanced in the domestic legal framework and that the case was carried out with the necessary social accountability and constraints posed by equality, impartiality and the high ethical standards for judges and public prosecutors (see para. 3.5 above).

8.13 The Committee considers that the State party has a legitimate interest in combating acts of corruption and in keeping its population informed about matters of public interest related to such acts.[66] The Committee observes that there is hardly a matter of more pressing public interest than a former President, accused of acts of corruption which allegedly occurred during his presidential tenure, and who remained highly involved in public life – from his appointment as Chief of Staff of the Cabinet, in 2016, to his standing once again for election to the highest office, in 2018. However, the Committee notes that the Supreme Federal Court has ruled that Judge Moro's actions created a presumption of guilt and a general expectation that the author would and should be found guilty (see para. 4.4 above). Among those actions were the issuing of a premature bench warrant in violation of domestic law, which provided an exposure that undermined the author's dignity and right to the presumption of innocence, and the "manipulatively selective" disclosure to the public of intercepts of telephone calls, all actions which occurred even long before the author's trial (ibid.). The Committee considers that those actions and their result amounted to a violation

[60] Ibid., para. 30.

[61] Committee's general comment No. 32 (2007), para. 30; and see, for example, *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), para. 8.3; *Engo v. Cameroon* (CCPR/C/96/D/1397/2005), para. 7.6; *Mwamba v. Zambia* (CCPR/C/98/D/1520/2006), para. 6.5; *Kovaleva et al. v. Belarus* (CCPR/C/106/D/2120/2011), para. 11.4; and *Kozulin v. Belarus* (CCPR/C/112/D/1773/2008), para. 9.8.

[62] CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 3.10–3.11

[63] Ibid., para. 3.12.

[64] Ibid., para. 4.23.

[65] Ibid., paras. 4.24–4.25.

[66] *Arias Leiva v. Colombia*, para. 11.7.

of the author's right to be presumed innocent, as protected under article 14 (2) of the Covenant.

8.14 In relation to the diverse public statements made by the public prosecutors asserting the author's guilt, the Committee notes that the nature of the prosecutorial role is to accuse a defendant for the commission of a crime and prove their guilt beyond a reasonable doubt. That, together with the principles of transparency and the right to information, inevitably entails that prosecutors take a public stance towards the culpability of a defendant. However, they too must abstain from making public statements which undeniably affirm the defendant's guilt and take precautions so as not to create an expectation of guilt.[67] In the author's case, while the State party has contested the author's allegations and characterized the prosecutors' public statements as "technical explanations",[68] in the light of the evidence on the record,[69] the State party has not shown how such statements by high-ranking law enforcement officials did not amount to public affirmations of the author's guilt. The Committee considers that the prosecutorial authorities failed to show the required restraint mandated by the principle of presumption of innocence and have therefore violated the author's rights under article 14 (2) of the Covenant.

e. Right to vote and right to be elected

8.15 With regard to the author's allegations under article 25 of the Covenant, the Committee recalls that the Covenant recognizes and protects the rights of every citizen to take part in the conduct of public affairs, to vote and to be elected and to have access to public service. Whatever form of constitution or government is in force, the exercise of those rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.[70] The Committee also recalls that, if conviction for an offence is a basis for suspending the right to vote or to stand for election to public office, such restriction must be proportionate to the offence and the sentence.[71] The Committee further recalls that, when such a conviction is clearly arbitrary or amounts to a manifest error or denial of justice, or the judicial proceedings resulting in the conviction otherwise violate the right to a fair trial, it may render the restriction of the rights under article 25 arbitrary.[72] The Committee recalls that States parties pursue a legitimate aim in combating acts of corruption and protecting the treasury, and thereby the public interest, for the purpose of preserving the democratic order.[73] A State party may therefore have a legitimate interest in restricting the right to hold public office of persons convicted of crimes of corruption.[74]

8.16 The Committee takes note of the author's argument that he was deprived of his right to stand as a candidate in the presidential election and to vote, on the basis of a law incompatible with the right to be presumed innocent (Supplementary Law No. 135/2020, also known as the Clean Slate Law) and as a result of criminal proceedings in which due process was not observed.[75] The Committee also takes note of the State party's argument that the author's right to be elected was only restricted while his criminal conviction was in force (see para. 5.3 above), on the basis of objective and reasonable criteria established by a law with ample democratic legitimacy.[76] The Committee further takes note of the State party's argument that the restriction on the author's right to vote was the result of legal, objective and reasonable restrictions.[77]

[67] See, for example, *Gridin v. Russian Federation*, para. 8.3.
[68] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 4.23.
[69] For example, ibid., paras. 2.8 and 3.12.
[70] Committee's general comment No. 25 (1996) on participation in public affairs and the right to vote, paras. 3–4.
[71] Ibid., para. 14; and *Dissanayake v. Sri Lanka* (CCPR/C/93/D/1373/2005), para. 8.5.
[72] *Scarano Spisso v. Bolivarian Republic of Venezuela* (CCPR/C/119/D/2481/2014), para. 7.12; and *Nasheed v. Maldives* (CCPR/C/122/D/2270/2013 and CCPR/C/122/D/2851/2016, para. 8.6.
[73] *Arias Leiva v. Colombia*, para. 11.7.
[74] Ibid.
[75] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 3.13.
[76] Ibid., paras. 4.26–4.28.
[77] Ibid., para. 4.29.

8.17 In the author's case, the Committee observes that it has already concluded that the criminal proceedings against him and his subsequent conviction violated due process guarantees provided for in article 14 of the Covenant. Therefore, the Committee finds that the consequent ban on the author's right to stand for election, as well as the restriction on his right to vote, constituted a violation of article 25 (b). Having reached this conclusion, the Committee decides not to analyse separately the compatibility of the Clean Slate Law or the restrictions on the right to vote in the State party's Electoral Code and subsequent regulations with article 25 (b) of the Covenant or their individual application to the author's case.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violations of articles 9 (1), 14 (1) and (2), 17 and 25 (b) of the Covenant. The Committee is also of the view that the facts before it disclose a violation of article 1 of the Optional Protocol to the Covenant.

10. In accordance with 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 individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to ensure that the criminal proceedings against the author comply with all the due process guarantees set out in article 14 of the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. 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 where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, to have them translated into the official language of the State party and to disseminate them widely.

# Annex I*

## Individual opinion by Committee member Duncan Laki Muhumuza (concurring)

1. The right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception, as encapsulated under article 14 (1) of the Covenant and the jurisprudence of the Committee.

2. Judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.

3. The tribunal and judges thereon must also appear to a reasonable observer to be impartial. Judges must not only be impartial; they must also be seen to be impartial.

4. While agreeing with the majority view that Judge of the Thirteenth Federal Criminal Court of Curitiba, Sérgio Moro, was subjectively partial in carrying out his judicial duties regarding the author, and that the objective element requiring impartiality was not met, I have some additional observations to add. Under article 14 (1) of the Covenant, all persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

5. It is my carefully considered view that Judge Moro's involvement in this process was calculated to produce a specific result. Indeed, his overall conduct during and after the election was inconsistent with the required impartiality and led to irreparable harm. The author was effectively impaired from participating in the political process, thereby violating his rights under article 25 of the Covenant. What is particularly worrisome is that Judge Moro's conduct appears to have been condoned by the State. His actions seem to have been further validated by the State, which appointed him as Minister of Justice.

6. Judge Moro was biased, and his conduct and subsequent acceptance of the ministerial position points to this observation. His judgment should never have been relied upon, because ultimately it rendered the author unable to pursue his right to participate in the political affairs of the country. It was also known that, by the time the author had exhausted the appeals from the flawed judgment, it would be too late for him to engage in the elections.

7. The Committee must entreat States parties to refrain from unduly utilizing systems in violation of due process guarantees. States cannot engage judicial institutions and other coercive agencies to deny an individual his or her rights.

* Circulated in the language of submission only.

# Annex II*

## Joint opinion by Committee members José Manuel Santos Pais and Kobauyah Tchamdja Kaptcha (dissenting)

1. We regret not being able to join the majority of the Committee, which concluded by finding a violation of several of the author's rights. We consider that the communication should have been declared inadmissible. Were it to be admitted, we would find that only article 14 (2) of the Covenant was violated.

2. The author, a former President of Brazil, was investigated in the context of two criminal cases related to Operation Car Wash opened within the federal jurisdiction of the state of Paraná, where the acting judge at the Thirteenth Federal Criminal Court of Curitiba was Sérgio Moro. Operation Car Wash uncovered a major corruption scheme involving Petrobras, major construction companies and various parties receiving secret campaign funds.[1]

3. The author began to be investigated in February 2016.[2] Having submitted his complaint to the Committee in July 2016, it is clear that the conditions contained in article 5 (2) (b) of the Optional Protocol were not met at the time. The same applies to the author's successive submissions since, throughout the criminal proceedings, given that he continued to use all available remedies for his defence. They were never exhausted[3] and proved to be effective, given that, in the judgments issued in 2021 by the Supreme Federal Court, the Court accepted and addressed author's arguments.[4] We fail to accept the justification for admitting the communication,[5] particularly given that the case law cited[6] hardly matches the facts in the present case. Moreover, such justification will allow any author to invoke before the Committee breaches of their rights to defence while domestic appeals are still pending.

4. Regarding the issue of the bench warrant, the author was to accompany the police to Congonhas Airport, where he was held for six hours. However, he himself recognizes that the airport became the scene for demonstrations and counter-demonstrations.[7] This seems to confirm the reasonableness of Judge Moro's use of articles 201, 218, 260 and 278 of the Code of Criminal Procedure, on which he based the bench warrant, allowing the judge to have the defendant come to his presence even if the latter were not willing to do so. In spite of the author's allegations that he did not want to obstruct justice, circumstances at the time seem to imply otherwise. In fact, the author and his wife were to be deposed, and he filed a writ of habeas corpus arguing that the investigative act would generate a great risk of protests and conflict. Protests indeed took place in the area surrounding the courthouse.[8] An intercepted call showed that the author had knowledge of the scheduled search and seizure and contemplated "assembling some congressmen to surprise them". Steps were therefore taken to avoid risks to both the author and security officers' moral and physical integrity, and the court asserted that the order was only to be used in case the author refused to accompany the police.[9] The measure was further in compliance with the Code of Criminal Procedure and the

* Circulated in the language of submission only.

1 CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 2.1–2.2. Operation Car Wash involved 175 detentions and 120 convictions. With regard to Judge Moro's decisions, sanctions were upheld or increased on appeal in 71 per cent of cases.

2 CCPR/C/134/D/2841/2016 (Initial proceedings), para. 2.3.

3 Ibid., paras. 4.1–4.3.

4 Ibid., paras. 4.3–4.4.

5 CCPR/C/134/D/2841/2016 (Final proceedings), paras. 7.4–7.5.

6 Namely, *Al-Gertani v. Bosnia and Herzegovina* (CCPR/C/109/D/1955/2010), para. 9.3; *Singh v. France* (CCPR/C/102/D/1876/2009), para. 7.3; *Lemercier and Lemercier v. France* (CCPR/C/86/D/1228/2003), para. 6.4; *Baroy v. Philippines* (CCPR/C/79/D/1045/2002), para. 8.3; *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002), para. 8.2.

7 CCPR/C/134/D/2841/2016 (Initial proceedings), para. 2.4.

8 Ibid., para. 4.6.

9 Ibid., paras. 4.7–4.8.

judicial authority's general power to grant precautionary measures that was at the time considered constitutional by the Supreme Federal Court.[10] We therefore fail to see a violation of article 9 (1) of the Covenant, the measure being neither arbitrary nor disproportionate.

5. While acknowledging the importance of protecting the confidentiality of communications, in particular those between lawyer and client, States parties need also to take effective measures for the prevention and investigation of criminal offences, in particular acts of corruption. In the present case, decisions on all telephone taps requested by the Office of the Federal Prosecutor were substantiated and in line with domestic law.[11] Subsequent judicial decisions even extended and expanded those measures. The lifting of the confidentiality of the call with then President of Brazil, Dilma Rousseff, was motivated and carried out to defend the public interest, given that it related to the appointment of the author, who was at the time under criminal investigation, as Chief of Staff. The tapping took place two hours and 20 minutes after Judge Moro had ordered an end to the telephone tapping.[12] However, such delay is understandable, given that the notice was conveyed to the Office of the Federal Prosecutor and then had to be transmitted to the unit performing the tapping, which justifies the delay. Moreover, the author's appointment as Chief of Staff had already been announced to the public by the Office of the President.[13] The Supreme Federal Court later overturned Judge Moro's decision and invalidated the tapping of the communication.[14]

6. The telephone number of the law firm whose communications were intercepted was registered in the name of a company belonging to the author. Once it was known that the number belonged to third parties, the Federal Regional Court decided that the evidence was not to be used and audio recordings were destroyed, as the author himself acknowledges.[15] There are no records of the intercepted conversations of lawyers other than Roberto Teixeira, one of the author's lawyers, nor conversations with content related to the right of defence.[16] Mr. Teixeira's telephone was tapped, because he was being investigated for money-laundering crimes and was not listed as the author's defence attorney.[17] We therefore fail to see a violation of article 17 of the Covenant.

7. The majority considered, following the reasoning of the Supreme Federal Court, that Judge Moro was subjectively partial and that the objective element of impartiality was not met.[18] However, most of Judge Moro's decisions in Operation Car Wash (95.2 per cent) were upheld on appeal by superior courts in successive judgments.[19] The author was convicted in July 2017 for corruption and money-laundering and sentenced to 9 years' imprisonment. In January 2018, the conviction was confirmed by the Federal Regional Court and the sentence increased to 12 years and one month's imprisonment.[20] In another judgment, of February 2019, the author was sentenced to 12 years and 11 months' imprisonment.[21] Successive judicial decisions therefore confirmed the author's convictions. The Supreme Federal Court, in April 2018, stated further that there was no bar to the author's imprisonment, despite the fact that his appeal was still pending.[22] An arrest warrant was subsequently issued and the author taken into custody to serve his sentence. A writ of habeas corpus was later dismissed by the Federal Regional Court,[23] thereby confirming the lawfulness of the author's imprisonment. In November 2019, however, the Supreme Federal Court changed its case law and considered that, under article 283 of the Code of Criminal Procedure, defendants could not be imprisoned until their conviction was final. In consequence, the author was freed the

[10] Ibid., para. 4.5.
[11] Ibid., para. 4.10.
[12] Ibid., para. 2.5.
[13] Ibid., para. 3.4.
[14] Ibid., para. 4.11.
[15] CCPR/C/134/D/2841/2016 (Final proceedings), para. 2.7.
[16] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 4.12.
[17] Ibid., para. 4.13.
[18] CCPR/C/134/D/2841/2016 (Final proceedings), para. 8.10.
[19] CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 2.9–2.13.
[20] Ibid., para. 2.11.
[21] CCPR/C/134/D/2841/2016 (Final proceedings), para. 4.3.
[22] CCPR/C/134/D/2841/2016 (Initial proceedings), para. 2.12.
[23] Ibid., para. 2.14.

next day, on 8 November.[24] Notwithstanding that decision, the author was lawfully imprisoned, in April 2018, as per the applicable law and case law in force at the time.

8. In the decisions issued in 2021, the Supreme Federal Court addressed two writs of habeas corpus. In the decision of 8 March, it considered that the convictions of the author had been rendered without jurisdiction and were therefore vacated.[25] In the decision of 23 March, it declared that Judge Moro had been biased. Instead of just analysing the question of illegal detention, both decisions went far beyond their scope. The latter decision is particularly illustrative of what can be seen as a political settling of accounts, referring, namely, to the fact that Judge Moro became Minister of Justice a year and a half after the author's first conviction, therefore concluding that he directly benefited from such conviction and imprisonment.[26] The decision failed, however, to also mention that Judge Moro had resigned from Government, in April 2020, when the Director General of the Federal Police was removed from office by current President of Brazil, Jair Messias Bolsonaro, in an attempt to hamper criminal investigations concerning family members of the President himself.

9. The Committee has time and again referred to its view that judges should be exempted from undue influence from the President, the legislature or the Executive. However, the justices of the State party's Supreme Federal Court are all appointed by the President (four were appointed by Ms. Rousseff, three by the author and two by Mr. Bolsonaro), which may explain the voting of the justices in the decisions issued in 2021. We would therefore not have concluded that there had been a violation of article 14 (1) of the Covenant, accepting the State party's arguments in this regard,[27] and we fear for the chilling effect that the present decision will have on the fight against corruption.

10. Regarding the violation of the right to vote and to be elected, we consider that the author did not suffer irreparable harm by being prevented from standing for election in 2018, given that he is now standing as a candidate in the upcoming presidential election to be held in 2022. The Superior Electoral Court rejected, in September 2018, the author's candidacy for the presidency on the basis of the Clean Slate Law, promulgated by the author himself while President. The law, derived from the people's initiative, was passed by an absolute majority of the National Congress.[28] According to article 1 (e) (1) of the law, citizens are ineligible to hold any public office for eight years if they have been convicted of crimes such as money-laundering and crimes against the public administration, in virtue of a criminal sentence subject to res judicata or rendered by a collective judicial body, which was the author's case. In 2012, the Supreme Federal Court ruled that the law was in compliance with the Constitution.

11. In our view, preventing the author from standing as a candidate in the presidential election of 2018 was legal, objective and reasonable.[29] The author had been convicted in July 2017 for corruption and money-laundering, a decision confirmed on appeal in January 2018. To allow him to stand as a candidate in such circumstances would have been incomprehensible to any reasonable observer.

12. Therefore, we consider that there were compelling and justifiable reasons to prevent the author from standing as a candidate in the presidential election in 2018 and would therefore not have found a violation of article 25 of the Covenant.

[24] CCPR/C/134/D/2841/2016 (Final proceedings), para. 4.2.
[25] Ibid., para. 4.3.
[26] Ibid., para. 4.4.
[27] CCPR/C/134/D/2841/2016 (Initial proceedings), paras. 4.14–4.18.
[28] Ibid., para. 4.27.
[29] Ibid., para. 4.29.