



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2414/2014\*, \*\*

<i>Communication submitted by:</i>	I.D.M. (represented by counsel, Ricardo Cifuentes Salamanca)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	14 May 2013
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 June 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2018
<i>Subject matter:</i>	Sentencing of former member of Congress by the highest judicial body because of parliamentary privilege
<i>Procedural issues:</i>	Abuse of the right of submission; insufficient substantiation of the complaint
<i>Substantive issues:</i>	Right to due process; right to a hearing by a competent, independent and impartial tribunal; right to be presumed innocent; right to have a conviction and sentence reviewed by a higher tribunal; equality before the law
<i>Articles of the Covenant:</i>	2, 3, 9 (1), (4) and (5), 14 (1)–(3) and (5), and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

1.1 The author of the communication is I.D.M., a Colombian citizen born on 14 October 1962. He claims that the State party has violated his rights under articles 2, 3, 9 (1), (4) and (5), 14 (1)–(3) and (5), and 26 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

\* Adopted by the Committee at its 123rd session (2–27 July 2018).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.



1.2 On 8 October 2014, the State party submitted its observations on admissibility and requested the Committee to consider the admissibility of the communication separately from the merits.

1.3 On 3 December 2014, the Committee, acting through its Special Rapporteur on new communications and interim measures, rejected the State party's request for the admissibility of the communication to be considered separately from the merits.

#### **The facts as submitted by the author**

2.1 The author was elected to represent the department of Santander in the House of Representatives of the Congress of the Republic for the period 2002–2006. On 19 March 2004, he was granted leave without pay for three months, starting from 1 April 2004. On 31 March 2004, Ms. Y.M.P. replaced him in the House of Representatives.

2.2 At a meeting on 3 June 2004, the First Committee of the House of Representatives submitted and called for a vote on a piece of draft legislation providing for the re-election of the President. Ms. Y.M.P. attended and voted at that meeting, in her capacity as a representative.

2.3 On 1 July 2004, the author returned to the House and resumed his duties until 19 July 2004, the end of the constitutional term. He was subsequently elected to the Senate for the period 2006–2010.

2.4 On 11 February 2008, the Council of State ordered that the author be removed from the office of senator as he was “barred from holding electoral office”.

2.5 At a time not specified in the communication, a member of Congress reported that on 1 June 2004, 18 of the 35 members of the First Committee of the House of Representatives, including Ms. Y.M.P., met and signed a document proposing to shelve the bill providing for the re-election of the President. However, that plan fell through because Ms. Y.M.P. and one other member of Congress changed their vote and their contribution to the debate after allegedly being offered inducements by the Government. This gave rise to criminal proceedings before the Supreme Court. According to the author, Ms. Y.M.P. testified before the Supreme Court that she had been promised money by the national Government in exchange for voting in favour of the presidential re-election bill and the author had threatened her to ensure she voted in favour of it. On the basis of Ms. Y.M.P.'s testimony, the Criminal Appellate Division of the Supreme Court (the “Criminal Division”) decided to open a criminal investigation into the author.<sup>1</sup>

2.6 On 20 May 2008, the Criminal Division issued the order to institute pretrial proceedings and ordered the author's interrogation and pretrial detention. The Criminal Division ruled, *inter alia*, that the parliamentary immunity enjoyed by the author as a former member of Congress was applicable in this case, as the acts attributed to him were related to the office he held at the time, and that, although he was on leave, he was still attached to the service and in office in accordance with rule 262 of the rules of procedure of Congress (Act No. 5 of 1992).

2.7 On 30 May 2008, the Criminal Division of the Supreme Court defined the author's legal status and found itself competent to try him. The author filed an application for reconsideration before the Supreme Court, claiming, *inter alia*, that under article 235 of the Constitution the Criminal Division was not the natural judge and thus was not competent to try him, since at the time of the events he was not performing the duties of a member of Congress and the acts in question were not related to congressional duties. On 16 June 2008, the Criminal Division rejected the author's application for reconsideration.

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<sup>1</sup> The author points out that, under articles 186 and 235 of the Constitution, members of Congress are tried by the Supreme Court. Article 186 states: “Offences committed by members of Congress shall be tried exclusively by the Supreme Court of Justice, which is the sole authority that may order their detention. In cases of flagrante delicto, members must be apprehended and promptly brought before the same body.” Article 235 states: “The functions of the Supreme Court are to: ... 3. Investigate and try members of Congress. ... When the aforementioned public officials cease to exercise their duties, immunity shall remain applicable only to punishable acts related to the functions they performed.”

2.8 Subsequently, the author filed a petition for *amparo* with the Civil Division of the Supreme Court regarding the decisions of the Criminal Division of 20 and 30 May, 16 June and 25 September 2008. The author challenged the competence of the Criminal Division to hear the case to determine his criminal responsibility. On 30 October 2008, the Civil Division rejected the author's petition for *amparo*.

2.9 On 12 March 2009, the Criminal Division ruled on a further appeal by the author, retaining jurisdiction over the case. The author claims that these decisions violated his right to a natural judge, equality before the courts, a fair trial and review of his conviction and sentence.

2.10 The author claims to have filed another petition for *amparo* with the Disciplinary Tribunal of the District Council of the Judiciary, which was declared inadmissible because criminal proceedings were in progress.

2.11 On 3 June 2009, the Criminal Division found the author guilty of extortion and sentenced him to 6 years' imprisonment, excluding alternatives to prison or house arrest, fined him 50 times the minimum monthly wage and barred him from standing for or holding public office for five years. The Criminal Division noted, *inter alia*, that the author's leave without pay at the time of the events was an administrative situation that did not alter his status as a member of Congress or separate him from office, since it was only a temporary suspension of functions during which he retained the status of public official. He therefore continued to hold the office of member of Congress and enjoy parliamentary immunity. It concluded that, in view of the offence of which he was accused, the natural judge to investigate and try him was the Criminal Division of the Supreme Court.

2.12 On 27 August 2009, the Disciplinary Tribunal of the High Council of the Judiciary overturned, on appeal, the decision of the Civil Division of the Supreme Court (see para. 2.8 above) and declared the author's petition for *amparo* to be admissible on the grounds that the Criminal Division had taken an arbitrary decision as a result of a procedural error in claiming to be competent both to investigate and to try the author. The High Council stated that a distinction should have been drawn between "office" and "functions"; that article 235 of the Constitution referred to immunity being applicable only to punishable acts related to the "functions performed" by the member of Congress; that at the time of the events in question the author was on leave without pay; and therefore that the exercise of jurisdiction by the Criminal Division was conditional upon the punishable conduct being related to the "functions performed" rather than to the "office" or status of a member of Congress.

2.13 On 18 December 2009, the Constitutional Court overturned the decision of the High Council of the Judiciary and concluded that the author's trial by the Supreme Court, acting as a court of sole instance, had not violated his right to due process "because the trial of senior officials by the highest body of ordinary jurisdiction provides full guarantees for the right to a defence and due process in line with the core international human rights instruments".

### **The complaint**

3.1 The author claims that the State party violated his rights under articles 2, 3, 9 (1), (4) and (5), 14 (1)–(3) and (5), and 26 of the Covenant.<sup>2</sup>

3.2 The author claims that his rights under articles 14 (1) and 26 of the Covenant were violated because he was not tried by the natural judge and with due respect for the right to equality before the courts. According to articles 186 and 235 of the Constitution, members of Congress enjoy parliamentary privilege and are tried by the Criminal Division of the Supreme Court. However, once the aforementioned officials have ceased to hold office, such privilege is retained only for punishable acts related to the functions performed as a member of Congress. Both the relevant legislation and the jurisprudence of the Supreme Court maintain that if a congressman was not in office and the events were unrelated to the functions performed by the person enjoying immunity, the natural judge is the judge under

<sup>2</sup> The communication does not substantiate the claims under articles 2 (1–2), 3, 9 and 14 (3), but merely makes reference to those articles.

ordinary law, not the Criminal Division of the Supreme Court.<sup>3</sup> Thus, if the Supreme Court had applied its own jurisprudence to the author's case, the investigation into his possible criminal responsibility should have been undertaken by the Attorney General's Office, because at the time of the events in question he was not performing the duties of a member of Congress, as he was on leave and was being replaced by Ms. Y.M.P. He was therefore not protected by parliamentary privilege. Furthermore, there was no link between the acts in question and the functions he had formerly exercised as a member of Congress. In light of this, the author considers that the Supreme Court changed its own jurisprudence for the specific purpose of trying him itself, avoiding his trial by the natural judge, i.e. the judge under ordinary law. He adds that the Criminal Division noted that "leave is one of those administrative situations in which public sector employees may find themselves, and involves a temporary separation from their usual work functions or, what amounts to the same thing, their temporary withdrawal from the office they occupy in a given State entity, without, however, a break in their employment contract with the company or public body concerned". According to the author, under this interpretation, it was obvious that the acts for which he was investigated bore no relation whatsoever to the functions performed as a member of Congress, since at the time of the events in question he was on leave and therefore performing none of those functions.

3.3 In criminal proceedings against members of Congress who enjoy parliamentary privilege, the Criminal Division of the Supreme Court investigates and itself tries the member; there is no functional separation between the body that investigates and the body that tries the case. It is therefore the same judges who conduct the investigation, determine the proceedings, call the trial, pass judgment and, where necessary, sentence the accused, in violation of the right to be heard by an impartial tribunal as established in article 14 (1) of the Covenant.

3.4 The author claims that the State party violated his right to be presumed innocent, as established in article 14 (2) of the Covenant, in that he was sentenced for allegedly threatening Ms. Y.M.P. in order to ensure that she supported the presidential re-election bill, even though there is not sufficient evidence to prove that this is actually what happened. In this regard, the author submits that it was demonstrated during the criminal proceedings — including by the statement of Ms. Y.M.P. herself and that of the witness C.G. — that he had never influenced or restricted Ms. Y.M.P. in the performance of her functions. The Public Prosecution Service itself, which had initially supported the accusation, noted that in light of the "evidentiary evolution" of the case, there was insufficient evidence for a conviction since there was no certainty regarding either the facts or the responsibility of the accused. When faced with the different accounts in the statements of Ms. Y.M.P. and Mr. C.G., the Criminal Division simply concluded that the witnesses had shown a desire to help the author by "harmonizing" their statements. In reaching this conclusion, the Criminal Division violated the principle of the presumption of innocence. What is more, it did not properly weigh the evidence and its assessment of the evidence was not sufficiently substantiated.

3.5 Bringing criminal proceedings against members of Congress also constitutes a violation of article 14 (5) of the Covenant, since the conviction and sentence handed down by the Criminal Division of the Supreme Court cannot be appealed to a higher tribunal. Although there is nothing to prevent the Supreme Court from establishing in its rules of procedure a mechanism for appealing a conviction and sentence, no such mechanism existed at the time when the communication was submitted to the Committee. Thus, in his case, the author had no possibility of appealing his conviction and sentence.

3.6 The author considers that, at the time of the events, the Supreme Court rejected any petition for *amparo* alleging that one of its own judgments or procedures violated human rights, and that this practice constitutes a violation of article 2 (3) of the Covenant.

3.7 The author maintains that the criminal proceedings brought against him in violation of his human rights, and the consequences thereof, caused him material and non-material

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<sup>3</sup> The author refers to the jurisprudence of the Supreme Court in cases Nos. 24162 of 10 August 2006, 24064 of 7 February 2008 and 27313 of 17 November 2008.

injury. He therefore requests, by way of reparation, that the Committee declare that his rights under the Covenant have been violated; that the State party publicize the Committee's decision in the same publications and media that treated him like a criminal following the judgment of the Criminal Division; that he be granted compensation for material and non-material injury, according to the claims presented in his communication in this regard; and that the State party take measures to avoid any repetition of the violations.

#### **State party's observations on admissibility**

4.1 In a note verbale dated 8 October 2014, the State party set forth its observations on the admissibility of the communication and requested the Committee to declare it inadmissible.

4.2 The State party provides a detailed account of the provisions of the Constitution, legislation and jurisprudence regarding parliamentary privilege and the investigation and trial procedures in criminal matters that fall within the remit of the Criminal Division of the Supreme Court. Articles 186, 234 and 235 of the Constitution establish that the Supreme Court is the natural judge in the investigation and trial of members of Congress in criminal matters.

4.3 The competences required for the trial of members of Congress are determined by a regulatory framework that guarantees the right to due process; the trial takes place before the highest judicial body in criminal matters, the Criminal Division of the Supreme Court. The State party refers to the jurisprudence of its Constitutional Court<sup>4</sup> and submits that the principle of a second hearing in criminal cases is not absolute, since it is not at the heart of the right to due process. Exceptions may be made to this principle provided that they are reasonable and proportional and respect the right to equality and substantive due process. One of the reasons for having parliamentary privilege for members of Congress is to guarantee the independence, autonomy and orderly functioning of the organs of State that are served by the State officials who enjoy such privilege, and to guarantee the independence and impartiality of the trial judge. Therefore, parliamentary privilege does not entail any personal benefit for those who enjoy it.

4.4 No requirement for a second hearing in criminal proceedings against senior officials enjoying parliamentary privilege can be inferred from the human rights treaties. States parties enjoy broad discretion to determine procedures and design effective mechanisms for the protection of rights without being required to establish a second hearing in criminal matters for senior officials enjoying parliamentary privilege. The trial of such officials by the highest body in criminal matters is in itself a full guarantee of due process. The State party maintains that it cannot be inferred from the wording of article 14 (5) of the Covenant that there must be specifically a "second instance", since the text refers to a "higher tribunal". The reference to a "higher tribunal" can be interpreted as meaning that the case must be heard by a court endowed with higher academic and professional qualities in order to ensure a correct evaluation of the issues before it. It should also be borne in mind that this is not about the trial of individuals but the trial of top-ranking officials, in this case parliamentarians.

4.5 In the light of the above, the Committee's Views in relation to such communications as No. 64/1979, *Salgar de Montejó v. Colombia*,<sup>5</sup> or No. 1211/2003, *Oliveró Capellades v. Spain*,<sup>6</sup> are irrelevant, since the authors did not have parliamentary status and the Committee did not have a chance to discuss the particularities of criminal proceedings against members of Congress.

4.6 In the author's case, on 20 May 2008 the Criminal Division of the Supreme Court ordered the opening of a formal investigation into him for the crime of extortion, under the above-cited articles of the Constitution and article 32 of the Code of Criminal Procedure (Act No. 906 of 2004). The author made use of the remedies available to challenge the

<sup>4</sup> Constitutional Court judgments C-650-2001 and C-254A of 2012.

<sup>5</sup> CCPR/C/15/D/64/1979.

<sup>6</sup> CCPR/C/87/D/1211/2003.

competence of the Criminal Division, but without success. He even filed a petition for *amparo* with the Disciplinary Tribunal of the High Council of the Judiciary, which was finally dismissed by the Constitutional Court on 18 December 2009, when it found that there had been no violation of the author's right to due process. The State party submits that, although the author was tried in sole instance on a criminal matter, his petition for *amparo* was examined and judged by other tribunals, such as the Disciplinary Tribunal of Cundinamarca District Council of the Judiciary, the High Council of the Judiciary and the Constitutional Court.

4.7 The State party submits that the author's claims about the effects of his leave without pay at the time of the events and the conclusions reached by the domestic courts are not relevant to the consideration of the communication. Moreover, the Committee is not competent to question the examination and evaluation carried out by the State party's courts in this regard. In any event, in accordance with article 261 of the Constitution and article 262 of Act No. 5 of 1992, on the rules of procedure of Congress, the jurisprudence of the Supreme Court holds that members of Congress on leave continue to be attached to the service and remain in office.<sup>7</sup> The State party adds that, according to the jurisprudence of the Supreme Court, for parliamentary privilege to be applicable, the accused must be a serving member of Congress or senator or the punishable conduct must be related to the functions performed. Article 235 of the Constitution, which regulates the powers of the Supreme Court, states that parliamentary privilege is applicable after the person has left office provided that the offence of which he or she is accused is related to the position that conferred such privilege. In the author's case, he held parliamentary office from 20 July 1998, when he first became a member of Congress, to 19 July 2006. The judicial authorities found it proven beyond doubt that the author was covered by parliamentary privilege on the date when the reported incidents occurred. He continued to be protected by such privilege as the conduct attributed to him was undeniably related to his functions as a member of Congress. The Supreme Court found that leave is purely an administrative situation that does not entail a break in the employment contract between the State and a public servant; the author therefore retained his status as a public servant.

4.8 The State party submits that the communication is inadmissible because the author is seeking to turn the Committee into an appeal court and a fourth level of jurisdiction to scrutinize the criminal proceedings in which the author was found guilty of extortion. The claims of a violation of the Covenant primarily reflect the author's disagreement with the judgments handed down by the domestic courts within the framework of due process. However, the Committee is not competent to reconsider the decisions of domestic courts and their assessment of the facts and evidence. The State party adds that the action of the courts was not arbitrary and that the author's claims were duly examined in the course of the judicial proceedings. The author had access to and made use of various procedural remedies, and the courts issued duly reasoned decisions.

4.9 The author's communication constitutes an abuse of the right to submit a communication. While the Optional Protocol does not establish a deadline for submitting a communication to the Committee, in its jurisprudence the Committee has deemed some communications to be inadmissible on the ground of abuse of the right of submission, owing to the amount of time that elapsed between the occurrence of the acts and the submission of the case to the Committee. In the present case, there was a lapse of more than three years between the last proceedings before the domestic courts and the submission of the communication to the Committee, with no convincing explanation by the author for this delay. The communication also constitutes an abuse of the right of submission because it provides false, distorted, incomplete and unclear information. For example, it refers to the Committee's jurisprudence as if it was applicable to the author's case, omitting to mention that the cases referred to were substantially different as they did not involve the trial of a parliamentarian. Somewhat inconsistently, the communication on the one hand complains about the absence of a natural judge and, on the other, questions the trial and evaluation of the evidence by the Criminal Division of the Supreme Court. In addition, the

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<sup>7</sup> The State party refers to the decisions of the Criminal Division of the Supreme Court in cases 13349 of 14 August 2000, 17653 of 11 March 2003 and 21497 of 24 January 2007.

communication presents its allegations to the Committee in a misleading way, claiming that the judicial decisions were arbitrary and inconsistent and amounted to a denial of justice.

4.10 The allegations of a violation of Covenant rights have not been sufficiently substantiated for the purposes of admissibility. The author claims that the State party violated his rights under articles 2, 3, 9, 14 and 26 of the Covenant. However, his allegations refer only to violations of article 14 and, briefly, to violations of article 26. At the same time, the author's allegations that the Criminal Division of the Supreme Court changed its jurisprudence for the sole purpose of declaring itself competent to try the author are unsubstantiated. Thus, the communication as a whole cites decisions without relating them to the supposed precedents of the Supreme Court in such a way as to enable the Committee to compare judgments and verify whether it really did change its jurisprudence and possibly violate the right to equality. Moreover, the jurisprudence to which the communication appears to refer is related to cases in which the person on trial was not a member of Congress. In this regard, the State party adds that, in relation to criminal proceedings against persons who enjoy parliamentary privilege, its courts have always applied the legislation in force and granted equal treatment to defendants.<sup>8</sup>

### **Author's comments on the State party's observations on admissibility, and additional information**

#### *Author's comments on admissibility*

5.1 In a letter dated 24 November 2014, the author submitted comments on the State party's observations and reiterated that his communication met all the admissibility criteria set out in the Optional Protocol.

5.2 The author reiterates his claim that the criminal proceedings against him constituted a violation of article 14 (5) of the Covenant, as members of Congress with parliamentary privilege are not entitled to a second hearing. He maintains that the Constitutional Court has established in its jurisprudence that criminal proceedings against individuals who enjoy parliamentary privilege that are heard by the Criminal Division of the Supreme Court, acting as a court of sole instance, are in compliance with the State party's Constitution and international treaties.<sup>9</sup> The Constitutional Court has standardized its jurisprudence, stating that the trial of senior State dignitaries in proceedings before a court of sole instance does not imply any disregard of the right to due process.<sup>10</sup>

5.3 In the criminal proceedings that established his criminal responsibility, the author had no opportunity to appeal against the conviction and sentence and have them reviewed by a higher court. A petition for *amparo* cannot be considered a substitute for a criminal appeal for the purposes of complying with article 14 (5) of the Covenant, as it is of a different legal nature and has different effects. Moreover, in his case, the petition for *amparo* submitted to the Civil Division of the Supreme Court was filed against the decision of the Supreme Court to declare itself competent to hear the case, not against the subsequent judgment of the Criminal Division. The author adds that the Supreme Court always rejects petitions for *amparo* filed against its own judgments or decisions. The right to a second hearing admits of no exceptions, even in the case of senior officials, and is not fulfilled, or "compensated for", by a trial in sole instance in the highest criminal court in the land.<sup>11</sup>

5.4 With regard to the State party's observations on abuse of the right of submission, the author maintains that there is no deadline for submitting a communication and that his communication was submitted within a reasonable period of time. Moreover, his communication does not present any knowingly false or distorted information. The

<sup>8</sup> The State party refers to nine judicial decisions in different cases, including convictions, handed down between December 2007 and February 2010.

<sup>9</sup> The author refers to Constitutional Court judgment C-545/08.

<sup>10</sup> The author refers to Constitutional Court judgment SU 198/13.

<sup>11</sup> The author refers to paragraph 7 of the Committee's Views in relation to communication No. 1211/2003, *Oliveró Capellades v. Spain*.

jurisprudence of international human rights bodies cited is relevant and applicable to his case.

5.5 The claims of a violation of Covenant rights are duly substantiated. With regard to article 2 of the Covenant, the author maintains that the State party has not taken the necessary measures to guarantee the right of all persons to a second hearing in criminal cases or the right to a fair trial, despite the Views and decisions of the Committee and other international human rights bodies that found that the State party violated these rights. Nor does the State party guarantee access to an effective remedy, which in the case of the State party's legal system is the petition for *amparo*, since article 2 (3) of the Covenant does not exclude any official of a State party from access to effective remedies, or establish that such remedies are not applicable to decisions taken by the Supreme Court.

#### *Additional information*

6.1 On 5 December 2014, the author informed the Committee that at some unspecified time he had submitted an application for annulment of the judgment of the Constitutional Court of 18 December 2009.

6.2 On 2 February 2011, the Constitutional Court, meeting in plenary, rejected the author's application for annulment. The Court ruled, *inter alia*, that the Second Review Chamber had not departed from the jurisprudence of the Constitutional Court since, in the nine cases between 1993 and 2008 in which it had consolidated its jurisprudence on the privileges established by the Constitution for certain officials and the competence of the Supreme Court to try members of Congress, it had never considered the administrative situation that arises when a member of Congress is on leave without pay.

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

7.1 On 5 May 2015, the State party submitted its observations on the merits of the communication and reiterated that it failed to meet the admissibility criteria established in the Optional Protocol.

7.2 With regard to the author's allegations of a violation of article 14 (1–2) and (5), the State party submits that the author had equal access to a fair hearing before an independent and impartial tribunal. Articles 186, 234 and 235 of the Constitution establish the procedure for the trial of members of Congress by the Supreme Court, as the natural judge. Similarly, article 32.7 of the Code of Criminal Procedure (Act No. 906 of 2004) provides that it is for the Criminal Division of the Supreme Court to investigate and prosecute senators and representatives of the lower House. However, criminal proceedings against a high-ranking State official take place before the Supreme Court if there is a separation of the functions of investigation and prosecution.

7.3 The decisions of both the Supreme Court and the Constitutional Court were based on settled jurisprudence. The Constitutional Court has consistently held that the principle of a second hearing is not absolute, since it is not at the heart of the right to due process, and that the law could introduce exceptions to the requirement for a second criminal hearing.<sup>12</sup> The Constitutional Court also noted that the use of a sole instance in proceedings involving members of Congress who had been removed from office was reasonable and proportionate and did not violate fundamental rights. Constitutional Court judgment C-545 of 28 May 2008 defines the jurisprudence with respect to the nature and purpose of constitutional immunity for the highest State officials, while separating the functions of investigation and prosecution within the Supreme Court to ensure the impartiality of the judge. According to this judgment, the purpose of immunity is to protect the autonomy and independence of such officials in the exercise of their functions by means of special proceedings that differ from ordinary proceedings, without implying any discrimination. A trial in sole instance by the Supreme Court differs in certain respects from ordinary trials, but this does not imply that the defendants do not enjoy due process of law. In fact, they have the privilege of

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<sup>12</sup> Constitutional Court judgments C-650-2001 and C-254A of 2012.



having the entire proceedings held before the judges with the highest qualifications and experience.

7.4 The State party reiterates that neither article 14 (5) of the Covenant nor the jurisprudence of the Committee or other international human rights bodies can be construed as requiring that, in the trials before the highest judicial instance of senior officials with immunity from ordinary criminal prosecution, provision must be made for a second instance similar to that in other criminal proceedings. In a previous case (*Gomaríz Varela v. Spain*), which did not deal with a senior official with parliamentary immunity, the Committee had concluded that the absence of the right to a review by a higher court of a sentence imposed by an appeal court, following acquittal by a lower court, did not constitute a violation of article 14 (5) of the Covenant.<sup>13</sup>

7.5 The author's allegations reflect his disagreement with the criminal proceedings and his conviction; he is, in fact, seeking to use the Committee as a fourth level of jurisdiction and to reopen the question of his criminal responsibility. However, a ruling that is unfavourable to the defendant does not constitute a violation of the Covenant. The State party points out that the judicial ruling that determined the author's criminal responsibility was not arbitrary but duly reasoned and handed down in the context of judicial proceedings in accordance with due process. The author filed a petition for *amparo* that was finally dismissed by the Constitutional Court on 18 December 2009. Due process was guaranteed in all judicial proceedings relating to the appeals filed by the author.

7.6 The criminal proceedings brought against the author did not constitute a violation of articles 14 (1) and 26 of the Covenant. Rather, they were the kind of proceedings brought against persons with parliamentary immunity. Therefore, the author was not treated differently from any other person in the same situation.

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

8.1 On 6 September 2015, the author submitted his comments on the merits of the communication and reiterated that the State party had violated his rights to have access to an independent and impartial tribunal, to be presumed innocent, to be tried by the natural judge and to appeal against his conviction and sentence to a higher tribunal.

8.2 With regard to his allegations concerning the lack of impartiality of the court, the author points out that the judges who decided to commit him for trial were the same ones who passed judgment and that there was therefore no separation of functions; the functions were not split, for example, between the subchambers of the Criminal Division, so that one subchamber would investigate and lay charges and another would be responsible for the trial and judgment.

8.3 In view of the arrangements described in the preceding paragraph, the author's right to be presumed innocent was also violated, as the judges who decided to commit him for trial were the same judges who tried him. The fact that the natural judge in the author's case might be the Supreme Court does not legitimize a criminal conviction by a court of sole instance in the absence of a functional separation between those making the accusation and those responsible for the trial and conviction.

8.4 With regard to the right to be tried by the natural judge, the author reiterates his claim that parliamentary immunity should not have been applied in his case since at the time of the events he was on leave without pay and not performing the duties of a member of Congress. Since he was replaced by Ms. Y.M.P., parliamentary immunity was applicable only in her case.

<sup>13</sup> CCPR/C/84/D/1095/2002.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

9.1 Before examining any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

9.3 The Committee takes note of the author's claim that he has exhausted all the effective domestic remedies available to him. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

9.4 The Committee notes the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because it contains false, distorted, incomplete and unclear information. The Committee points out, however, that the fact that the State party and the author of the communication disagree on the facts, the application of the law and the relevance of the jurisprudence of the domestic courts and the Committee does not, in itself, constitute an abuse of the right of submission.<sup>14</sup> The Committee also notes the State party's argument that the communication is inadmissible owing to the delay between the last decisions of the domestic courts and the submission of the communication to the Committee. The Committee points out that, although there is no explicit deadline for the submission of communications under the Optional Protocol, in accordance with rule 96 (c) of its rules of procedure, "an abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication."<sup>15</sup> In the present case, the Committee notes that, since the author's conviction by the Supreme Court, the Constitutional Court dismissed his petition for *amparo* on 18 December 2009 (see paras. 2.13 and 4.6 above). The author's application for annulment of this judgment was rejected by the Constitutional Court meeting in plenary on 2 February 2011 (see paras. 6.1–6.2 above). The Committee therefore notes that the communication was submitted to the Committee within the five-year limit provided for in its rules of procedure, and considers that it does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

9.5 The Committee takes note of the author's claim that his rights under articles 3, 9 and 14 (3) of the Covenant were violated by the State party. The author merely cites those articles of the Covenant without offering the slightest explanation of why he considers that those rights were violated. Consequently, the Committee finds that the author has not sufficiently substantiated this claim for the purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee takes note of the author's allegations of a violation of article 2 of the Covenant. The Committee recalls its jurisprudence in this connection, according to which 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 under the

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<sup>14</sup> See *F.A.H. and others v. Colombia* (CCPR/C/119/D/2121/2011), para. 8.3.

<sup>15</sup> This rule applies to communications received by the Committee after 1 January 2012.

Optional Protocol.<sup>16</sup> The Committee therefore considers that the author's allegations in this regard are inadmissible under article 2 of the Optional Protocol.

9.7 The Committee takes note of the author's claim that his rights under articles 14 (1) and 26 of the Covenant were violated because he was not tried by the competent judge and with due respect for the right to equality before the courts, since the Criminal Division of the Supreme Court allegedly amended its own jurisprudence for the specific purpose of trying the author and avoiding a trial by the ordinary judge (see para. 3.2 above). The Committee also takes note of the State party's arguments that the decisions of both the Supreme Court and the Constitutional Court in the author's case were based on the law in force and settled jurisprudence at the time of the events (see para. 7.3 above); that the jurisprudence cited by the author is not relevant to the case since it does not refer to the effect on parliamentary privilege of unpaid leave taken by a member of Congress; that the Supreme Court has stated in its jurisprudence that a member of Congress on leave without pay continues to be attached to the service and remains in office; and that the author was treated no differently from others in the same situation (see paras. 4.5, 4.7 and 7.6 above).

9.8 The Committee notes that the author does not contest the fact that, pursuant to articles 186 and 235 of the Constitution, members of Congress enjoy parliamentary privilege and are tried by the Criminal Division of the Supreme Court but considers that, as he was on leave without pay at the time of the events in question, the Supreme Court should have applied its own jurisprudence, which held that if a member of Congress had left office and the events had no functional relationship with the activities of a member of Congress, the competent judge was the ordinary judge, not the Criminal Division of the Supreme Court (see para. 3.2 above). However, in the author's case, the Criminal Division found that it was competent to try him on the grounds that, although he was on leave without pay, he had not been separated from congressional office, he still had parliamentary immunity and the acts attributed to him were related to the functions he performed as a member of Congress (see para. 4.7 above). The Committee recalls that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results.<sup>17</sup> The Committee also recalls its jurisprudence to the effect that it is generally for the courts of States parties to apply domestic legislation in each case, unless it can be shown that such application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>18</sup> In the circumstances of the present case, the Committee considers that the author has failed to sufficiently substantiate his claim that he was not tried by the competent court. Similarly, the Committee is of the view that the information made available to it does not reveal that the judicial authorities ignored their own jurisprudence in the author's case in order to determine the competent court in a manner that would amount to a violation of the right to equality before the courts and the law; and that the author has not sufficiently substantiated, for the purposes of admissibility, in what way he was discriminated against on one of the grounds referred to in article 26 of the Covenant. The Committee therefore considers that these claims are inadmissible under article 2 of the Optional Protocol.

9.9 The Committee notes the author's allegation of a violation of the right to be heard by an impartial tribunal, as set out in article 14 (1) of the Covenant, since in criminal proceedings against members of Congress with parliamentary immunity it is the Criminal Division of the Supreme Court that investigates, charges and judges, and there is no functional separation between the investigators and the judges (see para. 3.3 above). The Committee recalls that one aspect of the requirement of impartiality established in article 14 (1) of the Covenant is that the tribunal must appear to a reasonable observer to be impartial. Thus, not only must the judges be impartial, they must also appear to be so. If the judges' participation in the preliminary proceedings is such as to allow them to form an opinion prior to the trial and this knowledge is directly related to the charges against the accused

<sup>16</sup> See *Jusinkas v. Lithuania* (CCPR/C/109/D/2014/2010), para. 7.6; *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5; and *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4.

<sup>17</sup> See *F.A.H. and others v. Colombia*, para. 8.5.

<sup>18</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. See also *F.A.H. and others v. Colombia*, para. 8.5.

and the evaluation of those charges, their participation in the trial is incompatible with the requirement of impartiality established in article 14 (1) of the Covenant. In this case, however, the Committee notes that Constitutional Court judgment C-545 of 28 May 2008 (see para. 4.7 of the judgment) established the separation of the functions of investigation and judgment within the Supreme Court in criminal proceedings against members of Congress with parliamentary immunity, in order to guarantee the impartiality of the tribunal (see para. 7.3 above) and that the Supreme Court complied with this judgment. The Committee also notes that the author's allegations are of a general nature and essentially call into question the system of criminal procedure that applies to members of Congress with parliamentary immunity at the time of the events, referring to the fact that the Criminal Division of the Supreme Court — and, therefore, the same judges — were responsible for all stages of the criminal proceedings, including the investigation and the trial. However, the author has not adequately explained to the Committee how, in his case, there was no such separation of the functions of investigation and judgment within the Criminal Division, or how the same judges took part in the various stages of the proceedings in such a way as to undermine the impartiality of the tribunal. Therefore, in the particular circumstances of this case, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

9.10 With regard to article 14 (2) of the Covenant, the Committee notes the author's claim that the State party violated his right to be presumed innocent, as he was convicted without sufficient evidence to prove with certainty that he had committed the act constituting the offence of extortion; that the Criminal Division did not make a proper assessment of the evidence, including the different accounts in the statements of Ms. Y.M.P. and Mr. C.G.; and that its assessment of these statements was not sufficiently substantiated (see para. 3.4 above). The Committee recalls its jurisprudence to the effect that it is generally for the courts of States parties to evaluate the facts and evidence in each case, unless it can be shown that their evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>19</sup> The Committee has examined the materials submitted by the parties, including the judgment of the Criminal Division of the Supreme Court of 3 June 2009, and considers that these materials do not show that the criminal proceedings against the author suffered from the above-mentioned flaws. Accordingly, the Committee considers that the author's complaint in respect of article 14 (2) has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

9.11 The Committee takes note of the author's allegations in relation to article 14 (5) of the Covenant. It also takes note of the State party's argument that the complaint should be declared inadmissible for lack of substantiation. The Committee nevertheless considers that the author's complaint under article 14 (5) has been sufficiently substantiated for the purposes of admissibility. It therefore declares the complaint admissible and proceeds with the consideration of the merits.

#### *Consideration of the merits*

10.1 The 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 (1) of the Optional Protocol.

10.2 The Committee takes note of the author's claim that the criminal proceedings against him constituted a violation of article 14 (5) of the Covenant, since there is no mechanism whereby he can appeal the judgment and seek review by a higher tribunal of the conviction and sentence handed down by the Criminal Division of the Supreme Court on 3 June 2009 (see para. 3.5 above).

10.3 The Committee also takes note of the State party's arguments that it cannot be inferred from the wording of article 14 (5) of the Covenant that there must be specifically a "second instance", since the text refers to a "higher tribunal"; that this wording can be

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<sup>19</sup> See *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4.

interpreted as meaning that the case must be heard by a court endowed with higher academic and professional qualities in order to ensure a correct evaluation of the issues before it; that States parties enjoy broad discretion to determine procedures and design effective mechanisms for the protection of rights without being required to establish a second hearing in criminal cases involving senior officials enjoying parliamentary privilege; and that the trial of such officials by the highest body in criminal matters is in itself a full guarantee of due process (see paras. 4.3–4.4 above).

10.4 The Committee recalls that article 14 (5) of the Covenant provides that everyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal according to the law. The Committee recalls that the phrase “according to the law” is not intended to mean that the very existence of a right to review should be left to the discretion of the States parties. Although a State party’s legislation may provide in certain circumstances for the trial of an individual, because of his or her position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant’s right to have his or her conviction and sentence reviewed by a court.<sup>20</sup> In the present case, the State party has acknowledged that there was no remedy available for the author to seek a review of his conviction and sentence by another court (see paras. 4.3–4.4 above). Moreover, according to information in the public domain, on 24 April 2015, the Constitutional Court declared certain articles of the Code of Criminal Procedure which excluded the possibility of contesting all convictions before a functionally or hierarchically superior authority to be unconstitutional. The Court urged the Congress to introduce, within a year, comprehensive legislation establishing the right to challenge all convictions. Until such legislation was adopted, all convictions should be understood to be challengeable. On 28 April 2016, the Supreme Court issued a ruling stating that the Constitutional Court’s order was applicable only to executory judgments issued after 24 April 2016. On 18 January 2018, through Legislative Act No. 001 of 2018, the legislature of Colombia amended the Constitution (arts. 186, 234 and 235) to guarantee the right to a second hearing in criminal cases for persons with parliamentary immunity. Accordingly, the Committee finds that the State party violated the author’s rights under article 14 (5) of the Covenant.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14 (5) of the Covenant.

12. 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 under an obligation, *inter alia*, to provide the author with adequate compensation. The State party is also under an obligation to take all necessary steps to prevent the recurrence of similar violations in the future.

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

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<sup>20</sup> See *Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4. See also general comment No. 32, paras. 45–47.