United Nations CCPR/C/132/D/3238/2018

International Covenant on Civil and Political Rights

Distr.: General
24 August 2022
English
Original: Spanish

Human Rights Committee

Views adopted by the Committee under the Optional Protocol, concerning communication No. 3238/2018*, **, ***

Communication submitted by:	F.F.J.H. (represented by counsel, S.L.I.)
Alleged victim:	The author
State party:	Argentina
Date of communication:	28 August 2018 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 4 September 2018 (not issued in document form)
Date of decision:	8 July 2021
Subject matter:	Extradition to Chile
Procedural issues:	Examination under another procedure of international investigation or settlement; fourth level of jurisdiction; lack of substantiation; failure to exhaust domestic remedies
Substantive issues:	Prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; procedural safeguards; protection of minorities
Articles of the Covenant:	7, 9, 14 and 27
Articles of the Optional Protocol:	2 and 5 (2) (a) and (b)

1.1 The author of the communication is F.F.J.H., a national of Argentina born on 9 May 1986. He is a member of the Mapuche people and the traditional authority – known as the *lonco* – of his community. He claims that the State party would violate his rights under articles 7, 9, 14 and 27 of the Covenant if it were to extradite him to Chile. The Optional Protocol entered into force for the State party on 8 November 1986. The author is represented by counsel.

1.2 On 4 September 2018, pursuant to rule 94 of its rules of procedure, the Committee, through the intermediary of its Special Rapporteur on new communications and interim

* Adopted by the Committee at its 132nd session (28 June to 23 July 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** An individual opinion by Committee member Hélène Tigroudja (partially dissenting) is annexed to the present Views.

measures, registered the communication and requested the State party to take interim measures consisting of suspending the author's extradition to Chile while the Committee was examining his case.

Facts as submitted by the author

2.1 The author is a member and the *lonco* of the Pu Lof Mapuche community in the Cushamen Department of Chubut Province, Argentina. Since there are no traditional Mapuche doctors (known as *machi*) in Argentine territory,[1] it is common for Mapuche living in Argentina to cross the international border with Chile in order to receive medical care from traditional doctors based in Chilean territory. Thus, on 30 January 2013, the author was in Chile, receiving medical care at the home of M.H.P., the *machi* of the El Roble Carimallín community in the Río Bueno commune of the Los Ríos region.

2.2 During the traditional medicine session, members of the Chilean Carabineros (police) burst in and arrested the *machi*, together with the author and three other Mapuche. The arrestees were all accused of having set fire to a house on a farm on 9 January 2013 and of having manufactured firearms and ammunition. The author was also accused of having entered Chile illegally.[2]

2.3 From 30 January 2013, the day of his arrest, until 7 January 2014, the author was held in pretrial detention in Chile. On 7 January 2014, he was placed in night detention, meaning that he could go out during the day but had to sleep in prison. He was subsequently placed under house arrest and had to remain in Chile until the trial, which was scheduled for October 2014. However, staying in Chile entailed costs that the author could not afford and meant that he continued to feel wholly uprooted from his community and family across the border in Argentina. He therefore returned to Argentina via an ancestral Mapuche cultural route.

2.4 In October 2014, the author failed to appear at the trial that was held before the Criminal Court for Oral Trial Proceedings in Valdivia, Chile, and was therefore considered to be a fugitive.[3]

2.5 On 5 February 2015, the police force of Chubut, Argentina, obtained by means of torture a statement from a member of the Mapuche people that included information about the author's whereabouts.[4] On 9 February 2015, the local prosecutor's office in Río Bueno, Chile, requested the author's extradition, having learned his whereabouts through exchanges with the International Criminal Police Organization (INTERPOL) and the General Directorate for Regional and International Cooperation of the Attorney General's Office in Argentina.[5]

[1] According to the communication, the absence of traditional Mapuche doctors is the result of a historical process, attributable to the State party's relentless political and religious persecution of such doctors.

[2] The author explains that the territory of the Mapuche people extends over both sides of the current international border between Argentina and Chile. The Mapuche have used cultural routes between the two countries since time immemorial, in accordance with the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which requires States to facilitate contacts and cooperation between indigenous peoples across borders.

[3] At the trial, three of the defendants were acquitted because there was insufficient evidence and the *machi* was convicted of being an accessory after the fact. On 21 December 2018, following his extradition to Chile, the author would be sentenced to 9 years' imprisonment for arson and illegal possession of a firearm (para. 7.3).

[4] It emerges from a reading of the various documents in the case file that, independently of the proceedings in Chile, the author was already wanted by the Argentine authorities because he was facing charges in a number of criminal cases in Argentina (unlawful appropriation, cattle theft and possession of a firearm; inciting mob violence; inciting mob violence and public intimidation (para. 3.1). It was in the context of these investigations that a statement concerning the author's whereabouts was obtained from a member of the Mapuche people by means of torture.

[5] It emerges from a reading of the various documents in the case file that the extradition request was not initiated on 9 February 2015: as the State party explains (para. 6.3), the international arrest warrant was issued by Chile on 27 October 2014 (when the author failed to appear for trial, having violated the terms of his house arrest and returned to Argentina). A Red Notice was added on 9 February 2015 after the author's whereabouts had been ascertained.

2.6 As of 24 May 2016, the Special Police Operations Group of Argentina started filming the private day-to-day lives of the author's community in a bid to locate him. On 27 May 2016, the Group entered the community, violently evicted all its members and arrested the author.[6]

2.7 The author was held in pretrial detention until 6 September 2016, when the Federal Court of First Instance of Esquel, in the province of Chubut, declared the police report of 5 February 2015 concerning the author's whereabouts to be invalid because it had been drawn up on the basis of statements obtained through torture (para. 2.5). The Court therefore ordered the author's release.

2.8 On 22 September 2016, the Esquel Federal Prosecutor lodged an appeal with the Supreme Court against the judgment ordering the author's release.

2.9 On 27 June 2017, while the appeal was still pending, the author was arrested again under the same international arrest warrant and a second judicial extradition procedure was initiated, this time before the Federal Court of San Carlos de Bariloche, Argentina.[7]

2.10 On 3 August 2017, the Supreme Court finally ruled on the appeal lodged by the Esquel Federal Prosecutor in the first extradition proceedings (para. 2.8), upholding the first-instance ruling that the author should be released on the grounds that the police report was invalid.

2.11 However, on 5 March 2018, the Federal Court of San Carlos de Bariloche decided to grant the request for extradition.

2.12 On 16 April 2018, the author filed an appeal with the Supreme Court. On 23 August 2018, the Court confirmed the decision to extradite him.

2.13 At the time of the communication's submission, the author was being held in prison unit No. 14 in the town of Esquel pending his extradition to Chile.

Complaint

3.1 The author claims that the context for this communication is the criminalization of the Mapuche people for asserting their traditional land rights in the face of the illegal acquisition of land within their territory by the livestock breeding company Compañía de Tierras Sud Argentino S.A. and the Italian businessman Luciano Benetton, founder of the multinational company Benetton. The author reports that one of the main organizations driving this territorial claim is the Movimiento Mapuche Autónomo del Puelmapu (Autonomous Mapuche Movement of Puelmapu), of which he is one of the leaders. The author reports that three other criminal cases have been brought against him in the State party, for unlawful appropriation, cattle theft and possession of a firearm; inciting mob violence; and inciting mob violence and public intimidation. This shows that he is being persecuted for his efforts to defend Mapuche territory. The author notes that the *machi* community in Chile is also being criminalized for defending its traditional territory against the construction of a hydroelectric dam without the free, prior and informed consent of those affected.

3.2 The author claims that all domestic remedies have been exhausted and that he is about to be extradited to Chile, where his health and physical and spiritual integrity would be at risk. He has therefore asked the Committee to request interim measures in order to prevent his extradition while the case is under consideration.

3.3 In particular, the author claims that his extradition would violate article 7 of the Covenant, because he is at risk of being tortured in Chile. The author recalls that the main

[6] The arrest in May 2016 was made in connection with investigations in the criminal case opened in Argentina for alleged offences of unlawful appropriation and aggravated theft of cattle belonging to Compañía Tierras del Sud Argentino S.A. (para. 6.3).

[7] It emerges from a reading of the various documents in the case file that, when the author was arrested on 27 June 2017 in connection with a road traffic offence, the police realized that there was an international arrest warrant issued against him and notified the duty federal judge with jurisdiction over the matter, which was a judge assigned to the Federal Court of San Carlos de Bariloche (para. 6.4).

concerns raised by the Committee against Torture in its concluding observations on Chile[8] included the inappropriate application of counter-terrorism legislation in order to bring proceedings for terrorism against Mapuche activists charged with damaging private property; police brutality and the excessive use of force against members of the Mapuche people; and the poor sanitation and hygiene facilities in prisons. The author notes that while he was in pretrial detention in Chile, he suffered cruel and degrading treatment, including corporal punishment, verbal abuse, harassment by prison officers for being Argentine and cold temperatures because the prison had no heating or windowpanes.

3.4 The author also alleges a violation of his rights under article 9 of the Covenant. Although both States have ratified the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), article 10 of which states that preference should be given to methods of punishment other than confinement in prison in cases involving members of indigenous peoples, neither the Chilean nor the Argentine judicial authorities take this stipulation into account. As a result, he is being uprooted from his family, community and culture. The author notes that, while in detention, he has suffered from panic attacks, as well as chronic ulcers, blood vomiting and pain in various parts of his body, because his spirit "is out of place and is suffocating in confinement".

3.5 The author also alleges a violation of article 14 of the Covenant, arguing that the extradition proceedings are unlawful because they are based on a police report containing statements made under torture; because the second extradition procedure was initiated while the first was still pending; and because the judge of San Carlos de Bariloche is not the natural judge.

3.6 Lastly, the author claims that, because of the intimate relationship that is established between the *lonco*, the community and the land, his absence leaves the entire community unstable and unprotected, in violation of article 27 of the Covenant. The author explains that *loncos* are considered to be custodians of ancestral knowledge and are responsible for leading decision-making and presiding over important religious ceremonies.

3.7 The author requests that, by way of reparation, the State party should refrain from criminalizing members of the Mapuche people; refrain from dispossessing them of their ancestral territories in order to hand the land over to multinational companies; guarantee them equal treatment before the courts and other organs administering justice; and punish acts of violence committed by State officials against members of the Mapuche people.

Additional information provided by the parties after the communication was registered and interim measures were granted

4.1 In written submissions dated 10 and 23 September and 7 October 2018, the author reported that his request for release was rejected by the Federal Court of San Carlos de Bariloche on the grounds that he might try to escape the administration of justice, and that he was extradited on 11 September 2018 without his national identity document or passport, with only the clothes he was wearing and not enough warm clothing for bad weather, and without his traditional medicine (*lawen*) or toiletries. The author noted that the prison in Valdivia, Chile, where he is being held suffers from flooding and has no windowpanes or heating.

4.2 The author also recounted that the trial for which he was extradited was scheduled for 4 December 2018 and recalled that the Committee against Torture had expressed concern at the breadth and vagueness of the characterization of terrorism offences in Chile and the inappropriate application of counter-terrorism legislation in order to bring proceedings for terrorism against Mapuche activists charged with committing violent acts that resulted in damage to private property, as well as the number of deaths in custody, which amounted to 1,262 cases between 2010 and June 2018.[9]

5. On 11 September 2018, the State party indicated, by means of a note verbale, that it had examined the request for interim measures in line with the provisions of the Optional

[8] CAT/C/CHL/CO/6, paras. 18 and 19.

[9] Ibid, paras. 18 and 34.

Protocol and that the communication did not put forward any arguments or facts that shed new light on the issues that had already been considered by the Supreme Court of Justice. It stated that the author exercised his right to a defence without restriction throughout the extradition proceedings and that his case was even brought before the Supreme Court. However, all the judicial authorities had already dismissed the arguments that the author was now putting forward to the Committee and had concluded that the extradition was admissible because there was no evidence in the case file to suggest that the author would be at risk of persecution, ill-treatment, torture or a violation of his right to due process after being handed over to the Chilean authorities. Accordingly, the State party indicated that its understanding was that there were grounds to proceed with the author's extradition, and that it would submit its observations on admissibility and the merits before the established deadline.

State party's observations on admissibility

6.1 On 5 November 2018, the State party requested the Committee to declare the communication inadmissible on the grounds that the Committee was being asked to serve as a court of fourth instance and the same matter was being examined by the inter-American human rights system.

6.2 Regarding the alleged inadmissibility of the communication under article 5 (2) (a) of the Optional Protocol, the State party asserts that all the claims contained in the communication have already been submitted to the Inter-American Commission on Human Rights in the context of precautionary measures request No. MC-18-17 of 13 January 2017. This request was submitted on behalf of the members of the Pu Lof community whose *lonco* is the author in connection with their claim to ancestral territory, and it addresses the extradition and alleged criminalization of the author. The State party affirms that, in its replies to the Commission, it has already provided detailed information about the international arrest warrant issued for the purpose of extradition and the steps taken by the Argentine courts in the extradition process.

6.3 Regarding the alleged inadmissibility of the communication on the grounds that the Committee is not a court of fourth instance, the State party asserts that, since an international arrest warrant had been issued on 27 October 2014, when the author had failed to appear in court in Chile after having violated the terms of his house arrest and returned to Argentina, the first extradition proceedings were indeed initiated before the Esquel Federal Court on 27 May 2016, but that, on the same day, the author was brought before the Esquel College of Criminal Court Judges in a case involving offences committed in Argentina, namely, alleged offences of unlawful appropriation and aggravated theft of cattle belonging to Compañía de Tierras Sud Argentino S.A. However, on 6 September 2016, the Esquel Federal Court declared the proceedings before it to be null and void and ordered the author's release on the grounds that the police force had obtained information about his presence in Argentina unlawfully, in the context of a case filed against another member of the Mapuche (para. 2.7). The release order became final on 3 August 2017 when the Supreme Court declared the appeal lodged by the prosecutor's office to be inadmissible (para. 2.10).

6.4 The State party further recounts that the second extradition proceedings were initiated on 27 June 2017 when the author was arrested during a road safety operation for travelling in a vehicle that was carrying more than the authorized number of passengers. Since an international arrest warrant had been issued, the duty federal judge with jurisdiction over the matter, which was a judge assigned to the Federal Court of San Carlos de Bariloche, was notified that same night. On 7 September 2017, that Court decided that, since the Esquel Federal Court had not ruled in the first extradition proceedings on the admissibility or inadmissibility of the Chilean request for extradition but only on the invalidity of the Chubut police report, the subject matter of the first and second proceedings was not the same; the proceedings could therefore continue as the only extradition proceedings, because the first case had been set aside.

6.5 The State party reports that the Esquel Federal Court, ruling on an objection to jurisdiction lodged by the public defender of Esquel in the hope that a judge of this division would take over the extradition proceedings, found that there was nothing to prevent the Federal Court of San Carlos de Bariloche from conducting the proceedings, bearing in mind that the decision of the Esquel Federal Court to declare the first proceedings null and void

did not mean that the request for extradition had been rejected. Whether it was rejected would depend on whether there had been a failure to fulfil the substantive requirements established in the applicable international assistance agreement, and there had been no ruling on that question.

6.6 The State party confirms that, on 5 March 2018, the Federal Court of San Carlos de Bariloche declared that the author could be extradited (para 2.11) in order to be tried for setting fire to a place of residence and possessing a firearm illegally, but not for possessing ammunition illegally and entering the country illegally, in violation of the law on foreign nationals. When examining the admissibility of the extradition request, the Court checked that there were no grounds for denying the request, that is, that the criminal proceedings and sentence were not time-barred, that the accused was not being tried in Argentina for the same acts, and that the offences with which he was charged were not political ones in application of article 8 (d) of the Act on International Cooperation in Criminal Matters, which prohibits extradition when there is evidence of persecutory intent on account of political opinions. The State party notes that the Court has already explained in detail why the author's claims of persecution on account of his political opinions and his membership of the Mapuche people were not considered valid, even pointing out that, in the trial held in Chile, membership of the Mapuche people had been used not as an aggravating circumstance – which would have lent credence to the allegation of persecution – but rather as a mitigating circumstance in order to obtain a lower penalty for another of the defendants. After an extensive review, the Court found that the proceedings being conducted in Chile could be considered to ensure due process of law and that the Counter-Terrorism Act did not apply, since the defendants were being prosecuted for ordinary offences. In response to the author's claims that he might face ill-treatment if he were to be extradited to Chile, the Court referred to the prison situation and noted not only that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism had found that adaptations had been made in an effort to accommodate the special needs of Mapuche detainees, but also that the author had not provided any evidence indicating that he was likely to face ill-treatment.

6.7 The State party also confirms that, on 23 August 2018, the Supreme Court upheld this decision on appeal (para. 2.12), and declared that the author could be extradited for trial, provided the Chilean authorities took into account the time he had spent in detention during the previous extradition proceedings. The State party notes that the Supreme Court responded to each of the points that are now being raised by the author before the Committee and pointed out that steps had been taken to ensure that the author was able to follow various Mapuche cultural practices, including medical practices and the performance of periodic ancestral ceremonies, while he was in pretrial detention. When authorizing the extradition, the State party authorities also stipulated that the author must be able to take his ceremonial items with him. Lastly, the State party reports that, since the author did not have a national identity document in his possession, the judge ordered the national registry office at the airport to issue one urgently on the day of his extradition; the author did, therefore, travel with an identity document, contrary to his claims (para. 4.1).

6.8 Consequently, the State party claims that the extradition process was handled in full compliance with international standards, by judges who had jurisdiction and acted impartially, within a reasonable time frame, with complete respect for due process and taking into account the international standard that requires States not to extradite a person where there are substantial grounds for believing that there is a real risk of irreparable harm – a possibility that was duly and extensively analysed and ruled out. The State party concludes that, in his communication, the author is merely reiterating arguments that have been presented to the domestic courts and rejected by them with due substantiation and in accordance with the law, and that the Committee is not a court of fourth instance.

Author's comments on the State party's observations on admissibility

7.1 On 10 January 2019, the author claimed that the State party had violated the Optional Protocol by failing to take the interim measure requested by the Committee,[10] since, if the

[10] *K.B. v. Russian Federation* (CCPR/C/116/D/2193/2012) and *Saidova v. Tajikistan* (CCPR/C/81/D/964/200).

Committee were to conclude from its consideration of the communication that there had been irregularities in the extradition proceedings as alleged, irreparable harm would have been caused, irreversibly affecting the right to submit an individual communication.

7.2 The author also claimed that the communication should be declared admissible because the proceedings for precautionary measures brought before the Inter-American Commission on Human Rights did not involve an assessment of whether violations had been committed but merely of whether there was a serious and imminent risk.

7.3 Lastly, the author also reported that he had been sentenced by the State of Chile to 9 years' imprisonment for arson and illegal possession of a firearm in a sentence handed down on 21 December 2018 and that that there was now a request for his extradition to Argentina because the State party was ready to conduct oral proceedings in one[11] of the three cases opened against him (para. 3.1).

State party's observations on the merits

8.1 On 4 March 2019, the State party reiterated that the questions raised by the author before the Committee regarding the extradition proceedings that had allegedly violated articles 7, 9 and 14 of the Covenant had already been duly addressed and decided by the Argentine courts, in full compliance with the relevant international standards, and that the author was therefore asking the Committee to serve as a court of fourth instance. The State party also reiterated that it had paid particular attention to the author's specific needs, that it had made sure that he was able to follow various cultural practices – i.e. traditional medical practices and the performance of ancestral ceremonies in order to maintain a link with his community – while in detention in Argentina and that it had specified in the extradition request that the author should have his ceremonial items with him when he was transferred to Chile. For this reason, the State party concluded that there has been no violation of article 27 of the Covenant.

8.2 The State party affirmed that the Chilean courts had fully complied with the terms on which extradition had been granted: the author had been tried for the offences deemed extraditable by the Argentine courts and the time that he had spent in pretrial detention had been taken into account when he was sentenced. The trial had been conducted by competent, independent and impartial judges, in accordance with due process guarantees, and the author had been able to exercise his right of defence. Furthermore, his conviction had been reviewed by the Supreme Court of Chile after he had submitted an appeal for annulment. Lastly, the State party maintained that the author was being held in conditions of detention that met the relevant international standards, which meant that, contrary to his claims, there was no risk of irreparable harm.

Additional information provided by the parties

9. In a submission to the Committee dated 9 April 2019, the author requested that he should be permitted to serve the sentence handed down by the Chilean authorities in Argentina so that he would be close to his community and family. He also requested compensation for the harm caused by the State party's failure to comply with the Committee's request for interim measures.

10. On 19 June 2019, the State party reported that the Inter-American Commission on Human Rights had closed the file relating to the author's request for precautionary measures on 10 April 2019.

11. On 13 July 2019, the author reiterated that the State party had violated the Optional Protocol by failing to take the interim measure requested by the Committee, and that the extradition process had been unlawful owing to the lack of minimum guarantees.

12. On 10 August 2019, the author reported that the State party's request for him to be extradited in order to be tried for unlawful appropriation and theft of cattle belonging to Compañía de Tierras Sud Argentino S.A. had not been granted because it did not meet the

[11] For the offences of unlawful appropriation and theft of cattle belonging to Compañía de Tierras Sud Argentino S.A., a case in which other members of his community were acquitted (para. 3.1).

relevant requirements: unlawful appropriation is not an extraditable offence because it is punishable by a minimum prison term of 6 months, not 1 year. The author also recounted that the State party had rejected his request for the case to be definitively dismissed on the grounds that the reasonable period of three years provided for in article 146 of the Chubut Code of Criminal Procedure had elapsed.

13. On 10 October 2019, the State party argued that there was no link between the author's prosecution for the offences of unlawful appropriation and theft of cattle belonging to Compañía de Tierras Sud Argentino S.A. and the subject matter of the communication, which concerned the alleged violation of his rights in the event of extradition. The State party noted, nevertheless, that the judgment rejecting the author's request for a definitive stay of proceedings had been challenged through a special appeal that was still pending, and that domestic remedies had therefore not been exhausted in that respect.

14. On 25 April 2020, the author reported that on the previous day he had been placed in preventive isolation in Temuco prison, where he was serving his sentence, because he had been in contact with a psychologist who was a carrier of the coronavirus (COVID-19), and that he feared he would lose access to culturally appropriate health care and food.

15. On 29 May 2020, the State party claimed that it lacked jurisdiction *ratione loci* in respect of the issue mentioned in paragraph 14 as it fell within the jurisdiction of Chile. Notwithstanding the foregoing, the State party reported that officials at the Consulate of Argentina in the city of Concepción, Chile, had been in contact with Temuco prison by telephone on 13 May 2020 and had been informed that a general quarantine had been imposed because the psychologist involved in the social reintegration programme for detainees had been found to be an asymptomatic carrier of COVID-19, but that the author had tested negative for the virus. The Consulate had also been informed that the author made telephone calls to his family and his lawyers between two and five times a week and that detainees had access to three computers through which they could access platforms such as Facebook and Skype. On 15 May 2020, the Consul spoke directly by telephone with the author, who said that he was in good health and that he could communicate with his family via international telephone calls from the duty telephone in the Mapuche wing and via calls received from Argentina every Thursday, as well as via 15- to 20-minute-long video calls every Friday. Lastly, he said that he was consulting his lawyers about evaluating the application of the treaty between Chile and Argentina on the transfer of convicted nationals and the serving of criminal sentences.

Issues and proceedings before the Committee

State party's failure to carry out the request for interim measures

16.1 The Committee notes that the adoption of interim measures pursuant to rule 94 of its rules of procedure, in accordance with article 1 of the Optional Protocol, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measure requested by the Committee with a view to preventing irreparable harm undermines the protection of the rights enshrined in the Covenant.

16.2 As indicated in paragraph 19 of the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol. The Committee is therefore of the view that, by failing to respect the request for interim measures transmitted to the State party on 4 September 2018, the State party failed in its obligations under article 1 of the Optional Protocol.[12]

[12] *B.A. et al v. Austria* (CCPR/C/127/D/2956/2017), paras. 9.1 and 9.2.

Consideration of admissibility

17.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

17.2 Pursuant to article 5 (2) (a) of the Optional Protocol, the Committee must not consider any communication from an individual unless it has ascertained that the same matter has not already been submitted for examination under another procedure of international investigation or settlement. The Committee notes the State party's argument that all the claims contained in the present communication have already been submitted to the Inter-American Commission on Human Rights in the context of precautionary measures request No. MC-18-17 of 13 January 2017 and that, in its various replies to the Commission, the State party has already provided detailed information about the alleged criminalization of the author, the international arrest warrant issued for the purpose of extradition and the steps taken by the Argentine courts in the extradition process. On the other hand, the Committee notes the author's claim that the Committee is not precluded by article 5 (2) (a) of the Optional Protocol from considering the communication, since proceedings for precautionary measures before the Commission do not involve an investigation or assessment of whether rights violations have been committed but merely of whether there is a serious and imminent risk. The Committee also notes that, according to the State party, the Commission has closed the file relating to the request for precautionary measures.

17.3 The Committee considers that, since the Inter-American Commission on Human Rights has closed the proceedings relating to precautionary measures request No. MC-18-17, the matter is no longer pending before this regional body.[13] Moreover, the Committee notes that, when a request for precautionary measures is submitted to the Inter-American Commission on Human Rights or a request for provisional measures is submitted to the Inter-American Court of Human Rights without a related individual petition having been filed, these bodies do not consider the merits of the case, meaning that the procedures for precautionary and provisional measures are separate from the petitions procedure. They therefore do not constitute an examination of the matter within the meaning of article 5 (2) (a) of the Optional Protocol.[14] In these circumstances, and in the absence of information indicating that the same matter has been or is being examined under another procedure of international investigation or settlement, the Committee finds that there is no obstacle to the admissibility of the communication under article 5 (2) (a) of the Optional Protocol.

17.4 The Committee also notes the State party's claim that the communication should be declared inadmissible because, by merely reiterating arguments that have already been presented to the national courts and rejected by them with due substantiation and in accordance with the law, the author is asking the Committee to act as a court of fourth instance. In this regard, the Committee notes the State party's claims that the extradition process was handled in full compliance with international standards, by judges who had jurisdiction and acted impartially, within a reasonable time frame and with full respect for due process and the obligation not to extradite a person where there is a risk of irreparable harm. In particular, the State party claims that the discontinuance of the first extradition proceedings owing to the fact that the police security forces ascertained the author's whereabouts illegally meant that the second proceedings initiated when the author was arrested in connection with a road traffic offence could continue as the only extradition proceedings. It also claims that the Esquel Federal Court found that there was nothing to prevent the Federal Court of San Carlos de Bariloche from conducting the extradition proceedings (para. 6.5); and that, when examining the admissibility of the extradition request, the Federal Court of San Carlos de Bariloche declared that it was admissible in relation to some offences but not in relation to others; and that the Court checked that the requirement relating to statutory time limits had been met, that the accused was not being tried in the State party for the same acts and that the offences with which he was charged were not political.

[13] *Moreno de Castillo et al v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2610/2015 and CCPR/C/121/D/2610/2015/Corr.1), para. 8.3.

[14] *Hernández Colmenarez and Guerrero Sánchez v. Bolivarian Republic of Venezuela* (CAT/C/54/D/456/2011), para. 5.2.

The Court explained in detail why the author's claims of persecution for being a member of the Mapuche people were rejected; assessed whether the proceedings being conducted in Chile could be considered to constitute due legal process; and referred to the prison situation in Chile. The State party also clarified that the Supreme Court had confirmed the admissibility of the extradition request, provided that the Chilean authorities took into account the time already spent in detention, and had noted that steps had been taken to ensure that the author had been able to follow various cultural practices while in pretrial detention. On the other hand, the Committee notes the author's claims that the Mapuche people are being criminalized for asserting their land rights, that he was detained unlawfully, that he was not provided with minimum guarantees or tried by the competent judge in the extradition proceedings, and that he has already suffered cruel and degrading treatment in prison in Chile, including corporal punishment, verbal abuse, harassment for being Argentine, and cold temperatures.

17.5 The Committee notes that the author's claims refer to the evaluation of the facts and the evidence and the application of domestic law by the courts of the State party. The Committee recalls that, according to its established jurisprudence, the evaluation of the facts and the evidence is a matter that falls, in principle, within the purview of the national courts, unless such evaluation were to be manifestly arbitrary or amount to a denial of justice.[15] Accordingly, weight should be given to the State party's evaluation of the facts and the evidence in determining whether the alleged personal risk of irreparable harm in the event of extradition, deportation or expulsion exists.[16]

17.6 The Committee notes that the Committee against Torture concluded that, although there is not at present a consistent pattern of gross, flagrant or mass violations of human rights in Chile, the situation in Araucanía (which includes the city of Temuco, where the author is currently imprisoned) is of concern in many respects with regard to certain Mapuche leaders who are demanding their fundamental rights.[17] The Committee against Torture and the Committee on the Elimination of Racial Discrimination also expressed concern about the use of antiterrorist legislation to suppress demonstrations by Mapuche leaders demanding the return of their ancestral lands.[18] The Human Rights Committee is also aware that the Inter-American Court of Human Rights has ordered Chile to set aside the criminal convictions of Mapuche individuals and activists upholding the rights of indigenous peoples for acts wrongly categorized as acts of terrorism.[19]

17.7 However, in addition to the general context, there must also be a personal risk of irreparable harm. In the present case, the Committee notes that the author has not provided the Committee with substantiated information about the ill-treatment that he allegedly suffered while in pretrial detention in Chile, and that, recently, while serving his sentence in Chile, the author informed the Argentine Consul in the city of Concepción — with whom he spoke directly by telephone – that he was in good health and could communicate with his family by telephone and through video calls (para. 15), according to information provided by the State party that the author has not rebutted.

17.8 In particular, having examined the documents submitted by the parties, the Committee considers that none of the information brought to its attention indicates that the examination of the facts and evidence by the national authorities was irregular or incompatible with the provisions of the Covenant. Rather, the Committee notes that the extradition proceedings began with the author's arrest on 27 May 2016 but were declared null and void by Esquel Federal Court on the grounds that the police force had obtained information about his whereabouts unlawfully – a decision that was upheld by the Supreme Court – and that

[15] *Martín Pozo v. Spain* (CCPR/C/126/D/2541/2015), para. 9.3.

[16] *K. B. v. Russian Federation (*CCPR/C/116/D/2193/2012), para. 10.3; *Z. H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3; and *E. P. and F. P. v. Denmark (*CCPR/C/115/D/2344/2014), para. 8.4.

[17] *Calfunao Paillalef v. Switzerland* (CAT/C/68/D/882/2018), para. 8.3.

[18] CAT/C/CHL/CO/6, paras. 18-22, and CERD/C/CHL/CO/19-21, para. 14.

[19] Inter-American Court of Human Rights, *Norín Catrimán et al. (leaders, members and activist of the Mapuche indigenous people) v. Chile*, merits, reparations and costs, judgment of 29 May 2014, Series C, No. 279.

proceedings were initiated for a second time on 27 June 2017, following the author's arrest in connection with a road traffic offence and the referral of the case to the duty federal judge with jurisdiction over the matter, this being a judge assigned to the Federal Court of San Carlos de Bariloche. The Committee notes that the judicial authorities of the State party explained in detail the reasons for their dismissal of the author's claims that minimum guarantees were lacking in the extradition proceedings, and carefully examined the claim that he would be at risk of ill-treatment if he were to be extradited.

17.9 In this connection, prior to the extradition the Federal Court of San Carlos de Bariloche conducted an in-depth analysis of the author's claim that the extradition proceedings were invalid[20] (pp. 13–20 of the judgment). The Court also examined the requirements that must be met in order for an extradition to proceed according to the Inter-American Convention on Extradition, namely, that the requesting State has jurisdiction and that the act for which extradition is sought is an offence punishable by at least one years' imprisonment. Consequently, the Court declared the extradition admissible in respect of the offences of arson and illegal possession of a firearm but inadmissible in respect of illegal possession of ammunition and entering the country illegally (pp. 21–34 of the judgment). The Court also verified the absence of grounds for denying extradition, namely, that criminal proceedings were not time-barred, that the author would not have to appear before an extraordinary tribunal and that the offence was not a political one (pp. 34–47 of the judgment), and that the purely formal requirements were met (pp. 47 and 48 of the judgment). Subsequently, the Court conducted an in-depth analysis of the author's claim that he was being persecuted because of his political opinions and ethnicity (pp. 48–59 of the judgement). In this connection, and in the light of the relevant case law and jurisprudence, which holds that, in extradition matters, persecution is deemed not to exist in the requesting State if the case is processed in accordance with due process of law, the Court reached the conclusion that there was no persecution for belonging to the Mapuche people and noted that the author was informed of the charges against him in the presence of counsel, that he was brought promptly before a competent ordinary tribunal, that he had legal assistance, and that he was able to put forward various defences. This conclusion was reinforced by the Court's analysis of the decisions taken by the Valdivia Criminal Court for Oral Trial Proceedings during the trial of the other defendants, namely, that it did not apply antiterrorist legislation, that it dismissed the claim that the *machi* was persecuted since her conviction was based on the commission of an act punishable by law and not on her ethnicity, and that it even took into account, as a mitigating circumstance, the fact that the *machi* has the role of "spiritual leader and healer, being an ancestral authority of the Mapuche nation deserving of respect", in the words of the Court. Lastly, the Court also carried out an in-depth analysis of the prison situation in the requesting country, Chile, notably in the light of the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which examined prison conditions, and concluded that there was no evidence to suggest that, if extradited, the author would be exposed to real and certain danger. On this point, the Court indicated that "in spite of the shortcomings that might exist in the prison system of the requesting State, to which other prison facilities in the region are not immune", determined efforts on the part of prison officers to ensure that inmates were treated appropriately, including in accordance with their customs, were apparent (pp. 59–62 of the judgment).

17.10 Furthermore, the Committee notes that, after the extradition, antiterrorist legislation was not applied to the author during his trial in Chile,[21] and that, in the submission to the Committee, the author does not claim that he did not commit the acts for which he was tried and convicted in Chile.

17.11 In the light of the foregoing, the Committee considers that the information provided by the parties in the course of the process does not give grounds to conclude that the national courts of Argentina acted arbitrarily in their evaluation of the evidence and their interpretation of national legislation. Accordingly, the Committee finds the author's claims

[20] Federal Court of San Carlos de Bariloche, judgment of 5 March 2018, case No. 11466/2017.

[21] Valdivia Criminal Court for Oral Trial Proceedings, judgment of 21 December 2018, p. 160 (application of the Criminal Code and Act No. 17.798 on the control of weapons).

under articles 7, 9 and 14 of the Covenant inadmissible under article 2 of the Optional Protocol.

17.12 Regarding the alleged violation of article 27 of the Covenant, the Committee notes that, according to the author, he was taken to Chile without his traditional medicine (*lawen*) and his detention has destabilized his community and left it unprotected. However, the Committee notes that the author does not provide details of the alleged collective cultural harm and that the State party paid particular attention to his specific needs and made sure that he was able to follow various cultural practices while in detention (traditional medical practices and the performance of ancestral ceremonies in order to maintain a link with his community).[22] In these circumstances and in the absence of any other relevant information on file, the Committee concludes that, in the present case, the author has not sufficiently substantiated his claim under article 27 for purposes of admissibility and therefore finds this claim inadmissible under article 2 of the Optional Protocol.

17.13 Lastly, the Committee notes that, while the communication primarily concerns the process of extradition to Chile, the author also claims that he is being persecuted by the State party because three cases have been brought against him and, in particular, because his request for one of those cases to be definitively dismissed has been rejected. The Committee also notes the State party's claim that domestic remedies have not been exhausted because the special appeal lodged by the author against the judgment rejecting his request for definitive dismissal remains pending (paras. 3.1, 12 and 13). Consequently, the Committee concludes that this part of the communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

18. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[22] The State party refers here primarily to the conditions of the author's detention in Argentina, considering that it lacks competence *ratione loci* for the conditions of his current detention in Chile, although it does state that, when the author was transferred he was in possession of his ceremonial items and his traditional medicine and that in Chile he is also being treated appropriately at present.

Annex

[*Original: English*]

Individual opinion of Committee member Hélène Tigroudja (partially dissenting)

1. The present case raises two types of claims: substantive claims relating to the extradition proceedings between Argentina and Chile and to the conditions of detention of the author, a leader of the Mapuche community; and a procedural claim based on the non-compliance by Argentina with the interim measures granted by the Committee in response to the stay of extradition requested by the author.

2. I agree with the decision adopted by the Committee regarding the inadmissibility of the substantive part of the case, and consider that a fair balance was struck between the legitimate concerns regarding the structural discrimination and grave human rights violations suffered by the Mapuche people in Chile and the individual situation of the author.

3. Nevertheless, the majority of the Committee improperly addressed the second part of the case regarding the non-implementation of the interim measures granted by the Committee and requesting the stay of extradition (para. 1.2).[1] To be fair, the Committee did refer to the fact that Argentina had ignored the interim measures granted by the Committee (paras. 16.1 and 16.2) and concluded that, by extraditing the author to Chile, the State party had disregarded its obligations under article 1 of the Optional Protocol. From a legal point of view, this means that Argentina has breached an international obligation, the logical consequence of this wrongful act being the triggering of international responsibility.

4. In most cases, a violation of this international procedural obligation is coupled with one or more violations of the Covenant. In such circumstances, the Committee adopts Views, in which the violations are listed, and grants some measures of reparation.[2] However, it may happen, as in the present case, that the sole violation attributable to the State party is the non-implementation of interim measures and that all substantive claims are rejected. In the present case, the Committee has adopted a decision of inadmissibility, [3] and herein lies my disagreement.

5. The message conveyed to States parties by this practice of the Committee is blurred and legally incorrect. Either the State has violated an international obligation – regardless of its substantive or procedural nature – or it has not. If the State is at odds with its international obligations – and the Committee constantly stresses that article 1 of the Optional Protocol constitutes an international obligation (para. 16.2) – then the Committee cannot formally adopt a decision of inadmissibility. Instead, it should adopt Views or another type of decision rejecting, as inadmissible, the substantive claims of the author, but upholding the violation of article 1 of the Optional Protocol.

6. The majority of the Committee should take inspiration from the practice of the Committee on Economic, Social and Cultural Rights. In its decision concerning communication No. 51/2018, that Committee concluded that the substantive claims in the communication were inadmissible on various grounds;[4] then, referring to general comment No. 33 (2008) of the Human Rights Committee[5] and the jurisprudence of other international bodies, including the European Court of Human Rights and the Committee against Torture, it set out in detail the State's obligation to respect interim measures.[6] States may contest and challenge the binding nature of such measures but, at the least, the position of the Committee on Economic, Social and Cultural Rights is consistent and legally rigorous. In fact, the

[1] All paragraph numbers in parentheses refer to the Decision of the Committee.
[2] See, for example, *Mikhalenya v. Belarus* (CCPR/C/132/D/3105/2018), para. 9 and annex.
[3] See, for example, *B.A. et al. v. Austria* (CCPR/C/127/D/2956/2017), paras. 9.1 and 9.2.
[4] *S.S.R. v. Spain* (E/C.12/66/D/51/2018), paras. 6.1–6.4.
[5] In particular, para. 19.
[6] *S.S.R. v. Spain*, paras. 7.1–7.9.

Committee concluded by stating that, as it had found no violation of the complainant's rights, it would simply make a general recommendation to the State party in a bid to prevent future violations of article 5 of the Optional Protocol. It recommended that, to ensure the integrity of the procedure, the State party develop a protocol for honouring the Committee's requests for interim measures and that it inform all relevant authorities of the need to honour such requests.[7]

7. In the Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights, some scholars have called for the improvement of judicial practices and, especially, have stressed that international adjudicators should indicate the legal consequences of non-compliance and the type of remedy required for such breaches. Considering the grave and irreversible consequences of the breach of interim measures on the integrity of the individual complaint mechanism, it is time for the Human Rights Committee to clarify the international legal consequences faced by States parties under article 1 of the Optional Protocol and to adopt a clear and consistent position on this critical issue.

[7] Ibid., para. 10.