



## 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. 2481/2014\*, \*\*

<i>Communication submitted by:</i>	Vicencio Scarano Spisso (represented by León Alejandro Jurado Laurentín)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Bolivarian Republic of Venezuela
<i>Date of communication:</i>	11 November 2014 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 24 November 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Imprisonment of mayor for contempt of court
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; conditions of detention; right to due process; right to political participation
<i>Articles of the Covenant:</i>	9, 10, 14 and 25
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

1.1 The author of the communication is Vicencio Scarano Spisso, a Venezuelan national born in 1963. He claims that the State party has violated his rights under articles 9, 10, 14 and 25 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 10 August 1978.

1.2 On 24 November 2014, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee under article 92 of its rules of procedure, requested the State party to take protective measures to ensure that the author was provided with adequate conditions of detention, including access to the necessary medical care.

\* Adopted by the Committee at its 119th session (6-29 March 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.



**The facts as presented by the author**

2.1 The author, who acknowledges that he is openly critical of and opposed to the current national Government of the Bolivarian Republic of Venezuela, was elected as mayor of San Diego, Carabobo State, in 2004 and was subsequently re-elected in 2008 and 2013. In this last election, he garnered more than 75 per cent of the votes cast. He notes that, although his administration was local, it had national relevance because of the municipality's importance.

2.2 On 4 February 2014, social and student protests began in the city of San Cristóbal, Táchira State, in response to political and socioeconomic problems of national scope. On 12 February 2014, the protests spread to Caracas and other cities, leading to the suspension of classes at all educational institutions, as well as the partial suspension of public transportation services and the partial closure of businesses. The central Government responded to the protesters violently through the State security forces and, in some cases, through supposed quasi-governmental armed motorcycle groups known as *colectivos*. Opposition protesters, in turn, set up barricades called *guarimbas* across a number of urban roads. As a consequence of these protests, some student leaders and representatives of the political opposition were prosecuted, tried and deprived of their liberty.<sup>1</sup>

2.3 On 7 March 2014, a group of representatives of transport companies filed a constitutional protection (*amparo*) action with the Constitutional Chamber of the Supreme Court, seeking protection of the collective and diffuse rights and interests of the Venezuelan people. This action against the author and the Deputy Chief of the Municipal Police alleged dereliction of duty for failure to remove the barricades set up by citizens of the municipality of San Diego, specifically the one on the Barbula-Yagua highway. The *amparo* action was filed against the municipal authorities, despite the fact that they do not have jurisdiction over the aforementioned highway, whose management and supervision is the responsibility of the central Government. On 12 March 2014, the Constitutional Chamber admitted the *amparo* motion and ordered the author to take the following interim measures: (1) take all action and use all necessary material and human resources to prevent obstacles from being placed on public roads which might impede, hamper or alter the free movement of persons and vehicles; proceed with the immediate removal of any such obstacles; and ensure that the roads and areas adjacent to them remain free of rubbish and debris; (2) fulfil his duty to manage the flow of vehicles and people in order to ensure adequate and safe circulation on public roads; (3) ensure environmental protection, environmental sanitation and urban and domestic waste collection; (4) issue the necessary instructions to the municipal police forces; and (5) implement crime prevention and control activities. The decision was transmitted to the author on 14 March 2014, and the three-day period for challenging the measures began on that date.

2.4 On 17 March 2014, the Constitutional Chamber of the Supreme Court issued an order summoning the author and the Deputy Chief of the Municipal Police to a public hearing, on 19 March 2014, on the grounds that the press had published information from which it could be inferred that they had failed to comply with the constitutional order handed down in the decision of 12 March 2014, which the Chamber deemed to be a well-known and accepted fact. The author points out that the order does not specify how he supposedly failed to comply with the interim measures ordered by the Chamber.

2.5 On 18 March 2014, the author entered a notice of contest against the measures ordered on 12 March, claiming, inter alia, that his right of defence had been infringed, as the complainants had not specified what rights violations had allegedly been committed. In

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<sup>1</sup> The author cites a number of international statements on the situation triggered by the social protests of February 2014, including the statement of the then United Nations High Commissioner for Human Rights, Navi Pillay, condemning the acts of violence that caused death and injury, the excessive use of force by the national authorities in response to the protests and the large number of arrests among protesters. A group of independent experts of the Human Rights Council also expressed their concern at allegations of torture of protesters who were held incommunicado in military facilities without access to a lawyer, at the detention of journalists and at the suspension of broadcast coverage of the protests. The author also cites statements by the Inter-American Commission on Human Rights and by various international and national NGOs.

the notice, the author also claimed that, as no additional barricades had been set up in the jurisdiction of San Diego since 11 March 2014, the interim measures could not be carried out. Upon submitting the notice, the author noted that the public hearing was set in the Supreme Court's docket for the following day, although he had not been personally and formally notified of the hearing. By law, the party concerned must be notified before the date of the hearing is set.

2.6 On 19 March 2014, the Constitutional Chamber found the author's challenge of the interim measures order inadmissible. The same day, the Chamber held a public hearing in the presence of the parties, the Ombudsman's Office and the Public Prosecution Service, in which it was deemed to be a proven fact that in San Diego the barricades and debris had remained on the public roads and surrounding areas from 15 to 19 March 2014. At the hearing, the defence presented 131 pieces of evidence, of which the Chamber admitted the testimony of only five witnesses who testified that there had not been any barricades in San Diego since 11 March. The defence also submitted a 70-minute video, but only the first 4 minutes were shown. The Ombudsman's Office and the Attorney General's Office presented five National Guard officials, who testified that violent events in San Diego had been confirmed on 19 and 20 February only, and a resident of the municipality, who stated that the mayor had had the barricades removed.

2.7 At the end of the hearing, the Constitutional Chamber ruled that the author and the Deputy Chief of the Municipal Police had failed to implement the interim protection measures and had thereby committed the offence of contempt of court (*desacato*). On that basis, the Chamber sentenced them both to 10 months and 15 days' incarceration, to be served at the headquarters of the Bolivarian National Intelligence Service. The Chamber also ordered that the mayor be removed from office. The author points out that this occurred despite the fact that the Constitutional Chamber of the Supreme Court is not competent to adjudicate on criminal cases, in accordance with article 336 of the Constitution and article 25 of the Supreme Court Act. There is no legal basis in Venezuelan law to justify the author's imprisonment. The offence of contempt of court, as regulated under article 31 of the Protection of Constitutional Rights and Guarantees Act,<sup>2</sup> is designed to punish persons who fail to execute final decisions granting constitutional protection (*amparo*), not interim measures, as in this case. However, the Constitutional Chamber interpreted article 31 broadly in order to reach the verdict of contempt of court for the alleged failure to comply with an interim protection decision, which does not constitute a determination of the merits in an *amparo* case. Consequently, the Constitutional Chamber acted as an investigative criminal court of first and only instance. Once the decision was issued, the file was transmitted for enforcement and designation of the place of incarceration to the Seventh Court of First Instance, which was responsible for sentence enforcement in the Criminal Justice Circuit of Caracas. The author requested the application of the procedural guarantees and benefits provided for in the Code of Criminal Procedure, including the consideration of an alternative form of punishment, a review of the sentence calculation and a psychosocial evaluation; his request was denied by the Seventh Court on the grounds that it was not an ordinary criminal trial.

2.8 On 25 July 2014, in the early hours of the morning, a group of 32 officers from the General Directorate of Military Counter-Intelligence, dressed in black, wearing balaclavas and armed with rifles, entered the four cells in which the author, the Deputy Chief of the Municipal Police of San Diego, Mr. Leopoldo López and Mr. Daniel Ceballos, who had also been detained in connection with the protests of February 2014, were being held. The officers removed books, defence documents, letters from relatives and personal effects from the cells. The detainees were threatened and their food and other personal effects were thrown on the floor and trampled on. When the author demanded that a record be made of the confiscated objects, he was hit by the officers, pushed to the floor and kicked.

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<sup>2</sup> The article in question establishes: "A person who fails to comply with a writ of constitutional protection (*amparo*) issued by a judge shall be liable to 6 to 15 months' imprisonment."

### The complaint

3.1 The author claims that his right to due process, as enshrined in article 14 of the Covenant, was violated. The State held a trial in a constitutional court, claiming that it was not a criminal trial, although it bore all the punitive elements of a criminal proceeding. During the trial, the guarantees under article 14, which are also contained *mutatis mutandis* in article 49 of the Constitution, were infringed. Specifically, the sentencing decision was handed down in violation of the right to be tried by a competent court and by an independent and impartial tribunal, the right to an effective defence (which he was denied owing to the restrictions imposed on time and facilities) and the right to a second hearing.

3.2 The Constitutional Chamber of the Supreme Court was not competent; it acted as an investigative court of first and only instance, although the law in force does not give it the authority to adjudicate on criminal matters or to impose criminal penalties on offenders. In the Bolivarian Republic of Venezuela, in order for a person to be punished for the alleged commission of an offence, the Public Prosecution Service must first conduct an investigation and lay a charge, which must be substantiated and adjudicated by a criminal court. If the Chamber suspected that the offence of contempt of court had been committed, it should have notified the Public Prosecution Service so that the latter could conduct an investigation and, if appropriate, bring charges against the author before the competent criminal court in the jurisdiction where the events took place.

3.3 The author claims that the Constitutional Chamber does not meet the criteria to be considered an independent and impartial tribunal in accordance with article 14 and cites statements by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights<sup>3</sup> questioning the appointment process for Constitutional Chamber judges. The judges' lack of stability in their positions and their continued involvement in political activities, coupled with the fact that high-level officials, including the President, had made direct mention of the author's case, severely compromised the independence and impartiality of the judges who took the decision in the case.

3.4 Regarding due process guarantees, the author notes that he was never informed of the nature of the alleged contempt of court of which he was accused and that he was not given the time or facilities needed to mount a defence. Not only did he have a mere 24 hours to prepare his defence, there was also a considerable distance to travel between the location of the events, the Mayor's office and the court in Caracas. The above notwithstanding, the author still submitted 131 pieces of evidence, of which only 6 — 5 testimonies and a partially shown video — were admitted into evidence. One of the pieces of evidence that was not admitted was the report of the judicial inspection of the site by the Chamber to ascertain whether or not barricades were present. The author notes the need to take into account the complexity and importance of this case, which involved an official elected by the people who was charged with acts that were not imputable to him, as they were the result of the population's legitimate exercise of the right to protest. Refuting the charge therefore required extensive procedures, evidence and argumentation.

3.5 The author argues that, since the Constitutional Chamber of the Supreme Court is the country's highest judicial court, he was criminally prosecuted by a court of first and only instance, in violation of article 14 (5) of the Covenant.

3.6 The author claims that his right to liberty of person under article 9 of the Covenant was also violated through his arbitrary detention, which was designed to censure his freedom of opinion and expression and limit his ability to discharge his role as mayor. The fact that the decision to imprison the author was taken arbitrarily by the country's highest

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<sup>3</sup> The author cites paragraph 339 of a December 2009 report by the Inter-American Commission on Human Rights entitled "Democracy and Human Rights in Venezuela", as well as chapter IV of the Commission's annual reports of 2012 and 2013 and the decisions of the Inter-American Court of Human Rights in the cases *Chocrón-Chocrón v. Bolivarian Republic of Venezuela*, of 1 July 2011, *Reverón Trujillo v. Bolivarian Republic of Venezuela*, of 30 June 2009, and *Apitz Barbera et al. v. Bolivarian Republic of Venezuela*, of 5 August 2008. The author also notes the Committee's Views concerning communication No. 1940/2010, *Eligio Cedeño v. Bolivarian Republic of Venezuela*, of 29 October 2012.

authority infringed his right to challenge the legality of his detention, as there was no court that could carry out a proper review of the decision.

3.7 The author claims to be the victim of a violation of article 10 of the Covenant because he was held in a military prison that consists of two blocks: one for military personnel and the other, Block B, where he was held along with the Deputy Chief of the Municipal Police of San Diego, Leopoldo López, Daniel Ceballos, other individuals detained in connection with the protests of February 2014 and two other high-profile political figures. The author was held in isolation in the disciplinary unit, without access to other areas of the prison or to the rest of the inmates, including the detainees held in his block, who were also denied all contact with other inmates. The cells were completely enclosed, with no view onto the hallway and with high windows that did not provide a view of the outdoors, thereby creating a feeling of claustrophobia. The author's communications were restricted, all of his letters and messages being read and on occasion confiscated by the military authorities, including documents pertaining to his legal defence. In addition, he was subjected to five searches of his cell during which personal effects were removed, including the search conducted by the officers of the General Directorate of Military Counter-Intelligence on 25 July 2014. The author was prohibited from attending mass in the prison. He began to suffer from blood pressure problems, for which he was transferred on several occasions to the military hospital; he was denied access to his personal physicians and to medical information. A record was made of these detention conditions on 21 July 2014 by the Director of Fundamental Rights of the Public Prosecution Service and the Director of the National Military Prison, at which time the solitary confinement of the inmates of Block B was suspended. However, the aforementioned record was never made available to any of the detainees or to their legal representatives. Two days later, they were once again placed in solitary confinement, their rights were further restricted and the ill-treatment and threats increased.

3.8 The author also claims that his right to take part in public affairs and to have access to public service, in keeping with article 25 of the Covenant, were violated when the Constitutional Chamber ordered his removal from office as mayor, an act neither the Chamber nor any other judicial body had the authority to perform, given that a mayor's absence from office must be established by the Municipal Council, in accordance with article 87 of the Municipal Government Organization Act. The author was arbitrarily removed from office as mayor after being legitimately elected by a large majority, and was therefore unable to serve for almost the entirety of his mandate, for reasons related to his political opinions. The author points out that, on 20 March 2014, one day after the hearing at which the decision was taken to remove him from office, the vice-president of the National Electoral Council publicly announced that new elections were being scheduled as a result of the author's removal from office, even though the sentencing decision was not published until 9 April 2014.

3.9 The author further claims that his rights under article 25 of the Covenant were violated inasmuch as, while he was deprived of his liberty, he was prevented from exercising his right to vote and to be elected to public office, despite the fact that his prison sentence was not the result of any criminal proceeding against him and that the sentencing decision, while stripping him of his office, did not suspend his right to vote. This is evidence of an intention to prevent the author from exercising his political rights.

3.10 The author requests the Committee to urge the State party to take the following steps: (a) proceed with his immediate release; (b) reinstate him as mayor of the city of San Diego; and (c) provide him with comprehensive redress, including compensation, for the harm incurred, in keeping with the principle of *restitutio in integrum*.

#### **State party's observations on the admissibility and merits**

4.1 In its observations dated 14 December 2015, the State party asserts that the author has not exhausted all available and effective domestic remedies. Before turning to the Committee, the author had the possibility of using the domestic courts to challenge any alleged shortcomings with respect to due process guarantees, detention conditions and the right to take part in public affairs. Concerning the guarantee of an independent and impartial tribunal, the author failed to utilize the effective mechanisms established under

domestic law. Pursuant to article 53 of the Supreme Court Act, he could have challenged the authority of the judges within three days of the act motivating such a challenge.

4.2 The State party notes that three opposition leaders, Leopoldo López, María Corina Machado and Antonio Ledezma, organized the protest that took place on 12 February 2014 in Caracas, inciting violence and calling for the repudiation of the legitimately constituted Government. This led, at the end of the protest, to a group of some 50 protesters attacking the main offices of the Public Prosecution Service and the Ministry of People's Power and setting fire to patrol cars of the Scientific, Criminal and Forensic Investigation Unit and to several private vehicles. Some public servants who tried to pacify the attackers were assaulted. The objective of these acts of political violence, supported by various opposition mayors, including the author, was to depose President Nicolás Maduro through a plan called "La Salida" (The Exit). These mayors incited hate and political violence, triggering violent protests. In San Diego, vehicles were torched, oil was poured on the streets and wires were strung across streets to hurt motorcyclists. On 19 and 20 February, a group of armed individuals closed the highway, impeding vehicle access to San Diego, and clashed with the Bolivarian National Guard. Municipal police patrols and the author were present as the violent group was being pushed back by the National Guard. After the interim measures were ordered on 12 March 2014, barricades were set up that disrupted traffic on the San Diego interchange and a public transportation vehicle was torched. From 15 to 19 March, the barricades and debris remained on the city's public roads. State security forces did not obtain the cooperation of the municipal police or the Mayor's office in preventing and controlling the violent acts.

4.3 The State party points out that the Constitutional Chamber of the Supreme Court, after assessing the evidence submitted by the author and the plaintiffs (the Public Prosecution Service and the Ombudsman's Office), confirmed that the interim protection measures ordered on 12 March 2014 had been disregarded, as demonstrated by the failure to immediately remove all garbage and debris from public roads in order to ensure freedom of movement, the failure to prevent obstacles from being placed on the roads, the failure to protect the environment and ensure environmental sanitation and waste collection. Pursuant to article 31 of the Protection of Constitutional Rights and Guarantees Act and in exercise of its authority to impose penalties in constitutional cases, the Chamber, in an extensively reasoned decision, convicted the author of contempt of court. The testimony given at the hearing demonstrated that serious disturbances of public order and peace and damage to public property, including the obstruction of roads, the burning of vehicles and buses, violent acts by disruptive groups and environmental destruction, took place in San Diego both before and after the decision was rendered. Moreover, the author's failure to comply with the interim protection measures was a well-publicized fact. It was also proved that the Mayor's office and the municipal police had not cooperated with the State security forces. Furthermore, while the hearing was under way, actions were taken in other municipalities that could have led to the commission of further offences, and the Chamber therefore ordered that a copy of the decision be transmitted to the Public Prosecution Service to determine whether to initiate a criminal investigation into other acts against freedom of movement, the environment, public and private property, public order and peace, public authorities, and national security and independence, among others.

4.4 The State party contends that the Constitutional Chamber summoned the author to a public hearing within the required advance notice period and accorded him his due process right to present arguments in his defence regarding the alleged failure to comply with the protection measures, an act of contempt under the aforementioned article 31, which makes failure to comply with a writ of *amparo* a punishable offence. If there were no immediate means of ensuring the enforcement of its decisions, the court would lose all authority. In the case of the Chamber, there is no higher body that can punish failure to comply with a writ of *amparo*. Although a case of contempt of court could be referred to the Public Prosecution Service for the initiation of criminal proceedings, such proceedings would be excessively long and unsuited to this type of offence, given that the case might be shelved or that a court might be requested to dismiss the case on the grounds that the statute of limitations had expired or that the offence of contempt of court had not been substantiated, which would render compliance with the protection measures illusory. The involvement of

a criminal court in a case of failure to comply with a writ of *amparo* would be ineffective, and the inclusion of such an offence in a non-criminal law is therefore justified.

4.5 The State party notes that the law does not provide for the possibility of contesting an interim protection order because of the brief nature of the protection and the constitutional rights thereby protected, hence the ruling, in the decision of 19 March 2014, that the author's challenge of the protection measures was inadmissible.

4.6 Regarding the competence of the Constitutional Chamber, the Chamber admitted the motion for the protection of collective rights and interests as part of its constitutional mandate and ordered interim protection measures as a means of expediting action. The Chamber noted that legal doctrine cannot remain static when the Protection of Constitutional Rights and Guarantees Act does not provide for any procedure for assessing a possible failure to comply with a writ of *amparo* with a view to referring the case to the competent authority. In its decision of 17 March 2014, the Chamber ruled that the most appropriate procedure was the one provided for in article 26 of the Act, namely summoning the author to present arguments in his defence. The Act does not cover criminal offences or indicate what judicial authority should impose a penalty in the event of contempt of court. However, other provisions of domestic law stipulate that a court that has issued a decision has the power to punish non-compliance with said decision, irrespective of its material jurisdiction. Moreover, the Chamber itself has acknowledged that not all provisions on custodial sentences are necessarily provisions of criminal law and that therefore there is no need for the entire criminal justice system to be involved. In the present case, for example, no criminal offence was adjudicated; rather, the subject of the decision was the failure to comply with the ruling issued by the Constitutional Chamber, and the proceeding was carried out in exercise of the Chamber's authority to impose penalties in constitutional matters. Consequently, the Constitutional Chamber is not only the natural arbiter of the case in which it ordered the interim protection measures, but also of the acts constituting contempt of court. In this case, the Chamber found a constitutional offence defined in and punishable by law.

4.7 During the proceeding, various witness statements were heard and all pieces of evidence were presented. The Chamber admitted the testimony offered by the parties in the hearing and ordered that the witnesses be heard and questioned. The parties had similar opportunities to present their evidence. The judges were able to ask the parties and witnesses the necessary questions to clarify the facts.

4.8 The State party maintains that the author's detention cannot be considered arbitrary because it was the consequence of a ruling that he had failed to comply with the interim constitutional protection measures provided for in the aforementioned article 31, an offence punishable by imprisonment in accordance with the same article.

4.9 Regarding the alleged violation of the right to take part in public affairs, article 87 of the Municipal Government Organization Act establishes that a final court decision results in a permanent absence from office. Pursuant to article 3 of the Supreme Court Act, there can be no action or appeal against a decision of the Supreme Court. As there was a final court decision, which imposed a penalty for contempt of court, the rights enshrined in article 25 of the Covenant cannot be considered to have been infringed.

4.10 Lastly, regarding the author's conditions of detention, it should be noted that he was detained in a clean individual cell with two distinct areas, good ventilation and light and that he had ample opportunity to move about in the common areas of the detention centre, to make calls from the public telephones and to receive visitors from Thursday to Sunday between 10 a.m. and 4.30 p.m. His lawyers could visit him during those hours and also on Mondays and Tuesdays between 1 and 3 p.m. He underwent forensic medical examinations, which found that he was in good health. He enjoyed detention conditions far superior to those of an inmate in any other prison in the country. The author was released on 4 February 2015.

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

5.1 In his comments dated 15 December 2015, the author notes that he has exhausted all domestic remedies inasmuch as the conviction for contempt of court was handed down by

the Constitutional Chamber of the Supreme Court and could not be appealed, a fact recognized by the State party when it affirmed that any action against or challenge to the writ of *amparo* would be inadmissible. He repeats that he was given only 24 hours to mount his defence before the hearing of 19 March 2014, where he was convicted of contempt of court. He adds that the terms of the interim measures were so general that it was impossible to comply with them in full.

5.2 With regard to the protection of collective rights and interests, the State party argues that the Constitutional Chamber is competent to hear disputes of a national scope. Article 146 of the Supreme Court Act establishes that all persons are entitled to seek protection of their collective or diffuse rights and interests and provides that when the acts in question are of national import, the case will be heard by the Constitutional Chamber. Otherwise, it will be heard by a first-instance civil court in the jurisdiction where the acts took place.

5.3 The State party claims that the fact that the law provides for detention as a penalty does not mean that the offence is being treated as a criminal offence. What is indisputable is that deprivation of liberty was imposed as the penalty for the alleged failure to comply with a ruling. It is worrying that the State party appears to be arguing before the Committee that it deprives its citizens of their liberty without the deprivation of liberty being the consequence of penalties for offences established by law and decided by a criminal court, a situation that would constitute a blatant violation of article 9 of the Covenant.

5.4 The author emphasizes that the Constitutional Chamber does not have the authority to remove him from office; rather, it is the Municipal Council that should determine whether or not he was absent within the meaning of article 87 of the Municipal Government Organization Act. Moreover, his removal from office was not a reasonable or proportional measure. In order to guard against the imposition of restrictions on human rights, measures should have a legitimate purpose and the means used to achieve that purpose should be reasonable and proportional.

5.5 The author refutes the State party's description of the conditions of detention and stresses that his detention caused him serious health problems. Owing to these problems, his form of detention was modified, allowing him to serve part of his sentence under house arrest.

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

### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the claim is admissible under the Optional Protocol to the Covenant.

6.2 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.

6.3 The Committee takes note of the State party's assertions that domestic remedies have not been exhausted because the author has not brought his complaint before a national court. However, the Committee notes that the State party's statement is general and, with the exception of article 53 of the Supreme Court Act, does not identify what domestic remedies would be appropriate, effective and available to the author to assert his claims, which are grounded in articles 9, 14 and 25 of the Covenant and which are directly related to the trial in which he was convicted of contempt of court and sentenced to prison by the Constitutional Chamber of the Supreme Court. The Committee notes, in particular, that the Chamber is the highest judicial body and that there is no possibility of appeal against its decisions, as stated by both parties. The Committee notes the State party's submission that the author failed to utilize the effective mechanisms established under domestic law concerning the guarantee of an independent and impartial tribunal, since, pursuant to article 53 of the Supreme Court Act, he could have challenged the authority of the judges within three days of the act motivating such a challenge. However, the possibility of challenging the authority of the judges of the Constitutional Chamber does not, in this case, constitute an appropriate remedy for resolving the author's remaining claims under articles 9, 14 and



25 of the Covenant. The Committee notes that the State party has not specified what remedies the author could have exhausted in relation to his complaints under article 10 of the Covenant regarding his conditions of detention. It also notes the author's uncontested argument that his detention conditions, including his solitary confinement, were recorded by the Director of Fundamental Rights of the Public Prosecution Service and the Director of the National Military Prison on 21 July 2014, but that such record was not made available to him and that no action was taken to address this situation thereafter. The Committee therefore considers that article 5 (2) (b) of the Optional Protocol does not constitute a barrier to the admissibility of the communication.

6.4 The Committee finds that all conditions of admissibility of the author's claims under articles 9, 10, 14 and 25 of the Covenant have been met and, declaring the claims admissible, proceeds to examine them on the merits.

#### *Consideration of the merits*

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

7.2 The Committee takes note of the author's claims that his sentencing to prison for failure to comply with an interim measure in the context of a constitutional protection (*amparo*) action violated his article 9 right to liberty of person and his right not to be arbitrarily detained or imprisoned. The author contends that the State party held a trial in a constitutional court and handed down a prison sentence without going through the criminal justice system, and that the Constitutional Chamber of the Supreme Court thus overstepped its mandate in that the task of investigating the alleged commission of an offence and initiating criminal action, if warranted, before a criminal court falls to the Public Prosecution Service. The State party has argued that the author's conviction for contempt of court was the result of the exercise of the Chamber's power to impose a penalty in response to the failure to comply with the interim measures it ordered on 12 March 2014 and not the exercise of the power to bring a criminal action. Although article 31 of the Protection of Constitutional Rights and Guarantees Act does not establish the competent body or the procedure for determining whether the offence of contempt of court has been committed, referring the case to the criminal justice system would have been excessively time-consuming and ineffective, with the possibility that the Public Prosecution Service could have shelved the investigations or that the criminal court could have dismissed the case.

7.3 The author also contends that article 31 of the Protection of Constitutional Rights and Guarantees Act, which was the basis for his conviction, regulates cases of contempt in respect of final decisions on the merits of an *amparo* case, but not in respect of interim measures; that the sentence enforcement judge denied the author's request for guarantees and benefits, including an alternative sentence, review of the sentence calculation and a psychosocial evaluation, on the grounds that it was not an "ordinary criminal trial"; that the municipal authorities did not have jurisdiction over the highway in question; and that it was impossible to comply with the interim measures because there were no barricades on the public roads of San Diego from the date that the measures were ordered onwards, as was confirmed by the witnesses called by the defence, the Public Prosecution Service and the Ombudsman's Office.

7.4 The Committee recalls that any deprivation of liberty, whether as a consequence of a criminal offence or an offence of another type, should be established by law and should be based on statutory procedures.<sup>4</sup> A custodial regime must not amount to an evasion of the limits of the criminal justice system by providing the equivalent of criminal punishment without the applicable benefits.<sup>5</sup> In particular, the imposition of a draconian penalty of imprisonment for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary.<sup>6</sup> The Committee further recalls that the notion of

<sup>4</sup> See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 14.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

“arbitrariness” must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.<sup>7</sup>

7.5 The Committee notes that, in this case, both parties acknowledge that, under domestic law, the author could have been prosecuted for the offence of contempt of court through an ordinary criminal proceeding, although the State party argues that such a proceeding would have been too lengthy to ensure effective compliance with the interim protection measures. Both parties also note that the provision that served as the basis for the author’s conviction for contempt of court does not specify the competent body or the procedure for determining whether a punishable offence has been committed. The Committee also notes that the State party has not denied the author’s contention that the legal provision on which the Constitutional Chamber based its decision regulates contempt in respect of final *amparo* decisions but not in respect of interim measures and that the sentence enforcement judge denied the author the guarantees and benefits he requested on the grounds that the sentence was not the result of an ordinary criminal trial. In addition, the State party has failed to convincingly refute the author’s allegations that it was impossible to comply with the interim measures in question.

7.6 In the light of the above, the Committee considers that there were insufficient legal grounds for sentencing the author to 10 months and 15 days’ imprisonment and for removing him from the office of mayor, and that the State party has not demonstrated that the measure was a reasonable, necessary or proportional means of achieving the alleged objective. Accordingly, the Committee finds that the author’s detention was arbitrary within the meaning of article 9 (1) of the Covenant.

7.7 The Committee notes the author’s claims regarding article 10 of the Covenant, namely that he was held in solitary confinement in the disciplinary unit of a military prison, in a cell with no view of the outdoors, without access to the common areas or to other inmates and with severe restrictions on his communications and that he was subjected to body searches. The State party has refuted the author’s claim regarding access to common areas and regarding the rules on communication. It has not, however, responded to the other allegations, in particular the author’s assertion that the Director of Fundamental Rights of the Public Prosecution Service and the Director of the National Military Prison made a record confirming that the author and other detainees in Block B were being held in solitary confinement, as a result of which the solitary confinement was suspended for two days, after which time it was reinstated and detention conditions worsened. Accordingly, the Committee finds that the author’s detention under the conditions described constitute a violation of article 10 of the Covenant.

7.8 The Committee notes the author’s complaint that his right to a fair and public hearing by a competent tribunal was violated. The Committee recalls that this right, to which all persons against whom a criminal charge has been brought are entitled, also extends to acts that are criminal in nature that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.<sup>8</sup>

7.9 Bearing in mind the author’s observations, which the State party has not challenged, that the provision on which his conviction was based criminalizes non-compliance with final *amparo* decisions, but not non-compliance with interim measures, as well as the fact that the provision does not specify the competent body or the procedure for determining whether an offence has been committed, the Committee concludes that the trial and conviction of the author for contempt in respect of the interim measures imposed on him by the Constitutional Chamber violated his right to a hearing by a competent tribunal, in keeping with article 14 (1) of the Covenant.

7.10 Regarding due process guarantees, the Committee notes the author’s allegations, which the State party has not refuted, that he was not personally notified of the order of 17 March 2014 summoning him to the public hearing on 19 March regarding the alleged

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<sup>7</sup> Ibid., para. 12.

<sup>8</sup> See the Committee’s general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15.

contempt in respect of the interim measures and that he had only 24 hours to mount his defence. The author has noted that only 6 of the 131 pieces of evidence offered were admitted, one of which was shown only partially at the hearing. The Committee therefore finds that the facts described constitute a violation of the author's right to the minimum procedural guarantees set out in article 14 (3) of the Covenant.

7.11 The Committee notes the author's claim that he was criminally prosecuted in first and only instance by the country's highest judicial body. The Committee recalls that where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.<sup>9</sup> In view of the criminal nature of the sanctions imposed on the author, the Committee considers that, in the present case, the impossibility of a review of the author's conviction constitutes a violation of article 14 (5) of the Covenant.

7.12 The author has alleged that he was arbitrarily removed from the office of mayor by the Constitutional Chamber of the Supreme Court, an act which, pursuant to article 87 of the Municipal Government Organization Act, falls under the remit of the Municipal Council. The State party has argued that the existence of a final court decision justified the author's removal for permanent absence from office, in keeping with the aforementioned provision. Having concluded that the author's detention based on his conviction for contempt in respect of the interim protection measures was arbitrary and that the proceedings against him violated the due process guarantees provided for in article 14 of the Covenant, the Committee finds that his removal from office as mayor and his de facto inability to exercise his right to vote and be elected constitute a violation of article 25 (b) 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 facts before it disclose violations of articles 9, 10, 14 (1), (3) and (5), and 25 (b) of the Covenant.

9. 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 that full reparation be made to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide adequate compensation to the author. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not 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 or 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, have them translated into the official language of the State party and to disseminate them widely.

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<sup>9</sup> *Ibid.*, para. 47.