



International Covenant on Civil and Political Rights

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Communication No. 2085/2011

Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Emilio Enrique García Bolívar (represented by counsel, Luis Rondón and Omar García Valentiner)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Bolivarian Republic of Venezuela
<i>Date of communication:</i>	18 March 2011 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 March 2012
<i>Date of adoption of Views:</i>	16 October 2014
<i>Subject matter:</i>	Conduct of judicial proceedings in an employment case
<i>Procedural issues:</i>	Exhaustion of domestic remedies, substantiation of the claim, inadmissibility <i>ratione materiae</i> , incompatibility with the provisions of the Covenant
<i>Substantive issues:</i>	Right to a fair and public hearing within a reasonable period of time
<i>Articles of the Covenant:</i>	Articles 2, paragraph 3; 14, paragraphs 1 and 3; 15; and 26
<i>Articles of the Optional Protocol:</i>	Article 5, paragraph 2 (a) and (b)

* Reissued for technical reasons on 3 December 2014.

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)

concerning

Communication No. 2085/2011*

Submitted by: Emilio Enrique García Bolívar (represented by counsel, Luis Rondón and Omar García Valentiner)

Alleged victim: The author

State party: Bolivarian Republic of Venezuela

Date of communication: 18 March 2011 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 October 2014,

Having concluded its consideration of communication No. 2085/2011, submitted to the Human Rights Committee by Emilio Enrique García Bolívar under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Emilio Enrique García Bolívar, a Venezuelan national born on 21 July 1975. He claims to be the victim of a violation by the Bolivarian Republic of Venezuela of his rights under article 2, paragraph 3; article 14, paragraphs 1 and 3; article 15; and article 26 of the Covenant.

The facts as submitted by the author

2.1 On 21 July 1997, the author started work in a law firm (hereinafter “the firm”). One of the firm’s partners was the daughter of a high-ranking official of the Bolivarian Republic

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Gerald Neuman, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

of Venezuela.¹ On 27 September 2000, the author tendered his resignation; his legal relationship with the firm ended on 27 October 2000.

2.2 On 13 November 2000, in view of the firm's failure to pay the social benefits owed to him, the author filed a claim against it for the payment of social benefits and compensation in the amount of 97,601,125 bolívares² for actual and moral damages. On 21 November 2000, the eighth labour court of first instance of the judicial district of the Caracas Metropolitan Area admitted the application and ordered the defendant to answer the complaint.

2.3 On 20 November 2000, the National Assembly appointed three judges to the Social Appeals Chamber, one of whom was the father of a person who later became the firm's legal counsel.

2.4 On 22 November 2000, the firm named an attorney, who was the daughter of the Vice-President of the Social Appeals Chamber of the Supreme Court, to act as its legal representative.³

2.5 On 12 December 2000, the labour court of first instance refused to admit some of the evidence submitted by the author. On 14 December 2000, the author appealed the decision.

2.6 In January, February and March 2001, the ninth labour court of first instance postponed evidentiary hearings on three occasions on the grounds that some evidence had yet to be presented. Between January and February 2001, the author twice recused the judge of the eighth labour court of first instance on the basis of violations of due process and of the right to defence, as well as on the basis of unjustified errors and omissions and significant failures to comply with procedural rules.

2.7 In April 2001, on two occasions the author alerted the court to the postponement of the evidentiary hearings and the failure to rule on the appeal filed in December 2000. On 16 May 2001, the firm's lawyer presented its evidence. On the same day, the author objected to the validity of the hearing on the ground that his right to a defence had been violated as a result of the court's failure to rule on his appeal. On 1 June 2001, the fifth labour court set a date for judgement, but on 8 June 2001 the author instituted proceedings alleging a denial of justice and a breach of his right to a defence because of the failure to rule on his appeal of December 2000.

2.8 On 17 January 2002, the judge of the eighth court of first instance recused himself from the case due to his enmity with the author, pursuant to article 82, paragraph 18, of the Code of Civil Procedure.⁴ On 20 February 2002, the fourth court took over the case and set a time limit of 60 days for rendering a decision. On 21 May 2002, the fourth court judge extended that time limit for a further period of 30 days.

2.9 On 10 June 2003, the President of the Bolivarian Republic of Venezuela appointed the father of a director of the firm as the director of a State agency.⁵

¹ The daughter of the Director of the National Institute of Statistics.

² Equivalent to US\$ 140,543.37 at the exchange rate at the time that the claim was filed.

³ According to the information provided, the judge recused himself from the case on 14 July 2004.

⁴ Article 82 of the Code of Civil Procedure of the Bolivarian Republic of Venezuela states: "Judicial officers, whether ordinary, temporary or special, may be recused for one of the following reasons: ... 18. Due to enmity between the recused and any of the litigants, manifested by facts which, properly evaluated, cast into doubt the impartiality of the recused."

⁵ The author attached a copy of the official gazette (*Gaceta Oficial*) in which the appointment of the senior official was announced and the minutes of a meeting of the partners of the firm in which the name of the official's daughter appears.

2.10 On 13 August 2003, a new procedural labour law whose purpose was to reorganize the judicial system entered into force; this law provided for the establishment of a transitional procedural regime. As a result, on 15 March 2004, the third court of first instance of the transitional procedural regime took over the case. Under article 197, paragraph 4, of the Procedural Labour Act, which dealt with the transitional regime,⁶ the court had 30 days to rule on the merits of the case.

2.11 On 16 June 2004, the author petitioned the Social Appeals Chamber of the Supreme Court to take over the case concerning the payment of social benefits and compensation for actual and moral damages. The author contended that there had been procedural irregularities at first instance and a failure to ensure the procedural equality of the parties, which constituted an obstacle to effective judicial protection. The author claimed violations of his right of petition, his right to due process and his right to immediately claim social benefits, rights that are enshrined in articles 49, 51 and 92 of the Constitution of the Bolivarian Republic of Venezuela.⁷

2.12 On 22 June 2004, the third court of first instance noted that the earlier courts had not ruled on the author's appeal against the ruling of 12 December 2000. However, the Court upheld the author's claim in part and ordered the firm to pay 4,071,852.50 bolívares.⁸ The author appealed the decision on 28 June 2004.

2.13 On 29 June 2004, the President of the Social Appeals Chamber of the Supreme Court and another judge, who was the father of the lawyer who had represented the firm until 14 July 2004, recused themselves from hearing the case pursuant to article 82, paragraph 12, of the Code of Civil Procedure, which provides for the recusal of judiciary officials "on the ground of shared interests or close friendship with one of the litigants". The Supreme Court upheld their recusals on 12 and 14 July 2004, respectively, and proceeded to call up substitute or associate judges. In accordance with article 8 of the Supreme Court Act, notice of the appointment of two judges to the Chamber was published in the official gazette on 14 December 2004. The judges took up their duties on 17 January 2005.

2.14 An interim social appeals chamber⁹ was constituted on 1 July 2005. On 10 November 2005, the Chamber ruled on the author's request for cognizance. It decided that the conditions had been met for it to move forward with proceedings to determine whether there had been procedural irregularities that constituted an obstacle to effective judicial protection. In the event of such a finding, the Court would — if the Chamber deemed it appropriate — assume jurisdiction for the case concerning the author's claim regarding the payment of social benefits and compensation for actual and moral damages.

2.15 On 15 May 2007, the interim Social Appeals Chamber of the Supreme Court assumed jurisdiction over the case. The Court found that procedural irregularities had

⁶ Procedural Labour Act, chapter II: Transitional Procedural Regime, Cases at First Instance, article 197: "In proceedings at first instance initiated under the Act on the Organization of Courts and Labour Procedure, repealed by this Act, the following rules shall apply: ... 4. Where a case is ready for judgement, a decision shall be rendered within thirty (30) days of the entry into force of this Act."

⁷ Constitution of the Bolivarian Republic of Venezuela, 24 March 2000: article 49: "All judicial and administrative proceedings shall be subject to due process"; article 51: "Everyone shall have the right to petition or make representations before any authority or public official concerning matters within their competence and to obtain a timely and adequate response. Whoever violates this right shall be punished in accordance with the law, including the possibility of dismissal from office"; article 92: "All workers are entitled to social benefits to compensate them for length of service and to protect them in the event of dismissal. Salary and social benefits are to be paid immediately upon accrual."

⁸ Approximately US\$ 5,000 at the exchange rate at the time of the communication's submission.

⁹ Supreme Court Act, 2010, article 59: "Upon the granting of the recusal petition, the corresponding interim appeals chamber shall be constituted with the duly designated substitutes."

delayed a decision on the merits, which justified the Supreme Court's assumption of jurisdiction to grant judicial relief in order to prevent further injury. In accordance with article 163 of the Procedural Labour Act,¹⁰ the Appeals Chamber of the Supreme Court of Justice should have fixed the date of the oral hearing within 20 days of assuming jurisdiction. However, it failed to fix a date for the hearing.

2.16 On 17 October 2007, the firm filed an application for review of the jurisdiction decision, claiming that the decision violated the right to a second hearing. On 13 August 2008, the Constitutional Chamber dismissed the application, finding the jurisdiction decision to be in accordance with constitutional principles.

2.17 Between 19 October 2007 and 17 March 2009, three judges and one associate judge recused themselves in succession.¹¹ They were replaced by one substitute judge and three associate judges. However, on 29 July 2010, the new Supreme Court Act, which made no provision for associate judges, entered into force. As a result, only substitute judges appointed by the National Assembly could constitute a chamber. The National Assembly appointed substitute judges to the Social Appeals Chamber of the Supreme Court on 7 December 2010.

2.18 On 17 January 2011, under the Supreme Labour Court Act of 2010, the Social Appeals Chamber sent the file to the Court in plenary so that arrangements could be made for the constitution of an interim chamber following the recusal of all the Social Appeals Chamber's judges. That decision was taken by the President of the Appeals Chamber, who had recused himself from the case in June 2004.¹²

2.19 On 21 January 2011, in the absence of a ruling by the Social Appeals Chamber of the Supreme Court on his claim against the firm, the author filed an application for constitutional protection (*amparo*). On 26 July 2011, the application was declared inadmissible on the ground that, under article 6, paragraph 6, of the Protection of Constitutional Rights and Guarantees Act, applications for *amparo* relating to Supreme Court decisions are not admissible. Moreover, in accordance with its decision in an earlier case, the Chamber recalled that the provision in question was to be understood and interpreted as meaning that "by analogy, no appeal shall be admitted or heard in respect of omissions by the Supreme Court or of a failure by it to adjudicate a matter". The Constitutional Chamber added that the only means of ensuring the constitutionality of Supreme Court decisions was to request a review. On 27 July 2007, the author wrote to the President and other judges of the Constitutional Chamber of the Supreme Court asking that the decision be clarified and expanded upon. According to the author, article 6 of the Protection of Constitutional Rights and Guarantees Act was not applicable, since the *amparo* application did not relate to a decision by the Supreme Court but to the absence of a decision, which might constitute a violation of due process.

The complaint

3.1 The author claims a violation of his right to a fair and public hearing within a reasonable period of time under article 14, paragraphs 1 and 3, of the Covenant. The author considers himself to be a victim of a denial of justice by the Social Appeals Chamber of the Supreme Court owing to its failure to adjudicate an employment case over which it assumed jurisdiction in May 2007 and by the Constitutional Chamber because it has refrained from ruling on the *amparo* application filed in respect of the Court's failure to

¹⁰ Chapter V, Procedure at Second Instance, article 163: "On the fifth (5th) working day following receipt of the file, the competent upper labour court shall, by express order, fix the date and time of the oral hearing within a period not exceeding fifteen (15) working days from the date of said order."

¹¹ The author provides no information regarding the grounds for recusal.

¹² The communication provides no further information on this point.

adjudicate. The author claims that the extraordinary delay in handing down a decision in the case is aggravated by the fact that the legal action in question does not deal with a particularly unusual or complex matter. The author further claims that the case's referral to the Supreme Court in plenary constitutes a violation of article 14, since a chamber of associate judges had been established to rule on the case.

3.2 The author claims that the delays in the proceedings in his case are due to the lack of independence of the judiciary, the influence exerted by the recused Social Appeals Chamber judges whose family members represented the firm and the influence wielded by public officials with ties to the firm. The author claims that the director of the firm is the daughter of a high-ranking government official and that the firm is represented in the proceedings by the daughter of a Supreme Court judge. The author considers that it is impossible to receive a fair hearing by a court in the State party when the matter being considered affects the interests of persons connected to the Government. The author claims that the facts relating to his case demonstrate a violation by the State party of the principles delineated by the Special Rapporteur on the independence of judges and lawyers.¹³

3.3 The author also alleges a violation of the principle of non-retroactivity of the law, enshrined in article 15 of the Covenant, as a result of the retroactive application to his case of the 2010 Supreme Court Act. The author considers that the abolition of the post of associate judge under the Act has forestalled a decision in his case and further prolonged the proceedings.

3.4 In addition, the author considers that he has been discriminated against, in violation of article 26 of the Covenant, because other litigants have received a fair hearing within a reasonable period of time. The author claims that, following the entry into force of the 2010 Supreme Court Act, the Social Appeals Chamber of the Supreme Court has handed down decisions in various cases similar to his, with the chambers involved consisting of associate judges. However, in his case, the proceedings have stalled and been referred to the Supreme Court in plenary, which is not competent to hear the dispute. With regard to the delay in ruling on his application for *amparo*, the author claims that the Supreme Court has admitted *amparo* applications relating to cases brought after his claim, as indicated by their date and numbering.

3.5 The author claims that the violations of which he is a victim have led to a violation of his right to social security, since the State party has not allowed him to gain access to the social benefits owed to him by his former employer.

3.6 The author also considers that his right to an effective remedy under article 2, paragraph 3, of the Covenant has been violated, and he requests the Committee to invite the State party to ensure that a decision is taken on the merits of the case by the Social Appeals Chamber, in accordance with the ruling of 15 May 2007. Should the Social Appeals Chamber not decide on the merits, the author requests that he be awarded reasonable compensation for the damages arising from the denial of justice.

3.7 With regard to the exhaustion of domestic remedies, the author claims that there is no ordinary remedy available nor any higher ordinary court to which an application may be made in order to compel the State party to fulfil its responsibility to administer justice. Furthermore, the Labour Act does not establish a standard procedure for situations in which the Social Appeals Chamber refrains from hearing a case over which it has assumed jurisdiction.

¹³ The author refers to the reports of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/2004/60, para. 35, and A/HRC/8/4, para. 17).

State party's observations on admissibility and on the merits

4.1 On 21 August 2012, the State party submitted its observations on admissibility and on the merits. The State party reported that no final decision had been taken in respect of the claim for payment of social benefits and compensation and that it was waiting for a new hearing to be scheduled in accordance with the decision of 15 May 2007 of the Social Appeals Chamber of the Supreme Court. The State party added that the labour law in force at the time of the author's resignation was later repealed and that this is the cause of the many procedural incidents that have occurred in the course of the proceedings. The State party considers that the resulting time limits and delays cannot be attributed to the judicial branch.

4.2 The State party stresses that the author has not lodged a petition with the Inter-American Commission on Human Rights, which is the regional body with jurisdiction to hear the author's claims. The State party also recalls that the international protection of human rights is supplementary to the protection provided under the national laws of States.

Author's comments on the State party's submission

5.1 On 6 February 2013, the author transmitted a copy of the Supreme Court's order of 22 January 2013. The Court recalls that the interim Social Appeals Chamber, which was constituted on 14 January 2013, decided to move the date of the appeals hearing that had originally been scheduled for 30 January to a date 30 days after that.

5.2 On 18 February 2014, the author reported that the appeal filed on 14 December 2000 had been heard by the Social Appeals Chamber on 27 May 2013. The parties agreed to a proposal by the President to initiate conciliation proceedings. After the time limit for reaching a settlement between the parties expired, the Supreme Court handed down an oral decision on 17 June 2013 in which it found that, by failing to rule on the appeal, the lower court had violated the author's right to defence and due process. Accordingly, the Supreme Court declared all the proceedings subsequent to the filing of the appeal by the author in December 2000 to be null and void and referred the case to the Social Appeals Chamber for a ruling on whether to admit the appeal.

5.3 On 19 September 2014, the author transmitted a copy of the decision issued by the Constitutional Chamber of the Supreme Court on 10 July 2013 declaring inadmissible his request of 27 July 2007 for a clarification of the decision regarding the inadmissibility of his application for *amparo*.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes the submissions by the author and the State party to the effect that the matter has not been referred to the Inter-American Commission on Human Rights or to another procedure of international investigation or settlement. Consequently, the Committee finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee takes note of the author's claims regarding a violation of article 2, paragraph 3, of the Covenant and recalls that its jurisprudence in this connection indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication submitted under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.¹⁴

6.4 The Committee recalls that article 14, paragraph 3, and article 15 provide for procedural guarantees for persons charged with a criminal offence.¹⁵ In the present case, the proceedings under consideration concern an employment case, and the author's resignation did not result in the author being charged with a "criminal offence" or being held "guilty of any criminal offence" within the meaning of article 15 of the Covenant. Accordingly, the author's claims under articles 14, paragraph 3, and 15 of the Covenant are incompatible *ratione materiae* with the provisions of the Covenant and are inadmissible under article 3 of the Optional Protocol.

6.5 In relation to the claims of a violation of article 26 of the Covenant, the Committee notes that the material before it does not show that the author has raised the question of discrimination in national court proceedings prior to invoking them in the present communication. Therefore, it declares this part of the communication inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol, on the ground of non-exhaustion of domestic remedies.

6.6 The Committee notes that the author's claim that the State party has violated his right to social security does not fall within the scope of the Covenant. Consequently, this claim is inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the claimed violations of article 14, paragraph 1, the Committee notes that the material before it does not show that the author has raised the issue of the impartiality of the national courts prior to raising it in the present communication. In addition, the author's claims in this respect have not been sufficiently substantiated for the Committee. Therefore, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.8 However, the Committee considers that, for purposes of determining admissibility, the author has sufficiently substantiated his claim under article 14, paragraph 1, regarding the right to a fair and public hearing within a reasonable period of time. The Committee therefore considers this claim admissible and proceeds to consider it on the merits.

Consideration of the merits

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

7.2 With regard to the author's contentions in respect of article 14, paragraph 1, of the Covenant that the time that has elapsed without a decision being handed down on his claim for the payment of social benefits and compensation for actual and moral damages has exceeded a reasonable period of time and resulted in a denial of justice, the Committee takes note of the State party's arguments that the delay in the proceedings cannot be

¹⁴ See, for example, communication No. 1887/2009, *Peirano Basso v. Uruguay*, Views of 19 October 2010, para. 9.4, and communication No. 802/1998, *Rogerson v. Australia*, Views of 3 April 2002, para. 7.9.

¹⁵ See general comment No. 32 (2007) of the Committee on the right to equality before courts and tribunals and to a fair trial (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (vol. I)), para. 3*).

attributed to it and that there have been many procedural incidents related to the litigation between the parties. The Committee recalls that the author's claim for the payment of social benefits and compensation for actual and moral damages was originally admitted by the court of first instance on 21 November 2000 and that, on 15 May 2007, the Social Appeals Court of the Supreme Court assumed jurisdiction for hearing and ruling on the case. However, no date was set for the hearing, and it was not until 14 January 2013 — five years and eight months after the Supreme Court's decision to assume jurisdiction — that an interim chamber was formed. Furthermore, the Supreme Court finally reached a decision regarding the author's appeal on 17 June 2013, i.e., 12 years and 4 months later, and referred the case to the corresponding chamber of the Social Appeals Court. Consequently, at the date of this decision, no ruling has yet been made on the appeal against the dismissal of evidence by the court of first instance or on the author's original claim for the payment of social benefits and for compensation for actual and moral damages, which had been admitted over 13 years ago. In the circumstances of this case, the Committee considers that the delays in the proceedings cannot be attributed to the conduct of the author or to the complexity of the case,¹⁶ but instead mainly to the conduct of the authorities, including judicial authorities, of the State party.

7.3 The Committee recalls that an important aspect of the fairness of a hearing is its expeditiousness and that delays in proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the principle of a fair trial enshrined in paragraph 1 of this provision.¹⁷ The Committee therefore considers that the proceedings in the author's case were unduly delayed, in violation of article 14, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 14, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy by, inter alia: (a) ensuring that the proceedings afford all the judicial guarantees provided for in article 14, paragraph 1, of the Covenant, in particular with regard to the need to issue a ruling as soon as possible; and (b) providing the author with redress, particularly in the form of appropriate compensation. The State party is also under an obligation to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee the rights recognized in the Covenant to all individuals within its territory or subject to its jurisdiction and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive information from the State party, within 180 days, about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated.

¹⁶ Communication No. 1887/2009, *Juan Peirano Basso v. Uruguay*, 19 October 2010, para. 10.3.

¹⁷ See general comment No. 32 (2007), para. 27, of the Committee and communication No. 203/1986, *Munoz Hermoza v. Peru*, 4 November 1988, para. 11.3, and communication No. 514/1992, *Fei v. Colombia*, 4 April 1995, para. 8.4.