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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^{*,**,**}

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

* 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, Shuichi Furuya, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions by Committee member Duncan Laki Muhumuza (concurring), and by Committee members José Manuel Santos Pais and Kobauyah Tchamdja Kpatcha (dissenting) are attached to the present Views (Final.Proceedings)

1.1 The author of the communication is Luis Inácio Lula da Silva, a Brazilian national born on 27 October 1945 and former President of Brazil from 2003 to 2010. He claims that the State party violated his rights under articles 9 (1); 14 (1) and (2); 17; and 25 of the Covenant. The Optional Protocol entered into force for the State party on 25 December 2009. The author is represented by counsel.

1.2 On 24 October 2016, in accordance with rule 92 (5) of the Committee's rules of procedure,¹ the Special Rapporteurs on New Communications and Interim Measures, acting on behalf of the Committee, requested the State party to submit observations relating only to the question of admissibility.

1.3 On 22 May 2018, the Committee² rejected the author's interim measures request on account that "the information provided by the author [did] not enable the Committee to conclude at [that] time [...] that the facts before it would put the author at risk of irreparable harm, or that they could prevent or frustrate the effectiveness of the Committee's Views". The Committee however recalled "that it is incompatible with the obligations under the Optional Protocol for a State party to take any action that would prevent or frustrate the consideration by the Committee of a communication alleging a violation of the Covenant or to render the expression of its Views nugatory and futile". The Committee also decided to revert their decision of 25 October 2016 and to examine the admissibility and merits of the communication jointly.

1.4 On 17 August 2018, the Committee, taking note of the author's allegations of 27 July 2018 (see fn. 3 *infra*), concluded that "the facts before it indicate the existence of a possible irreparable harm to the author's rights under article 25 of the Covenant". Pursuant to rule 92 of its rules of procedure, the Committee requested "the State party to take all necessary measures to ensure that the author enjoy and exercise his political rights while in prison, as candidate to the 2018 presidential elections, including appropriate access to the media and members of his political party; as well as not to prevent the author from standing for election at the 2018 presidential elections, until the pending applications for review of his conviction have been completed in fair judicial proceedings and the conviction has become final". On 10 September 2018, the Committee reiterated its request to the State party dated 17 August 2018, recalling the State party's obligations under the Optional Protocol.

The facts as presented by the author³

Contextual Background

2.1 In March 2014, a criminal investigation later known as "Operation Car Wash" (*Operação Lava Jato*) was opened within the federal jurisdiction of the state of Paraná. Judge Moro, the Judge of the 13th Federal Criminal Court of Curitiba at the time, was the acting first instance judge in the investigation. Operation Car Wash uncovered corruption between the State owned national oil and petrol company, Petrobrás, other five major construction companies, and various parties across the political spectrum for secret campaign funds. The author denies having known or approved of such crimes or received any money or favours for actions or decisions he took during his presidency or at any other time.

2.2 Among others, the author was investigated in the context of two cases related to the Operation Car Wash, both under the jurisdiction of Judge Moro, namely, a case relating to construction companies that had allegedly helped him buy a holiday apartment (the so-called

¹ Then rule 97.

² All decisions in paras. 1.3 and 1.4 were taken by the Special Rapporteurs on new communications and interim measures, acting on behalf of the Committee.

³ The following facts are reconstructed from the author's different submissions to the Committee; including his original submission of 28 July 2016, further information of 17 November 2016, comments on admissibility of 25 May 2017, further information of 5 October 2017, further information of 29 January 2018, additional comments on admissibility of 16 March 2018, additional information and request for interim measures of 6 April 2018, additional information and request for interim measures of 27 July 2018, additional information and request for reiteration of interim measures of 4 September 2018, and additional information of 25 October 2018.

“Triplex case”); and a case related to the alleged furnishing of his country property (the so-called “Atibaia” case).

Legal proceedings against the author

2.3 On 19 February 2016, Judge Moro approved a request by the Prosecution to tap the author’s telephones, as well as those of members of his family and his lawyer. On 26 February 2016, Judge Moro specifically authorised an intercept on the central extension of the law firm of the author’s lawyer, affecting 25 lawyers and 300 clients.

2.4 On 2 March 2016, Judge Moro issued a bench warrant calling the author for questioning. At 6 am on 4 March 2016, the police gained entry to the author’s house and demanded that he accompany them to the official compound at the Congonhas Airport, where he was held for 6 hours. The author notes that the news that the Judge had issued a bench warrant for questioning was leaked to the media by the “prosecution apparatus (i.e. the judge, the federal prosecutor and the federal police)”. Consequently, photographs were taken of the author as if he were under arrest. The airport became the scene for demonstrations and counter-demonstrations.

2.5 On 16 March 2016, Judge Moro ordered an end to the telephone tapping at 11:12 am, when he sent an urgent notice to the Federal Prosecutor’s Office to discontinue tapping the author’s telephone. However, the author explains that the tap continued illegally when he held a call with then President Dilma Rousseff at 1:32 pm and discussed with her matters related to his appointment as Chief Minister. The author adds that, although illegally intercepted, Judge Moro released to the media the content of the call that afternoon (along with other calls between the author, his wife, his lawyers and other members of his family). On 17 March 2016, Judge Moro issued a decision confirming the legality of both the interception and the disclosure of the call between the author and President Rousseff.

2.6 On 22 March 2016, Justice Zavascki of the Supreme Federal Court (*Supremo Tribunal Federal*), in the context of a complaint submitted by President Rousseff, granted a preliminary injunction suspending the effects of Judge Moro’s decision authorizing the disclosure of the conversations between President Rousseff and the author. On 13 June 2016, Justice Zavascki overturned Judge Moro’s decision of 17 March affirming, *inter alia*, that Moro had no jurisdiction to lift the confidentiality of the conversation with President Rousseff, and declared its content null for the purposes of the investigations. On 11 July 2016, the author filed a suspicion motion (*exceção de suspeição*) for Judge Moro to recuse himself, which was rejected by the former judge himself on 22 July.⁴

2.7 On 4 March 2016, the Association of Federal Judges of Brazil (AJUFE, in Portuguese), of which Judge Moro is a member, issued a statement saying that the former judge, the prosecutors and the police “acted within strict legal and constitutional limits” and would “continue to act in compliance with the law and the Constitution”. Also on 4 March 2016, the National Association of Federal Prosecutors (ANPR, in Portuguese) issued a press release saying the bench warrant against the author was fully lawful. On 29 July 2016, AJUFE issued a press release condemning the author’s petition to the Committee, saying that it had “unfounded laments”. On 13 December 2016, AJUFE’s President appeared in the media praising Judge Moro as “an example to Brazil”. Finally, on 15 December 2016, the ANPR issued a press release attacking the author for suing Prosecutor Dallagnol, the lead Prosecutor of Operation Car Wash, for defamation.

2.8 On 14 September 2016, the prosecutors of the investigations related to the Car Wash Operation appeared on television for 90 minutes setting out their case for the author’s guilt

⁴ This motion consists in requesting the Judge to recuse himself under the suspicion of bias. The author filed a total of four suspicion motions (Nos. 5032506-82.2016.404.7000; 5032521-51.2016.4.04.7000; 5032531-95.2016.4.04.7000; and 5051592-39.2016.4.04.7000) which were all rejected by Judge Moro.

“beyond reasonable doubt”⁵. After this event, the author sued Prosecutor Deltan Dallagnol for defamation.

2.9 On 22 September 2016, the Special Court of the Federal Regional Court of the 4th Region (*Tribunal Regional Federal da 4^a Região*, from now on Federal Regional Court) rejected a disciplinary procedure motion against Judge Moro, filed by other defendants in the Car Wash investigations. According to the Court, given that Operation Car Wash was an “*unprecedented case; that brings unprecedented problems; and demands unprecedented decisions (...)* it is not possible to condemn [Judge Moro] for adopting preventive measures against the obstruction of justice”⁶.

2.10 On 9 March 2017, the 4th Section of the Federal Regional Court dismissed a criminal complaint brought by the author and his family against Judge Moro on the basis that these matters had already been decided on 22 September 2016 regarding administrative sanctions against the judge. The author’s appeals before the Superior Court of Justice (*Superior Tribunal de Justiça*) and the Supreme Federal Court were rejected.

2.11 On 12 July 2017, Judge Moro convicted the author for corruption and money laundering and sentenced him to 9 years’ imprisonment. By November 2017, the author’s suspicion motions against Judge Moro, which had been rejected on appeal by the Federal Regional Court, had also been rejected by the Superior Court of Justice.⁷ The Supreme Federal Court rejected appeals on two of the motions in December 2017.⁸ On 24 January 2018, the Federal Regional Court confirmed the author’s conviction on appeal and increased the prison sentence to 12 years and one month. The author appealed this decision on the merits. On 2 February 2018, the author filed a writ of *habeas corpus* before the Supreme Federal Court arguing that, according to the State Party’s Constitution, a convicted person should not serve a prison sentence until the decision was final.

2.12 On 5 April 2018, the Federal Supreme Court rejected the author’s writ of *habeas corpus* (by 6 to 5 votes) and stated that there was no bar to his imprisonment, despite the fact that his appeal was still pending.⁹ Within a few hours of the announcement of this decision, Judge Moro issued an arrest warrant requiring the author to be taken into custody to serve his sentence. On 7 April 2018, the author was taken to the Prison of Pinhais, Curitiba.

2.13 On 23 April 2018, the author filed a special appeal with the Superior Court of Justice and an extraordinary appeal to the Supreme Federal Court, both of them challenging his detention order. According to the author, although the Federal Regional Court could have granted leave to appeal in a matter of days, it only did so on 22 June 2018, and only granted leave to appeal to the Superior Court. The author requested an urgent hearing in the Superior Court, but his request was not examined until after the judiciary recess had begun on 26 June 2018.

⁵ The author provides a transcript of the television broadcast which includes phrases like: “These pieces of evidence demonstrate that Lula was the big general commanding the practice of crimes with powers to determine how it worked and, if he wanted, to order its interruption”; “Now, who did have power to distribute and effectively has distributed positions for fund-raising purposes? Lula. Only Lula’s decision-making power enabled the strategy of corrupted governability. Lula was at the top of the power pyramid, appointing high level positions in the Federal Public Administration. In addition, during the period in which the criminal scheme was structured to the detriment of Petrobrás, Lula provided the high positions in the Federal Public Administration”; “Without Lula’s decision-making power, this scheme would be impossible”; “It is inconceivable that a party leader such as Lula did not take part in [the corruption scheme] and, more than that, that he was not in charge of these schemes that reveal a permanent and unique way of obtaining public resources in the name of the Workers’ Party”; “Once more, this makes Lula the common and necessary link of the criminal scheme.”

⁶ No. 0003021-32.2016.4.04.8000/RS, 22/09/2016, p. 5 (italics in original).

⁷ The Federal Regional Court denied the first three motions on 26 October 2016 and the fourth one on 8 March 2017. The Superior Court of Justice rejected the appeals against the rejection of the motions for bias on 22 September 2017, 2 October 2017, 19 October 2017 and 6 November 2017.

⁸ By June 2018, the review of the other two motions had been rejected by the Supreme Federal Court.

⁹ The author points to the fact that the minority judges stated that the Constitution establishes that a defendant can only be incarcerated after a judgement has become final.

2.14 On 6 July 2018, the author's writ of *habeas corpus* came to Judge Favreto, an appellate judge of the Federal Regional Court assigned to hear all such cases in the vacation period. At 9:05 am on 8 July 2018, Judge Favreto granted the author's *habeas corpus* and ordered his provisional release. In his decision, Judge Favreto noted (i) that the author's presidential candidacy was a new fact relevant to the question of whether he should be incarcerated before his appeal was decided by court; (ii) that the 6-5 Supreme Court decision allowed the author's incarceration but did not mandate it; and (iii) that Judge Moro had given no reasons for determining the author's incarceration. The release order was not implemented by the relevant authorities and the author brought this fact immediately to Judge Favreto's attention. According to the author, enquiries soon revealed that Judge Moro, who was on vacation, had given an order by telephone that the author should not be released. At 12:44 pm, Judge Favreto re-issued his release order and directed that it be immediately implemented. At 2.13 pm, Judge Gebran Neto, one of the three judges who had turned down the author's appeal, ordered that Judge Favreto's decision be vacated. At 4:12 pm, Judge Favreto ruled that Judge Gebran Neto had no jurisdiction, as Judge Favreto was the authorized recess judge. At 5.53 pm, the Federal Attorney's Office appealed to the Chief Justice Thompson Flores of the Federal Regional Court who, at 7.30 pm, ruled that Judge Gebran Neto was the competent authority, overruling the decision to release the author.

2.15 On 23 August 2018, the author requested the Superior Electoral Court (*Tribunal Superior Eleitoral*) to ensure that public-utility media companies give the author, who was leading in voting intention polls, equal treatment in their coverage of electoral campaigns, in line with the applicable Electoral Law. On 24 August 2018, however, the Court denied the request. The author filed an appeal before the same court on 27 August 2018 and, the Court denied it the next day, by 6 votes to 1.

2.16 On 1 September 2018, and disregarding the Committee's request for interim measures, the Superior Electoral Court rejected the author's candidacy to the Presidency, prevented him from campaigning via radio, television and the internet, and ordered the party to appoint a substitute candidate within 10 days. This meant that the author could not even be mentioned in voting intention polls form then on.¹⁰ On 11 September 2018, the Worker's Party was compelled to withdraw the author's candidacy, replacing him with Fernando Haddad, the then vice-presidential candidate.

2.17 On 28 September 2018, Supreme Federal Court Justice Lewandowski authorized a newspaper columnist to interview the author in prison, after a complaint filed by the newspaper arguing censorship to the press. On the same day, Justice Fux, then acting Chief Justice of the Supreme Federal Court, admitting a motion filed by a political party, suspended Lewandowski's decision and prohibited the interview, and ordered that, if already conducted, its release be censored. On 1 October 2018, Justice Lewandowski issued another decision to authorize the interview, saying that the political party that had filed the motion did not have the procedural legitimacy and that his decision was not an injunction subject to possible suspension but a decision on the merits. On the same day, Chief Justice Dias Toffoli suspended Justice Lewandowski's second decision stating that the decision rendered by then acting Chief Justice Fux should be complied with until subsequent deliberation of the Supreme Federal Court *en banc*.

The complaint

Article 9 (1) – Bench Warrant of 4 March 2016

3.1 The author states that Article 260 of the Brazilian Criminal Procedure Code lays down a pre-condition for issuing a bench warrant: "If the defendant refuses to give testimony in the interrogation... the competent authority may order that the defendant be compelled to attend the investigating authority." He alleges that, as confirmed by case-law, this is a compulsory procedure which deprives the suspect of his liberty and can only be ordered by a judge if the defendant has explicitly refused to give testimony previously. He adds that the judge must

¹⁰ The author filed two *supersedeas* motion before the Supreme Federal Court to request the extraordinary appeal to have suspensive effects but both of them were rejected.

first subpoena the potential defendant, and only if he fails or refuses to attend can a bench warrant be issued.

3.2 In this case, however, Judge Moro issued the bench warrant on 2 March 2016 for execution on 4 March, without ever having subpoenaed him before. The former judge claimed that a bench warrant was necessary to secure the author's safety. Nevertheless, the author alleges that the legal pre-condition for the issuance of the warrant was never fulfilled (i.e. there had been no refusal to testify) and so the question of public order could not arise. Although the period during which he was compulsorily detained was only 6 hours, the event and the demonstration it provoked had enormous symbolic effect, *inter alia*, because it conveyed the message that he was hiding from justice. The author explains that this amounted to a violation of article 9 (1) of the Covenant, because compulsory transportation for questioning also constitutes a deprivation of liberty. The author adds that the Committee held an 8-hour detention to be disproportionate and therefore arbitrary.¹¹

Article 17 – Disclosure of various telephone intercepts

3.3 The author explains that Judge Moro's release to the media of various transcripts and audios of telephone intercepts was carried out in contravention of Articles 8 and 10 of Law 9,296/96, which regulates wiretappings.¹² He alleges that disclosure of this material had no conceivable public interest, and was done out of malice with the design of publically humiliating and intimidating the author, in violation of his rights under Article 17 of the Covenant. He adds that the State party had recently been condemned by the Inter-American Court of Human Rights for allowing the disclosure of secret recordings of a personal nature.¹³ The author claims that Judge Moro, both in light of domestic law and this jurisprudence, should have kept telephone taps confidential, at least until a ruling on their relevance and admissibility at trial.

3.4 The author adds that releasing the conversation between him and President Rousseff was even more clearly illegal, since that conversation was intercepted even after Judge Moro himself had requested to discontinue the tapping. Therefore, in violation of his own order, Judge Moro decided not only to keep the intercepted conversation but to release it to the media. He justified the release on grounds of public interest, yet the author's appointment as Chief of Staff had already been announced to the public by the President's Office on the morning of 16 March 2016, before the interception and disclosure of the conversation. The author alleges that the disclosure was designed to create a public political outcry and to create strong pressure to reverse the author's appointment, giving the impression that the author was anxious to escape apprehension because he was guilty.

3.5 The author contends that, although the Supreme Court overturned Judge Moro's decision on the legality of the wiretap, no action has been taken against him. He explains that despite several complaints by citizens, the National Court Council (*Conselho Nacional de Justiça*) has not taken any action, and neither have other prosecutorial authorities, who should have acted *ex officio* knowing that Moro committed public action crimes.¹⁴

¹¹ The author cites *Spakmo v. Norway* (CCPR/C/67/D/631/1995), para. 6.3.

¹² Article 8: "Phone call tapping, of any nature, shall be filed in separate records, attached to the records of the police investigation or the criminal procedure, preserving the secrecy of procedures, recordings and their respective transcriptions".

Article 10: "It is a crime to tap telephone data and telematics communications or to breach judicial secrecy without judicial authorization or for purposes which are unauthorized by law". Article amended in 2019 to include "environmental listening" to the prohibition.

¹³ *Escher v Brazil*, IACHR Series C No 200, 6 July 2009.

¹⁴ The author alleged that the Supreme Federal Court should have submitted a copy of the case to the Federal Attorney's Office pursuant to Article 40 of the Code of Criminal Procedure: "When judges or courts verify in records and documents which are known to them the existence of a public action crime, they shall send to the Federal Attorney's Office the copies and documents needed to file a charge".

Article 17 – Telephone intercepts of author’s lawyers and disclosure of the conversations

3.6 The author alleges that the interception of his lawyers’ telephones and the subsequent selective disclosure of certain conversations, covering his lawyers’ advice about various aspects of issues with Judge Moro, also violated his right under Article 17 of the Covenant. He explains that, according to Judge Moro, the interception was carried out because there was evidence of one of the author’s lawyers’ involvement in the purchase of the Atibaia property. Mr. Roberto Teixeira, the lawyer in question, was therefore “an investigated party, not a lawyer”. The author alleges that this was a false distinction, since Mr. Teixeira remained his lawyer at all times and there could be no suspicion deriving of his involvement as a lawyer in a property purchase, unless the transaction itself was fraudulent or illegal. The author adds that no such evidence existed, nor did it emerge from the transcripts of the intercepted calls. The author alleges that this was therefore a clear breach of attorney-client privilege which, as has been recognized by the Committee, is “intended to protect the client”¹⁵.

Article 14 (1) – Absence of an impartial tribunal

3.7 The author maintains that, when deciding on the suspicion motion, Judge Moro relied on the normal procedure which permits a judge who renders a decision at the investigative stage to sit as the trial judge. The author explains that the criminal procedure in Brazil does not effectively differentiate between the stages of investigation and trial. The first instance judge is responsible for authorising prosecution requests for extraordinary measures;¹⁶ for approving the Prosecution’s criminal charges; and then for trying the case without a jury¹⁷ and without other judges. The author alleges that this procedure is not in itself a breach of Article 14 of the Covenant, but that, according to the Committee, the involvement of judges in preliminary proceedings wherein they form an opinion about a defendant is incompatible with the requirement of impartiality.¹⁸ He further adds that the Committee has also asserted that “[j]udges must not only be impartial, they must also be seen to be impartial”¹⁹. He alleges that it is relevant that the public perception was that Moro would arrest and convict the author, which he eventually did.

3.8 The author explains that the indicia of Judge Moro’s partiality included, among others: (i) Deliberately issuing an unlawful bench warrant to detain him publicly and unnecessarily; (ii) Tapping his telephones and those of his family, and unlawfully and maliciously releasing transcripts to the media (in particular the calls with then President Rousseff); and (iii) Intercepting and releasing to the media confidential calls with his lawyer, and making allegations of criminal conduct against his lawyer. He adds that Judge Moro had repeatedly accepted invitations to attend and speak at events run by groups politically hostile to him, and who called publicly for his arrest and conviction,²⁰ and attended as guest of honour to the launch of a book about the Car Wash investigation, which portrayed Moro in a hagiographic light and defamed the author by claiming he was guilty of corruption. The author highlighted that the perception of Judge Moro’s actions could not be divorced from his much-publicised theory of the crusading pro-active “attack judge” which he advanced in his public lectures and publications.²¹ The author contends that, because Judge Moro used his public office position to advance arguments prejudging the author’s guilt, he disqualified himself as an impartial judge in the proceedings against the author.

¹⁵ *Van Alphen v. Netherlands* (CCPR/C/39/D/305/1988), par. 5.7.

¹⁶ Such as search and seizure warrants, bench warrants, telephone tapping and the like.

¹⁷ Except in intentional crimes against life.

¹⁸ The author cites *Larrañaga v. The Philippines* (CCPR/C/87/D/1421/2005), para. 7.9. The author also cites the European Court of Human Rights’ *Hauschildt v Denmark*, No. 10486/83 (1989).

¹⁹ *Lagunas Castedo v. Spain* (CCPR/C/94/D/1122/2002), para. 9.7.

²⁰ Among others, the Brazilian Social Democratic Party, Editora Abril (a paper that has repeatedly called the author corrupt and demanded his arrest and conviction), and *Veja* magazine (which published a doctored front cover picture of him in a convicted prisoner’s uniform).

²¹ The author cites Judge Moro’s publication “*Considerações Sobre a Operação Mani Pulite*”, *R. CEJ, Brasília*, n. 26, p. 56-62, jul./set. 2004, using the name “*juízes de ataque*”.

Article 9 – Risk of indefinite pre-trial detention

3.9 When submitting his original communication and before he was imprisoned after the Federal Regional Court's confirmation of the conviction, the author argued that he was at risk of indefinite pre-trial detention, in violation of Article 9 of the Covenant. He explains that he had been formally identified as a suspect in a number of investigations and was undergoing a procedure that would in all likelihood lead to his pre-trial arrest and indefinite detention without any effective remedy. He explains that Article 312 of the Brazilian Code of Criminal Procedure provides that preventive detention may be ordered "to maintain public order, economic order, for the convenience of a criminal investigation or to secure the enforceability of the criminal law, whenever there is evidence of a crime and sufficient indication of authorship." He claims that the "maintenance of public order" –the exception under which most Car Wash suspects had been detained– is vague, and must be confined to emergency situations. Similarly, the "convenience" of a criminal investigation should be interpreted as a situation where the detainee is likely, if released, to frustrate the investigation by fleeing or interfering with witnesses, or can be shown from his criminal record or his recent intentions to be likely to commit further serious crimes. The author claims that Article 312 does not comply with Article 9 of the Covenant because it lacks the "strict criteria"²² to regulate detention for the purposes of obtaining testimony, which is an exceptional measure that must be carefully and precisely regulated.²³ He adds that the Committee has condemned states that have detained defendants to force them to cooperate with the investigations.²⁴ The author finally claims that, although he was never put in pre-trial detention, he should be considered a victim according to the Committee's jurisprudence because there was a "real risk" of a violation of his rights under the Covenant.²⁵

Article 14 (2) – Breaches of the presumption of innocence

3.10 The author alleges that the virulent media campaign fostered by Judge Moro, the Federal Prosecution and the police, amounted to a breach of his right to presumption of innocence in violation of article 14 (2) of the Covenant. He notes that, according to the Committee's General comment No. 32, "[i]t 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."²⁶ He adds that this principle was applied by the Committee in a case where public assertion of guilt by a high ranking prosecutor at a public meeting, which were given wide media coverage, amounted to a breach of Article 14 (2).²⁷ In the same vein, the author notes that the Committee has found violations of this right through extensive and adverse pre-trial comments by "state-directed" media,²⁸ which highlights the significance of a link between the adverse media coverage and the State.

3.11 The author alleges that many Car Wash suspects were held in detention until they entered into plea-bargains, and that the details of those plea-bargains, whenever they mentioned him or his associates, were leaked to the media. The media then deployed the leaked information, no matter how unreliable, to add to his public demonization and the expectation that he would be found guilty of corruption. He alleges that the State party's media were all hostile to him. Although he was formally a subject of investigation, State party legislation offered no protection to his honour and reputation during this period, a protection which could have been afforded for e.g. by contempt of court laws preventing the media from prejudging his guilt. He alleges that Judge Moro had done nothing to discourage

²² *Campbell v. Jamaica* (CCPR/C/47/D/307/1988), para. 6.4.

²³ The author cites jurisprudence of the Inter-American Court of Human Rights with regards to the requirements for pre-trial detention; among others, *Usón Ramírez v. Venezuela*, Series C No. 207, para. 144.

²⁴ *Van Alphen v. Netherlands* (CCPR/C/39/D/305/1988).

²⁵ The author cites *Kindler v. Canada* (CCPR/C/48/D/470/1991), para. 13.2.

²⁶ General comment 32, para. 30.

²⁷ *Gridin v. Russia Federation* (CCPR/C/69/D/770/1997), para. 8.3.

²⁸ *Saidova and Saidov v. Tajikistan* (CCPR/C/81/D/964/2001), para. 6.6.

the slander, because of his notion that “public opinion” must demonstrate support for prosecutions.²⁹

3.12 He alleges that the Federal Prosecutors involved in his cases have continuously made public statements asserting his guilt.³⁰ He highlights, as examples, the 90-minute press conference of September 2016 and that Prosecutor Dallagnol published a book called “*A Luta Contra a Corrupção*”, portraying the author as guilty of the crimes of which he was accused. He claims that the only remedy available against this abuse was a complaint to the Prosecutor’s National Council, which he filed on 31 May 2016. However, no action was taken on the grounds that the Council could not reproach a member of the Federal Attorney’s Office other than conducting an internal investigation with mere recommendations to the Prosecutors involved.

Article 25 (b) – Right to vote and right to be elected

3.13 The author submits that the State party violated his rights under article 25 (b) of the Covenant both to run in the presidential elections and to vote as Supplementary Law 135/2020 (known as “Clean Slate Law”, *Lei da Ficha Limpa*) institutes an 8-year ineligibility period for political agents convicted by a collegiate body for committing specific crimes; among them, those for which the author was convicted.³¹ The author alleges that this law is both unconstitutional and incompatible with the Covenant, since its application amounts to a violation of the right to be presumed innocent.³² He notes that the Committee has already found a violation of both the right to vote and be elected in a case where the author’s imprisonment resulted from a proceeding in which his due process guarantees were not respected.³³ He alleges that, in his case, his imprisonment was the result of criminal proceedings without due process guarantees; and that it was a criminal process instituted against him in order to prevent his candidacy in the elections. Evidence of this is that nearly 1,400 politicians who had their registrations denied by the Electoral Courts in 2018 and had appeals pending were allowed to continue campaigning for that year’s election until the decisions on their appeals were final.

Exhaustion of domestic remedies

3.14 The author notes that “it is the Committee’s constant jurisprudence that the rule of exhaustion applies only to the extent that those remedies are effective and available”³⁴. He cites the jurisprudence according to which remedies must offer a “reasonable prospect of redress”³⁵ and must not be “unreasonably prolonged”³⁶, and that internal reviews by

²⁹ Among others, the author cites a lecture held in São Paulo in which Judge Moro said “These cases involving severe corruption crises, powerful public figures, only proceed if supported by the public opinion and the organised civil society. And this is your role.”

³⁰ For example, one of the heads of the investigation, Carlos Fernando dos Santos Lima, allegedly told Radio Station Jovem Pan on 27 March 2016: “We clearly see payments by construction companies benefitting the former President and his family... others who co-operated (i.e. by plea-bargains) confirm the former President already knew about the scheme and approved it... And he also knew about everything, he had the power and ability to hinder the result... so in this sense he was not just being part of it, and that’s why saying he ruled over it is correct. He is the author of the crime”.

³¹ In the author’s case, the collegiate body was the Federal Regional Court, which acted as the appeal instance to Judge Moro’s conviction.

³² According to Article 5 (LVII) of the State party’s Constitution: “no one shall be considered guilty before the issuing of a final and unappealable penal sentence”. Equally, according to its Article 15: “Disfranchisement of political rights is forbidden, the loss or suspension of which rights shall apply only in the event of: (...) III. final and unappealable criminal sentence, for as long as its effects last...”

³³ *Scarano Spisso v. Venezuela* (CCPR/C/119/D/2481/2014), para. 7.12. The author also refers to General comment no. 25, para. 14.

³⁴ Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights (CCPR/C/113/4), para. 49.

³⁵ *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

³⁶ *Ičić et al. v. Bosnia* (CCPR/C/113/D/2028/2011), para. 8.3.

professional supervisory bodies for judges and prosecutors do not constitute a remedy which has to be exhausted.³⁷

3.15 With regards to the bench warrant, the author claims that he was not given the opportunity to challenge it at the time, and that the damage done to him by the publicity was irreversible. He adds that any later complaint against Judge Moro would have been sent for “internal investigation” by a council of judges which would have not resulted in an effective remedy. He also claims that any subsequent constitutional action would have been met by the argument that the litigation was a futile, because the case was in the past and the damage was irreversible. The author argued that he could have sued for civil damages, but the trial would have been prolonged.

3.16 Regarding the two claims involving the disclosure of telephone tapping, the author claims that there was no domestic remedy available other than a civil action, which would take years to come to trial. Although Justice Zavascki of the Supreme Federal Court confirmed the illegality of the disclosure of the call involving President Rousseff on 13 June 2016, he provided no remedy or redress to the author, accepting that the effects of the illegality were “irreversible”. He claims that there was no effective way he could require action by government or by the Judicial Council.

3.17 With regards to Judge Moro’s lack of impartiality, the author claims that there was no effective way in which judge Moro could be recused for bias. The appropriate motion to recuse could only be filed before the judge himself (who was obviously an interested party) or by a petition directed to the Attorney General (Rodrigo Janot) who had himself, in his role as Federal Prosecutor, accused Lula of being guilty. He claims that, in any event, the Attorney General merely had a discretion to initiate government action, which did not amount to an effective remedy. All possible motions had to be submitted to Judge Moro, who rejected them. These remedies were not efficient to guarantee a trial with an impartial judge, as they hinged on the decision of the very judge to whom objection was taken. Also, the motions were appealed all the way to the Supreme Federal Court, and denied.

3.18 With regards to the risk of pre-trial detention, the author argues that, as a pre-trial detainee, he would have no right to *habeas corpus* or to access to a court to order their release other than going through Judge Moro himself. He claims that since domestic law did not confine pre-trial detention to cases where there is likelihood of flight or interference with evidence, and since pre-trial detention was used in order to obtain a confession (i.e. a plea bargain), there was no effective remedy available to prevent it.

3.19 With regards to his presumption of innocence, the author claims that the State party took no measures to prevent the leaks and disclosure of information to the media. He adds that the lack contempt of court laws meant that there were no effective remedies to prevent the media from pre-judging his guilt on the basis of those leaks. He further claims that the complaints to the National Council of Prosecutors about the behaviour of the Federal Prosecutor in publicly alleging that the author was guilty were merely sent for “internal investigation”. He argues that these cannot be considered effective remedies, since they are administrative and discretionary disciplinary proceedings.

State party’s non-compliance of request for Interim Measures

3.20 The author explains that the State party failed to comply with the requests for interim measures issued by the Committee. He claims that the State party’s behaviour clearly had the purpose of making the violations to his political rights irreversible, and to make it impossible for a potential decision by the Committee to be complied with. He claims that, by acting to prevent, frustrate or render the examination by the Committee nugatory and futile, the State party has committed grave breaches of its obligations under the Optional Protocol.³⁸

³⁷ *Yachnik v. Belarus* (CCPR/C/111/D/1990/2010), para. 8.3.

³⁸ *Maksudov et al v. Kyrgyzstan* (CCPR/C/93/D/1461,1462,1476& 1477/2006).

The State party's observations on admissibility and merits³⁹

Admissibility: exhaustion of domestic remedies

4.1 The State party alleges that the author failed to invoke and exhaust all available domestic remedies prior to filing his individual communication before the Committee, and the Committee is therefore barred from examining the communication pursuant to Article 5 (2) (b) of the Optional Protocol. It claims that the European Court of Human Rights has established in its jurisprudence that the exhaustion of domestic remedies is normally determined with reference to the date on which an application is lodged, accepting exceptions when the last stage is reached shortly after the lodging of the application but before the determination of admissibility.⁴⁰

4.2 The State party explains that the author's several submissions show that he has been gradually making use of the available domestic remedies since filing his communication, which demonstrates that he had not properly exhausted them before resorting to the Committee. The State party submits that the author's claims relate to two ongoing criminal proceedings in Curitiba,⁴¹ which were pending before the first instance court at the time of the filing of the author's communication. The State party explains that, should a conviction be reached – as it happened afterwards –, the author would be entitled to appeal against both convictions,⁴² appeals which would stay his conviction sentence. The State party also explains that, if faced with a conviction, the author would be entitled to other ordinary and extraordinary appeals before the Superior Court of Justice and the Supreme Federal Court (as well as internal appeals within those courts).⁴³ The State party alleges that the author had also filed lawsuits for damages but failed to wait for the first instance decision before filing his communication before the Committee.

4.3 The State party adds that, even at the moment of filing of its observations on admissibility and merits, the last stages of available domestic remedies had still not yet been reached.⁴⁴ It alleges that, in light of the myriad of domestic remedies filed by the author after submitting the communication before the Committee, and given the fact that some important appeals were still pending, it should be concluded that domestic remedies were not exhausted.

4.4 The State party adds that the author tried to depict the domestic system of justice as a whole as a biased system in which there would be no prospects of real relief to be granted. It alleges that the suggestion of a general partiality among national judges towards the author is a subjective illation, as it shows on its discussion of the merits. It therefore requested the Committee to declare the author's communication inadmissible for lack of exhaustion of domestic remedies.

Article 9 (1) – Bench Warrant of 4 March 2016

4.5 The State party explains that the bench warrant did not subject the author to arbitrary arrest or detention because both the request from the Federal Prosecution and the decision by the court were fully reasoned as required by domestic law. It adds that the warrant was a purely technical measure with no associated political nuance or intention, which did not

³⁹ The following observations are reconstructed from the State party's different submissions to the Committee; among them, its observations on admissibility of 27 Jan 2017, its additional observations on admissibility of 29 September 2017, its additional observations of 3 April 2018, its further submissions of 11 May 2018, 9 and 13 September 2018, and its observations on admissibility and merits of 21 November 2018.

⁴⁰ The State party cites *Baumann v. France*, Ap. No. 33592/96, para. 47 and *Karoussiotis v. Portugal*, Ap. No. 23205/08 para. 57, among others.

⁴¹ Criminal lawsuits No. 5046512-94.2016.4.04.7000 and No. 5063130-17.2016.404.7000.

⁴² In accordance with Article 593, I, of the Criminal Procedural Code.

⁴³ In accordance with Article 619 of the Criminal Procedural Code (for ordinary motions for amendment of judgement), and in accordance with Articles 105 and 102, respectively for the extraordinary appeals.

⁴⁴ The State party mentions the different several appeals before the Superior Court of Justice and the Supreme Federal Court which were still pending.

involve any prejudgment of criminal liability.⁴⁵ The State party explains that, as clarified at the time by the Operation Car Wash Task Force,⁴⁶ the measure was ordered in compliance with the Brazilian Criminal Procedural Code⁴⁷ and the judicial authority's general power to grant precautionary measures, which were at the time of issuance considered constitutional by the Supreme Federal Court.⁴⁸

4.6 The State party contends that the bench warrant was necessary and justified by the circumstances as the public security was at stake. On 17 February 2016, the Prosecution Service of the State of São Paulo had scheduled for both the author and his wife to be deposed. The author tried to avoid the investigative act through the filing of a writ of *habeas corpus* before the Court of São Paulo arguing that it would generate great risk of protests and conflict. Neither him nor his wife attended the deposition and protest still took place in the surroundings of the courthouse. The State party alleges that this event was an important factor that motivated the bench warrant against the author, aiming at guaranteeing the overall tranquility of the investigative act.

4.7 The State party argues that, when deciding on the suspicion motion, Judge Moro explained that an intercepted call between the author and the President of the Worker's Party on 27 February 2016 showed that the author had knowledge of a scheduled search and seizure and revealed that he contemplated "assembling some congressmen to surprise them"⁴⁹. The State party states that, in light of these conversations, the police had taken steps to avoid risks to both the investigated and the security officer's moral and physical integrity. The State party alleges that, under the described circumstances, the Court could even have opted to issue a more severe legal measure such as temporary detention or preventive arrest. However, in addition to having opted for a less severe measure, the Court asserted in its order that the use of handcuffs and filming of the author were not allowed; it expressly guaranteed his right to remain silent and the presence of his attorney; and it stated that the order was only to be used in case the author refused to accompany the police.

4.8 The State party affirms that the author's allegations that the Prosecution illegally publicized the investigative act has no verisimilitude. It explains that since the measure was issued precisely to guarantee that the deposition take place in an atmosphere of tranquility, its successful execution relied on the strict compliance with the necessary secrecy. In fact, contrary to the author's allegations, the influx of people only began after the author's counsel came to know of the measure. It concludes that it was the author's counsel and not the prosecution the one who intended to disrupt the deposition.

Article 17 – Disclosure of various intercepts of telephone conversations

4.9 The State party explains that an interference with the right to privacy under Article 17 of the Covenant must not be arbitrary or unlawful. It recalls that, according to General comment 32, "[e]ven in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children."⁵⁰

4.10 The State party explains that the decisions on all telephone interceptions, which were requested by the Federal Prosecution, were widely substantiated and in line with domestic law. It alleges that the decision explains the indispensability of the measure for the elucidation of serious crimes that emerged from considerable evidence, as did the subsequent decisions which extended and expanded the interception measure. The State party adds that lifting of the confidentiality was also motivated and carried out to prevent obstruction of

⁴⁵ The State party cites Judge Moro's bench warrant order, No 5007401-06.2016.4.04.7000/PR, 29/02/2016.

⁴⁶ The State party cites "Nota de esclarecimento da força-tarefa Lava Jato do MPF em Curitiba", 05/03/2016, available at: <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/nota-de-esclarecimento-da-forca-tarefa-lava-jato-do-mpf-em-curitiba>.

⁴⁷ The State party mentions articles 201, 218, 260 and 278.

⁴⁸ The State party mentions *Habeas Corpus* 107644.

⁴⁹ No 5032531-95.2016.4.04.7000/PR, 22/07/2016.

⁵⁰ General comment 32, para. 29.

justice and because of the public interest for a “healthy public scrutiny on the performance of the Government and criminal Justice itself”⁵¹. According to Judge Moro, “[t]here is no defense of privacy or social interest that justifies the maintenance of secrecy in relation to evidentiary elements related to the investigation of crimes against the Government”⁵². Therefore, the disclosure of a telephone interception granted by the judge in a decision widely substantiated raises no issues under Article 17.

4.11 The State party adds that the Supreme Federal Court determined the invalidation of the communication between the author and then President Rousseff, which shows the possibility of reviewing judicial decisions and the independence of the organs involved in the author’s criminal process. It asserted that the reversion of a judicial decision that was rendered in a technical way constitutes an act within the judicial procedure and does not imply recognition of disciplinary or criminal fault, which did not occur in this case.

Article 17 – Telephone intercepts of author’s lawyers and disclosure of the conversations

4.12 The State party alleges that, with regards to the interception of the author’s lawyer’s office, the number subject to the wiretap was registered in the name of a company which belonged to the author (LILS Palestras, Eventos e Publicações Ltda.). This fact was confirmed by the Federal Regional Court who, upon knowing that the phones were used by third parties, decided that the evidence not be used for any purpose.⁵³ In addition, the recorded audios were destroyed.⁵⁴ The State party cites Judge Moro’s decision on the suspicion motion according to which, “there are no records of tapped conversations (...) of other lawyers other than Roberto Teixeira himself, not even conversations with content related to the right of defence”⁵⁵.

4.13 With regards to the interception of Mr. Teixeira’s cell phone, the State party affirms that he was himself investigated and that a criminal complaint was filed against him for the alleged perpetration of money laundering crimes. The State party cites Judge Moro’s decision according to which Mr. Teixeira was not listed as one of the defence attorneys of the author, and that “[i]f the attorney himself gets involved with illegal conduct, which is the object of the investigation, there is no immunity to investigation or tapping.”⁵⁶

Article 14 (1) – Absence of an impartial tribunal

4.14 The State party alleges that the participation of a judge in public events, as books releases and artistic exhibitions, does not entail a breach of the duty of impartiality or an attempt to self-promotion. It adds that awarding prizes as a result of recognition of the exercise of a professional activity is a legitimate and common practice in the field of Law and other areas of human knowledge.

4.15 With regards to the allegations of lack of impartiality due to the fact that the trial judge decided on requests of provisional measures during the pre-trial stage, the State party affirms that the role of the judge in the preliminary investigation was of a passive nature. It explains that the investigative judge evaluates the legality of requests presented by the parties and police authorities but is not allowed to actively conduct them himself. This means that these decisions are taken with a low degree of judicial cognizance and, thus, do not bind the judge during the trial of the case. The State party cites Judge Moro’s decision according to which “[a]lthough deliberations mean, on judicial cognizance, some type of consideration of the case, what is relevant is that the judge, even after taking favourable or unfavourable decisions

⁵¹ Judge Moro’s decision of 16/03/2016, as cited in his letter to the Supreme Federal Court of 29/03/2016.

⁵² Ibid.

⁵³ No. 5061114-07.4.04.0000/PR, 15/03/2018.

⁵⁴ No. 98.2016.4.04.7000/PR, 2/04/2018.

⁵⁵ No. 5032531-95.2016.4.04.7000/PR, 22/07/2016.

⁵⁶ Judge Moro’s decision of 16/03/2016, as cited in his letter to the Supreme Federal Court of 29/03/2016.

in favour of one of the parties in the lawsuit, keep an open mind to change his mind during the trial, after the adversarial phase and the arguments”⁵⁷.

4.16 The State party notes that in *Larrañaga v. The Phillipines* (cited by the author), the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author, and that this involvement was such that allowed them to form an opinion on the case prior to the trial and appeal proceedings. The State party adds that the European Court of Human Rights has asserted that the mere fact that a trial judge had also made pre-trial decisions in a case is not in itself a vice of partiality.⁵⁸

4.17 However, according to the State party, in its legal system the judge never takes part in the investigation stage and does not participate in the investigative strategy designed by prosecutors and police officers. The judge, thus, does not form an opinion on the case prior to the trial, but only guarantees the defendants’ right to judicial supervision of acts carried out by police and prosecutors. The State party explains that this was confirmed by the Federal Regional Court when rejecting the author’s four suspicion motions. This does not mean that the author had no effective remedy or that the judges and courts were not impartial.

4.18 The State party finally explains that judges and prosecutors’ professional associations are private institutions created by citizens in their private capacity and regulated by the Civil Code. They are not part of the State party’s judiciary and therefore enjoy a wide protection of freedom of speech. It adds that the opinions expressed by those associations do not constitute official opinions of any of the State party’s branches, and that they have no capacity to influence the independence of judges. It concludes that the author’s allegations on this respect are rhetorical claims that lack substantiation.

Article 9 – Risk of indefinite pre-trial detention

4.19 The State party clarifies that the author was never placed under preventive arrest. It adds that the author was imprisoned due to the provisional execution of his conviction, after sentences had been rendered by the first and second instances, in accordance with Supreme Court case-law. The State party explains that lawful detention of a person after a conviction by a competent court is a legitimate ground for deprivation of liberty that, although explicit in the European Convention on Human Rights, it is implicit in other treaty provisions.⁵⁹ It notes that the Supreme Federal Court decided on 17 February 2016, before the author’s first conviction, that the presumption of innocence did not prevent imprisonment resulting from a judgement, which, on appeal, confirms a conviction.⁶⁰ In fact, several other defendants in the Car Wash Operation were imprisoned with convictions confirmed on the second instance, before the author was.

4.20 With regards to the alleged lack of enforcement of a decision rendered by Judge Favreto sitting for the Federal Regional Court, which ordered the author’s release, the State party explains that the judge is under investigation before the Superior Court of Justice for the alleged commission of the crime of wilful abuse of power.

4.21 With regards to allegations of widespread use of pre-trial detention in the Car Wash Operation, the State party explains that the Federal Court of Curitiba had duly based its decisions ordering pre-trial detention of the accused on the relevant legal provisions,⁶¹ providing the reasoning for them and always highlighting the exceptionality of pre-trial detention. It adds that although some of these decisions were reversed by higher courts, this only shows that the State party’s judiciary is independent and impartial.

⁵⁷ Judge Moro’s letter to the Supreme Federal Court of 29/03/2016.

⁵⁸ *Hauschildt v Denmark*, No. 10486/83 (1989), para. 50.

⁵⁹ The State party cites the UN, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. Chapter 5. Human Rights and Arrest, Pre-Trial and Administrative Detention, p. 172. (<https://www.ohchr.org/Documents/Publications/training9chapter5en.pdf>)

⁶⁰ *Habeas corpus* 126.292; which only confirmed long-standing jurisprudence from the Court on the matter, prior to a revision that took place in 2009.

⁶¹ According to Article 312 of the Criminal Procedures Code.

4.22 With regards to the allegations that pre-trial detentions in Operation Car Wash were ordered with the intent to force plea bargains, the State party notes that 83.5% of the 175 plea agreements celebrated were carried out while those investigated were free. It adds that for plea bargains to be valid they must be voluntary, in accordance with Law 12850, as amended in 2013, a year prior to the commencement of investigations in Operation Car Wash.

Article 14 (2) – Presumption of innocence

4.23 The State party alleges that there is nothing in the pronouncements of members of the Federal Prosecution Office that could influence the independent and impartial performance of the Judiciary. It adds that a technical explanation to society regarding the charges against the author is comprised in the right to information and in accordance with the principle of transparency. It also notes that the author and his defence held several press conferences to convey their version of the facts to society.

4.24 With regards to the first televised press conference held by the prosecutors of the Car Wash task force, the State party refers to Judge Moro's decision on the suspicion motion against them. According to that decision, the press conference: (i) was not endowed with political-partisan or political-ideological purposes; (ii) had the intention to inform and remain accountable, considering the notoriety of the accused; (iii) attested to the relevance of the affirmation of the author's power of command; and (iv) did not include a disrespectful tone in the adjectives used in the charges presented.⁶²

4.25 The State party explains that the author filed a lawsuit against Prosecutor Dallagnol, seeking compensation for alleged moral damages, which was dismissed by the judge of the 5th Civil Court of São Bernardo do Campo District in the State of São Paulo, and on appeal by the Appellate Court of the same state. The State party cites excerpts of the appellate decision that highlight the context of the charges, the strong evidence available, and the fact that public interest trumps the right to privacy when a public person is involved.⁶³ The State party explains that the author also filed an administrative complaint against the Federal Prosecution Service, before an independent control body, the National Council of the Federal Attorney's Office, which dismissed the complaint on similar grounds.⁶⁴

Article 25 (b) – Right to vote and right to be elected

4.26 The State party alleges that a violation to Article 25 of the Covenant can only be considered, as its own text asserts, if the restriction to the concerned right is unreasonable. It cites General comment 25, according to which restrictions can be imposed as long as they are established by law and based on objective and reasonable criteria.⁶⁵

4.27 With regards to the author's right to be elected, the State party explains that the Clean Slate Law was passed, in accordance with the Constitution,⁶⁶ by an absolute majority of the National Congress, which means that the restrictions are both exceptional and carefully considered. It adds that this law derived from the people's initiative⁶⁷ – which demonstrates a strong exercise of legislative democracy and popular sovereignty –, and promulgated by the author himself while holding the Presidency. According to Article 1 (e) (1), citizens shall be ineligible to hold any public office for eight years if they have been convicted of crimes like 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. The State party explains that this was the author's case. The State party adds that in 2012, the Supreme Federal Court ruled that this law was in compliance with the Constitution. This decision was

⁶² No. 5051579-40.2016.4.04.7000/PR, 6/12/2016. The State party also quotes large excerpts from the author's first conviction, in which Judge Moro also punctuated the regular conduct of the prosecutors in the exercise of their functions.

⁶³ No. 1031504-08.2016.8.26.0564, 20/12/2017.

⁶⁴ Disciplinary Complaint No. 1.00659/2017-01, 19/12/2017 (decision and legal opinion).

⁶⁵ General comment 25, para. 4.

⁶⁶ Article 14, § 9.

⁶⁷ In accordance with Article 61, § 2 of the State party's Constitution.

rendered four years before the criminal cases against the author, which shows that it has not been applied to him in an *ad hoc* manner.

4.28 The State party holds that the restrictions to the author's rights were democratically established by domestic law and duly applied to him, as a result of equitable protection of the human rights to good governance and democracy, making these restrictions reasonable and in accordance with Article 25 of the Covenant.

4.29 With regards to the author's right to vote, the State party also alleges that this restriction was legal, objective and reasonable. It explains that, in accordance with the Electoral Code,⁶⁸ the Superior Electoral Court published a resolution⁶⁹ establishing electoral sessions in imprisonment and correctional facilities with at least 20 people able to vote. This was not the case at the Regional Superintendence of the Federal Police in Curitiba, and therefore the author could not vote. The State party explains that with 600,000 people in custody, this restriction is not only established by law but also reasonable and objective.

Interim measures

4.30 The State party claims that the Supreme Electoral Tribunal took duly into account, in good faith, the recommendation of the Human Rights Committee to grant provisional measures to the author. It highlighted that Judge Fachin's proposal to allow the author's registration as a candidate was defeated. It adds that Judge Weber's opinion against the registration of the author's candidacy but in favour of his right to campaign and have his name maintained in the ballot box system was also defeated.

5. The final proceedings of the present Views can be found in document CCPR/C/WG/134/DR/2841/2016 (Final proceedings).

⁶⁸ Law 4,737 of 15 July 1965.

⁶⁹ 23,554, of 8 December 2017.

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ADVANCE UNEDITED VERSION

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2841/2016^{*,**,**}

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

* 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, Shuichi Furuya, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions by Committee member Duncan Laki Muhumuza (concurring), and by Committee members José Manuel Santos Pais and Kobauyah Tchamdja Kpatcha (dissenting) are attached to the present Views (Final.Proceedings)

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

The author's comments to the State party's observations on admissibility and merits

Admissibility: exhaustion of domestic remedies

2.1 In its comments on admissibility and 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 timeframe. For example, the author's final appeal against his conviction to the Supreme Court, which is suggested by the State party as a remedy, had been delayed by a year at the time of the filing of these 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 judges. He stressed that the only time that a judge ruled substantively in his favour, that judge was removed and is now subject to an investigation.

2.2 The author alleges that the State party assumed that the alleged 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 Judge Moro's partiality) could feature on 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 suspicion motions 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 inevitable conviction and imprisonment.

2.3 The author claims that the Committee's and the European Court of Human Rights' jurisprudence cited by the State party accepts 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.

Article 9 (1) – Bench Warrant of 4 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 Criminal Procedure Code. He explains that (i) the *habeas corpus* to lift the deposition in Sao Paulo involved a different investigation, and (ii) taking legitimate action in a court in relation to the time of a deposition cannot be interpreted as a refusal to give it.

2.5 The author alleges that the media presence at 6 am at his home can only be explained because of 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, as 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. Finally, 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 Court rule.

Article 17 – Disclosure of various intercepts of telephone conversations

2.6 The author claims that General comment 32, cited by the State party, relates specifically to the need to publish reasons for judgements where some trial secrecy has been necessary. He adds that it does not in any way justify the release by an investigating judge of telephone tapping of private conversations even before a charge has been brought. He adds

that the immediate release of telephone tapping in order to assist the demonization of a suspect before he is charged is a characteristic of an undemocratic and authoritarian state.

Article 17 – Telephone intercepts of author’s lawyers and disclosure of the conversations

2.7 With regards to the law firm’s telephone, the author alleges that Judge Moro was notified twice by the telephone company that the phone number intercepted was actually related to the law firm in question. He adds that Judge Moro simply stated that this was unnoticed by the court due to the enormous amount of work, which the author considers an unacceptable excuse considering the very serious circumstances.⁷⁰ Equally, the author explains that, although the State party alleges that these calls were never used in the investigations, the Court had many documents with records from calls made from the law firm (including calls discussing the author’s strategy defences) with several comments on their margins, showing that they had definitely been analysed by the Federal Police.⁷¹ The fact that they were later destroyed does not preclude that the author’s defence strategy was closely monitored by judicial authorities.

2.8 With regards to his lawyer’s mobile phone, the author alleges that Mr. Teixeira was not even being formally investigated at the time that the interceptions occurred. Despite the fact that Mr. Teixeira had not filed one of the petitions challenging a search warrant, he had signed all other petitions that were filed, and it was well known that he was the author’s lawyer.

Article 14 (1) – Absence of an impartial tribunal

2.9 The author claims that the State party failed to recognize a defect in domestic law. Such defect consisted in allowing a judge in the investigative phase who determines that a suspect is probably or likely to be found guilty⁷² to assume subsequently the role of trial judge. This inevitably imbues the judge with the belief produced in those early decisions, making him act with prejudice during the trial. He explains that, according to domestic law, both wiretappings and search and seizure orders require a high degree of cognizance. He adds that it matters not if this 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 to be portrayed by the media as the leading anticorruption hero. Furthermore, Judge Moro’s widely spread theory of the “attack judge” showed that, had the author been acquitted at his trial, this 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 includes that judges behave in public in a way that will not permit reasonable members of the public to perceive them as biased.⁷³

2.11 The author explains that two new facts came to light that showed that Judge Moro’s bias existed from the time that he was appointed as an investigative judge. Firstly, on 1 October 2018, six days before the first round of presidential elections, the former judge published the only plea bargain testimony which mentioned the author, accusing him of crimes. It was from former Finance Minister Antonio Palocci, and was actually rejected by the Federal Attorney’s Office, who said the testimony did not give enough evidence or good investigative leads. However, after the release of this 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 publicised before the election. Secondly, in November 2018, then President elect Bolsonaro announced that he would appoint Judge Moro as his Minister of Justice, a position which the former judge accepted.

⁷⁰ The author cites the United Nations Basic Principles on the Role of Lawyers, Principles 16 and 22.

⁷¹ The author filed an affidavit of a lawyer who consulted the material provided from the tapping at the Court.

⁷² For example, by ordering searches and seizures, and telephone interceptions.

⁷³ The author cites General comment no. 32, para. 21.

The author recalled that, nonetheless, in December 2017, Judge Moro had 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 guess it would not be appropriate”⁷⁴.

2.12 The author also recalls that Judge Moro, who was not an appeal judge and was on holiday at the time, gave orders on the telephone to countermand Judge Favreto’s decision of 8 July 2018 to release the author from imprisonment (see para 2.14 Initial Proceedings). He adds that it is extraordinary that the State party authorities are criminally prosecuting Judge Favreto for exercising his jurisdiction, rather than Judge Moro, who intervened without jurisdiction.

2.13 Finally, the author also claims that the State party passed 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 speech, like those of judges’ associations, might not be illegal, they have consequences on the fairness of an appeal.

Article 9 – Risk of indefinite pre-trial detention

2.14 The author claims that while Judge Moro did not put the author in pre-trial detention, he did order to revoke 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 Judge Moro’s jurisdiction, who had already ordered the pre-trial detention of 29 Car Wash suspects. He recalls that, according to the Committee’s jurisprudence, he is entitled to complain as a “victim” because there was a real risk of a violation.⁷⁵

Article 14 (2) – 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 stop or at least postpone prejudicial comments until after the trial. He adds that the prosecutors’ 90-minute press conference was not information, but a propagandistic exercise in persuading viewers of the author’s guilt. He claims that none of the factors mentioned by Judge Moro’s attempt to justify the press conference (see para. 4.24 Initial proceedings) excuse the prosecutors’ public demonization of the author. Finally, with regards to the press, he claims that his complaint was not about reporting facts or news, but about prejudicial comments stoked 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 say a defendant is guilty before a conviction.

Article 25 (b) – 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 this is forbidden by the State party’s own Constitution in its Article 15, which provides for a revocation of political rights only after a final judgement of conviction.

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.

⁷⁴ The author cites OPOVO online, “*Há um ano, Moro disse que postular cargo político ‘não seria apropriado’*”, 3/11/2018, available at: <https://www.opovo.com.br/noticias/politica/2018/11/ha-um-ano-moro-disse-que-postular-cargo-politico-nao-seria-apropriad.html>.

⁷⁵ The author refers again to *Kindler v. Canada* (CCPR/C/48/D/470/1991).

The State party's additional observations

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

Article 14 (1) – 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 the association's opinions, in disregard of the rule of law. It adds that the investigations against Judge Favreto were set in motion on the legitimate grounds of indicia of use of the judicial office to advance private interests. The State party replies to the author's claim that Judge Moro's acceptance of 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. It claims that an inference on personal intentions are simply not judicial evidence and should not be taken into account by the Committee.

3.3 With regards 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 to Article 7 (3) of Law No. 12,850/2013, the rule of publicity of procedural acts shall prevail and no secrecy shall exist 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.

Article 9 – Risk of indefinite pre-trial detention

3.4 The State party reiterates that the author never faced pre-trial detention and that both the Covenant and its domestic law allow 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.

Article 14 (2) – Presumption of innocence

3.5 The State party claims that, in light of its previous observations, independence in the office, 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 this was carried out with the necessary social accountability and constraints posed by equality, impartiality and high ethical standards on judges and public prosecutors.

Author's additional information and comments on admissibility and merits

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

New facts

4.2 On 7 November 2019, the Supreme Federal Court declared the constitutionality of Article 283 of the State party's Code of Criminal Procedure, which establishes that defendants cannot be imprisoned until their conviction is final. This decision allowed the invalidation of the execution of the author's conviction after the confirmation on appeal while other extraordinary appeals were pending. By virtue of this 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 President.

4.3 On 8 March 2021, the Rapporteur of the Supreme Federal Court granted one of the author's *habeas corpus* by considering that the decisions of the 13th Federal Criminal Court

of Curitiba (including both Judge Moro's and Judge Hardt's convictions)⁷⁶ were rendered without jurisdiction. It understood that the author's two convictions and other two investigations related to the "Lula Institute" were not directly related to Operation Car Wash but involved other bodies of the Public Administration. The convictions against the author were therefore vacated.⁷⁷

4.4 On 23 March 2021, the 2nd Panel of the Supreme Federal Court granted the author's second *habeas corpus* by declaring that Judge Moro was biased.⁷⁸ The Court listed the following seven facts for their finding, all of which, according to the author, confirm his different complaints:

(i) Former Judge Moro's bench warrant of 4 March 2016, which was issued prematurely, without previously summoning the author to appear in court, as required by Article 260 of the Criminal Procedural Code, and which provided an exposure that undermined the author's dignity and presumption of innocence;

(ii) The 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;

(iii) The disclosure of the conversations with family members and third parties obtained from telephone interceptions was manipulatively selective, particularly those of 16 March 2016 between the author and the then President Rousseff, which were released at a time of enormous tension in the State party's society and which Justice Zavascki declared were obtained illegally since they were intercepted after the judicial decision to interrupt the interceptions;

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

(v) His clear expressions, in the judgement of the so-called Triplex case, of his perceptions of an alleged abusive behaviour by the author's defence. He stated that, in his perception, the defence had acted in an aggressive manner, with inappropriate procedural behaviour, aiming to offend him;

(vi) His ordering the lifting of the confidentiality of Mr. Palocci's plea bargain and transferred it to the investigations concerning the Lula Institute. This was done when the evidentiary stage of those investigations was already closed, which meant the content of the plea bargain could not serve as grounds for a future judgement. This was also done three months after the judicial decision that ratified the plea bargain, to coincide with the eve of the elections and done by Moro's own initiative, that is without a request by the prosecuting body;⁷⁹

⁷⁶ On 6 February 2019, Judge Hardt, appointed to temporarily replace Judge Moro at the Federal Criminal Court of Curitiba, sentenced him to 12 years and 11 months' imprisonment for corruption and money laundering in the Atibaia case.

⁷⁷ This 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. Full Bench of the Federal Supreme Court – *habeas corpus* no. 193,726.

⁷⁸ 2nd Panel of the Supreme Federal Court – *habeas corpus* no. 164.493/PR – 23/03/2021. The decision was confirmed by the full bench of the Supreme Federal Court, 7 votes to 4, on 23 June 2021. On 24 June 2021, the 2nd Panel extended the finding to all the other investigations against the author in which Judge Moro had participated.

⁷⁹ The illegality of both lifting the secrecy of the plea bargain and transferring it to the Lula Institute investigations was determined by the Second Panel of the Supreme Federal Court on 10 September 2020.

(vii) His acceptance of the position of Minister of Justice of President Bolsonaro, the author's main political adversary and whom Judge Moro helped get elected. Therefore, Judge Moro was directly benefitted by the author's conviction and imprisonment.

Admissibility

4.5 The author explains that the Supreme Federal Court's decision cannot be viewed as an effective remedy for the wrongs done to him 5 years earlier, for the following reasons: (i) 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. (ii) Although it addressed the first three complaints, the decision was directed at complaint 4, i. e., right to an impartial tribunal. Furthermore, it provided no compensation or any form of restitution other than historical vindication. (iii) It was not reached on a motion that was or could have been filed in 2016. The Supreme Court acted only on 25 June 2019, a few weeks after the release of transcripts which revealed Judge Moro's close involvement with the Prosecution. This was a new fact which was not linked to court filings in 2016. The Supreme Court decided only in December 2019 to open federal files to the author's lawyers, files which provided indisputable evidence of bias. (iv) 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 additional observations on admissibility and merits

5.1 On 15 November 2021, the State party submitted additional observations on the admissibility and merits of the communication. The State party claims that the author's allegations were upheld by the judicial decisions handed by the Supreme Federal Court in 2021, and that all decisions rendered on the criminal proceedings were annulled. It alleges that these facts prove that a) the author had not exhausted the internal remedies when he filed his communication to the Committee; and b) the measures requested in his communication are no longer necessary and became 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 judgement confirmed on appeal.⁸⁰ The State party explains that, in fact, this was the consolidated jurisprudence of the Court prior to 2009. The State party alleges that the changes in the jurisprudence of the Court and the fact that the author was released as soon as the jurisprudence changed is a clear demonstration of the independence of its judiciary.

5.3 With specific regard to his political rights, the State party claims that any limitations imposed stayed in place only while the criminal conviction was in force. Since the conviction 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 pursuant to rule 94 of its rules of procedure

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 entrusted to the Committee under that article.⁸¹ Failure to respect the interim measures

⁸⁰ *Habeas Corpus* 126.292.

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

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 Protocol⁸², and therefore constitutes a violation of article 1 of the Optional Protocol.⁸³

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 (para. 3.20 Initial.Proceedings). The Committee also takes note of the State party's argument that the Supreme Electoral Tribunal duly took into account, in good faith, the recommendation of the Committee to grant provisional measures (para. 4.30 Initial.Proceedings). The Committee is of the view that the State party has failed to substantiate how the request for interim measures was complied with, insofar as the author was neither allowed to campaign nor allowed to run as candidate in the 2018 presidential election in the terms requested by the Committee (para. 1.4 Initial.Proceedings). 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 a) the author had not exhausted domestic remedies when he filed his communication to the Committee; and b) the measures requested in his communication are no longer necessary and became moot, since the author's claims were accepted by the State party's judiciary (para. 5.1 *supra*).

7.4 With regards 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 (para. 4.1 Initial.Proceedings). However, the Committee recalls its longstanding jurisprudence according to which, when examining complaints, that determination is made with reference to the time a communication is being examined.⁸⁴ 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 re-submitted to the Committee if declared inadmissible for that reason.⁸⁵ The Committee notes that, in all instances, both parties have had the chance of filing further information and allegations, which have been transmitted respectively 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 (para. 4.2 Initial proceedings). However, the Committee notes that the author made all reasonable attempts to remedy the alleged violations at the domestic level.⁸⁶ The Committee takes note that, for example, with regards to the author's article 14 (1) claims,

⁸² Committee's general comment No. 33, para. 19.

⁸³ *Valetov v. Kazakhstan*, para. 15.

⁸⁴ See, among others, the Committee's views in *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 et al. v. France* (CCPR/C/86/D/1228/2003), para. 6.4; *Baroy v. The Philippines* (CCPR/C/79/D/1045/2002), para. 8.3; *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002), para. 8.2.

⁸⁵ *Bakhtiyari et al. v. Australia*, para. 8.2.

⁸⁶ *Lemercier et al. v. France*, para. 6.4..

the Supreme Federal Court had already rejected, by June 2018, his appeals against the rejection of all four suspicion motions against Judge Moro (fn. 5, paras. 2.11 and 3.17 Initial Proceedings). The Committee also takes note of the author's argument according to which his claims relate to pre-trial matters which could not be rectified by any appeals mentioned by the State party against his conviction (para. 2.2 *supra*). 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 be expected to exhaust at this point in time.⁸⁷ 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 regards 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 handed by the Supreme Federal Court in 2021 and that all decisions in the criminal proceedings were annulled (para. 5.1 *supra*). 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 such decision took too long to be considered effective; and that it did not provide any compensation or any form of restitution (para. 4.5 *supra*). 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. Furthermore, the Committee observes that the State party has failed to demonstrate how these decisions a) were timely and effective to avoid all the alleged violations invoked before the Committee (including the right to an impartial tribunal)⁸⁸; or b) have already provided full reparation to the author commensurate to all the violations alleged⁸⁹ 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 regards to the author's claims concerning the alleged risk of indefinite pre-trial detention, in violation of article 9 of the Covenant, the Committee considers that these claims have not been sufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

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 intercept and release of telephone conversations, the absence of an impartial tribunal, the presumption of innocence, and the right to vote and be elected. Therefore, the Committee declares the communication admissible as raising issues under articles 9 (1), 14 (1) and (2), 17, and 25 of the Covenant, and proceeds with its consideration on the merits.

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. Article 9 (1) – Bench Warrant of 4 March 2016

8.2 In relation to the author's first claim under article 9 (1) of the Covenant, the Committee recalls that the third sentence of the provision provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law.⁹⁰ The Committee must therefore determine, firstly, whether the author

⁸⁷ *Katashynskiy 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; *C.F. et al. v. Canada* (CCPR/C/24/D/113/1981), para. 6.2; *Muhonen v. Finland* (CCPR/C/24/D/89/1981), para. 6.1; and *Sequeira v. Uruguay* (CCPR/C/10/D/6/1977), para. 9.b.

⁸⁸ See *mutatis mutandis*, *Brewer Carías v. Venezuela* (CCPR/C/133/DR/3003/2017), para. 9.8.

⁸⁹ General comment 31, para. 16.

⁹⁰ General comment 35, para. 22.

was subject to a deprivation of his liberty and, secondly, whether such a deprivation was established by law.⁹¹

8.3 In relation to the first point, the Committee recalls that “[e]xamples of deprivation of liberty include police custody, [...] confinement to a restricted area of an airport, [and] being involuntarily transported”⁹². The Committee takes note of the author’s argument that compulsory transportation for questioning constitutes a deprivation of liberty (para. 3.2 Initial.Proceedings). 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 (para. 4.7 Initial.Proceedings). The Committee observes, however, that the State party has not contested that, in the author’s specific context, his transportation and the time held in 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 must consequently determine whether this 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 to avoid overly broad or arbitrary interpretation or application.⁹³ The Committee takes note of the author’s argument that, in light of Article 260 of the State party’s Criminal Procedural Code, a bench warrant can only be ordered after the defendant has been subpoenaed and has either failed or refused to attend to give testimony, pre-conditions which were not satisfied in his case (para. 3.1 and 3.2 Initial.Proceedings). The Committee also takes note of the State party’s argument that the measure was ordered according to its Criminal Procedural Code 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 (para. 4.5 Initial.Proceedings). However, the Committee observes that, when deciding on the lack of impartiality of the investigating judge, the Supreme Federal Court considered the issuing of the bench warrant to be premature because the author had not been previously summoned to appear in court as required by said Article 260 (para. 4.4 *supra*). 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. Article 17 – Disclosure of various intercepts of telephone conversations and telephone intercepts of author’s lawyers

8.5 In relation to the author’s claims under article 17 of the Covenant, the Committee notes that the author complains about the disclosure of various telephone intercepts between his family, lawyer, and former President Rouseff (paras. 3.3 and 3.6 Initial.Proceedings), as well as about the interception of his lawyer and his lawyer’s law firm’s telephones (para. 3.6 Initial.Proceedings). 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 former president Rouseff was carried out in contravention of Articles 8 and 10 of Law 9,296/96, without conceivable public interest, and to publicly humiliate and intimidate him (para. 3.3 Initial.Proceedings). The Committee also takes note of the State party’s argument that the lifting of the confidentiality was motivated and carried out to prevent obstruction of justice and because of the public interest for a healthy public scrutiny on the performance of the Government and justice (para. 4.10 Initial.Proceedings).

8.6 In relation to the interceptions, the Committee takes note of the author’s argument that the tapping of his lawyer’s telephone breached the attorney-client privilege by intercepting conversations about his legal defence strategy (para. 3.6 Initial.Proceedings). The Committee also takes note of the State party’s argument that the number of the law firm was registered

⁹¹ Ibid., para. 14.

⁹² Ibid., para. 5.

⁹³ Ibid.

in the name of a company which belonged to the author; that once it was known the number belonged to third parties the Federal Regional Court decided that the evidence not be used for any purpose; and that there are no records of tapped conversations of lawyers other than Mr. Teixeira, nor conversations with content related to the right of defence (para. 4.12 Initial.Proceedings). The Committee also takes note of the State party's argument that Mr. Teixeira's phone 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 (para. 4.13 Initial.Proceedings). The Committee further takes note of the author's argument that, although the State party alleges the calls were never used and the records were destroyed later, this does not preclude that the author's defence strategy was closely followed by judicial authorities (para. 2.7 *supra*). Finally, the Committee takes note of the author's argument that Mr. Teixeira was not being formally investigated at the time the interceptions occurred and that although he had not filed one of the petitions challenging the search warrant against the author, he had signed all other petitions that were filed and it was well known that he was the author's lawyer (para. 2.8 *supra*).

8.7 The Committee observes that both the interception and disclosure of telephone conversations constitute interferences with the right to privacy,⁹⁴ 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.⁹⁵ This means that it must cumulatively meet several conditions set out in paragraph 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.⁹⁶ The Committee also 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.⁹⁷ 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 State parties to take effective measures for the prevention and investigation of criminal offences,⁹⁸ in particular those related to acts of corruption.⁹⁹

8.8 The Committee considers, in light of the Inter-American Court of Human Rights' analysis, that Law 9,296 complies with the standard of legality required by article 17 of the Convention.¹⁰⁰ The Committee notes particularly that Article 10 of Law 9,296 prohibits the lifting of judicial secrecy "without judicial authorization or for purposes which are unauthorized by law" (fn. 18 Initial.Proceedings), thus 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 interceptions to the lawyer's and law firm's telephones were conducted after a reasoned decision of the intervening judge. However, the Committee also notes that the conversations with former President Rousseff were illegally intercepted, as repeatedly recognized by the Supreme Federal Court (paras. 2.6 Initial.Proceedings and 4.4 *supra*). The Committee considers that the interception's illegality also renders the conversation's disclosure "unlawful", within the meaning of article 17 (1). Furthermore, the Committee notes that the Supreme Federal Court characterized all disclosures (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" (para. 4.4 *supra*). The Committee therefore considers that the timing and manner of both the interception of the lawyer's and law firm's telephones and all disclosures reveal ulterior purposes that are "unauthorized by law" in the terms of

⁹⁴ General comment 16, para. 8.

⁹⁵ General comment 16, paras. 3-4; and *Van Hulst v. The Netherlands* (CCPR/C/82/D/903/1999), para. 7.3.

⁹⁶ *Ibid.*

⁹⁷ General comment 16, paras. 8; and *Van Hulst v. The Netherlands*, para. 7.7.

⁹⁸ *Van Hulst v. The Netherlands* (CCPR/C/82/D/903/1999), para. 7.6.

⁹⁹ *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.7.

¹⁰⁰ *Escher v Brazil*, IACHR Series C No 200, 6 July 2009, paras. 130-132.

Article 10 of Law 9,296 and thus arbitrary. The Committee therefore considers that the mentioned interceptions and disclosures were unlawful and arbitrary, and declares them in violation of article 17 of the Covenant.

c. Article 14 (1) – Absence of an impartial tribunal

8.9 With regards to the author’s allegations under article 14 (1), the Committee recalls its longstanding jurisprudence according to which the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.¹⁰¹ The Committee also recalls that said right is a safeguard which applies equally to supervisory judges at the preliminary stages of proceedings.¹⁰² The Committee further recalls that the requirement of impartiality has a subjective and an objective element.¹⁰³ According to the first one, judges must not allow their judgement 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.¹⁰⁴ According to the second one, the tribunal must also appear to a reasonable observer to be impartial.¹⁰⁵ That is, judges must not only be impartial, they must also be seen to be impartial, and there are ascertainable objective facts which may raise doubts as to their impartiality.¹⁰⁶ The Committee recalls that the impartiality of a judge must be presumed until there is evidence to the contrary,¹⁰⁷ and that partiality may be evidenced by various Article 14 irregularities in the actions of the intervening judge.¹⁰⁸

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 (para. 4.4 *supra*). The Committee observes that, out of the seven facts found by the Supreme Federal Court, the first six occurred before the elections; that five of those facts (i, ii, iii, iv and vi) constituted *prima facie* Article 14 irregularities; and that the first three occurred prior to the author filing his communication before the Committee. The Committee considers that, to a reasonable observer¹⁰⁹, 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 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 debarred from running for president, 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 in Article 14 (1).

d. Article 14 (2) – Presumption of innocence

8.11 With regards to the author’s allegations under article 14 (2), the Committee recalls its jurisprudence as reflected in its general comment no. 32, 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 proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle”¹¹⁰. The same general comment, as well as the Committee’s jurisprudence,¹¹¹ explains that “[i]t is a duty for all public authorities to refrain from

¹⁰¹ General comment 32, para. 19; and *González del Río v. Peru* (CCPR/C/46/D/263/1987), para. 5.2.

¹⁰² *Brewer Carías v. Venezuela*, para. 9.2.

¹⁰³ *Jenny v. Austria* (CCPR/C/93/D/1437/2005), para. 9.3.

¹⁰⁴ General comment 32, para. 21.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Lagunas Castedo v. Spain* (CCPR/C/94/D/1122/2002), para. 9.7.

¹⁰⁷ *Jenny v. Austria*, para. 9.4.

¹⁰⁸ See, for example, *Khostikoev v. Tajikistan* (CCPR/C/97/D/1519/2006), paras. 7.2-7.3; *Saidov v. Tajikistan* (CCPR/C/81/D/964/2001), para. 6.7.

¹⁰⁹ General comment no. 32, para. 21.

¹¹⁰ General comment no. 32, para. 30.

¹¹¹ 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),

prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused,” and that “[t]he media should avoid news coverage undermining the presumption of innocence.”¹¹²

8.12 In this sense, 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 (paras. 3.10-3.11 Initial.Proceedings). The Committee also takes note of the authors argument that the Federal Prosecutors have continuously made public statements asserting his guilt (para. 3.12 Initial.Proceedings). On the other hand, the Committee takes note of the State party’s argument that informing the public of corruption charges against the author in a technical manner is comprised in the right to information and in accordance with the principle of transparency (para. 4.23 Initial.Proceedings). The Committee also takes note of the State party’s argument that the regular conduct of the prosecutors in the exercise of their functions was highlighted in different occasions by Judge Moro, by other first and second instance judges, and by administrative prosecutorial authorities (paras. 4.24-4.25 Initial.Proceedings). The Committee finally takes note of the State party’s argument that independence in the office, freedom of speech and the general right to information have been balanced in the domestic legal framework, and carried out with the necessary social accountability and constraints posed by equality, impartiality and high ethical standards on judges and public prosecutors (para. 3.5 *supra*).

8.13 The Committee considers that the State party has a legitimate interest in combating acts of corruption as well as in keeping its population informed about matters of public interest related to these acts.¹¹³ 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 the cabinet in 2016 to his running once again for the highest office in 2018). However, the Committee first notes that the Supreme Federal Court has ruled that Judge Moro’s actions created a presumption of guilt and a general expectation that he would and should be found guilty (para. 4.4 *supra*). Among these 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 presumption of innocence” (Ibid.), and the “manipulatively selective” (Ibid.) disclosure of intercepted calls to the public, all actions which occurred even long before the author’s trial. The Committee considers that these actions and their result amounted to a violation 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 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. This, together with the principles of transparency and 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.¹¹⁴ In the author’s case, while the State party has contested the author’s allegations and characterized the prosecutors’ public statements as “technical explanations” (para. 4.23 Initial.Proceedings), in light of the evidence on the record (see, for example, fns. 6 and 37 Initial.Proceedings), 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 right under article 14 (2) of the Covenant.

para. 6.5; *Kovaleva et al. v. Belarus* (CCPR/C/106/D/2120/2011), para. 11.4; *Kozulin v. Belarus* (CCPR/C/112/D/1773/2008), para. 9.8;

¹¹² General comment no. 32, para. 30.

¹¹³ *Arias Leiva v. Colombia*, para. 11.7.

¹¹⁴ See, for example, *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), para. 8.3.

e. Article 25 (b) – Right to vote and right to be elected

8.15 With regards to the author's allegations under article 25 of the Covenant, the Committee recalls that the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service. Whatever form of constitution or government is in force, the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.¹¹⁵ The Committee also recalls that if conviction for an offence is a basis for suspending the right to vote or to stand for office, such restriction must be proportionate to the offence and the sentence.¹¹⁶ The Committee further recalls that when this 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.¹¹⁷ The Committee further recalls that States parties pursue a legitimate aim in combating acts of corruption and protecting the treasury, and therefore the public interest, for the purpose of preserving the democratic order.¹¹⁸ Thus, a State party may have a legitimate interest in restricting the access of persons convicted of crimes of corruption to public office.¹¹⁹

8.16 The Committee takes note of the author's argument that he was deprived of his right to run in the presidential elections and to vote on the basis of a law incompatible with the right to be presumed innocent (the Clean Slate Law) and as a result of criminal proceedings in which due process was not observed (para. 3.13 Initial.Proceedings). The Committee 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 (para. 5.3 *supra*), on the basis of objective and reasonable criteria established by a law with ample democratic legitimacy (paras. 4.26-4.28 Initial.Proceedings). The Committee also 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 (para. 4.29 Initial.Proceedings).

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 run for elections 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 to the right to vote in the State Party's Electoral Code and subsequent regulations with article 25 (b) of the Covenant, as well as their individual application to the author's case.

9. 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 (1), 14 (1) and (2), 17, and article 25 (b). 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 that full reparation be made 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

¹¹⁵ See general comment No. 25, paras. 3 and 4.

¹¹⁶ *Ibid.*, para. 14, and *Dissanayake v. Sri Lanka* (CCPR/C/93/D/1373/2005), para. 8.5.

¹¹⁷ *Scarano Spisso v. Venezuela* (CCPR/C/119/D/2481/2014), para. 7.12; and *Nasheed v. Maldives* (CCPR/C/122/D/2270/2013 and 2851/2016), para. 8.6.

¹¹⁸ *Arias Leiva v. Colombia*, para. 11.7.

¹¹⁹ *Ibid.*

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, have them translated into the official language of the State party and to disseminate them widely.

Annex I

[English only]

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) and the jurisprudence of this Committee.

2. Judges must not allow their judgement 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 therein 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 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) "...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 post the election was inconsistent with the required impartiality, and led to irreparable harm. Mr. Lula da Silva was effectively impaired from participating in the political process, thus 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 validated by the State which appointed him as Minister of Justice.

6. Judge Moro was biased, and his subsequent conduct and acceptance of the ministerial position points to this observation. His judgement 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 exhausted the appeals from the flawed judgement, it would be too late for him to engage in the elections.

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

Annex II

[English only]

Joint opinion by Committee members José Santos Pais and Kobayuh 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 not have been admitted. Were the complaint to be admitted, only article 14(2) of the Covenant was violated.

2. The author, former President of Brazil, was investigated in the context of two criminal cases (Triplex and Atibaia), related to Operation Car Wash opened within the federal jurisdiction of the state of Paraná, where Sérgio Moro was the acting first instance judge. Operation Car Wash uncovered a major corruption scheme involving Petrobrás, major construction companies and various parties for secret campaign funds (paras. 2.1, 2.2 Initial.Proceedings)¹²⁰

3. The author began to be investigated in February 2016 (para. 2.3 Initial.Proceedings). Having submitted his complaint in July 2016, it is clear 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, he continued to use all available remedies for his defence. These were never exhausted (paras. 4.1-4.3 Initial.Proceedings) and proved to be effective since the 2021 judgements by Supreme Federal Court accepted and addressed author's arguments (paras. 4.3, 4.4 Initial.Proceedings). We fail to accept the justification to admit the complaint (paras. 7.4-7.5 Final.Proceedings), particularly since the case law cited (fn. 20 Final.Proceedings) hardly matches the facts in the present case. Moreover, such justification will allow any defendant 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 6 hours. However, he himself recognizes the airport became the scene for demonstrations and counter-demonstrations (para. 2.4 Initial.Proceedings). This seems to confirm the reasonableness of Judge Moro's use of several articles of the Criminal Procedure Code (CPC) on which he based the bench warrant (fn. 55 Initial.Proceedings), allowing the judge to have the defendant come to his presence even if not willing to. 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 the investigative act would generate great risk of protests and conflict. Protests indeed took place in the surroundings of the courthouse (para. 4.6 Initial.Proceedings). An intercepted call showed the author had knowledge of 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 the order was only to be used in case author refused to accompany the police (paras. 4.7-4.8 Initial.Proceedings).

The measure was further in compliance with the Brazilian CPC and the judicial authority's general power to grant precautionary measures and at the time considered constitutional by the Supreme Federal Court (para. 4.5 Initial.Proceedings). We fail therefore 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, State 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 interceptions, requested by the

¹²⁰ Operation Car Wash involved 175 detentions and 120 convictions. As regards Judge Moro's decisions, sanctions were upheld or increased on appeal in 71% of the cases.

Federal Prosecution, were substantiated and in line with domestic law (para. 4.10 Initial.Proceedings). Subsequent judicial decisions even extended and expanded the interception measure.

The lifting of the confidentiality of the call with then President Dilma Rousseff was motivated and carried out to defend the public interest, since it related to the appointment of the author –at the time under criminal investigation– as Chief of Staff. The tapping took place 2h20m after Judge Moro had ordered an end to the telephone tapping (para. 2.5 Initial.Proceedings). However, such delay is understandable, since the notice was conveyed to the Federal Prosecutor’s Office 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 President’s Office (para. 3.4 Initial.Proceedings). Finally, Supreme Federal Court later overturned Judge Moro’s decision and invalidated the tapping of the communication (para. 4.11 Initial.Proceedings).

6. The 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 the number belonged to third parties, the Federal Regional Court decided that the evidence was not to be used and recorded audios were destroyed, as the author himself acknowledges (para. 2.7 Final.Proceedings). There are no records of tapped conversations of lawyers other than Mr. Teixeira, nor conversations with content related to the right of defence (para. 4.12 Initial.Proceedings). Teixeira’s phone was intercepted because he was being investigated for money laundering crimes and was not listed as the author’s defence attorney (para. 4.13 Initial.Proceedings). We fail therefore to see a violation of article 17 of the Covenant.

7. The majority considered, following Supreme Federal Court, that Judge Moro was subjectively partial and the objective element of impartiality was not met (para 8.10 Final.Proceedings). However, most of Judge Moro’s decisions in Operation Car Wash (95.2%) were upheld on appeal by superior courts in successive judgements (paras 2.9-2.13 Initial.Proceedings). 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 (para. 2.11 Initial.Proceedings). In another judgement, of February 2019 (Atibaia case), the author was sentenced to 12 years and 11 months’ imprisonment (fn. 10 Final.Proceedings). Successive judicial decisions confirmed therefore the author’s convictions. The Supreme Federal Court stated further, in April 2018, that there was no bar to the author’s imprisonment, despite the fact that his appeal was still pending (para. 2.12 Initial.Proceedings). So an arrest warrant was issued and the author taken into custody to serve his sentence. A writ of habeas corpus was later dismissed by the Federal Regional Court (para. 2.14 Initial.Proceedings), thereby confirming the lawfulness of the author’s imprisonment.

In November 2019, however, Supreme Federal Court changed its case law and considered that under Article 283 of the CPC, defendants cannot be imprisoned until their conviction is final. In consequence, the author was freed the next day, on 8 November (para. 4.2 Final.Proceedings). Notwithstanding, the author was lawfully imprisoned, in April 2018, as per the applicable law and case law at the time.

8. The 2021 decisions by the Supreme Federal Court addressed two writs of habeas corpus. The first decision (8 March) considered the convictions of the author were rendered without jurisdiction and therefore vacated (para. 4.3 Final.Proceedings). The second decision (23 March) declared Judge Moro was biased. Instead of just analysing the question of illegal detention, both decisions went far beyond their scope. The second decision is particularly illustrative of what can be seen as a political settling of accounts, referring namely that Judge Moro became Minister of Justice a year and a half after the author’s first conviction, therefore concluding he directly benefitted from such conviction and imprisonment (para. 4.4 Final.Proceedings). This decision failed, however, to also mention that Judge Moro resigned from government, in April 2020, when the director general of the Federal Police was removed from office by President Bolsonaro, in an attempt to hamper criminal investigations concerning family members of the President himself.

9. The Committee has time and again referred that judges should be exempted from unduly influence by the President, legislature or executive. However, the Justices of the State Party's Supreme Federal Court are all appointed by the President (4 were appointed by President Rousseff, 3 by President Lula and 2 by President Bolsonaro), which may explain the voting of the Justices in the 2021 decisions.

We would therefore have not concluded for a violation of article 14(1) of the Covenant, accepting the State party's arguments in this regard (paras 4.14-4.18 Initial.Proceedings) and we fear the chilling effect the present decision will have on 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 to run for elections in 2018 since he is now candidate for the upcoming presidential elections (2022). The Supreme Electoral Tribunal rejected, in September 2018, the author's candidacy to 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 (para. 4.27 Initial.Proceedings). According to article 1(e) (1), citizens shall be ineligible to hold any public office for eight years if they have been convicted of crimes like 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, Supreme Federal Court ruled that this law was in compliance with the Constitution.

11. In our view, preventing the author to run as presidential candidate was legal, objective and reasonable (para. 4.29 Initial.Proceedings). The author had been convicted in July 2017 for corruption and money laundering, confirmed on appeal in January 2018. To allow him to be a candidate in such circumstances would be incomprehensible to any reasonable observer.

12. Therefore, we consider there were compelling and justifiable reasons to prevent the author to run for presidential elections in 2018 and would not have found a violation of article 25 of the Covenant.
