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Human Rights Committee

Opinion adopted by the Committee under Article 5(4) of the Optional Protocol with respect to communication No. 2244/2013* **

Filed by:	Roberto Isaías Dassum and William Isaías Dassum (represented by attorneys Xavier Castro Muñoz and Heidi Laniado Hollihan)
Alleged victim:	The authors
State party:	Ecuador
Date of communication:	March 12, 2012 (initial filing)
References:	Decision adopted in accordance with Article 97 of the Committee's Rules and Regulations, conveyed to the State party on June 5, 2013 (not published as a document.)
Date of approval of the Opinion:	March 30, 2016
Matter:	Criminal conviction and seizure of the authors' property
Substantive issues:	Right to freedom; due process guarantees; retroactive application of an unfavorable criminal statute; equal standing before the law, and non-discrimination
Procedural issues:	Lack of victim standing; inadmissibility *ratione materiæ*; *litis pendentia*; lack of jurisdiction; non-exhaustion of internal appeals; abuse of the right to file communications

* Adopted by the Committee at its 116th period of sessions (March 7-31, 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Inasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fort, Yuval Shany, Konstatine Verdzelashvili, and Margo Waterval.
Attached in the appendix to the present document is the text of a dissent signed by Yuval Shany, a member of the Committee.

Articles of the Covenant: 2(1) and 3(a); 9; 14(1)(2) and (3c); 15; 26

Articles of the Optional Protocol: 1; 3; 5(2) a) and b)

1. The authors of the communication are Roberto Isaías Dassum and William Isaías Dassum, Ecuadorian citizens. They allege to be the victims of the violation of their rights recognized in Articles 9; 14(1) and (2), separately, and as related to Articles 2(1) and (3a); 14(3c); 15; and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol went into effect as regards Ecuador on March 23, 1976.

The facts according to the authors

2.1 The authors are businessmen and were the shareholders and administrators of corporations that were part of a corporate unit known as the "Isaías Group," the most visible head of which was the bank Filanbanco. The authors were, respectively, the president and vice president of this bank. In the late nineteen nineties, Ecuador experienced external and internal difficulties that severely affected its economy. The loss of the production sector in general had severe repercussions on the financial system as the former's creditor. Ecuadorian banking went into crisis as of 1998, at which time practically all banks requested liquidity loans from Banco Central del Ecuador (BCE). These loans were granted by BCE in 1998 and were based on the solvency of the technical equity constituted by the financial group in question and submitted to the Office of the Superintendent of Banks. Filanbanco's solvency was certified by the latter entity, which approved its access to stabilization loans.

2.2 After receiving several liquidity loans, Filanbanco's private shareholders asked Ecuador's Banking Board to place the bank in a Restructuring Program in order to strengthen it; this was so decided in a Resolution of December 2, 1998. This program was exclusively applicable to solvent banks experiencing liquidity problems, which proves that Filanbanco was a solvent bank whose liquidity problems were temporary. Otherwise, it would have undergone a process of elimination of doubtful assets prior to its liquidation.

2.3 Under the Restructuring Program, the bank was turned over to a State agency, the Deposits Guarantee Agency (Agencia de Garantía de Depósitos, AGD). An audit conducted by Arthur Andersen in March 1999, barely three months after the surrender of the bank to the AGD and while under state management, showed that the bank was solvent and that the private management crisis was due to liquidity problems. Nevertheless, on July 30, 2002, while still under state management, the Banking Board ordered the bank's forced liquidation, after having imposed upon Filanbanco the absorption of an insolvent bank (Banco La Previsora) and caused Filanbanco to make loans to other banks experiencing problems. Following the declaration of forced liquidation, Filanbanco closed its doors to the public on July 30, 2002. On April 8, 2010, the Office of the Superintendent of Banks declared the transfer of its assets to BCE and the extinguishment of its legal personality.

2.4 Within the framework of the facts described above, an intense persecution was unleashed against the authors as former shareholders and administrators of Filanbanco, including threats

and defamation by the Office of the President of the country and other government officials, and the commencement of criminal proceedings. The proceedings began with the request to the Chief Justice of the Supreme Court by the Attorney General of the State, on June 16, 2000, to prosecute the authors and other former officers of Filanbanco for the crimes of bank peculation (Article 257 of the Criminal Code in effect at the time the acts took place, *i.e.*, 1998[1]) and falsehood (Article 363 of said Code), as well as for several financial crimes contemplated in the General Act on Financial System Institutions. On June 22, 2000, the Chief Justice of the Court issued an order initiating the investigative phase of the proceedings for the crimes mentioned by the state attorney and ordering the pretrial detention of the authors. On June 26, 200, the Chief Justice of the Court issued an arrest warrant to the Office of the Commander General of the National Police; this warrant was challenged by the authors on June 27, 2000.

2.5 On November 20, 2002, upon the conclusion of the investigation into the facts, the Attorney General of the State filed her Prosecutorial Opinion amending her report of June 16, 2000, in light of the investigation. The Opinion contains the accusation against the authors for financial crimes (false declarations and authorization of illegal operations) but affirms that there was no abuse of public funds belonging to BCE (peculation) or bank peculation, as it was only after the facts in the accusation that the making of linked, related or intercompany loans was classified as the crime of (bank) peculation.

2.6 On March 19, 2003, the Chief Justice of the Court, deviating from the indictment filed by the Attorney General, issued an order to commence full proceedings for the crime of bank peculation.[2] The authors filed appeals from, and motions to vacate, this order with the Office of the Chief Justice.

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[1] Article 257. Any servant of public organizations and entities and any individual in charge of a public service who should have abused public or private monies, the effects representing them, items, certificates, documents or personal effects in their possession by virtue or reason of his position, whether the abuse consists of defalcation, arbitrary disposition, or any other similar abuse, shall be punished with imprisonment for no more than eight and no less than four years. (…)

This provision includes servants handling funds of the Ecuadorian Social Security Institute or of state and private banks. (…)

Law No. 99-26 of May 13, 1999, introduced an amendment whereby the following paragraph was added:

"Also comprised within the provisions of this article are the officers, administrators, executives or employees of institutions of the national private financial system, as well as the members of the boards of directors of such entities, who have contributed to the commission of these crimes."

That same statute added the crime of "special bank peculation":

Article 257-A. The persons described in the previous article who, abusing their position, should have acted fraudulently in order to obtain or make linked, related or inter-company loans, in violation of express legal provisions with respect to this kind of operations shall be punished with imprisonment for no more than eight and no less than four years. The same penalty shall be applied to beneficiaries who shall fraudulently have intervened in the commission of this crime, and those who have allowed their name to be used for their own benefit or that of third parties.

[2] The order states that several media outlets had been claiming that bank peculation existed only as of the introduction of Article 257A of the Criminal Code. However, this affirmation was unfounded, as the crime of bank peculation had already been described in paragraph 3 of Article 257, which was in effect at the time when the acts were committed. The order cites an opinion handed down in 1984 where the Supreme Code applied said criminal provision and found guilty the administrators of Banco La Previsora.

2.7 On May 12, 2009, the First Criminal Division of the National Court of Justice (National Court) confirmed the order to commence full proceedings. The authors requested enhancements, clarifications, and modifications, and moved to vacate and to recuse the justices. On October 28, 2009, the justices who made up the Division decided to excuse themselves from continuing to hear the case, alleging that they had been the subject of attempts to suborn them. Three associate justices were appointed who, in an order of January 15, 2010, ruled on the challenges raised by the authors. In addition, they modified the order of May 12, 2009, to commence full proceedings arguing that the principles of legality and consistency between the prosecutor's charge and the judgment had been violated. Consequently, the authors ought not to be tried for peculation but rather for the crimes with which they had been charged in the prosecutor's indictment (balance sheets and documentary forgery).

2.8 On January 19, 2010, the Chief Justice of the National Court of Justice, acting *ex officio*, suspended the three associate justices for "alleged irregularities that have generated social alarm, [thereby] affecting the image of the Judiciary Function," and initiated disciplinary proceedings against them for having changed the type of crime imputable to the authors. The President of the Republic asked the National Court of Justice to investigate the accounts of the associate justices and publicly stated that the National Court of Justice should remove them from the bench. On January 26, 2010, the National Assembly issued a resolution rejecting the associate justices' ruling and urged the National Court of Justice to investigate their actions and decide on the appropriate sanctions. In the end, the associate justices were reported by the Attorney General of the State to the National Court of Justice, removed from the bench, and tried for prevarication. However, the proceedings against them were dismissed by the Second Criminal Division of the National Court on December 8, 2010, for lack of evidence.

2.9 The vacancy created by the removal of the associate justices was covered by the appointment of a "Criminal Division of Occasional Associate Justices of the National Court of Justice," created specifically for this process. The Constitution establishes a single category of associate justices of the National Court of Justice who are selected following the same procedures and having the same responsibilities as the regular justices; they are designated by the National Court of Justice through public competitive examinations (and not by the Chief Justice of the National Court of Justice acting of his own accord) and their writ does not include the trying of a specific cause.[3]

[3] According to the decision of May 17, 2010, issued by the occasional justices and contained in the case file before the Committee, the Attorney General of the State appealed from the resolution by the division of permanent associate justices, asking that it be revoked and that the order issued by the regular justices be confirmed. The appeal was decided by the division of occasional associate justices under the norms regulating the operation of the National Court, particularly the Court's Resolution of January 21, 2009, which affords the Chief Justice of the Court the possibility to designate occasional associate justices when neither the regular justices nor the permanent associate justices are able to act. Their jurisdiction having been established, the occasional justices ascertained that the division of permanent associate justices had reformed *sua sponte* the decision of the permanent justices to prosecute the authors for peculation without having the power to do so for, independently of the division's make-up, it was still the same jurisdictional organ and, therefore, it could not revoke its own decision. Its competence was limited to ruling on the defendants' applications for clarification and enhancement. Consequently, the division of occasional justices declared inexistent the order of the permanent associate justices and, further, it declared the order of the regular justices to be in effect. As for the defendants' petitions for clarification and enhancement, the division dismissed them as unrelated to any language or clarification flaws.

2.10 On May 17, 2010, this Division declared non-existent the decision of January 15, 2010, and restored the peculation charge. This was the Division's one and only decision. After handing it down, its members resumed their private legal practice.

2.11 The acts that are the subject of the proceedings took place prior to 1998, at a time when the 1979 Constitution and the 1983 Code of Criminal Procedure were in effect. According to Articles 254 and 255 of the latter Code, proceedings are suspended until the defendants surrender themselves or are apprehended to stand trial. On August 11, 1998, a new Constitution went into effect, Article 121 of which allowed the trial *in absentia* of public officials and servants in general charged with crimes of peculation, bribery, graft, and unlawful enrichment. The 2008 Constitution includes a similar provision. The authors were not public officials, nor were they being investigated for the aforementioned crimes. In addition, the acts being imputed to them had taken place before the 2008 Constitution; this notwithstanding, the proceedings against them continued.

2.12 On August 3, 2010, the Second Criminal Division of the National Court ordered the commencement of full proceedings. In addition, the arrest warrant against the authors was ratified, as was the order to request police authorities and Interpol to locate and apprehend them. On August 11, 2010, the challenges raised by the authors were dismissed and the order was issued to commence trial proceedings *in absentia*. At the same time, the State applied for and obtained from Interpol orders to apprehend the authors, who were living in the United States. In addition, the Government requested their extradition from the United States.

2.13 On April 10, 2012, a justice of the Specialized Criminal Division of the National Court sentenced the authors to eight years' imprisonment for the crime of peculation. Appeals, motions to annul, and motions to vacate were dismissed on March 12, April 24, and October 29, 2014, respectively, by the Specialized Criminal Division. On September 17, 2015, the Constitutional Court declined to hear an extraordinary action for the protection of constitutional rights.

2.14 The National Court vacated *sua sponte* the appellate decision that found the authors liable for the crime of peculation --through misappropriation-- contemplated in Article 257 of the Criminal Code. The Court considered that said decision wrongly interpreted this article and that the crime for which the authors were being sentenced was actually bank peculation, also contemplated in the same article. The penalty imposed was deprivation of freedom for eight years, with no attenuating circumstances, as there was the aggravating circumstance that the crime had been committed while acting as a gang.

2.15 According to the authors, the above cassation decision aggravates the violations to the Covenant as: (a) It violates the principle of legality by retroactively applying the crime of "misappropriation" as a modality of the crime of peculation, a type of crime that had been decriminalized; it retroactively applied a less favorable criminal law, as it considered them as active subjects of the crime of bank peculation which, at the time of the indictment, was applied to circumstances much more limited; applied the aggravating circumstance of acting as a "gang," which has been repealed by the present Integral Organic Criminal Code; and applied the crime of peculation, which is indeterminate and precludes the defendant's defense; (b) It violates the

principle of formal equality by applying more onerous sanctions than those which would have been levied in cases with identical facts; (c) It violates the principle of *non reformatio in peius* by imposing sanctions more onerous and crimes different from those contained in the appellate decision, thereby violating the right to a defense; (d) It violates their right to be tried by independent judges, as the justices who ruled on the motion to vacate had been involved in previous decisions in the same cause or had publicly evinced partiality.

2.16 Simultaneously with the criminal proceedings, AGD conducted civil seizure proceedings against the former shareholders and former administrators of Filanbanco, with the alleged purpose of securing payment of the debt with bank depositors at the time the institution was intervened. The proceedings began with Resolution AGD-UIO-GG-2008-12 of July 8, 2008, which provided the seizure of all the property of those who had been administrators and shareholders of Filanbanco until December 2, 1998. On this basis, and with no previous or administrative proceedings and with the support of law enforcement, the seizure began of more than 200 companies and other assets owned by the authors and other members of the Isaías group.[4] Furthermore, on July 9, 2008, the Constituent Assembly elected within the framework of the political process led by the President of the Republic, issued Constituent Mandate No. 13 to which it assigned constitutional ranking. This mandate ratified the legal validity of the aforementioned Resolution; declared that the Resolution could not be the subject of any actions for the protection of constitutional rights or any other special actions; and ordered that all actions filed be dismissed without the possibility of suspending or preventing compliance with the Resolution. Judges hearing any type of constitutional action related to that resolution and any actions taken to execute said constitutional action were to dismiss them under pain of removal from the bench and without prejudice of any potential criminal liability they may thereby incur. The Mandate further established that it was not "subject to any complaints, challenges, actions for the protection of constitutional rights, lawsuits, claims, opinions or administrative or judicial pronouncements."

2.17 The background to Constitutional Mandate No. 13 is Constitutional Mandate No. 1 of November 9, 2007, which prohibits controlling or challenging decisions by the Constituent Assembly. This Mandate establishes that judges and courts processing any action contrary to those decisions shall be removed and prosecuted. On June 10, 2010, Roberto Isaías Dassum filed an action seeking to declare Mandate No. 13 unconstitutional; it was dismissed on June 21, 2012, on the grounds of the immunity enjoyed by the Mandate.

2.18 The authors' appeals from this Resolution as well as from others which followed it for the purpose of expropriating property were to no avail. The Resolution stated that all the property of the authors, including property not intended for the operation of Filanbanco or any other company of that financial group, was subject to seizure, *i.e.*, it included property intended for the authors' own personal use. In addition, seizure included properties which, according to public knowledge, were held to belong to the authors, *i.e.*, independently of the ownership set forth in the respective property deeds.

[4] The case file contains a list of the companies and other properties expropriated.

The report

3.1 The authors allege that the irregularities that occurred during the criminal proceedings and in the seizure process gave rise to violations of their right to the judicial guarantees of due process under Article 14, paragraphs 1, 2, and 3 c), independently and as related to Articles 2, paragraphs 1 and 3 a); and the right to equal standing before the law and to non-discrimination under Article 26; the right not to have unfavorable criminal statutes retroactively applied to them, under Article 15; and the right to personal freedom in accordance with Article 9 of the Covenant.

3.2 The case is not pending before another international procedure [*sic*] and internal appeals related to the criminal proceedings have been exhausted. With respect to the seizure procedure, there is no appropriate judicial appeal, as Constituent Mandate No. 13 excluded any and all judicial actions or appeals.

Complaints relative to Articles 14 and 26

3.3 In the criminal proceedings, Ecuador violated the authors' rights to: (i) be tried by a competent, independent, and impartial court, established under the law; (ii) to be presumed innocent until such time as their guilt is established; and (iii) to be tried without undue delays.

3.4 The decision by the three permanent associate justices of the First Criminal Division of the National Court not to prosecute the authors for the crime of bank peculation resulted in the associate justices' removal from the bench and prosecution. Such arbitrariness infringes the judicial independence established in Article 14(1) of the Covenant.

3.5 The occasional associate justices division created specifically for this process reestablished the charge of "bank peculation." This decision was made barely ten days after the associate justices were sworn in, in spite of the complexity of the case, the voluminous size of the case file, and the fact that the cause had been pending for ten years. This was the only decision handed down by this division. It was, therefore, a special court whose creation infringed the requirements of law and whose sole purpose was to hand down a ruling against the authors. Whatever basis in internal law may be invoked for the creation of this "occasional" court, it is illegitimate that it resulted exclusively from the replacement of three associate justices who were arbitrarily suspended and removed. Consequently, the designation of this division violated the principle of a "competent court established under the law."

3.6. On May 10, 2010, Roberto Isaías moved for the revocation of the designation of the occasional associate justices. On May 11 and May 20, respectively, he asked that those associate justices recuse themselves from hearing the cause and challenged the decision that restored the charge of bank peculation, alleging that his right to be tried by a competent, independent, and impartial court had been violated.

3.7 The guarantee of their natural judge was likewise violated since, being domiciled in Guayaquil, the authors should have been tried by an ordinary court in the District of Guayas.

However, the cause against the authors was joined to those of other individuals who had a special jurisdiction in order to bring the proceedings before the National Court.

3.8 The violation of the right to an impartial judge or court resulted as well from the prohibition upon the authors to recuse judges. This prohibition was the fruit of an amendment to the Code of Criminal Procedure introduced in 2009 whereby an absolute ban was established on the recusal of judges in causes initiated and processed under the 1983 Code, which was the legal corpus applicable to the cause against the authors.

3.9 The authors' right under Article 14(2) of the Covenant to the presumption of innocence was infringed as the result of: (i) the reiterated statements made by the highest officials of the Executive Branch affirming the authors' guilt; and (ii) the treatment as guilty parties the authors received during the proceedings, even before they were tried in full proceedings. Already in the order initiating full proceedings, the Chief Justice of the Supreme Court affirmed that "it had been determined in the investigative phase" that the authors "had incurred" acts that "constituted criminal means for the commission of the crime of bank peculation." This and other affirmations of a like tenor implied that the authors' liability was deemed to have been established even before oral proceedings began, and placed them in the situation of having to bear the burden throughout the rest of the proceedings of proving they were not guilty.

3.10 The authors' right to be tried without undue dilations was violated by the unreasonable duration of the process: (i) four years after the acts imputed to them and two years after proceedings commenced, before the prosecutor's indictment was filed (November 20, 2002); and more than six years to decide the appeal from the order opening full proceedings, in spite of the fact that the law establishes that it was to be decided within a period of 15 days plus one additional day for every 100 pages in the case file. More than seven years elapsed between the formal commencement of full proceedings and its ratification by the division of occasional associate justices.

3.11 The authors' absence from the country may not be invoked as a cause for the delay in the criminal proceedings. This is so for two reasons: a) the State chose to try them *in absentia*, despite the fact that its own Constitution forbade it; and b) by removing themselves from Ecuador, the authors exercised their legitimate right to look after their freedom, physical integrity, and safety against the abuse of power that victimized them.

3.12 The seizure process likewise violated the right to due process. AGD is an administrative organ that may not evade the reach of Article 14 of the Covenant when it acts to determine rights and obligations of a civil nature. Taking this into account, the lack of an adversarial administrative procedure before AGD where the authors may exercise their right to a defense in advance of AGD's decision to expropriate their property violated the due process guarantees in Article 14(1) and (2) of the Covenant. The State availed itself of Mandate No. 13 to cloak the legal weakness of resolution AGD-UIO-GG-2008-12 with the ironclad mantle of jurisdictional immunity. Such immunity entails a violation of the right of access to justice, to due process, and to equal standing before the law and the courts in order to enforce rights of a civil nature, particularly the authors' property rights as former owners and shareholders of Filanbanco. Mandate No. 13 also violates the right to due process as related to Article 2, paragraphs 1 and 3

of the Covenant, by failing to respect the right to file an effective appeal and the authors' right to equal standing before the law. For the same reason, the Resolution and Mandate No. 13, taken as a whole, violated the right to equal standing before the law and to non-discrimination contemplated in Article 26 of the Covenant by denying specific individuals access to justice in order to assert their rights.[5]

Complaints related to Article 15

3.13 The authors are victims of the violation of this article because: (i) a new type of crime was applied to them *ex post facto*; and (ii) they were charged with a crime that had already been repealed by the time full criminal proceedings were instituted against them.

3.14 Law No. 99-26 of May 13, 1999, *i.e.*, at a time subsequent to the occurrence of the acts imputed to the authors, amended the Criminal Code to include the crime of "special bank peculation" (Article 257-A), which had not existed up until that time, that implies engaging in loan operations with related companies. This amend shows that, prior to it, the conduct defined by this crime was not punishable. Until that date, both banking and criminal legislation explicitly allowed those operations within certain limits. Now, then, the National Court applied to the authors a repealed crime (contained in Article 257), but did so changing its construction so as to make related and inter-company operations fall under its provisions. The prohibition against retroactive application contained in Article 15(1) of the Covenant may not be evaded through an expansive or abusive interpretation of the old statute for the purpose of conferring retroactive effects upon the new law.

3.15 On the other hand, the authors were being imputed with having authorized the use of the liquidity loans granted to Filanbanco by the Central Bank for purposes other than those contemplated in the law. This behavior fits the legal definition of misappropriation. But it so happens that Law 2001-47 "decriminalized" the misappropriation of public or private funds as a form of peculation before the order to commence proceedings against the authors was issued in 2003. This results in a violation of Article 15(1) *in fine* of the Covenant which protects the right to the retroactive application of the most favorable criminal statute. This is so even though the Supreme Court avoided using the term "misappropriation" and had recourse instead to "arbitrary disposition of public funds" and "fraud" through the "authorization of illegal financial operations."

3.16 Retroactivity at loggerheads with Article 15(1) also exists in the seizure process that began on July 8, 2008, for the legal basis used by AGD was Article 29 of the Act of Economic Rearrangement in the Tax and Fiscal Area, which was made part of that law in 2002.

Complaints related to Article 9

3.17 The court's pretrial detention order against the authors, even if not consummated, is an arbitrary measure by the State, at daggers drawn with Article 9 of the Covenant. In order for individual freedom to be violated, it is not always necessary that a pretrial detention order be

[5] The authors state that a complaint against the Resolution, filed on June 28, 2010, was dismissed by the Provincial Court of Justice of Guayaquil under Mandate No. 13.

physically executed or that the individual subject to an arbitrary detention order be imprisoned. The mere issuance of the arrest warrant of June 22, 2000, and of an international apprehension order, as well as other steps taken to apprehend the authors, such as the extradition proceedings, within the framework of an irregular and arbitrary criminal process, bereft of a minimum of judicial guarantees, violates the right to personal freedom.

Observations by the State party as to admissibility

4.1 In its observations of December 4, 2013, and December 10, 2015, the State party sets forth the differences between the criminal proceedings (initiated in 2000) and the seizure proceedings (initiated in 2008). The former afforded the necessary judicial guarantees, as the criminal cause is aimed against physical persons for allegedly criminal activities contemplated in the Criminal Code. On the contrary, the facts associated with the seizure of property have their genesis in business activities and actions related to the assets of legal persons. Inasmuch as the only parties bringing these matters before the Committee are the authors, no other internal action different from them may be introduced in said proceedings. Only physical persons are entitled to the international protection of human rights. Consequently, proceedings where the plaintiffs are legal persons whose rights and obligations under national legislation are being debated must remain outside the object of the communication. Furthermore, no actions brought by persons, whether legal or physical, different from the authors may be debated in said proceedings.

4.2 Even though the communications alleges the violation of rights contemplated in the Covenant, it does so from the standpoint of alleged effects on the assets of the different companies or groups of companies, a standpoint which behooves legal persons. The authors are seeking to extend rights under the Covenant to defend the rights of legal persons. For this reason, the Committee must declare itself incompetent to hear any administrative, legal or jurisdictional fact involving companies or business groups. Moreover, the purpose of allegations associated with the ownership rights of stockholders, administrators, companies, and corporate units such as the Isaías Group is to protect an alleged right to ownership, and, therefore, allegations related to the seizure process must not be admitted by the Committee *ratione materiæ*.

4.3 The authors filed a petition with the Inter American Commission on Human Rights. The outcome of those proceedings was a resolution not to admit the case on the grounds that it did not meet the requirements for considering it and that internal appeals had not been exhausted. The Commission conducted a prolix review of the petition and adopted a final decision, duly notified to the complaining parties. Consequently, the Committee should not hear the communication, pursuant to the provisions of Article 5, paragraph 2a) of the Optional Protocol.

4.4 The communication lacks support as pertains to the State's obligations under the Covenant inasmuch as the authors are not on Ecuadorian territory and, therefore, obligations under the Covenant are not enforceable as against the State party. For the same reason, the authors are not subject to the State's use of force.

4.5 The Optional Protocol establishes unjustified delay as an exception to the exhaustion of appeals. In the instant case, it is necessary to take into consideration the complexity of the

proceedings, which necessitated the request for and subsequent review of technical reports (external audits) and of reports from different public monitoring institutions (the Central Bank, the Commission Against Corruption, the Office of the Superintendent of Banks). In addition, the proceedings unfolded during a reasonable period of time if the intense procedural activity of the authors, who filed all manner of appeals under internal legislation,[6] is taken into account.

4.6 The authors have come before the Committee without taking into account the objective of the Covenant and the Optional Protocol, thereby hindering the work related to hearing individual petitions filed with this body. This is a clear example of the abuse of their right to file a communication.

Observations by the State party as to the merits

4.7 Any argument by the authors which questions the independence of judges and courts is merely the result of their dissatisfaction with the courts' decisions and does not arise out of the obligations that are the subject of Article 14 of the Covenant. Article 182 of the Ecuadorian Constitution establishes the concept of associate justices as part of the judicial structure, with the same ranking and the same regime as to conflicts of interests and responsibilities in the performance of their duties as regular justices. Based on the power of the National Court *en banque* to issue its own norms, contained in the Constitutional Court's Resolution for the transitional period which constitutes binding constitutional jurisprudence for all public servants and private parties, the Substitute Resolution on the Composition of the National Court was issued on December 22, 2008; Article 11 thereof sets forth the legitimate, legal, and constitutional activity of the associate justices of the National Court. This provision states that "in the absence of permanent associate justices, occasional justices may be called to hear a given cause. The[ir] designation shall be incumbent upon the justices of the Division where the cause is being tried and, otherwise, upon the Presiding Justice of the respective Division." Therefore, no one's right to be heard by a competent court has been violated. On the other hand, the recusal of judges as a procedural guarantees tool is in effect in Ecuador.

4.8 The principle of the presumption of innocence was not violated by the declarations of the President of the Republic, made in the course of a program intended to inform the citizenry of his activities and government policies; such program represents the freedom of expression of all citizens, including the head of state, whose personal opinions on a given matter do not imply an influence on judges and courts.

4.9 With respect to the grievances related to Article 15, the crime of peculation was already contemplated in the 1938 Criminal Code, amended in 1971 (Article 257). This provision was again amended in 1977 and, under it "servants of state or private banks," which included even shareholders, administrators, and employees, began to be considered as active subjects of the crime.[7] This made it possible to prosecute the authors and other bankers at that time. The judge considered the authors to be private banking servants; that they held the positions of president and vice president of Filanbanco; that, according to the opinion on the motion to vacate, "abused

[6] The State party provides a chronological listing of the procedural motions filed during the years that the proceedings were pending.

[7] Conclusion by the National Court in its opinion on the motion to vacate.

public funds, *i.e.*, the liquidity loans granted by Banco Central (…) their behavior falling [therefore] under the crime contemplated in and punished by the first and second paragraphs of Article 257." Subsequently, the law of May 13, 1999, added a third paragraph to this article whereby it included "officers, administrators, executives or employees of institutions of the national private financial system, as well as the members of the boards of directors of such entities." The amendment clarified what had previously been established in connection with active subjects of the crime. The lawgiver, mindful of the social alarm created by the grave economic, social, and political consequences of the 1998 banking crisis, sought through this amendment to expressly determine the active subjects of the crime; this does not imply that the previous statute had failed to do so.

4.10 With respect to the seizure proceedings, AGD and the Banking Board observed the principle of legality. Specifically, AGD's Resolution 153 of July 31, 2008, contains the Instructions for the Seizure of Property, and guarantees proceedings where due process will be respected; therefore, there is no infringement at all of Article 14(1) of the Pact in connection with equal standing before the courts. In addition, the seizure system included procedures to prove the lawful origin and real ownership of the expropriated property. AGD could have been subjected, in the alleged abusive exercise of its powers, to administrative review proceedings contained in the Administrative Jurisdiction Act.

4.11 As regards Constituent Mandate No. 13, Ecuador rejects the authors' argument that it is unconstitutional and illegitimate. The Constituent Assembly was not a state organ but, rather, a supra-state organ whose powers stem directly from popular will. According to the democratic principle, this will is different from and higher than that of the State. Under Article 2.2 of its Rules and Regulations, "the Constituent National Assembly shall approve Constituent Mandates which render mandatory its decisions and norms in the exercise of full powers. Mandates shall be effective immediately, without prejudice of their publication in the respective organ." The Assembly considered Filanbanco's complex financial and economic situation and underscored the importance of the activities by State institutions (AGD) considered as part of the expression of the powers constituted for the eradication of all manner of impunity. The property seizure proceedings were legitimated under those circumstances. Assembly Mandate No. 13 included measures intended to protect the rights of workers in intervened companies through a Resolution issued on July 8, 2008. That Resolution and Mandate No. 13 are not acts of State containing *ad hominem* legal norms, as they do not pertain to physical persons, contrary to what the authors contend.

4.12 Since the authors are not under the jurisdiction or within the territory of Ecuador, facts related to an alleged violation of Article 9 of the Covenant may not be attributed to Ecuador. With respect to the extradition process, the United States Department of State advised the Ecuadorian State in June 2013 of its refusal to extradite the authors, indicating that Ecuador was to provide sufficient evidence to find probable cause for the crime imputed to them, and that the Departments of State and Justice would further consider the request for extradition.

4.13 The State party recalls the Committee's jurisprudence in *González del Río v. Peru* (communication 263/1987) under which the issuance or existence of an arrest warrant does not by itself constitute a form of deprivation of freedom. This jurisprudence reaffirms that the scope

of the protection of the right in question is physical freedom, and that its violation requires not only that the individual in question be arrested but also that said detention be illegal and/or arbitrary. To the extent that a competent judge issues a pretrial detention order under the law and justifies the existence of criminal indicia and of the participation of the defendants in the commission of said crime, as indicated in the order initiating criminal proceedings against the authors, the pretrial detention order is justified. The order of June 22, 2000, justified the pretrial detention order on the basis of Filanbanco's failure to comply with the law, since during the life of the loans granted by the Central Bank, these loans were not used to safeguard the stability of the financial system but, instead, to invest in forbidden operations. Throughout the entire criminal proceedings, the pretrial detention order was periodically reviewed by the judges hearing the cause in order to verify its nature and ensure that the defendants would appear for trial. Every ratification of the order met the legal requirements and was justified by the indicia pointing to the existence of crimes. In addition, the duration of the effective life of pretrial detention orders against an individual who is a fugitive may not be reduced to a figure, as the order by itself does not constitute an abridgment of his physical liberty and may not be or become illegal or arbitrary.

Comments by the authors on the observations made by the State party

5.1 On February 6, 2014, the authors made comments on the observations by the State party.

5.2 The campaign aimed at discrediting them [the authors] and the constant statements made against them continue. Thus, in February 2014, during the program *Enlace Ciudadano*, broadcast by several radio and television outlets, the President of the Republic once more accused them of driving the country's leading bank into bankruptcy and attacking the national government in press outlets, referring to them as "scoundrels" and "criminals."

5.3 Ecuador affirms that the criminal proceedings observed all guarantees of due process and effective protection by the courts. However, it offers no basis for this assertion, does not deny the facts that are the subject of the communication, and does not challenge their characterization as a violation of rights guaranteed under the Covenant.

5.4 As regards the observations related to the seizure procedure, the authors point out that behind the rights of legal persons are the rights of their shareholders, physical persons who the State itself decided were the authors or members of their family. The Act of Economic Rearrangement in the Tax and Fiscal Area expressly provides for a measure against "the shareholders," who would be answerable with their personal assets, *i.e.*, as individuals or physical persons, for the alleged losses sustained by the banks, *i.e*., the legal persons in which they are partners as individuals. All acts of the State reported in the present communication were explicitly directed against the authors *qua* individuals and not against a legal person.

5.5. With respect to the proceedings before the Inter American Human Rights Commission, the authors filed their complaint in 2005, but in 2008 the Commission decided not to admit it on the grounds that internal appeals had not been exhausted. The authors requested that the Commission reconsider its decision but subsequently waived their request and formally

withdrew their petition. This took place before they filed their communication with the Committee.

5.6 The authors reject Ecuador's argument of incompetence *ratione loci*. All acts reported in the communication were carried out by agents of the State in the exercise of Ecuadorian jurisdiction. Their [the authors'] absence from the territory does not release the State from its responsibility for the violation of its obligations under the Covenant, nor does it deprive the victims of the protection afforded by the Covenant. Prosecuting an individual denotes the exercise of the jurisdiction and the power of the State over that individual.

5.7 Ecuador does not produce any evidence of the abuse of [the authors'] right, nor does it explain how such an abuse might have occurred. As regards the delay in the criminal proceedings, it is imputable to the lack of diligence on the part of the judicial authorities and the arbitrary manner in which they have acted; this has compelled the authors to file appeals in order to defend their procedural guarantees.

5.8 Ecuador points to deregulation and the freeing up of financial activities which reduced State control over that sector as one of the causes of the financial crisis of 1999-2000. This affirmation shows that the activities and behaviors for which the authors were prosecuted were not prohibited by the legislation in effect at the time. Quite the contrary: they were in agreement with the General Act on Financial System Institutions.

5.9 With respect to the duration of the proceedings, the authors beg to point out that not filing appeals and not raising defenses cannot be a negative burden to be borne by the victims of procedural violations. The six-year delay in initiating criminal proceedings following the order to commence such proceedings may not be attributed to the authors; nor can it be justified that proceedings to determine criminal liability for bank crimes should have lasted more than 13 years.

5.10 The Organic Code of the Judicial Function, issued on March 9, 2009, does not grant the National Court competence to designate occasional associate justices, and repeals the Resolution of the Supreme Court on May 19, 2008, which allowed the designation of occasional associate justices.

5.11 With respect to Mandate No. 13, the authors recall that the purpose of a Constituent Assembly is to draft a new constitution. In certain cases, those bodies have assumed other functions such as the designation of officials or the promulgation of certain transitory norms between one constitutional order and the one that will follow it. However, the fact that a constituent body should regulate and be involved in particular cases pertaining to specific individuals, depriving them of fundamental rights, constitutes an irregular and discriminatory situation.

5.12 As regards the *ex post facto* non-application of a crime, or of a repealed crime, Ecuador failed to provide a precise answer to the authors' allegations or to overcome their arguments with respect to the violation of Article 15(1) *in fine* of the Covenant. As to the complaint made under Article 9 of the Covenant, the authors reiterate their initial arguments. The arrest warrant against

them remains in effect and Ecuador continues to attempt to physically deprive them of their freedom.

Committee Deliberations

Admissibility Review

6.1 Prior to reviewing any complaint made in a communication, the Human Rights Committee must decide, in accordance with Article 93 of its Rules and Regulations, whether or not the case may be admitted under the Optional Protocol to the Covenant.

6.2 The Committee notes the objection raised by the State party that obligations under the Covenant are not enforceable against it because the authors are not in Ecuadorian territory. The Committee considers that the authors' complaints related to judicial proceedings conducted against them in the State party, independently of their residence abroad, and that the State party has exercised its jurisdiction over this matter. Consequently, absence from the territory does not constitute an obstacle to the admissibility of the communication.

6.3 The Committee considers that the authors' allegations are not of a nature that would imply an abuse of the right to file communications and that no obstacles exist to the admissibility of the communication under Article 3 of the Optional Protocol.

6.4 The Committee notes the State party's observations that the communication is inadmissible under Article 5, paragraph 2 a), of the Optional Protocol because the authors filed a complaint with the Inter American Human Rights Commission. The authors replied to this argument by pointing out that the Commission decided in 2008 not to process the complaint, that the authors requested a reconsideration of that decision, but that they subsequently withdrew their request, prior to filing their communication with the Committee. The Committee recalls its jurisprudence[8] and considers that the same matter is not being reviewed within the framework of another international review or arrangement procedure. Therefore, the Committee is not barred by Article 5, paragraph 2 a), of the Optional Protocol from reviewing the present communication.

6.5 The authors affirm that the pretrial detention ordered by the court deprives of their freedom and violates their rights under Article 9 of the Covenant. The Committee observes, however, that the pretrial detention order against the authors was issued within the framework of criminal proceedings; that it has not been carried out as the authors are not within the territory of the State party; and that the authors have not been deprived of their freedom. Therefore, the Committee considers that this complaint lacks support and is inadmissible under Article 2 of the Optional Protocol.

6.6 With respect to the complaints related to Articles 14(1) and (2) of the Covenant, individually and as related to Articles 2(1) and 3(a) and 26 as to the seizure of property, and to Articles 14(1)(2) and (3c) and 15 of the Covenant as regards the criminal proceedings, the

[8] Communication 2202/2012, *Castañeda v. Mexico*, admissibility ruling of July 18, 2013, paragraph 6.3

Committee considers that they have been sufficiently supported for the purpose of admissibility, declares them admissible, and proceeds to review the merits thereof.

Review of the merits of the question

7.1 The Human Rights Committee has reviewed the present communication taking into account all the information provided to it by the parties, as required by Article 5, paragraph 1, of the Optional Protocol.

7.2 The authors allege that the seizure procedure violated their right of access to justice, to equal standing before the law, and to due process under Article 14(1) and (2) of the Covenant in the determination of their civil rights to challenge the seizure of property personally owned by them; that there were no adversarial administrative proceedings where they could exercise their right to a defense before AGD decided to expropriate; that Constitutional Mandate No. 13 forbade the filing of judicial actions against the AGD resolution that ordered the seizures, and expressly established that any judges who admitted any type of constitutional action related to said resolution as well as any steps taken to execute it were to be dismissed under penalty of removal from the bench, without prejudice of any potential criminal liability; and that these questions would likewise violate their right to due process as related to Article 2(1) and (3a), and the right to equal standing before the law and to non-discrimination pursuant to Article 26. The State party points out that the facts associated with the seizure of property have their origin in business activities and actions related to the assets of legal persons. Inasmuch as only physical persons are entitled to international protection in human rights matters, the authors' grievances in connection with the seizure process would fall outside the purpose of the communication; and also *ratione materiæ*, as the subject of said grievances is an alleged right to property.

7.3 The Committee recalls its General Observation No, 31 (2004) on the Nature of the General Legal Obligation Imposed upon State Parties by the Covenant, paragraph 9 of which states that "[t]he fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights."

7.4 In the present case, the Committee Considers that the issuance of Constitutional Mandate No. 13, which expressly forbade the filing of actions for the protection of constitutional rights or others of a special nature against the actions of the AGD and included the instruction to remove from the bench, without prejudice of any potential criminal liability, any judges who would hear this type of actions, violated the authors' right, under Article 14(1) of the Covenant, to a process with due guarantees for the determination of their rights or obligations of a civil nature.

7.5 Having reached this conclusion, the Committee will not review the grievance related to the violation of Article 26 of the Covenant by the same facts.

7.6 The authors affirm that the criminal proceedings violated their rights under Article 14 to be tried by a competent, independent, and impartial court, established by law; to the presumption of innocence; and to be tried without undue delays. In this regard, the Committee observes that

the National Court was designated as having competence by virtue of the special jurisdiction that some of the codefendants enjoyed and on the basis of internal procedural norms the interpretation of which it is not incumbent upon the Committee to question.

7.7 The Committee also observes that the prosecutor's report of November 20, 2002, charged the authors with financial crimes but not with peculation and pointed out, among other things, that bank peculation had been included in the criminal code after the facts in the accusation. Nevertheless, the Chief Justice of the Court issued an order opening full proceedings for the crime of bank peculation, affirming that this behavior was contemplated in Article 257 of the Criminal Code in effect at that time of the facts and that there was jurisprudence to that effect. The order opening full proceedings was confirmed by the Court's Criminal Division on May 12, 2009, but subsequently the justices who sat in this Division excused themselves from continuing to hear the case. This led to their replacement by three associate justices of the same Division who were to decide the authors' challenges to the order to initiate proceedings. Thus constituted, the Division issued a resolution that amended the order of May 12, 2009, opening full proceedings and ruled that the authors should not be tried for peculation but instead for the crimes charged in the prosecutor's report. The Chief Justice of the Court suspended *sua sponte* the associate justices considering their behavior to be irregular, and the State appealed from the resolution issued by them. On the basis of the Court's resolution of January 21, 2009, which allows the Chief Justice of the Court to designate occasional associate judges when neither the justices nor the permanent associate judges are able to act, three occasional associate justices were appointed to the Criminal Division to decide the appeal. Thus organized, the Division revoked the decision of the permanent associate justices on the classification of the crime on the grounds that the latter, although not empowered to do so, had amended *sua sponte* the decision of the justices, for, independently of the composition of the Division, it was still the same jurisdictional organ and, therefore, it could not revoke its own decision.

7.8 The Committee observes that the Criminal Division's competence to decide matters related to the order to initiate proceedings is not at issue. The fact that its composition was altered twice on the grounds of procedural norms does not affect the principle of the natural judge in the circumstances of the case, for the decision on such composition was accomplished under the laws in effect at the time, including the norms which regulate the operation of the Court, according to the affirmations made by the State party. Since the Committee is not a fourth instance, it is not incumbent upon it to analyze the substantive contents of the decisions made by the intervening justices.

7.9 The Committee notes the statements made by the President of the Republic asking for the removal of the associate judges; and that on January 26, 2010, the National Assembly issued a resolution rejecting the associate judges' decision and asking for an investigation into their actions; and that the associate judges were removed from the bench and tried by the National Court for prevarication, although the case was eventually dismissed.

7.10 The Committee observes that the facts that led to the authors' prosecution had major and long-lasting repercussions on the country's economic and financial situation. The Committee observes that, within this framework, the country's highest authorities spoke out publicly and made statements urging that those responsible for those events, individuals who had headed the

country's most representative financial institutions, be subjected to criminal sanctions. This does not imply, however, that the manner in which the criminal proceedings against the authors was conducted, nor the final outcome of the investigation, was in obedience to, or the result of, those public statements by representatives of the executive or legislative branch, or that such representations constituted a violation of any of the Covenant's norms.

7.11 In light of the foregoing, the Committee deems that the facts as set forth do not allow it to conclude that a violation of Article 14(1) and (2) of the Covenant exists.

7.12 With respect to the authors' complaint related to the delay in the criminal proceedings, the Committee observes and agrees with the State party that the facts that were the subject of the judicial investigation were quite complex, not only by virtue of their very nature but also because of the number of individuals involved in them. Furthermore, there was a large number of procedural motions and appeals that the Court was called upon to decide. Taking these factors into consideration, the Committee lacks sufficient elements to conclude that there were undue delays on the part of the National Court under Article 14(c) of the Covenant.

7.13 The authors affirm having been the subject of a violation of Article 15 of the Covenant due to their having been convicted of a crime, bank peculation, contemplated in Article 257 of the Criminal Code, which did not cover the acts imputed to them and that, in order to convict them, the courts abused the interpretation of said article. Moreover, behaviors were imputed to them that fell within the legal definition of "misappropriation" even though the misappropriation of public or private funds as a form of peculation was decriminalized in 2001. The Committee observes that the issues related to the type of crime applicable to the authors and the construction of Article 257 of the Criminal Code were the subject of numerous procedural motions and pronouncements by different divisions of the National Court since the inception of the proceedings through the handing down of the decision on the motion to vacate, which reviewed the evolution of the types of crimes applied to the case, including the nomenclature of bank peculation. Prior to the conviction at the trial court level, the Criminal Division of the National Court, in three different manifestations (justices, permanent associate justices, and occasional associate judges), had issued opinions on the classification of the acts imputed to the authors as peculation. Indeed, the legal controversy over the classification of the imputed acts as peculation was what caused the Division's justices to excuse themselves from continuing to hear the matter; the permanent associate justices to be removed from the bench; and the appointment of a division comprised of occasional associate justices. The same issue was also reviewed at the appellate and cassation levels. The grievances brought by the authors before the Committee under Article 14(1) and (2) of the Covenant are likewise based on the controversy over whether the acts imputed to them might or might not be included within the definition of peculation contained in Article 257 of the Criminal Code. The complaints under Article 14(1) and (2) and those related to Article 15 of the Covenant are, therefore, intimately related. However, the Committee lacks competence to decide the debate on the *ius puniendi* or over the different criminal nomenclatures and the contents thereof, as the Committee is not a fourth instance.

7.14 The Committee recalls its jurisprudence under which it is incumbent upon the courts of State parties to weigh the facts and the evidence in each particular case, or the application of internal legislation, unless it should be demonstrated that such weighing or application was

clearly arbitrary or tantamount to a manifest error or to the denial of justice. The Committee observes that, in accordance with the cassation decision, the behavior imputed to the authors was already contemplated in Article 257 of the Criminal Code in effect as the time the acts occurred (bank peculation) and that the 1999 amendment, which was adopted subsequently to said acts, simply clarified what had been previously established in relation to the active subjects of the aforementioned crime. The Committee considers that there are insufficient elements to affirm that the interpretation of Article 257 of the Criminal Code made by the internal courts was manifestly erroneous or arbitrary. Consequently, the facts described do not allow the Committee to conclude that there was a violation of Article 15 of the Covenant.

8. The Human Rights Committee, acting under the provisions of Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights rules that the State party violated the authors' rights under Article 14(1) of the Covenant to a process with due guarantees for the determination of their rights or obligations of a civil nature.

9. In accordance with Article 2, paragraph 3), of the Covenant, the State party has the obligation to provide the authors an effective appeal. In compliance with this obligation, the State must make full reparation to the individuals whose rights acknowledged in the Covenant may have been violated. Consequently, the State party must ensure that the pertinent civil proceedings are carried out with guarantees, in accordance with Article 14(1) of the Covenant and the present opinion.

10. By becoming a party to the Optional Protocol, the State party has acknowledged the Committee's competence to determine whether or not there has been a violation of the Covenant. Pursuant to Article 2 of the Covenant, the State party has undertaken to guarantee all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and legally enforceable appeal whenever a violation is proven. Therefore, the Committee asks the State party to file, within a term of 180 days, information on the measures it may have adopted in order to apply the present opinion. The State party is likewise asked to publish the Committee's opinion and to afford it wide dissemination within the State party.

Annex

Partial dissent by Committee Member Yuval Shany

[*Original: English*]

1. I agree with the Committee that Resolution AGD-UIO-GG-2008-12, approved by the Deposits Guarantee Agency on July 8, 2008, together with Legislative Decree No. 13, approved by the Constituent Assembly on the following day, violated the authors' right, recognized in Article 14, paragraph 1, of the Covenant, to be publicly heard, with due guarantees, by a competent court in order to determine their legal rights and obligations which, in this case, are their rights and obligations as private individuals who sustained the seizure of their assets in their capacity as directors and stockholders of Filanbanco. The Committee also acted correctly in overruling the State party's *ratione personæ* objection, making reference to the objective of the challenged measures of expropriating corporate assets, inasmuch as the authors' private property was comprised within said measures and they were deprived, as private individuals, of the ability to oppose the lawfulness of such measures.

2. However, I am not as convinced by the manner in which the Committee has considered the declaration of the President of Ecuador asking that the associate justices be investigated and removed, nor by the way in which it has considered the authors' assertions with respect to the retroactive application of Law No. 99-26 of May 13, 1999. As regards the president's declaration, I do not agree with the Committee's position that the key question is to determine whether or not it has been shown that that the "manner in which the criminal proceedings against the authors unfolded or the final outcome of the investigation was influenced by the public statements made by representatives of the executive and the legislative branches or were the result of such statements" (par. 7.10). The fact that a high ranking member of the executive branch should ask that judges be investigated and removed by reason of the provisional decision they handed down in the course of complex criminal proceedings is a grave and direct act of interference with the independence with which such proceedings are conducted. It should be recalled in this regard that the right to be tried by an independent court is an absolute right[9] in the sense not only that it is not subject to exceptions but also in the sense that said right is not subject to the eventual result of irregular acts. Or to put it differently: the right to be tried by an independent court may be violated even if it is not shown that the outcome of the process was affected by the lack of independence. Therefore, it is my opinion that the president's statement violated the authors' rights to be tried by a truly independent court that reasonably appears to be independent.[10]

3. With respect to the issue of retroactivity, the Committee rightly points out that it is generally incumbent upon the national courts of State parties to evaluate the manner in which national law is applied. This notwithstanding, in the circumstances of the present case, where the Attorney General and the associate justices opined that the complaint should not include the new crime of bank peculation because of the non-retroactive application of its new definitions, and

[9] See the Committee's general observation No. 32 in par. 19

[10] *Findlay contra el Reino Unido*, opinion by the European Court of Human Rights on February 25, 1997, par. 73

considering the aforementioned interference by the executive branch in the criminal proceedings, I continue to harbor doubts as to whether the final position of the national courts in the matter could be fully admitted by the Committee.